

Understanding the Legal Protections and Limitations upon Religion and Spiritual Expression on Campus

John Wesley Lowery*

When considering the issues associated with addressing faith, spirituality, and religion on campus, it is important for student affairs professionals, especially those at public colleges and universities, to be cognizant of the associated legal issues. The Constitution protects the freedom of religious exercise and against the establishment of religion by the government or its agents. Common issues faced by student affairs professionals include those associated with prayer on campus as well as the official recognition of student religious groups and their access to university resources.

It is impossible to examine the issues surrounding religion in higher education, particularly public higher education, without examining the legal issues involved. O'Neil (1997) observed, "Religious expression on the public campus has been persistently troublesome and may become more so as the aspirations of student religious organizations intensify" (p. xv). The primary reason that legal issues are so significant is the provisions of the First Amendment to the Constitution. The First Amendment states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The two most important clauses of the First Amendment with respect to religion and higher education are the Free Exercise and the Establishment Clauses. However, a number of recent cases have also drawn upon the freedom of speech and assembly clauses as well.

Kaplin and Lee (1995) articulated the demands that the Establishment Clause of the First Amendment places on public institutions of higher education:

Under the Establishment Clause of the First Amendment, public institutions must maintain a neutral stance regarding religious beliefs and activities; they must, in other words, maintain religious neutrality. Public institutions cannot favor or support one religion over another, and they cannot favor or support religion over nonreligion. (p. 56)

While most higher education administrators understand that they cannot endorse a particular religious practice, they often fail to understand fully that public institutions of higher education also cannot favor or support nonreligion over religion. The neutrality demanded by the Court does not mean that institutions can

*John Wesley Lowery is assistant professor of higher education and student affairs at University of South Carolina. Correspondence concerning this article should be sent to jlowery@gwm.sc.edu.

prohibit all religious activities on campus or silence all discussion of the topic. It seems that many in the academy believe that the First Amendment's mandate of the separation of church and state demands that religion be entirely removed from public higher education. Clark (2001) described many student affairs professionals as hesitant to address religion and spirituality on campus noting they were "unaware of or confused about the legal issues involved in religion and spirituality on the college campus" (p. 38). Without a better understanding of the limitations and protections of spiritual expression on campus, our institutions cannot fully and effectively address this important aspect of the lives of students, faculty, and staff.

The Constitution and Religion

In order to understand the place of religion in student life today, it is vital to understand the Constitution's protection of the free exercise of religion and prohibition against the establishment of religion by the government, set forth in the First Amendment (Lowery, 2000). Often the courts are forced to balance these two competing fundamental rights against one another in deciding cases involving education.

Establishment of Religion

The Supreme Court has established a three prong test for determining whether a governmental program violates the establishment of religion clause of the First Amendment in two cases decided by the Court in 1971, *Lemon v. Kurtzman* and *Tilton v. Richardson*. In *Lemon*, the Court noted that a law need not go so far as to create an official state religion to violate the First Amendment stating, "A given law might not establish a state religion, but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment, and hence offend the First Amendment" (403 U.S. at 611). Drawing upon a number of earlier cases, the Supreme Court in *Lemon* articulated its new three part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'" [citations omitted] (403 U.S. at 612-613). Kaplin and Lee (1995) noted that while the first prong of the *Lemon* test was easily understood, "the other two prongs (effect and entanglement) have been both very important and very difficult to apply in particular cases" (p. 59). Chief Justice Burger observed in his ruling in *Tilton v. Richardson* (1971), "Candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication" (403 U.S. at 678). His comments still ring true today (McCarthy, 2001).

One of the areas pertaining to the Establishment Clause about which there is considerable confusion is the constitutionality of prayer at campus events on public college campuses. In the cases of *Engel v. Vitale* (1962) and *Abington School District v. Schempp* (1963), the Court has struck down policies of beginning the school day with a prayer or Bible reading. The Court also struck down a policy of starting the school day with a moment of silence in *Wallace v. Jaffree* (1985). In *Lee v.*

Weisman (1992), the Supreme Court ruled that the inclusion of prayers by a clergy member at a high school graduation violated the Establishment Clause of the First Amendment. In *Lee*, the Supreme Court stressed the coercive nature of prayer in public school context even while acknowledging that participation in high school graduation was not purely mandatory. The Court noted "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise" (505 U.S. 587). The Supreme Court expanded upon its analysis in *Santa Fe Independent School District v. Doe* (2000). In *Santa Fe*, the Supreme Court ruled that the school district's policy of having students vote whether to have a prayer, even one which was student-led, before high school football games violated the establishment of religion clause as well.

