



Student Aid, Religious Education, and the First Amendment

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[00:00:00] Jeffrey Rosen: Hello We The People friends. As I mentioned a few weeks ago, we're thrilled to be launching a crowdsourcing campaign to support this podcast. Thanks to our friends with the John Templeton Foundation, every dollar that you give to support We The People will be doubled up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the constitution. Since we launched the campaign a few weeks ago, we have raised \$12,625, that's from 71 different donors from 13 states. Friends, thank you so much for that support, and we would love to have donation and support all 50 states. So I'll let you know which states remain in the coming weeks. In the meantime, please go to constitutioncenter.org/wethepeople and give a donation of any amount, \$5, \$10. The goal is to get broad and passionate support from all of you wonderful lifelong learners are engaged in our common quest to grow and wisdom together. So that's constitutioncenter.org/wethepeople, all one word, all lower case.

[00:01:15] Hello friends, I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people. This week, the Supreme Court heard oral arguments in *Carson against Macon*, which centers around the meaning of the Free Exercise Clause of the first amendment and the scope of public funding for religious education. Joining us to learn from this important case are two of America's leading scholars of the first amendment and the Free Exercise Clause. It's such an honor to convene both of them, and I'm still looking for word to learning from both of them as always. Erwin Chemerinsky is Dean of the UC Berkeley School of Law. He joined an Amicus brief with other education and constitutional law scholars in support of the respondent in this case. He's also co-author of *The Religion Clauses: The Case for Separating Church and State*. Erwin, it is one to welcome you back to We The People.

[00:02:25] Erwin Chemerinsky: It's always such a pleasure. Thank you.

[00:02:28] Jeffrey Rosen: And Michael McConnell is Richard and Francis Mallory, professor of law at Stanford, and director of the Constitutional Law Center. He filed an Amicus brief and supported the petitioners, and he's also the co-author of our interactive constitution explainers on the Free Exercise Clause and the Establishment Clause. Michael, it's wonderful to welcome you back to We The People.

[00:02:48] Michael McConnell: Always good to be doing these.

[00:02:50] Jeffrey Rosen: Erwin, why is this case important and why should our listeners care about it?

[00:02:56] Erwin Chemerinsky: I think it's a very important case. Let's start with what it's about. There are parts of the state of Maine that are too rural to support public school systems. So in these areas, school administrative units provide funds for parents to send their children to private school. There's about 5,000 students who are affected by this. Maine law requires that the money be used for secular private schools. It can't be used for sectarian private schools to schools, and a couple of parents who brought a challenge to this saying that denying the use of funds for religious schools and religious education violates free exercise of religion. Why does it matter? For the issue before the Supreme Court was when may the government give aid to religious schools, without that violating the Establishment Clause of the first amendment? So there were cases about, can the government provide auto visual equipment to religious schools without that violating the Establishment Clause? Can the government provide sign language and are to students in religious schools without that violating the Establishment Clause? Even can the government provide buses for field trips to religious schools without that violating the Establishment Clause?

[00:04:10] Now the issue is completely different. Now the issue is, when must the government give aid to support religious education without doing so violating the Free Exercise Clause? It was in 2017 in Trinity Lutheran versus Comer that the Supreme Court for the first time said that the Free Exercise Clause requires government support for religious education when it's provided for secular education. This case is the next step after that.

[00:04:39] Jeffrey Rosen: Thank you so much for that. Michael, why would you say that the case is important and why our listeners should care about it?

[00:04:46] Michael McConnell: Uh, first, may I just clarify, just in case some of our listeners may not be as into the weeds as Erwin and I are. Uh, there is no argument that there is a constitutional right to government funded religious education. The argument is that when the government chooses to provide a subsidies or benefits for private education, that the government cannot discriminate among private schools by saying, well, we'll give money to secular private schools or to modestly, you know, sort of religious private schools, but not to, not to this, uh, sort of scare "category" of sectarian schools. So, you know, main citizens can use, uh, these, uh, benefits to go to Tony private schools, to whatever they want, including some schools that are in fact religious, uh, but the state of Maine is taken upon itself to declare some schools to be just too religious, sectarian is their word. Uh, and, uh, the benefits can't be used there.

[00:05:53] Why is this important just to ... I mean, Erwin is quite right there. This is possibly in all the areas of constitutional law the one where the Supreme Court has done the most dramatic U turn, uh, over the last 40 years. Uh, in the 1970s and 1980s, the court came up with an elaborate, uh, doctrine called Lemon versus Kurtzman in which it struck down most forms of aid that extended to, uh, fully accredited, but, uh, religious schools. Um, and, and starting in the late ... and it depends on where you count, but starting the late 1980s and extending through the, uh, early **[inaudible 00:06:40]**, uh, the court backed away from that. It said, no, the Establishment Clause does not require governments to discriminate against religious schools.

[00:06:50] And then in the last, uh, five or six years, uh, the court has gone the full step. Not only do, are they not required to discriminate, uh, they're not permitted to discriminate against religious schools. This case is possibly the last i- in or at least the, the punctuation mark, the exclamation point, uh, at the end of a series of cases in which the court has increasingly said that the Establishment Clause of the first amendment and together with the Free Exercise Clause requires the government to be neutral with respect to providing benefits or subsidies to private activity.

