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**CONSTITUTIONAL LAW OF RELIGION  
CONLW 957-201  
COURSE INFORMATION  
FALL SEMESTER 2018**

<b>MEETING ROOM:</b>	<b>232 Katz</b>
<b>MEETING TIME:</b>	<b>Mondays, Wednesdays 1:00 P.M. - 2:15 P.M.</b>
<b>OFFICE:</b>	<b>239 Katz Building</b>
<b>TELEPHONE:</b>	<b>814.863.3640 (direct)</b>
<b>E-MAIL</b>	<b><a href="mailto:lcb11@psu.edu">lcb11@psu.edu</a></b>
<b>WEBSITE</b>	<b><a href="http://www.personal.psu.edu/lcb11">http://www.personal.psu.edu/lcb11</a></b>
<b>BLOG</b>	<b><a href="http://lcbackerblog.blogspot.com">http://lcbackerblog.blogspot.com</a></b>
<b>CONFERENCE</b>	
<b>HOURS:</b>	<b>Mondays and Wednesdays 4:00 P.M. TO 6:00 P.M., AND BY APPOINTMENT</b>
	<b>e-mail anytime</b>
<b>QUESTIONS:</b>	<b>CLASS RELATED QUESTIONS VIA EMAIL</b>
<b>FINAL EXAM DATE:</b>	<b>24 HOUR TAKE HOME FINAL to be taken anytime between 9:00A.M: Nov. 29, 2018 -- 3 P.M. Dec. 13, 2018</b>

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**COURSE SHORT DESCRIPTION**

This course examines current constitutional doctrine concerning religion under the First Amendment to the Constitution. The focus will be on the essential cases and principles of the Free Exercise and Establishment Clauses of the First Amendment. The course considers the definition of "religion" for purposes of federal constitutional law. It then engages in a deep examination first of the Establishment Clause, and then of the Free Exercise Clause of the Federal Constitution. The cases and principles that interpret and apply the Religion Clauses are organized along three thematic lines: (1) the regulation of religious activity (free exercise and neutrality, governmental interests, legislative accommodation), (2) the funding of religious activity (establishment and neutrality, governmental support of religious institutions), and (3) the treatment of religion in government's culture shaping activities (public schools, school curriculum, religious speech). The Course also considers the constitutional limits of state involvement in disputes within religious organizations. The course ends with a consideration of the framework of religious liberty in selected foreign states and within the emerging jurisprudence of regional human rights organizations.

## STATEMENT OF LEARNING OUTCOMES AND ASSESSMENT

### *Learning Outcomes:*

Students are expected to acquire a working knowledge of the following.

1. Understand the core framework within which the Religion Clauses of the U.S. Constitution in the context of the Bill of Rights.
2. Examine the history, original understanding and the jurisprudential techniques used to interpret the Religion Clauses and the interplay between the Establishment and Free Exercise Clause.
3. Identify the basis for determining what is religion for purposes of the Religion Clauses.
4. Demonstrate deep familiarity with the jurisprudence of the Establishment Clause in the following respects:
  - (A) early development;
  - (B) organized religious exercises in the public schools;
  - (C) school curricula;
  - (D) Ceremonial Deism;
  - (E) Legislative Prayer;
  - (F) Public Displays;
  - (G) Public Forums;
  - (H) Private Sponsorship;
  - (I) Access to Public facilities; and
  - (J) Government Aid to Religion or Religious Institutions (educational and other)
5. Demonstrate deep familiarity with the jurisprudence of the Free Exercise Clause in the following respects:
  - (A) Difference in meaning of the term Religion for Free Exercise Clause;
  - (B) Early cases;
  - (C) Traditional compelling Interest Test and its development;
  - (D) The transformation of the traditional Approach (Employment Div. v. Smith);
  - (E) The role of intentional discrimination under the contemporary Constitutional test;
  - (F) The effect and constitutionality of accommodation statutes.
6. Identify and apply statutory schemes for the accommodation of religion at the state and federal level.
7. Examine the constitutional limits and framework for the law of religious institutions and property disputes.
8. Demonstrate familiarity with the issues relating to clergy abuse.
9. Understand the basics of the Ministerial Exception and issues of standing under the Religious Clauses. 7. Develop a working familiarity with the U.S. Alien Tort Claims Act and its relevance to CSR related litigation.
10. Identify and understand the basic approaches to issues of religious liberty in selected foreign jurisdictions (France, Turkey, U.K., India, China).
11. Develop familiarity with the basic framework for protection of religious liberty within the jurisprudence of regional human rights organizations.

