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ACADEMIC FREEDOM,
RELIGIOUS COMMITMENT, AND
RELIGIOUS INTEGRITY

DOUGLAS LAYCOCK*

How does a religiously affiliated law school or university maintain both its academic and religious commitments over the long term? To crystallize that question, how has Notre Dame done it? How does Notre Dame expect to keep doing it?

In his luncheon speech yesterday, Notre Dame's Provost stated three commitments at Notre Dame:

One, Notre Dame is committed to academic excellence. In every recruitment, it wants to hire the best faculty member it can find.

Two, Notre Dame is committed to faculty governance. The faculty hired pursuant to the first commitment will run the institution, and hire their successors, largely on the basis of votes cast within departments that are defined by academic discipline. Notre Dame allocates authority this way because faculty are generally better than boards of trustees at running universities.

Three, Notre Dame is committed to perpetuating its religious mission.1

How do they expect to maintain all three of these commitments? How do you turn an institution over to voters who have been selected on the ground of excellence in geology, law, or French literature, and expect that in fifty years, or a hundred years, or two hundred years the religious mission will not have fundamentally changed? That is the essential problem for religious law schools and religious universities.

I. SOME TECHNIQUES THAT DO AND DO NOT LIMIT ACADEMIC FREEDOM

I teach secular subjects in a secular law school; I cannot tell religious law schools how to solve their central problem. But I suspect that the conflict between academic commitment and religious commitment is like many other pairs of conflicting commitments in academia. All law schools struggle to sustain conflicting commitments. How do you sustain

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a commitment to teaching in the face of the faculty's incentive to re-
search? How do you sustain a commitment to academic excellence more
generally in the face of the faculty's incentives to personal comfort and
convenience? We all face such conflicts; the religious schools simply
have one more pair of conflicting commitments that the rest of us do not
have.

With respect to most of these conflicting commitments, the most im-
portant thing we can do is to keep talking about them. We try to social-
ize new faculty to believe that teaching is important, and that to do all
aspects of the job well requires sacrifice of personal leisure. We remind
each other of our commitments to teaching and to excellence. No aca-
demic freedom issue raised is by such jawboning efforts to sustain com-
mitments that we think are important to our institutions. If presidents,
deans, provosts, and senior faculty believe it is critical that the teaching
mission, the religious mission, or any other inconvenient commitment be
sustained, and if they instill that commitment in junior faculty, then from
generation to generation the commitment can be sustained. But this
kind of socialization is hard to do, and not all schools will succeed.

A second thing a religious school might do to sustain its religious
commitment is preferences in hiring. Now here are the beginnings of an
academic freedom issue. Notre Dame tries to do the original version of
affirmative action.² It tries to make sure there are many Catholics in the
pool, and then it hires the best academic. That is one approach. In
surveys, most religiously affiliated institutions report going further than
that. They report at least some religious preference in hiring.³

In discussions between religious institutions and accreditation au-
thorities, such hiring preferences have been understood principally to
raise a discrimination issue and not an academic freedom issue. But they
can easily be understood either way. Suppose you have two young appli-
cants for an assistant professor position, and you say they are both quite
good, that one is a little better, but the one that is a little better is an
agnostic. The second-best academically is a Catholic and more support-
ive of the religious mission, and you decide to hire him. The critics of
religious schools can treat that as a discrimination issue; you have dis-
criminated on the basis of religion. But they can also say that this is

². Id.
³. EDWARD M. GAFFNEY, JR. & PHILIP R. MOOTS, GOVERNMENT AND CAMPUS: FED-
ERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION 34 (1982) (reporting
data from survey of 210 responding institutions).
discrimination on the basis of what the rejected applicant thinks, so that it is also an academic freedom issue.

There are limits to this reconceptualization. The best reasoned accounts of academic freedom insist that academic freedom is not equivalent to general freedom of speech or thought. Rather, the special protections of academic freedom are justified by a professor's special expertise in an academic discipline. On that view of academic freedom, discriminating between Catholics and agnostics in the hiring of law professors would generally not raise an academic freedom issue, because their religious beliefs do not grow out of their disciplinary expertise. There is an obvious irony here; the religious law school, which maintains that religious belief is relevant, would appeal to a secular conception of the role of academics, under which religious belief is irrelevant.

