

## **HISTORY OF CHURCH-STATE RELATIONS IN THE WEST**

Emory University  
Fall Semester, 2006  
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### **Preface**

The following set of materials has been prepared for the course "History of Church-State Relations in the West." In this course, we shall explore the interactions between religious and political authorities and institutions in Europe and colonial America during certain critical periods from the 4th to the 18th centuries. We shall focus on the variety of legal and political arrangements developed to facilitate the cooperation of religious and political authorities, to protect them from each other, and to define the religious liberties and duties of those subject to their authority. We shall also pay attention to the variety of philosophical and theological theories of church and state that supported and contested these legal and political arrangements. Jurisdictional disputes over marriage and family life, and the treatment of religious outsiders, notably Jews, provide running examples throughout the course.

The course will focus on four periods: (1) the 4th and 5th century Roman Empire and the establishment of Christianity by Roman law, and the state prohibitions on Judaism and heresy; (2) the Papal Revolution of the 11th to 13th centuries and the rise of clerical hegemony and religious establishment by the church's canon law; (3) the Protestant Reformation of the 16th century, and the fresh rise of religious establishments by state civil law; and (4) the American colonial experience of the 17th and 18th centuries, and the gradual rise of constitutional principles of religious liberty that culminated in the First Amendment.

The reading materials are comprised of both primary sources (constitutions, statutes, and treatises written during the period under consideration) and secondary sources (descriptions and analyses by more recent historians). In preparation for class, the secondary sources, and primary sources marked with an asterisk (\*) merit closest scrutiny.

## Course Instructions

**1. Reading Materials.** In addition to the photocopied materials that follow, I have assigned two volumes of mine for this course:

- *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Westminster John Knox Press, 1997) [hereafter FSC]
- *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge University Press, 2002) [hereafter LP].

Please purchase these volumes at the Druid Hills Bookstore in Emory Village, or directly from the publisher or through one of the electronic bookstores (e.g., amazon.com; barnesandnoble.com).

**2. Classes.** Please attend and be prepared for each class. If you have a scheduling conflict or emergency that prevents your attendance, please send me an email message prior to the class. I shall sanction habitual and unaccountable absence from class or delinquency in class preparation by lowering your final examination grade -- or, in extreme cases, involuntarily withdrawing you from the course. Conversely, I shall reward faithful classroom attendance and participation by raising your final examination grade by one or two grades (e.g., from B to B+ or A-).

**3. Review Classes.** At the end of each major section of the course, and at the end of the semester, I shall hold extra review classes for you to ask questions about the material covered to date. These classes are all optional attendance.

**4. Class Cancellation.** Our schedule has built into it an extra two class periods to give us a bit more flexibility. I need to be out of town on Tuesday, **September 5**, and am cancelling class that day. If we do not use the other extra class period, we shall end the course on Thursday, November 30 (rather than on the scheduled date of Tuesday, December 5); that will give you a bit more time for the final examination.

**5. Final Examination.** I shall distribute a final take home examination on our last day of class. Your answers will be due on the last day of the law school examination period, Friday, December 22. The examination will consist of a broad synthetic question that pulls together various themes discussed in the course. You will be assigned a limit of 3000 words for your answer and will have two or three questions from which to choose one. The exam is entirely open book, with the expectation that the course reading materials and your notes will provide more than enough information to prepare your answer. I shall hand out a few sample questions later in the semester to whet your appetite.

**6. Office Hours.** Office hours will be Tuesdays and Thursdays, 12:00–2:30 p.m. To arrange an appointment at another time, please email me at the above number or my associate Amy Wheeler at [awheeler@law.emory.edu](mailto:awheeler@law.emory.edu).

## Course Outline

### Key to Page Numbers

CM = Page Numbers in Photocopied Course Materials that follow

FSC = Page Numbers in John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (1997)

LP = Page numbers in John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (2002)

\* = Key Documents, to be reviewed in detail in class.

