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The Law of Religious Liberty and Higher Education

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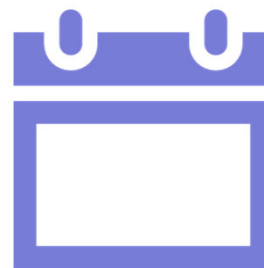
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Agenda

- Constitutional religious liberty
- State Religious Freedom Restoration Acts
- Title VII and state non-discrimination laws



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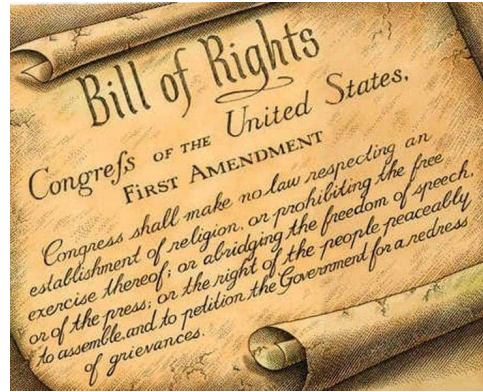
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Constitutional Religious Liberty



Where does the Constitution protect religious liberty?

- First Amendment, Clause 1
- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”
- Applies to the federal government and state governments (through “incorporation” by the Fourteenth Amendment)



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What does it mean that the state cannot “establish” religion?

- Government actions cannot have the principal or primary purpose of advancing or inhibiting religion
- Government actions must avoid excessive entanglement with religion
- Limitations on government sponsored religious symbols and prayer
- Religion may benefit from religiously-neutral government programs

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Example

State university wishes to establish and run a divinity school to prepare ministers for a particular religious denomination to the exclusion of other denominations. Divinity school would be supported by state funds and tuition charged by the university.



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Poll Question

- Can the state university establish the divinity school?
 - Yes
 - No
 - **Answer: No. The Establishment Clause would prohibit such a program.**

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Example

Dean of Business School at public university insists on beginning each faculty meeting with a spiritual invocation, rotating among religious viewpoints. Dean requires all faculty to attend and to stand and be silent while prayer is said.



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Poll Question

- Does this violate the Establishment Clause?
 - Yes
 - No
 - **Answer: Yes.**

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Example

Religious student group seeks to be recognized by public university so it can access funding opportunities paid for by student fees. University allows all other kinds of student groups to register but bans registration of religious groups.



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Poll Question

- Is the University's ban permissible?
 - Yes
 - No
 - **Answer: No, University's ban violates the Establishment Clause.**

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Example

State university allows community groups of all kinds to rent space in its conference center for a range of different events, including political events and philosophy symposia. University refuses to rent to any group that seeks to hold a religious event in the conference center.



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Poll Question

- Can the University refuse to rent to groups seeking to hold religious events?
 - Yes
 - No
 - **Answer: No.**

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Example

Public university allows only recognized student groups to use space in its Union. Outside religious group seeks to use space in student Union but is denied access because it is not a recognized student group.



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Poll Question

- Can the University deny the outside religious group access to the space?
 - Yes
 - No
 - **Answer: Yes. This does not violate the Establishment Clause.**

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What does the free exercise clause protect?

- Government cannot take actions specifically targeting free exercise without satisfying “strict scrutiny.”
 - Compelling government interest
 - Least restricting means of satisfying that interest
- Government can take neutral action that incidentally burdens religion as long as there is a rational basis for the action.
- If the government makes any exceptions for non-religious actions, it needs to make exceptions for comparable religious actions too.

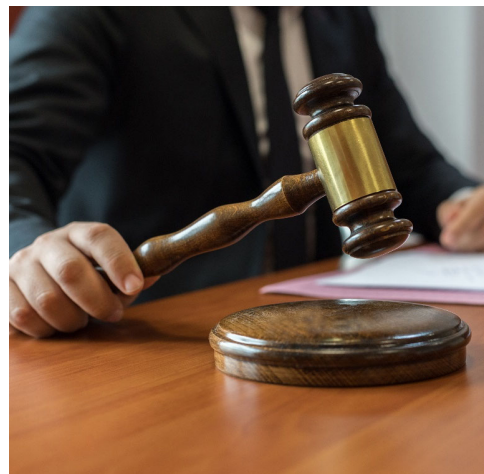
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At the Supreme Court (*Carson v. Makin*)

- Challenge to Maine program that pays for some students to attend private schools
- Two families that want to send their children to Christian schools argue the state’s exclusion of schools that provide religious instruction from the program violates the Constitution
- Supreme Court heard oral arguments in December 2021



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What are the arguments?

