

RELIGION CLAUSES OF THE FIRST AMENDMENT

JANUARY 2021 SYLLABUS

Course Information:

- Course Number 6930; 1 Credit Hour
- The class will meet at the following times from January 11-15, 2021:
 - Monday through Thursday: 10 a.m. to 11:50 a.m. and 1 p.m. to 1:50 p.m.
 - Friday: 10 a.m. to 11:50 a.m.

Course Instructor:

- **KATHRYN KIMBALL MIZELLE, U.S. DISTRICT COURT JUDGE FOR THE MIDDLE DISTRICT OF FLORIDA**
 - If any questions arise, please email **chambers_fimd_mizelle@fimd.uscourts.gov** or call chambers at **(813) 301-6165**. Please flag in the subject line that it concerns this course.
- **Office Hours:** Please contact me via e-mail to schedule an appointment.

Required Texts:

- The reading assignments will primarily derive from the required text of Chapter 17 (Freedom of Religion) of Maggs & Smith's CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH (4th ed.). Additional reading assignments will consist of historical materials, cases, and other excerpts that will be listed here in the syllabus and publicly available. If any materials are not publicly available, they will be provided before each session.

Course Description and Objectives:

This compressed course offers an introduction to the Religion Clauses of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These provisions, referred to as the Establishment Clause and Free Exercise Clause, are the first rights enumerated by the Founders in the Bill of Rights, and they form the constitutional basis of religious liberty in the United States. This course will first explore the historical and jurisprudential foundations of both Clauses and then address the contours of the provisions as interpreted by the United States Supreme Court, asking how and why the Court's analysis has evolved. The course will also touch upon statutory causes of action that are closely related to the Religion Clauses, such as the Religious Freedom Restoration Act. The goal of the course is to begin to understand the original meaning of the Clauses, their development throughout the Court's jurisprudence, and to examine potential doctrinal directions of the pressing issues in the religious-liberty field of litigation.

Learning Outcomes:

After completing this course, students should be able to:

- Describe the historical underpinnings and jurisprudential development of the Establishment Clause and the Free Exercise Clause and related statutory causes of action.
- Explain the current litigation challenges surrounding the development of each doctrine.
- Articulate the kinds of religious-liberty claims that are cognizable in American courts, including the necessary allegations and defenses that parties would invoke, and identify the strongest legal arguments and policy support for competing positions and effectively advocate for either position.

Course Requirements:

- This course is open to students who have already taken the required first-year Constitutional Law class.
- Unless instructed otherwise in advance, you will **not** be permitted to use laptops, cell phones, or other electronic devices during class. Please do not bring any such devices into the classroom.
- Class attendance is mandatory. If you arrive late, it is your responsibility to see me after class to make sure I have marked you late rather than absent.
- This compressed course is one credit hour. Per ABA Standard 310, students must devote 120 minutes to out-of-class preparation for every “classroom hour” of in-class instruction. Accordingly, it is expected that you will spend at least 28 hours on class preparation and assignments.
- All other generally applicable policies of the Law School and University apply.

Online Course Evaluation:

- UF expects each student to provide feedback on the quality of instruction in this course by completing online evaluations at <https://evaluations.ufl.edu>. Evaluations are typically open during the last two or three weeks of the semester, but students will be given specific times when they are open by the Office of Student Affairs. Summary results of these assessments are available to students at <https://evaluations.ufl.edu/results/>.

Accommodations:

- Students with disabilities who wish to request an accommodation must first register with the Disability Resource Center by providing appropriate documentation. Once registered, students will receive an accommodation letter which must be presented to the instructor when requesting accommodation. Students with disabilities should follow this procedure as early as possible in the semester.

