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Academic Freedom and the Free Exercise of Religion

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I. Introduction

Father Curran believes that the Roman Catholic Church should grant academic freedom to its theology professors.¹ He argues that academic freedom is good for both the Church and its universities.² The academic freedom he proposes for theologians appears to be considerably less than what most academics claim for themselves, but considerably more than the Church now allows.

His essay and his personal dispute with the Church raise several distinct questions. The first is whether more academic freedom would be good for the Church. On this question our opinions are similar to his, though he has failed to formulate a neat solution to this hard problem.

The second question is who should decide whether academic freedom would be good for the Church. On this question he is largely silent. But his lawsuit³ and his passing reference to the Constitution⁴ imply a belief that either secular law or secular courts can control Church policy in this area. We fundamentally reject any such implication. The teaching and professing of theology are at the core of the free exercise of religion; the Constitution absolutely bars the government from interfering in doctrinal disputes at religious universities. It is hard to imagine a question less appropriate for the secular courts than whether Curran should teach theology at the Catholic University of America. Only Catholics should decide what is good for Catholicism.

Recognizing this concern, Curran raises a third issue, saying that he seeks only to enforce the civil contracts of the university as a civil corporation.⁵ Of course the Church could enter into an enforceable contract

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1. Curran, *Academic Freedom and Catholic Universities*, 66 TEXAS L. REV. 1441, 1454 (1988).

2. *See id.* at 1449-54.

3. Curran v. Catholic Univ. of Am., Civ. No. 1562-87 (D.C. Super. Ct. filed Feb. 27, 1987).

4. Curran, *supra* note 1, at 1453 & n.66.

5. Oral remarks at Symposium on Academic Freedom; *see* Plaintiff's Complaint at ¶¶ 37-50,

waiving its right to control its theologians. But it is unlikely to do so, and our general reluctance to find an implied waiver of constitutional rights⁶ requires that any such agreements be explicit and deliberate. Any government attempt to impose academic freedom on a religious university without its knowing and authorized consent would directly clash with the first amendment.

Finally, Curran suggests that if the university denies academic freedom to its theologians, it may forfeit government financial aid to the rest of the university. We think that this result is unlikely and would be an invalid penalty on the exercise of constitutional rights. We will explore each of these questions in turn.

II. How Much Academic Freedom Is Good for the Church?

A. *The Costs and Benefits of Academic Freedom*

Curran argues that academic freedom is essential to the theologian's somewhat independent role in the Church. In part, he views this as the price of respectability for Catholic universities among academics;⁷ in part, he fears it may be the price of continued financial aid from the government.⁸ But most importantly, he believes it is essential to the religious mission of the Church. Academic freedom for theologians is essential to the "creative fidelity" that makes "the word and work of Jesus present in the light of contemporary, historical, and cultural circumstances."⁹ In Catholic theology, as in every other discipline, free and open debate is the best route to truth.

We are persuaded by Curran's argument. We believe it would be better for the Church if it allowed its theology departments academic freedom approaching that of secular universities. A series of highly publicized dismissals for theological error will inevitably reduce the stature of Catholic universities. If such dismissals occur outside the theology and philosophy departments, the effect would likely be devastating. If either of us were Catholic, we would write the Vatican on Curran's behalf. We would fear for the future of Catholic education; we would feel alienated by a hierarchy that did not trust us to hear Curran's views and retain our faith, and we would find his teachings on sexual morality more plausible than the hierarchy's.

Curran (Civ. No. 1562-87) [hereinafter Plaintiff's Complaint] (alleging breach of contract, promissory estoppel, and breach of an implied covenant of good faith and fair dealing).

6. See *infra* notes 73-78 and accompanying text.

7. Curran, *supra* note 1, at 1446-47.

8. *Id.* at 1449-50.

9. *Id.* at 1450.

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But our opinions are wholly irrelevant except as the Church chooses to consider them. The Church may have some concern for our opinions as members of the public, as members of the academic community, or as professionals and potential opinion leaders. Violations of academic freedom at Catholic universities may make us less likely to accept faculty appointments there, less likely to send our children there, and less likely to recommend that other students and faculty go there. No church is wholly immune to public opinion, and no university is wholly immune to the informal sanctions of the academic community. The American Association of University Professors (AAUP) is free to censure Catholic University for its treatment of Curran, if it chooses to do so, though we would hope that any such statement would be sensitive to the special problems of theology departments.

Whatever the costs, they are for the Church to weigh. The Church probably knows it will pay a price for limiting the academic freedom of its theologians; if not, it will find out soon enough. The hierarchy may well underestimate the price, but academics probably overestimate it.

In any event, the Church may have its reasons for choosing to bear the costs of limited academic freedom, reasons that may be more persuasive to the hierarchy than to academics. The Church has its own goals and values, and it may think that some of them are incompatible with some of the freedoms protected by secular society. The unbridled search for truth may seem more threatening than valuable if you believe that on the most fundamental questions the truth is revealed and unchanging. The Church has preserved a set of core beliefs substantially intact for nearly two thousand years. It has maintained a continuous institution for the same period, while successive empires rose and fell around it. Even more astonishing, the Church aspires to preserve the beliefs and the institution, still intact and faithful to the original, from now until the end of time. These are extraordinary achievements and even more extraordinary goals, wholly unlike the goals of any secular university.

The Church may fear that it cannot achieve these goals without a structure that is more authoritarian than academics prefer. Indeed, the Church can only wonder how different it would be today if it had foregone the violent suppression of heresy from the beginning. Today it has given up violence and secular enforcement of religious beliefs, but it has not given up hierarchical control over its own clergy. It may think that over the very long run, the dangers of theological error are too great to risk unlimited academic freedom for its theologians. It may fear that its core beliefs will gradually evolve beyond recognition. It also may fear that too much deference to individual understandings of the faith inevita-

bly leads to the successive splintering that has characterized Protestantism. Creative fidelity perpetuates the faith through changing times, but believers will always disagree over the relative emphasis on "creative" and on "fidelity."

