

GEORGETOWN UNIVERSITY
Religious Freedom & Supreme Court
SPRING 2020
Church-State Tensions and Religious Freedom
in American Society From the Founding to the Present
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COURSE PRECIS

The interplay of law and religion in American society is fraught – on one hand, we celebrate religious pluralism and religious tolerance, enshrine the free exercise of religion in our Constitution, place "God" on our currency and in our Pledge of Allegiance, and enshrine Moses in our Supreme Court. Yet, on the other -- we have seen heresy trials and executions of "witches" in 17th-century Salem; the meteoric rise of the nativist/anti-Catholic Know Nothings in the 1850's, the 20th-century resurgence of the nativist/racist, anti-Catholic, anti-Semitic Ku Klux Klan, replete with church bombings and, cross-burnings; and of late, Nazis in Charlottesville with torch lit anti-Semitic chants, and mass shootings of congregants at houses of worship.

This course examines the intersection/symbiosis/clash of law and religion in the United States from Colonial times through the present, to include the most recent Supreme Court decisions. We begin with an examination of the historical antecedents of the two Religion Clauses of the First Amendment -- the anti-establishment clause, which prohibits government action respecting "establishment" of religion (yet expressly avoids definition of that term); and the free exercise clause, which proscribes governmental prohibition of the "free exercise" thereof (while expressly avoiding definition of that term as well). How can we square these two freedoms? And what exactly constitutes "religion"? The Constitution is silent. We must look elsewhere for guidance – elsewhere is the United States Supreme Court.

Through historical analysis and case study of the leading Supreme Court cases, we will examine the contentious interplay between church and state, between religion and the Constitution; and assess the legal, societal and ethical implications of the Court's pronouncements in this volatile, vexing area. While we talk of the "separation of church and state" (notwithstanding the existence of myriad established churches in the colonies), the "wall of separation" in fact is (depending on your viewpoint) a Kafkaesque Catch-22, or a Constitutional sieve. Consider the following provocative, nettlesome and enduring questions:

Free Exercise of Religion

We are generally agreed that an individual has the right to freely worship on his/her Sabbath. What if a worker's Sabbath falls on a workday – obligatory day off? Or justifiable grounds for dismissal if absent?

Can government mandate what your religion proscribes (and vice versa)?

Can a religious sect ingest "sacramental" illegal drugs? Or opt out of Social Security?

Can a baker refuse to make a wedding cake for a gay or lesbian couple, citing religious objections?

Can employers decide which laws to obey if they can come up with a religious rationale for disobeying the ones they don't like?

Religious Symbols in the Public Space

Religious symbols and memorials abound in the United States. Consider the frieze of the prophet/lawgiver Moses in the United States Supreme Court and the crosses on Arlington cemetery headstones. Can they stay or must they go?

If Moses is okay in the Supreme Court, why can't a local judge post the Ten Commandments in his/her courtroom?

Can government place a Nativity scene in a public square at Christmas? What if they add a reindeer and Santa for "balance"?

Can government place a memorial cross in a National Park? What if it has been there since the Civil War; is it grandfathered? What if it was erected in 1988? Does antiquity matter? Should it? How old is not old enough?

What about the names of all those California cities (Santa Cruz, Santa Monica, Los Angeles)?

Government Funding and Religious Schools

We are generally agreed that government may not build a church or a mosque.

What about constructing a K-12 parochial school? Or a University science lab at Texas Christian or Southern Methodist?

Government provides Pell Grants and GI Bill benefits to college students who elect to attend Brigham Young and Notre Dame. Why is that okay?

Can government provide need-based vouchers to K-12 children whose families elect to send their child to a Holy Trinity or a Sidwell Friends? Is that benefit different? Why?

The Missouri Department of Natural Resources offers grants that provide funds for qualifying organizations to purchase recycled tires to resurface playgrounds (to prevent skinned knees). Trinity Lutheran School applies for a grant. A secular safety measure/ Or impermissible State aid to religion?

Religion in Public Schools

The Supreme Court has proscribed government-mandated prayer in public schools. An outcry ensued. Is any discussion/manifestation of religion permissible in a public school classroom? How about:

Daily Bible reading?

Reading the Bible (Genesis, Exodus) as part of a Great Books course?

A course in Comparative Religion (Christianity, Islam, Judaism, etc.) and their sacred texts?

A pan-denominational invocation at a public school graduation?