- Parents argue
 - Maine's exclusion of sectarian options violates the Constitution because it is not neutral toward religion nor generally applicable
- State argues
 - Public education "should be a nonsectarian one that exposes children to diverse viewpoints..."
 - Plaintiffs are not being denied a "generally available public benefit"

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Example

Public community college adopts a rule prohibiting proselytizing anywhere on campus. The college allows all other manner of speech on campus, including politicking and petition drives. The rule prohibiting proselytizing is not subject to strict scrutiny and therefore constitutional.



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Poll Question

- The rule prohibiting proselytizing is not subject to strict scrutiny and therefore constitutional.
- True or false?
- **Answer: False.**

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Example

Public university's code of conduct bans smoking of any kind on campus. Religious student wishes to smoke peyote on campus as part of religious ceremony.



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Poll Question

- Is the code of conduct religion neutral?
 - Yes
 - No
- Will the code of conduct survive rational basis review?
 - Yes
 - No
 - **Answers: Code of conduct provision is religion-neutral and thus not subject to strict scrutiny. It will likely survive rational basis review.**

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Example

Private college bans religious gatherings on campus to limit spread of COVID-19. But college allows a range of other gatherings, including political meetings, movies, and dances.



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Poll Everywhere

- Does the college's ban violate the free exercise clause?
 - Yes
 - No
 - Answer: No, because it is a private college
- What if the college was a community college?
 - The ban would violate the free exercise clause.
 - The ban would not violate the free exercise clause.
 - **Answer: College's ban on religious gatherings likely violates free exercise clause.**

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State RFRAs

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What is a RFRA?

- “Religious Freedom Restoration Act”
- Enacted by many states in response to Supreme Court’s *Employment Division v. Smith* opinion that applied rational basis review to religion-neutral actions that incidentally burden religion
- Usually prohibit state agencies (including universities) from substantially burdening exercise of religion without meeting “strict scrutiny”



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What is “strict scrutiny?”

- To substantially burden the free exercise of religion, governmental entity must show:
 - Compelling governmental interest
 - Burdening the free exercise of religion is the “least restrictive means” of furthering the compelling interest



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Example

State university has a compelling interest in prohibiting slaughter of animals in residence hall based on health and sanitary concerns. Prohibition substantially burdens religious practices of students who wish to engage in ritual slaughter of animals in residence hall in accordance with religious beliefs. University can demonstrate prohibiting slaughter in residence hall is the least restrictive means of furthering health/sanitary interest.



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Poll Question

- Has the University passed “strict scrutiny?”
 - Yes
 - No
 - **Answer: Yes.**

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Example

State university has a compelling interest in not having loud noises in a residence hall after 9:00 pm to allow students to sleep. To achieve interest, university prohibits all music in a residence hall after 9:00 pm. This rule burdens the religious practice of a student whose beliefs include sung, nightly prayer at 10:00 pm.



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Poll Question

- Does this prohibition meet strict scrutiny?
 - Yes
 - No
 - **Answer: No. Institution cannot demonstrate least restrictive means because not all sung, nightly prayer is loud. Regulation must be more narrowly tailored to loud music.**

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How are RFRAs enforced?

- Usually, by private lawsuits seeking injunctive relief, damages, attorney fees, and costs
- Sovereign immunity is not a bar
- May also be asserted as a defense to a judicial or administrative suit against the affected person
- Some state attorney generals may have enforcement authority



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Title VII and Non-Discrimination Laws

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Do civil rights laws protect religious liberty?

- Yes
- Title VII prohibits employment discrimination based on “religion”
 - But there is an exemption for religious institutions
- State non-discrimination statutes typically mirror Title VII
- Prohibit classic discrimination by adverse treatment as well as failure to accommodate
- Apply to both public and private institutions



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What is adverse treatment discrimination?

- Treating an employee adversely with respect to the terms and conditions of employment
- Where religion is the “motivating factor” in the adverse treatment



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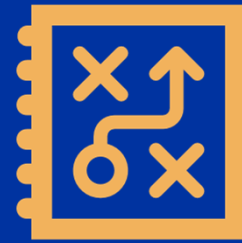
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Example

Supervisor at private, secular university disagrees with subordinate employee's religious beliefs, which supervisor views as heretical. Because of this disagreement, supervisor cuts employee's hours and fails to give employee raises despite giving them to similarly situated employees whose religious views align with supervisor's.



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Poll Question

- Can the supervisor cut the employees hours?
 - Yes
 - No
 - **Answer: No.**

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Example

Muslim employee at public university faces repeated joking and denigration from co-workers about employee's faith. Employee complains but supervisor fails to act. Employee develops anxiety and dreads coming to work.