[00:07:30] Jeffrey Rosen: Thanks so much for that. Before we turn to what's next, um, Erwin in the oral arguments for the case, the liberal justices express, some concern about the consequences of allowing sectarian schools to participate in this program. Justice Breyer asked about schools that, um, discriminate against LGBT teachers 'cause of their religious doctrine. Although it turned out there was a main anti-discrimination law that had an exception for them. So if the court does rule for the religious schools as many people expect, what would the consequences be? And why do you think it's important that they not allow religious schools to participate in this program?

[00:08:09] Erwin Chemerinsky: I think that the government has a compelling interest in providing a free secular public education for its students. Maine could create public schools to educate these students, and Maine would not have to provide religious education. To answer your question directly. I think James Madison got it right when he said it's important to tax people to support the religion of others. Maine says, we wanna tax people to provide for secular education. We shouldn't be taxing people to provide for religious indoctrination religious education. If parents wanna provide that, they can do so, but it's not for the government to support it. So I think from a free exercise perspective, it's not a violation of free exercise religion to deny funding for religious education. And I think it should be deemed a violation of the Establishment Clause for the government to subsidize religious schools.

[00:09:02] Jeffrey Rosen: Michael, in your fascinating historical brief, you argue that James Madison would've reached the opposite conclusion. You say that unlike John Locke and Thomas Jefferson who had, um, more deistical notion of freedom of conscience which focused on thought, Madison embraced the views of the more enthusiastic evangelicals who thought the free exercise included not only worship, but other forms of religious conduct. Tell us more about that argument. And also, what role there is for the Establishment Clause in restricting religious worship or conduct.

[00:09:38] Michael McConnell: Well, let's be clear about what Madison and Jefferson were objecting to back at the beginning. It was not to neutral treatment of religious organizations that provide public services like education or orphanages or hospital or any of the other numerous activities that religious organizations provide to the public. It was about whether people could be taxed to give money to churches for the purpose of worship and the carrying on of religious activity. That's what they were against. At the time of the found, we didn't have public schools, but to the extent there was public support or governmental support for education, it went, invariably went to religious schools on an equal basis with, uh, with any others. In fact, virtually all schools were religious in, in that time. If, and if Erwin were right, which he plainly is not

according to Supreme Court doctrine, going back decades, not recent cases but decades, uh, that would mean that, you know, GI bill benefits couldn't be used at Notre Dame.

[00:10:50] It would mean that the Methodist church can't be one of the charitable organizations, uh, you know, per provided for in the, in the, in the tax code. It might even mean that you can't provide police and fire and other protections, uh, to religious organizations. Uh, we have never in this country taken the position that because organizations are religious, they are cut off from the generally available, uh, benefits of neutral benefits of civil society. Uh, there was this weird period in the 70s and 80s when for, I think, complicated sociological reasons, but heavily related to anti Catholicism, uh, that the court, um, concocted this weird doctrine, uh, under which elementary and secondary schools could be, uh, discriminated against. It is backed away from that, and Maine's policy was adopted at the high point of that and s- specifically adopted because they thought that, uh, Supreme Court doctrine at the time, 1980 required them, uh, to exclude a sectarian school. So they wrote it into their law, uh, but we've moved 180 degrees from that.

[00:12:09] Jeffrey Rosen: Erwin, what's your response to Michael's claim that ruling for the schools would be a return to the historical norm? He says from the time of the founding, when there was public aid to schools, they tended to be religious schools, the university of Pennsylvania, for example, uh, you know, curriculum prescribed by Ben Franklin recommended textbooks that, that advocated religion, like the one written by Samuel Johnson, the future president of Columbia. And then in a brief, in this case, it turns out that religious aid did go to main schools until the 80s, when, as Michael said, Maine changed its policy. So is, is he wrong that this would just be a return to the historical norm?

[00:12:45] Michael McConnell: He's very wrong here because there's no historical norm of the constitution requiring the government to support religious education. What's so striking about this case is the argument is that it violates free exercise of religion, if the government doesn't provide the support for religious education. Prior to 2017, not once did the Supreme Court ever say the government had to under the first amendment provide assistance, religious education. No is denying that the government provide things like GI benefits or certain tax breaks to religious schools. But I think that Michael is ignoring the Supreme Court decision of *Locke versus Davy* that involved the state of Washington that provided scholarships called Promise Scholarships to students who attend college in the state. But it wouldn't provide the aid to those who are going to be ordained as a minister.

[00:13:38] And the question is, does that violate free exercise of religion? Is the government required to subsidize religious education? And the Supreme Court seven to two, and an opinion by Chief Justice Requist said, there is an inherent tension between free exercise and Establishment Clause. He referred his play in the joints, but it was clear that the government doesn't have the constitutional obligation to subsidize religious education. To me, what's so striking about this case is what Michael, and what the petitions are arguing is that free exercise requires the government to support religion.

[00:14:12] Jeffrey Rosen: Michael, what's your response said, Erwin says you're ignoring *Locke V Davis* and, and would the court have to revisit or overturn *Locke V Davis* to rule for the schools in this case?

[00:14:22] Michael McConnell: Erwin is absolutely right. And if I implied that the new doctrine that neutrality is constitutionally required, uh, is just a return. I, I never, I sho- should not have said that it, I don't think I, I did. It is a return on the ground to past practice because in the past, we never had states discriminating against schools because they were religious. So, uh, this is a n- a new phenomenon and I, I think properly held unconstitutional. *Locke V Davy* is ... I, I hope they do overrule it. It, it never made a piece of sense. It's, it's a v- it's written as an extremely narrow decision, very hard even to figure out what its, what its contours are. It's based on a historical claim, that there was a special rule against the funding of the education of clergy. This historical practice is, that is utter and complete historical nonsense.