Ironically, veneration and loyalty to the Church may increase its risks from academic freedom. The Church inspires veneration and loyalty even among its dissenters. Those who reject its teachings but do not wish to leave it have great incentive to convince themselves that their personal views are really the views of the Church, if only Church doctrine were properly and creatively understood. This creative view of fidelity can resolve dissonance for dissenters; it is also a way for dissenters to claim the authority and credibility of the Church for their personal views. Thus, dissenters will always tend to overemphasize "creative" in their understanding of "fidelity."¹⁰

The Church may also believe that it is important to preserve distinctively Catholic universities that speak with a clear voice to the faithful and the public. It is one thing for Curran to dissent from Cornell University; it is quite different for him to legitimize his dissent with his position as professor of theology at Catholic University. At a time when the Church's strongly held views on sexual morality are distinctly in the minority, the Church may decide that prominent internal dissent undermines its ministry and diverts its scarce funds. And 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.

Finally, the Church may believe that its universities should provide a distinct Catholic perspective for its students. Certainly many students and their parents select Catholic universities for this reason, and some students complain bitterly that their school is Catholic in name only. As faculty identify more and more with the academy, with their respective disciplines, and with the secular values of research, excellence, national recognition, and prestige, they may identify less and less with the university's religious mission. The Church may insist that its universities teach and preserve a Catholic perspective, even if this requires them to limit their faculties' academic freedom.

10. This tendency should be familiar to all students of constitutional law, because veneration of the Constitution creates the same temptation for every reformer to claim that the Constitution embodies his views. For further elaboration of the analogy between constitutional and religious interpretation, see S. LEVINSON, *CONSTITUTIONAL FAITH* (1988); Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984); Levinson, "The Constitution" in *American Civil Religion*, 1979 *SUP. CT. REV.* 123; Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 889-94 (1985).

B. Curran's Proposed Limits on Academic Freedom

Curran recognizes the tension between religious tradition and academic freedom. His claim to academic freedom includes two significant limitations. First, he says that academic freedom means "that no *external* authority, lay or clerical, should make decisions about hiring, promoting, tenuring, or dismissing faculty members."¹¹ But what about internal authority? He apparently concedes that the voting faculty of a religious university can make personnel decisions on grounds of religious orthodoxy.¹² Does he also concede that the university's president or trustees can make such decisions? They too are internal authorities. But even if he limits this concession to what the faculty can do, his version of academic freedom is not the orthodox one.

Second, he explicitly concedes that deviation from fundamental Catholic teaching is grounds for dismissing a professor of Catholic theology.¹³ Theologians can write about the death of God¹⁴ at the Harvard Divinity School, but apparently not at the Catholic University of America. Curran says that such a dismissal could be for incompetence.¹⁵ This view turns on an innovative conception of incompetence, and it may be a useful pragmatic solution for the Church, but it does not resolve the tension between academic freedom and religious authority. To say that all the death-of-God theologians are incompetent is an odd usage. To say that they are competent at Harvard University, but that they would be incompetent at Catholic University, is an even odder usage. A book questioning the existence of God or the divinity of Christ may be written well or poorly; it may be professionally competent or professionally incompetent. The Church's objection is not that such a book is incompetent, but that it is heresy.

Curran apparently agrees that Catholic theology departments need not harbor heretics. But he wants to fit the judgment of heresy into the traditions of academic freedom by relabeling heresy as incompetence. This relabeling fails. What he proposes may be necessary for religious universities, but it is nonetheless a major limit on academic freedom.

11. Curran, *supra* note 1, at 1441 (emphasis added); see also *id.* at 1447-49 (also distinguishing church authorities external to the university from internal university authorities).

12. See *id.* at 1453-54.

13. *Id.* Many leaders of religious universities hold similar views and openly express them as limitations on academic freedom. For a survey, see May, *Academic Freedom in Church-Related Institutions*, ACADEME, July-Aug. 1988, at 23.

14. For examples of the death-of-God theology, see *THE MEANING OF THE DEATH OF GOD: PROTESTANT, JEWISH AND CATHOLIC SCHOLARS EXPLORE ATHEISTIC THEOLOGY* (B. Murchland ed. 1967); *TOWARDS A NEW CHRISTIANITY: READINGS IN THE DEATH OF GOD THEOLOGY* (T.J.J. Altizer ed. 1967).

15. See Curran, *supra* note 1, at 1454.

He also says that the faculty and not the hierarchy should make the judgment of heresy, or in his peculiar terms, the judgment of incompetence.¹⁶ Presumably, he expects the faculty to be more tolerant and more sympathetic to claims of academic freedom. But his position is not just the familiar claim that the faculty should make academic judgments. In secular universities, we think it illegitimate for the faculty to police fidelity.¹⁷ But Curran would let the theology faculty do just that.

In his oral remarks, Father Curran suggested that his definition of competence is plausible if the discipline is defined narrowly. Death-of-God theologians may not be incompetent as theologians, but they are incompetent as *Catholic* theologians. This narrow definition is simply another way of describing the restriction on academic freedom. Suppose the University of Chicago created a Department of Classical Economics, and dismissed its Marxists and Keynesians because they were incompetent at classical economics. We can be sure that the AAUP would not accept those dismissals as legitimate judgments of incompetence. Such dismissals would enforce orthodoxy and violate academic freedom. The same is true when a Catholic theologian is dismissed or disciplined for departures from faith. Curran's concession to religious limits on academic freedom is principled, and the intellectual honesty that compelled the concession is admirable, but he does not succeed in reconciling that concession with the traditional secular understanding of academic freedom.

This second proposed limit on academic freedom requires a judgment about what teachings are so fundamental that the university can dismiss those who reject them. He apparently believes that the issues of sexual morality on which he dissents are not fundamental; the Catholic hierarchy disagrees. The question is one of degree and obviously is not fit for judicial review.