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Poll Question

- Could the employee bring a hostile environment claim under Title VII against the employer?
 - Yes
 - No
 - **Answer: Yes.**

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What must an employer do to accommodate religious beliefs?

- Employer must accommodate employee's sincerely held religious beliefs or practices unless
- The accommodation would impose an undue hardship



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What does it mean to have a sincerely held religious belief?

- Whether the employee has a personal, genuinely held belief
- Belief does not have to be part of organized religion
- Belief does not have to be orthodox to the employee's claimed faith
- Religious belief can still be sincere even if recently adopted or occasionally violated
- Religious belief does not have to be validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine

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How do sincerely held religious beliefs impact COVID vaccines requirements?

- Basis for requesting exemption from workplace COVID-19 vaccine mandates
- EEOC guidance states employers should assume a request for a religious objection to a COVID-19 vaccination is based on a sincerely held religious belief.
 - Employer can make a limited factual inquiry into the request and seek additional supporting information.

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Are there state specific laws?

- Kansas HB 2001
 - Effective November 23, 2021
 - Forbids employers from inquiring into the sincerity of an employee's request for relief from an employer's COVID-19 vaccine requirement

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Example

Self-described Catholic employee professes belief that any vaccine derived in any way from fetal stem cells is inherently immoral and cannot be used regardless of its social benefit. However, the Pope issues guidance that certain vaccines are permissible if their connection to fetal stem cells is remote.



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Poll Question

- Is this a genuinely held belief?
 - Yes
 - No
 - It depends
 - **Answer: Likely, yes.**

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Example

Employee who previously self-described as a Christian reports they have converted to Islam and now seek a scheduling change to allow the employee time off on Friday for prayer.



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Poll Question

- Is the employee, who has only been a Muslim for a few days, expressing a sincere belief?
 - Yes
 - No
 - It depends
 - **Answer: Yes.**

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Example

University's application for religious accommodation requires employees to list the name of religious leader who can attest to sincerity of employee's religious belief. Employee indicates their religion does not have a hierarchy and all adherents are equal.



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Poll Question

- Can the institution deny the employee's request?
 - Yes
 - No
 - **Answer: No.**

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Example

Employee submits request for religious exemption claiming employee wants to be exempt from COVID-19 vaccine because vaccine has not been thoroughly tested, employee does not trust the FDA, and the government is “running peoples’ lives.”



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Poll Question

- Has the employee shown a sincerely held religious belief?
 - Yes
 - No
 - It Depends
 - **Answer: It depends. Likely a political, rather than religious belief.**

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What does it mean to create an undue hardship?

- The burden must be genuine and not speculative
- The burden must be more than *de minimus*. E.g.,
 - Costly
 - Compromises safety
 - Infringes rights of other employees
 - Violates CBA or seniority rights
 - Requires other employees to do more than their share of hazardous or burdensome work

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Example

University bookstore manager prohibits employees from wearing hats because it looks “unprofessional.” Jewish employee wishes to wear a yarmulke, which the manager considers a “hat.”



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Poll Question

- Does the manager need to accommodate the Jewish employee?
 - Yes
 - No
 - **Answer: Yes.**

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Example

Employee normally works on Fridays from 7:00 am to 5:30 pm. Employee wishes to schedule time off to attend Good Friday service and gives several weeks notice of the request.



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Poll Question

- Does the institution need to accommodate a schedule change?
 - Yes
 - No
 - **Answer: Yes.**

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Example

Employee works in the cafeteria at a public university. Employee professes a religious belief against wearing any kind of covering on his hands or head. Local health code requires food service workers to wear gloves and hair nets. 70% of employee's job duties include food preparation and service.



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Poll Question

- Does the University have to accommodate the employee?
 - Yes
 - No
 - **Answer: No. University does not have to accommodate employee because it would create an undue burden.**

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Example

University employee who works in student healthcare facility treating sick students professes religious opposition to COVID-19 vaccine as well as face-covering requirements of any sort. Institution has imposed a vaccine mandate with face-covering accommodation for those with religious objections to vaccine.



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Poll Question

- Is it an undue hardship for the University to accommodate the employee?
 - Yes
 - No
 - **Answer: Likely an undue hardship to accommodate an employee who refuses both the vaccine and mask where work necessitates interaction with sick students.**

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Example

College employee professes religious belief in constant evangelization. Employee seeks accommodation from workplace restrictions that bar employee from attempting to evangelize co-workers during working hours. Co-workers object that such an accommodation violates their own right not to be subjected to evangelization at a government workplace.



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Poll Question

- Is accommodating the employee an undue hardship?
 - Yes
 - No
 - **Answer: Yes. Accommodating the employee is an undue hardship.**

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