HONORS 214 (Fall 2020) Prof. David Gerber

The First Amendment and Religion [dagerber@buffalo.edu](mailto:dagerber@buffalo.edu)

Wednesday, 10:20 – 11:10 (virtual, all semester, via ZOOM)

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***Goals of the seminar***: To analyze (1) the place of religion and religious institutions in American public life, past and present; and (2) the public negotiations, through the conflict of ideas and through law and politics, over that place.

**The philosophical validity of religion and the claims to truth or revelation of any one particular religion, as you experience them personally, are only considered in so far as they bear in these subjects concerning religion in the public sphere. In other words, this class is not the place to debate matters of faith from a theological perspective or the competing claims of various religions to revelation. In other words, it is not the place to proclaim that my religion is better or truer than your religion.**

**We will take it for granted, however, that it is completely legitimate if faith or non-faith influences your views on the issues before us this semester. A person with religious faith may well, for example, believe that we need more religion, officially recognized, in public life and proceed from that perspective to analyze our issues. A person with a secular orientation, including a person of faith believing that religion is a completely private matter, may reason from that perspective.**

The analytical work of the seminar will not be theological or philosophical, but rather legal-constitutional, political, and social. The central intellectual problems of the seminar will revolve around the traditions of religious liberty, religious diversity (or, pluralism) , and government neutrality in matters of religion (what has come to be known as “church-state separation”) that have arisen out of Supreme Court interpretation of the religion clauses of the First Amendment and the controversies that have arisen from these interpretations. To that end, we will be reading Supreme Court decisions.

Those clauses say simply, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” We have been arguing about their meanings since the First Amendment was written, but that argument accelerated greatly in the twentieth century.

I. ***Organization and Your Responsibilities.***

(1) There will be no lectures. The seminar is based exclusively on discussion and argument. ***This is more difficult because done electronically, but we’ll all endeavor to do the best we can. Under the circumstances, no one will be penalized for not being involved in discussion on a frequent basis.***

(2) Come to class each week having completed the readings that are assigned, and be prepared to discuss them. This should not be difficult: on average over the course of the semester, though the amount of reading varies from week to week, you are asked to do on average about 15 pages of reading a week. On the other hand, even at a very few pages, the reading you will be doing, Supreme Court decisions, is demanding.

I will be sending questions every week **via UB LEARNS** to help guide your reading. ***Look for these questions in your email.***

(3) Each week someone will be chosen at random to begin class by informally summarizing the issues before us.

(4) To assist you in preparing for class discussions, you will be asked to keep an electronic journal in which you summarize *in about two-pages* the Supreme Court decisions you will be reading. The summary should include both majority and minority opinions.

(5) This journal will be turned in via email attachment at the end of the semester, and become one basis of your grade.

(6) There are no examinations, quizzes, or papers expected of you. There may be short one-page paper from time to time. These will be turned in at the time of the next class after these papers are assigned.

(7) In summary, what you are asked to do is READ; THINK; AND DISCUSS.

II. Learning Outcomes *A. Template of the Honors College*

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| **Course Learning Outcome** | **Delivered through the Following Instructional**  **Method(s):** | **Students Achievement**  **Assessed with the following Methods/**  **Assignments:** |
| Skills, knowledge, ethical judgment, personal responsibility for lifelong learning while creating a sense of community among  Honors Scholar cohort. | The course urges you to take seriously the obligations of citizenship through participation in discussions of the First Amendment’s *religion clauses*, which may be interpreted from moral, legal, and political perspectives that often are in conflict. | Students will be questioned closely and at random in class about the case under review in the manner of the law school classroom. They will also be asked directly to respond to one another’s arguments. |
| Attain and apply critical thinking skills to define and solve problems. | The course requires close reading of Supreme Court decisions, which require interpretation from the perspectives of language and jurisprudence. Readings are the court decisions and essays about the Court and the First Amendment religion clauses. | Students will be asked to argue by analogy, comparison and contrast, and with respect to precedent. In preparation for class, they will brief the case of the week, and keep a notebook of briefs. |
| Understand the value of  an interdisciplinary approach to thought and discovery. | The course requires three disciplinary perspectives simultaneously: History (origins and precedents); Political Science (the functions and workings of political institutions); and Law (state codes developed to bring about justice and order). | The course requires at the foundational level a synthesis of these disciplines in every aspect of the analysis it develops in looking at the development of constitutional law regarding the First Amendment. |

II. Learning Outcomes *B. Instructor’s Statement*

If you work at fulfilling its minimal demands, here it how you will profit:

1. Ability to read critically.

2. Ability to make finer conceptual distinctions, and hence speak abstractly in more precise ways;

3. Ability to argue in a disciplined manner in behalf of points-of-view you favor;

4. Patience and respect for positions with which you disagree;

5. Appreciation of the complex purposes law is constructed to fulfill and the complex processes by which law is made;

6. Ability to separate what one personally favors, morally or simply by personal preference, from what, in most cases, laws need to be. Law in our system must balance simultaneously morality, legal precedent, the need for social, political, and moral order, and the obligation to seek equal justice and fairness.

