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Defining the Terms of Academic Freedom: A Reply to Professor Rabban*

Rebecca S. Eisenberg**

I suspect Professor Rabban is right in saying that we have more than a semantic dispute.¹ But it is difficult to identify our areas of substantive disagreement with any precision because of a major difference in the meanings that each of us ascribes to certain key words and phrases.

The essence of my argument is as follows: What I call "the traditional American conception of academic freedom" justifies professional autonomy for faculty members as a means of furthering certain academic values. But the mechanism of faculty autonomy fails to protect these traditional academic values in the contemporary context of externally sponsored university research.² In defining the terms of academic freedom and in articulating its underlying justification in this traditional conception, I rely primarily on two seminal policy statements of the American Association of University Professors (AAUP): the 1915 Declaration of Principles³ and the 1940 Statement of Principles on Academic Freedom and Tenure.⁴ These statements define academic freedom as the freedom of faculty members to research and publish, to teach, and to speak or write as citizens. Although the AAUP statements do not explicitly identify the restraints from which academic freedom protects faculty members, they focus primarily on restraints imposed by university trustees and administrators.⁵ The statements justify academic freedom as an expedient means of furthering the academic values of inquiry, dissemination, critical objectivity, and professionalism.⁶ To avoid confu-

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1. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEXAS L. REV. 1405, 1407 (1988).

2. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEXAS L. REV. 1363, 1372 (1988).

3. American Ass'n of Univ. Professors, Declaration of Principles (1915), reprinted in ACADEMIC FREEDOM AND TENURE app. A at 157-76 (L. Joughin ed. 1969) [hereinafter 1915 Declaration].

4. 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 3, at 33-39 [hereinafter 1940 Statement].

5. See 1940 Statement, *supra* note 4, at 34-36; 1915 Declaration, *supra* note 3, at 163-74.

6. See 1940 Statement, *supra* note 4, at 34; 1915 Declaration, *supra* note 3, at 158.

sion with other conceptions of academic freedom, I refer to this particular conception as "the traditional American conception of academic freedom."⁷ To distinguish the substantive terms of academic freedom from its underlying rationale, I sometimes refer to the former as the "definition" of academic freedom⁸ or "faculty autonomy"⁹ and to the latter as the "justification" for academic freedom¹⁰ or "academic values."¹¹

In this traditional conception of academic freedom, faculty autonomy furthers academic values by protecting faculty members from university administrators who might otherwise use their power as employers to make faculty members behave in accordance with the political and financial interests of the university's benefactors. I argue that when faculty members themselves need to find outside sponsors to fund their research, they stand to be co-opted directly by the political and financial interests of those sponsors, and faculty autonomy is therefore an inadequate mechanism for protecting academic values in this context. In other words, the traditional "definition" of academic freedom is no longer in harmony with its traditional "justification" in contemporary sponsored research.

Professor Rabban asserts that I have confused "an adulterated version of academic freedom with the traditional conception," and that I therefore perceive a "conflict between academic freedom and academic values that does not actually exist."¹² This assessment seems to be based at least in part on a misunderstanding of my use of the terms set forth above. For example, Professor Rabban sometimes asserts that I have characterized the traditional American conception of academic freedom as supporting unfettered professional autonomy for faculty members,¹³ although elsewhere he contradicts himself on this point.¹⁴ Lest other readers come away with the same misunderstanding of my argument, let me repeat: When I refer to the "definition" of academic freedom in the traditional conception, I refer only to the substantive terms of academic

7. Eisenberg, *supra* note 2, at 1363-64, 1371, 1373, 1381, 1383-84, 1390, 1404.

8. *Id.* at 1365, 1367-68, 1373-74.

9. *Id.* at 1371-72, 1389, 1391, 1404.

10. *Id.* at 1365, 1370, 1372-73, 1384, 1404.

11. *Id.* at 1363-64, 1367, 1371-72, 1374-76, 1380-84, 1388, 1391-93, 1396-97, 1401, 1403-04.

12. Rabban, *supra* note 1, at 1406, 1407.

13. Professor Rabban states that "[a]ccording to Eisenberg, academic freedom, particularly as defined in many of the AAUP's influential documents, consists simply of the right of individual faculty members to be left alone in performing their research and teaching." *Id.* at 1406. He also states that "[c]ontrary to Professor Eisenberg's repeated assertions, [the traditional conception of academic freedom] has never reduced academic freedom to an unfettered individual right to teach and research." *Id.* at 1407.

14. For example, Professor Rabban states that "[a]s Professor Eisenberg recognizes, the AAUP's seminal 1915 Declaration of Principles on academic freedom does not endorse unqualified autonomy for individual faculty members." *Id.* at 1409.

