THE CONSTITUTION AND THE RELIGIOUS UNIVERSITY

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My subject is the religious university and the Constitution. We do not think quite as often as we should about the connection between the two—or, more to the point, about the link between a theory of the religious university and a theory of the free exercise of religion. Religious universities are not just like every other kind of school, and we all too rarely try to tease out the differences.

Let me begin by making clear that I believe in both the idea and the ideal of the religious university. Religious colleges and universities have done America enormous services over the past two centuries; and, if the nation continues to respect their autonomy, and if the universities themselves continue to value their integrity, they will continue to do America enormous services for as long as there is an America.

I should take a moment and explain my terms. When I refer to the religious university, I mean the consciously religious school: a university that today, now, at the end of the twentieth century, views itself as religious. I am not including all schools that were founded by religious people with religious missions; if I did, the number would be far higher, and would encompass, for example, nearly all the leading private universities in the country, including Yale, where I teach, which was founded by a cantankerous bunch of Congregationalists. Over time, the great majority of schools founded on faith commitments have surrendered those commitments.1 George Marsden has proposed that we return to thinking of many of these schools as religious and that we make an effort to reassert the strong themes of Protestant

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virtue on which they were established. But I think it a bit late for
that, appealing though it may sound to the religious ear. Better,
surely, to allow the schools that are consciously secular to remain so,
and to concentrate our understanding of the religious university on
those that are consciously religious.

And there are plenty of consciously religious schools to go around.
By most estimates, there are approximately 800, which means that
something more than one-third of the colleges and universities in the
nation answer the description. Of those 800, more than one-fourth—
roughly 235—are Roman Catholic schools, by far the largest single
block. Many of these—Georgetown and Notre Dame, as well as
DePaul itself, come at once to mind—are among the finest institutions
of higher learning in the world.

When I say that the religious schools have performed enormous
services to the nation, the foremost service that I have in mind may
also seem the most mundane: the education of generations of students
who have become generations of leaders. Yet this is why the schools
exist. Simply put, many parents prefer for their children, and many
students prefer for themselves, schools that adhere to the ethics of
particular religious traditions. The availability of this choice is no triv­
ial freedom. There was a fairly recent era in American history when
the idea of religious universities—especially Catholic universities—
was viewed by politicians and the public alike with reactions ranging
from skepticism to hostility.

Happily, we nowadays live in a nation that accepts the freedom of
religions to run colleges and universities without significant interfer­
ence from the state and the freedom of students and their parents to
choose to attend them. These freedoms in turn contribute to the over­
all freedom of religion, which, at its best, encompasses far more than
belief, and includes the nurturing of a lively plurality, not simply of
religious ideals about the life well-lived, but of lives well lived in ac­
cordance with religious ideals. Thus does the religious university
serve both religion and society.

Now, do not misunderstand me. A school that has no religious mis­

2. See George Marsden, The Soul of the American University: From Protestant

nial Times to the Present 83-97 (1985); Warren Nord, Religion and American Educa­
tent prejudice (and, occasionally, ironclad quotas) from attending the more prestigious schools of the Ivy League in the early years of the twentieth century.\(^4\) That, too, is important work for democracy; but secular colleges are not the subject of the present lecture. I want to discuss, rather, what is specially valuable, and specially fragile, about openly and explicitly religious schools.

Before approaching that point, however, let me continue to define my terms. I said earlier that what religious universities need most is a society that respects their autonomy and an ability to act with integrity. Let me explain what I mean. When I say autonomy, I have in mind a space in which to behave as though one is truly private, that is, unregulated. This may seem an odd formulation. But it actually makes sense. We talk a great deal nowadays about the right to privacy in a variety of contexts, but we hardly ever really mean it—not in the traditional sense, the right to be left alone and even undiscovered.\(^5\) Modern America simply leaves us no private space. But autonomy is the functional equivalent of privacy. A respect for autonomy allows people and institutions, in certain settings, to behave in ways that people do notice, and yet with which people are unable to interfere.

To take the most obvious example, given our subject, the right to worship God freely in whatever way one might choose is part of an individual’s autonomy. We might say, colloquially, that it is part of an individual’s privacy, but that is a misuse of the word, because we do not require that those whose mode of worship may be unfamiliar or unpopular keep it to themselves in order to enjoy the protection of our political and constitutional traditions. A Sikh who wears his turban, an Orthodox Jew who wears his tallith and his yarmulke, the Catholic who wears ashes on her forehead on the first day of Lent, all are exercising an autonomy that cannot be violated, even though everybody sees them do it. Similarly, a religious school’s right of autonomy does not depend principally on whether anybody (particularly students or faculty) is affected by its “private” actions, still less on whether anybody happens to approve of them. The autonomy is a matter of constitutional right.

