

## SPRING 2026 COURSE SYLLABUS

Course Number: 442-001  
Course Title: Advanced Constitutional Law: Freedom of Religion Seminar  
Credit Hours: 2  
Grading Mode: Letter grade  
Meeting Time(s): THUR 4:00-6:00P  
Meeting Mode: ON CAMPUS  
Exam Time(s): N/A  
Exam Mode: N/A  
Prerequisite(s): N/A  
Corequisite(s): N/A  
Instructor(s): WILLIAM H. HURD

Contact Info:  
[whurd1@gmu.edu](mailto:whurd1@gmu.edu) | Office hours by appointment only.

### Reading(s) & Supplement(s):

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.

### Course Overview

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

This provision of the First Amendment lies at the heart of the American constitutional system, yet it is often misunderstood by many who seek to invoke it. Knowing what this provision means – and has meant over the course of American history – is an important part of being an educated member of the legal profession.

### Course Learning Outcomes

In this fast-moving area of the law, 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.

### Grading Policies

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%).

## Classroom Policies

**Attendance:** Per AR 3-1.4, “maintenance of matriculation requires regular class preparation, participation and attendance, registration in the course of study required for the student’s program (full-time or part-time), successive registration for each fall and spring term of each academic year until study is completed, and compliance with all other relevant requirements.”

**Absences:** Per AR 4-1.1, “if a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course. A student who is not present for at least 75 percent of a session of the course is absent from that session.”

### Participation & Preparation:

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

### Use of Technology & AI:

Moderate Use Policy: Generative AI tools may be used in this course for the following purposes, and with the following guidelines. Students may use AI in this course to brainstorm, study, explore, but may not use AI as the primary source for research, as the primary source for text of written assignments, to prepare drafts of assigned paper. Students must use AI tools responsibly, and verify facts or citations presented by AI, and should be prepared to produce the transcript of prompts and responses upon request. Misuse will be treated as a violation of academic standards.

### Use of Electronic Text Books During Exams:

N/A

## Course Schedule & Assignments

### 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 Assessments (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)
- 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)
- *Perrelli 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)
- *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)

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)
- *Mahmoud v. Taylor*, 145 S.Ct. 1123 (2025)

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)
- *303 Creative LLC v. Elenis*,  
143 S. Ct. 2298 (2023)

#### 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)
- *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) (Rhenquist, C.J.,  
concurring in the judgment)

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**c. Lemon Test, Its Endorsement Offshoot, and Their Demise**

- *Lemon v. Kurtzman*,  
403 U.S. 602 (1971)
- *Lynch v. Donnelly*,  
465 U.S. 668 (1984)
- *Allegheny v. ACLU*,  
492 U.S. 573 (1989)
- *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1  
(2004) (O'Connor, J.,  
concurring in the judgment)
- *Capital Square Review Bd. v. Pinette*,  
515 U. S. 753 (1995)
- *American Legion v. American Humanist Ass'n*,  
139 S. Ct. 2067 (2019)
- *Kennedy v. Bremerton Sch. Dist.*,  
142 S. Ct. 2407 (2022)

**d. Neutrality**

- *Larson v. Valente*,  
456 U.S. 228 (1982)
- *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Comm.*,  
145 S.Ct. 1583 (2025)
- *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)
- *Shurtleff v. City of Boston*,  
142 S. Ct. 1583 (2022)
- *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*,  
561 U.S. 661 (2010)

## 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. 327 (1985)
- *Groff v. DeJoy*,  
143 S.Ct. 646 (2023)
- *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)
- *Drummond ex rel. State v. Oklahoma Statewide Virtual Charter Sch. Bd.*,  
558 P.3d 1 (2025)

## 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.

### b. Covid

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

### c. Legislative Prayer

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

### d. Displays on Government Property: Ten Commandments and Crosses

- *McCreary County v. ACLU*,  
545 U.S. 844 (2005)
- *Van Orden v. Perry*,  
545 U.S. 677 (2005)
- *American Legion v. American Humanist Ass'n*,  
139 S. Ct. 2067 (2019)

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

- *Engel v. Vitale*,  
370 U.S. 421 (1962)
- *Abington Sch. Dist. v. Schempp*,  
374 U.S. 203 (1966)
- *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)
- *Roake v. Brumley*,  
141 F.4th 614 (5th Cir. 2025)
- [Virginia] Board of Education Guidelines Concerning Religious Activity in the Public Schools]

f. 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)

## Student Resources

[Antonin Scalia Law School Academic Regulations](#)

[GMU Common Course Policies Addendum](#)

[Mason Square Services](#)

[Mason Square Police](#)

Van Metre Hall, Room 110

Emergency - Dial 911

Escort Services - 703-993-8070

Dispatch – 703-993-2810

[Student Support and Advocacy Center \(SSAC\)](#)

Mason Square Sexual Assault Services:

Van Metre Hall, Room 222D

703-993-8186

Notice of Mandatory Reporting of Sexual Assault, Sexual Harassment, Interpersonal Violence, and Stalking:

As a faculty member, I am designated as a “Non-Confidential Employee,” and must report all disclosures of sexual assault, sexual harassment, interpersonal violence, and stalking to Mason’s Title IX Coordinator per University Policy 1202. If a student wishes to speak with someone confidentially, please contact one of Mason’s confidential resources, such as Student Support and Advocacy Center (SSAC) at 703-380-1434 or Counseling and Psychological Services (CAPS) at 703-993-2380. Students may also seek assistance or support measures from Mason’s Title IX Coordinator by calling 703 -993-8730, or emailing [titleix@gmu.edu](mailto:titleix@gmu.edu).

[Mason Square Clinic](#)

Van Metre Hall, Room B102

703-991-2831

[Counseling and Psychological Services](#)

[Student Health Services](#)

[Student Disability Services](#)

[Student Conduct](#)

[University Life](#)