While the Supreme Court has consistently struck down as unconstitutional official prayers at public school events in the K-12 context, the Supreme Court has not spoken directly on the issue of prayer at public institutions of higher education. In *Tanford v. Brand* (1997), the Court of Appeals for the Seventh Circuit ruled that a religious invocation at Indiana University's graduation did not violate the establishment of religion clause because it was not coercive. The Court of Appeals for the Sixth Circuit reached a similar conclusion in *Chaudhuri v. Tennessee* (1997) and refused to prohibit the inclusion of prayer in Tennessee State University's graduation ceremony. In *Chaudhuri*, the court also stressed the absence of any likely influence of prayers upon college graduates, as opposed to the more impressionable school-aged students, and the non-coercive nature of the nonsectarian prayer. The most recent case involving prayer in the higher education context is *Mellen v. Bunting* (2003). The Court of Appeals for the Fourth Circuit ruled that General Bunting violated the establishment of religion clause in reinstating the "supper prayer" at VMI in 1995. The prayer was offered each night at dinner which all freshmen students are required to attend. The court also considered the unique nature of VMI's campus culture and stressed the coercive environment at VMI. Judge King wrote,

Put simply, VMI's supper prayer exacts an unconstitutional toll on the consciences of religious objectors. While the First Amendment does not in any way prohibit VMI's cadets from praying before, during, or after supper, the Establishment Clause prohibits VMI from sponsoring such a religious activity. (327 F.3d at 372)

He further observed, "The supper prayer has the primary effect of promoting religion, in that it sends the unequivocal message that VMI, as an institution, endorses the religious expressions embodied in the prayer" (327 F.3d at 374). The issues in this case are not fully settled. After the Court of Appeals for the Fourth Circuit refused to rehear the case en banc, Virginia's Attorney General indicated that the state will seek review of the decision by Supreme Court (Potter, 2003). Virginia's Attorney General has indicated that the state will seek review of the decision by all of the judges on the Court of Appeals for the Fourth Circuit sitting en banc. The case's implications are also limited by the unique circumstances present at VMI that are unlikely to be found at other public institutions. However,

the decision is significant for the application of the Supreme Court's rulings on prayer in public schools to public colleges and universities (Selingo, 2003).

Free Exercise of Religion

The majority of cases in which the Supreme Court has addressed the free exercise of religion in an educational context have originated in a K-12 setting. One of the earliest cases in which the Court addressed this important question was *West Virginia v. Barnette* (1943). In *Barnette*, the Supreme Court overturned a West Virginia policy requiring all students salute the American flag, which Jehovah's Witnesses argued violated their religious beliefs. In his opinion, Justice Jackson wrote,

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what will be orthodox, in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. (319 U.S. at 642)

In *Employment Division v. Smith* (1990), the Court refined the test applied to determine if government regulation impacting religious practice violated the Free Exercise of Religion Clause of the Constitution. The Court moved away from the compelling interest test established in a series of cases starting with *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972). In *Smith*, the Court upheld the denial of unemployment benefits to two drug rehabilitation counselors who were fired by a private corporation for their use of peyote in a Native American Church ceremony. The Court rejected the higher standard of "compelling interest" used in earlier cases such as *Sherbert* and *Yoder*. The Court instead allowed as constitutional "a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion" (494 U.S. at 880). The standard articulated in *Smith* is considerably easier for the state to meet than the earlier "compelling interest test." This interpretation was consistent with the Court's earlier ruling in *United States v. Lee* (1982).

The Court examined the meaning after *Smith* (1990) of "generally applicable regulatory law" (494 U.S. at 880) in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993). The Court overturned as unconstitutional a city ordinance prohibiting animal sacrifices, which are part of religious ceremonies within the Santeria religion. Justice Kennedy, writing for the majority, summarized the Court's earlier ruling in *Smith*:

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore. v. Smith, supra*. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance

that interest. These ordinances fail to satisfy the *Smith* requirements. (508 U.S. at 531-532)

In *Church of Lukumi Babalu Aye v. City of Hialeah*, the record contained clear evidence that the city council had passed the animal sacrifice ordinance in direct response to the Church of Lukumi Babalu Aye and the Santeria practice of animal sacrifice. Only when evidence exists that the law was not neutral and was not intended to be generally applied would the Court require that the compelling interest test be applied.