This autonomy may sometimes lead to the violation of laws that others willingly obey. The Supreme Court has lately been hostile to this vision of religious autonomy, rejecting, for example, the request by a Muslim prisoner to attend services required by his faith but not

\(^4\) For an excellent discussion of this era, see generally Sherry Gorelick, City College and the Jewish Poor: Education in New York, 1880-1924 (1981).

held in the maximum security wing of the prison where he was incarcerated—even though Christian inmates in the wing had all their religious needs met.\footnote{See O'Lone v. Estate of Shabazz, 482 U.S. 342, 352-53 (1987) (sustaining the decision of prison authorities that work rules were more important than allowing inmates to attend services mandated by their Islamic faith).} The Court’s position has been that the Free Exercise Clause protects only against intentional discrimination by the state against a religion,\footnote{See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993).} which would of course render the clause a superfluity in light of the Equal Protection Clause. This line of cases has reduced the clause from a guarantee of autonomy, with the robust religious pluralism that the term implies, to a guarantee that the religious may believe what they like as long as they do not try to do anything about it—nineteenth century Protestantism masquerading as constitutional principle. But more on this in a moment.

When I say \textit{integrity}, I mean, roughly, what we tend to call the courage of one’s convictions. More formally, I have in mind a quality that entails three steps: first, the ability to discern what is right (or what is God’s will); second, the determination to act in accord with what one has discerned; and, third, the willingness to be open and public about those actions and the reasons for them in the face of criticism or even punishment.\footnote{STEPHEN L. CARTER, \textit{INTEGRITY} 10-12 (1996) (defining the three steps of integrity).} Integrity is the virtue without which other virtues are useless: after all, if I lack integrity, you have no way of judging whether I really possess the qualities I seem to possess.

For the religious college or university, integrity is crucial. To see why this is so, consider the \textit{purpose} of religious schools. The religious university, at its best, is fully religious and yet fully a university and, in consequence, is not precisely what we expect of either. Instead, it fulfills a position that is at once glorious and precarious, for it sits, albeit uneasily, astride the metaphorical wall of separation between church and state, uniquely situated to be able to see both sides, but always at risk to topple one way or the other, and, in so toppling, to lose its best self.

To see the significance of this image, consider the separation metaphor itself. In a better world, we would be guided by Justice Stanley Reed’s famous and prescient warning to his brethren half a century ago that “a rule of law should not be drawn from a figure of speech.”\footnote{McCullom v. Board of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting).} Not living in that better world, we must instead be guided by the metaphor. Yet the metaphor is instructive. Its true origin, as Mark DeWolfe Howe pointed out in the 1960s, does not lie with Thomas
Jefferson's coinage, which occurred two decades after the First Amendment was adopted; rather, its origin is in Roger Williams's far more evocative seventeenth-century metaphor of the garden and the wilderness.

For Williams, the garden was the domain of the church, the gentle, fragile region where the people of God would congregate and try to build lives around the Divine Word. The wilderness was the world beyond the garden, uncivilized and potentially quite threatening to the garden. The wall separated the two, and the reason for the wall was not that the wilderness needed protection from the garden—the wall was there to protect the garden from the wilderness. And yet, wrote Williams, if the wall was ever breached, it was the responsibility of the people of the garden to go out into the wilderness and try to civilize it—that is, to make all the world a garden. Thus, not only did the wall not protect the wilderness; the metaphor, as originally understood, envisioned that the garden would ultimately overwhelm the wilderness. As Howe wrote, in his usual perfect prose:

When the imagination of Roger Williams built the wall of separation, it was not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained. . . . The principle of separation epitomized in Williams' metaphor was predominantly theological.10

In the present day, although some of the people of the wilderness complain about incursions by the people of the garden—for example, about religious activism in electoral politics—there is far more constitutional merit when the people of the garden complain about incursions by the people of the wilderness. The wilderness does far more to threaten the garden than the other way around; there is no comparison between the temporal power of the two. It boggles the imagination to suppose that the Framers adopted the First Amendment in order to incorporate a Jeffersonian misunderstanding that would not occur for another twenty years. More likely, they knew how fragile a thing is faith, and they understood how its nurturance requires the construction of a wall, not to keep the faithful in, but to keep the world out.

