

UNIVERSITY OF ALABAMA SCHOOL OF LAW

LAW AND RELIGION  
PROFESSOR PAUL HORWITZ  
FALL 2011

SYLLABUS, COURSE REQUIREMENTS AND GRADING CRITERIA

**I. INTRODUCTION**

Welcome to Law and Religion. This 3-credit course meets on Tuesdays, and Thursdays from 2-3:15 p.m. As the title suggests, this course focuses on the relationship between law and religion, under the United States Constitution and beyond. Thus, our focus will be on the jurisprudence of the Free Exercise and Establishment Clauses of the First Amendment, although we will also have occasion to discuss broader philosophical questions concerning the relationship between religion and politics, the intermediary role of religious institutions, and other issues.

**II. COURSE MATERIALS AND BACKGROUND READING**

Our primary text for this course will be Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution*, 3d ed. (Aspen Publishers 2011), and my own book, *The Agnostic Age: Law, Religion, and the Constitution* (2011). I may also assign additional handouts over the course of the semester. I am fine with your finding used copies of my own book, looking for discounted sales, etc. I should note in fairness that although I think it's quite natural to assign this book, which does after contain the main themes of most of my work in law and religion, I'm still thinking about how to work it into the syllabus. For now, I encourage you to read it from start to finish at your own pace, absent particular assignments, and think about what it says about the primary materials we're working through.

For those seeking additional reading on this topic, the potential sources are endless. Focusing primarily on student-oriented supplemental reading rather than the many academic books discussing law and religion, you might, of course, turn to the countless general treatises on constitutional law and/or the First Amendment that are on the market, although I find that the First Amendment treatises often unfortunately skimp on the Religion Clauses. For supplements geared directly toward law and religion, you might consider Thomas C. Berg, *The State and Religion in a Nutshell* (Thomson/West, 2004), or Daniel O. Conkle, *Constitutional Law: The Religion Clauses* (Foundation Press [Turning Point Series], 2003). Of course, none of these is required, and the casebook itself should provide ample reading. One last book I would commend to anyone deeply interested in these issues is a wonderful recent two-volume publication: Kent Greenawalt's

*Religion and the Constitution, vol. 1: Free Exercise and Fairness* (Princeton University Press, 2006), and volume 2, *Establishment and Fairness* (PUP, 2008). All of these books are or will be on reserve.

### III. COURSE COVERAGE

The readings for this semester are offered below ***and are subject to revisions***, which I will announce in class, as well as potential supplemental readings, as mentioned above. Please note that the schedule of readings presented below is given ***by topic, not by date***; you will be responsible for keeping up with the readings, although I will generally let you know where we are and where we are going next. As a rule of thumb, I suggest you set a reading pace of 20 pages per class, and stick to it even if we lag behind, as we will cover longer stretches of material more quickly from time to time. As noted, I will sometimes assign supplemental reading, particularly including recent cases.

| <u>Topic</u>  | <u>Pages</u>       |
|---|--------------------|
| <b>INTRODUCTION</b>   | 1-14, 23-57, 69-73 |
| <b>RELIGION IN THE REGULATORY STATE</b>                         |                    |
| Original intent and free exercise exemptions                    | 122-139            |
| Belief and conduct: the Mormon cases ( <i>Reynolds et al.</i> ) | 147-159            |
| Modern exemptions ( <i>Sherbert</i> )                           | 159-173            |
| The demise of exemptions ( <i>Smith</i> )                       | 173-186            |
| Post-Smith: RFRA, Boerne, and RLUIPA                            | 186-193            |
| Neutrality and general applicability                            | 193-211            |
| Burdens on religion; sincerity                                  | 211-232            |
| Governmental interest: general                                  | 232-244            |
| Legislative accommodations: general                             | 225-238            |
| Accommodations: Estab. Cl. case law                             | 257-283            |
| Denominational neutrality ( <i>Kiryas Joel</i> )                | 283-296            |
| Internal church disputes  | 319-333            |
| Churches as employers   | 333-347            |
| <b>POWER OF THE PURSE</b>                                       |                    |
| Introduction and history ( <i>Everson</i> )                     | 367-382            |
| The limited-aid approach ( <i>Lemon</i> )                       | 399-432            |
| The neutral-aid approach: indirect aid                          | 432-438            |
| Neutrality and direct aid ( <i>Mitchell</i> )                   | 438-458            |
| State restrictions on aid ( <i>Davey</i> )                      | 458-481            |
| Strings on Government Aid; “Charitable choice”; Standing        | 481-520            |
| <b>RELIGION AND GOVERNMENT’S ROLE IN CULTURE</b>                |                    |
| Modern school prayer decisions: basics                          | 521-533            |
| School prayer: recent decisions                                 | 533-564            |

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| Public religious displays                  | 564-586          |
| Religious displays: 10 Commandments        | 586-606          |
| School curriculum: evolution and creation  | 606-620          |
| Challenges to the public school curriculum | 620-633          |
| Religious speech: introduction             | 653-673          |
| Religious speech in public schools         | 673-686, 691-695 |
| Drawing lines: gov'tal vs. private speech  | 699-715          |
| Religion and political decision making     | 727-736          |

**DEFINITION OF RELIGION**

761-804

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[Syllabus continues on next page...]