But the academic freedom issue cannot always be avoided so easily. If you are hiring a theology professor, the candidate's religious beliefs are relevant to what he or she teaches and writes in his or her academic discipline. Ironically, just where the institution's need to prefer the faithful is greatest, the academic freedom objection becomes strongest.

A more common example in law schools would be beliefs that go both to some legal issue and some religious issue. Suppose you have two young applicants for a position in constitutional law. They are both first rate, and they are both Catholic. But one is strongly pro-choice and thinks that *Roe v. Wade*\(^4\) defends a great human liberty, and one is strongly pro-life and thinks that *Roe* was a usurpation. A preference for the pro-life applicant squarely poses an academic freedom issue. Their views on *Roe* are at the core of the professional judgment and competence of the two potential faculty members.

Even so, I suspect that some such preference in hiring is critical over the long run. If you do not have a critical mass of faculty committed to the religious mission, that mission will not be sustained. Fortunately, rejected applicants rarely sue; they have nothing invested in the institution and usually find it simpler to take a different job elsewhere. I have not done a careful search, but I know of only one lawsuit alleging either discrimination or an academic freedom violation because a university took substantive views into account in hiring. A would-be theology pro-

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fessor unsuccessfully sued Marquette University, alleging that the school’s preference for Jesuits discriminated on the basis of sex, and that its consideration of her views on abortion violated a common law right to academic freedom.\(^5\) I know of no such claim against a secular institution, although secular faculties sometimes covertly consider the views of applicants. In the example of the two constitutional law teachers, there are surely schools where the pro-life applicant would not have much of a chance, and where the pro-choice applicant would be preferred.

The core academic freedom issue is not hiring, but tenure and tenure revocation. Can you discharge a faculty member for taking a position contrary to the religious teachings of the sponsoring church? That is core to academic freedom, but it is plainly the least important technique for preserving the school’s religious mission. It is least important because it happens so rarely; the cost is so enormous that many schools will not do it at all, and the rest will do it only in the most extreme cases. If you have one faculty member attacking the religious mission and saying things that you just cannot live with, that one person is not going to undermine the whole mission. If a critical mass of the faculty remains committed to the religious mission, the religious mission will still be there after this troublesome person is gone. On the other hand, if you have a large group of people attacking the religious mission, the mission is probably lost anyway, and you cannot fire them all.

So I think that discharge is not an issue about perpetuating the religious mission over the long term. Rather, discharge is an issue of integrity in the present. Carl Monk said yesterday that the question for the Association of American Law Schools (AALS) is whether there are some values that are so important that we have to impose them on everybody.\(^6\) That is not a question that the state should be asking about religious institutions. But I think it parallels the question that the religious institutions should ask themselves. Are there some issues that are so important that we have to insist on at least acquiescence from everybody?

I know of no such case that has arisen in a law school, but I can imagine some that could arise in law schools. Sarah Weddington, the prevailing counsel in *Roe v. Wade*, now teaches in the public affairs school at my university. Suppose she were at Notre Dame. Litigating *Roe v. Wade* from a Catholic law school might have provoked a dis-

\(^5\) 410 U.S. 113 (1973).
charge; I assume that it would at least have provoked debate over a discharge. Some of Dean Glickstein's remarks yesterday imply that there are issues that might provoke consideration of discharge at Touro, although I assume that he would view discharging a faculty member as a harder choice than restricting a student organization or barring an outside speaker; he addressed only these easier issues. However we think any particular case might come out, it is possible to imagine such cases in a religiously affiliated law school.

II. Obstaciles to the Use of These Techniques

A. Formal Obstacles

There has been much discussion at this conference of accreditation rules and of AALS rules as obstacles to preservation of the religious mission. These rules are not the most important obstacles, but they may be the most tangible. These rules attempt to limit some of the things religious schools might do to sustain their religious commitment and preserve their religious integrity.