III. ***Textbooks.***

All readings for the course will be found in the two paperback books named immediately *below*. Both books are available at the University Bookstore, but you can get them wherever you like. It doesn’t matter if the books are new or used. Wherever you get them, buy them as soon as possible. **They are not available as PDFs or in electronic form.**

(1) Robert S. Alley, editor, *The Constitution and Religion: Leading Supreme Court Cases on Church and State*. This book reprints edited court decisions, and has short introductory remarks before each case.

(2) Ronald B. Flowers, *That Godless Court? : Supreme Court Decisions on Church-State Relationships*. This book provides summaries of most of the Supreme Court decisions you will be reading, and places those decisions in a number of different contexts, especially the context of ongoing traditions of judicial (Court) interpretation. Unless specific reading assignments for this book are mentioned *below*, this book exists as a supplement to your reading, and you should use it to gain more information and further perspectives on the Supreme Court decisions we are reading. **It will help you greatly to make sense of these decisions.**

**If for whatever reason, such as residence outside the United States during the semester and/or difficulties regarding postal communications, you find it impossible to get these two books in their published, physical form, contact me, and I’ll make an arrangement for you to have an alternate source of readings. Though these two books are especially useful for this seminar, there is no need to worry about this; we can find alternatives for you.**

IV. Schedule of Classes and Readings

All readings of court cases refer to Alley, *The Constitution and Religion*, and are identified not by that book, but by the title of the case. Find the relevant case for the week in Alley’s book.

1. 2 September Introduction and Organization

2. 9 September What the Supreme Court Does, How It Works, and Why It Matters. Does the Court Evade Big Decisions for Pragmatic Reasons?

Read, Flowers, “The Court and Its Procedures,” pp. 1-8 [8]

Read, the***Wikipedia***summary of *Burwell v. Hobby Lobby* *Stores, Inc*. (2014). The Court’s decision is 70 pages in its entirety, and we won’t be reading that. I am asking you to familiarize yourselves with this law suit and Court decision to provide you with an example of the ways the Supreme Court thinks – in other words, the ways it reasons out its decisions on highly significant and complex questions… and most of what comes before the Court regarding First Amendment issues is “highly significant and complex.”

3.16 September Constitutional Origins: What Precedents are there in History to Guide Us as We Interpret the Constitution’s Religion Clauses? Why Did The Founders of the American Republic Care So Much about Religion?

Read, Flowers, pp. 10-20 [10]

Read, Alley, pp. 15-27. [12]

4. 23 September Religious Liberty Mormon Polygamy and the Limits of Liberty: Should Religions and People of Faith Get Exemptions from General Laws? Should We Accept Plural Marriage?

Read, *Reynolds v. United States* (1879) [5]

5. 30 September Religious Liberty Speech and Public Proselytizing: Should the State Have the Power to Determine What Is a Religion and What the Legitimate Functions of Religion Are? Should There Be Special Speech Rights for Religions?

Read, *Cantwell v. Connecticut* (1940) [6]

6. 7 October Religious Liberty Religious Faith and Exemptions from Demonstrations of National Loyalty: Should the Pledge of Allegiance be Mandatory for All Public School Students?

Read, *Minersville School District v. Gobitis* (1940) [1]

Read, *West Virginia State Board of Education v. Barnette* (1943) [9]

7. 14 October Religious Liberty, State Neutrality, and Disability Rights: Should the State Pay for a Sign Language Interpreter Working in A Catholic High School? Which Set of Rights Should Prevail, Religious or Disability?

Read, *Zobrest v. Catalina Foothills School District* (1993) [9]

**(If you go to my website at *www.dagerber.com*, you’ll see that a friend of mine and I have written a recently published analysis of this law suit and the Court’s decision in the case.)**

8. 21 October Religious Liberty **Compelling State Interest** as a Test for Determining the Limits of State Regulation of Religions

Read, Sherbert v. Verner (1963) [5]

Read, Oregon v. Smith (1990) [17]

9. 28 October Religious Liberty Should of People of Faith (in this case Amish) Have Exemptions from Compulsory Education Laws?

Read, *Wisconsin v. Yoder* (1972) [16]

10. 4 November Religious Establishments/ State Neutrality What Can the State Do and Not Do to Subsidize or Promote Religion? : The Landmark Bus Subsidy Law Suit

Read, *Everson v. Board of Education* (1947) [25]

11. 11 November Religious Establishments/ State Neutrality What Can the State Do to Aid Schools with Religious Affiliations? Is **the Lemon Test** a Useful Guide for the Courts?

Read, *Lemon v. Kurtzman* (1971) [16]

12. 18 November Religious Establishments/ State Neutrality Nondenominational **Ceremonial Deism** in Public Schools – Is Prayer at Public School Graduation Constitutional?

Read, *Lee v. Weisman* (1992) [20]

13. 2 December Religious Establishments/ State Neutrality Can the State Recognize **Religion in History**? Does the Presence of Religion in History Legitimate State Activities Advancing Religion?

Read, *Stone v. Graham* (1980) [4]

Read, *March v. Chambers* (1983) [10]

14. 9 December Religious Establishments/ State Neutrality Can the State Participate in Christmas?

Read, *Lynch v. Donnelly* (1984) [15]