In the earlier case of *Bob Jones University v. United States* (1983), the Supreme Court ruled that the Internal Revenue Service did not violate the First Amendment in stripping Bob Jones University of its tax free or charitable status for its racial discriminatory admissions policy. The Court noted, "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice" (461 U.S. at 592). However, the Court's ruling in *Smith* removed the compelling interest test as the appropriate standard in evaluating cases.

There have been several cases involving student housing which help to illustrate the campus applications of these issues. In *Hack v. Yale* (2000), a group of Orthodox Jewish students sued Yale University claiming that the policy requiring all unmarried freshman and sophomore students under 21 to live on campus violated the Free Exercise Clause "as devout Orthodox Jews they cannot reside in those dormitories because to do so would conflict with their religious convictions and duties" (237 F.3d at 82). However, the court concluded that Yale's policy was neutral in both its design and its application to Orthodox Jewish students. In *Rader v. Johnston* (1996), Douglas Rader, an evangelical Christian student, brought a similar lawsuit against the University of Nebraska-Kearney. Rader claimed, "The obnoxious alcohol parties in the dormitories, the immoral atmosphere, and the intolerance towards those who profess to be Christians would severely hinder my free exercise of religion and be a definite hardship for me" (924 F. Supp. at 1545). He sought instead to live in an off-campus facility owned by the Christian Student Fellowship. The federal district court noted that there were numerous exceptions to the parietal policy and additional exceptions had been granted beyond those provided within the policy. As a result, Judge Piester concluded,

Although UNK's parietal rule is neutral on its face, Douglas Rader has shown that the defendants have enforced the rule against him in a manner that is not neutral or generally applicable. The defendants, in turn, have not demonstrated that their enforcement of the parietal rule is narrowly tailored to further a compelling state interest. (924 F. Supp. at 1558)

The main difference between the *Hack* and *Rader* cases was the granting of exceptions within and beyond the policy. Judge Piester appeared to conclude that the University of Nebraska-Kearney granted exceptions to virtually anyone, except

those students seeking to live in Christian Student Fellowship housing.

Balancing Free Exercise and Establishment of Religion

Kaplin and Lee (1995) noted that the common goal of the Free Exercise and Establishment Clauses of the First Amendment was government neutrality towards religion. In *School District v. Schempp* (1963), the Supreme Court addressed the interplay between these two provisions of the First Amendment:

The wholesome “neutrality” of which this Court’s cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. (370 U.S. at 222)

It is the overlap between the two clauses that is often the source of great confusion for student affairs administrators.

This confusion is most clearly illustrated in the case of *Orin v. Barclay* (2001). Orin sought to offer an anti-abortion display at Olympic Community College. Orin was allowed to make the demonstration on the conditions that he did not “did not create a disturbance, interfere with students’ access to school buildings, or couch his protest in overtly religious terms” (272 F.3d at 1211). After several hours of the confrontational demonstration, the dean of students arrived and threatened to have the demonstrators arrested if they “mentioned God or referred to the Bible” (272 F.3d at 1212). Barclay’s prohibition against religious speech by the demonstrators was grounded in his misunderstanding of the Establishment Clause believing that the First Amendment demanded it to preserve the separation of church and state. However, once the college allowed secular speech within a forum, religious speech could not be excluded on the basis of its viewpoint. The court concluded its discussion of this point by noting, “A reasonable public official should have known that permitting Orin to express his views on abortion only so long as those views were not religious in nature violated his First Amendment rights” (272 F.3d at 1216). It is also instructive to note that the Court of Appeals for the Ninth Circuit allowed the lawsuit against Barclay for violations of Orin’s constitutional rights to proceed.

The Constitution and Private Colleges

While public colleges and universities are required to comply with the First Amendment, private colleges are not similarly constrained. Private colleges are only required to comply with the Constitution if the institution establishes a contractual relationship with the students in which it promises to afford these rights. For example, a private college is not legally required to provide students the free

speech rights addressed in the First Amendment of the Constitution as private institutions are not, generally, agents of the state. However, if a private college promises to give students free speech rights, the institution will be required by that contract to extend to students the same rights as a public college.

