RELIGIOUS LIBERTY: A BASIC PRIMER

The Right To Religious Liberty

America is a nation that, from its founding, has proclaimed the rights of religious liberty and religious diversity. In the eighteenth century, after hundreds of years of religious wars, persecutions, and hatreds in the west, the deepest minds of our civilization, religious and secular, asserted the need for religious liberty and its consequence, religious pluralism. For James Madison and so many of the American Founders, religious liberty was an inalienable right.

Before it even addresses freedom of speech and of the press, the First Amendment of the United States Constitution recognizes freedom of religion. It declares, "Congress shall make no law . . . respecting an establishment of religion or prohibiting the free exercise thereof." This simple phrase fulfills two vital purposes, as the

U.S. Supreme Court explained in its celebrated decision in *Cantwell v. Connecticut* (1940). First, the "Establishment Clause" of the First Amendment "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." In other words, freedom of conscience and the freedom to choose and to belong to a religion or religious organization, or to none at all, cannot be restricted by law. The government may not establish a religious orthodoxy, nor advance a specific religion, nor promote religion in general. This principle—that the government must be neutral on the subject of religion—has been confirmed many times by the Supreme Court, most recently in the case of *Zelman v. Simmons-Harris* (2002). In its decision, the Court affirmed the constitutionality of school voucher programs in which the state gives funds for tuition assistance to individual citizens who then may choose to spend it at either secular or religious schools. The Court held that such programs are constitutional because they have neither the "purpose" nor the "effect" of "advancing or inhibiting religion." The program, said the Court, "is neutral in all respects toward religion." Second, the "Free Exercise Clause" protects the freedom of religious citizens to practice a

The *Establishment Clause* of the First Amendment prevents the state from forcing any form of religion or religious creed on the individual.

chosen form of religion. The religion clauses of the First Amendment assure liberty not only to the citizen's religious sensibilities and practice, but also to the citizen's moral, ethical and conscientious precepts when these function for the nonbeliever in the same ways that religion functions for the believer. "Thus," the Supreme Court made clear in *Cantwell*, "the Amendment embraces two concepts—freedom to believe and freedom to act." In short, the meaning of the religion clauses was stated clearly by the Supreme Court in *Zelman*: The state may not "advance" (Establishment Clause) nor "inhibit" (Free Exercise Clause) religion.

The *Free Exercise Clause* of the First Amendment protects individuals and groups from government interference in the practice of their religion.

The "freedom to act," the freedom protected by the Free Exercise Clause of the First Amendment, is not unlimited, however. The government—and that includes *public* universities, because they are governmental entities whose powers are kept in check by the Bill of Rights—may restrict religious liberty under certain circumstances.

The precise extent of the government's ability to regulate religious practice is the subject of much misunderstanding. Recent changes in the law, particularly in the civil rights area, have led many university administrators

(and their legal advisers) to believe that they have vast authority—even an obligation—to regulate the religious practices of students, faculty members, and religious organizations. This view, however, is profoundly mistaken. In fact, the recent legal trend has been precisely the opposite: toward an *expansion* of the religious liberty of individuals and organizations, of believers and unbelievers alike.

There is a widespread notion that religious belief and practice must be curtailed to protect the civil rights of others. Laws and regulations indeed extend what are commonly called "rights" to individuals. The Bill of Rights (the first ten amendments to the U.S. Constitution), however, is the foundation and heart of our liberties. The First Amendment explicitly states a set of civil liberties protected by the Constitution, in particular, the freedoms of speech, press, and religion. These liberties set the boundaries to claims of newer and newer "rights." Individuals claim "rights" of equal access to group membership and leadership or "rights" of never being "offended" or "excluded." In short, some individuals believe that "civil rights" might somehow trump the "civil liberties" of those who exercise such constitutionally protected liberties as freedom of speech, freedom of the press, freedom of religion, and what follows from them, freedom of association.

For example, the Boy Scouts of America were recently involved in litigation over a state's attempt to compel

them to admit gay scouts and scout leaders. The U.S. Supreme Court, however, ruled that the Scouts have a right to determine the nature of their own voluntary association, social message, and organizational mission. The issue, of course, is not whether governmental authorities, a majority of citizens, FIRE, or strong minorities agree or disagree with the Scouts, but whether private groups like the Scouts, including gay political or social groups, may determine their own mission and membership.

Most recent confusion about religious liberty has arisen from the issue of an appropriate legal "test" for government action. Obviously, the government may restrict religious practices that include murder, theft, and other felonies, but where do we draw the line? What uniform standard will be used to judge the legality of government limitations on religious practice? This standard has changed twice in the last forty years.