## I. INTRODUCTION

## CM Pages

### A. Overviews.

1. Brian Tierney, "Religious Rights: A Historical Perspective," in *Religious Liberty in Western Thought*, ed. Noel B. Reynolds and W. Cole Durham, Jr. (1996), 29-57 1
2. John Witte, Jr., "History of Separation of Church and State: Facts, Fictions, and Future Challenges," *Journal of Church and State* 48 (2006): 15-46 16
3. Id., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (2007), ch. 1 43
4. FSC, 1-15

### B. Why History?

1. Jaroslav Pelikan, *The Vindication of Tradition* (1984), 65-82 (excerpts) 59

## II. CHURCH AND STATE IN THE ROMAN EMPIRE

### A. State Indifference, Repression, and Toleration of the Church.

1. Sidney E. Ehler, *Twenty Centuries of Church and State* (1957), 1-10 63
2. Gerd Tellenbach, *Church, State, and Christian Society at the Time of the Investiture Conflict*, (1959), 25-37 69
3. Charles N. Cochrane, *Christianity and Classical Culture* (1940), 177-337 (excerpts) 75
4. Documents.
  - a. Didaché, or The Teaching of the Twelve Apostles (c. 120) 92
  - b. Emperor Trajan's Rescript to Governor Pliny on the Treatment of the Christians (113) 97
  - c. Edict of Milan on the Toleration of the Christian Religion (313)\* 97
  - d. Edict Establishing Catholicism (380)\* 98
  - e. The Code of Justinian (ca. 529), Title V 99

### B. Concepts of Religious Liberty and Church-State.

1. Luke Timothy Johnson, "Religious Rights and Christian Texts," in *Religious Human Rights, in Global Perspective*, 2 vols., ed. John Witte, Jr. and Johan D. van der Vyver (1996), 1:63-93 110
2. Review Tierney, "Religious Rights," supra, CM pages 32-38

3. Review Witte, "History of Separation of Church and State," supra CM pages 17-19
4. FSC, 16-22
5. Documents
  - a. Augustine, *City of God* (c. 410), bks. 14, 19\* 123
  - b. Letter of Pope Gelasius I to Anastasius I (494)\* 128

**C. Judaism and the Roman Empire.**

1. Aaron M. Schreiber, *Jewish Law and Decision-Making: A Study Through Time* (1979), 283 130
2. Amnon Linder, *The Jews in Roman Imperial Legislation* (1987), 67-89 131
3. Elliot N. Dorff and Arthur Rossett, *The Living Tree: The Roots and Growth of Jewish Law* (1988), 265-275 143
4. Documents
  - a. Theodosian Code and Novels (438) (excerpts) 149
  - b. *The Visigothic Code* S.P. Scott ed. (1910), 362-383\* 156

### III. CHURCH AND STATE IN THE HIGH MIDDLE AGES

**A. Introduction: The Papal Revolution.**

1. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), 85-119 (excerpts) 165
2. Review Tierney, "Religious Rights," supra, CM pages 6-10
3. Review Witte, "History of Separation of Church and State," supra, CM pages 19-21
4. Documents
  - a. Dictates of the Pope (1075)\* 178
  - b. Brian Tierney, *The Crisis of Church and State, 1050-1300* (1964), 51-73, 91-92 179

**B. Constitutional Law and Canon Law.**

1. Brian Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150-1650* (1982), 8-13, 19-44 186
2. LP, 35-41, 259-62
3. FSC, 22-36

**C. The Two Swords Theory of Church and State.**

1. Otto von Gierke, *Political Theories of the Middle Age*, repr. ed. (1958), 7-21 192
2. Ewart Lewis, *Medieval Political Ideas* (1954), 2:506-538 199
3. Early Variations on the Two Powers Theory
  - a. Humbert, *Three Books Against Simony* (1054-58)\* 212
  - b. Peter Damian, *Letter to King Henry IV* (1065)\* 213
  - c. Honorius, *Summa Gloria* (c. 1100)\* 214