III. Who Should Decide What Is Good for the Church?

A. The Right of Churches To Settle Their Own Disputes

It is well settled that courts should not decide cases involving religious belief or practice.¹⁸ An obvious corollary to this basic rule is that

16. *Id.*

17. See Fuchs, *Academic Freedom: Its Basic Philosophy, Function, and History*, in *ACADEMIC FREEDOM AND TENURE* 242, 246 (L. Joughin ed. 1969) (noting that the core of academic freedom is "the freedom of individual faculty members against control of thought or utterance from either within or without").

18. See *Jones v. Wolf*, 443 U.S. 595, 602-06 (1979); *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). Courts may resolve church property disputes by apply-

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secular courts should not decide who should teach Catholic theology.¹⁹ Whether and how far Curran's views depart from Catholic teaching is a quintessential internal dispute. If a court relied on its understanding of religious doctrine to award an ecclesiastical or theological position, it would violate the first amendment by establishing the winning faction.²⁰

More important, the rule prohibiting secular courts from interfering in internal church disputes protects the free exercise rights of churches and their members.²¹ The free exercise clause guarantees not just the bare freedom to conduct religious activities, but also the freedom to conduct those activities autonomously: churches may define their own doctrines,²² select their own leaders,²³ run their own institutions,²⁴ and resolve their own disputes.²⁵ The Catholic Church's right to resolve its controversy with Curran is simply one facet of its general right to conduct all its internal affairs free from secular interference.

This right to church autonomy is a fundamental part of religious liberty.²⁶ Religion includes important communal elements for most believers, and the Constitution guarantees every individual the right to create or join a religious organization that is independent of the state. Religious liberty for individual believers thus depends on religious liberty for their churches. If secular courts have the final power to resolve church disputes, the church does not control its destiny and the community of believers does not control its faith. Secular interference with a church's internal affairs is as much a violation of free exercise as secular interference with the beliefs of individuals.

These principles are especially applicable to those charged with pre-

ing neutral principles of law to church documents, provided that they can do so without encountering questions of faith or practice. *Jones*, 443 U.S. at 602-06. This controversial exception is irrelevant to the Church's power to control its theologians. It is relevant to Curran's contract claim, considered *infra* text accompanying notes 53-71.

19. See *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1503-06 (E.D. Wis. 1986), *aff'd in part, on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

20. See *Presbyterian Church*, 393 U.S. at 449; *Crowder v. Southern Baptist Convention*, 828 F.2d 718, 721 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988); *Adams & Hanlon, Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1337-38 (1980).

21. See *Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1395-96 (1981).

22. *E.g.*, *Presbyterian Church*, 393 U.S. at 449-50.

23. *E.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (per curiam); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 119 (1952); *Crowder*, 828 F.2d at 724-26.

24. See, *e.g.*, *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (construing statute to avoid constitutional issues); *Serbian E. Orthodox Diocese*, 426 U.S. 696 (holding that courts cannot review creation of new dioceses or removal of bishops).

25. See cases cited *supra* note 18.

26. See *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2871-72 (1987) (Brennan, J., concurring); *Laycock, supra* note 21, at 1388-92.

serving, developing, and teaching the faith. These people are at the heart of the principle that secular courts should not resolve internal church disputes. Thus, courts regularly refuse to interfere in disputes between churches and their ministers. They have refused to hear claims of employment discrimination²⁷ or wrongful discharge²⁸ brought by ministers, parochial school teachers,²⁹ and similar religious leaders,³⁰ and the Supreme Court has refused to apply the National Labor Relations Act³¹ to lay teachers in parochial schools.³² The courts have recognized that a minister's role in a church is so central that the government cannot intervene in a church's selection of its ministers, even in pursuit of interests that are legitimate and compelling in the secular context. One court noted that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."³³

Father Curran is an ordained priest, and some courts would view his ordination as sufficient to bar any judicial inquiry into his relations with the Church.³⁴ But his function should be equally dispositive.³⁵ A professor of theology at a church university performs an essential teaching

27. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

28. *Serbian E. Orthodox Diocese*, 426 U.S. at 708-20; *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986); *Kaufmann v. Sheehan*, 707 F.2d 355 (8th Cir. 1983); *Simpson v. Wells Lamont Corp.*, 494 F.2d 490 (5th Cir. 1974); *Knuth v. Lutheran Church Mo. Synod*, 643 F. Supp. 444 (D. Kan. 1986); *O'Connor Hosp. v. Superior Court*, 195 Cal. App. 3d 546, 240 Cal. Rptr. 766 (1987) (denied review and ordered not published, Dec. 23, 1987); *see also Hafner v. Lutheran Church-Mo. Synod*, 616 F. Supp. 735, 736-39 (N.D. Ind. 1985) (holding that the court lacked jurisdiction to decide whether church had to provide for minister during illness).

29. *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 944-61 (6th Cir. 1985), *rev'd on other grounds*, 477 U.S. 619 (1986); *Miller v. Catholic Diocese*, 728 P.2d 794 (Mont. 1986); *cf. Reardon v. Lemoyne*, 122 N.H. 1042, 454 A.2d 428 (1982) (allowing suit by discharged nuns for breach of express employment contract, but only to extent that contractual claims raised no issues of religious doctrine). *Eut see EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (holding that the policy of providing employee health insurance only to heads of households is not protected by religion clauses or exempt from Equal Pay Act).

30. *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) *aff'd in part, on other grounds*, 814 F.2d 1213 (7th Cir. 1987); *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985); *see also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981) (holding that the EEOC cannot require reporting of data on faculty at seminary), *cert. denied*, 456 U.S. 905 (1982).

31. 29 U.S.C. § 158(a)(1), (5) (1982).

32. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979); *see also Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 398-99 (1st Cir. 1986) (en banc) (equally divided court refused to enforce collective bargaining order against religious university). *But see Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (holding that the application of New York's labor relations act to a parochial school is not unconstitutional if the sponsoring church has no doctrinal objection to collective bargaining).

33. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

34. *See McClure v. Salvation Army*, 460 F.2d 553, 555 (5th Cir.) (Salvation Army officer,

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function of the church, and the courts have so held.³⁶ A court that can order reinstatement of one dissident theologian can order reinstatement of many others, including those who may dissent more radically or on more fundamental matters than Father Curran. For courts to interfere in such matters is to interfere in the very process of forming the faith.

