LAW AND POLICY 1996: RELIGION ON CAMPUS

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17th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1996
LAW AND POLICY 1996:
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1996 National Conference on Law and Higher Education

The Discussion Format

This presentation will be in a discussion format, comparable to interviews with Professor Kaplin conducted by Gary Pavela for Synthesis: Law and Policy in Higher Education.

The presentation is not rehearsed. It is designed to be an informal, wide-ranging, conversational, overview of key law and policy issues pertinent to the evolving law of religious freedom on campus.

Audience participation is encouraged. Gary Pavela will stop at various points in the discussion to solicit relevant questions and comments from the audience. Please direct your questions or comments to the issue being addressed at the time.

Both Professor Kaplin and Gary Pavela will be available immediately after the presentation for individual questions.

Religious Freedom on Campus: Policy Perspectives

1. A survey published in the November 1994 issue of American Demographics reveals that 53 percent of teenagers "say their religion or faith is one of the most important parts of their lives" ("Generations", p. 10). Likewise, the United States and much of the world may be in the midst of a religious revival (see the November 28, 1994 issue of Newsweek, "In Search of the Sacred," p. 54: 58% of Americans "say they feel the need to experience spiritual growth"; 20% report having "had a revelation from God in the last year"). An important new book on this subject is Harvey Cox's Fire from Heaven (1995). Professor Cox reports that America is experiencing "another great awakening," especially in the growth of Pentecostalism—an "experiential" branch of Christianity, growing faster than
any other religion on Earth, that has already attracted 410 million adherents worldwide.


   Now -- here is my secret: I tell it to you with an openness of heart that I doubt I will ever achieve again, so I pray that you are in a quiet room as you hear these words. My secret is that I need God -- that I am sick and can no longer make it alone. I need God to help me give, because I no longer seem to be capable of giving; to help me be kind, as I no longer seem capable of kindness; to help me love, as I seem beyond being able to love (p. 359).

3. See the January 11, 1995 *Campus Report* at Stanford University ("Forums focus on values" . . . p. 10). At the request of a group of Stanford graduate students, who "wanted to hear what was going on in the hearts and souls of the faculty," a distinguished group of faculty members and administrators agreed to speak and respond to questions on the topic, "What Matters to Me and Why."

4. College administrators contending with "cults" and controversial issues of religious expression sometimes overlook the potential benefits of increased interest in and commitment to religious perspectives.

   a. See the Independent Sector report "America's Teenagers as Volunteers" (1994). Research on the volunteering patterns and experiences of teenagers, aged 12-17, revealed that 61 percent of these teenagers were involved in volunteer activities, averaging 3.2 hours a week in 1991. One-fourth of the volunteers gave five or more hours a week. Religious affiliation and sentiment were important factors contributing to the high rate of teen volunteer activities. The report concluded that: "The active teen volunteer is more likely to belong to a church or synagogue and volunteer there...[T]he data show that over 40 percent of church-related activities reach out to the larger community and to non-members in many ways distinct from the sacramental or educational activities of the church or synagogue."

their annual meeting here today to "repent of racism of which we have been guilty" and to apologize to and ask forgiveness from "all African-Americans."

5. In the broadest sense, religious values and perspectives are an inherent part of the educational process. See Ernest L. Boyer, "Lifelong Learning in the Arts," April 16, 1994 speech delivered before the National Endowment for the Arts in Chicago, Illinois:

Einstein wrote that all religions, all arts, and all sciences are branches of the same tree. But where are students invited to discover connections such as these? . . .

The full range of human experiences—physical, emotional, and spiritual—cannot be captured in words alone. For the most intimate, most profoundly moving experiences, we need more subtle symbols. And so it is that men and women have, throughout history, turned to music, dance, and the visual arts.

Religious Freedom on Campus: Legal Issues

1. The distinction between public and private institutions:

The First Amendment contains two "religion" clauses. The first prohibits government from "establishing" religion; the second protects individuals' "free exercise" of religion from governmental interference. . . .

