University of St. Thomas Journal of Law and Public Policy

Volume 2
Issue 1 *Spring 2008*

Article 5

Freedom of Speech at a Private Religious University

Michael Stokes Paulsen
University of St. Thomas School of Law, paul2317@stthomas.edu

FREEDOM OF SPEECH AT A PRIVATE RELIGIOUS UNIVERSITY

MICHAEL STOKES PAULSEN*

I.

What are the principles of "freedom of speech" and "academic freedom" that properly govern at a *private* university? May a religious university, like my new home the University of St. Thomas, properly ban controversial speech, exclude speakers it deems offensive, limit professors' academic freedom, or refuse honorary degrees, based on its desire to maintain a distinctive religious message and voice as a religious institution? Recent controversies involving Ann Coulter, Desmond Tutu, and Bill Gates have raised these questions in a prominent way for the University of St. Thomas.

As a recent refugee from the University of Minnesota Law School, where I taught for sixteen years, I am a newcomer to this side of the free speech block. There, at a state university, the principles are, or at least should be, clear: A state university is, legally, an arm of the government and is *constrained* by the First Amendment. It may not properly censor students' or guest speakers' expression, and, usually, not even faculty members' expression, based on official disagreement with the content or viewpoint being expressed. Private citizens and groups possess First Amendment rights *against* the government, and the University of Minnesota is, for these purposes, the government. Properly understood, a state university has no "free speech" rights of its own. It is a public forum, a common carrier, for the expression of views by members of the university community.[1]

*Distinguished University Chair and Professor of Law, University of St. Thomas School of Law (Minneapolis, MN). Prior to coming to the University of St. Thomas School of Law, Paulsen served as the McKnight Presidential Professor of Law and Public Policy, Law Alumni Distinguished Professor of Law, and Associate Dean for Research and Scholarship at the University of Minnesota Law School. This essay is a slight revision of a lecture delivered in 2008 on the occasion of Professor Paulsen's appointment as University Chair.

1. On state universities as public fora for expression of views by members of their university communities, the most important (and correct) Supreme Court precedents are *Widmar v. Vincent*, 454 U.S. 263 (1981) (university may not exclude otherwise-eligible student group from use of university facilities for its meetings and expression, on the basis of the content of the group's expression), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (applying the same principle to a student organization's request for consideration for funding on the same basis as other student organizations). Both *Widmar* and *Rosenberger* involved religious student organizations, but the free speech principle is applicable across the

This has important consequences. A state university, as an institution, does not have a free speech right to exclude views with which it disagrees; it follows that controversial, extreme, or offensive views expressed by students, student groups, guest speakers, and even faculty usually cannot fairly be imputed to the university as the expression of its own views. The University of Minnesota does not endorse everything it fails to censor, because it legally *cannot* censor speech with which its officials disagree.[2]

A private university is in an altogether different situation, almost the precise opposite one. It is *not* constrained by the First Amendment; it is *empowered by* the First Amendment, vested with its own rights, as an organization, to the freedom of speech. In First Amendment jargon, a private university is an "expressive association" possessing the constitutional right to express its views as an institution, to control its membership decisions (e.g., faculty, students) so as to control its message, and to exclude voices and messages with which it disagrees or speakers of whom it disapproves. To some extent the University of St. Thomas *might* be thought to endorse speakers or groups it fails to censor, precisely because it has the legal right to do so.[3]

---

range of university constituents.

2. For a crisp, clear expression of this proposition, see Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 14 (1985) ("The argument most often pressed against the Equal Access Act is that allowing religious speech in high schools is an actual or apparent endorsement of religion. The claim of actual endorsement is absurd. Perhaps in a totalitarian state the government implicitly endorses all that it does not censor. But no such inference can be drawn in a nation with a constitutional guarantee of free speech. Indeed, the core case for first amendment protection is speech critical of the government. No governmental unit can interfere with such speech, but it obviously does not follow that the government endorses the critical message."). *See also Westside School District v. Mergens*, 496 U.S. 226, 250 (1990) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.").

