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# Religion: How to Stay out of Court

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WESTERN KENTUCKY UNIVERSITY

# Religion

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How to Stay Out of Court

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In the First Amendment to the Constitution of the United States of America, it reads that, “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.” This single sentence, the Establishment Clause, is the backbone of religious freedom in the United States, and with its several annotations it has given shape and breadth to the concept of religion in America, more specifically our topic, i.e. religion in higher education and student affairs.

Before we begin analyzing legal issues involved, it is extremely important that we set definitions for terms we will fall back on throughout the course of our analysis. First, we have defined “religion” as “a cause, principle, or system of beliefs held to with ardor and faith.” From that definition, we draw the following definitions:

- **Religiously-affiliated institution:** A college or university whose history or principles are tied to a particular religious group.
- **Religious institution:** A college or university which is inextricably tied to the tenets of its founding faith and bases its standards and practices based upon them.

Based upon these definitions, it is important that we also clarify the differences between the two. A religiously-affiliated institution typically bases its academic calendar upon the calendar of their faith and may require that students take classes in religion as part of their courses of study or celebrate major events with an ecumenical service. Alternately, a religious institution typically requires that both students and faculty be members in good standing of their particular faith or agree to adhere to the values of that faith as specified by the institution. Religious

institutions may discriminate in hiring and admissions based upon the stated religion of the applicant due to their stated expectations of faith.

Because of the Establishment clause, it would be unconstitutional for a religious/religiously-affiliated institution to be funded primarily by the state or federal government. To that end, it is also important to clarify the difference between public and private institutions. A public institution is typically regarded as an institution that receives funding from the state and is operated for the academic benefit of the citizens of that state (or commonwealth). A private institution is not primarily supported by the state (although they may receive subsidies or tax breaks), but often by a private group or agency, through private fundraising, or from internal endowments.

### State and Federal Funding

Following clarification that private institutions are not primarily supported with public funds, it is equally important to clarify that many private institutions, including religious/-ly-affiliated institutions, do receive public funding to support specific objectives. In many cases, the funds must be shown to be used for non-sectarian projects, such as a science or computer lab, improving facilities for handicapped access, etc, and the funds usually come in the form of grants that must be applied for rather than any sort of annual allotment.

With the understanding that state funding is available to private institutions, it is time to delineate conditions under which those funds might not be available. In the case of *Columbia Union College v. Clarke, et al* (1999), Columbia Union College applied for funding from the State of Maryland under the Sellinger program operated by the Maryland Higher Education

Commission which was intended to be used for such previously acknowledged programs as science labs and computer technology. The MHEC rejected the application based upon the pervasive nature of Columbia Union College's Seventh-Day Adventist religious identity and mission. While the school itself is better defined as a religiously-affiliated institution than as a religious institution, the school was also known for incorporating religion into other courses and programs, including the sciences.

Following a legal battle concluding in the Fourth Circuit Court, it was upheld that the MHEC was obliged to deny the funds based on "compelling state interest". Columbia Union College, in applying for Maryland's Sellinger program, was obligated to "demonstrate that no Sellinger funds will be used for 'sectarian purposes' including 'religious instruction, religious worship, or other activities of a religious nature'." Because of Columbia Union's mission, it was decided that the institution is "pervasively sectarian", meaning that it could not effectively separate its secular work from its sectarian work.

Religious institutions may face this issue in the future depending upon their standards and practices, but it is more important to remember as student affairs professionals that public funding, including grants, may have stipulations in regards to its use and it is important to be very clear about what may or may not be involved in any programming or training the money is intended for. Be sure to have clear expectations about any stipulations in regards to public funding as well as any institutional expectations about how funding is to be acquired and disbursed.

### Student Groups or Organizations:

This section will explore the many ways that a student affairs professional can ensure they stay out of court in reference to religion and Student Groups or Organizations. The section will introduce some cases, outcomes, and how they can be used as guidelines to prevent lawsuits. These can serve as guidelines for ensuring peaceful gatherings/demonstrations, access to media forums, and funding from all student organizations. Under the 1984 Equal access act it is outlined that it unlawful any school that receives federal financial assistance and has created a limited open forum to deny recognition of student initiated groups on the basis of religious, political or philosophical content of the speech meetings (LaMorte, p.58, 2002). In order to understand the magnitude of the impact the 1984 equal access act one must begin to understand how the type of group can determine the access to the media, funding, and recognition in the university setting.