These rules are the principal reason it matters whether we characterize hiring preferences as an academic freedom issue or a discrimination issue. Federal discrimination law and most state discrimination laws allow religious institutions to prefer employees of their own faith. Reliance on these exemptions is not risk free; some enforcement authorities are hostile to these exceptions and construe them narrowly. A religiously affiliated law school might have to persuade a court that it is indeed a religious institution, that its preference for faculty with particular views on issues important to the faith is a preference for faculty of its own faith, and that it has not waived the exemption by hiring some faculty who are not of its own faith. The school should win on all these issues, but each presents some litigation risk.

The accreditation authorities have their own anti-discrimination rules, but they also recognize modest exceptions. A religious school can prefer members of its own faith as long as it does not preclude admission

9. See, e.g., Speer v. Presbyterian Children's Home and Serv. Agency, 847 S.W.2d 227 (Tex. 1993). The state claimed that Christianity is not a religion for purposes for the exemption, so that a Presbyterian agency that hired only Presbyterians would be protected, but a Presbyterian agency that hired only Christians would not be. Id. at 239 (Gonzalez, J., concurring). The court avoided decision on this issue by holding the case moot. Id. at 228.
on the basis of religion.\textsuperscript{10} This circumlocution presumably means that you can maintain a critical mass of students and faculty of your own faith, but you cannot insist on a faculty or a student body that is entirely of your own faith — you must admit and hire some nonbelievers or believers in other faiths. This exception, if reasonably interpreted, protects most religiously affiliated schools, but not those schools that want universal adherence to the sponsoring faith.

The important point is that these exceptions apply only to discrimination claims. It is not clear that the accreditation authorities recognize any exception to their academic freedom rules. The dispute turns principally on the great muddle that the American Association of University Professors (AAUP) has now made of its academic freedom rules. The American Bar Association and the Association of American Law Schools rules seem to incorporate the AAUP rules.\textsuperscript{11} But the AAUP rules are a mess.

The fundamental statement of the AAUP rules has an express exception for religious schools. This is the 1940 Statement of the AAUP and the Association of American Colleges, which says that schools can have limitations on academic freedom in pursuit of their religious mission if they disclose those limitations in advance.\textsuperscript{12} But a 1970 committee report claims that few religious schools want the exception, and that the Committee no longer approves of the exception.\textsuperscript{13} Does that mean they repealed it, or that they kept it but they are unhappy about it? Nobody knows. And if they attempted to repeal the exception, how can the 1940 Statement, adopted by the entire body of two organizations, be amended

\textsuperscript{10} See Section of Legal Education and Admission to the Bar, American Bar Ass’n, Standards for Approval of Law Schools § 211(d) (1993) [hereinafter ABA Standards]. A similar formulation appears in Ass’n of Am. Law Schools Exec. Comm. Reg. § 6.17(S) (permitting preference but “neither a blanket exclusion nor a limitation on the number of persons” that do not share the school’s religious commitment.).

\textsuperscript{11} See ABA Standards §§ 103, 211, 405(d), and Annex I (tracking the AAUP’s 1940 Statement); Bylaws of the Ass’n of Am. Law Schools § 6-8(d) and Exec. Com. Reg. § 6.16 in AALS HANDBOOK (AALS 1993). See generally Michael W. McConnell, Academic Freedom in Religious Institutions, in Symposium, Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles, 53 LAW & CONTEMP. PROBS. 303 (Summer 1990).


\textsuperscript{13} American Ass’n of Univ. Professors, 1970 Interpretive Comments, in Policy, Documents & Reports 6 (AAUP, 1984).
by a mere committee of one of the organizations? No one knows the answer to that either.

A 1988 committee report says that religious institutions are fully subject to all the requirements of the 1940 statement even if they invoke the exception. The chair of the 1988 committee later said that he thought that meant the exception was repealed. However, he reported that the majority of his committee surprised him after the vote with the claim that their report meant only that religious schools must adhere to the 1940 Statement including the exception.

Whatever that leaves is the AAUP rule. The AALS rule adopts it by reference, with some emphasis on the 1970 committee report. I rather suspect that the AALS means to reject all exceptions to academic freedom. Brigham Young's recent statement, setting forth in careful terms the limitations it feels compelled to impose on academic freedom, probably puts it in violation of the AALS rule.