*Learning Outcomes Assessment:*

Student achievement in all learning outcomes will be measured in a 24 hour take home final examination. Learning Outcomes will be monitored through student participation in the weekly discussion of problems that build on readings.

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## COURSE MATERIALS

1. FRANK S. RAVITCH AND LARRY CATÁ BACKER, LAW AND RELIGION: CASES, MATERIALS AND Readings (3<sup>rd</sup> ed., West Academic, 2015)  
ISBN- 978-0-314-28407-5 (TEXT) REQUIRED
2. LESLIE GRIFFIN (ED.), LAW AND RELIGION (Aspen Publishers, 2010)  
ISBN 978-0-7355-7819-7 (GRIFFIN)

## COURSE INFORMATION AND RULES

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”*  
U.S. Const. Amend. 1.

This course examines current constitutional doctrine interpreting and applying the Religion Clauses of the First Amendment to the Federal Constitution. The course will focus primarily on “Church/State” law- the legal doctrines that have arisen in cases under the Establishment Clause and Free Exercise Clause of the First Amendment. Additionally, the course will explore the role of law in various religious traditions and the role of religion in law and public discourse. Topics addressed will include religion and public schools, government aid to religious institutions (including school vouchers and charitable choice), government endorsement of religious symbols, the role of public forum doctrine in religion cases, freedom of religious expression, the freedom to practice one’s religion, and legal disputes within religious entities. In addition, the course will introduce students to religious law and the approach to law and religion in other major jurisdictions.

Required readings will be announced in class from time to time. Substantially all such readings will be drawn from the Text. Further readings may be added or substituted throughout the semester. The Griffin text is meant to be used as a supplement to add materials and richness to the consideration of key cases. I plan to follow the Text, covering most chapters as detailed in the syllabus below. Stay tuned. A review of the table of contents of those chapters of the Text will give you a good idea of the materials to be covered this semester and can provide a structure for your study notes.

Please bring Text, and any other assigned readings, with you to class as appropriate. Please note that you will be responsible for all assigned readings for class, whether or not discussed specifically in class.

Understand that there is no guarantee that we will be able to cover in class all material assigned for reading for that class session, or that we will get through all of the assignments described in the syllabus by semester's end. Anticipate, therefore, that there may be occasions when you will have read ahead. If there are concerns, please see me. *You will be tested only on the materials covered in class unless otherwise indicated.*

### ATTENDANCE AND CLASS PARTICIPATION

Law School rules require me to notify students of my attendance policy. First year and introductory classes provide the basis for your legal education. It is important for you to attend class. *I remind you the final exam is drawn largely from the readings and discussion in class.*

**Class attendance is required.** Law school policy imposes on students the obligation to attend class regularly and punctually. I take attendance seriously. The Law School also has in place an Honor System. I will take advantage of the Honor System for purposes of recording attendance. **All students will be assumed to be present unless they send me an email indicating that they are absent. Students are honor bound to report all absences, and failure to report absences will be treated as an honor code violation.**

**You are responsible for marking your attendance.**

**THERE WILL BE SEVERAL GROUP PROJECTS. EACH OF YOU WILL BE ASSIGNED TO A GROUP AND EACH GROUP WILL BE REQUIRED TO MAKE A CLASS PRESENTATION (WITH POWERPOINT). THE GROUP PROJECT WILL NOT BE GRADED BUT FAILURE TO PARTICIPATE IN THE GROUP PROJECT WILL REDUCE YOUR GRADE IN CLASS BY ONE LETTER GRADE.**

**Class participation is required.** All students are expected to be prepared for each class session (that is, to have carefully read the material assigned). Please note that I do not intend to make this a lecture course. All of you will find yourselves participating in at least some of the discussion. At the end of each class I may designate one or more students as class participation leaders for the next class. I reserve the right to call on students at random. **Outstanding participation may result in an increase in your grade, again at my discretion.**

**SEATING IS ASSIGNED.** Please sit in your assigned seat so I can try to get to know your names. Seating assignments will take place on the 2nd day of class.