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| d. Henry IV's Summons to the Diet of Worms (1076)*   | 216 |
| e. York Tractates (c. 1100)*   | 218 |
| 4. The Emerging Doctrine of Papal Power  |     |
| a. Brian Tierney, <i>Origins of Papal Infallibility, 1150-1350</i> (1972), 39-45   | 220 |
| b. Thomas Aquinas, <i>Summa Theologica</i> (c. 1253), Part III. (Supp.), QQ. 17-18*  | 223 |
| c. Tierney, <i>Papal Infallibility</i> , 82-86, 115-121  | 228 |
| d. Pope Innocent III, Selected Decretals (1198-1202)   | 231 |
| 5. Mature Versions of the Two Swords Theory  |     |
| a. John of Paris, <i>De Potestate Regia et Papali</i> (1302-3), chaps. 1-13 (excerpts)   | 235 |
| b. Pope Boniface VIII, <i>Unam Sanctum</i> (1302)*   | 244 |
| <b>D. The Plight of Jews and Heretics.</b>   |     |
| 1. Jennifer Bray, "The Mohammaten and Idolatry," in W. Sheils, ed., <i>Persecution and Toleration</i> (1984), 89-99                            | 246 |
| 2. Schreiber, <i>Jewish Law</i> , 281-291  | 252 |
| 3. James Parkes, <i>The Jew in the Medieval Community: A Study of his Political and Economic Situation</i> , 2d ed. (1976), 101-136 (excerpts) | 260 |
| 4. Solomon Grayzel, <i>The Church and the Jews in the XIIIth Century</i> (1933), 49-59, 72-82  | 269 |
| 5. Documents.  |     |
| a. Innocent III, An Edict in Favor of the Jews (1199)*   | 273 |
| b. Decrees of the Fourth Lateran Council (1215)*   | 274 |
| c. English Charters and Councils (1201-1275)   | 276 |
| d. Charter of the Jews of the Duchy of Austria (1244)  | 278 |
| e. Las siete partidas (c. 1265), Title 24  | 281 |

## IV. CHURCH AND STATE IN THE PROTESTANT REFORMATION

### A. Background and Overview.

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|---|-----|
| 1. Sidney Z. Ehler and John B. Morrall, <i>Church and State Through the Centuries</i> (1954), 96-99   | 284 |
| 2. LP, 40-50, 177-182   |     |
| 3. Documents  |     |
| a. Statute of Praemunire (1393)*  | 286 |
| b. Pragmatic Sanction of Bourges (1438)   | 288 |
| c. Concordat of Bologna (1516)*   | 293 |
| 4. John Witte, Jr., <i>Religion and the American Constitutional Experiment</i> , 2d ed. (2005), 10-15 | 299 |

### B. Church and State in the Lutheran Reformation.

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| 1. Overview                                      |  |
| a. LP, 1-23                                      |  |
| 2. The Early Radical Attack                      |  |
| a. LP, 53-69                                     |  |
| 3. Church, State, and Family in the Two Kingdoms |  |
| a. LP, 87-138, 262-92                            |  |