Student Religious Organizations

Healy and Recognition of Student Organizations

In *Healy v. James* (1972), the Supreme Court spoke forcefully on the association rights of college students. The dispute in *Healy* arose from Central Connecticut State College's refusal to recognize a local chapter of the Students for a Democratic Society (SDS) as a student organization. The Court ruled,

While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. (408 U.S. at 181)

The college could not refuse to grant recognition to the SDS "simply because it finds the views expressed by any group to be abhorrent" (408 U.S. at 187-188). However, the Court discussed three specific situations in which a college or university would be justified in its refusal to recognition of an organization:

1. The group has a known "affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal goals." (408 U.S. at 186)
2. The group poses a "substantial threat of material disruption through its conduct." (408 U.S. at 189)
3. The group refuses to comply with "reasonable school rules governing conduct." (408 U.S. at 191)

The cases following *Healy* primarily involved the efforts of Southern public colleges and universities to deny recognition to gay, lesbian, and bisexual student groups with one notable exception.

The courts did specifically address the issues involving student religious organizations in *Aman v. Handler* (1981). In this case, the University of New Hampshire refused to recognize campus chapter of the Collegiate Association for Research of Principles (CARP) an organization that allegedly had ties with Reverend Sun Myung Moon and the Unification Church. In a campus hearing regarding recognition, the vice president for student affairs provided the following comments in support of the university's decision:

Specifically, it is felt the University of New Hampshire should not formally recognize an organization which has a demonstrated history on campus of working against the University's educational mission. It is the opinion of the University that CARP is primarily a recruitment branch for the Unification Church and past experience has shown students left the University with the encouragement of CARP. It appears the experience of many students after

leaving colleges and universities has been negative and possibly harmful. In addition, the Unification Church has openly admitted deceptive practices have been used by the organization. (653 F.2d at 43)

The student members of CARP filed suit in federal court claiming that the university's actions violated their constitutional rights. In court, the University of New Hampshire sought to justify its refusal to recognize CARP within the Supreme Court's earlier ruling in *Healy* (1972). However, the court concluded that while the university had offered various arguments in support of its decision, there was not sufficient evidence to support the denial of the students' rights.

One area of significant controversy remains related to religious student organizations which has not been resolved by the courts. There were legal disputes at both Rutgers University and the University of North Carolina at Chapel Hill as to whether a student religious organization could be required to comply with the universities' nondiscrimination policy prohibiting discrimination on the basis of sexual orientation (Young, 2003). These two cases were resolved in very different fashions. The University of North Carolina agreed not to force the student religious group to follow the sexual orientation clause of the nondiscrimination policy (Christian student group, 2003). However, the settlement reached in Rutgers resulted in a change in the organization's constitution to include the institution's non-discrimination policy in its entirety (Rooney, 2003). French (2003), who was involved in the legal disputes at both UNC and Rutgers, described nondiscrimination policies at the "loyalty oath" of the modern academy" (p. 63). However, in earlier cases, the courts ruled that student organizations could not discriminate on the basis of race. Kaplin and Lee (1997) noted,

Just as the institution cannot discriminate on the grounds of race or sex, neither can the student organization discriminate—either as an agent of the state or with the substantial support of the institution. The institution has an obligation to either prohibit discrimination by student organizations or to withhold institutional support from those that do discriminate. (p. 405)

Kaplin and Lee (1995, 1997) cited several cases in which the courts had discussed the institution's obligation to prevent discrimination by student organizations. In *Joyner v. Whiting* (1973), the court noted, "The equal protection clause forbids racial discrimination in extracurricular activities of a state-supported institution and freedom of the press furnishes no shield for discrimination" (477 F.2d at 463). The Court of Appeals for the Fourth Circuit also dealt with these issues in *Uzzell v. Friday* (1980) and the use of racial classifications in structure of several subcommittees of the Student Government at the University of North Carolina at Chapel Hill.