[00:15:24] Every single college at the time of the constitution, uh, educated people for the ministry. In fact, for, you know, Harvard and Yale at the time, a majority of their graduates were going into the clergy and the- these schools all received, uh, aid from state governments. So *Lock V Davy* was a s- a silly and uninformed and confused decision, uh, from the beginning. I hope they do overrule it. I don't think they have to because the, the, *Locke* is written in such a, you know, convoluted and silly way that it's e- it's pretty much easy to distinguish in any case. But, uh, and it's the only case that stands, uh, in support of the state.

[00:16:08] Jeffrey Rosen: Erwin, what if the court does overturn *Locke V Davy*? What's next? There was an interesting colloquy with Chief Justice Roberts and Justice Breyer. Could the state say, "Hey, at school, you can get money, but you can't use it to build a chapel." Chief Justice Roberts wanted to know the answer to that. What are the consequences of overturning *Locke* and allowing aid to schools for religious education?

[00:16:29] Erwin Chemerinsky: Michael said earlier that he thought that this was the ... I think his word was, final case in the sequence that started with *Trinity Luther V Comer* in 2017, and *Espinoza versus Montana Department of Revenue* in 2020. I disagree that this is final. I think this is gonna lead to a good deal, more litigation. Let me give you an example. Many public school systems fund char charter schools. they've generally required that the charter schools be secular. I think the next argument to come to the court is gonna be, if the government's funding secular charter schools, it has to fund religious charter schools. I think then it could come to the point of, well, if the government is funding parents to send their children to public school, why shouldn't the government be funding parents to send their children to religious schools as well?

[00:17:19] I'll go back to something that Michael said from James Madison. James Madison said it was immoral, and that was his word to use the tax dollars to support religion. And Michael said, what we shouldn't be doing under Madison's view is using tax dollars to support, and I'm quoting Michael here, "Worship or the carrying out of religious activity." That's what religious schools exist for. And I think what separation of church and state is about is our government and our public schools should be secular. The place for religion should not be subsidized by the government.

[00:17:54] Jeffrey Rosen: Michael, what's your response to Erwin's claim that this is just the beginning and that, uh, the next case will save schools, fund charter schools. They have to fund religious schools, and this would violate Madison's injunction that it's immoral to use tax dollars to support of religion?

[00:18:09] Erwin Chemerinsky: I just have to correct this. Madison did not say it was immoral to use tax dollars to support religion. What he said is that it is immoral to require people to pay a tax directed specifically and exclusively to religion, that is a special religious tax. Uh, if people wanna support their churches, that's their business, but he did not imply the government funds going to private institutions, uh, uh, come with some sort of secularization, uh, requirement. They never did. Madison did not advocate that. Even Jefferson didn't advocate that.

[00:18:48] Jeffrey Rosen: And what's next? Erwin says that if states fund secular charter schools, they would have to fund religious charter schools as well. Do you think that's right?

[00:18:55] Erwin Chemerinsky: Well, I, I I'm inclined to doubt it, but, but Erwin probably is right That there will be further cases. Charter schools are probably one of them, uh, that the, one of his colleagues at Berkeley is a major advocate for doing away with these limitations, which have been, uh, you know, a very problematic in delivering services to underprivileged kids. And the inner cities were very frequently, uh, it is the, uh, sort of, uh, nearly bankrupt remnants of the Roman Catholic school system that are the, you know, the most available institutions and infrastructure for doing that. The idea that people have a constitutional right, uh, to force the government, to fund any private schools at all, I consider pretty farfetched. Uh, but, uh, you know, but probably people will bring some cases. People do.

[00:19:51] Jeffrey Rosen: Erwin, let's take this further. Still Michael argues that Harvard and Yale were sectarian and educated ministers and received public funding. If the Supreme Court took us back to that world, wouldn't state funds be available to religious schools that said prayers to open classes and would that call into question the school per our cases?

[00:20:12] Erwin Chemerinsky: What Michael said earlier is the principle that underlies this is that when the government subsidizes secular private education, it must subsidize religious education as well. If that's the principle, then I don't see why we draw a line. If the government subsidizing secular charter schools, why doesn't they have to subsidize religious schools as well? If it's providing a free education for those going to public schools, why doesn't they have to provide a free education for those going to religious schools? Why isn't it discriminating against parents who make the choice for religious education for their children? I think once you take Michael's principle, I can't see a basis for drawing such a distinction. And in fact, I think then there is really nothing left of the Establishment Clause of the first amendment, and we have an incredibly robust free exercise right. And once we take away the Establishment Clause, then I do worry about things like the decisions prohibiting prayer in public schools, the decisions that limit religious symbols on government property and the like.

[00:21:17] Jeffrey Rosen: Michael, what would be left of the Establishment Clause under your vision? Would the school prayer decisions have to be revisited?

[00:21:24] Michael McConnell: Absolutely not. And, you know, I'm confident that when the, when, and if these cases arise, Erwin will be on this show explaining why no, no, uh, uh, Carson versus Macon does not require, uh, any of these extensions that he's now warning against, and very likely he will be right. The Establishment Clause will simply return to what it was intended to be, uh, which is a prohibition on, uh, the government using its power specifically, you know,

for the support of, of religion as such, it was not designed to secularize society, root religion out of the various places in American culture where religion exists including, uh, uh, private education. Uh, it, it, there was a, there was a very brief period in our history, uh, when the Supreme Court started walking down this path of using the Establishment Clause to secularize, uh, society. It's, it's drawn on back from that, uh, the, the, the Establishment Clauses is not pro religion. It is not anti-religion, it is neutral toward religion.