A pre-game prayer in a public high school locker room led by the team captains?

Public classroom recitation of the Pledge of Allegiance and "one nation under God"?

Are any of these religiously-tinged activities permissible? Some of them? None?

Course Goals/Aims and Requirements

Historical documents and Supreme Court decisions will serve as grist for the analytical mill as we assess whether the rule of law is a bulwark of religious freedom, an impediment to unfettered free exercise; or perhaps both.

Teaching Method: Class is a fast-paced mix of lecture, case analysis, discussion, and the Socratic method of teaching based on textbook and case assignments.

We place a premium on interdisciplinary inquiry, close reasoning and cogent exposition (oral and written).

- Interdisciplinary Inquiry: You will be pushed to develop the ability to examine issues through kaleidoscopic inquiry. History, economics, and political theory and practice all weigh heavily in a contextual understanding of the Court, Religion and the Constitution.
- Close/Critical Reasoning: We are of course interested in WHAT the Court decides-- the Court's answer to the question posed is our analytical destination. Our paramount interests lie elsewhere: we must identify the basis for the Court's decision -- the WHY (the analytical journey); only then can we assess whether the decision is compelling and persuasive.
- Written and Oral Exposition

Examinations: The examinations will consist of essay questions in which you will be asked to analyze and discuss the constitutional implications of hypothetical church-state scenarios. An in-class midterm examination will be given February XX. An in-class final examination will be given on April XX.

Research Paper: Each student will be assigned to research a particular topic tied to a particular church-state issue. The student will produce a scholarly research paper (not an A&E biography) of 16-20 pages (double-spaced). Assignments will be made on February X.

Class Attendance and Participation: Structured argumentation is an acquired skill. You will be pushed in class to reason critically, articulate a position, and defend it. Class preparation, attendance and participation are essential. Any student who misses a class is in jeopardy of expulsion. Students who know that they must miss a class must notify the professor in advance. Two absences = mandatory withdrawal.

Textbook/Supplement, Grading and Class Schedule

Required Text: McConnell, Religion and the Constitution (Aspen Casebook) (THIRD EDITION (2011) (The book lists at \$180 but is also available new and used on Amazon for less; it is also available on Amazon for rent at less than half the list price). I have also placed an order with the GU Bookstore.

Required Course Supplement: Will be provided to students at no charge. **BUT YOU MUST OBTAIN THROUGH THE DEAN'S OFFICE IN ADVANCE OF FIRST CLASS!**

Time: The class will meet DAY from 6:30 to 8:45pm as noted. Room TBD.

Grading: The grade for the course will be based upon the mid-term (30%) the research paper (35%), the final examination (30%). The quality of class preparation and classroom presentation will be factored into the final grade (5%).

NO TAPING OR RECORDING OF CLASSES!!

SYLLABUS INTRODUCTION AND OVERVIEW

Session 1 – January

- A. The Constitution
- B. The Religion Clauses
- C. What Is “Religion”?

Supp: Stein Article; Hentoff Article; Largest US Religious Groups Chart; Constitution – Excerpts; Glossary; Supreme Court Justices Chart; Who Are These Guys?

THE ANTI-ESTABLISHMENT CLAUSE

GENESIS

- A. Historical Antecedents
- B. The Founders’ Viewpoints
- C. Jefferson's "Wall"

Text: 15-17; 22-23; 29-35; 43-57; 65-66; 74-76

THE STATE AND RELIGIOUS SCHOOLS

Session 2 – January

The Historical Struggle

Text: 382-94

The Early Cases

Text: Pierce 394-95

Supp: Cochran, Meyer

Erecting the Wall

- A. Direct Financial Aid
 - 1. Primary/Secondary Schools

Text: Lemon 399-408; Nyquist 408-11; Notes 411-15

- 2. Colleges and Universities

Text: Tilton, Hunt, Roemer 422-25

B. Indirect Financial Aid

1. Buses, Books, Materials, Testing, Diagnostics

Text: Everson, Allen, Meek, Wolman, Levitt 367-77; 380-81; 415-17

Supp: Regan

2. Shared Time (Remedial/Enrichment Courses)

Text: Ball, Aguilar --Catch-22? 417-19

Supp: Ball, Aguilar

Session 3 – January

3. Tax Relief and Tuition Benefits

Text: Nyquist, Mueller, Witters 408-11; 431-36

Supp: Mueller

4. Sectarian Re-Districting -- Anomalous Accommodation or Religious Gerrymander?

Text: Kiryas Joel 284-92

Re-Thinking the Wall

◦◦Chinks in the Wall

Text: Zobrest, Agostini 437-38

◦◦Holes in the Wall

Text: Mitchell, Zelman (The Voucher Case) 438-440; 441-47

◦◦Re-Bricking the Wall?