There are many reasons why it is important to protect the garden from the encroachments of the wilderness. I want to focus on a single one: the importance of protecting the ability of the religious to resist

the dominant understanding of life and the world that the state will try to impose. The school has always been a key site for that resistance. As the late Robert Cover put the point, “There must, in sum, be limits to the state’s prerogative to provide interpretive meaning when it exercises its educative function.”11 Otherwise, “[t]he state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.”12 The fact that the power wielders do not like the alternative meanings is not, by itself, reason enough to justify their destruction.

I like the phrase of the theologian David Tracy, who has written that “the religions live by resisting.”13 The survival of a religion rests on its ability to avoid being overwhelmed by the secularity of the wilderness. As long as it is able to teach the faithful the alternative meanings that its vision of God provides, it will help create people who form the core of dissent and thus of change. It is no accident that in the most important social battles in the nation’s history—abolitionism and the civil rights movement—the forces of justice have been led by the religious dissenters. And the religious dissenters were able to exist at all because the wall of separation protected the garden, enabling them to create meanings of their own. That resistance to the wilderness may not be the only truth and the only value of the separation of church and state, but it is, from the point of view of both religion and democracy, surely the most important.

Let us not, today, pause to contemplate how sorely generations of smart judges, philosophers, and politicians have misunderstood the metaphor. Others, writing since Howe, have tried to repair that omission.14 Let us instead consider the application of the metaphor to the role of the contemporary religious university.

II. THE CONTEMPORARY RELIGIOUS UNIVERSITY

The religious university, like any other religious institution, can serve this important societal function of resistance: of standing up for the possibility that life itself has different meanings than those the dominant culture tries to create. This function of religions, says the

12. Id.
theologian David Tracy, accounts for what he and other post-modern theologians call their subversive nature. For that matter, in its own backhanded way, the Supreme Court appears to agree. In 1878, in explaining why the Mormon religious belief in polygamy was insufficient to shield Mormons who married multiple wives from prosecution, the Justices referred to the Mormons as "subversive of good order"—meaning that their insistence on living a moral understanding different from the mainstream threatened the orderly day-to-day operation of the society.

Although I think the Court made a legal mistake in giving insufficient weight to the claims that religion makes on the conscience, I think the Court's social analysis was precisely on point: religions are often subversive of good order. The true believer often will act in ways that others consider bizarre or even immoral. Such activity does threaten to unweave the fabric of the society. Indeed, I often think that it is this very subversive nature that leads to the suspicion toward religion that even today is too often seen in liberal politics. Nobody much likes subversives, of course, which is one reason that religions are so often slapped down by legislatures and courts alike—and why the power of faith is often needed to help them to stand back up.

Often the willingness of the religious to be subversive in the face of official and unofficial pressures has made the nation better. The abolitionist and civil rights movements, both of which were openly and proudly religious, provide strong evidence, if any is needed, for the importance of these religious institutions that subvert the established meanings. But the religious university is a special kind of subversive, laying claim to a position in an area where religion is less honored than it should be—the academy.

The religious university is, of course, religious. The religious university is, of course, a university. In its religious aspect, the institution dwells in the garden. In its university aspect, it dwells in the wilderness. That is why it sits so precariously on the wall. At its best, the religious university is able to translate the garden for the benefit of the wilderness and the wilderness for the benefit of the garden. At its worst, it falls into the garden and can no longer view the wilderness, or tumbles into the wilderness and loses sight of the garden. In order to maintain this precarious balance, the religious university must have the constitutional autonomy and the integrity to resist the incursions

of the wilderness, but must also have the wisdom and the courage to resist the urge to remain wholly in the beauty of the garden.

What does it mean to say that the religious university should resist the incursions of the secular world? It means many things. I would like to mention particularly two: first, the religious university must define the common understanding of the university to the needs and understandings of its own religious tradition; second, the religious university must be willing to speak up for itself and its own traditions when the secular world threatens. Both of these points flow from the understanding that religions must be centers of resistance when they believe the world is wrong—but that the religious university has a special role to play in translating the language of both the garden and the universe for the other.

One thinks, for example, of the twenty-four colleges of the Mennonite tradition, most of which do not seek endowment funds, preferring to rely, in the Mennonite tradition, on the kindness of strangers. At the same time, Mennonite schools push traditional Anabaptist notions, including internationalism—both by seeking students abroad and by preparing young Americans for missions abroad—and community, by placing special emphasis on the Christian responsibilities that teachers, staff, and students all owe to one another.\(^{17}\) The colleges, while seeking to educate their students, also make affirmative efforts to stand in the world as examples of the principles of the faith.