[00:22:38] Jeffrey Rosen: Erwin, what do you believe that the Establishment Clause requires and forbids?

[00:22:42] Erwin Chemerinsky: I think Thomas Jefferson got it right when he said there should be a wall that separates church and state. I think what the Establishment Clause about is secularizing government, not secularizing society as Michael says. I think the idea of the Establishment Clause is that our government should be secular, that the place for religion is in people's lives, the homes, the churches, the synagogues, their mosques, but not in government.

[00:23:09] Jeffrey Rosen: Michael, I think you believe that, uh, Jefferson's view is wrong as a historical matter and was not embraced by the framers and ratifiers of the first amendment.

[00:23:18] Michael McConnell: Well, you know, I think it all depends on what you mean by the wall, and at a certain level of abstraction, I agree with Erwin that the purpose is to make sure that government, uh, is secular. But by government here, they're meaning, you know, the force of laws, the, the course of apparatus of the state. They don't mean that everything government touches has to become, uh, secular. So you take, for example, uh, public events or public monuments, you know, the very first public monument erected by the federal government, uh, was the Washington monument. And, and, uh, it, it contains a religious inscription.

[00:23:57] When Benjamin Franklin, uh, and, uh, uh, and others were asked to design a Seal for the United States, what they came up with involved, a wood cut showing, uh, the, the pa- parting of the red sea in the book of Exodus and the slogan, uh, resistance to tyranny is obedience to God. Uh, there was no sense that, uh, that these non-coercive cultural aspects touched by government all had to be secularized. I think the key here is that when the government uses the force of its laws to require people to, uh, engage in religion, that's what establishment is really about.

[00:24:42] Jeffrey Rosen: Or when those historical examples are undoubted, Ben Franklin did indeed propose Moses parting the sea as the great seal of the United States. Uh, what do you believe changed and was it the incorporation of the Establishment Clause against the states that made those symbols unconstitutional?

[00:24:57] Erwin Chemerinsky: Well, first I think the history is far more equivocal than Michael makes it seem. I think I can point to a great deal that suggests that the framers intended a secular government. After all, look through the constitution. It never mentions God. The framers thought themselves as product of the enlightenment, where reason it replaced religion as a basis for decision. State after state were establishing their own version of the Establishment Clause, and repudiating their state churches at the time of the founding. But I'm not an

originalist. I don't believe the meaning of any constitutional provision is fixed when it's adopted. I think we're always deciding, what does it mean for our society? And our society is far more religiously diverse than it was in 1791. And it's interesting, you mentioned the incorporation of the Establishment Clause. This occurred in *Everson versus Board of Education* in the late 1940s.

[00:25:51] And what's striking there is that all nine justices agreed with Thomas Jefferson's metaphor of a wall separating church and state. I find what Michael said a moment ago very frightening, because if I understood, he said, the government violates the Establishment Clause only if it coercing religious behavior. Would that then mean that voluntary school prayer is permissible? Does that then mean that the government can provide unlimited religious monuments across the top city hall? Because it's not coercive? Does that mean that the government is constitutionally required to subsidize religious education because it's not coercive? This is a view that Justice Scalia and Thomas took of the Establishment Clause. And to me, it's a chilling and a frightening one.

[00:26:36] Jeffrey Rosen: Thank you for that. Michael, what are the consequences and limits of your view and not of Justice Scalia and Thomas that government may not coerce religion? Are the things that Erwin suggested on the table?

[00:26:48] Michael McConnell: Well, I don't think so. I mean, you take school prayer, which is, I, I think is a, is a great and important, uh, example, the, the, the case that was before, uh, the Supreme Court [inaudible 00:26:59] versus *Vitality* and then *Abington School District against Shemp* purported to be voluntary and that, you know, kids were not coerced into joining the prayer, but what the court said and I think it was right, was that "the indirect coercive effect is plain." When you require a bunch of people to be in a room, children especially, uh, and you know, telling them that they can like leave the room or, or whatever, when the activity is going on, uh, anyone who knows kids can tell you that is a coercive matter. Now, what about prayer? Uh, almost every president of the United States, including Joe Biden and, and Barack Obama have had prayers, uh, at their inauguration ceremonies. Those are public events.

[00:27:48] When, when, when George Washington had his inaugural address, he even said that his first public act, that was his word would be offering a prayer. So, uh, when prayer really is non-coercive, uh, then it's been a part of American tradition from the beginning. And le- okay, let's go with Erwin. Let's say we don't care about the history that, that we should ask, what do people believe today? I think what people believe and most people in their bones believe is that government ought to be neutral. I do not think there is some great groundswell of support, maybe outside of some of the higher reaches of academia, uh, for using, uh, the, uh, first amendment, uh, as an instrument to forcibly secularize, uh, society. Y- yes, this is, is a diverse society and religion and religious practice and religious expression is part of that diversity to try to, to root out the religious elements in any aspect of life that's touched by government, uh, would be a massive change, uh, in the way the United States is.

[00:28:58] Jeffrey Rosen: Erwin, in your book on the religion clauses, you identify three major approaches to the Establishment Clause, the accommodation theory, the neutrality theory, and the strict separation theory. Where do you think the court is going in this regard and how are they likely to evaluate attempts to favor particular religions?