Therefore, as a student affairs professional it is important for one to understand the difference between a “limited open forum/student group” and “a curriculum-related group”. A “limited open forum/student group”: is defined as a forum in school that grants an offering to or opportunity for one or more non curriculum student groups to meet during non instructional time (LaMorte, p.59, 2002). A “curriculum-student group” is defined as: one that has more than just a tangential or attenuated relationship to courses offered by the school or faculty lead (LaMorte, p.59, 2002). This was clearly outlined based on the decision in Board of Education of the Westside Community Schools v. Mergens. In the decision it was outlined that the only way a group may be denied official recognition is by sanctioning only curriculum-related groups or by declining federal funding. Also, the university must take the proper steps to ensure equal access

to all and ensure that the First Amendment and Fourteenth amendment rights of the students are not being violated by the university and its policies.

Under the 1984 Equal Rights Act it is important to understand that all groups are to be protected regardless of how controversial a group might be. Perhaps not fully recognized at the time the ruling was passed, the act also protected religious and political groups that had the least community support; some examples are: skinheads, GLBT for Christ, Satanist, and nonviolent gangs. Due to their official recognition as student organization they were guaranteed access to the school media via the “Equal access to means of Publicizing meeting. Under this provision it is outlined that all student organizations should be given an opportunity to organize and recruit more members by utilizing student bulletin boards, communication systems, and media. However, the institution reserves the right to inform the students that organizations that discriminate or affects others are not affiliated with the institution. Also, newspapers can be edited by the university if it is found to be offensive to its student body and staff. The main thing to remember with media is that a student organization can be censored as long as they are given due process and the same treatment applies to all organizations. Therefore, remember that a clear guideline and outline of procedures must be set in place for all media communications to be approved or disapproved by university officials (. Also, you must provide areas in which the exchange of ideas can take place amongst various student groups.

Under *Tinker v. Des Moines Independent Community school district*, 393 U.S. 503, (1969) a student affairs professional must remember “students do not give up their constitutional rights at the school house gate, thus allowing symbolic protests”. In this case, a perfect example of a peaceful exchange of ideas took place. The student “Tinker” wore a black band in demonstration against the war efforts by the United States military. The school principal

suspended the student because Tinker refused to remove the black band as it was freedom of speech.

This case is important especially for public institutions that are federally funded to remember when determining if a student group should be allowed to congregate to express their views in a limited open forum. Private institutions tend to be privately funded and have more ability to limit the rights of the student based on contractual law between the student and the private university. Therefore, as a student affairs professional one must educate oneself about the type of institution in which you are employed by, the demonstration areas, and guidelines to be followed by the congregation. It is important to remember that the exchange of ideas is encouraged by the University but, it must be a verbal exchange which does not intend to psychological or bodily harm a student with a different view. Otherwise, this becomes an issue of hate speech and or hate crime. This can be exemplified by the visit of the Klux Klux Klan to various cities and universities in which members of other religious and ethnic groups may choose to question the K.K.K. propaganda may do so as long as no physical contact occurs the different views shall be exchanged. Also, congregations are to be allowed during school hours as long as they are not disturbing the progress of academic endeavors and student groups are to be allowed to meet on school premises during non instructional time.

The role of student activity fees in the university setting and ways to ensure that one is not violating the First or Fourteenth amendment rights of the students by funding all student organizations. First, the definition of an activity fee is: a fee charged to students to fund non-academic campus resources, functions, and events. They are typically broken down into allocable and non-allocable funds. The non-allocable funds usually are dispersed to organizations such as student activities boards. The allocable portions of the funds are usually distributed to



organizations where the money is dispersed and regulated through a student government system such as student government association, residence hall association, and hall councils in the residence halls. Important terms to remember when dealing with funding of student organizations are that under the first amendment one must ensure the fee allocation process uses objective criteria that ensures viewpoint neutrality and ask oneself have I ensured effective supervision of the allocation process as a university official, this will ensure viewpoint neutrality.

Viewpoint Neutrality is defined as: when allocating funds, all viewpoints must be given equal consideration, regardless of majority and minority views. In order for a funding board to maintain itself in the range of viewpoint neutrality it is recommended that one elects individuals that share different religious, procedural, and philosophical views. This will ensure that all of the perspectives are being discussed and thought out before rendering a final funding decision. Ensure that the student government system responsible for allocating the funds received has concrete guidelines in place that will ensure the view point neutrality is maintained as if these guidelines were to lack one may use unbridled discretion to discriminate on the basis of personal judgment or content(Center for individual freedoms, Constitutional Requirements for Student Fees, 2000).