A private institution's position under the Establishment and Free Exercise Clauses differs markedly from that of a public institution. Private institutions have no obligation of neutrality under these clauses. Moreover, these clauses affirmatively protect the religious beliefs and practices of private institutions from government interference.


2. Access to the facilities of public institutions: In Widmar v. Vincent, 454 U.S. 263 (1981), the U.S. Supreme Court held that a University of Missouri at Kansas City decision to bar a student
religious group from using university facilities "for purposes of religious worship or religious teaching" was an unjustifiable infringement upon the group's First Amendment rights of freedom of speech and freedom of association. The Court wrote that:

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.


College administrators familiar with the Widmar case sometimes forget that First Amendment protections are applied to religious worship, as well as religious discussions or Bible readings. That issue was addressed in the Widmar opinion:

Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment.

3. Access to subsidies and services: The U.S. Supreme Court held in Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995), that the University of Virginia could not exclude a student publication from access to indirect, student-fee generated subsidies, based solely on the publication's religious perspective. According to the majority:

There is no difference . . . of constitutional significance . . . between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf. The latter occurs here. The University provides printing services to a broad spectrum of student newspapers qualified as CIOs by reason of their officers and membership. Any benefit to religion
is incidental to the government’s provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life. By paying outside printers, the University in fact attains a further degree of separation from the student publication, for it avoids the duties of supervision, escapes the costs of upkeep, repair, and replacement attributable to student use.

To obey the Establishment Clause, it was not necessary for the University to deny eligibility to student publications because of their viewpoint.

Justice O’Connor, one of the five justices in the majority, wrote a concurring opinion that confined the case to its facts— noting that the final outcome depended "on the hard task of judging--sifting through the details..." The University of Virginia’s approach of treating student organizations as "Contracted Independent Organizations" impressed her, along with the fact that university-managed funds are paid "directly to the third-party vendor and do not pass through the organization's coffers." This safeguard, she argued, "ensures that the funds are used only to further the University’s purpose in maintaining a free and robust marketplace of ideas..." It also "makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities) ... and unlike a block grant to religious organizations."

Given Justice O’Connor’s concurring opinion, and the Court’s 5-4 vote, the Rosenberger case should be read narrowly, confined to circumstances where: (a) funds belonging to or managed by the state are paid directly to vendors (not student groups); (b) religious publications rather than religious groups are subsidized; and (c) the specific purpose of the subsidy is to foster a marketplace of ideas on campus.

Note: in language that should be of concern to administrators at public colleges across the country, Justice O’Connor also wrote:

[A]lthough the question is not presented here, I [also] note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees... [T]he existence of such an opt-out possibility not available to citizens generally... provides a potential basis for distinguishing proceeds
of the student fees in this case from proceeds of the general assessments in support of religion.

This is an invitation to challenge mandatory student activity fees at public universities.

Consider also this critical comment from the winning side in *Rosenberger*:

As a lawyer for the winning side in the *Rosenberger* case, it would be churlish of me to criticize the Supreme Court for its decision. But the case should not have been so hard... The majority opinion is... disappointing. It disregards old separationist precedents, but it does not overrule them. It does not explain why the precedents on which the dissent relies are hostile to religion and antithetical to the liberal purposes of the First Amendment... It provides no affirmative vision of the place of religious speech under the First Amendment, and it is written with little conviction.


4. **Invocations and benedictions:** The courts are divided, but some jurisdictions have held that brief, nonsectarian invocations and benedictions may be permitted at public colleges. On May 4, 1995 a federal district judge in Indianapolis rejected a request from a graduating law student and a law professor at the Indiana University School of Law to block an invocation and benediction at the University’s graduation ceremony. *Tanford v. Brand*, 883 F. Supp. 1231 (S.D. Ind. 1995):

Plaintiffs must provide more than a simple allegation that a nonadherent feels awkwardness during a religious exercise. There needs to be an additional showing that the state’s involvement in the religious exercise is likely to induce an observer’s reluctant participation, or to make dissent an unlikely alternative, or to influence the development of an unformed religious identity, or all of the above. Given the advanced mental and social abilities of these plaintiffs, however, as explained above, there is no such risk here.