**My approach to class: or why I can challenge you, sometimes tell you that you are wrong, and still respect you:** Understand that one of my goals for this year is to teach you how to defend your answers, and present your analysis, even under aggressive questioning. Lawyers who develop an ability to remain calm under pressure and who can meet even unreasonable arguments or demands serve their clients better. The object, then, is to provide students with some practice in the art of responding, even to the unreasonable argument. **Don't take it personally.**

**Class Notes and Recording of Class.** Take notes as you like. Please feel free to get together with your classmates for studying and sharing notes. Please remember that the purpose of the course is NOT to provide experience in stenographic techniques. Participation rather than the taking of dictation is encouraged. To that end, *all of my classes are recorded and you are encouraged to review those recordings at your convenience.*

## **No personal recording of class.**

### **[Policy Regarding Creation of, and Access to, Recordings by the Law School of Class Sessions](#)**

All law school courses occur in classrooms equipped with audiovisual telecommunications equipment that is capable of making an audiovisual recording of each class session as it occurs. In order to provide the potential educational benefits of recorded classes to our students, the law school has decided to automatically record, and to archive for a limited period of time, all class sessions occurring in law school classrooms. The purpose of the recordings is to permit students enrolled in each recorded course to access the recordings outside of the regularly scheduled class period, according to rules established by the professor.

Access to recorded classes will be controlled via a secure course management platform, such as CANVAS, and will be restricted to students enrolled in the recorded course, the professor, and those University IIT personnel necessary to maintain the system. All recordings will be deleted following the conclusion of the semester in which the recorded course occurs (unless all identifying student images are edited out of the recording, in which case the professor and law school jointly may decide to retain the edited recording for other purposes).

By registering for or attending law school courses, a student consents to the law school's making and display of class recordings within the scope of this policy.

The office of the Associate Dean for Academic Affairs has provided you with this statement; please familiarize yourself with all of its terms. In case of doubt about meaning, please contact the Office of the Associate Dean:

#### **A. Student Access to Class Recordings; Open Access:**

**All Class/Open Access.** All class recordings will be posted on the course ANGEL site for access by any student enrolled in this course. Access will end the last day of the final exam period. Your Professor may not consent to or authorize access to or distribution of class recordings beyond the students enrolled in that course.

## B. Student Use of Recordings and Materials:

A student may not record any part of a class by any means without prior express authorization of the faculty member. If a student receives faculty authorization to record a class, the student may not copy or download such recording to a computer or other device, distribute it to any other person, or use the recording for any purpose other than personal education and study except with the prior express authorization of the faculty member. Unauthorized recording, distribution, or use of a class recording is a violation of the Honor Code.

A student may not use course materials such as slides or other documents posted on ANGEL for any purpose other than personal education and study and may not disseminate, publish, or alter course materials without prior express authorization of the faculty member. Unauthorized use of course materials is a violation of the Honor Code.

Penn State Law Honor Code, Violation 2.1(1) covers unauthorized recording and unauthorized use of class recordings or course materials. It prohibits "Taking, using . . . or otherwise abusing the property of another, including, without limitation, books, briefs, class notes, outlines, or any other academic items, without authorization."

C. Questions, Special Requests. You should direct any questions, concerns or requests regarding classroom recordings or any classroom technology to the AV Team at [av@law.psu.edu](mailto:av@law.psu.edu).

## **GRADING**

The course grade will be based on a **take home exam**.