[00:29:23] Erwin Chemerinsky: I think Michael and I would agree that for several decades, the Supreme Court took a separatist approach very much believing that the wall that separates church and state. Just again to correct Michael, it wasn't about secularizing society. It was a view that government should be secular. But I think that there are now joy of the justices who believe from the Establishment Clause perspective that the government violates the Establishment Clause only if the government coerces religious behavior, and a majority of the justices who believe that the government violates free exercise of religion, if it subsidizes private secular education, but not religious education. I think from the oral argument yesterday, it's likely that Carson versus Macon is gonna be a six three decision against the state of Maine.

[00:30:11] And one thing neither Michael and I have mentioned, Justice Thomas and maybe justice Gorsuch believed that the Establishment Clause doesn't apply to state and local governments at all. Justice Thomas has taken the position that the Establishment Clause was just meant to keep Congress from creating a church to rival state churches. So from the Thomas perspective, there'd be no violation of the Establishment Clause, even if a state coerced religious behavior.

[00:30:41] Jeffrey Rosen: The National Constitutions Center relies on support from listeners like you to provide our nonpartisan constitutional education to Americans of all ages. For a limited time, every dollar you give to support, We The People will be doubled with a generous one-to-one match up to a total of \$234,000 made possible by the John Templeton Foundation. Please visit constitutioncenter.org/wethepeople. Donate and thank you for your crucial support. That's constitutioncenter.org/wethepeople, all one word, all lower case. Now back to the show.

[00:31:19] Michael, Erwin of course is correct about Justice Thomas' view. And that allows me to say, I think for the first time on We The People, the wonderful word, the anti-disestablishmentarianism, that SAT word that, uh, suggests that the Establishment Clause was intended to prevent the federal government from disestablishing the state churches, but not to constrain state establishments. Um, do you believe, Michael McConnell, that Justice Thomas is correct on this matter and should the court disestablish the Establishment Clause?

[00:31:50] Michael McConnell: Uh, I respectfully disagree with Justice Thomas on this. When the framers of the first amendment chose the language of Congress shall make no law respecting an establishment of religion, they chose that word respecting very deliberately in order to, uh, make clear that the federal government could not establish religion, but the federal government also could pass no laws that would undermine or respect, have anything to do with the then existing state establishments of religion. And there were about half the states at that time that had establishments of religion. They've all dis-established since then, but the time of the founding, that was so. Well, the Supreme Court's doctrine, which I agree with, uh, is that those portions of the bill of rights, which protect individual rights are incorporated against the states. It is true that the portion that has to do with not interfering with state establishments has nothing to do with individual rights, but the requirement that the federal government itself not establish is a classic, uh, individual right.

[00:33:03] It means the, the federal government can't require people to attend church. It means they can't require people to contribute to churches. It means they can't require people to, to pray

or to worship or to, uh, affirm religious beliefs. All those are individual rights, and I think that that is incorporated against the states. And that's, since the states have all dis established the other aspect of the Establishment Clause, it's irrelevant today, but the individual rights portion, which is all the cases, uh, uh, is, is still, i- I think the court correctly is held, uh, that, that applies to the states as well as the federal government.

[00:33:44] Jeffrey Rosen: Fascinating. Erwin, as I hear Michael, uh, if his view were to prevail on the court, which it might, then you could have state support for religious schools, as long as the decision to attend the schools was by private choice, and you might have religious activities at the school as long as they were truly voluntary and not coerced, but public schools effectively are coercive environments and you couldn't have an error. Is, is that about right and do you imagine any other consequences of Michael's view being adopted by the court?

[00:34:17] Erwin Chemerinsky: I think it's important to separate the Establishment Clause and the free access clause. Michael's view would say that the government giving such support to religious schools doesn't violate the Establishment Clause. That's inconsistent what the Supreme Court said for several decades. But moreover, what Michael says is for the government to support secular private education, but not religious education violates Free Exercise Clause, and that what's a dramatic change in the law, and that's where I think Carson versus Macon is going.

[00:34:51] Jeffrey Rosen: Thank you for that. Michael, is it fair to say that, um, that proposition that for the government to support private secular education, but not religious ones wasn't something contemplated by the framers 'cause they didn't confront that situation? And tell us more about your parsing of the language of the Free Exercise Clauses, which did contain exceptions for activities that disturbed public safety and civil peace and how do those fit into the need for schools that, uh, public and private to obey anti-discrimination laws?

[00:35:27] Michael McConnell: Well, Jeff, those are two quite different questions. Let me first talk about the, you know, how we get to a position where, uh, discrimination against private religious schools is unconstitutional. Uh, this is, uh, uh, a- and, and it did not come up for the framers. This is not, so you can't point to, it never occurred to any states, uh, to, to do such a thing. So this is not something that they were uh, familiar with. Um, but in, in general, at the beginning for about the first 100 years, um, courts under both state and federal constitutions had a fairly narrow understanding of what it meant to burden, uh, a, uh, a constitutional right. And so by and large, unless you're actually being punished for exercising a constitutional right, uh, the courts were unlikely to, to hear your case.

[00:36:23] But you know, starting in the late 19th century and then really, uh, coming on strongly in the, uh, 50s and 60s and 70s led by, you know, my former boss, uh, uh, Justice William Brennan, but others, the court has come to see that denying someone an otherwise available benefit on account of their exercising, a constitutional right is itself a burden. So the way bre- Justice Brennan put it in a case involving loyalty oaths in the 1950s, um, he said that denying, uh, someone in o- a been a if at which they would otherwise be legally entitled on account of their exercising in that case, the free speech right not to sign a loyalty oath is the equivalent of a fine, that is, there's no economic or practical difference between finding

somebody \$200 for exercising a constitutional right, and denying them a \$200 benefit that they otherwise would've received because they exercise that constitutional right.