B. The Relative Importance of Formal and Informal Obstacles

The formal accreditation rules are significant but secondary. I agree with the speakers who have said that the principal obstacles to perpetuating religious commitment and integrity are internal and informal. The most obvious internal obstacle is the aspirations of the faculty. It is tough to hire the second best person academically, even if that person is very good. You pay a price for such hiring, and faculty rarely want to pay that price. Faculty want respect in the larger secular academic community.

This desire for respect makes the faculty responsive to the elite secular culture that Stephen Carter has written about. It is sometimes embarrassing in an academic setting to be thought of as one of those people who takes religion seriously.

These conflicting pressures mean that there will be disagreements within the faculty about the relative balance of the religious mission and the academic mission. That is inevitable. Disagreements will also arise

15. Id.
16. Bylaws of the Ass'n of Am. Law Schools § 6-8(d) in AALS HANDBOOK, supra note 11.
within the faculty and the church about how best to understand the religious mission. There will be liberal and conservative views of what the tradition requires will emerge. Different people acting in complete good faith can emphasize all sorts of different strands within the tradition differently. Some strands of the tradition will be far more comfortable than others to the secularists in the faculty.

These cultural and intellectual pressures are far more powerful than the pressure exerted by the accrediting rules. Even so, the accrediting rules are important for several reasons. First, they are a symptom, a sign of the seriousness of the larger problem. I think the recent conflicts over accrediting have arisen because the secular agencies have been moving in for the kill. The AAUP says that we no longer need an academic freedom exception for religious institutions. We had to have it as a matter of political accommodation in 1915 and even in 1940, but in 1970 or 1988 we no longer needed it. When the ABA and the AALS tried to take away the religious exception for sexual orientation discrimination, the implicit claim was that we had reached a point of secularization such that we did not have to keep accommodating those funny little schools that retained religious objections. The gay community may be only a small percentage of the population, but it may have more political clout than religiously affiliated law schools.

Second, the accreditation rules can constrain your options for dealing with the underlying problem of sustaining both academic excellence and religious mission. That problem is very difficult, and you need all the tools that you can think of at your disposal. The accreditation rules may take away some of those tools.

Someone said yesterday that these rules and the fights over these rules are mostly symbolic. The rules have not really constrained options because there are so many other constraints, and because the rules have not been enforced. The fights have arisen over the enactment or amendment of the rules; no agency has actually withdrawn a school’s accreditation for having violated a rule on religious grounds. All that is true, but if your school is unable to comply with a proposed rule, it is folly to defer fighting until your accreditation is on the line.

If you acquiesce when the rule is proposed, then when you get a live issue and you violate the rule, the accreditation authorities will tell you that the question of a religious exemption has already been settled. They will say they proposed a rule and they heard from only fifteen schools, and even those did not oppose it vigorously. So the debate is over. You lost. Now the only question is whether you are in compliance
or in violation. So even if it seems symbolic when such a rule is proposed, that is the point at which to fight it.

Third—and this may be their most important effect—the accreditation rules provide arguments and leverage for the secularizers within the faculty.\(^\text{20}\) They change the nature of the internal debate. We have heard lots of references to conflicts that illustrate that internal debate. The Land O'Lakes statement and the resistance to *Exordia Ecclesiae* are two examples of the tension between the Church hierarchy and its desire to emphasize the religious mission, on the one hand, and the faculty and its desire to tilt more towards the secular mission, on the other. The culture wars are within each religious tradition and not merely between the religious and the secular.\(^\text{21}\) There are those who would change the faith, and there are those who would secularize the institution.

Beyond a certain point, something like the law of entropy applies. There is a point of no return at which a secularized institution will not go back and become religious. At least, it will not do so if it depends on faculty governance processes. Once the faculty is randomly distributed with respect to religious belief, there is no force at work to re-sort faculties and recreate a predominance of a particular faith. There are many forces of secularization at work, but I see few forces that might reverse the trend once the faculty has abandoned the religious mission. The principal counterforce is that new religious schools begin. Some day they may be great universities. But in the short run, they are small and struggling and they are not direct replacements for the more distinguished religious universities that became secularized.