**THE EXAM IS OPEN BOOK. You must work alone.** You will have 24 hours to complete the exam from the time you pick it up. Students will be given the option of choosing the time you take the exam. The exam may be picked up on any day from the first day of final exams to 3:00 P.M. on the last day of the final exams period (November 29, 2018 through Thursday, December 13, 2018).

Exams will be distributed through CANVAS and will be submitted through CANVAS. More detailed instructions will be made available later in the semester. EXAMS MUST BE SUBMITTED NO LATER THAN 24 HOURS AFTER PICK UP. The Clock in CANVAS WILL BE TREATED AS PRESUMPTIVELY ACCURATE. **I will not police you – you are on your honor to comply with final exam rules.**

The [HONOR CODE MAY BE ACCESSED HERE](#).

**ANY EXAM DELIVERED AFTER 4 P.M. ON MAY 10, 2018 OR MORE THAN 24 HOURS AFTER STARTING THE EXAM WILL RECEIVE A GRADE OF “F”.**

The awarding of grades is based on the curve system adopted by the faculty of the Law School and is subject to the limitations of those curve rules. The Grading Norms may be accessed [HERE](#). I will adhere to this system. Students interested in discussing the curve system itself, its wisdom, or making proposals with respect to the system, are advised to consult their academic dean.

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**ACADEMIC HONESTY AND INTEGRITY**

Both Penn State Law (PSL) and the School of International Affairs (SIA) safeguard and promote the ideals of honor and integrity by prohibiting lying, cheating, stealing, and other dishonorable conduct. Accordingly, all students should act with personal integrity, respect other students’ dignity, rights and property, and help create and maintain an environment in which all can succeed through the fruits of their efforts.

Dishonesty of any kind will not be tolerated in this course. Dishonesty includes, but is not limited to, cheating, plagiarizing, fabricating information or citations, facilitating acts of academic dishonesty by others, having unauthorized possession of examinations, submitting work of another person or work previously used without informing the instructor, or tampering with the academic work of other students. Students who are found to be dishonest will receive academic sanctions and will be reported to the relevant authorities for possible further disciplinary sanction. For an explanation of what types of conduct constitute plagiarism, see the definition of plagiarism in the Law School Honor Code section 1.2 (R) at <http://www.law.psu.edu/Honor/Contents.cfm>.

See <http://istudy.psu.edu/FirstYearModule/CopyrightPlagiarism/StudentGuide.html> also <http://its.psu.edu/turnitin/TurnitinHandout.rtf>.

All acts of academic dishonesty will be dealt with and punished in accordance with applicable Penn State University, Penn State Law, SIA and Graduate School policies, as applicable.

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**CONFERENCES**

I try to maintain an open door policy. I encourage you to see if me should you have any questions or concerns. While face time is important, students should not consider it necessarily the best or exclusive means for communicating with me. There is little excuse for the complaint – ‘he is not available’ – when communication is possible by telephonic and electronic means.

TECHNOLOGY HAS MADE IT EASY TO COMMUNICATE.  
PLEASE TAKE ADVANTAGE OF IT.  
*You are encouraged to contact me by e-mail. I will respond promptly.*

**<lcb911@me.com>**

## **CANVAS**

This year I will be relying on PSU's CANVAS system for communication with you. Please bear with me as I learn the system and expect glitches. I will post questions to the CANVAS class site and send e-mails via that site. Please check in regularly for information about the course. It will be your responsibility to keep apprised of the information posted there.

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## **Additional University Policies and Statements**

### **UNIVERSITY DISABILITIES POLICY STATEMENT**

To comply with University policy regarding persons with disabilities, this statement is included in this course syllabus:

Penn State welcomes students with disabilities into the University's educational programs. Every Penn State campus has an office for students with disabilities. The Student Disability Resources Web site provides [contact information for every Penn State campus](http://equity.psu.edu/sdr/disability-coordinator): <http://equity.psu.edu/sdr/disability-coordinator>. For further information, please visit the [Student Disability Resources Web site](http://equity.psu.edu/sdr): <http://equity.psu.edu/sdr>.

