

RELIGION AND THE CONSTITUTION
UNIVERSITY OF FLORIDA LEVIN COLLEGE OF LAW
FALL 2024 SYLLABUS – LAW 22564 – 2 CREDITS

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Office Hours: Monday 7pm-9pm or by appointment. You may also contact me through Canvas

MEETING TIME: Monday 5pm-7pm

LOCATION: Holand Hall-355B

COURSE DESCRIPTION AND OBJECTIVES:

Background. The First Amendment to the U.S. Constitution:

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 peaceably to assemble, and to petition the Government for a redress of grievances.

The first religion clause is referred to as the *Establishment Clause*, the second as the *Free Exercise Clause*.

James Madison originally proposed for the Bill of Rights the following provision concerning religion: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed.” This language was altered in both the House and the Senate; the conference committee of the two bodies, chaired by Madison, came up with the final, somewhat more indefinite version. (Consider whether this was an improvement.)

In the nineteenth century the legal scholar (and Supreme Court Justice) Joseph Story viewed the religion clauses simply as denying to the Federal Government all power to act upon the subject of religion. “It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.”

“Probably,” Story also wrote, “at the time of the adoption of the Constitution and

of the First Amendment to it, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.”

Not until the Supreme Court held the religion clauses applicable to the states (in the 1940s, via the “incorporation” doctrine) did it have much occasion to interpret them; but once it did, the religion clauses were construed quite broadly. In *Everson v. Board of Education* (concerning transportation expenses to and from public and private [religious] schools) the Court declared that the Establishment Clause forbids not only practices that “aid one religion” or “prefer one religion over another,” but also those that “aid all religions.” As for the Free Exercise Clause, the Court asserted in *Wisconsin v. Yoder* that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” (*Yoder* held that Amish children could be exempted--on religious grounds--from attending school beyond eighth grade; Justice Douglas, the Court’s most liberal member, dissented in part. Why?)

More recent decisions, however, reflect a narrower interpretation of the religion clauses. Indeed, in *Employment Division v. Smith* the Court disavowed earlier views and held that the Free Exercise Clause never “relieve[s] an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” (in that case, a law criminalizing the use of peyote, which was essential to certain religious practices of the Native American Church). In *Walker v. Superior Court* (involving a Christian Scientist’s use of non-medical treatment) the California Supreme Court held that “parents have *no* right to free exercise of religion at the price of a child’s life.”

While the U.S. Supreme Court has not departed completely from previous Establishment Clause holdings, recent decisions reflect greater sympathy for the view that the clause bars “preferential” governmental promotion of particular religions yet allows governmental promotion of religion in general. Overall, the Court remains sharply split on both clauses.

Plan of course. The course has two main parts. *The first part* is broadly introductory and considers such basic issues as:

What is religion? Defining religion. Is there a distinctly “legal” definition of religion? Is the “truth” of a religious doctrine ever legally at issue? (*United States v. Ballard*). Relationship to defamation law. The role of sincerity (*Ballard*). Should social change affect the interpretation of the Religion Clauses?

Why protect religion? Religion vs. science. The Bible vs. Darwin. Belief vs. knowledge (*Ballard*). Relationship to philosophies of free expression. Belief vs. conduct (*Reynolds v. United States*). The police powers of the states. Standards of review (*Carolene Products*).

Origins and theory of the constitutional Religion Clauses. Historical sources and documents. Jefferson's "wall of separation" between church and state (*McCullum v. Board of Education*). The Garden and the Wilderness [the church and the world] (Roger Williams, Mark DeWolfe Howe). Interplay between the two Religion Clauses.

Second part. In this part the main doctrines and caselaw of the Free Exercise Clause and the Establishment Clause will be studied. Group presentations will be designed and planned around the two Religion Clauses and possibly additional topics (for example, the role of the Jehovah's Witnesses in litigating religion law), depending on student interest. (Presentations could involve new issues not yet included in the casebook--such as restrictions on religious assembly to protect against Covid-19.) Organizational details will depend on the interests of the students.

REQUIRED READING MATERIALS:

Readings for the first part will be provided in Initial Readings posted to the "Files" section of the course's Canvas page. *Religion and the Constitution, 5th ed Aspen Publishing Author: McConnell, Berg, & Lund Copyright 2022*

Please be sure to register for the Canvas course and have any required materials with you in print or easily accessible electronic form in class. You are responsible for checking your Canvas page and the e-mail connected to the page on a regular basis for any class announcements or adjustments.

COURSE EXPECTATIONS AND GRADING EVALUATION:

Grading: 90% final exam; 10% class presentation;

Advance preparation for class is essential. I will usually attempt to give a rough estimate of the next week's reading at the end of the preceding week. *But in any event you are always responsible for preparing at least 10 pages beyond the point where a previous day's class ended.*

In addition to the group activities in part two (above), there will be a take-home final examination (with a length limitation of approximately 10 double-spaced pages). A practice exam will be handed out toward the end of the semester and discussed at a special review session. More detailed information concerning the exam will be given out later.

We'll generally follow the order of the readings in the reading lists, but some

selections may be skipped, and other assignments may be added from other sources from time to time. (Any such modifications will be announced in class and on *Canvas*.)

Class participation: Students will be called on regularly. The quality of class participation may be taken into account in the determination of grades.