Widmar and Access to Campus Facilities

The Supreme Court built upon the foundation established in *Healy v. James* (1972) in *Widmar v. Vincent* (1981). The Supreme Court clearly stated that an institution of higher education, namely the University of Missouri-Kansas City, could not deny a student organization access to university facilities for religious services. The Court

concluded that the university had created a public forum when it made meeting space available to groups. Once that public forum was created, the university could not deny groups access on the basis of the content of the speech—including religious speech. As in other cases, the university argued that this prohibition was demanded to preserve the separation of church and state. However, the Court ruled that providing equal access to campus facilities for student religious groups as is offered other student organizations did not violate the standard the Court established in *Lemon* (1971). Justice Powell, writing for the majority, concluded,

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. (454 U.S. at 277)

Kaplin and Lee (1997) noted that *Widmar* did not allow that institutions could not create facilities especially for religious groups or give them preferential treatment. In *Keegan v. Delaware* (1975), the Delaware Supreme Court reached the same conclusion in overturning a University of Delaware policy that prohibited religious worship in the common spaces of residence halls while allowing their use for secular purposes.

The ruling from the Court of Appeals for Fourth Circuit in *Chapman v. Thomas* (1984) illustrates another important limitation of the *Widmar* (1981) ruling. In *Chapman*, the court ruled that North Carolina State University could prohibit Chapman from going door to door in the residence halls to encourage students to attend his campus Bible studies. Following the *Widmar* rationale, the court concluded that the residence halls were not a public forum and as such NCSU could legally prohibit Chapman's canvassing, even while allowing limited canvassing by candidates for student government.

Rosenberger and Access to University Funds

The Supreme Court ruled in *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) that University of Virginia had violated the First Amendment when refusing to pay the costs associated with the printing of *Wide Awake*, a student Christian publication, because of the religious viewpoint expressed in the publication, while funding other student publications. The Court concluded that the university was engaging in unconstitutional viewpoint discrimination. Justice Kennedy wrote in his opinion:

By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications. (515 U.S. at 831)

The Court's decision in *Rosenberger* extended the facilities decision in *Widmar v. Vincent* (1981) to include services as well, or in Justice Kennedy's language, extended the public forum analysis to include "metaphysical" (515 U.S. at 830) forums. Once the University of Virginia made the decision to fund student publications through the student activity fee, student religious publications could not be denied funding on the basis of the religious viewpoint expressed (Gibbs & Gehring, 1996). Prior to the Supreme Court's ruling in *Rosenberger*, a number of observers (Buchanan, 1988; Gibbs, 1995a, 1995b; Jones, 1981) and at least one federal circuit court (*Tipton v. University of Hawaii*, 1994) expressed concerns about the constitutionality of public colleges and university funding religious student organizations.

Kaplin and Lee (1997) warned against an over-reading of Justice Kennedy's decision noting that Justice O'Connor's more narrow concurring opinion provides the crucial fifth vote needed to form a majority in the case. Justice O'Connor noted that her decision was highly fact specific and widely applicable stating,

The nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court's decision today. Instead, certain considerations specific to the program at issue lead me to conclude that by providing the same assistance to *Wide Awake* that it does to other publications, the University would not be endorsing the magazine's religious perspective. (515 U.S. at 849)

The specific considerations discussed by Justice O'Connor included the system for registering student organizations at UVA which clearly established student organizations as separate from the university; the fact that the payments in this case were being made to a third party; the numerous student publications active at UVA which worked against any assumption that UVA endorsed *Wide Awake's* message; and finally, Justice O'Connor's expressed some concerns over the constitutionality of mandatory student activity fees. However, the question of the constitutionality of mandatory student activity fees was resolved by the Court decisively in *Board of Regents of Univ. of Wis. System v. Southworth* (2000). Justice Kennedy, writing a unanimous opinion, noted "The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral" (529 U.S. at 251).

Conclusion

It is vital that student affairs administrators understand the legal issues involved with student religious life on campus. Misunderstandings about the separation of church and state have led institutions to mistakenly limit students' religious expression unconstitutionally and some professionals to refuse to even discuss issues related to religion and spirituality. Through a series of rulings over the past 30 years, the Supreme Court has held that student religious organizations should be treated in the same manner as other student organizations. The Establishment Clause does not prevent a public institution from allowing student religious

organizations to use campus facilities (Widmar, 1981) or funding student religious publications (Rosenberger, 1995), but the refusal to do either, when other student groups are allowed access, violates the students' rights under the First Amendment, including both the right of Freedom of Speech and Free Exercise of Religion. The Establishment Clause is not without significance, however, in determining what actions the institution itself can take. Campus policies and decisions should be carefully reviewed to insure that they afford the neutrality and equal treatment for students' religious expression demanded by the courts.

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