#### IV. OFFICE HOURS AND CONTACT INFORMATION

I will be generally available to visitors on Tuesdays and Thursdays from 1-2:30 p.m. Feel free to stop by to discuss questions on the class or anything else. No appointments are necessary during office hours. If you can't make it during those hours, feel free to make an appointment to stop by at another time. I'm also happy to schedule lunch or coffee with groups of students.

There are a number of ways to reach me. My office is in Room 360. My number there is (205) 348-6110. You may also leave a note in my faculty mailbox or contact my assistant, Donna Warnack. My email addresses are [phorwitz@law.ua.edu](mailto:phorwitz@law.ua.edu), and [phorwitz@hotmail.com](mailto:phorwitz@hotmail.com); use my Alabama email, but feel free to try the alternate one if you need to. I will try to return emails and calls promptly, but there may be delays depending on my availability or your question.

Please make sure to *sign up for the TWEN page* for this class; my password is "horwitz." We'll discuss the use of the TWEN page further in class.

#### V. MAKE-UP CLASSES

If I need to miss a class, I will make an announcement in class, and schedule a make-up period well before the end of classes.

#### VI. ATTENDANCE AND PARTICIPATION

Regular and punctual attendance is required. Each student is responsible for keeping track of his or her absences. Attendance will be taken at the start of class through distribution of an attendance sheet. If you are not in your seat at the beginning of class and do not personally initial the sign-in sheet at that time, you are considered absent. Students may initial only their own names, not those of other students. Lack of preparation, early departure, or inappropriate behavior may result in a student being marked absent.

Moreover, because this is not simply a case-parsing class, but ideally a wide-ranging *discussion* about law and religion, I expect you to take seriously your obligation to read and think about the materials assigned for each class. Although I welcome volunteers, I **will** call on volunteers when and as necessary. Accordingly, please make every effort to come to class **prepared** and on time, and ready to focus on this class only – not on the newspaper, computer Solitaire, instant messaging, Nick Saban, or anything else. Although I can't enforce this rule as well as I'd like, at least use this rule of thumb: if your laptop use is distracting me or your classmates, you shouldn't be doing it. If you are aware in advance that you will be absent from class, or that you cannot do the reading, please let me know, or leave a message in my mailbox.

Finally, I should let you know as a matter of courtesy that we may have faculty visitors in class from time to time. I apologize for the intrusion. Act normally, unless that is not your usual custom.

## **VII. GRADES AND EVALUATION**

Students will have a choice between two evaluation methods in this course. I will provide a deadline in class for you to tell me which option you have selected.

(1) During the semester, you will write two **single-spaced** papers of **8-10 pages**, each based on a list of cases I will provide. Although you may cite secondary materials, you need not do so and I don't necessarily encourage you to do so. Rather, I want you to write a close, careful reading of the case, in which you really wrestle with the opinion(s) and try to offer a careful, critical analysis of the issues it raises. Law school gives surprisingly few opportunities for close analysis of cases and careful writing, and this is intended as a response to that lack. In short, and to reiterate, this is an analytical exercise, not a research paper. One paper will be due by Thanksgiving and the other by the end of the semester. It will be worth 80 percent of your grade and will be due by the end of classes. The remaining 20 percent of your grade will come from class participation.

(2) For those who are interested, you may instead submit a substantial research paper on a topic concerning law and religion. The paper must at the minimum meet the Law School's requirements for eligibility for writing credit; I assume the paper will be an original, well-researched paper of at least 25-30 pages in length. Paper topics should be cleared with me in advance; I am also happy to help you come up with a suitable topic, and will supply a list of possible topics at some point in the semester. The paper will be due on or around the exam period. It will be worth 80 percent of your grade, with class participation taking up the remaining 20 percent.

## **VIII. ACCOMMODATIONS**

The Law School is committed to meeting the needs of students with physical, learning, or other disabilities, and provides appropriate accommodations and services tailored to each person's specific requirements. The Law School's assistant deans and the University's Office of Disability Services work together to help individuals with disabilities achieve and maintain individual autonomy. Students with disabilities are encouraged to contact Jenelle Marsh, Senior Assistant Dean for Students/Academic Services, at (205) 348-5750 or [jmarsh@law.ua.edu](mailto:jmarsh@law.ua.edu), so that the individual's needs for support services can be evaluated and accommodated in a timely manner.

## **IX. DISCLAIMER**

This is a syllabus, not a binding contract. In the words of Justice Holmes, “It is an experiment, as all life is an experiment.” Dates and details are subject to change. Actual mileage may vary. Void where prohibited.

**PH**