In 1963, the Supreme Court decided the case of *Sherbert v. Verner*. In *Sherbert*, as it is known, a woman challenged a state's decision to deny her request for unemployment benefits. The state's decision was based on her refusal to work on Saturday, the Sabbath Day of her faith. The Supreme Court held that the state violated the Free Exercise Clause of the First Amendment when it required, in exchange for a government benefit (unemployment compensation), a change in religious practice (nonobservance of Sabbath rest).

This decision, by itself, was unremarkable. What set *Sherbert* apart, however, was the legal standard that it introduced. Justice William Brennan, writing for the Court, stated that if a government action imposes a significant burden on religious practice, that action could be justified only if

1) it advances a "compelling state interest"; and
2) "no alternative forms of regulation" would suffice. *Unless both requirements of that test could be satisfied, the government's action would be unconstitutional and invalid.*

This standard is known, among lawyers and in courts, as "strict scrutiny." It is not sufficient for the state to wish to regulate religion to achieve this or that "good." Rather, to overcome the powerful presumption in favor of religious liberty, the state must have the most urgent—that is, "compelling"—need to act, and it must show that this need could not be satisfied by some other more narrowly tailored and less intrusive regulation. Further, the regulation may not be simply a disguised attempt to interfere with a religious practice.

The standard set by *Sherbert*—although the Supreme Court occasionally, but rarely, departs from it—marked a very significant advance in "free exercise" jurisprudence and provided vital protection for religious liberty. It was very difficult for the government to prove that "compelling" governmental interests justified specific regula-

tions restricting religious liberty. Courts became and remain justifiably reluctant to believe that a government is "compelled" to limit core individual freedoms.

In 1990, however, the standard underwent a change whose scope and application is both controversial and widely misunderstood. In *Employment Division v. Smith*, the Supreme Court decided the case of two individuals punished for the religious use of peyote, an illegal drug. Peyote is ingested for sacramental purposes during some ceremonies of the Native American Church. The Supreme Court upheld the State of Oregon's decision to deny unemployment benefits to the individuals, and, in so doing, it changed more than two decades of precedent.

Again, the crucial issue is the standard that the Court established in *Smith*, as this case is known. That new standard was that the government was not required to satisfy "strict scrutiny"—that is, to demonstrate both that its regulations furthered a "compelling state interest" and that no alternative forms of regulation would serve the same purpose. Instead, the government needed only to demonstrate that its restriction of religious practice arose *not from any attack on religion*, *but on the basis of a valid law*, *generally applicable to all citizens*—in legalese, a "valid and neutral law of general applicability." In other words, the Free Exercise Clause, by itself, would not protect individuals from state restrictions on religious practice (such as the use of an illegal drug) if the state was

not specifically targeting religion, but was simply enforcing a law equally applicable to all. (By such reasoning, some argued, the state could have banned sacramental wine in Catholic and other masses during Prohibition.)

In the controversy that followed this decision, many governmental bodies, in a rush to regulate religious practice, chose to ignore the clear force with which many aspects of the Supreme Court's ruling preserved certain strict standards. First and foremost, the Court had stated emphatically that state action toward religious organizations must be *neutral*. In other words, the government—although freed from the "compelling state interest" standard—did not have the right to enact laws designed primarily (or even partially) to suppress the practice of religion. For example, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993), the Supreme Court overturned the City of Hialeah's attempt to ban ritual animal sacrifice, finding that the purpose of the statute was the suppression of Santeria religious worship (practiced by some Caribbean-Americans).

Religious individuals and groups can *enhance* the level of constitutional protection by combining their First Amendment *free exercise* rights with other constitutional rights—such as *freedom of speech* and *freedom of association*.

While *Smith* weakened the force of free exercise claims, religious individuals and groups could strength-

en those claims by "coupling" or "bundling" them with other constitutional rights. If religious individuals were confronted by a government policy that restricted their religious practice, they often argued rightly that the policy violated *not only* free exercise rights, but also rights to free speech and free association. If, indeed, state actions affect other constitutional rights while regulating religious practice, then the standard changes, and "strict scrutiny" again will often apply to official actions, thus reestablishing the highest hurdle for government activity to overcome. ("Freedom of association" is not explicitly mentioned in the Constitution. However, the Supreme Court long has held that the right to free speech is virtually meaningless without a corresponding right to form organizations, such as the NAACP, the Christian Coalition, the ACLU, and the Republican and Democratic Parties, for example, in order to advance particular viewpoints and to associate with others of like mind. In short, "freedom of association"—without which freedom of speech would be profoundly weakened—is implied by the Constitu-

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Freedom of association protects your right to form organizations, to advance particular viewpoints, and to associate with others of like mind. Courts have ruled that free association rights apply to religious individuals and groups.

tion's Bill of Rights. Indeed, there exists an explicit Constitutional right to free assembly. The First Amendment protects "the right of the people peacefully to assemble," a self-evident protection for private organizations.)

