Religious Liberty on Campus

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof … ."

This primer outlines some of the freedoms students have on campus because of religious liberty. For a thorough analysis, consult FIRE's *Guide to Religious Liberty on Campus*.

The First Amendment enshrines religious liberty as one of our most fundamental and cherished freedoms. American courts have come to view this as protection for any closely held belief, so this protection serves as a bulwark against interference with our fundamental freedom of conscience. Below is a short guide to help you understand how these rights play out on the modern college campus:

The First Amendment lays out religious liberty in two clauses, the Establishment Clause and the Free Exercise Clause:

1. The Establishment Clause bars official governmental endorsement of or preference to any given belief system or lack thereof.
2. The Free Exercise Clause restrains the government from restricting any closely held conviction, religious or otherwise.

Protections under the Free Exercise Clause are not exclusive to religious individuals or to official doctrines. The closely held beliefs of citizens, even beliefs that are not rooted in official religious doctrine, are protected. Thus, believers and nonbelievers alike are protected from any unreasonable governmental infringements upon their freedom of conscience.

The freedom to act upon religious or other strongly held convictions is not unlimited. The government regulates conduct of all sorts, but for the government to restrict the free exercise of one's religion, the restriction must be a neutral conduct restriction generally applicable to all of society, and it must not restrict the exercise of other related constitutional freedoms. Statutes are frequently deemed in violation of the free exercise clause if the law specifically mentions religious practice, when there are hints of anti-religious motivation, or when the law affects religious practice alone. Constitutional challenges under the Free Exercise Clause are most successful if coupled with violations of an individual's or group's freedom of speech and freedom of association. Courts have generally found that freedom of association, and the related freedom to exclude, is so closely intertwined with free expression and a group's ability to present a cohesive message that restrictions on free association for private groups, clubs, and organizations are constitutionally suspect.

Crucially, a standard of "strict scrutiny" applies to any discrimination committed against an individual or group by the government merely for their religious beliefs. Strict scrutiny means that to be constitutional, government action must:

1. advance a compelling state interest; and
2. be the least restrictive means for achieving that interest; and
3. be narrowly tailored to achieve that interest.

Most of the time, courts are unwilling to find that restrictions based on religious beliefs meet this demanding standard.

On a college campus, one major factor in determining students' religious liberty rights is whether the institution is public or private.

PUBLIC INSTITUTIONS

As governmental institutions, public colleges and universities must obey the Constitution and ensure that students enjoy all rights found within it. This means that First Amendment rights are guaranteed to public college students. Public universities are also bound by state laws, which may provide students with additional rights and liberties. In this way, public colleges are required to provide access on equal terms to school facilities for all student organizations, including religious groups. A public university cannot deny a student group funding or access to the same resources supplied by the school to other student groups simply because the administration disagrees with the group's religious beliefs or lack thereof. Likewise, public universities cannot punish students for viewpoints expressed through speech and protest, including religious convictions.

PRIVATE INSTITUTIONS

As nongovernmental organizations, private colleges and universities are not obligated to provide students with all of the freedoms guaranteed by the Constitution. Religious liberty is not a right that private universities are required to provide. However, private colleges are bound by state law, federal statutes, and the rights promised to students in university documents. Universities are often legally bound to the promises they make in student handbooks, guides, and other documents under state contract law. This means that if a university promises the right to freedom of conscience or religious liberty, many states will require them to fulfill this contractual agreement.

FREQUENTLY ASKED QUESTIONS

Q: Does religious liberty also extend to those who adhere to a nontheistic religion or strongly held conviction?
A: Yes. Adherents to Buddhism, secular humanism or any other closely held conviction are also protected by the religious liberty clauses in the First Amendment.

Q: What exactly is hate speech? Can my religious liberty and freedom of conscience be denied at a public university on the grounds that it constitutes hate speech?
A: There is no legal definition of hate speech in the United States, and no one definition on which

all people agree. When used, the term usually refers to speech that someone considers to be unacceptably offensive or degrading on the basis of race, gender, sexual orientation, or other similar bases. Hate speech is commonly (and wrongly) thought to be unprotected under the First Amendment. In fact, most hateful speech is constitutionally protected. There are some exceptions to the First Amendment (such as "true threats" and harassment), but hate speech is not recognized as unprotected speech. Therefore, religious speech and beliefs cannot be restricted even if students or others at public universities label it as hate speech.