[00:37:32] Um, that principle was first applied to the Free Exercise Clause in a case in 1963, Sherbert against Verner written by Justice Brennan, and the modern cases like, uh, Carson against Macon are simply applications of, uh, of that same, uh, understanding. So again, it isn't that you have the right to receive these subsidies. It's that when the government is already created a legal right, for everybody else, a generally applicable benefit, you can't be denied, uh, the, that benefit because you are going to be exercising a, a constitutional right like the free exercise of religion.

[00:38:16] Jeffrey Rosen: Thank you so much for that. Erwin, your response to Michael's point that the basis for his vision is not in this case, the original understanding of the constitution, but decisions from the 1960s and 70s written by Justice Brennan. Is that consistent with an originalist vision?

[00:38:33] Erwin Chemerinsky: No, and I don't think it's consistent with Justice Brennan's vision either. Justice Brennan very much believed in the wall that separates church and state. He very much believed that government aid to religious schools violated the Establishment Clause of the first amendment. Sherbert versus Verner was a very limited case. Involved a woman who quit her job rather than work on her Saturday Sabbath. And the question was, could she be denied unemployment benefits? I also think it's important to note that it was at 1990, in Employment Division versus Smith, that the Supreme Court dramatically changed the Free Exercise Clause and said, you can't use the Free Exercise Clause to challenge a neutral law of general applicability. And that was written by Justice Scalia. But I also wanna focus on what Michael said the principle is and how breathtaking the implications are for what we're talking about. Michael's words were that the government can't deny a benefit to someone on account of exercising a constitutional right.

[00:39:31] In Pierce versus Society of Sisters, the Supreme Court in 1925 said, parents have the right to send their children to parochial school while they're being denied government support for education on account of exercising, a constitutional right. That's why I said earlier, that I worry that the implication of Carson versus Macon is, if the government's gonna support secular charter schools, it's gotta support religious schools. If the government's gonna pay for children's education in public secular schools, why shouldn't it have to pay for religious schools? Because you're denying a benefit, government subsidy on the account of parents exercising a constitutional right, the religious education of their children. That's a principle that has no stopping point.

[00:40:13] Jeffrey Rosen: Michael, as you said, I, I asked you a bit back two questions. And the second one had to do with the original understanding of the Free Exercise Clause. We had a great two town hall recently where Vincent Munos of Notre Dame said that the attempt to create exemptions from generally applicable laws under the Free Exercise Clause is not an originalist position. That exemptions that the framing were legislatively granted like the exemptions for Quakers and military service. Is he right? And, and is the court on the free exercise side also going down a road, uh, that goes beyond what the framers intended?

[00:40:47] Michael McConnell: This is a serious scholarly debate about the meaning of the Free Exercise Clause. I, I disagree with Professor Munos. He, he makes excellent points, uh, but I think on balance, the historical evidence is stronger that the Free Exercise Clause actually was understood to protect people in their exercise of religion, with an exception, with a fairly narrow exception where their exercise of religion would, uh, disturb public peace or the, or the, uh, like the f- the, uh, a common law rights of others.

[00:41:25] Jeffrey Rosen: Erwin, on that point, there was discussion in the oral argument about whether religious schools that discriminated against gay lesbian teachers could get public support and Justice Breyer said, what about a school that fires teachers for exercising their right to marry if they're gay? Is that where the court is going? And how can that be reconciled with the framers belief that religious exercise can't disturb the public piece or the civil rights of others?

[00:41:56] Erwin Chemerinsky: I think that's exactly where the core it is going because assuming the Supreme Court in Carson versus Macon rules against the state of Maine, the implication would be that the government has to provide the money to parents to send their children to religious schools, even if they're religious schools that discriminate against gays and lesbians, even if the school that fires a gay lesbian or transgender teacher, I don't see any way to draw that line. And to me again, what this is about is, the government shouldn't be required to support discrimination in that way. I worry that the court's going in that direction generally, and saying that people on a counter of the religious beliefs have the right to discriminate against others, even in violation of state at law. I think that's where the court was going in Fulton versus City of Philadelphia last June. I think that's where the court was pointing in masterpiece cake shop a few terms ago.

[00:42:47] Jeffrey Rosen: Michael, should, uh, school that fires gay teachers for religious reasons be entitled to receive public funds? And is that consistent with the exception in the framing error laws that religious activity could not be supported in ways that disturb the public peace or civil rights of others?

[00:43:07] Michael McConnell: Almost every state that has passed employment discrimination protections for, uh, L B G T people has, uh, incorporated, uh, uh, accommodations for religious institutions, uh, for, for the very good reason that, you know, most of the major, not all, but most of the major religious, uh, denominations, uh, in this country have long standing, you know, well known teachings on, uh, subjects of sexual morality that come into, you know, into conflict, uh, with these laws. Uh, Maine itself has, has carved out, uh, some of these. Now, uh, w- when the cases come and I do think I'm very ... I'm, I'm with Erwin here. These cases are coming. When they come, I think it's going to be very difficult to know. Uh, I, I can't predict how the court is going to decide them. They will be very important cases, and they're gonna be very difficult cases.