It is important to be clear about the nature of the loss when a religious school loses the religious part of the mission and becomes wholly secular. It is a loss in religious terms, and it is a loss to the religious community that created that school. But if it happens internally, it is not a loss to religious liberty. It is simply a choice. An institution chose to go another way, and the law should protect that choice. The accrediting authorities should also protect that choice. Secularization is a loss to religious liberty only when it is imposed from the outside, when the pressures of the law or the accrediting authorities push an institution toward or away from secularization.

\(^{20}\) I am indebted to Father Heft of the University of Dayton, who made this point in a conversation at the conference. It was one of those points that made obvious sense as soon as he said it.

This distinction between internal debate and external pressure is too often overlooked, even on the inside. It is especially overlooked from the outside. The accrediting authorities are always telling one school what they heard at some other school that seemed unconcerned about an objectionable rule. But it is simply irrelevant that some other school with the same denominational affiliation did not object. The AALS and the ABA cannot tell religious institutions how to define their mission. They cannot tell Catholic University or Villanova that Barbara Aldave is doing it differently down at St. Mary's, or vice versa. And if Pope John XXIII University is different from Pope Pius IX University, so be it. They are different threads in the tradition. It does not matter that only fifteen schools complained. If one school complained, and if that one school has a religious objection, that school is entitled to adhere to its version of the faith.\textsuperscript{22}

That includes even the hard case of dismissals of tenured faculty on matters that would otherwise be a violation of academic freedom. Most of the schools represented in this room would never do it. Those who would do it, would do it only in the most extreme cases. But it is an internal decision. It is a decision to be debated among your faculties. It is, in my view, none of the business of the ABA or the AALS.

III. RELIGION AS A SPECIAL AND NOT SO SPECIAL CASE

Robert Destro objected yesterday to special treatment of religion. He complained that special provisions about religion in the accrediting rules suggest that religion is somehow suspect. Listeners objected that he wanted exemptions from some of these rules, and they said that an exemption is a special treatment. I think that response is right. Religion is entitled to special treatment in some ways, but I also agree with what I think Professor Destro was complaining about. Religion is unique in some ways; in other ways, it presents issues with obvious secular analogs. The question is not whether religion should get special treatment, but rather when, and how, and to what extent.

What Professor Destro objects to in the special treatment of religion in the current accrediting rules is not that some rules are only for religion, and certainly not that there is an exemption for some religious law schools. What he objects to is the sense in the rules, more explicit in the debate surrounding the rules, that the religious exemption is a threat, that the religious institution is a threat, that religion is a dangerous force.

\textsuperscript{22} See, e.g., Thomas v. Review Board, 450 U.S. 707, 714-15 (1981) (protections individuals bona fide religious belief even though it was not shared by other members of his church).
that has to be controlled. It is not just that religious institutions have a special liberty that entitles them to an exemption; it is also that religious institutions are a special danger. They do things like inquisitions. It has been four hundred years, but you never know, it might break out again.\textsuperscript{23} The first step is letting them constrain the academic freedom of their own faculty; next they will be burning people at the stake. There is a lack of respect, a sense of condescension, that many speakers at this conference have talked about. It appears in the accrediting rules, and more generally in the elite secular culture.

This fear of religion contrasts sharply with how the secular academic community treats other intellectual movements. We are expected in our hiring and promotion decisions to take seriously all sorts of intellectual perspectives, some of which I find very strange. Marxism is a movement that seems to have outlived its time but is alive and well in the American academy.\textsuperscript{24} Critical legal studies, post-modernism, deconstruction, attacks on linear thinking — these are all thriving movements. Is the alternative to linear thinking circular thinking, or disconnected thinking? My favorite law library expended public funds to buy a book that promises a "feminist-vegetarian critical theory."\textsuperscript{25} I am not making this up; we are supposed to take that seriously. But many of our colleagues would not take seriously a Catholic or a Calvinist or a Lutheran theory. To the extent that is so, the academy is being inconsistent about one of its core values. The academy's extraordinary intellectual pluralism does not reach to religious perspectives.

