THE FIRST AMENDMENT AND RELIGION IN AMERICA

PSC 291
Professor Jackson
Spring 2016

Required material: All assigned readings are posted in .pdf format on Blackboard. (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. (Students who are taking this for Political Science writing [PSC 291W] should meet with me at the end of the first class on January 19th to discuss writing requirements that will be in lieu of the short mid-term paper and final essay.)

January 19 **Overture**

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

Stanley Fish, "Liberalism and Secularism" (2007), http://fish.blogs.nytimes.com

Biblical Antecedents & Early Christianity: Covenant and Separation

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

Exodus 19-20; Exodus 24; Exodus 31; Deuteronomy 17:14-20; Judges 8:22-23, 9:1-15; I Samuel 8; Daniel 2-4; 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 26 **Europe & Christianity: Persecution to Toleration**

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

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 (1689)

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

February 2 **The Colonial Experience & Constitutional Development**

John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment (Westview Press, 3rd ed. 2011), pp. 21-40 (hereafter "Witte & Nichols")

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. 178-200
George Washington, First Inaugural Address (1789)
Congressional Resolution: Day of Thanksgiving (1789)
George Washington, Farewell Address (1796)
Thomas Jefferson, Letter to the Danbury Baptists (1802)
James Madison, Detached Memoranda (circa 1817)

February 9 **The American Experience Through the Application of the First Amendment to States**

Noah Feldman, Divided by God: America's Church-State Problem—and What we Should do About It (Farrar, Straus and Giroux 2005), pp. 53-56 (hereafter "Feldman, Divided by God")
"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 & Nichols, pp. 118-22 & 130
"Reynolds v. United States," 98 U.S. 145 (1879)
* Note on "Cleveland v. United States"
"Pierce v. Society of Sisters," 268 U.S. 510 (1925)
"Cantwell v. Connecticut," 310 U.S. 296 (1940)
*Note on "Murdock v. Commonwealth of Pennsylvania"

February 16 **Free Exercise at the Supreme Court**

"Sherbert v. Verner," 374 U.S. 398 (1963)
* Note on "McGowan v. Maryland" and "Braunfeld v. Brown"
* Note on "Wisconsin v. Yoder"
* Note on "United States v. Lee"
"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)

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"

Religious Exemption Law Map of the United States
Religious Land Use and Institutionalized Persons Act of 2000
*Note on "Cutter v. Wilkinson"

Free Exercise and Corporations

"Burwell v. Hobby Lobby Stores, Inc.," 573 U.S. ___ (2014)

February 23 **Work on Mid-Term Paper**

March 1 **Mid-Term Paper Due** (half-class)

"Religion" and its "Exercise"

"United States v. Seeger," 380 U.S. 163 (1965)

March 8 **No class (Spring break)**

March 15 **Perspectives on the Free Exercise of Religion**

Martha Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality (Basic Books 2008), pp. 116-20, 151-58, 164-74 (hereafter "Nussbaum, Liberty of Conscience")
Kent Greenawalt, Religion and the Constitution Volume I: Free Exercise and Fairness (Princeton University Press 2006), pp. 124-56
Paul Horwitz, "The Hobby Lobby Moment," 128 Harv. L. Rev. (2014), pp. 154-189
"Thomas v. Review Board," 450 U.S. 707 (1981)
*Note on "United States v. Ballard"

March 22 **The Establishment Clause and State Aid to Religious Schools**

Feldman, Divided by God, pp. 57-71, 86-92 [see February 9]
"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)

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

*Note on Taxpayer Standing

March 29 **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)
"Town of Greece v. Galloway," 572 U.S. ___ (2014)
*Note on "Newdow v. Rio Linda Union School District"

Commandments and Symbols

"Stone v. Graham," 449 U.S. 39 (1980)
"Allegheny County v. Greater Pittsburgh ACLU," 492 U.S. 573 (1989)

April 5 **Commandments and Symbols (cont.)**

"Van Orden v. Perry," 545 U.S. 677 (2005) (including "Appendix")
"McCreary County v. ACLU of Kentucky," 545 U.S. 844 (2005)
Witte & Nichols, pp. 231-34

Religious Speech and the Establishment Clause

"Widmar v. Vincent," 454 U.S. 263 (1981)
"Good News Club v. Milford Central School District," 533 U.S. 98 (2001)
*Note on "Faith Center Church Evangelistic Ministries v. Glover"
*Note on "Christian Legal Society v. Martinez"

Exercise *vs.* Establishment

"Locke v. Davey," 540 U.S. 712 (2004)

Exercise *and* Establishment

"Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC," 565 U.S. ___ (2012)
*Note on "Bob Jones University v. United States"

April 12 **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)
Andrew Koppelman, "And I Don't Care What It Is: Religious Neutrality in American Law," 39 Pepperdine L. Rev. (2013), pp. 1115-1124
Nussbaum, Liberty of Conscience, pp. 225-32 [see March 15]
Steven Smith, "The Last Chapter?," 41 Pepperdine L. Rev. (2014), pp. 903-936

April 19 **Work on Final Paper**

April 26 **Papers Due; Concluding Thoughts and Discussion**