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freedom in that conception—the freedom of faculty members to research, publish, and teach without restraints imposed by university administrations. I do not refer to the underlying academic values that academic freedom is supposed to further, nor to other competing values that might (or might not) override the values served by academic freedom, nor to norms of professional competence that continue to govern faculty members notwithstanding their freedom from restraints imposed by lay university administrators, nor to the peer review mechanisms by which these professional norms are enforced. In excluding these values, norms, and mechanisms from the definition of academic freedom, I do not mean to deny their existence or to minimize their importance. They simply are not what I mean by “academic freedom.”

My usage is consistent with most of the scholarly literature on academic freedom. Most definitions of academic freedom, including those cited in my article and in Professor Rabban’s essay,¹⁵ express what Gerald MacCallum has called a “triadic relation” involving an agent or agents, a preventing condition or conditions, and a range of actions.¹⁶ In these definitions, academic freedom is the freedom of certain agents (professors, students, and universities) to engage in certain activities (research and writing, teaching, and extramural utterances) without restraint from certain authorities (universities, governments, and religious entities).

Professor Rabban offers a similar triadic definition of academic freedom: “Classic discussions of academic freedom stress the freedom of the professor to investigate, teach, and publish, subject only to scholarly standards and professional ethics. Other restrictions on the choice of research or on the expression of scholarly views, whatever their source, violate academic freedom.”¹⁷ In this definition the relevant agent is the professor, the relevant preventing conditions are restrictions other than scholarly standards and professional ethics, and the relevant range of actions is investigation, teaching, and publication. But Professor Rabban’s

15. See sources cited in Eisenberg, *supra* note 2, at 1365 nn.5-7; sources cited in Rabban, *supra* note 1, at 1408 n.11.

16. MacCallum, *Negative and Positive Freedom*, 76 PHIL. REV. 312, 314 (1967). MacCallum’s triadic approach clarifies confusion arising from earlier discussions of freedom that attempted to distinguish between “positive freedom,” or “freedom to,” and “negative freedom,” or “freedom from.” See, e.g., I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-41 (1969); Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1306-07 (1955). MacCallum demonstrates that all intelligible statements about freedom must at least implicitly refer to an agent, a preventing condition, and a range of actions or goals, and that all such statements about freedom thus have both positive and negative aspects. For a thoughtful discussion of the literature on positive and negative freedom, see Westen, “Freedom” and “Coercion”—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 550-54.

17. Rabban, *supra* note 1, at 1408.

actual use of the term "academic freedom" in the body of his essay is much broader than this opening definition would suggest, embracing not only faculty autonomy, but also other mechanisms for furthering academic values and norms such as peer review, and even the underlying values and norms themselves.

Although Professor Rabban commends me for distinguishing between "academic freedom and academic values, terms that too often are vaguely defined and improperly conflated,"¹⁸ he himself conflates these terms throughout his essay. He states that "academic freedom includes adherence to professional norms"¹⁹ and that "[t]he traditional definition of academic freedom . . . includes a variety of norms designed as pragmatic means of implementing the search for knowledge."²⁰ In Professor Rabban's usage, "academic freedom" itself enjoins faculty members to observe these professional norms: "Professors violate the norms of academic freedom when they falsify or plagiarize material, indoctrinate students, follow blindly the dictates of political or religious authority, or allow grants from government or industry to distort their research and conclusions."²¹ In other words, professors may claim the protection of "academic freedom" only when they follow professional norms; conversely, they violate "academic freedom" when they depart from these norms.

According to Professor Rabban, it is the function of peer review to detect such "violations" of academic freedom. He states that: "[b]eginning with the 1915 Declaration, commentators have identified peer review as the primary method of determining whether individual professors have violated, or have engaged in activities unprotected by, academic freedom."²² This statement suggests a conception of peer review not as a separate constraint on faculty autonomy from which "academic freedom" offers no protection, but as an enforcement mechanism for uncovering violations of "academic freedom" by faculty members themselves.

I find this usage confusing and misleading. The purpose of peer review is to assess the merit of academic work by professional standards, not to spot violations of academic freedom. Faculty members whose

18. *Id.* at 1407.

19. *Id.* at 1406.

20. *Id.* at 1407. Professor Rabban sometimes uses the term "academic freedom" to refer to the underlying interests that justify faculty autonomy rather than to faculty autonomy itself. Thus he refers to "the potential for faculty abuse of the autonomy justified by academic freedom." *Id.* at 1416.

21. *Id.* at 1410.

22. *Id.*

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work is found incompetent through peer review may be subject to sanctions, but it does not follow that even incompetent academic work either violates or is “unprotected by” academic freedom. To extend the label “academic freedom” to the obligation of faculty members to comply with professional norms is to lose the special sense of academic freedom as a limited liberty from nonprofessional restraints on academic work.