There have been several cases in which the use of mandatory fees by the University for Allocable Fees have come to question on the basis that the funds can be used to subsidize ideological and political expressive speech that student can disagree with. One of the most recent cases is the Fry v. Board of Regents of the University of Wisconsin, 132 F; the student shared the previously mentioned views on mandatory fees. The student questioned the validity of him having to pay mandatory fees that were being allocated to subsidize speakers and activities that were not shared by the individual. The court found that the university funding allocation system

had created failed to create a viewpoint neutral environment as the funding decisions were being based on the majority. As a university a limited public forum was to be created which in term required a viewpoint neutral system to be put in place; this would protect the 14<sup>th</sup> amendment rights of the students as it would allow for the proper due process and equal opportunity to funding. Therefore, the funding board would be composed of elected officials who would provide an opportunity for the voices of the students to be heard in making funding decisions regardless of the differences in personal views. There is another method known as the “Lemon Test” that can be utilized to ensure the proper allocation of funds. It is defined as: public funds being used for the support of private education and established the three pronged test for determining if it is legal (Imber, & Van, 2004). The purpose of the *Lemon* test is to determine when a law has the effect of establishing religion. The test has served as the foundation for many of the Court's post-1971 establishment clause rulings. As articulated by Chief Justice Burger, the test has three parts:

The three prongs are: “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." (Allison, 2006).

In conclusion, when dealing with student organizations it is important for student affairs professionals to ensure the protection of the first and fourteenth amendment rights to students attending public universities. The university setting should ensure that a limited open forum is created in order to allow for the exchange of religious, philosophical, and political ideals take place outside of classroom discussions. Therefore, facilitating the learning process to take place

outside of the classroom and allowing for all students to have the ability to grow and develop their personal views. Learn the differences that exist amongst student organizations and the differences between allocable and non-allocable funds. Practice and train your organizations to use viewpoint neutrality in all decisions within your student organizations especially when it comes to funding. Just remember “Students do not give up their constitutional rights at the school house gate”; meaning you must educate yourself about the constitutional rights of the student at your specific institution.

### Faculty

For the sake of consistency we are going to address public universities only. There are differences between public and private institutions that have already been addressed. A public university’s faculty has different rights and regulations than faculty at private institutions. At the same time, public universities have certain rights and regulations as well.

First, faculty must adhere to the university’s curriculum when developing course content. In 1998, the US Court of Appeals, Third District ruled on *Edwards v. California University of Pennsylvania*. Edwards, a professor, filled a suit against the University stating that the University “deprived him of his rights to free speech, due process, and equal protection by restricting his choice of classroom materials, criticizing his teaching performance, and suspending him with pay for a portion of one academic term (“*Edwards v. California*,” 1998).” Edwards taught “Introduction to Educational Media.” The original content of this class was to prepare teachers for the use of projection equipment, chalkboards, photographs and film in their classroom. Edwards’ syllabi, however, were emphasizing issues of bias, censorship, religion and humanism.

In 1989, a student complained, saying that Edwards was advancing his religious beliefs during instructional time. The Vice President of Student Affairs then got involved. She informed Edwards of the complaint and told him to take the “doctrine materials” out of the curriculum. Edwards then appealed to the President, who upheld the decision made by the Vice President. This deliberation continued through 1991 when Edwards filed his original suit.

The case came before the Court of Appeals in March of 1998. The court concluded that “a public university professor does not have a First Amendment right to decide what will be taught in the classroom.” The court came to this decision based on precedent that was set in *Bradley v. Pittsburg Board of Education* – “no court has found that teachers’ First Amendment rights extend to choosing their own curriculum... in contravention of school policy or dictates.” It was also stated that Edwards had the right to appeal for the curriculum to be changed; however, he did not have the right to use the proposed curriculum until it had been approved by the judging university body.

The University has the right to choose the content and curriculum of each class. In the Edwards ruling the court made a valuable distinction between the curriculum and how it is taught. “[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. It does not follow, however, that viewpoint-based restrictions are proper when the University does not speak itself or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers. *A holding that the University may not discriminate based on viewpoint of private persons whose speech it facilitates does not restrict the University's own*

*speech*, (emphasis added) which is controlled by different principles (Edwards v. California, 1998).”