Text: Locke (The Blaine Amendment Case) 461-65

Research Paper Topics Assigned

Sample Exam Question Distributed

Session 4—February

RELIGION IN THE STATE SCHOOLS

A. Religious Exercises

Text: Engel, Schempp, Wallace, Lee v. Wiseman, Santa Fe, Newdow 533-39; 544; 548-57; 560-62; 703-11

Supp: Stone

B. Religion in the Curriculum

Text: Epperson, Edwards 606-12; 614-17

Session 5 – February

GOVERNMENT ACKNOWLEDGMENT OF RELIGION

Religious Symbols in Government Space

Text: Lynch, Allegheny County, Capitol Square, McCreary County, Van Orden, Sumnum
564-79; 699-701; 587-92; 597-605; 702-03

Supp: Salazar; Mount Soledad

Session 6 – February

THE FREE EXERCISE CLAUSE

A. Free Exercise Cabined – The Early Cases

1. Belief v. Conduct Analysis
Reynolds, Cantwell, Barnette
2. Indirect Burden Analysis
Supp: Braunfeld

Session 7 –Midterm Examination February

Session 8 -- March

B. Free Exercise Resurgent -- The Apogee of Strict Scrutiny

Text: Sherbert, Yoder, Thomas, Frazee 160-65; 169(4)-73; 784-85

C. Free Exercise Ebbing – State Interest in the Ascendancy

Text:: U.S. v. Lee, Bob Jones, Bowen v. Roy, Lyng 232-35; 489-90; 230; 215-20
Supp: Bowen v. Roy

MARCH 18 AND 25 INDEPENDENT STUDY – RESEARCH PAPER

Session 9 – April

D. Free Exercise Today – Recent Cases

Text: Smith, Lukumi Babalu Aye, Boerne, Locke, Cutter, Gonzales v. UDV 173-79; 198-202;
186-92; 461-70; 271-75; 235-40

Session 10 and 11 -- April and

E. The Latest Word from the Roberts Court – Fall 2013 Term to Present: Paradigm Shift?

Supp.:

Establishment: Town of Greece, American Legion

Free Exercise: Hobby Lobby, EEOC v .Abercrombie & Fitch, Zubik, Trinity Lutheran,

Masterpiece Cakeshop, Basking Ridge (NJ)

CONCLUSION

- A. Semester in Review: Long and Winding (and Confusing?) Road
- B. Wrap-up

Session 12 – April 29 FINAL EXAMINATION

PAPERS DUE NLT MAY 16

IV. Honor Code

This course is governed by the University Honor Code -- I commit myself to respect and uphold the Georgetown University Honor System: To be honest in my academic endeavor; and to conduct myself honorably, as a responsible member of the Georgetown Community.

V. Disabilities Statement

If you believe you have a disability that affects academic performance, then you should contact the Academic Resource Center (arc@georgetown.edu) for further information. The Center located in the Leavey Center, Suite 335. The Academic Resource Center is the campus office responsible for reviewing documentation provided by students with disabilities and for determining reasonable accommodations in accordance with the Americans with Disabilities Act (ADA) and University policies.

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**RELIGION, THE CONSTITUTION AND THE SUPREME COURT
2020 SUPPLEMENT INDEX**

FOOD FOR THOUGHT
STEIN ARTICLE
HENTOFF ARTICLE

CONSTITUTION -- EXCERPTS
GLOSSARY
SUPREME COURT JUSTICES
20 LARGEST U.S. CHURCHES CHART
WHO ARE THESE GUYS?

COCHRAN
MEYER

REGAN
BALL
AGUILAR

MUELLER

STONE

SALAZAR
MOUNT SOLEDAD

BRAUNFELD

BOWEN v. ROY

TOWN OF GREECE

HOBBY LOBBY

EEOC v. ABERCROMBIE & FITCH

ZUBIK

TRINITY LUTHERAN

MASTERPIECE CAKESHOP

BASKING RIDGE

AMERICAN LEGION

HOSANNA-TABOR