[00:44:07] The Fulton case to which Erwin refers, had to do with the Roman Catholic charitable arm, uh, that has been engaged in providing adoption services in literally for hundreds of years, way before the city of, of Philadelphia, uh, ever became, uh, involved. And the city decided to stop, the, just cut the, them out, uh, because when there was a family that was, uh, LGBT that wanted to adopt or be foster parents, uh, they would refer them to another agency rather than, uh,

handling the matter of themselves. And in the end of the Supreme Court, uh, overwhelming by an overwhelming vote, decided that, uh, Philadelphia was really targeting its rules at the, uh, Roman Catholic, uh, diocese and you can't do that. And so that was a very narrow ruling, but hard case. There're gonna be hard, even more hard cases in the future.

[00:45:06] I think, uh, you know, I at least hope that the principle will be, uh, and I don't know how much farther, but at least the principle should be that the government cannot, uh, force, uh, people with a conscientious objection on matters of sexual morality to take acts that are contrary to their own conscience. I think that's just as important a principle, uh, as the principle that, uh, people, uh, should be able to act, themselves to act in accordance with their own sexual identity.

[00:45:37] **Jeffrey Rosen:** Thanks for that. Erwin, when the court gets a case involving a teacher who's been fired from a school that receives public funds for getting married, for example, uh, because they're gay, what argument would you make about why that's unconstitutional?

[00:45:52] **Erwin Chemerinsky:** I think it's important to separate two questions. One is, should people be able to discriminate an account of their religious beliefs? And the second is, should the government be constitutionally required to subsidize such discrimination? In terms of the former question, I disagree with Michael. I believe there is a compelling government interest in stopping discrimination. And if we're gonna allow religious discrimination against gays and lesbians, then why not a religion that let discriminate blacks or women as well? There's always tension between liberty and equality. Any law that prohibits discrimination limits the freedom to discriminate, but our society has made the judgment for over half century that stopping discrimination is more important than the freedom to discriminate.

[00:46:40] Now I fear where the court is going is saying, that people have the freedom to discriminate if it's account of the religious beliefs. But there's a second separate question, and that's, should the government have to use its resources to support such discrimination? And I worry that the implication of Carson versus Macon is that the is required under free exercise to allow parents to use the money, to send their children to private schools, even if those private schools discriminate on the basis of sexual orientation or gender identity. And I think that's a very frightening proposition.

[00:47:14] **Jeffrey Rosen:** Michael, uh, the court has confronted this tension between religious freedom inequality before in the Bob Jones case the court held that a Christian university couldn't deny admission to applicants in an interracial marriage. If you were arguing that case involving the teacher who's fired for exercising his right to marry, how do you think the court should rule and why?

[00:47:37] **Michael McConnell:** I think it's kind of pointless for us to be speculating in a discussion of, of Carson versus Macon about cases that haven't happened and where we don't know what the laws are. The first thing I always do when I'm confronted with a constitutional case is try to find out what the law actually provides. Are there exceptions, uh, how is it in, in fact generally applicable? Most of these cases do rest upon, uh, their details. And I think it's significant. I think it's interesting that supporters of the state of Maine in the Carson case don't really wanna talk about what Maine actually does, which is exclude all so called sectarian

schools reserving to itself the right to decide when a school is too religious and therefore sectarian. That's what the case is about. Uh, and instead, they want to, uh, pause at, uh, hypotheticals. It had nothing to do, even with Maine law vers- uh, and certainly nothing to do with, uh, Carson versus Macon.

[00:48:41] Jeffrey Rosen: Erwin, on that point, Michael's brief sites a case that he decided while a judge on the 10th circuit that forbade this state from deciding which schools could be supported based on evaluation of their own religious doctrine. And that's an enterprise that even the more, uh, liberal justices, including justices Kagan and Breyer have been reluctant to engage in in the past, which is why they've been joining these past cases requiring religious neutrality. What do you think of that entanglement question and, and might justices Breyer and Kagan be regretting, uh, how far they've sat down this road?

[00:49:15] Erwin Chemerinsky: I think what's at stake in Carson versus Macon and raised by your question is, does the government have the constitutional duty under free exercise to support religious education? What Maine is saying is that it has an interest in a state inviting a secular education for all of its students. It can create secular public schools without indicate religious schools. On the other hand, what Michael, and what the challenge they're saying is, that the government has the duty, a constitutional requirement to subsidize religious education. And this until four years ago was truly unprecedented American history.

[00:49:54] Jeffrey Rosen: Michael, tell us more about that important 10th circuit case that you decided it's relevance for Carson and, and also your response to Erwin's case that there's a difference between a right and a duty.

[00:50:05] Michael McConnell: In that decision, that 10th circuit, and I had the honor of writing that opinion held that it is a violation of the Establishment Clause even for the government to fund some religious private schools and not others on the basis of the government's judgment about how, uh, how religious they are. And I think that applies just as much as the Free Exercise Clause, uh, in the Maine case because, uh, the state of Maine does in fact subsidize some religious schools, but when you get to be too religious, uh, well then, a- and, and, and how do they find this out? They've conducted months long investigations into, you know, exactly what's going on in the, in the classroom and to all the various, uh, practices. If this is not a violation of the separation of church and state, I don't know, uh, what is.

[00:51:02] And again, correcting Erwin, no one is asserting that there is a constitutional right to a government funded religious and education. This is a case arising under a state statute, long standing state statute, where this, uh, legislature of Maine voluntarily, not being required, they passed the following statute, providing tuition, I'm quoting here, tuition at the public school, or the proved private school of the parent's choice at which the student is accepted. Approved meaning accredited.