Another good example is supplied by the history of what have come to be called the “traditionally black colleges” in the South, many of which were first established by white Christians from the North, who believed themselves on a mission from God. In fact, many of the schools were founded after the Civil War by the American Missionary Association, which believed fervently in the education of the freed slaves, a duty the rest of the nation preferred to ignore. A number of the colleges embarked on programs of integrated education, in defiance of local custom, and often in defiance of state law. When local authorities threatened to shut the schools down, most of them finally yielded to secular authority—but many of their missionary founders also campaigned to have the segregation laws changed. (Of course, the campaign took decades to bear fruit.)

Today, unfortunately, few universities, secular or religious, embark on campaigns to transform the nation’s basic structure. Yet, because of the specially exalted position of education in our society, the con-

\(^{17}\) For a more detailed discussion of these and other aspects of the Mennonite colleges, see Rodney J. Sawatsky, What Can the Mennonite Tradition Contribute to Christian Higher Education?, in Models for Christian Higher Education, supra note 1, at 187.
sciously religious university has the opportunity to live and display its faith in the way in which it chooses to educate young adults. That display may serve the purpose of inspiring the larger society to change, but that is not its principal goal. Its principal goal is to mark the religious school—and thus the religious tradition—as different. The wall of separation is especially necessary at those moments, because the school that marks itself as different may also act in ways that are unpopular.

Consider the example of Brigham Young University ("BYU"), which in 1995 prevailed in litigation aimed at forcing it to change its policy of not allowing male and female students to live together, even off campus. The university was only indirectly a target, but the effect of a defeat would have been the same. BYU enforces its policy by requiring landlords who want to rent to its students to agree that they will admit only men or only women to their buildings. The plaintiffs, represented by the American Civil Liberties Union, were a man and a woman who had been refused spaces in buildings run by the defendants, who were landlords. The man tried to rent in a building reserved for women; the woman in a building reserved for men. The claim was that this was sex discrimination, in violation of (among other things) the Utah human rights ordinance.

The court escaped the need to decide this hard issue by deciding an easier one: the plaintiffs, he held, had been denied housing because they were not BYU students, not because of their gender. Because non-student status was not one of the categories protected under any relevant anti-discrimination statute, the denial of housing was not illegal, and the suit was dismissed.

Stored away inside these facts is the germ of our larger issue. How did the lawsuit actually arise? I refer not to the law, but to the facts. The landlords who were the defendants created single-sex buildings: this one inhabited only by men, that one inhabited only by women. They did so in order to get BYU students to rent housing. The students would otherwise have been required by university rules (which

19. Id. at 1235.
20. Id. at 1234.
21. Id. at 1236.
22. Id. at 1237.
23. Id. at 1243.
24. Id.
25. Id. at 1235.
26. Id.
each student signs) to look elsewhere. But the landlords also made a further decision. They rented apartments only to students. This decision was possible only because the students themselves followed the rules. This is not the case at every university: many schools have changed their rules precisely because students did not like them. So at BYU—a relatively expensive school that nobody is forced to attend—the students must be following the rules in large part because they want to follow them. Some ninety-nine percent of the school’s students are Mormons, although there is no religious requirement for admission. The students, then, have likely chosen the school in part because they want to attend at a place that reinforces the moral teachings of the faith. And it is this force, not some conspiracy among landlords, that the plaintiffs confronted. So whatever may be the right legal answer—I confess I thought the case rightly decided, but I also think the arguments on the other side are weighty ones—the practical answer is that if we are to nurture religious universities in their effort to sit astride Roger Williams’s wall, we must grant them space to enforce policies like the one that the American Civil Liberties Union here tried to attack.

In the law, such spaces as these are known as accommodations of religion—allowing religions in some of their aspects to operate in ways that other people and entities may not. For example, when an Orthodox Jew seeks to wear a yarmulke while serving in military uniform, which would otherwise be a violation of regulations, he is asking for an accommodation. The theory behind granting accommodations is that they are required by the First Amendment, that without them, religions that lack the political clout to protect themselves in the legislative process will, over time, disappear. Why? Because the state will adopt regulatory laws without considering the religion’s interests.

Nobody argues that accommodations should always be granted. The test most popular among accommodationist scholars—and the one articulated by the Congress in the Religious Freedom Restoration Act (“RFRA”)—is that when defiance of a law is religiously motivated, the state may enforce it against the religionist only by demonstrating that the law is narrowly tailored to serve a compelling

27. Id.
28. Id.
29. Id.
interest. In theory, this is a sensible test. In practice, it has all the well-known flaws of balancing tests: it is relatively standardless, and so the outcomes of concrete cases are not predictable. Under such a balancing test, it is difficult for the university to tell ex ante whether its practice will be protected on religious freedom grounds, or whether a court might decide that the state has a compelling interest in forcing landlords to let men and women live in the same building.