Just as secular schools have their own intellectual movements that look different from more traditional ones, so they have secular constraints on academic freedom. At the time this talk was given, I was chairing the search committee for a new Executive Vice-President and Provost at The University of Texas. The advertisement for this position, in the \textit{Chronicle of Higher Education}, listed the qualifications: A doctoral degree or equivalent, a distinguished record of teaching and research, and a commitment to affirmative action.\textsuperscript{26} From the institutional perspective, that made sense. We are a university that once was segre-
gated; we are the law school of *Sweatt v. Painter*. There are reasons to say that affirmative action is one of those values that is so important we are going to impose it on everybody.

But it is equally clear that this is an enormous constraint on academic freedom. There are many academics who have genuine doubts about the proper limits of affirmative action, about the justice of imposing the cost of remedying the past on young people rather than on those who were older and around for more of the evil, about the risk that it may harm race relations more than it helps. All of those people are told, in effect: "Do not aspire to high positions of academic leadership here. We have a test oath. There is just one thing that you have to believe, just one thing that you must be committed to, just one thing on which dissent ends your prospects for an administrative career." But I did not hear a single complaint about that ad. No one came forward to say it was inappropriate.

Texas eventually promoted the Dean of the Law School to be Executive Vice President and Provost, and because no good deed goes unpunished, I also chaired the search for a new Dean. The advertisement for the Dean's position did not mention affirmative action, but that did not make the issue go away. Two potential candidates have asked me whether their views on affirmative action would bar them from serious consideration. Indeed, this was the very first question each of them asked. They know that they dissent from the orthodox position, and they assume that there is a price. My answer was that they could believe anything they wanted, and that they could have criticized affirmative action in print at times in the past, but that they would have to promise not to try to reopen the issue or change the faculty's consensus on the issue. I have no doubt that was the right answer, but I could not help feeling like the regulators who tell religious minorities that they can believe anything they like as long as they do not try to act on it.

At the faculty level, there is no explicit test oath about affirmative action; informal pressure to conform to the dominant view is strong on some campuses and weak on others. I have colleagues who are opposed to affirmative action; I have one who consulted with plaintiffs who sued us to try to enjoin our affirmative action policy. But it is fairly clear there is a de facto rule that we must preserve a predominance of the faculty who are committed to affirmative action. That is not written down anywhere in the way it is written down that Notre Dame must preserve a predominance of Catholic faculty. But I have not the slightest doubt that departments which became overtly resistant to affirmative

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action would discover that they had difficulties with the higher administration. I suspect that discretionary budget allocations would start to look bad. The point is not that Texas or other schools with similar policies have done something terribly inappropriate. The point is simply that secular institutions also have core values that are sustained by constraints on academic freedom, and the AALS adds what coercive power it has to the maintenance of those values.

The affirmative action debate parallels the debate over religious universities in another way as well. An issue at the heart of the affirmative action debate is whether the proper unit of analysis is the individual, racial, or sexual group. A recurring issue in the debate over academic freedom and religious discrimination at religious universities is whether the proper unit of analysis is the individual or the institution. These are parallel questions; the religious institution is an embodiment of the religious group.

With respect to race, sex, and ethnicity, the accrediting authorities unambiguously focus on the group. We must do justice to groups. Our institutions must be representative of ethnic and sexual groups, and if individuals must bear the cost, so be it. It is an inevitable consequence of most of our affirmative action policies that some white applicants will be rejected even though they are better qualified than some minority students who are admitted, and that some white students who are admitted will get less financial aid than some minority students who have equal financial need or even less financial need. The focus is on managing diversity, on doing justice to the group, and on nondiscrimination at the level of the group. That is controversial in the larger society, but among academics, the balance of opinion has turned overwhelmingly in favor of group justice.