B. The Protections for Losers in Religious Disputes

Whether resolved internally or externally, in secular litigation or in religious proceedings, religious disputes will have losers. But some losers are more sympathetic figures than others. When the winner appears to be the old guard of a large hierarchical institution, and the loser appears to be a comparatively powerless individual, our sympathies often lie with the loser. Whatever the need for church autonomy, we are reluctant to leave the loser wholly unprotected.

The great protection for the losers of internal church disputes is structural: religion is a wholly voluntary and radically pluralistic activity in this country. What made the Catholic Church a threat to individual liberty in the Middle Ages was its monopoly of religious authority and its power to invoke secular authority. The religion clauses forever ended that threat in this country. Because the state has no power to punish heresy, the Church has no power over the life, liberty, or property of its dissidents.

The remarkable religious pluralism fostered by the religion clauses sharply limits even the incidental consequences of church discipline. There are hundreds of other churches and thousands of other employers. A church has no monopoly over any thing of value except those internal things the state cannot coerce, such as the sacraments and the church's imprimatur. The value of these things is religious; the state cannot award them because its attempt to do so desanctifies them.

This analysis is fully applicable to Curran's claim against Catholic University. The Church cannot stop him from proclaiming his views. Any attempt to silence him depends on his voluntary acquiescence in Church discipline, and the mere attempt to discipline him has increased the audience for his views. He probably could choose from a dozen prestigious academic appointments. What he cannot choose is the appear-

working as a secretary, treated as a minister because all officers are ministers), *cert. denied*, 409 U.S. 896 (1972).

35. See *Rayburn*, 772 F.2d at 1168-69.

36. See *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 283-84 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1504-05 (E.D. Wis. 1986), *aff'd in part, on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

ance of religious authority or legitimacy that flows from a position as professor of theology at Catholic University.

Whatever power a church has over its dissidents comes from their voluntary affiliation with the church. If they want the things that only the church can grant, the church has power over them to that extent. If they feel mistreated, they can leave. If they cannot leave—if they believe that God wants them to stay in the church that is mistreating them—they can hardly ask the state to regulate God's church and thus modify the effect of His command.

The voluntary nature of religious activity has always played a prominent role in church autonomy cases. The Supreme Court has consistently said that individuals who voluntarily affiliate themselves with a church do so on the church's own terms: all who join a church do so with "implied consent" to its government, to which they "are bound to submit."³⁷ As long as membership is voluntary, church members need no protection from their church. They have no constitutional right to demand that the church treat them fairly. Rather, the Constitution protects both the church and individual believers from government interference.

All this would be true even in the case of an isolated individual mistreated by a monolithic church. It is true a fortiori when the individual plaintiff is the de facto representative of a large faction within a church. Curran's case illustrates this common pattern. Father Curran embodies the hopes and dreams of millions of Catholics who want change on one or more important issues: more permissive teachings on sexual ethics, more democracy in the Church, more autonomy for Church-affiliated universities, or even more academic freedom for theologians. If the secular courts intervened on Curran's behalf, these Catholics would have a powerful practical and symbolic victory over other Catholics, including, most importantly, those Catholics who have been entrusted with the leadership of the Catholic Church. Intervening in all cases like Curran's would fundamentally change the Church.

The government obviously has no business deciding whether the Roman Catholic Church should be reformed. The reformers must fight their battles within the Church, not in the secular courts. Internal reform comes slowly in a hierarchical church, but that is not the courts' concern. Catholics know full well that their Church is hierarchical and that the hierarchy has most of the power. Some of them like it that way

37. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871).

and some do not. Those who like it that way are entitled to keep it that way, unless the reformers change it through internal Church processes. Those who do not like it can suffer in silence, complain from within, move to another church, start their own church, or simply withdraw. Many of them have withdrawn or reduced their participation.³⁸ What they cannot do is insist that the government remake the Church to their liking.

If efforts to reform the Church from within were hopeless, that would merely describe a fact about the Church; it would not add to the case for interference by secular courts. But internal reform is not hopeless. For a time it appeared that Curran and the university would compromise their differences. Curran would have lost his canonical mission but retained his academic tenure; he would have taught at Catholic University but not in the theology department.³⁹ Curran claimed victory and said that "what they are settling for now is what I had offered in the past."⁴⁰ Now the settlement has broken down; the parties could not agree on what Curran would teach instead of theology.⁴¹ It is not clear whether the University's offer was illusory or whether Curran thinks he has the leverage to get an even better offer. Once before, widespread protest forced Catholic University to retain Curran on the faculty.⁴² He obviously hopes to repeat that victory.

This kind of pressure from private citizens, and especially from Catholics and members of the Catholic academic community, is entirely legitimate. Government regulation of such decisions, either by legislation or judicial decision, is illegitimate. An important lesson of Curran's

38. See A. GREELEY, W. MCCREADY & K. MCCOURT, *CATHOLIC SCHOOLS IN A DECLINING CHURCH* 103-54 (1976). From an elaborate statistical analysis of social survey data on American Catholics, the authors conclude that *Humanae Vitae*, the papal encyclical on birth control, caused a 50% reduction in Catholic religious observance. *Id.* at 139. This decline was partly offset by the positive effects of the Second Vatican Council. *Id.* The principal factors in this reaction were reduced respect for papal authority and rejection of the Church's sexual ethics. *Id.* at 129. These two issues are at the heart of Curran's dispute with the Church hierarchy. For further analysis with more recent data, see Hart & Greeley, *The Center Doesn't Hold: Church Attendance in the United States, 1940-1984*, 52 *AM. SOC. REV.* 325 (1987).

39. See Steinfeld, *Catholic U. Trustees Vote To Bar Curran from Theology Dept.*, *N.Y. Times*, Apr. 13, 1988, at A17, col. 1. For a more complete story, see Hansen, *Curran To Teach Outside Theology Department*, *Nat'l Cath. Rep.*, Apr. 22, 1988, at 4, col. 1.

