

Law and Religion

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Office hours: Fri 10:00-12:00pm

Law 773
Spring 2013
Tues/Thur 2:50-4:15

This course is an advanced constitutional law offering on the law that regulates the role of religion in American life. Our focus is on Supreme Court doctrine interpreting the establishment and free exercise clauses of the First Amendment, as well as the statutory law that has grown out of struggles between Congress and the Court to define the meaning of those clauses. Students should leave the course with a solid grounding in the law on free exercise, government funding of religion, the regulation of public religious displays, and church autonomy. Some attention will also be devoted to the eighteenth-century origins of the American law of religious liberty, comparative regimes of religious freedom, and contemporary free exercise and establishment clause controversies related to Islam and the Catholic Church.

Required Materials:

- Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution*, 3rd ed. (New York: Wolters Kluwer, 2011) (available for purchase at the USM Bookstore and on reserve at the Garbrecht Library) [hereafter designated as “CB”].
- Casebook supplemental materials posted in PDF form to the course Blackboard website [hereafter “CB Supp.”].
- All other materials will be posted to the course Blackboard website. *In the case of readings, students must print out and bring these website materials to the relevant class sessions.*

How and when to find me:

Office hours are on Friday between 10:00 and 12:00pm (starting Jan. 25), but you should also feel free to catch me immediately after class or to step into my office any time my door is open. We can also meet by appointment.

Participation, evaluation and attendance:

If the class size is small enough, I will likely run the class meetings in a mixed lecture/seminar discussion format. I will occasionally ask a small group of students to think in advance about a problem based on issues raised in the assigned readings, to be discussed in the

course of one of our class sessions. These problems will be distributed several days in advance of the relevant class meeting.

Grades will be determined on the basis of a twenty-four hour take-home exam, but consistently robust or consistently lackadaisical class participation can affect your final grade (by no more than one half-letter). The exam may be picked up at the Registrar's Office on Tuesday, Wednesday, or Thursday of the first week of exams or Monday and Tuesday of the second week. The exam must be picked up between 1:30 and 2:00pm and must be returned within 24 hours.

You have the option to write a paper that can also qualify for ULW credit with an additional unit for which you must register separately. For those who choose this option, your paper grade will determine your grade in the course, subject to the same proviso regarding class participation stated in the previous paragraph. The paper topic and a schedule for interim deadlines must be determined in consultation with the instructor by no later than the end of the second week of class (Jan. 25). The final paper will be due by Tuesday, April 29, 2013 at 4pm. No extensions of this deadline will be granted, so please plan accordingly.

Barring a medical or family emergency, students who miss more than four classes (including students taking the course on a pass/fail basis) may be asked to withdraw from the course. *Please plan your work and clinical schedules accordingly.*

Amendments to the syllabus:

Assignments are complete through March 14. I will issue a second (revised) syllabus later in the semester. Please note that this syllabus is not a contract: while the list of topics is likely to remain stable, it is possible that I may swap out one or more topics depending on the interests of the class, current developments, and a possible guest speaker.

Schedule of Meetings and Readings:

Part One: Overview and History

1. Jan. 15: Course Orientation; Defining "Free Exercise" and "Non-Establishment."

CB 1-14, 173-179

2. Jan 17: History (Establishments and the Virginia Assessment Controversy)

CB 15-29, 44 (Jefferson's Letter to the Danbury Baptists), 47-58

3. Jan. 22: History (The First and Fourteenth Amendments)

CB 58-81

Sarah Barringer Gordon, *The Spirit of the Law* (Cambridge, MA: Harvard University Press, 2010), pp. 1-14

Part Two: Religion in the Regulatory State

4. Jan. 24: The Belief/Conduct Distinction (the Mormon Cases); Modern Exemptions (*Sherbert* and *Yoder*)

CB 147-173

5. Jan. 29: The Demise of Exemptions (*Smith* and its Reverberations)

CB 173-198

6. Jan. 31: Free Exercise After *Smith* (Burdens on Religion)

CB 198-202, 204-207, 210 (starting on “Notes on ‘Hybrid’ Claims”)-231

7. Feb. 5: Governmental Interests

CB 232-257

8. Feb. 7: Accommodations (I)

CB 257-278

9. Feb. 12: Accommodations (II)

CB 283-292, 296-305, 307 (starting at note 5)-311
Problem #1

10. Feb. 14: Institutional Religion (I)

CB 313-333

11. Feb. 19: Institutional Religion (II)

CB Supp. #1 (*Hosanna-Tabor*)
CB 347-366

Part Three: Power of the Purse

12. Feb. 21: Introduction and History

CB 367-376, 382-395 (end of note 1)

13. Feb. 26: The Limited-Aid Approach (*Lemon*)

CB 399-419, 426-432

14. Feb. 28: The Neutral-Aid Approach (Indirect Aid); Viewpoint Discrimination

CB 432-452, 458-459
Problem #2

15. Mar. 12: Mandatory Neutrality; “Strings” on Government Aid

CB 461-468, 481-492

16. Mar. 14: Aid to Faith-Based Initiatives; Establishment Clause Standing

CB 492-519
CB Supp. #2 (*Winn*)

Part Four: Religion and Government’s Role in Culture

17. Mar. 21: School Prayer and Related Controversies

CB 529-540, 546 (starting at note 4)-557, 559-561 (notes 3-4)

18. Mar. 26: Endorsement and Disapproval, Ten Commandments

CB 564-575, 587-602

19. Mar. 28: School Curricula

CB 607-610 (*Epperson*), 614-617 (*Aguillard*), 620-627 (*Mozert*)

20. Apr. 2: Introduction to religious speech, government property

CB 639-650 (end of note 5), 653-665

21. Apr. 4: Religious speech in public schools, religious free speech

CB 673-677 (*Mergens*), 679-684 (*Good News Club*), 686-690 (end of note 1), 691-695 (*CLS*)

22. Apr. 9: Governmental vs. private speech

CB 699-709, 711-714
Supplement #3 (notes on *Salazar v. Buono*)

23. Apr. 11: Religious institutional participation in policy making

CB 744-759

24. Apr. 16: What is “Religion”?

CB 761-786, 802-804 (notes 2-3)

Conclusion

25. Apr. 18: A Foreign Comparison (French *Laïcité* and European Establishment)

CB 95-105 (end of note 1)
Maine Law Review symposium on the *Lautsi* decision