In a well-known recent controversy, a group of state university and private university law schools asserted that they possessed a First Amendment free speech right to exclude United States government military recruiters from their campus facilities, and that a federal statute that withdrew federal funds from such schools if they did so was therefore unconstitutional. The Supreme Court unanimously rejected this claim. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")*, 547 U.S. 47 (2006). As to state universities, there was a further ground for rejecting such a claim, not separately discussed by the Court in *Rumsfeld v. FAIR*: state universities do not possess First Amendment rights; rather, quite the reverse, as state actors they are constrained by the First Amendment. If a state university had "free speech" rights of its own to exclude the expression of views with which it disapproved, *Widmar* and *Rosenberger* would have been decided differently.

3. The principle is well established. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981). For an extended general discussion of this issue, see Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996). On this principle's application to *Boy Scouts v. Dale*, see Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1919-1939 (2000). On the specific issue of a private university's freedom to exclude from its programs or facilities organizations whose views or practices it finds antithetical to its own mission or message, see Michael Stokes Paulsen, *How Yale Law School Trivializes Religious*

II.

What *should* a private religious university, a faith community, *do with* its First Amendment freedom to define the parameters of free speech and academic freedom that will prevail within its community? The fact that one possesses a freedom (of speech, or of anything else) does not itself tell you what it is you should do with that freedom or, indeed, whether you should exercise it at all. As is appropriate with a *freedom*, different folks and different expressive associations will choose different answers.

My view is that a good case can be made for adopting the principles of the First Amendment as an internal rule of self-regulation: freedom of speech is, generally, good policy. It avoids, to some extent, the problem of mistaken attribution. When a student group invites Ann Coulter to speak at its university, such as St. Thomas, pursuant to the school's "free speech" policy, no one thinks that she speaks for St. Thomas as an institution. She speaks for herself, and any offense she gives is not fairly attributable to St. Thomas. The University's commitment is to free speech, not Ann Coulter's views.

On the other hand, sometimes the attribution problem is too severe to be ignored. If a Catholic university were to grant an honorary degree to a major financial backer of pro-abortion advocacy organizations (the Bill Gates issue), it is hard to deny that the university "owns" whatever message is thereby conveyed. The University's choices of speakers for commencement or for distinguished lectureships, or even for endowed chairs, pose similar problems, though perhaps to a slightly lesser degree: these are, after all, speakers selected by *the institution*. So, too, the deliberate hiring by a Catholic university of openly pro-abortion-rights Roman Catholic faculty members would pose serious and legitimate concerns of imputation of such views to the University itself. It would also cause "scandal," a related but distinct concern of embarrassment to the message the institution and the community wish to convey, occasioned by the apparent conflict between the community's stated views and certain aspects of its practice.

Generally, aside from fundamental matters at the heart of the Faith, the better course may be to give a broad berth to academic freedom and dissent, especially in professors. Once again, a free speech policy tends to diminish, it does not entirely remove, the concern that professors' views will be counted as the university's speech. Disclaimers help, when they are believable: "Be Advised: Michael Paulsen does not speak for the University of St. Thomas!" That, of course, was the case when I was at the University of Minnesota; nobody thought it particularly necessary to warn readers or

Devotion, 27 Seton Hall L. Rev. 1259 (1997) (regretting as a policy matter, but defending as a constitutional matter, Yale Law School's exclusion of a Christian religious freedom advocacy organization from use of the school's placement office services, because the Christian organization had a statement of faith to which it asked its lawyer-employees to subscribe).

hearers that the views I might express were not the official, approved views of the government of Minnesota.

A free speech policy distances a religious university from the views expressed by any particular speaker. The downside of such a policy is that it, too, sends a subtle message: the university values free expression *more than* other things, such as the clarity of its repudiation of abortion, racism, hatred, genocide, terrorism, or even mere bad manners. That might be the right stance for a religious *university* to embrace, simply because it is a university: we value free speech more than anything else. But this is always a choice, and choices have consequences.