40. Hansen, *supra* note 39, at 4.

41. Feuerherd, *Pact Between Curran, Catholic U. Crumbles*, *Nat'l Cath. Rep.*, May 27, 1988, at 31, col. 1; Steinfeld, *Theologian Rejects Catholic U. Proposal To Settle Suspension*, *N.Y. Times*, May 18, 1988, at A21, col. 1.

42. The university originally denied Curran tenure. The faculty protested and the university reversed its decision. This struggle is recounted briefly in Feeley, *The Dissent of Theology: A Legal Analysis of the Curran Case*, 15 *HASTINGS CONST. L.Q.* 7, 9 n.8 (1987); Maguire, *Can a University Be Catholic?*, *ACADEME*, Jan.-Feb. 1988, at 12. For a sampling of Catholic opinion on the present Curran controversy, see *VATICAN AUTHORITY AND AMERICAN CATHOLIC DISSENT: THE CURRAN CASE AND ITS CONSEQUENCES* (W. May ed. 1987).

experience is that even within a hierarchical church, private protests can make a difference.

*C. The Legal Irrelevance of the Church's Attitude
Toward Academic Freedom*

Curran goes to some length to show that the Catholic Church has fostered a tradition of academic freedom for its theologians.⁴³ Some readers may think that this solves the problem. If the Church believes in academic freedom anyway, perhaps the courts can enforce it without requiring the Church to violate its religious tenets. Curran does not make this argument, but we address it because similar arguments are so widespread.⁴⁴

First and foremost, this argument fundamentally misconceives the nature of religion and religious liberty. Religion is more than a set of rules for the faithful to obey, and the free exercise of religion is more than a right to obey the religious rules. All faiths offer something more affirmative than a set of rules. The right to free exercise of religion includes a right to act on religious faith, whether or not required by rules. Many activities that are unquestionably exercises of religion are not required by doctrine or conscience.

To build and run a religious university is an exercise of religion.⁴⁵ This is especially true for a faith like Catholicism, with its strong intellectual tradition. The free exercise clause therefore protects a church's right to run a university with a minimum of government interference. The Church need not justify every university management decision by referring to religious doctrine; it is enough for the Church to note that it is managing its own institution.

There is a second defect in the argument that enforcing academic freedom would not violate Catholic teachings. The argument assumes that Curran is right that the degree of academic freedom he proposes would not violate church teachings. Whether academic freedom for theologians violates Catholic teachings is itself a religious question that only the Church can answer. A secular court has neither the authority

43. See Curran, *supra* note 1, at 1441-47.

44. See, e.g., *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1368 (9th Cir. 1986) (holding that because the church said it did not believe in sex discrimination, requiring it to give benefits to male and female employees did not have a significant impact on the exercise of its religious beliefs); *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161, 1170-71 (2d Cir. 1985) (holding New York labor relations act applicable to parochial school because affiliated church had no doctrinal objection to collective bargaining). Other examples are collected in Laycock, *supra* note 21, at 1390 nn.141-43.

45. See *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 77 (1st Cir. 1979).

nor the expertise to declare that a particular policy is or is not consistent with religious doctrine.⁴⁶ Distinctions between the teaching magisterium of the bishops and that of the theologians,⁴⁷ between theology courses with and without canonical effects,⁴⁸ and between teaching Catholic theology in and not in the name of the Church⁴⁹ raise questions that secular courts cannot decide.

Finally, this approach to free exercise would not uniformly protect all faiths. Catholics always have believed that tradition supplements scripture.⁵⁰ Many Protestant faiths reject the authority of tradition; they insist that the scripture alone defines the faith.⁵¹ This difference in religious belief might lead to very different views on the wisdom of academic freedom for theologians, but it should have nothing to do with a church's constitutional right to autonomy. Secular courts cannot choose to enforce academic freedom at Catholic University but decline to do so at Mercer University or Concordia College. This sort of discrimination among faiths violates the core values of the religion clauses.⁵²

IV. Is This Dispute a Simple Contract Case?

Although he does not discuss it in his essay, Curran has filed a lawsuit against Catholic University alleging breach of contract. The trial judge has allowed the case to proceed "to the extent that, allegedly," the claim is based on a civil contract.⁵³ This Comment is not the place for an advisory opinion on the proper resolution of that lawsuit. We do not know all the terms of Curran's contract; it may have other promises or understandings not alleged in his complaint.⁵⁴ Nevertheless, it is important to consider the relationship between the constitutional rights of a religious organization and the contractual rights of its members and employees. Casual implication of "contractual" rights or insensitive inter-

46. See *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-50 (1969); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1503 (E.D. Wis. 1986), *aff'd in part, on other grounds*, 814 F.2d 1213 (7th Cir. 1987).

47. See Curran, *supra* note 1, at 1452-53 & 1452 n.61.

48. See Plaintiff's Complaint, *supra* note 5, ¶¶ 22-23.

49. See *id.* ¶ 23(d).

50. See Crehan, *The Bible in the Roman Catholic Church from Trent to the Present Date*, in 3 CAMBRIDGE HISTORY OF THE BIBLE: THE WEST FROM THE REFORMATION TO THE PRESENT DAY 199 (S. Greenslade ed. 1963) [hereinafter CAMBRIDGE HISTORY]; Curran, *supra* note 1, at 1450-51. For a summary in the legal literature, see Levinson, *supra* note 10, at 126-30.

51. See Bainton, *The Bible in the Reformation*, in 3 CAMBRIDGE HISTORY, *supra* note 50, at 1; Sykes, *The Religion of Protestants*, in *id.*, at 175, 175-98; Levinson, *supra* note 10, at 125-30.

52. See *Larson v. Valente*, 456 U.S. 228, 244 (1982).

53. *Curran v. Catholic Univ. of Am.*, Civ. No. 1562-87, at 5 (D.C. Super. Ct. Apr. 5, 1988) (order denying motion to dismiss).

54. For an analysis of the dispute that takes account of many provisions of church and university law, see Feeley, *supra* note 42, at 33-40.

pretation of express contracts can seriously undermine a church's constitutional rights.

