

RELIGION CLAUSES OF THE FIRST AMENDMENT

SPRING 2020 SYLLABUS

Course Information:

- Course Number 25221; 1 Credit Hour
- Location: HOL 382
- The class will meet eight times during a two-week session from Tuesday, January 21, 2020, through Thursday, January 30, 2020.

Course Instructors:

- **ASSOCIATE JUSTICE CLARENCE THOMAS**
- **KATHRYN KIMBALL MIZELLE**
 - During the two-week seminar, I encourage you to stop by my visiting office either by appointment or during office hours, which I anticipate will be from 2:30-3:30 p.m. each day.
 - If any questions or concerns arise, please feel free to email me at kmizelle@jonesday.com or call me at (202) 879-3611.

Required Texts:

- The reading assignments will consist of online historical materials, cases, and other excerpts that will be listed here in the syllabus. Materials not publicly available will be posted online 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 and the Religious Land Use and Institutionalized Persons Act. The goal of the course is to begin to understand the original meaning of the Clauses, their development throughout American history and the Court’s jurisprudence, and to examine potential doctrinal directions of the pressing issues in the religious-liberty field of litigation. Given the brevity of the course, it is not possible to delve deeply into any one aspect of the Clauses. Rather, the research paper provides students with the opportunity to explore in more detail one particular area of interest.

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. Enrollment is capped at 35 and students will be selected based on an application process.
- We will meet for an hour and a half hour each day (**4:30-6:00 p.m.**), January 21-January 24, and January 27-January 30.
- 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 approximately 20% of your grade.
- A research paper constituting approximately 80% of your grade. Please select one Supreme Court case addressing an aspect of the Religion Clauses and write an original research paper concerning the case. The goal in writing the paper is to uncover the full context of the litigation—to tell a complete story about the parties and current landscape of the law that is not necessarily captured in the judicial opinion itself and to contribute an original perspective to the case. We will provide detailed grading criteria and discuss expectations of the research paper in class. In the interim, please be considering which case you might want to select, as all cases must be submitted for approval by Thursday, January 29, and no two students may select the same case. I will provide a non-exhaustive list of cases to consider on the first day of the course.
- The paper should be between **5,500-7,500 words** and will be due **March 20, 2020**.

Reading Assignments:

The required reading assignments for the eight class sessions are listed below, but modifications will likely be made throughout the course based on assessment of the class's progress. The additional materials are intended solely for assistance in preparing your research paper or personal enrichment and need not be read for class.

Session 1: Groundwork for Religion Clauses - Tuesday, January 21 (4:30-6:00 p.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:

- MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT (updated ed., 2013) (excerpt)
- D. DRAKEMAN, CHURCH, STATE, & ORIGINAL INTENT (2010) (excerpt)

- M. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (2011) (excerpt)
- Historical Documents (excerpt)

Skim 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

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

- 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: Free Exercise Clause Part 1 - Wednesday, January 22 (4:30-6:00 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? If not, why not? Would the Founders have anticipated these problems?

Required Reading:

- *Reynolds v. United States*, 98 U.S. 145 (1879) [focus on 160-167]
- *Cantwell v. Connecticut*, 310 U.S. 296 (1940)
- *Sherbert v. Verner*, 374 U.S. 398 (1963)
- *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [focus on the majority and dissenting opinions]

For additional cases pre-*Smith*, please 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 3: Free Exercise Part II - Thursday, January 23 (4:30-6:00 p.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?

Required Reading:

- *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990)
- *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) [focus on the majority opinion and note which portions receive a majority vote]
- Relevant text of the Religious Freedom Restoration Act (excerpt)¹
- *City of Boerne v. Flores*, 521 U.S. 507 (1997) (skim)
- Relevant text of RLUIPA (excerpt)

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 Provisions to the Free Exercise of Religion*, 42 Harv. J. L. & P. Pol'y 971 (2019).

¹ The Supreme Court recently granted review of *FNU Taznin v. Tanvir*, No. 19-71, which asks the Court to determine whether money damages are available under RFRA.

Session 4: Free Exercise Part III - Friday, January 24 (4:30-5:50 p.m.)

We will conclude the first week by examining the Court's most recent Free Exercise/Non-discrimination cases and doing a group discussion of a pending case.

- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)
- *Kennedy v. Bremerton School District*, 139 S. Ct. 634 (2019)
- *Espinoza v. Montana Department of Revenue*, No. 18-1195 (please read the cert petition and brief in opposition and skim the merits briefs)

Session 5: Establishment Clause Part I - Monday, January 27 (4:30-6:00 p.m.)

Please refresh yourself with the reading assigned from the first session, in particular the excerpts from the books by Drakeman and McConnell, as those documents relate to the groundwork necessary to understand the origins of the Establishment Clause, in particular the theory of the "wall of separation." Consider the following questions:

- Does incorporation of the Establishment Clause against the States make sense in light of its purpose and the Founders' views?
- Who was the Establishment Clause designed to protect?
- Where did the Court derive the "neutrality" principle from in *Everson*?
- Where did the Court derive the *Lemon* test?

Required Reading:

- *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947)
- *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1948)
- *Zorach v. Clauson*, 343 U.S. 306 (1952)
- *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

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 6: Establishment Clause Part II - Tuesday, January 28 (4:30-6:00 p.m.)

Given some of the inconsistency in the Court's Establishment Clause jurisprudence, we will address the cases topically instead of chronologically. Today's readings focus on the concept of coercion, particularly in the school context.

Required Reading:

- *Engel v. Vitale*, 370 U.S. 421 (1962)
- *Wallace v. Jaffree*, 472 US. 38 (1985)
- *Lee v. Weisman*, 505 U.S. 577 (1992)
- *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000)
- *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)
- Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986) (skim)

Session 7: Establishment Clause Part III - Wednesday, January 29 (4:30-6:00 p.m.)

Plan to discuss how the Court’s doctrine has developed under the Establishment Clause with respect to financial aid. Consider the following questions:

- What test should apply to public benefits?
- After *Zelman*, what is the test for determining neutrality? Have the lower courts been given clear guidance on how to evaluate these claims?
- Why do plaintiffs have “taxpayer” standing at all? (see *Flast v. Cohen*, 392 U.S. 83 (1968))

Required Reading:

- *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664 (1970)
- *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)
- *Locke v. Davey*, 540 U.S. 712 (2004)
- *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct 2012 (2017)
- Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 Brigham Young Law Review 275 (skim)
- *Gaylor v. Mnuchin*, 919 F.3d 420 (Cir. 7th 2019) (skim)

Session 8: Thursday, January 30 (4:30-6:00 p.m.)

Plan to discuss how the Court has addressed various public symbols, public spaces, legislative prayer, and endorsement. 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:

- *Marsh v. Chambers*, 463 U.S. 783 (1983)
- *Lynch v. Donnelly*, 465 U.S. 668 (1984)
- *Van Orden v. Perry*, 545 U.S. 677 (2005)

- *McCreary County v. ACLU*, 545 U.S. 844 (2005)
- *Town of Greece v. Galloway*, 572 U.S. 565 (2014)
- *American Legion v. American Humanist Society*, 139 S.Ct. 451 (2019)