

# ADVANCED CONSTITUTIONAL LAW: FREEDOM OF RELIGION SEMINAR

Antonin Scalia Law School  
at George Mason University – Fall 2022

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**“Congress shall make no law respecting an Establishment of Religion or prohibiting the free exercise thereof...”**

Learning Outcomes: Students will be able to understand the major doctrines and case law applicable to cases under the Free Exercise and Establishment Clauses and will gain insight into how the case law and doctrines have arisen and how they may agree with – or differ from – original intent.

In lieu of textbooks, reading materials will consist of excerpts from cases in the syllabus, highlighted and provided in advance of class, along with supplemental handouts. Recordings of U.S. Supreme Court arguments also will be used.

Grades will be based on a 20-page paper written on an approved topic of the student's choosing (90%), as well as on class participation (10%).

All students should be prepared to discuss all the cases and topics covered in the assigned readings.

Office hours by appointment.

## 1. Indicia of Original Intent – and Otherwise

**This section will examine the philosophical, pragmatic and theological underpinnings of the Religion Clauses, as well as the competing concepts about the proper relationship between government and religion in the years surrounding the Founding of the American Republic.**

- A Bill Establishing Provision for Teachers of the Christian Religion (1784)
- Memorial and Remonstrance Against Religious Assessment (1785)
- Virginia Act for Religious Freedom (1786)
- Geo. Washington's Thanksgiving Day Proclamation (1789)
- Letter of Danbury Baptists to Thomas Jefferson, and Jefferson's response (1802)

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- Joseph Story, *Commentaries on the Constitution of the United States* (1833) §§1863-73
- *Marsh v. Chambers*,  
463 U. S. 783 (1983)
- James Madison's "Detached Memoranda" (1823 ?)
- *Church of the Holy Trinity v. United States*,  
143 U.S. 457 (1892)

### 2. Why Do the Religion Clauses Apply to the States?

**This section will examine the doctrine of incorporation as well as the revolution in the application of the Establishment Clause to the States, including the failed political revolution of the later 1800's and the successful judicial revolution of the 1940's and thereafter.**

- Excerpt from proceedings in U. S. House of Representatives (June 8, 1789)
- *Barron v. Baltimore*,  
32 U.S. 243 (1833)
- *Permolli v. New Orleans*,  
44 U.S. 589 (1945)
- The Blaine Amendment (1875)
- *Myers v. Nebraska*,  
262 U.S. 390 (1923)
- *Cantwell v. Connecticut*,  
310 U.S. 296 (1940)
- *Everson v. Board of Education*,  
330 U.S. 1 (1947)
- *Illinois v. Board of Education*,  
333 U.S. 203 (1948)
- *Zorach v. Clauson*,  
343 U.S. 306 (1952)
- *Jaffree v. Board of School Com'rs*,  
554 Supp. 1104 (S.D. Ala. 1983)

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- *Elk Grove Unified Sch. Dist. v. Newdow*,  
524 U.S. 1 (2004) (Thomas, J., concurring in the judgment)
- *Van Orden v. Perry*,  
545 U.S. 677 (2005) (Stevens, J. joined by Ginsburg, J.,  
dissenting)
- *American Legion v. American Humanist Ass'n*,  
139 S. Ct. 2067 (2019) (Thomas, J., concurring in the  
judgment)

### 3. What Does Free Exercise Mean?

This section will examine the major competing interpretations of the Free Exercise Clause and how the concept has expanded and contracted over time, including a review of current issues and exploration of potential problems.