A. *The Contract as Contract*

Of course a church and its members can make a contract and agree that it be enforced by secular courts.⁵⁵ But if they wish to do so, they must make their intention clear in advance. Courts should not imply such an agreement without a clear showing that at the time the parties entered into the relationship they intended to create contractual rights and to have their disputes settled outside the church. Church autonomy would be threatened seriously if any party to an internal dispute could invoke secular adjudication merely by alleging a previously unexpressed intent to resolve disputes in secular courts.

Curran's complaint alleges a mixture of express terms, implied terms, and canon law theories. The only allegations of express contract are that the university granted him academic tenure⁵⁶ and that a faculty handbook sets forth procedures the university must follow to suspend or dismiss a faculty member.⁵⁷ Curran's complaint also contains detailed allegations about his and the Church's conflicting understandings of canon law and the Church's authority over its theologians.⁵⁸ These allegations highlight the religious nature of the dispute and demonstrate that the case does not involve a secular contract that courts can construe without resolving religious questions.⁵⁹

The bulk of the contract is allegedly implied. The complaint alleges that "academic tenure" has "a settled and understood meaning within the academic profession and community,"⁶⁰ and that this meaning includes academic freedom,⁶¹ a vested property right in his job,⁶² and con-

55. See Adams & Hanlon, *supra* note 20, at 1336-38; Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1403-05 (1981); Laycock, *supra* note 21, at 1403-04.

56. Plaintiff's Complaint, *supra* note 5, ¶ 11.

57. *Id.* ¶ 25.

58. *E.g.*, *id.* ¶¶ 22, 23(d), 31(o).

59. See Jones v. Wolf, 443 U.S. 595, 604 (1979) (stating that secular courts can construe church legal documents in secular terms pursuant to "neutral principles," but if interpretation of the document "would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body"); Knuth v. Lutheran Church Mo. Synod, 643 F. Supp. 444, 448 (D. Kan. 1986) ("The contractual rights and duties of good faith alleged in plaintiff's complaint are not a matter of secular law and would require this court to undertake . . . a searching and impermissible inquiry into church polity . . ."); Reardon v. Lemoyne, 122 N.H. 1042, 1049, 454 A.2d 428, 433 (1982) ("[C]ontractual grounds for non-renewal or dismissal may be found to involve doctrinal judgments which are clearly beyond the judicial sphere of authority.").

60. Plaintiff's Complaint, *supra* note 5, ¶ 11.

61. *Id.* ¶ 12.

62. *Id.* ¶ 11.

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tinuous tenure until retirement.⁶³ The complaint alleges that a “covenant of good faith and fair dealing is also in fact an implied term of plaintiff’s contract with the University.”⁶⁴ The complaint does not allege an express promise of academic freedom.

The implied covenant of good faith and fair dealing is not a contract term but a form of regulation. The law imposes a duty of good faith on contracting parties whether or not they intend it;⁶⁵ the duty is most important precisely when one side does not intend it. Such a duty appropriately regulates both the secular world and the churches in their dealings with outsiders. But it is an unconstitutional regulation of internal religious affairs to impose such a duty on a church’s relation with its members and employees, and especially on its relation with its theologians.⁶⁶

Few churches will treat their members, their employees, or even their theologians in ways that seem to the church unfair or in bad faith. When it happens, there can be no secular remedy. In the bulk of cases, the real issue is the familiar one of who should decide. The church, and not the secular courts, should decide what good faith and fair dealing require in the religious context.⁶⁷ Whatever duties of good faith and fair dealing the church may impose on itself, it need not forfeit its right to control its theologians.

The most important allegation in Curran’s complaint is that the grant of academic tenure implicitly grants academic freedom as understood in the “academic profession and community.”⁶⁸ This claim may rest on contractual interpretation that is oblivious to the Church’s constitutional rights, or it may assert another form of regulation to which the contract is only incidental. The real theory of the complaint may be that the university cannot have tenured faculty unless it accepts secular un-

63. *Id.*

64. *Id.* ¶ 14.

65. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); U.C.C. § 1-203 (1978); see also *Miller v. Catholic Diocese*, 728 P.2d 794, 797 (Mont. 1986) (treating the breach of implied covenant of good faith and fair dealing as a tort claim, not a contract claim). Implied covenants may be contractual for some important purposes, including the availability of punitive damages. See *Texas Oil & Gas Corp. v. Hagen*, 31 Tex. Sup. Ct. J. 140, 143 (Dec. 16, 1987); *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981). But implied covenants are not contractual in the sense relevant here, which is whether the Church has voluntarily bargained away its right to control its theologians.

66. “[I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant.” *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714-15 (1976) (citation omitted).

67. See *id.* at 713 (noting that secular courts can review neither substance nor procedure of church decisions); *Kaufmann v. Sleenan*, 707 F.2d 355, 358 (8th Cir. 1983) (holding that claims that church violated self-imposed due process rules were for church to decide).

68. Plaintiff’s Complaint, *supra* note 5, ¶ 12.

derstandings of academic freedom. Neither argument is constitutionally acceptable.

The religious university does not have to grant academic freedom at all, and if it does, it is not required to grant academic freedom as it is understood in the secular "academic profession and community." Even if no constitutional right were at stake, an honest inquiry into the meaning of this contract would ask whether the Catholic theological community has a different understanding of academic tenure. As a matter of contract law, the question is what the parties meant by "academic tenure," not what Harvard, Texas, or the AAUP would have meant.

An inquiry into the understanding of tenure in the Catholic theological community would surely lead to the conclusion that tenure includes at least the limitations suggested in Curran's essay—that internal university authorities can police fidelity to the faith and that faculty members cannot deviate from fundamental Church teachings.⁶⁹ But these limitations would change the nature of the contract and convert a simple contract question into a religious question. Courts cannot decide which competing religious faction departed from doctrine.⁷⁰ If a departure from doctrine is a ground for discharge under a tenure contract, secular courts cannot enforce the contract when a church colorably alleges that a faculty member has departed from fundamental Church teaching.