Classroom Etiquette: Cellphones should be turned off prior to class or not brought into the classroom at all. If you need to make or take a call during the class period, you should not attend class that day. If you think your computer might make a noise during class, please do not bring it into the classroom that day. These rules are for the benefit of you and your fellow classmates.

CLASS ATTENDANCE POLICY:

Attendance in class is required by both the ABA and the Law School. Attendance will be taken at each class meeting. Students are responsible for ensuring that they are not recorded as absent if they come in late. A student who fails to meet the attendance requirement will be dropped from the course. The law school's policy on attendance can be found [here](#).

COMPLIANCE WITH UF HONOR CODE:

Academic honesty and integrity are fundamental values of the University community. Students should be sure that they understand the UF Law Honor Code located [here](#). The UF Law Honor Code also prohibits use of artificial intelligence, including, but not limited to, ChatGPT and Harvey, to assist in completing quizzes, exams, papers, or other assessments unless expressly authorized by the professor to do so.

INFORMATION ON UF LAW GRADING POLICIES:

The Levin College of Law's mean and mandatory distributions are posted on the College's website and this class adheres to that posted grading policy. The following chart describes the specific letter grade/grade point equivalent in place:

Letter Grade	Point Equivalent	Letter Grade	Point Equivalent
A (Excellent)	4.0	C (Satisfactory)	2.0
A-	3.67	C-	1.67
B+	3.33	D+	1.33
B	3.0	D (Poor)	1.0
B-	2.67	D-	0.67
C+	2.33	E (Failure)	0.0

The law school grading policy is available [here](#).

OBSERVANCE OF RELIGIOUS HOLIDAYS:

UF Law respects students' [observance of religious holidays](#).

- Students, upon prior notification to their instructors, shall be excused from class or other scheduled academic activity to observe a religious holy day of their faith.
- Students shall be permitted a reasonable amount of time to make up the material or activities covered in their absence.
- Students shall not be penalized due to absence from class or other scheduled academic activity because of religious observances.

EXAM DELAYS AND ACCOMMODATIONS:

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

STATEMENT RELATED TO ACCOMODATIONS FOR STUDENTS WITH DISABILITIES

Students requesting accommodations for disabilities must first register with the Disability Resource Center (<https://disability.ufl.edu/>). Once registered, students will receive an accommodation letter, which must be presented to the Assistant Dean for Student Affairs (Assistant Dean Brian Mitchell). Students with disabilities should follow this procedure as early as possible in the semester. It is important for students to share their accommodation letter with their instructor and discuss their access needs as early as possible in the semester. Students may access information about various resources on the UF Law Student Resources Canvas page, available at <https://ufl.instructure.com/courses/427635>.

STUDENT COURSE EVALUATIONS

Students are expected to provide professional and respectful feedback on the quality of instruction in this course by completing course evaluations online via GatorEvals. Click [here](#) for guidance on how to give feedback in a professional and respectful manner. Students will be notified when the evaluation period opens and may complete evaluations through the email they receive from GatorEvals, in their Canvas course menu under GatorEvals, or via <https://ufl.bluer.com/ufl/>. Summaries of course evaluation results are available to students [here](#).

RECORDINGS OF CLASS

Students are allowed to record video or audio of class lectures. However, the purposes for which these recordings may be used are strictly controlled. The only allowable purposes are (1) for personal educational use, (2) in connection with a complaint to the university, or (3) as evidence in, or in preparation for, a criminal or civil proceeding. All other purposes are prohibited. Specifically, students may not publish recorded lectures without the written consent of the instructor. A “class lecture” is an educational presentation intended to inform or teach enrolled students about a particular subject, including any instructor-led discussions that form part of the presentation, and delivered by any instructor hired or appointed by the University, or by a guest instructor, as part of a University of Florida course. A class lecture does not include lab sessions, student presentations, clinical presentations such as patient history, academic exercises involving solely student participation, assessments (quizzes, tests, exams), field trips, private conversations between students in the class or between a student and the faculty or guest lecturer during a class session. Publication without permission of the instructor is prohibited. To “publish” means to share, transmit, circulate, distribute, or provide access to a recording, regardless of format or medium, to another person (or persons), including but not limited to another student within the same class section. Additionally, a recording, or transcript of a recording, is considered published if it is posted on or uploaded to, in whole or in part, any media platform, including but not limited to social media, book, magazine, newspaper, leaflet, or third-party note/tutoring services. A student who publishes a recording without written consent may be subject to a civil cause of action instituted by a person injured by the publication and/or discipline under UF Regulation 4.040 Student Honor and Student Conduct Code.

ABA OUT-OF-CLASS HOURS REQUIREMENTS: ABA Standard 310 requires that students devote 120 minutes to out-of-class preparation for every “classroom hour” of in-class instruction. Each weekly class is approximately 2 hours in length, requiring at least **4 hours** outside of class including reading the assigned materials, writing critical analyses, and developing your final paper.

COURSE SCHEDULE OF TOPICS AND ASSIGNMENTS

This syllabus is offered as a guide to the direction of the course. Our pace will depend in part on the level of interest and the level of difficulty of each section and is subject to change.

First Assignment: posted to Canvas as an Announcement, with supporting documents in "Files."