Consider a contrasting lawsuit, which Georgetown University lost. The suit was aimed at forcing the school to grant official recognition of an organization of gay students. The denial was challenged under the District of Columbia's human rights law, which forbids discrimination on the basis of sexual orientation. The University argued that because homosexual conduct is considered sinful by the Catholic Church, the school's religious freedom protected it from suit. The city argued that discrimination on the ground of sexual orientation is sufficiently egregious that every regulated entity must yield. Both are, within their special contexts, perfectly sensible arguments, as one would expect, given the delicate balancing act that religious universities perform.

The practical difference between the cases is that although Georgetown, like BYU, is self-consciously a religious school, it has pursued the goal of diversity in the student body with perhaps greater vigor. This is a noble goal, and schools that feel so moved by their religious commitments should pursue it: that is often part of how they serve both worlds. However, the diversity of the student body means that now, when a challenge is brought to a school policy, it is not an outsider who does not seem to like what the school stands for; it is a full member of the school's community, seeking to transform it from within. To be sure, religious universities should not lose all constitutional protection because they diversify their student bodies, and perhaps they should, in effect, be required to give fair notice of what religious rules they plan to enforce—but no school is likely to list everything, and no student is likely to be aware in advance what issues might strike him or her as important after a year or two of higher education. In short, conflicts will arise. We would be better off if the courts did not think themselves the right places to adjudicate the inner

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32. Subsequent to the delivery of this lecture, the Supreme Court found the Religious Freedom Restoration Act unconstitutional in City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
34. Id.
35. Id. at 4-5.
36. Id. at 32.
workings of the religious university, but that is the way the world works. Sometimes, a court will try to finesse the religion issue. A few years ago, for example, Marquette University was the subject of a sex discrimination lawsuit, challenging its hiring preference for members of the Society of Jesus, all of whom are men. The plaintiff, who sought a position in the theology department, argued that she had not been hired because of the preference. The university defended the preference itself as an exercise of religious freedom. The court avoided the question by determining that the plaintiff would not have been hired even had she been a man, that she was, in effect, not qualified for the position—because she was pro-choice, and the Catholic Church is pro-life!

If these conflicts are all to go to court, the judges should at least take pains to understand the religious point of view. The peculiar and sometimes totalizing secular ethos of our day often denies that there is anything distinctive about religion, its role in the human mind, or its situation in society, and it is this ethos as much as legal principle that often leads to legal difficulties. Georgetown faced not only the problem of its own internal conflict, but the reluctance of intellectuals—and here I include judges—to concede the possibility that religion is unique among human activities and thus might have a unique need to be allowed to go its own way. This secular ethos proposes that the purpose of the wall of separation is to protect the wilderness, not the garden, and so takes pains to limit as far as possible the effect the garden can have beyond its walls. This means that a university trying to sit astride the wall will be pushed, or more likely pulled, by a secular world which, despite lip-service that is paid to the ideal of diversity, actually seems to want every institution to look the same—which is when the integrity of the faith is tested.

A few years ago, Holy Cross received some critical press after it refused official recognition of a student group advocating a pro-choice position on abortion. The school’s view was that because abortion is so grievous a sin in Catholic doctrine, Holy Cross could not retain its identity and also allow the group to receive the favored status available to others. Some observers said that the school was interfering

37. Maguire v. Marquette Univ., 814 F.2d 1213, 1215 (7th Cir. 1987).
38. Id.
39. Id. at 1215-16.
40. Id. at 1217-18.
41. I discuss the problem of secular pressure on all institutions to conform to the same set of norms in the first part of my forthcoming book The Dissent of the Governed: A Meditation on Law, Religion, and Disobedience (forthcoming 1998).
with free speech, which might have been fair criticism had Holy Cross been a public university. But, in its context, the critique was inapt. All the school did was to deny the group its official imprimatur. And the school took pains to preserve its position on the wall. It remained true to the values of the garden but also, as far as it could, true to the values of the wilderness. So Holy Cross did not say that students (or faculty) could not advocate on behalf of abortion rights. It did not say that the student newspaper could not publish any pro-choice articles.

I must say that Holy Cross seems to me to have acted fully within the model that I describe in this lecture. I value free speech but I also value free religion, including the autonomy of religious institutions, not only to follow the teachings of their faith, but to stand up as a model of that faith lived well in a secular world. (Georgetown, I should add, faced the same decision and made the opposite choice, approving the pro-choice student group, and thus proved the adage that sometimes you can't win: the school received for its trouble a sharp rebuke from James Cardinal Hickey, Archbishop of Washington.)