Q: Does freedom of association protect religious student groups' ability to limit membership based on adherence to their chosen doctrine at a public university?
A: Yes and no. While the courts have traditionally recognized freedom of association as integrally tied to free expression, this may be somewhat limited in the context of official student group recognition that public universities provide. In the 2011 *Christian Legal Society v. Martinez* case, (see below in U.S. Supreme Court section), the Supreme Court held that a public university can require groups to which it provides funding or recognition to accept all persons as members, thereby restricting a group's ability to discriminate based upon ideological conviction or sexual orientation, as long as all student groups are required to take all comers. The courts, however, are not completely settled on how much further schools may go, and the case certainly does not give public colleges the authority to restrict the expression of groups without official recognition or to deny official recognition based on the groups' viewpoint alone.

Q: Do I have a right to freedom of association at a private institution of higher education?
A: It depends. Universities are usually bound to keep the promises they make to students in their handbooks, conduct codes, and other university materials. So if your school promises a right to freedom of association, but later denies this right, then you may have a case. However, the specifics of contract law differ from state to state. This means that while many states require strict adherence to stated promises, some do not.

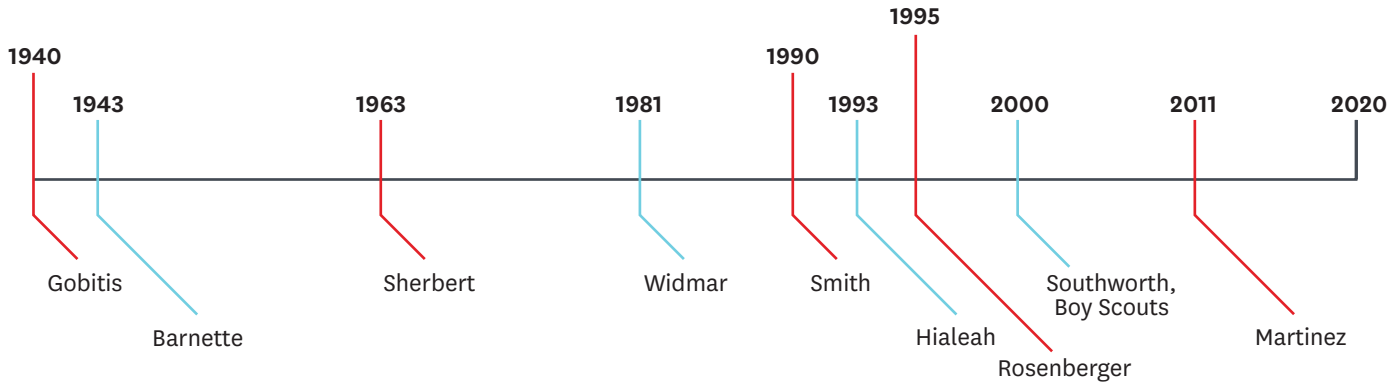
Q: Can a public university deny the official recognition of a student group deemed too similar to an already existing student group?
A: No, a public university (including a student government that distributes mandatory student fees) cannot deny recognition of a student group simply because it believes there are similar groups on campus.

Q: What are my rights at a religiously affiliated university?
A: Like any other private university, your rights at a religious university are contractual promises that the school makes in its student handbook, conduct codes, etc. Often, at a religious institution, these rights may be explicitly restricted in student guides and other associated material.

U.S. SUPREME COURT DECISIONS

Concepts of religious liberty and freedom of association have evolved over time, and their applications on public university campuses have been at times contradictory. Here is a brief timeline, with associated case summaries, to provide some context for the current case law. The legal concepts that apply in the present, and their associated historical roots and evolution, are laid out below.

Minersville School District v. Gobitis (1940): In this case, the Supreme Court held that mandatory flag salutes were constitutionally permitted infringements on the religious liberty and free speech rights of practicing Jehovah's Witnesses who, for religious reasons, rejected saluting the flag as a form of idol worship. The Court held, in the 8–1 decision, that the school's interest in fostering "national cohesion" was "inferior to none in the hierarchy of legal values." Such legislative and educational initiatives were seen to trump freedom of conscience concerns for public school children.



