

# THE FIRST AMENDMENT AND RELIGION IN AMERICA

PSC 291/REL 297

Professor Jackson

Spring 2008

**Assigned book and other required material:** J. Witte, Jr., Religion and the American Constitutional Experiment (Westview Press 2<sup>nd</sup> ed. 2005). The readings for the first week's assignment will be posted on Blackboard for the class. All other assignments for the course are in .pdf format on a CD that I will hand out at the first class. (The .pdf files can be printed on a 2-to-1 basis, if you so desire, conserving paper and ink. This is practical for many of the .pdf files that currently have one printed page per .pdf page, but probably not practical (i.e., legible) for the .pdf files that currently have two printed pages per .pdf page.)

**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.**

**--First Amendment to the Constitution of the United States**

This course is an examination of the special articulation and role of religion in the United States, particularly as expressed in the two religion clauses of the First Amendment. We will examine some of the key historical and political antecedents to the Constitution's formulation of religious freedom, and we will read closely and critically key decisions (usually, but not exclusively from the Supreme Court of the United States) that have shaped, and continue to shape, the application of the First Amendment's construct to American civil and social life.

Work for the course will consist of regular class attendance and participation, a short mid-term paper and a final essay.

*January 17*    **Overture**

Richard Posner, "Faith-Based Morality and Public Policy" (and related material), <http://leiterreports.typepad.com/blog/2004/12/>

## **Biblical Antecedents & Early Christianity: Covenant and Freedom**

Genesis 1:1-2:4; Exodus 19-20; Exodus 21-23 (skim); Exodus 24; Exodus 25-31 (skim); Deuteronomy 17:14-20; Judges 8:22-23, 9:1-15; I Samuel 8; II Chronicles 19; Daniel 2-4; Esther

William S. Green & Gary Porton, "Religious Resources for Political Culture: The Case of Judaism," in J. Neusner, ed., Religion and the Political Order: Politics in Classical and Contemporary Christianity, Islam, and Judaism (Atlanta, Scholars Press, 1996), pp. 109-20

Matthew 22:15-21

Bruce Chilton, "Primitive and Early Christianity," in J. Neusner, ed., God's Rule: The Politics of World Religions (Georgetown U. Press, 2003), pp. 37-60

*January 24*

## **Christianity and Polity: Faith, Reason, and Freedom**

Harold J. Berman and John Witte, Jr., "Church and State," The Encyclopedia of Religion 3, pp. 489-95

Harold J. Berman, "Law and Religion in the West," The Encyclopedia of Religion, 8, 472-75

William S. Green, "Religion and Society in America," in J. Neusner, ed., World Religions in America: An Introduction [Revised and Expanded Edition] (Westminster/John Knox Press, 2000), pp. 246-55

John Noonan, Jr. & Edward Gaffney, Jr., Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government (Foundation Press 2001), pp. 117-37 (hereafter, "Noonan & Gaffney")

John Locke, A Letter Concerning Toleration (1688)

William S. Green, "What Do We Mean by 'Religion' and 'Western Civilization'?" in J. Neusner, ed., Religious Foundations of Western Civilization (Abingdon Press, 2006), pp. 3-23

Bernard Lewis, What Went Wrong: Western Impact and Middle Eastern Response (Oxford U. Press, 2002), pp. 96-116

*January 31*

## **The Colonial Experience & Constitutional Development**

John Witte, Jr., Religion and the American Constitutional Experiment (Westview Press, 2d ed. 2005), pp. 1-105, 261-63 (hereafter "Witte")

Noonan & Gaffney, pp. 158-65

Thomas Jefferson, Notes on Virginia (Query XVII) (1784)

Noonan & Gaffney, pp. 169-73

James Madison, A Memorial and Remonstrance Against Religious Assessments (1785)  
Noonan & Gaffney, pp. 178-208

*February 7*    **The American Experience Through “Incorporation”**

“People v. Ruggles,” 8 Johns. R. 290 (NY 1811)  
“Barnes v. First Parish in Falmouth” (Mass. 1810) (Noonan & Gaffney, pp. 222-31)  
Alexis de Tocqueville, Democracy in America (Book I, Chapter XVII) (1835)  
Witte, pp. 107-24  
“Reynolds v. United States,” 98 U.S. 145 (1879)  
“Pierce v. Society of Sisters,” 268 U.S. 510 (1925)  
“Cantwell v. Connecticut,” 310 U.S. 296 (1940)  
Witte, pp. 125-42