Of course, practicalities as much as the pressure of our peculiar intellectual secularism may force upon the consciously religious university compromises that it would rather have avoided. Sometimes the examples may seem mundane, as in the mid-1980s, when Brandeis University, which traditionally had served only kosher food in its student dining halls, decided to add pork and shellfish to the menu. But for a traditionally Jewish school, the decision was anything but mundane, as became clear when it sparked controversy among alumni, for obvious religious reasons. The school defended the change as an aid to recruiting a diverse student body. Keeping the dining hall menus entirely kosher was sensible to the extent that Brandeis identified itself as a Jewish university, but was simply inconsistent (so school officials evidently concluded) with other aspects of the school's mission once it made the choice to diversify its student body.

At other times the conflict may rise to the level of national concern, as when the Internal Revenue Service tried to revoke the tax exempt status of Bob Jones University, a Christian college that believed itself called by God to follow some racially discriminatory policies—banning, for example, interracial dating. The university, briefly aided by the Reagan Administration, battled the case all the way to the

42. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995) (holding that the University's denial of funds to a Christian student organization out of a general fund for printing costs of publication was prohibited viewpoint discrimination).
Supreme Court, where it lost.\(^{44}\) Rather than surrender its tax exempt status, Bob Jones abandoned its discriminatory policies, suggesting, as the late legal scholar Robert Cover pointed out, that perhaps school officials did not believe in their hearts that they were doing God's will to begin with.\(^{45}\)

It is easy to cheer the Bob Jones result and to dismiss the Brandeis question as relatively unimportant. And yet matters are more complex. The consciously religious university will always feel the pressure to be like everybody else; the question is how to decide when to submerge its distinctive identity for the sake of conformity. This is where the concept of integrity may come to the university's aid, for integrity as I have been using the term proposes that a time of difficult decision is time not for knee-jerk response but for deep contemplation—for the religious, a time of prayer. Officials at Bob Jones should have been on their knees seeking divine guidance on the question of racial separation before fighting the case all the way to the Supreme Court. It seems unlikely that God would give them one answer when they faced only administrative sanction and a different answer when they faced an order from the highest court of the land. More likely, until the loss in the Supreme Court, they were not really listening.\(^{46}\)

I cannot suggest, except in very general terms, the right way for the religious university, fully religious and fully a university, to strike these balances; I can only point out that the balances must be struck. A society that values religious autonomy must grant the school sufficient space to make the difficult decision, and the religious school itself must be guided by its integrity in making the decision rightly. I will say this much, however: A school that never compromises, choosing to view every issue in terms of its religion, cannot keep a foot in the wilderness, and thus can never be a true university; a school that always compromises and thus preserves none of the integrity of its faith will quickly tumble out of the garden, and thus will no longer be truly religious. The successful, creative resolution of this tension is what allows the school to keep its balance. And nowhere must the religious university maintain this balance more delicately than on the question of academic freedom, to which I now turn.

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\(^{44}\) Id. at 605.

\(^{45}\) Cover, supra note 11, at 51.

III. QUEST FOR ACADEMIC FREEDOM

In 1989, the courts of the District of Columbia rejected a lawsuit by Professor Charles Curran, a tenured member of the theology faculty at the Catholic University of America, who had been forbidden by the school to teach Catholic theology after the Sacred Congregation for the Doctrine of the Faith (an office of the Vatican) lifted Curran’s ecclesiastical license to teach the subject. Curran, a dissenter from church teachings on (among other subjects) birth control and homosexuality, had been a thorn in the Vatican’s side for years. Some critics of the decision, including the American Association of University Professors, insisted that Catholic University was violating Curran’s academic freedom. Others argued that the outcome might “renew suspicion about other Catholic universities and colleges, which were once perceived as mouthpieces for the church hierarchy.”47 For defenders, however, the question was simply one of religious freedom, of the ability of a religious university to decide for itself what faith requires of its faculty. Richard John Neuhaus recently put the point this way: “The church’s position, to put it too simply, is that those who claim to teach Catholic theology should teach what the church teaches.”48

Academic freedom is the jewel in the crown of the modern university, for it enables professors to go where their research leads them. It frees teachers from the debilitating pall of academic or political orthodoxy. It is a celebration of the virtue of intellectual endeavor and a symbol of the belief that if truth is ultimately to triumph, error, too, must be given a free rein.