Professor Rabban also extends the term “academic freedom” to the interest of peer review bodies in judging the merit of academic work:

The commentators²³ thus seem implicitly to conceive of two related types of academic freedom: the freedom of the individual professor to pursue teaching and research, and the freedom of faculty peers to judge whether individual professors have fulfilled their professional responsibilities. These two types of academic freedom are in tension and, occasionally, in conflict.²⁴

Again, the use of a single term to refer to these two separate interests is unnecessary and confusing. I do not dispute that peer review is an important, time-honored constraint on faculty autonomy that furthers some of the same academic values identified in the traditional justification for academic freedom. Indeed, as I note in my article, the authors of the 1915 Declaration hoped that peer review would forestall lay regulation of academic work and thereby further the value of academic professionalism.²⁵ But the interest of faculty committees in performing this function does not fall within what I call the traditional “definition” of academic freedom. Academic freedom in this traditional definition neither conflicts with peer review nor protects it. Peer review is another mechanism that operates in tandem with faculty autonomy to further academic values.

In Professor Rabban’s usage, “academic freedom” prohibits faculty members from using their professional autonomy in ways that conflict with the underlying academic values that academic freedom is supposed to further. Whenever faculty members undermine these academic values, they “violate the norms of academic freedom” and are therefore beyond the scope of its protection. In this definition “academic freedom” corresponds perfectly with the academic values it embraces; to state that “academic freedom” conflicts with these academic values would there-

23. Here Professor Rabban evidently refers to the authors of AAUP policy statements and to Arthur Lovejoy and William Van Alstyne writing in their individual capacities. Professor Rabban does not claim that these commentators explicitly attach the label of academic freedom to the interest of faculty peers in performing peer review.

24. Rabban, *supra* note 1, at 1412.

25. Eisenberg, *supra* note 2, at 1366-67 & n.12.

fore involve an inherent contradiction in terms.²⁶

Of course, attaching the label "academic freedom" to professional norms and academic values tells us nothing about how we can enforce these norms and advance these values. The primary mechanism put forth in the traditional American conception of academic freedom is faculty autonomy. I have argued that this mechanism is ill-suited to the task of protecting academic values in sponsored research. Professor Rabban evidently agrees with me—at least to a point.²⁷

Another mechanism for protecting academic values which Professor Rabban highlights (although he loosely subsumes this mechanism under his broad conception of academic freedom) is peer review. Can peer review be expected to make up for the deficiencies of faculty autonomy as a mechanism for protecting academic values in sponsored research? I have not addressed this question in my article, and a thorough answer is beyond the scope of this reply. Nonetheless, there are several reasons why I think that peer review is an inadequate mechanism to solve the problems that I have identified.

First, peer review committees may not be competent to detect or counteract influences from outside the academy that are distorting how faculty members exercise their autonomy. The traditional function of peer review committees has been simply to assess the professional merit of academic work, not to inspect it for evidence of external influence. Distortions in favor of the interests of sponsors may be subtle and considerably more difficult to spot than professional incompetence or misconduct. Assuming the research has some academic merit and is competently formulated, a peer review committee might be helpless to detect and expose the influence of the sponsor's nonacademic interests on the faculty member's academic interests.²⁸

Second, members of peer review committees may themselves be co-opted directly or indirectly by the interests of research sponsors. Peer review committees are generally composed of colleagues in the same or

26. There might still be room for disagreement about the content of the academic norms and values embraced by the term "academic freedom."

27. Professor Rabban balks at limiting faculty autonomy by requiring prior approval of sponsored research proposals. See *infra* note 30 and accompanying text.

28. The traditional conception of academic freedom assumes that faculty members will generate new knowledge most effectively if they can freely pursue the lines of inquiry that most interest them, and that faculty members will do just that in the absence of university-imposed restraints on free inquiry. But faculty members who rely on outside sponsors to fund their research have a financial incentive to conform their research projects to meet the needs of their sponsors. Yet since no one other than the faculty member doing the research can say whether the selected research problem is more or less interesting to her than some other, unidentified problem for which funding is unavailable, peer review cannot reliably detect distortions in a faculty member's choice of research.

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similar fields who also depend on research sponsors for financial support. Even if the particular project has no financial impact on the individual peer reviewers or their institutions,²⁹ their assessment of the academic merit of sponsored research projects will inevitably be influenced by their own research agendas, which in all likelihood have been conditioned by their awareness of the kinds of research questions for which funding is available. Peer reviewers are unlikely to adopt standards of academic merit for their colleagues' sponsored research projects that their own sponsored research projects would not satisfy.