An inquiry into the understanding of tenure in the Catholic theological community might lead to an even broader limit on academic freedom than Curran concedes. Perhaps the parties understood that the Church hierarchy—and not just the university—would retain power to police compliance with fundamental Church teaching. Certainly that would be the hierarchy's understanding. The hierarchy always has claimed and exercised that power, and surely did not understand the grant of tenure to end its power.

The understanding of tenure by the faculty, or even by the university administration, might be different. The administration of Catholic University apparently would not have taken action against Curran if the hierarchy had not forced the issue. But that simply highlights the important agency issues in this dispute. The university administration shares Curran's interest in independence from the hierarchy, and his formulation of academic freedom as freedom from all constraints external to the university neatly separates the Church university from the Church. Whether the university has such independence from the hierarchy, espe-

69. See Curran, *supra* note 1, at 1453-54.

70. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449-50 (1969).

cially with respect to the teaching of theology, is itself a religious question. The secular courts should not resolve it as a matter of contract unless a contract between the university and the hierarchy clearly provides the answer. A contract between Curran and the university cannot bind the hierarchy unless the university had authority to bind the hierarchy. With respect to an outsider who did not understand the Church, the university might have apparent authority even though it lacked actual authority. But it is not plausible for an ordained theologian to claim that he did not understand the hierarchy's power.

The allocation of authority between university administrations and church administrations is not uniform. The Archbishop of Washington is also the Chancellor of Catholic University; that relationship maximizes his control over the university. Catholic universities with lay boards of trustees presumably have greater independence from the hierarchy, and their independence may sometimes be embodied in charters or contracts designed for secular enforcement. A lay board of trustees may be the only viable option for universities created by nonhierarchical churches.

Such variations in church organization are irrelevant to the government's constitutional power to regulate church universities.⁷¹ But they may be relevant to the university administration's power to contract away religious control over the faculty. If university trustees have made secular contracts promising academic freedom even to theologians, and if the sponsoring church has given those trustees authority to make such contracts, then such contracts should be enforceable. But any distinction turns on the contract and the authority of the officials who make the contract. The choice to vest control in a lay board of trustees does not make the church university secular and subject to regulation or to a more hostile interpretation of its contracts.

B. The Contract as Constitutional Waiver

Curran's contract claim is not merely a matter of contract interpretation. It also is a matter of constitutional waiver. The first amendment protects the Church's right to control its theologians; Curran's complaint alleges that the Church waived that right by granting its theologians academic tenure.

A deliberate waiver of constitutional rights is enforceable.⁷² But a general or ambiguous statement that fails to mention the constitutional

71. See *NLRB v. Bishop Ford Cent. Catholic High School*, 623 F.2d 818, 821-23 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); Laycock, *supra* note 21, at 1412-14.

72. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (holding that warrantless search does not violate fourth or fourteenth amendment if person has consented to search).

right is quite different. Courts will not imply waivers of constitutional rights. In the civil context as well as in the criminal,⁷³ waivers of constitutional rights must be intentional and intelligent,⁷⁴ knowing,⁷⁵ express,⁷⁶ and unambiguous.⁷⁷ A religious university's contract with its faculty should not be construed to waive the right to religious discipline unless the waiver meets these standards. Recent wrongful discharge cases against religious employers have properly focused on the religious nature of the dispute and have not been distracted by apparent violations of handbook procedures and other breaches of contract.⁷⁸

A bare grant of academic tenure is not enough to waive first amendment rights. A grant of academic tenure in Catholic University's chemistry department may imply academic freedom on scientific disputes that raise no theological issue, but it probably does not imply academic freedom to develop a nonprescription abortifacient in the university's laboratories. It certainly does not imply that theologians have academic freedom to retain their post and dissent from the Church's teachings.

In this context, to imply so much from the two words "academic tenure" is dubious even as a matter of contract interpretation. As a matter of constitutional waiver, it is preposterous. One can imply a waiver of first amendment rights out of so little only if one is hostile to the underlying right.

Even a general policy statement promising academic freedom should not waive the hierarchy's control over theological disputes unless it specifically says so. For example, many religious universities have

73. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (predeprivation hearing); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 142-45 (1967) (freedom of speech); *Moser v. United States*, 341 U.S. 41, 47 (1951) (citizenship); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (civil jury trial); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292, 307 (1937) (evidentiary support for determination of constitutional issue).

74. *Fuentes*, 407 U.S. at 94-95 (voluntary and intelligent); *Moser*, 341 U.S. at 47 (intentional and intelligent); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (same).

75. *Fuentes*, 407 U.S. at 95; *Curtis Publishing*, 388 U.S. at 142-45; *Moser*, 341 U.S. at 47; *Johnson*, 304 U.S. at 464. Except for certain rights of criminal procedure, "knowing" apparently does not require that the person waiving a constitutional right know the law that creates the right. See *Schneekloth*, 412 U.S. at 235-48.

76. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

77. *Id.*; *Fuentes*, 407 U.S. at 95 (holding that predeprivation hearing was not waived by contract providing that creditor could "repossess" the collateral); *Aetna Ins.*, 301 U.S. at 393; *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1263-64 (5th Cir. 1983); *Bowens v. North Carolina Dep't of Human Resources*, 710 F.2d 1015, 1018-19 (4th Cir. 1983); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 584 (W.D. Pa. 1987).

78. *Kaufmann v. Sheehan*, 707 F.2d 355, 355-56 (8th Cir. 1983); *O'Connor Hosp. v. Superior Court*, 240 Cal. Rptr. 766, 773 (1987) (denied review and ordered not published, Dec. 23, 1987); cf. *Miller v. Catholic Diocese*, 728 P.2d 794, 797 (Mont. 1986) (dissenting opinions rely principally on alleged violations of due process). But see *Reardon v. Lemoyne*, 122 N.H. 1042, 1048-49, 454 A.2d 428, 432-33 (1982) (holding that secular court can hear claim that parochial school teachers had contractual right to procedural protections).