In order to receive consideration for reasonable accommodations, you must contact the appropriate disability services office at the campus where you are officially enrolled, [participate in an intake interview, and provide documentation](http://equity.psu.edu/sdr/applying-for-services): <http://equity.psu.edu/sdr/applying-for-services>. If the documentation supports your request for reasonable accommodations, your [campus's disability services office](http://equity.psu.edu/sdr/applying-for-services) will provide you with an accommodation letter. Please share this letter with your instructors and discuss the accommodations with them as early in your courses as possible. You must follow this process for every semester that you request accommodations.

### ***Counseling & Psychological Services (CAPS)***

<http://studentaffairs.psu.edu/counseling/>

CAPS staff work with thousands of Penn State students per year in group therapy, individual counseling, crisis intervention, and psychiatric services as well as providing prevention, outreach, and consultation services for the University community. Services at CAPS are designed to enhance students' ability to fully benefit from the University environment and academic experience.

As specialists in working with undergraduate and graduate students, staff at CAPS can help you address your concerns in a caring and supportive environment. CAPS can help students resolve personal concerns that may interfere with their academic progress, social development, and satisfaction at Penn State. Some of the more common concerns include anxiety, depression, difficulties in relationships (friends, roommates, or family); sexual identity; lack of motivation or difficulty relaxing, concentrating or studying; eating disorders; sexual assault and sexual abuse recovery; and uncertainties about personal values and beliefs.

## ***Protocol for Responding to Bias Motivated Incidents***

Penn State University has adopted a “Protocol for Responding to Bias Motivated Incidents.” It may be accessed [HERE](#). It is grounded in the policy that the “University is committed to creating an educational environment which is free from intolerance directed toward individuals or groups and strives to create and maintain an environment that fosters respect for others.” That policy is embedded within an institution traditionally committed to academic freedom (the policy may be accessed [here](#)) and free and open discussion. Bias motivated incidents include conduct that is defined in University Policy AD 91 (accessed [here](#)). Students who experience a possible bias motivated incident, as well as students, faculty or staff who are witnesses of the same, are urged to report the incident immediately by doing one of the following:

\* Contact your County Emergency Dispatch by dialing 911 in cases where physical injury has occurred or is imminent;

\* File a report on the Report Bias website: <http://equity.psu.edu/reportbias/statement>;

\* Contact one of the following offices:

University Police Services, University Park	814-863-1111
MRC Counselor/Diversity Advocate for Students	814-865-1773
Office of the Vice Provost for Educational Equity	814-865-5906
Office of the Vice President for Student Affairs	814-865-0909
Affirmative Action Office	814-863-0471

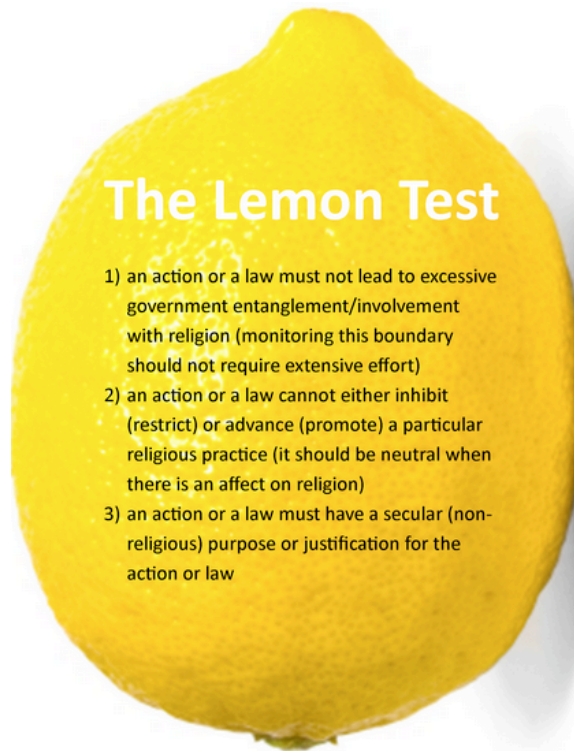
## SYLLABUS:

Class 1: Read: (1) Presidential Executive Order 13798 (4 May 2017) “[Promoting Free Speech and Religious Liberty](#),” (2) J. Sessions, Memorandum (6 Oct. 2017) “[Federal Law Protections for Religious Liberty](#),” (3) J. Sessions, [Remarks at the DOJ’s Religious Liberty Summit](#) (30 July 2018).