Third, peer review tends to be strictly reactive, serving only to approve or disapprove the outcome of individual faculty members' decisions about what research they will do, how they will do it, and how they will write it up. Peer review committees might tell faculty members that the work they have done or propose to do is unacceptable, but it is not their function to tell them what research projects they should have done or should do instead. These affirmative decisions necessarily rest in the first instance with faculty members themselves. Peer review can never replace the undistorted judgment of unbiased faculty members in conceiving and performing research projects. At best, peer review might allow after-the-fact detection of particularly blatant distortions in favor of sponsors' interests, and the prospect of such detection could have a beneficial deterrent effect in some cases.³⁰

29. Peer reviewers in the same institution might view the research funding as important to the financial interests of their department or university and thus have an indirect financial stake in approving the research project.

30. Subjecting sponsored research proposals to peer review before they are approved might be more effective. A subcommittee of the AAUP's Committee A suggested advance approval of research proposals by faculty committees as a mechanism for assuring the academic merit of corporate-sponsored research. American Ass'n of Univ. Professors, *Academic Freedom and Tenure: Corporate Funding of Academic Research*, ACADEME, Nov.-Dec. 1983, at 18a, 23a. Provisions for prior review of sponsored research proposals for academic merit also appear in a significant minority of the university research policies I studied. See Eisenberg, *supra* note 2, at 1402 n.107. But even if peer review occurs before the research is performed, peer reviewers could still do nothing more than react to a research project selected by a faculty member whose decision, in all likelihood, has already been influenced by the interests of the research sponsor. Such a reactive mechanism can at best only partially compensate for distortion in the antecedent judgments of the faculty members actually doing or proposing to do the research.

Professor Rabban opposes requiring prior approval of the scholarly value of sponsored research proposals on the ground that it unduly restricts faculty autonomy, asserting that such a requirement "should strike virtually everyone as a violation of academic freedom." Rabban, *supra* note 1, at 1419. This conclusion appears to be based on a conception of "academic freedom" that conflicts with academic values. Certainly, requiring prior approval of the subject matter of a proposed research project may interfere with a faculty member's autonomy in selecting research topics. This interference may be justified, however, if faculty autonomy is not a matter of intrinsic individual rights but rather an instrumental means of furthering traditional academic values. Prior approval mechanisms for sponsored research may help protect academic values when financial interests might otherwise lead faculty members to orient their research projects to meet sponsors' needs. If faculty members cannot be trusted to exercise their autonomy in ways that further academic values, univer-

In sum, even if one defines "the traditional conception of academic freedom" to include peer review, the academic community still needs to find additional mechanisms for protecting academic values in sponsored research. If one uses the term "academic freedom" loosely, however, it may not be necessary to attach new labels to these mechanisms. Instead, one could simply incorporate other mechanisms for furthering academic values, along with peer review, into our ever-evolving conception of academic freedom.

It is tempting to stretch the label of academic freedom to encompass other mechanisms for furthering academic values because of the high status and respect that the label commands in our society. But there are also dangers in this approach. Professor Van Alstyne has eloquently stated one such danger in arguing against the inclusion of faculty members' general civil liberties under the heading of academic freedom:

Gresham's law, that "bad money tends to drive out good money," applies equally to catchwords as it does to currency. Bad usages tend to drive out good usages, and by much the same sort of process. The process begins in the ordinary human impulse to seize upon certain significant phrases in an altered context, trading upon those phrases to improve an argument that might otherwise fail to impress those to whom it is directed. The process comes to its end when the constant overuse of such phrases becomes so very apparent that we are made to feel apologetic for having to use them at all—even when we believe them to be crucial in what we mean to convey. In short, the process begins with the inflation of rhetoric, and it ends with the debasement of meaning.³¹

Thus the label "academic freedom" may lose its force if it is used to mean too many different things.

A related hazard is that extending old labels to new ideas makes it more difficult to recognize the limitations of old ideas. This difficulty arises in part because ambiguity in the meaning of key terms interferes with clear thinking. It is difficult to analyze the effectiveness of "academic freedom" as a means of furthering academic values if it is not clear what "academic freedom" means. The difficulty is compounded by the fact that challenges to "academic freedom" inevitably provoke defensive reactions among faculty. If instead of calling into question the continuing effectiveness of "academic freedom" as a means of protecting aca-

sities need to find other mechanisms for protecting these values. While I have some doubts about the adequacy of peer review as a solution to the problem, I do not think that prior peer review of sponsored research proposals should be excluded from consideration on the ground that it violates academic freedom.

31. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in *THE CONCEPT OF ACADEMIC FREEDOM* 59, 59-60 (E. Pincoffs ed. 1972).

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demic values we simply revise the meaning of “academic freedom” to meet new problems without changing our terminology, some people might still understand “academic freedom” to mean “faculty autonomy.” Consequently, we create a risk that old principles will be applied thoughtlessly and inappropriately in new contexts.