#### a. The Earlier Cases (Pre-Smith)

- *Reynolds v. United States*,  
98 U.S. 145 (1879)
- *Minersville School Dist. v. Gobitis*,  
310 U.S. 586 (1940)
- *West Virginia State Bd. of Educ. v. Barnette*,  
319 U.S. 624 (1943)
- *Wisconsin v. Yoder*,  
406 U.S. 205 (1972)
- *Sherbert v Verner*,  
374 U.S. 398 (1963)
- *Thomas v. Review Bd. of Indiana Employment Security Div.*,  
50 U.S. 707 (1981)
- *Hobbie v. Unemployment Appeals Com.*,  
480 U.S. 136 (1986)

#### b. Smith

- *Employment Division v. Smith*,  
494 U.S. 872 (1990)

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### c. Post-Smith Developments

- Religious Freedom Restoration Act (RFRA)
- *City of Boerne v. Flores*,  
521 U.S. 507 (1997)
- Religious Land Use and Institutionalized Persons Act (RLUIPA)
- *Church of Lukumi Babalu Aye v. City of Hialeah*,  
508 U.S. 520 (1993)
- *Cutter v. Wilkinson*,  
544 U.S. 709 (2005)
- *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)
- *Our Lady of Guadalupe Sch. v. Morrissey-Berru*,  
140 S. Ct. 2049 (2020)
- *Burwell v. Hobby Lobby Stores, Inc.*,  
573 U.S. 682 (2014)
- *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,  
140 S. Ct. 2367 (2020)
- *Fulton v. City of Philadelphia*,  
141 S. Ct. 1868 (2021)

### d. Religious Liberty and Private Discrimination

- *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,  
138 S. Ct. 1719 (2018)
- *State v. Arlene's Flowers, Inc.*,  
441 P.3d 1203 (Wash. 2019) (cert. denied July 2, 2021)
- *Telescope Media Grp. v. Lucero*,  
936 F.3d 740 (8th Cir. 2019)
- *Brush & Nib Studios, LC v. City of Phoenix*,  
448 P.3d 890 (Ariz. 2019)

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- *303 Creative LLC v. Elenis*,  
6 F.4th 1160 (10th Cir. 2021)  
(*cert granted Feb. 22, 2022* (No. 21-476))  
(to be heard this term).

#### 4. The Establishment Clause – Who Has Standing to Complain?

**This section will examine issues of standing related to enforcement of the Establishment Clause, including issues involving the Article III jurisdiction of federal courts.**

- *“The European model of constitutional review of legislation”*  
Ján Mazák, Judge and the President of the Constitutional Court of the Slovak Republic
- *Marbury v. Madison*,  
5 U.S. 137 (1803)
- *Lujan v. Defenders of Wildlife*,  
504 U.S. 555 (1992)
- *Flast v. Cohen*,  
392 U.S. 83, 93 (1968)
- *Hein v. Freedom from Religion Found., Inc.*,  
551 U.S. 587 (2007)
- *Ariz. Christian Sch. Tuition Org. v. Winn*,  
563 U.S. 125 (2011)

#### 5. What is an Establishment of Religion?

**This section will examine the various tests used to ascertain whether a government practice violates the Establishment Clause, using cases to illustrate the tests as well as critiques of their application and conflicts between the tests.**

- *Everson v. Board of Education*,  
330 U.S. 1, 15-16 (1947)
- a. **Empowerment**
- *Larkin v. Grendel's Den*,  
459 U.S. 116 (1982)
- b. **Coercion**
- *Lee v. Weisman*,  
505 U.S. 577 (1992)

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- *Santa Fe Indep. Sch. Dist. v. Doe*,  
530 U.S. 290 (2000) (part)
- *Newdow v. United States Cong.*,  
292 F.3d 597 (9th Cir. 2002)
- *Elk Grove Unified Sch. Dist. v. Newdow*,  
542 U.S. 1 (2004)

### c. **Lemon Test – and its Endorsement Offshoot**

- *Lemon v. Kurtzman*,  
403 U.S. 602 (1971)
- *Santa Fe Indep. Sch. Dist. v. Doe*,  
530 U.S. 290 (2000) (part)
- *Capital Square Review Bd. v. Pinette*,  
515 U. S. 753 (1995)
- *American Legion v. American Humanist Ass’n*,  
139 S. Ct. 2067 (2019)
- *Shurtleff v. City of Boston*,  
142 S. Ct. 1583 (2022)
- *Kennedy v. Bremerton Sch. Dist.*,  
142 S. Ct. 2407 (2022)