*February 14*    **Free Exercise at the Supreme Court**

“Wisconsin v. Yoder,” 406 U.S. 296 (1972)  
\* Note on “Sherbert v. Verner,” 374 U.S. 398 (1963)  
“Employment Division, Dept. of Human Resources of Oregon v. Smith,” 494 U.S. 872 (1990)  
\*Note on “Church of Lukumi Babalu Aye, Inc. v. Hialeah,” 508 U.S. 520 (1993)  
Witte, pp. 143-84

**Congress Enters the Fray**

Religious Freedom Restoration Act of 1993  
“City of Boerne v. Flores,” 521 U.S. 507 (1997)  
\*Note on “Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. \_\_\_\_ (Feb. 21, 2006)  
Religious Land Use and Institutionalized Persons Act of 2000  
\*Note on “Cutter v. Wilkinson,” 544 U.S. 709 (2005)

*February 21* **“Religion,” “Exercise,” and Proof**

“United States v. Seeger,” 380 U.S. 163 (1965)  
James Hitchcock, The Supreme Court and Religion in American Life, Vol. II (Princeton U. Press, 2004), pp. 59-76  
“Thomas v. Review Board,” 450 U.S. 707 (1981)  
Winnifred Sullivan, The Impossibility of Religious Freedom (Princeton U. Press, 2005), pp. 2-3, 7-9, 29-31, 105-09, 138-51  
Jacob Neusner, “Preface,” in Jacob Neusner, ed., Religious Foundations of Western Civilization (Abington Press, 2006), pp. ix-x

**“Separation of Church and State” and Divergent Religious Views**

Stanley Fish, “Liberalism and Secularism,” <http://fish.blogs.nytimes.com/> (September 2, 2007)

*February 28* **Work on Mid-Term Paper**

*March 6* **Mid-Term Paper Due**

*March 20* **The Establishment Clause and State Aid to Religious Schools**

“Everson v. Bd. of Education,” 330 U.S. 1 (1947)  
“Lemon v. Kurtzman,” 403 U.S. 602 (1971)  
“Zelman v. Simmons-Harris,” 536 U.S. 639 (2002)  
Witte, pp. 185-232

**Tax Exemptions to Religious Organizations**

“Walz v. Tax Comm. of the City of New York,” 397 U.S. 664 (1970)

**“Standing” and the Ability to Challenge Monetary Aid**

“Hein v. Freedom from Religion Fdn.,” 551 U.S. \_\_\_\_ (2007)

*March 27* **Prayers, Pledges, and the First Amendment**

“West Virginia State Bd. of Education v. Barnette,” 319 U.S. 624 (1943)  
“Lee v. Weisman,” 505 U.S. 577 (1992)  
“Marsh v. Chambers,” 463 U.S. 783 (1983)

\*Note on “Simpson v. Chesterfield County Bd. of Supervisors,”  
404 F.3d 276 (4<sup>th</sup> Cir. 2005), cert. denied, 546 U.S. \_\_\_  
(2005)  
“Newdow v. United States,” 328 F.3d 466 (9<sup>th</sup> Cir. en banc, 2003),  
vacated because of lack of standing, 542 U.S. 1 (2004)

### **Commandments and Symbols**

“Stone v. Graham,” 449 U.S. 39 (1980)  
“Allegheny County v. Greater Pittsburgh ACLU,” 492 U.S. 573 (1989)  
“Van Orden v. Perry,” 545 U.S. 677 (2005) (including “Appendix”)  
“McCreary County v. ACLU of Kentucky,” 545 U.S. 844 (2005)

*April 3*

### **Religious Speech and the Establishment Clause**

“Widmar v. Vincent,” 454 U.S. 263 (1981)  
“Rosenberger v. Rector and Visitors of the University of Virginia,” 515  
U.S. 819 (1995)  
“Good News Club v. Milford Central School District,” 533 U.S. 98  
(2001)  
“Faith Center Church Evangelistic Ministries v. Glover, No. 05-16132 (9<sup>th</sup>  
Cir. Sept. 20, 2006), *cert. denied* (Oct. 1, 2007).

### **Exercise vs. Establishment**

“Locke v. Davey,” 540 U.S. 712 (2004)

*April 10*

### **Academic Views on the Supreme Court and the Religion Clauses**

Michael W. McConnell, “Religious Freedom at a Crossroad,” 59 U.  
Chicago Law Review (1992), pp. 115-94  
Kathleen M. Sullivan, “Religion and Liberal Democracy,” 59 U. Chicago  
Law Review (1992), pp. 195-223  
Noah Feldman, “A Church-State Solution,” NY Times Magazine (July 3,  
2005)  
Marci Hamilton, God vs. The Gavel: Religion and the Rule of Law  
(Cambridge U. Press 2005), pp. 3-11, 273-302  
Witte, pp. 233-59

*April 17*

### **Work on Final Paper**

*April 24*

### **Papers Due; Concluding Thoughts and Discussion**