West Virginia State Board of Education v. Barnette (1943): In 1943, the Court took a surprising turn and overruled its very recent precedent in the *Gobitis* case. The case struck down mandatory flag salutes. The Court, in the 6–3 decision, determined that "[c]ompulsory unification of opinion" was antithetical to First Amendment values and was not a compelling interest of the government, even in a primary school setting and even during the patriotic fervor of World War II. Justice Robert H. Jackson wrote in the majority opinion that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Sherbert v. Verner (1963): Adell Sherbert, a member of the Seventh-Day Adventist Church, was fired from her job for refusing to work on Saturday and subsequently denied unemployment benefits by the State of South Carolina. In a 7–2 decision, the Court found that government actions would be found legitimate only if they advanced a "compelling state interest" and if "no alternative forms of regulation would suffice."

Widmar v. Vincent (1981): This case, decided 8–1, found that public universities providing a platform for speech had to remain viewpoint neutral to avoid violating either the Establishment Clause or the Free Exercise Clause. A recognized student group called Cornerstone, a fundamentalist evangelical Christian student-led organization on campus, was denied access to school classrooms that had been made open for reservation by all recognized student organizations. The Court held that the restriction on Cornerstone's access was viewpoint-based, and therefore unconstitutional.

Employment Division, Department of Human Resources of Oregon v. Smith (1990): In this case, the Supreme Court found in a 6–3 decision that an Oregon statute prohibiting the consumption of peyote, used in Native American religious ceremonies, did not violate the Free Exercise Clause. The Court ruled that a religious conviction did not exempt practitioners from abiding by an otherwise legitimate

governmental restriction. The Court also found that while states have the power to exempt otherwise illegal activity for religious purposes, they are not required to do so. The decision, in effect, rolled back the strict scrutiny standard of *Sherbert*.

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah (1993): In response to the judicial rollback of strict scrutiny review in *Smith*, Congress passed the Religious Freedom Restoration Act, reinstating strict scrutiny. The act, however, was later struck down as applied to the states by the Supreme Court for violating separation of powers. Despite this ruling, the Court seemed to recognize that it had set a dangerous precedent with *Smith*. In the *Hialeah* ruling, the Court unanimously decided that a city ordinance banning ritual animal sacrifice was unconstitutional. The Court held that the rule was neither neutral nor a rule of general applicability, as it explicitly burdened religious activity. After *Hialeah*, courts would apply strict scrutiny when a law specifically mentions religious practice, when there is evidence of anti-religious motives by the government, or when the law affects religious practice alone. The ruling also made it clear that strict scrutiny would apply if the government action violated other constitutional rights, including free speech and free association.

Rosenberger v. Rector and Visitors of the University of Virginia (1995): In this case, the Court decided 5–4 that the First Amendment mandated that the University of Virginia provide funding to a student-run religious publication. The UVA policy in question blocked funding to any religious group advocating belief or worship in a deity or ultimate reality. Because the funding in question was offered to all student groups, including secular publications, and offered a government-sponsored forum for speech, the university's denial of publication funding to a religious group constituted viewpoint discrimination and violated the Establishment Clause. The case firmly established public universities' obligations to treat religious groups as they treat other student groups.

Boy Scouts of America v. Dale (2000): In another 5–4 decision, the Court found that applying a New Jersey public accommodations anti-discrimination statute to the Boy Scouts was an unconstitutional infringement on the organization's First Amendment rights. The Court held that the state mandate that the Boy Scouts not discriminate based upon sexual orientation violated the group's right to expressive association and burdened its ability to present a cohesive message.

Board of Regents, University of Wisconsin System v. Southworth (2000): In this case, the Court unanimously decided that a university policy mandating that students pay a fee to subsidize student activities was not a violation of the students' free speech rights. The student-plaintiff in the case claimed that he should not have to pay a fee that went to groups with whom he disagreed. However, the Court held that the university's fee system passed First Amendment muster so long as the university was funding an open forum system that did not discriminate based on viewpoint in doling out funds.

Christian Legal Society v. Martinez (2010): In this case, the Court decided 5–4 that it is constitutional for a public university to enforce an "all comers" policy that requires all registered student groups to allow "any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." In this case, the University of California, Hastings College of the Law required that

all registered student groups allow "any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." Christian Legal Society filed suit, claiming that the policy violated its right to free association. The Court held that the restriction was reasonable and viewpoint neutral, advancing a legitimate educational goal of the institution. The dissent, written by Justice Samuel Alito, strongly condemned this interpretation. Alito wrote that freedom of association could not be separated from freedom of speech, in a similar line of reasoning to the *Boy Scouts* case. He characterized the majority opinion as accepting that there would be "no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning."

You can learn more about *Martinez* and how it relates to student's First Amendment rights by reading FIRE's FAQ on this case.