Grading:

The grading policy will be in accordance with the Law school’s curve and policies, which are available online. Your grade will be based on the following:

- Class participation, including attendance and meaningful engagement, constituting 20% of your grade.
- A take-home exam constituting 80% of your grade. The exam format will be similar to a writing competition where you will receive a hypothetical set of facts and be asked to argue on behalf of one party or the other using a closed universe of cases to support your position. I will provide a detailed grading rubric on the last day of the class along with the exam. To assist with blind grading, please identify your exam by using only your UF ID and do **not list your name** on the exam.
- The exam should be emailed to my chambers address listed above no later than **midnight on Monday, February 1, 2021**.

Make-Up Exams

The law school policy on exam delays and accommodations can be found [here](#).

RECORDINGS OF CLASS DISCUSSIONS

Students may not take, circulate, or post photos or videos of classroom discussions, whether they are in-person, hybrid, or completely online. Students failing to follow this rule will be referred to the College of Law Honor Code Council and the University's Office of Student Conduct and Conflict Resolution.

COVID POLICIES

Many students will have face-to-face instructional sessions to accomplish the student learning objectives of this course. In response to COVID-19, the following policies and requirements are in place to maintain your learning environment and to enhance the safety of our in-classroom interactions. I may take noncompliance into account when grading students or determining if a student may remain in the course.

- You are required to wear approved face coverings at all times during class and within buildings. Following and enforcing these policies and requirements are all of our responsibility. Failure to do so will lead to a report to the Office of Student Conduct and Conflict Resolution. You also will no longer be permitted on the UF Law campus. Finally, Dean Inman will also report your noncompliance to the relevant state board of bar examiners.
- This course has been assigned a physical classroom with enough capacity to maintain physical distancing (6 feet between individuals) requirements. Please utilize designated seats and maintain appropriate spacing between students. Please do not move desks or stations.
- Sanitizing supplies are available in the classroom if you wish to wipe down your desks prior to sitting down and at the end of the class.
- Be mindful of how to properly enter and exit the classroom. Practice physical distancing to the extent possible when entering and exiting the classroom.

- If you are experiencing COVID-19 symptoms (<https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>), please do not come to campus or, if you are already on campus, please immediately leave campus. Please use the UF Health screening system and follow the instructions about when you are able to return to campus. <https://coronavirus.ufhealth.org/screen-test-protect/covid-19-exposure-and-symptoms-who-do-i-call-if/>.
- Course materials will be provided to you with an excused absence, and you will be given a reasonable amount of time to make up work. <https://catalog.ufl.edu/UGRD/academic-regulations/attendance-policies/>.

Reading Assignments:

The required reading assignments for the five class sessions are listed below, but modifications will likely be made throughout the week. The additional materials are intended solely for personal enrichment and need not be read for class.

Session 1: Groundwork for Religion Clauses - Monday, January 11 (10–11:50 a.m.)

Please read these sources with the aim of understanding how the Founders viewed the purpose and meaning of the Clauses and the historical context from which they were reacting when drafting the Bill of Rights. Consider the following questions:

- What would those voting on the Bill of Rights have understood them to mean?
- Does the drafting history from the First Congress inform that inquiry?
- How was the role of religion viewed in the States versus the federal government?
- Why were the Religion Clauses included in the First Amendment with other rights about free speech and freedom of the press?

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1231–1237
- MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT (updated ed., 2013) (excerpt)
- M. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (2011) (excerpt)
- D. DRAKEMAN, CHURCH, STATE, & ORIGINAL INTENT (2010) (excerpt)
- Historical Documents (excerpt)

For additional sources on the historical context, please consult the following:

- *The Founders' Constitution*, volume 5 (available online at http://press-pubs.uchicago.edu/founders/tocs/amendI_religion.html)
 - Document 10: John Locke, A Letter concerning Toleration

- Document 13: Patrick Henry, Religious Tolerance
 - Document 15: Samuel Adams, The Rights of the Colonists
 - Document 62: *People v. Ruggles*
 - Document 69: Joseph Story, Commentaries on the Constitution, § 1872
- J. WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2011)
 - R. Garnett, *Religious Liberty, Church Autonomy, and the Structure of Freedom*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1585191.