5. **Religious expression in the classroom:** Are there any limits to student or faculty religious expression in the classroom? Regarding students, see the May 8, 1995 decision by the United States Court of Appeals for the Sixth Circuit in *Settle v.*
Ms. Ramsey [the teacher] assigned a research paper to her ninth-grade class at Dickson County Junior High School. In assigning the paper, the teacher stressed to the students that she wanted them to learn how to research a topic, synthesize the information they gathered, and write a paper using that information. . . [S]tudents could not merely expound on their own ideas. . .

So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors -- race, religion, gender, political ideology -- but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions -- in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject . . .

The court in Settle did suggest, however, that Ms. Ramsey was on weak ground when she concluded that the law somehow prevented her from allowing a student to make a presentation about a religious topic. Circuit Judge Alice Batchelder, who concurred in the result, observed that:

Ms. Ramsey was dead wrong in her view that [the student's] paper topic was impermissible because a paper of a religious nature is impermissible in the public schools. Had the assignment been to write a paper of opinion, and had Ms. Ramsey rejected the paper on the ground of its religious content alone, Brittney's freedom of speech truly would have
been violated.

Regarding faculty speech, see Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), a leading higher education case. An exercise physiology professor "occasionally referred to his religious beliefs during instructional time" and also organized an optional after-class meeting to discuss "Evidences of God in Human Physiology." The university required the professor to discontinue both practices. In upholding the university's authority to do so, the court concluded:

In short, Dr. Bishop and the University disagree about a matter of content in the course he teaches. The University must have the final say in such a dispute. Though Dr. Bishop's sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments. By its memo to Dr. Bishop, the University seeks to prevent him from presenting his religious viewpoint during instructional time, even to the extent that it represents his professional opinion about his subject matter. We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings [926 F.2d at 1076-77].

(For further discussion of this case, see Kaplin & Lee, The Law of Higher Education (3rd ed. 1995), pp. 309-311.)

For another recent example, see Bauchman v. West High School, 1995 WL 694563, 64 USLW 2189 (D.C. Utah 1995) (choral class utilizing Christian music does not violate First Amendment or Religious Freedom Restoration Act, so long as objecting students may opt out of particular activities).

6. Free exercise of religion: The federal "Religious Freedom Restoration Act" provides:

(a) IN GENERAL—Government shall not burden a person's exercise of religion even if the burden results from a law of general applicability, except as provided in subsection (b).
(b) EXCEPTION—Government may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) furthers a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

The Act, which restores a strict scrutiny standard of review to free-exercise-of-religion cases, "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise." Plaintiffs may enforce the Act by a private cause of action and obtain attorney fees if they prevail.

At public institutions of higher education, virtually any campus regulation—including drug and alcohol policies—might be challenged on "religious" grounds. But not every ethical or philosophical belief will be considered "religious" by the courts. In Wisconsin v. Yoder, 406 U.S. 205 (state of Wisconsin could not require Amish children to attend public school after the eighth grade), for instance, the Amish challengers prevailed only after showing that their beliefs:

[] are shared by an organized group;
[] relate to religious principles and an interpretation of religious literature;
[] regulate their daily lives; and
[] support a lifestyle that had been in existence for a substantial period of time.


Practical Guidelines

A consensus on religion in the schools is emerging. The statements evidencing this consensus are a source of practical guidance for administrators faced with campus issues. Most of this guidance is also applicable to public colleges. See the December 18, 1995 issue of Synfax Weekly Report:

On December 7, 1995 the National PTA and the Free Forum First Amendment Center at Vanderbilt University issued a twelve page "Parent's Guide to Religion in the Public Schools." This is a PTA-distributed version of a document titled "Religion In The Public Schools: A Joint Statement of Current Law" (Joint Statement) drafted earlier in the year by a dozen religious and civil liberties organizations, chaired by the American Jewish Congress.