Those standards—government neutrality and strict scrutiny when other constitutional rights are involved—critically limit the state's regulation of religious practice. Administrators, faculties, and student judiciaries at public colleges and universities—eager to impose their secular orthodoxies on campus—often view the *Smith* decision as granting them a free hand to regulate religious practice on campus. Nothing could be further from the truth. *Campus policies that inhibit religious practices almost always inhibit the rights of free speech, association, and assembly.*

Furthermore, and this has affected more recent Court rulings, the *Smith* decision produced a very intense and critical response from the public, from Congress, and from both mainstream and minority religious groups. Indeed, Congress passed and President Bill Clinton signed legislation to correct what they saw as the serious ills of *Smith*, but the Supreme Court judged such

attempts to be unconstitutional on grounds of the separation of powers. (The Court found that Congress did not have the power to expand or to contract constitutional rights.) Nonetheless, the Court began to understand that it had entered dangerous territory in limiting the religious rights not only of Native American Church members, but also of *all* Americans. In subsequent cases the Court has pulled back dramatically, narrowing the application of the *Smith* doctrine and keeping much of "strict scrutiny" intact. For example, in the *Hialeah* case mentioned above, Justice Kennedy's opinion reads as a virtual "how-to" guide for lawyers who wish to circumvent *Smith* and apply strict scrutiny to government decisions. *Hialeah* restores strict scrutiny to many situations: when a law specifically mentions religious practice, when there are hints of antireligious motives by the government, or when the law affects religious practice alone.

Even in light of recent limits on the *Free Exercise Clause*, courts will still give *strict scrutiny* to government regulations that *mention religious practice*, that are *motivated by antireligious bias* or *have an impact upon religious practice alone*.

In the wake of the *Hialeah* case, it is now unclear whether the *Smith* test retains much viability. If the government takes an action or enacts a law that impinges upon religious rights alone, then there is a

good chance that *Hialeah* would offer the religious individual or group the protection of strict scrutiny. If the government action implicates more than just religious rights (such as rights to free speech or free association), then religious individuals or groups will be able to "bundle" their religious rights with these other rights and again be protected by strict scrutiny.

For many first-rate legal minds, then, the test established by *Sherbert*, that of "compelling state interest," is still unsettled in its scope, and may still apply to a broad range of cases. What is wholly clear, however, is that for the state legally to regulate religious practice, the restriction in question must, at the very least, be neutral *and* must not inhibit the exercise of other, related constitutional freedoms. *If a public university discriminates among viewpoints by limiting specific religious practices or by denying to one religious group or individual a benefit that it offers to other religious groups or to secular organizations, then its actions will almost certainly be deemed unlawful.*

What Does It Mean, Legally, To Be "Religious"?

The right to religious liberty is not limited to members of mainstream churches, or to fundamentalist Protestants, or to observant Catholics, or to Orthodox Jews. Indeed, the rights of religious liberty are not the exclusive realm of those who would define themselves as particularly "religious." It is a common misperception

that only those individuals who attend church, mosque, or synagogue regularly either care about or are affected by issues of religious liberty.

The right to the free exercise of "religion" is not limited by conventional or orthodox understandings of the nature of "religion" or "religious practice." Indeed, the Free Exercise Clause protects both the beliefs and practices of those whose religion may not be based upon belief in God (nontheists) and those whose religion is founded upon belief in a Supreme Being (theists). The Supreme Court has made clear that freedom of religion includes a wide variety of deeply held nontheistic beliefs that play a role in someone's life similar to that played by the belief in God in the life of a more traditionally religious person. The religion clauses of the First Amendment are best understood as guardians of *everyone's* freedom of conscience—and of *everyone's* particular ideas of ultimate meaning and ultimate spiritual authority, including the freedom of those who disbelieve.