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adopted the 1940 Statement on Academic Freedom and Tenure (1940 Statement).⁷⁹ They may do so because they are generally committed to academic freedom, intend to honor it, and wish to declare their intention. It does not follow that they have knowingly waived their church's power to control the religious doctrine taught in its name and to resolve internal doctrinal disputes, or that they had the authority to do so. It is unreasonable to believe that they thought of all the unusual or extreme situations that might arise or that they really intended to relinquish their first amendment rights in all possible situations. It would be better if they thought of all the possible exceptions to academic freedom and disclosed them in writing, as the 1940 Statement contemplates.⁸⁰ But their failure to do so is not a waiver unless parties can waive constitutional rights through inadvertence or by agents bent on expanding their own autonomy. In light of the historical hierarchical allocation of authority within the Church, courts should find a judicially enforceable right of academic freedom for Catholic theologians only from a commitment that specifically mentions academic freedom, theologians, and secular enforcement.

V. Will Catholic Universities Lose Their Government Aid?

Curran also asserts that if the Church restricts the academic freedom of theologians in its colleges and universities, the courts may rule that all government funding to those institutions is unconstitutional.⁸¹ We think he is wrong about this; the government cannot require forfeiture of constitutional rights in one department as a condition of financial aid to another. But even if we are wrong, the risk to funding has no effect on the legal status of Curran's demand for academic freedom. The Church could choose to discipline its theologians and forfeit its government funds, or to forfeit control over its theologians and retain its government funds. Only the Church can make that choice.

Under current law, government can aid higher education in secular subjects at religious universities if the university is not so "pervasively sectarian" that it is impossible to separate secular from religious functions without intrusive investigation.⁸² Courts have not sharply drawn

79. American Ass'n of Univ. Professors & Association of Am. Colleges, Statement of Principles on Academic Freedom and Tenure (1940), *reprinted in* ACADEMIC FREEDOM AND TENURE, *supra* note 17, at 33.

80. *Id.*

81. Curran, *supra* note 1, at 1449-50.

82. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 750-52 (1976) (plurality opinion); *Hunt v. McNair*, 413 U.S. 734, 743-45 (1973); *Tilton v. Richardson*, 403 U.S. 672, 680-82 (1971) (plurality opinion). In *Roemer* and *Tilton*, the concurring Justices making up the majority would have allowed aid to religious colleges on terms less restrictive than those proposed by the plurality. See *Roemer*,

the line between pervasively sectarian universities and all other universities. Academic freedom and the absence of religious indoctrination in secular subjects are important, perhaps essential factors, in the finding that a religious university is not pervasively sectarian.⁸³ But it is not necessary to exclude all religious influence from instruction even in secular subjects.⁸⁴ Most important, it is not necessary that theology courses be free of religious indoctrination.⁸⁵ The Supreme Court has reasoned that government aid would go only to secular courses and that only these courses need be free of religious indoctrination.⁸⁶

The same reasoning applies to academic freedom for a theology faculty. The government cannot aid a theology department in any event, and a church's treatment of its theology faculty is irrelevant to the constitutionality of government aid to other departments. To require a religious university to grant academic freedom to its theology professors as a condition of research grants in chemistry or scholarships in elementary education would penalize the religious university without advancing the government's interest. Such penalties on constitutional rights are unconstitutional under well-settled rules against unconstitutional conditions.⁸⁷ The free exercise cases describe such conditions as burdens on the constitutional right.⁸⁸ The recent Civil Rights Restoration Act⁸⁹ could not override this constitutional right, and it does not attempt to do so.⁹⁰

426 U.S. at 769-70 (White & Rehnquist, JJ., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 661-71 (White, J., dissenting in *Lemon* and concurring in *Tilton*).

83. *Roemer*, 426 U.S. at 755-58.

84. *See id.* at 755.

85. *Id.* at 756 n.20, 759 u.21.

86. *Id.*

87. The doctrine of unconstitutional conditions provides that government cannot condition a government benefit on surrender of an unrelated constitutional right. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968) (defining unconstitutional conditions doctrine); Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 978-95 (1986) (same).

88. *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046, 1049 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

89. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 28.

90. The Act defines "all the operations of . . . a college, university, or other postsecondary institution" as a single "program or activity" for purposes of certain statutes that forbid discrimination in any "program or activity" that receives federal financial assistance. *Id.* §§ 3-6, 1988 U.S. CODE CONG. & ADMIN. NEWS at 28-31. The effect is indeed to threaten federal funding in all departments because of discrimination in one. But none of the referenced statutes applies to Curran's dispute. The statutes forbid discrimination on the basis of race, sex, blindness, handicap, or age, but not on the basis of religion, theology, or exercise of academic freedom. *See* 20 U.S.C. § 1681(a) (1982); *id.* § 1684; 29 *id.* § 793; 42 *id.* § 2000d; *id.* § 6102.

Religious institutions are exempt from the ban on sex discrimination if compliance would not be consistent with their religious tenets. Pub. L. No. 100-259, § 3, 1988 U.S. CODE CONG. & ADMIN. NEWS at 28-29. Threatening secular research grants as a means of regulating age or handicap discrimination in a theology department would raise serious constitutional questions, but those questions are well beyond the scope of this Comment. Race discrimination can apparently be regulated

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Thus, the Church's restriction on academic freedom for its theologians should not result in a forfeiture of government funds.

VI. Conclusion

Civil libertarians tend to be secularists and individualists. Thus, the natural defenders of churches' constitutional rights tend to identify with Father Curran's claim to academic freedom and not with the institution's claim to religious autonomy. But only one of these claims has a constitutional basis. The Constitution protects believers and churches from the state. It does not and cannot protect believers from each other or from their churches.

There will always be disputes within churches, and those disputes always will have losers and winners. Outsiders often will sympathize with the losers. But religious liberty cannot survive if the losers succeed in their demand that secular authorities resolve religious disputes.

even within religious universities; the Supreme Court brushed aside a free exercise claim in *Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983). For an argument that the free exercise claim should have prevailed, see Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEXAS L. REV. 259 (1982).