But academic freedom is broadly confused with freedom of speech, and this is a serious mistake in analysis—for although academic freedom and freedom of speech share common characteristics, academic freedom serves a different function and requires careful definition. Academic freedom is a special category of free speech, guided by the mission of a university and the rules of an academic discipline. Perhaps the most influential formal definition is this one, offered in 1930 by Arthur O. Lovejoy, one of the organizers of the American Association of University Professors:

Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without inter-

ference from political or ecclesiastical authority, or from the admin-
istrative officials of the institution in which he is employed, unless
his methods are found by qualified bodies of his own profession to
be clearly incompetent or contrary to professional ethics.49

Academic freedom, in other words, has always been a cabined free-
dom, the freedom to do research and announce one’s results within
the strictures of one’s discipline. It is not the same as free speech.
When Stanford’s William Shockley, winner of the Nobel Prize in phys-
ics, decided to look into genetics—about which he knew almost noth-
ing—and announced that black people were, by inheritance, the
intellectual inferiors of whites, he may have been exercising free
speech, which includes the rights to be both racist and wrong, but he
was not exercising academic freedom. Why? Because he was working
outside of his discipline. On the other hand, when Leonard Jeffries of
the City College of New York claimed that Jews had basically run the
slave trade, he may have been in error and anti-Semitic as well, but he
was at least arguably within the bounds of his discipline—black stud-
ies—which might, incredible though it may seem, also place him
within the bounds of academic freedom. He might plausibly be said to
be outside the bounds if (as seems likely) competent scholars in the
field overwhelmingly believed his conclusions the result of shoddy
work. As Sidney Hook once pointed out, however, academic freedom
does not allow a school to punish scholars for the wrong headedness
of their conclusions—only for the incompetence of their
methodologies.

How does this complex yet crucial doctrine operate at a religious
university? This is an awkward subject for me, a scholar at a relent-
lessly secular university, to address, for we scholars have the unfortu-
nate habit of finding injustice whenever any institution, anywhere in
the world, will not remake itself in our preferred image. And yet I
must reveal my prejudices and say that although Catholic University’s
defenders were correct to place reliance on the religious university’s
freedom to be religious, which resolves any legal problem, a true uni-
versity must not make the error of creating such orthodoxy that no-
body ever is allowed to question anything the religion teaches. I am
not suggesting that Catholic University did this when it prohibited
Curran from teaching Catholic theology; from what I can tell, Catholic
University is a vibrant and dynamic scholarly community. But the risk
is real for any school that allows, as Lovejoy put it, “ecclesiastical au-
thority” to decide what propositions its faculty members may or may

49. JAMES JOHN ANNARELLI, ACADEMIC FREEDOM AND CATHOLIC HIGHER EDUCATION 4
not defend: the risk is that the school will tumble off the wall into the
garden. The garden is not a bad place to be, and dwelling there may
well be better than dwelling in the wilderness. But if a university is in
the garden only, it can never fulfill its mediating role of translating
each for the other.\(^{50}\)

Charles Curran himself had argued, long before his own punish­
ment, for the importance of dissent by Roman Catholic theologians,
as long as the dissent was from noninfallible rather than infallible
church teachings.\(^{51}\) In particular, said Curran, theologians must be
free to propose interpretations of the teachings that the church might
not have considered.\(^{52}\) (He did not call for theologians to propose
interpretations that the church had infallibly rejected.) That is, of
course, an internal matter for a religion—and a religious institu­tion—to
decide, and for an outside scholar (such as myself) to suppose that
secular academic values can supply the right religious answer is as ab­
surd as a secular dietician deciding for a Muslim or an Orthodox Jew
what foods to eat. Yet the point Curran was trying to make was much
like Hook's: as long as the scholarly methodology is acceptable, the
school should be indifferent as to the scholar's conclusions. And
although a religious university might find itself religiously compelled
to sketch some outer limits—for example, what may be taught as
"Catholic theology"—it risks its soul as a university if it tries to export
similar religious standards on what conclusions may be reached to
every field of scholarly endeavor.

The Roman Catholic Church, which operates universities all over
the globe, has struggled quite openly with this problem for many
years, issuing a long series of documents, occasionally inconsistent
with each other.\(^{53}\) Peter Viereck wrote long ago that anti-Catholicism
is the anti-Semitism of the intellectual, a point that was surely over­
stated, but one that also reverberates every time bishops remind Cath­
olic universities of their obligations to preserve the faith, and
opponents decry threats to the survival of academic freedom—with­

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\(^{50}\) For a thoughtful and even moving account of how Catholic schools try to strike this bal­
ance, see generally David J. O'Brien, From the Heart of the American Church: Catho­
lic Higher Education and American Culture (1994).

\(^{51}\) See generally Charles E. Curran & Robert E. Hunt, Dissent in and for the
Church: Theologians and Humanae Vitae (1969) (discussing the role and responsibilities
of theologians).

\(^{52}\) See generally id.