Session 2: Establishment Clause Part 1 - Monday, January 11 (1–1:50 p.m.)

Consider the following questions while preparing for this session:

- Who was the Establishment Clause designed to protect?
- Where did the Court derive the “neutrality” principle from in *Everson*?

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1237-1246

For further resources, please consult the following books:

- PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004) (in particular, refer to Chapter 7: *Jefferson and the Baptists: Separation Proposed and Ignored as a Constitutional Principle*)
- DONALD DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2009)

Session 3: Establishment Clause Part II - Tuesday, January 12 (10–11:50 a.m.)

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1247–1266

Session 4: Establishment Clause Part III - Tuesday, January 12 (1–1:50 p.m.)

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1267–1295
- *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (skim only Chief Justice’s dissent)
- *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) (skim only Justice Thomas’s concurring opinion)

Session 5: Establishment Clause Part IV - Wednesday, January 13 (10–11:50 a.m.)

Consider the following questions:

- If you are counsel to the city of Gainesville, what practical steps do you advise your client to take if it wishes to display a religious symbol?
- What is the governing standard after *American Legion*? How would you analyze a newly constructed religious symbol on public property?

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1300–1333
- *American Legion v. American Humanist Society*, 139 S.Ct. 451 (2019) (read only the majority opinion)

Session 6: Free Exercise Clause Part I - Wednesday, January 13 (1–1:50 p.m.)

We will examine the development of the Free Exercise Clause up until *Employment Division v. Smith*. Consider the following questions:

- What sources does the Court rely upon and where does it derive its rules?
- In *Sherbert*, was the Court applying strict scrutiny when it requires the state to articulate a “compelling interest” before applying a neutral law that burdens someone’s religious freedom? What kind of governmental interest satisfies that?
- Was the law in *Yoder* “neutral and generally applicable”? Was it a *religious* belief?
- Was it consistent with the original meaning of the Free Exercise Clause? Would the Founders have anticipated these problems?

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1334–1348

For additional cases addressing the Free Exercise pre-*Smith*, you may review the following:

- *Watson v. Jones*, 80 U.S. 679 (1872)
- *United States v. Ballard*, 322 U.S. 78 (1944)
- *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952)
- *United States v. Seeger*, 380 U.S. 163 (1965)
- *Jones v. Wolf*, 443 U.S. 595 (1979)
- *Goldman v. Weinberger*, 475 U.S. 503 (1986)
- *Hernandez v. Commissioner*, 490 U.S. 680 (1989)
- *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)

Session 7: Free Exercise Part II - Thursday, January 14 (10–11:50 a.m.)

We will discuss the governing precedent for the Free Exercise Clause, Congress's and the States' reactions, and post-*Smith* developments. Consider the following:

- Did *Smith* change the law as articulated by *Yoder* and *Sherbert*? If so, did it correctly articulate the Free Exercise standard; if yes, why; if no, how so?
- Is assessing “purpose” a proper part of the analysis for considering whether the challenged law violates the Free Exercise Clause?
- In *Church of Babalu Aye*, focus on the majority opinion and consider which portions received a majority vote.

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1348–67
- *FNU Tanzin v. Tamvir*, 592 U.S. _ (Dec. 10, 2020), No. 19-71 (skim)

For further reading on the *Smith* debate, please consult these law review articles:

- Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990)
- Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992)
- Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685 (1992)
- Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J. L. & P. Pol'y 971 (2019)

Session 8: Free Exercise Part III – Thursday, January 14 (1–1:50 p.m.)

Required Reading:

- CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH: Chapter 17 p. 1368–1383
- *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020)

Session 9: Free Exercise Clause Part IV - Friday, January 15 (10–11:50 a.m.)

Required Reading:

- *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87, 529 U.S. _ (Nov. 25, 2020)
- *Fulton v. City of Philadelphia*, No. 19-123 (argued Nov. 4, 2020) – please skim the briefs of the following litigants: Petitioners, City Respondents, and Intervenor-Respondents