Of course, the best and easiest way to avoid or mitigate the mistaken attribution problem is to be clear in the things for which you stand. I call this the "Planting the Flag" principle. The best way to make clear that an institution's commitment is pro-life is not to go around nervously suppressing pro-abortion speakers or seeking to negate inferences of implied endorsement from failure to censor, but for the institution to speak clearly and unmistakably in a pro-life fashion. The best disclaimer is an affirmation.

One thing that should be clear from all this is that mere recitation of the terms "free speech" or "academic freedom," so often sloppily bandied about, does not dispose of the problem. For in the case of a private university, the freedom of speech is *the university's* right to stand for what it wishes to stand for and to control the content of messages spoken under its auspices. Academic freedom is, in the case of a private university, *the university's* right to teach, research, and serve in accordance with its own principles, free from interference by outsiders, and to prescribe the standards for its own community that it thinks most appropriate.

The rhetoric of free speech, even where replete with disclaimers and disavowals, and even where coupled with clear affirmations of principle, cannot *entirely* shield a religious university's act of providing a platform to horrific speakers and views. Everybody has his or her "squeal point." These differ, and are probably not perfectly susceptible to principled definition. Here is my squeal point: Mahmoud Ahmadinejad is a monster–a Holocaust-denying, wipe-Israel-off-the-map, Jew-hating mini-Hitler. At *some* level, Columbia University's *invitation* of Ahmadinejad spoke for Columbia's values (notwithstanding its president's condemnation of Ahmadinejad and the removal of any sign of Columbia's name or seal from the stage). In the end, Columbia *chose* to give Ahmadinejad a prestigious platform for expressing his views.

Desmond Tutu is no Ahmadinejad and University of St. Thomas President Father Dennis Dease's retreat in the fall of 2007, withdrawing the withdrawing of co-sponsorship of an event in which Tutu was to be a speaker, was probably a wise retreat. A harsh, even offensive, historical comparison of Israel settlement policy to Nazi policy is not Holocaust advocacy. Further, the context and degree of St. Thomas's involvement rendered any perceived endorsement of Tutu's views remote. But all such

judgments involve line drawing and reasonable people will draw their lines in different places. Father Dease drew a line. Many in the University community disagreed with where he drew it. **(I did, too.)** But it was not, in principle, wrong for Father Dease to make such a judgment. It was not a *violation* of the principles of freedom of speech and academic freedom; it was an *exercise* of the freedom of speech.

III.

I close with a final, somewhat ironic footnote. I originally wrote a somewhat briefer version of these remarks, literally overnight, in response to a desperate request for last-minute replacement copy for the inaugural issue of the *St. Thomas Lawyer* magazine. It seems that two invited authors had, quite accidentally, ended up writing about the same topic and nearly duplicating each other's submissions. So the editors axed one, and asked me if I could produce something interesting and provocative within a day or two. I did, or tried to, but the editors apparently thought it a little bit *too* interesting or provocative, and they axed my article, too.

As is usual with me on such things, I did not quite know whether to be amused or irritated. What a delicious irony! An article discussing free speech at a private university was vetoed by a private university on the ground that it was too sensitive a topic! Yet, in a reverse irony, by the logic of my own reasoning, this was an entirely appropriate *exercise* by the private university of its constitutional rights to freedom of speech and to control the content of its own messages. (The magazine is, after all, *St. Thomas*'s magazine, and the University certainly has the right to control what gets said in its own pages.) But wait! There is double-reverse irony: For here I am, speaking about it, at a St. Thomas event, under St. Thomas auspices, as a St. Thomas professor, receiving a St. Thomas endowed chair, a great university honor. Has not St. Thomas thereby endorsed everything I have said?! Should not someone have stopped me from saying these things?

Ultimately, this dizzying series of bizarre reverse-reverse-ironies has to end up proving either one or the other of two things. The first alternative is that all of this tends to demonstrate the utter futility of attempting to regulate speech in a private university and the wisdom of adopting free-speech policies. Professors are a rambunctious, disorderly bunch and you should probably adopt free speech principles just so whatever they say ends up doing less damage to the institution's message. Students are even more difficult to control.

The other alternative is that you have to be a much, much more aggressive censor: You need to be much more careful about whom you choose to receive endowed university chairs.