Overview Class Policies and Procedures  
Constitutional and International Context

Class 2: Read GRIFFIN pp. 1-7; TEXT pp. 3-37.

The Early Development of Establishment Clause Doctrine



(Pix credit: [Civil Liberties: Securing Basic Freedoms](#); image credit: <http://www.lemon-buy-back.com/>)

Class 3: Read TEXT pp. 37-63; 400-411

From the Early School Prayer Cases to the *Lemon* Test.

Class 4: Read TEXT pp. 65-95

Public Religious Exercises

- Organized “Religious” Exercises in the Public Schools

-*Lee* and its Aftermath

Class 5: Read TEXT pp. 95-124

Public Religious Exercises Continued

- Organized “Student Initiated Prayer” Concept
- Moment of Silence Laws

Class 6: Read TEXT pp. 124-180

Religion and Curriculum

- Creationism/Intelligent Design in Public Schools
- Kitzmiller case (pp. 138-180)

Class 7: Read pp. 180-211;

Religious Exercises

- Ceremonial Deism

Class 8: Read pp. 211-253

- Legislative Prayer

- Municipal Prayer

Class 9: Read TEXT pp. 255-281

Religious Symbolism and Public Displays

Government sponsored enforced displays

Class 10: Read TEXT pp. 281-327

Religious Symbolism and Public Displays

- The Ten Commandments Cases

Class 11: Read TEXT pp. 327-364

Religious Symbolism and Public Displays.

- Other Displays

Religious Symbolism and Public Displays

- Privately Sponsored Displays on Public Property

Class 12: READ TEXT pp. 364-397

Transfer to private parties

Equal Access to Government Facilities and Programs

Class 13: Read TEXT pp. 399-419

Government Aid to Religion or Religious Institutions

- The Lemon Test

Class 14: Read TEXT pp. 419-454

Government Aid to Religion or Religious Institutions

- The Move Toward Formal Neutrality
- School Vouchers

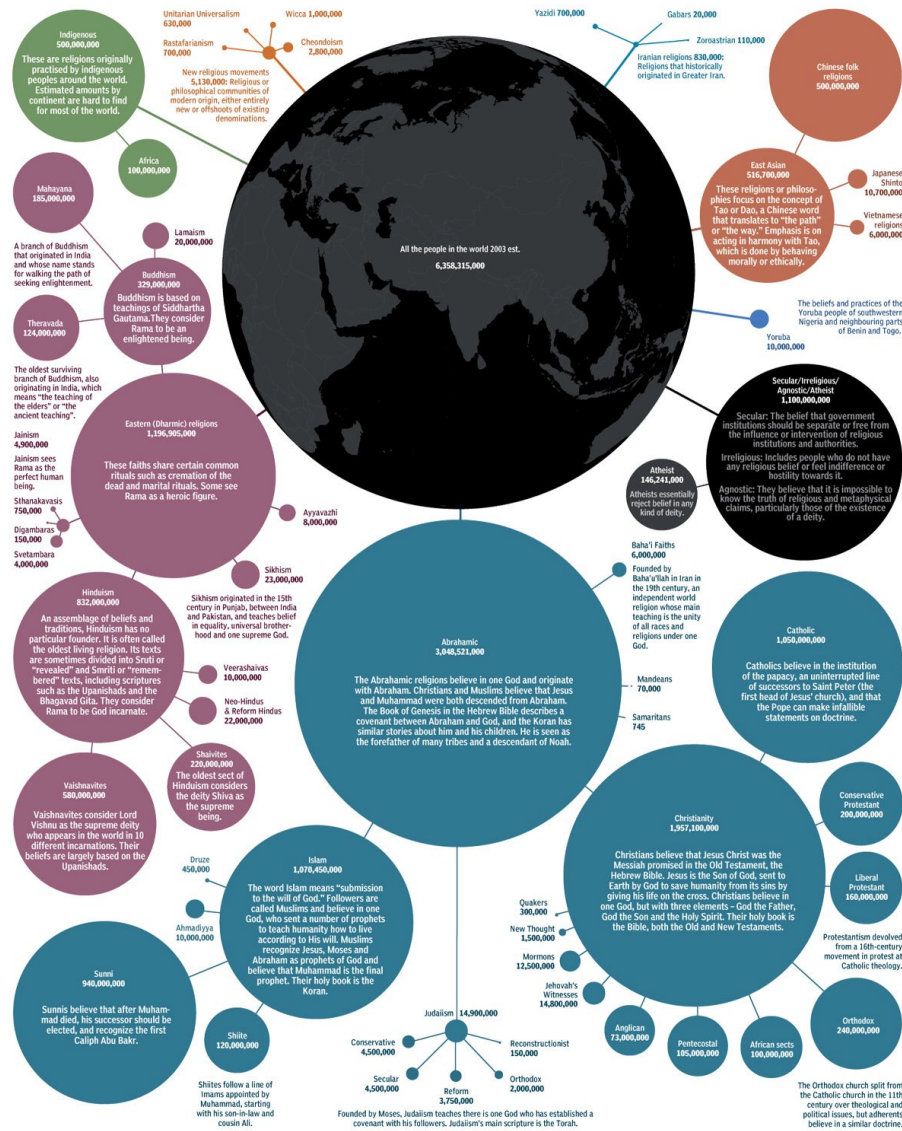
Class 15: Read TEXT pp. 454-465; [Trinity Lutheran Church v. Comer](#) (2017).  
 Government Aid to Religion or Religious Institutions