The Joint Statement is a voice of reason and clarity in the midst of an intense national debate about the role of religion in the public schools. Drafting or endorsing organizations include the American Civil Liberties Union, the American Jewish Committee, the Baptist Joint Committee, the National Association of Evangelicals, the Union of American Hebrew Congregations, the American Muslim Council, and the Unitarian Universalist Association. The fact that a diverse group of religious and secular organizations could agree on a statement of current law concerning issues such as student prayer, teaching about religion, and distribution of religious literature is a sign that moderates on all sides remain committed to a spirit of cooperation.

The Joint Statement (in the form of the "Parent's Guide") will be distributed to 30,000 PTA presidents, and constitutes the basis for related guidelines issued by the Department of Education. A substantial impact on colleges can be expected, as students and parents become familiar with the consensus that has emerged. Excerpts from the Joint Statement follow, reprinted by permission from the American Jewish Congress:
Initial statement

The Constitution permits much private religious activity in and about public schools. Unfortunately, this aspect of constitutional law is not as well known as it should be. Some say that the Supreme Court has declared public schools "religion-free zones" or that the law is so murky that school officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been settled. . .

Student Prayer

Students have the right to pray individually or in groups or to discuss their religious views with their peers so long as they are not disruptive. . . . However, the right to engage in voluntary prayer does not include, for example, the right to have a captive audience listen or to compel other students to participate.

Graduation Prayer and Baccalaureates

School officials may not mandate or organize prayer at graduation, nor may they organize a religious baccalaureate ceremony. If the school generally rents out its facilities to private groups, it must rent them out on the same terms, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services, provided that the school does not extend preferential treatment to the baccalaureate ceremony and the school disclaims official endorsement of the program. . .

The courts have reached conflicting conclusions under the federal Constitution on student-initiated prayer at graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area . . .

Teaching About Religion

Students may be taught about religion, but public
schools may not teach religion. As the U.S. Supreme Court has repeatedly said, "[i]t might well be said that one's education is not complete without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization. . ." Public schools may not teach as scientific fact or theory any religious doctrine, including "creationism," although any genuinely scientific evidence for or against any explanation of life may be taught. Just as they may neither advance nor inhibit any religious doctrine, teachers should not ridicule, for example, a student's religious explanation for life on earth.

Student Assignments and Religion

Students may express their religious beliefs in the form of reports, homework and artwork, and such expressions are constitutionally protected. Teachers may not reject or correct such submissions simply because they include a religious symbol or address religious themes. Likewise, teachers may not require students to modify, include, or excise religious views in their assignments, if germane. These assignments should be judged by ordinary academic standards of substance, relevance, appearance and grammar . . .

Religious or anti-religious remarks made in the ordinary course of classroom discussion or student presentations are permissible and constitute a protected right. If in a sex education class a student remarks that abortion should be illegal because God has prohibited it, a teacher should not silence the remark, ridicule it, rule it out of bounds or endorse it, any more than a teacher may silence a student's religiously-based comment in favor of choice.

If a class assignment calls for an oral presentation on a subject of the student's choosing, and, for example, the student responds by conducting a religious service, the school has a right--as well as a duty--to prevent itself from being used as a church . . . Teachers may [also] rule out-of-order religious remarks that are irrelevant to the subject at hand. In a discussion of Hamlet's sanity, for example, a
student may not interject views on creationism.

**Distribution of Religious Literature**

Students have a right to distribute religious literature to their schoolmates, subject to reasonable time, place, and manner or other constitutionally-acceptable restrictions imposed on the distribution of all non-school literature. Thus, a school may confine distribution of all literature to a particular table at particular times. It may not single out religious literature for burdensome regulation . . .

**Religious Persuasion versus Religious Harassment**

Students have a right to speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. But school officials should intercede to stop religious speech if it turns to religious harassment aimed at a student or a small group of students. While it is constitutionally permissible for a student to approach another and issue an invitation to attend church, repeated invitations in the face of a request to stop constitute harassment . . .

**Student Garb**

Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, to be immodest.