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Although the Supreme Court has never precisely defined "religion," it has given religious liberty stun-

The *Free Exercise Clause* protects even those individuals who do not define themselves specifically as "religious."

ningly broad scope. First, as noted, one does not have to define oneself specifically as "religious" to receive constitutional religious protections. In *United States v. Seeger* (1965), the Court held that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God" could be classified as religious.

In the groundbreaking case of *Welsh v. United States* (1970), the Supreme Court built on its decision in *Seeger*. It reviewed the appeal of an individual who had sought conscientious objector status under a statute that exempted from military service individuals who, by reason of "religious training and belief," were conscientiously opposed to war in any form. Mr. Welsh, however, had stated that he could not affirm or deny belief in a "Supreme Being," and he had struck the words "my religious training" from the form that requested the exemption. He was convicted for refusing to accept induction into the armed services. Reversing that conviction, the Supreme Court found that Welsh's beliefs—including his belief that taking any life was morally wrong—were more than "a merely personal honor code" and were held with "the strength of more traditional religious convictions." Consequently, he was entitled to receive the "religious" exemption to military service.

Second, if individuals do define themselves as religious, they do not have to belong to a theistic religion to receive the protection of the religion clauses of the Constitution. The Supreme Court specifically rejected any limitation of "religion" to theistic religions in *Torcaso v. Watkins* (1961), a case invalidating a Maryland constitutional provision that required appointees to public office to declare a belief in the existence of God. In extending protection to a Secular Humanist challenging the Maryland law, Justice Hugo Black, writing for the Court, specifically listed a number of prominent, nontheistic religions, citing "Buddhism, Taoism, Ethical Culture, Secular Humanism, and others."

You do not have to belong to a theistic religion to receive the protection of the religion clauses of the First Amendment; nor do you have to belong to an "organized" religious group.

Third, religious protections are not limited to members of an "organized" religious group. In *Frazee v. Illinois Department of Employment Security* (1989), the Supreme Court allowed a Christian who was not a member of an established religion or sect to receive unemployment benefits despite his refusal to work on Sundays. Justice White, writing for a unanimous Court, explained that the protection of the Free Exercise Clause was *not* limited to those "responding to the commands of a particular religious organization."

Fourth, individuals can assert religious liberty claims even if their views differ from those of their church or from other members of their religion. In *Thomas v. Review Board of Indiana Employment Security Division* (1981), the Supreme Court reversed Indiana's decision to deny unemployment benefits to a Jehovah's Witness who quit his job because his religious beliefs forbade participation in the production of armaments. Indiana courts had upheld the decision to deny benefits, finding that Thomas's views regarding the production of tank turrets differed from those of other Jehovah's Witnesses and were not those of "his religion." The Supreme Court emphatically disagreed with such a requirement of conformity, holding that "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."

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These decisions may be seen as the Supreme Court's recognition that not only are minority religions entitled to constitutional protection (a doctrine that has long been established), but that quite unconventional religions, and even what might be called "substitutes" for religion, are entitled to the same protection. The doc-

trine of protected religious diversity has taken profound hold in constitutional jurisprudence.

Religious liberty, thus, exists for all individuals—believers and unbelievers—who hold sincere and meaningful beliefs about ultimate issues in life. Such beliefs are of transcendent importance to many individuals. State actions that strike at those beliefs, that offend one's conscience, may very well involve and implicate the First Amendment. Citizens should not limit their liberty—nor shrink back in the face of repression—simply because their consciences place them outside the mainstream of American life, or because their "church" is small, or because no one else shares their views. Liberties exist for a minority as much they do for the majority. That is the nature of a free and decent society.

Public Versus Private: The Limits of Constitutional Protection

To this point, this discussion of religious liberty has focused on protections offered by the First Amendment and constitutional law, which restrict the behavior of the state, including public colleges and universities. However, it is as important to understand what the Constitution does not protect as it is to understand what it does protect. The Constitution of the United States protects individual freedoms from *government* interference. It does not, as a rule, protect individual freedoms

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from interference by *private* organizations, such as corporations or private universities. For example, while a state could never create a Christian academy or mandate attendance at Bible classes and chapel services, voluntary private organizations have a right to do precisely such things. Thousands of church-based schools and colleges exist in America, and these private, religious organizations are free to mandate religious practice, to forbid what they judge to be immoral behavior, and to restrict speech. Private organizations have freedoms denied to government—the freedom to impinge on constitutional liberties that are protected from governmental interference. Indeed, the Constitution guarantees the "free exercise" of those liberties, because we could not have a free and pluralistic society if private organizations did not enjoy this freedom of belief and practice.