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| b. FSC, 42-73   |     |
| 4. The Lutheran Establishment   |     |
| a. Roland H. Bainton, <i>The Reformation of the Sixteenth Century</i> (1956), 141-159   | 302 |
| b. The Religious Peace of Augsburg (1555)*  | 309 |
| 5. Lutheranism and Anti-Judaism   |     |
| a. William A. Mueller, <i>Church and State in Luther and Calvin</i> (1954), 60-72 (excerpts)  | 314 |
| b. Martin Luther, <i>That Jesus Christ was Born a Jew</i> (1523)*   | 317 |
| c. Id., <i>Concerning the Jews and Their Lies</i> (1543)*   | 318 |
| <b>C. Church and State in the Anabaptist Reformation.</b>   |     |
| 1. Thomas G. Sanders, <i>Protestant Concepts of Church and State</i> (1964), 75-96  | 319 |
| 2. Robert Friedmann, <i>The Theology of Anabaptism</i> (1973), Part II, 38-47   | 328 |
| 3. Robert Kreider, "The Anabaptists and the State," in Guy Hershberger, ed., <i>The Recovery of the Anabaptist Vision</i> (1957), 180-193 | 331 |
| 4. George Huntston Williams, <i>The Radical Reformation</i> , 3d ed. (1992), 755-788 (excerpts)   | 338 |
| 5. Documents  |     |
| a. The Schleithem Confession (1527)*  | 351 |
| b. Walter Klaassen, ed., <i>Anabaptism in Outline</i> (1981), 101-115, 244-257*   | 356 |
| c. Balthasar Hubmaier, <i>Concerning Heretics and Those Who Burn Them</i> (1524)  | 371 |
| d. Selections in Klaassen, <i>Anabaptism in Outline</i> , 290-301   | 375 |
| <b>D. Church and State in the Calvinist Reformation.</b>  |     |
| 1. The Geneva Experiment in Church-State Relations  |     |
| a. John Witte, Jr., <i>The Reformation of Rights; Law, Religion and Human Rights in the Calvinist Tradition</i> (2007), ch. 1             | 381 |
| b. John Calvin, <i>Institutes of the Christian Religion</i> (1559), bk. 4, ch. 1, 6, 8, 10, 11, 20*                                       | 410 |
| 2. Church, State and Family Life in Calvin's Geneva   |     |
| a. FSC, 74-129  |     |
| <b>E. Church and State in the Anglican Reformation.</b>   |     |
| 1. The Tudor Reformation of Church-State Relations  |     |
| a. FSC, 130-140   |     |
| b. Joseph Lecler, <i>Toleration and the Reformation</i> , 4 vols. (1960), 2:329-379 (excerpts)  | 423 |
| c. Reformation Constitutional Acts 1533-1559*   | 432 |
| 2. Anglican Establishment Theory and Practice   |     |
| a. Philip E. Hughes, <i>Theology of the English Reformers</i> (1965), 235-253   | 443 |
| b. J.P. Sommerville, <i>Politics and Ideology in England 1603-1640</i> (1986), 203-216  | 453 |
| c. The 39 Articles (1571), Arts. 19-21, 37  | 461 |
| 3. Church, State and Family Life in Reformation England   |     |
| a. FSC, 140-176   |     |
| 4. Persecution and the Struggle for Religious Liberty   |     |
| a. Lecler, <i>Toleration</i> , 2:380-395  | 462 |
| b. Act Prohibiting Bulls from Rome (1571)   | 472 |
| c. Act Against Sectaries (1593)*  | 473 |
| d. Act Against Papists (1593)*  | 473 |

## V. CHURCH AND STATE IN EARLY AMERICA

### A. Models and Principles of Church and State/Religious Liberty

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| 1. Overview   |     |
| a. Witte, <i>Religion and the American Experiment</i> , 23-55                           | 474 |
| b. FSC, 176-198   |     |
| 2. Classic Texts  |     |
| a. John Locke, <i>A Letter Concerning Toleration</i> (1689)                             | 491 |
| b. Roger Williams, <i>Bloudy Tenent of Persecution For Cause of Conscience</i> (1644)   | 498 |
| c. William Penn, <i>The Great Case of Liberty of Conscience</i> (1670)                  | 506 |
| d. Thomas Jefferson, <i>A Bill for Establishing Religious Freedom</i> (1779)            | 514 |
| e. Id., <i>Notes on the State of Virginia</i> (1784), Query 17                          | 515 |
| f. James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i> (1785) | 517 |
| g. George Washington, <i>Letters on Religious Liberty</i> (1787-1792)                   | 520 |
| h. Virginia Bill of Rights (1776)   | 526 |
| i. Massachusetts Constitution (1780)  | 527 |

### B. The Formation of the First Amendment Religion Clauses

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| 1. Witte, <i>Religion and the American Constitutional Experiment</i> , 57-86, 241-43 | 533 |
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