With respect to religion, the focus of the accrediting authorities has remained on the individual. The religious institution is permitted to pursue its religious mission, but only as long as no cost is imposed on any individual. The accrediting authorities believe that you cannot impose a cost on a person who does not share your religious belief, even if the only cost is that someone goes to a different law school. Their approach is similar with respect to hiring and discharge of faculty. You cannot impose a cost on individual professors. You cannot require any

29. For an illustration of this view, see Judith J. Thomson & Matthew W. Finkin, Academic Freedom and Church-Related Higher Education: A Reply to Professor McConnell, in FREEDOM AND TENURE IN THE ACADEMY 419, 423, 425-26, 429 (William W. Van Alstyne ed.,
faculty member to sacrifice any fraction of his or her academic freedom in order to help sustain the religious mission. Neither the rules, nor the rhetoric of those who enforce the rules, reflects any sense of diversity at the institutional level. There is no sense of the religious university as a mediating institution that stands between the individual and the state, preserving diversity and preserving liberty.

There is an inconsistency here. And it is not just a logical inconsistency. It is not just that in some technical way the accrediting authorities are looking at the group in one case and at the individual in another case. They look at the group in cases where they are sympathetic to the goals of the group. They look at the individual in cases where they are not sympathetic to the goals of the group. The accrediting authorities are sympathetic to the goals of racial minorities and women, and so they encourage institutions to impose costs on individuals in pursuit of those goals. They are generally unsympathetic to the religious mission of religious universities, so any cost to individuals seems excessive.

IV. CONCLUSION

One way in which religion plainly is special is that there are special legal protections for religious choice. The Constitution and the Religious Freedom Restoration Act guarantee the free exercise of religion. The difficult choices about how to preserve academic and religious commitments are to be made by religious academics and religious universities, not by government.

The ABA and AALS should simply back off and give the religious schools space to pursue their own missions. Let them struggle with their conflicting commitments. It is a difficult mission to perpetuate both academic excellence and religious commitment in the same institution over a long period of time. Some will succeed, some will fail. In the long run it may be that most will fail. If we had enough historical data I think we could calculate the half life of serious religious commitment at religious universities in the United States. But a lot of talented people are working to sustain those commitments, and some of them may last for a long time.

James White said yesterday the ABA's focus is only on the soundness of the education delivered. I wish I believed him, and I hope he comes

1993)(conceding the value of religious institutions of higher education, but denying that they should "continue to exist at the cost of using coercion").

to believe it as well. Most of these schools meet minimum standards of quality, and for those who do not, the focus should be on that problem and not on some other problem. I would not let the ABA or the AALS ask Carl Monk's question: "What values are so important that they have to be imposed on all our members?" It is no business of the state to impose values on religious institutions.\textsuperscript{31}

The ABA is the state for this purpose, because in most states it operates with the delegated coercive authority of the state supreme court. The AALS is not the state, as Professor Monk said. It is a membership organization, and it is legally free to do whatever it wants. It can expel all the religious law schools if it wants. But just try to imagine the controversy that would ensue if the AALS said it was just a private organization and so it would adopt some racially discriminatory policy. I think it would be inappropriate, although not illegal, for the AALS to try to impose values on religious institutions.

What the AALS should do ethically and as a matter of sound policy, is to back off and let the religious institutions pursue their dual mission. For the religious institutions, I would emphasize the good sense, if not the moral duty, of full and fair disclosure. This is not because religion is especially dangerous or has to be constrained with a disclosure requirement, but because disclosure is both better for the mission and fairer to those who will not value the mission. You do not want people in the faculty meeting saying, "This wasn't even a Catholic school when I was hired; what are you doing to me?" Someone at this conference said that happened at their school, which means that somebody failed to disclose the religious commitment when that person was hired. You will get a larger number of malcontents and a larger number of people actively working to subvert the religious mission if you are not candid about what you are trying to accomplish. Affirmatively state that dual mission. If your religious commitment includes limitations on academic freedom, affirmatively state those limitations. The Brigham Young statement is extraordinarily well done. I think the more disclosure the better, both for your mission and for the secularists who do not want to share in it.

For any school that seriously pursues both academic and religious commitments over the long term, the internal debate will be lively and sustained. The important point is that the debate should be internal. The ABA and AALS should stay out of the debate and let the religious institutions conduct it.

\textsuperscript{31} Cf. Engel v. Vitale, 370 U.S. 421, 425 (1962) (holding that "it is no part of the business of government to compose official prayers for any group of the American people").