The case of private universities serves well to illustrate this distinction. Despite their theoretical freedom to restrict speech, private, secular universities once prided themselves on being special havens for free expression—religious, political, and cultural. Indeed, many of America's great private educational institutions have tra-

ditionally chosen to allow greater freedom than public universities, even permitting forms of expression that public universities could legally prohibit. Until recently, few places allowed more discussion, more diverse student groups, and more cutting-edge expression than America's elite private universities.

Unfortunately, that now has changed. Even America's best private, secular, and liberal arts colleges and universities are becoming centers of censorship and repression on behalf of campus orthodoxies. Speech codes, sweeping "anti-harassment" regulations, and broad and vague anti-discrimination policies increasingly have stifled discourse. More and more, vaunted Ivy League and similar universities are becoming places where a vast number of religious traditions and ideas are simply not welcome. Many secular, private schools appear as committed to their anti-religious orthodoxy as Bob Jones University is to its fundamentalist Christianity and anti-secularism.

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Although these private institutions are not bound by the First Amendment, there still are limits to what harm they may do to those who seek to exercise their religious liberty. Contrary to the wishes of many administrators

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and faculty members, private organizations do not possess unlimited power over the lives of members of those communities. Beyond the Constitution, we still live in a society of both common and statutory law. Here, a complex web of federal and state statutes and state common law provides considerable protections for the religious rights of individuals and groups.

For example, Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits private employers from discriminating against any employee "because of such individual's race, color, religion, sex, or national origin." ("Titles" are parts or sections of an Act.) While someone may be fired from a job for loudly criticizing a supervisor, a person may not be fired or otherwise discriminated against simply for being a man, or a black, or a Methodist. This provision is the legal source of workplace sexual harassment laws and regulations.

Statutes are laws written by legislatures—both state and federal—that often limit a university's ability to act against the interests of its students.

Another sort of protection arises from conditions that Congress may place on private organizations that choose to accept and use federal funding for various programs. Title IX, for example, famous for its impact on collegiate athletic programs, prohibits sexual discrimination at any school (private or public) that receives federal funds: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." (Here, however, Congress recognized the necessity of not interfering with the free exercise of religion by exempting from the act "educational institutions of religious organizations with contrary religious tenets.") Title VI prohibits discrimination on the basis of race and ethnicity: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Since virtually every university in America receives some amount of federal funds, they are almost all bound by these restrictions. Further, individual states have passed their own laws, some of which simply mirror federal laws and constitutional requirements, and some of which create their own unique requirements.

For students at private colleges and universities, however, the most relevant law is state common law. The

phrase "common law" is an ancient term for legal rules that are created, adapted, and applied not by legislatures or city councils but by juries and judges over a long period of time. Most arose from the rules that worked in keeping the peace and fairness of civil society. The common law typically encompasses legal rules that govern contracts and torts (that is, things that cause harm), or, more technically, "civil wrongs" (such as product liability, libel, medical malpractice, or car accidents involving negligence or recklessness). Often, the origins of a specific element of common law—such as the imposition of monetary liability for negligent acts that harm others—stretch back hundreds of years to the fifteenth and sixteenth centuries. Without common law, there would have been no rules but the right of the strongest. Individual states have each incorporated varying degrees of common law into their legal systems. In general, however, common law prevents a private college or university from committing fraud or breach of contract in its dealings with individuals, or from harming them wrongfully.

State *common law* rules can provide considerable protection to private school students. In general, the common law prevents a private college or university from committing *fraud* or *breach of contract* in its dealings with individuals and groups.

Given this complex system, which varies state by state,

it is difficult to talk about "student rights" as if they were the same for everyone, everywhere. Students at Brown University in Rhode Island have common law rights substantially different from students at Harvard University in Massachusetts or at Vanderbilt University in Tennessee. Different states have different legal doctrines.

To understand your rights as a student, therefore, you must ask the following questions: 1) Is my college or university a public institution? If so, its actions are limited by the First Amendment and by federal and state statutes and state common law. If it is a private institution, it still will be limited by federal and state statutes and state common law. Thus, you will need to know 2) what are my statutory rights? and 3) what are my state common law rights? To help answer the third question, concerning your common law rights, it will be useful to know what the school itself says in its student handbooks, catalogues, and disciplinary codes. In these, you will find its promises to its students, many of which may be legally binding. In the pages that follow, this guide will explain in more detail the significance of these questions and will provide some universal, generalized guidance that will help you to identify some of the primary threats to religious liberty on the modern campus and to plan responses to potential persecution, oppression, or unequal treatment.