- Must Government Fund Religion Under General Funding Programs?

Class 16: TEXT Chapter 5 pp. 467-597  
 CLASS GROUP DISCUSSION

# WORLD OF RELIGION

*There's no escaping religion. It has enormous societal, cultural, political and historical implications. It's been blamed for wars and praised for bringing people together. But it is practised in some form across the world by billions of people every day. So what are the world's major believing and non-believing constituencies? Below are estimates of the world religions based on the best data available.*



(Pix credit: Infographic List: <https://infographiclist.com/2012/05/15/world-of-religion-infographic/>)

Class 17: Read TEXT pp. 599-638

The Free Exercise Clause

- What is Religion?
- Free Exercise Clause Exemptions: The Early Cases
- Free Exercise Clause Exemptions and the Compelling Interest Test
- Retreat from Compelling Interest

Class 18: Read TEXT pp. 638-682

Laws of “General Applicability”

- Intentional Discrimination and Free Exercise Rights

Class 19: TEXT Read pp. 682-718; Sean Davis, How RFRA Works (Infographic)

Free Exercise: From Constitution to Constitutional Accommodation via Statute

- [RFRA](#) and the Legislative Response to Smith
- 



(How RFRA Works; Becketlaw.org: <https://www.becketlaw.org/research-central/rfra-info-central/>)

Class 20: Read TEXT pp. 718-735; [Religious Freedom Acts by State](#); [Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission](#) (2017);

RLUIPA  
State RFRAs

Class 21: Read TEXT Chapter 7, pp. 737-848

CLASS GROUP DISCUSSION

Class 22: Read TEXT pp. 849-885

Religious Entities: Property Disputes & Schisms

Class 23: Read TEXT pp. 885-919  
Liability for Clergy Abuse  
The Ministerial exception

Class 24: Read TEXT pp. 919-942  
Standing and the Religion Clauses  
Mootness, Ripeness and the Religion Clauses

Class 25: Read TEXT pp. 1089-1144  
Law and Religion beyond the U.S. Group Presentations  
--Turkey  
--France  
--United Kingdom  
--Other European States  
--China  
--[India](#).

Class 26: Read TEXT pp. 1293-1327  
Regional Human Rights Organizations  
--OAS; African Union

Class 27-28: Read TEXT pp. 1327-1364; 1364-191  
The European System