The lesson is for faculty to stick closely with the course description that is listed on University documents. It is important the faculty to not take too much freedom when developing syllabi for their classes. The university has the right to control what curriculum is taught to the students. For that reason, it is important to faculty to remember to control what they say in their classroom. A way to maintain appropriate content would be to have a faculty’s Department Head check a faculty’s syllabi if the faculty or administration were concerned about the content being covered. This would be a more proactive approach that could catch problems before they arise in the classroom.

A similar rule about what a faculty member can say in the classroom was set in Bishop v. Aronov in 1991. Bishop was a human physiology teacher at the University of Alabama. Students reported that during instructional time Bishop would make comments about his views of religion and how God was evident in the development of the human body. He also organized an optional, after class meeting to discuss God’s evidence in physiology.

Students from Bishop’s 1986-1987 class complained about Bishop’s remarks. Bishop then received a memo from the President asking him to refrain from “1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered (Bishop v. Aronov, 1990).” In September of 1987 Bishop filed suit against the Board of Regents of the University of Alabama. He claimed that the actions taken by the President infringed on his first and ninth amendment rights to freedom of speech and religion.

The 11<sup>th</sup> Circuit Court of Appeals decided that a classroom is not the professor's open forum to do with what they please. It is expected that each faculty member holds their own person views on religion, education, and politics. The university cannot expect to limit what the professors choose to believe, however, that is outside of the classroom. While the professor is teaching, the professor is anticipated to limit the amount of personal beliefs that they interject into lecture.

As Dr. Bishop described, the reason for his remarks were to build rapport and a relationship with his students. The court had this to say about his efforts: "These attempts at professor-student affinity are laudable. But plainly some topics understandably produce more apprehension than comfort in students. Just as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes, much less seek camaraderie by trying to discovery 'something in [Dr. Bishop's] life that is inconsistent with Christianity' (Bishop v. Aronov, 1991)"

Discussing a person's personal beliefs opens that person up to scrutiny if seen acting not in accordance with their beliefs. If this happens, then any relationship built with students is severed and worse than without personal disclosure. At the same time, some beliefs may not build relationships; they might offend what others believe. While a person cannot live being concerned that they could offend someone, there is a time and place for personal expression. The court ruled that the classroom is not it.

Another lesson that we can take from the Bishop case is to be cautious of how outside class meetings can appear. Dr. Bishop chose to offer an optional outside of class meeting to discuss evidences of God in human physiology. This class was offered the week before finals were given. The court considered how this class could have been mistaken as coercing the

students into being a part of the religious lecture. It was ruled that prohibiting the optional class would be unconstitutional. It is a person's right to be able to assemble a group. And it is a university's responsibility to act with equal acceptance of all groups wanting to gather.

The ruling from the case reports that: “[u]nder its authority to control curricular conduct, the University may restrict a professor from conducting an "extra" or "optional" class or meeting under the patronage of a university course. In particular, scheduling the class directly before finals and describing it as an "optional class" can be prohibited to avoid the apparent sponsorship of the University. However, like the district court, we hold that the University cannot prevent Dr. Bishop from organizing such a meeting for interested persons, either on or off University grounds. Should Dr. Bishop again conduct such meetings and invite his students, the University may direct that Dr. Bishop make it clear to students that the meeting is neither required for course credit nor sanctioned by the University and that Dr. Bishop employ blind-grading and so assure students (Bishop v. Aronov, 1991).”

These three guidelines will help you stay in the safe bounds of what is appropriate for a professor to do.

1. Do not change the university approved curriculum for a course;
2. Do not express personal views about religion during instructional in the classroom,  
and
3. If you choose to share your beliefs and knowledge with students outside of the classroom be sure to allow students the option of coming without rewarding attendance and make sure to let students know that the University is not sanctioning the meeting.

Religion is something that can bring people a sense of peace, hope and joy; however, on a college campus, it is something that can also bring heartache, pain and frustration. It is important for students, faculty and staff to have clear understanding of what is and what is not acceptable. Therefore, having guidelines printed for the college is a way to lessen the ambiguity associated with questions about religious groups and meetings. Also, it is important to be equally accepting of all groups. A campus cannot allow a Christian group to meet if it is not willing to allow an opposing group the same liberties. Lastly, a campus is a place where many people with differing points of view are confined to a small area. Before you speak, you should ask, "Is this applicable? Does it advance the point? How could it be misconstrued?" After answering these questions, you should be able to decide if what you have to say should actually be said out loud. Asking these questions before speaking can save everyone from having to answer these, and harder questions, later in court.



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