### d. **Neutrality**

- *Larson v. Valente*,  
456 U.S. 228 (1982)
- *Board of Educ. v. Grumet*,  
512 U.S. 687 (1994)
- *Widmar v. Vincent*,  
454 U.S. 263 (1981)
- *Rosenberger v. Rector & Visitors of the Univ. of Va.*,  
515 U.S. 819 (1995)
- *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010)

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### 6. Play in the Joints

The first part of this section will examine the distinction between the impermissible “advancement” or “support” of religion and the permissible “accommodation” of religion. The second part will examine the distinction between a permissible decision not to “accommodate” religion and impermissible government discrimination against religion.

#### a. Accommodation or Advancement

- *Walz v. Tax Commissioner*,  
397 U.S. 664 (1970)
- *Texas Monthly, Inc. v. Bullock*,  
489 U.S. 1 (1989)
- *Estate of Thornton v. Caldor*,  
472 U.S. 703 (1985)
- *Corporation of the Presiding Bishop v. Amos*,  
483 U.S. 327 (1987)
- *Witters v. Washington Dep’t of Servs. For Blind*,  
474 U.S. 481 (1986)

#### b. Non-Accommodation or Discrimination

- *Locke v. Davey*,  
540 U.S. 712 (2004)
- *Trinity Lutheran Church of Columbia, Inc. v. Pauley*,  
137 S. Ct. 2012 (2017)
- *Espinoza v. Montana Dept. of Revenue*  
140 S. Ct. 2246 (2020)
- *Carson v. Makin*,  
142 S. Ct. 1987 (2022)



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### 7. Major Issues in Establishment Clause Cases

This section will examine the application of the Establishment Clause to some of the major issues that have confronted the courts.

#### a. Covid

- *Roman Catholic Diocese v. Cuomo*,  
141 S. Ct. 63 (2020)

#### b. Legislative Prayer

- *Marsh v. Chambers*,  
463 U.S. 783 (1983)
- *Town of Greece v. Galloway*,  
572 U.S. 565 (2014)

#### c. Displays on Government Property: Holidays, Ten Commandments and Crosses

- *Allegheny v. ACLU*,  
492 U.S. 573 (1989)
- *Lynch v. Donnelly*,  
465 U.S. 668 (1984)
- *McCreary County v. ACLU*,  
545 U.S. 844 (2005)
- *Van Orden v. Perry*,  
545 U.S. 677 (2005)
- *Salazar v. Buono*,  
559 U.S. 700 (2010)
- *American Legion v. American Humanist Ass'n*,  
139 S. Ct. 2067 (2019)

#### d. Religion in the Government's Schools

- *Engel v. Vitale*,  
370 U.S. 421 (1962)
- *Abington Sch. Dist. v. Schempp*,  
374 U.S. 203 (1966)

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- *Wallace v. Jaffree*,  
472 U.S. 38 (1985)
- *Brown v. Gilmore*,  
258 F.3d 265 (4<sup>th</sup> Cir. 2001)
- *Edwards v. Aguillard*,  
482 U.S. 578 (1987)
- *Stone v. Graham*,  
449 U.S. 39 (1980)
- [Virginia] Board of Education Guidelines Concerning  
Religious Activity in the Public Schools

### e. **Government in the Religious Schools**

- *Tilton v. Richardson*,  
403 U.S. 672 (1971)
- *Hunt v. McNair*,  
413 U.S. 734 (1973)
- *Comm. for Public Educ. & Religious Liberty v. Nyquist*,  
413 U.S. 756 (1973)
- *Mueller v. Allen*,  
463 U.S. 388 (1983)
- *Board of Education v. Allen*,  
392 U.S. 236 (1968)
- *Aguilar v. Felton*,  
473 U.S. 402 (1985)
- *Agostini v. Felton*,  
521 U.S. 203 (1997)
- *Mitchell v. Helms*,  
530 U.S. 793 (2000)
- *Zelman v. Simmons-Harris*,  
536 U.S. 639 (2002)