\(^{53}\) For useful discussions of the debate over academic freedom at Catholic universities, see
generally Annarelli, supra note 49; P.H. Ratterman, S.J., The Emerging Catholic Uni­
ersity (1968).
out any sense of the importance of the survival of the faith, too.\textsuperscript{54} Besides, although the Catholic universities have received the most press, other denominations have wrestled with varieties of the same problem. Baptist schools, for example, have fought for most of this century over the question of what should be in the curriculum and what views teachers can espouse.\textsuperscript{55} Recently, there has been what some have called a "purge" of liberals and moderates at Southern Baptist seminaries—although nearly everybody agrees that the question of academic freedom is very different at a seminary than at a university.

And yet in some sense, the battle over academic freedom at religious universities is only the surface manifestation of a deeper question. The question is not only what kind of faculty atmosphere the school should create in order to deserve the sobriquet "university"; the question also involves the standards for selecting faculty in the first place. For example, Calvin College, a school in Grand Rapids, Michigan run by the Dutch Reformed Church, requires all its faculty members to send their children to be educated at one of the city's extensive network of Christian schools. Is this a reasonable way of ensuring continued attention to the school's religious mission or a threat to faculty diversity? Again, only the school can decide (a freedom the courts must zealously protect) but, in reaching its decision, the school must always be aware of the importance of keeping its balance on the wall between the garden and the wilderness.

Of course, to say what is true—that a religious university should respect academic freedom as far as it can—is not the same as saying that the school must accept everything from its faculty, any more than it must accept everything from its students. The religious university possesses a spiritual mission as well as a secular one, and must struggle to be as true as it can to both. Thus, the school needs sufficient autonomy to create its own meaning for academic freedom, a meaning that will be influenced by its religious mission. But the school must also possess sufficient integrity to avoid confusing the requirements of its religion with a more general discomfort with dissent. This integrity will enable the school to avoid the religious analogue of the moral hazard problem familiar to other areas of human behavior: protected in its religious self by its legal accommodation, the school might fail to

\textsuperscript{54} See, e.g., Peter Steinfels, Bishops Approve Standards for Catholic Universities, \textit{N.Y. Times}, Nov. 14, 1996, at A16. Let me hasten to add that I am not suggesting any illiberal motives on the part of any critics quoted in the story.

be as true as it should to its academic self, and so punish conduct it actually should be supporting.

IV. Conclusion

None of this is remotely interesting, of course, unless one believes in the importance of religion, or of religious institutions. I believe in them. As I have already indicated, I believe that nurturing the sources of deep dissent—of fundamentally different meanings—is vital to democratic progress. Thus I think religion useful to democracy. But, more important, I think religion important on its own terms, for it fills a vital role, and what would otherwise be a gaping hole, in the human soul. Religion directs our attention to the ultimate questions of human existence—not explaining the basic forces of the universe but understanding why there is a universe, not how our bodies operate but why they do, not how to enhance the range of choices arrayed before us but what choices we should make. Indeed, let me press the harder point: Religion is not simply important to democracy—religion is more important than democracy. In philosophical terms, religion is prior to democracy.

This is the reason that so many deeply religious people worry about the movement in contemporary scholarship—and, to some extent, in politics—to isolate religion, to treat it as aberrant, something that cannot form a part of the rational public dialogue on which the liberal state rests. As John Courtney Murray pointed out long ago, if religion is incompatible with liberal democracy, that is a flaw in democracy, not religion. I do not believe the two are incompatible; indeed, I doubt that liberal democracy could thrive without a robust religious voice near its center, calling the nation to moral account, and employing the most powerful language of love and sacrifice we have available to us. This is not to say that religions should run everything—I fear theocracy as much as the next person does—but it is to say that liberal democracy without religion is less a theory of government than a lifeless, morally indifferent husk.

The religious university, at its best, is at the center of both religion and democracy, living the mission of its faith and yet living as well the

56. I know that there are self-proclaimed atheists who deny that the hole exists, but I agree with Martin Buber that in a sense there are no atheists—that the atheist is often closer to God than the proud believer, because the atheist must wrestle with Him nearly every day.

57. A typical and by no means unusual example of this is Thomas Nagel, Moral Conflict & Political Legitimacy, 16 PHIL. & PUB. AFF. 215 (1987), discussing the conflict between the personal standpoint of the individual and the professed impartiality of liberalism. See Bruce Ackerman, Social Justice in the Liberal State 364 (1980).
mission of the university. Guided by its integrity, protected by its autonomy, it sits successfully astride the wall between the garden and the wilderness, translating each for the other because it is fully a part of each, providing ample evidence of just how consistent the two really are.