[00:51:41] While the schools we're talking about in the Carson case or accredited schools, what happened is that in the, in 1980, at the high point of this brief period when the Supreme Court is experimenting with a, an, a historical and illogical interpretation of the Establishment Clause, the state attorney general said, "Oh, well, we have to exclude sectarian schools," sectarian, by the

way, being a longstanding code word for Roman Catholic. Protestants aren't sectarian, you see. Uh, Catholics are sectarian, and that's what this case is about. Maine has voluntarily chosen to include private schools, including some religious schools within its funding system. The question is, can they decide that some schools are just too sectarian, too religious, uh, to be permitted. Uh, and I think that violates not just free exercise, but establishment as well.

[00:52:42] Jeffrey Rosen: Erwin, your response.

[00:52:43] Erwin Chemerinsky: The issue is, can the state choose to subsidize education at secular private schools without being required to subsidize education at religious schools? That's what Carson versus Macon is about. And I think it would violate the Establishment Clause for the government to subsidize religious education. And I don't think it violates free exercise of religion if the government choose not to. What I find interesting listening to Michael is how he wants to embrace the cases he likes like Sherbert versus Verner, and repudiate decades of cases, not just from the 1980s, but cases going back to the 1940s that he doesn't like, and cases like Locke versus Davy. I think what the Supreme Court has done for at least a half century until very recently is say that the Establishment Clause limits the ability of the government to support religious education and religious institutions. And until four years ago, the court had never found that it violates free exercise religion to deny aid to religious schools.

[00:53:42] Jeffrey Rosen: And Michael, your response to that point about whether you're reputing cases from the 40s, not just the 80s and, and then we'll have closing arguments.

[00:53:50] Michael McConnell: Erwin. And I both think that some cases on the books were rightly decided and some were wrongly decided. And we are not alone in that. Every constitutional law professor thinks that, and probably every lawyer. So let's just agree that, uh, you know, both of us invoke principles from the past. I think the only actual decision that, uh, is even remotely on, in support of the state's position in this case is Locke V Davy. And that was, uh, very poorly reasoned, uh, late 1980s, uh, uh, decision of the Supreme Court. And if it's overruled, I think we should all be happy.

[00:54:36] Jeffrey Rosen: Well, for closing arguments, I'm going to give a challenging request because I can't think of two people in the country better equipped to answer it. And that is for both of you, as concisely, as possible to share with We The People listeners your view of the correct relationship between the Establishment Clause and the Free Exercise Clause. Erwin, let's begin with you.

[00:54:56] Erwin Chemerinsky: I think there's an inherent tension at times between the Establishment Clause and the Free Exercise Clause. My view of the Establishment Clause is a robust view that is meant to create a separation of church and state. My view of the Free Exercise Clause is very similar to Justice Scalia's that the Free Exercise Clause doesn't provide a basis for exception to general laws. I worry very much that if we doubt in that path, we have to ... the government and the courts are constantly deciding, what is religion or what's a sincerely held religious belief? I would just conclude, as I've said, all along prior to 2017, not once did the Supreme Court hold that the failure to subsidize religion violated free exercise. What the court had held for decades was, government support for religious schools violates the Establishment

Clause. Now the Supreme Court has turned that on its head, sees no violation of the Establishment Clause and support for religious schools, but it is creating a constitutional right, a constitutional obligation of the government to subsidize religious education. And that's what I think is wrong.

[00:56:04] Jeffrey Rosen: Michael, the last word is to you, what is your view for We The People listeners of the correct relationship between the Establishment Clause and the Free Exercise Clause?

[00:56:15] Michael McConnell: So I think the two clauses are entirely complimentary. They were proposed by essentially the same people, mostly the more intensely religious, uh, elements, but supported also by people like Jefferson and Madison who were from somewhat more from the, uh, enlightenment, uh, wing. But, uh, no one at the time thought they were intention, uh, with each other. They were basically not the same principle, but entirely complementary principles, uh, that the Establishment Clause prevents the government from promoting uniformity on, with respect to religion, uh, through, uh, the use of its powers to, uh, to, uh, coerce or, uh, people into supporting religion and the powers to interfere with the, uh, doctrines and hiring and personnel of the church.

[00:57:05] Uh, and the Free Exercise Clause was designed to make sure that people of minority views, uh, would be able to pre- exercise their religion, uh, even when they were, uh, dissenters from, uh, the majority in the democratic process. I think the tension that, uh, Erwin perceives, uh, and, and continues to believe in is entirely a product of the misunderstandings of the Supreme Court in the 19, uh, mostly the 1970s and 1980s, uh, which created attention that, uh, that never was there.

[00:57:42] Jeffrey Rosen: Thank you so much. Erwin Chemerinsky and Michael McConnell. It is always a joy and a privilege to learn from both of you about the meaning of the first amendment and the constitution of the United States, and very much looking forward to the next opportunity. Erwin, Michael, thank you so much for joining.

[00:58:01] Erwin Chemerinsky: Thank you.

[00:58:02] Michael McConnell: Thank you.

[00:58:08] Jeffrey Rosen: Today's show was produced Melody Raul, and engineered by Greg Sheckler. Research was provided by Michael Esposito, Chase Hanson, Sam Desai, and Lana Orrick. Please rate, review and subscribe to We The People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional debate. And please support the We The People crowdsourcing campaign. Go to constitutioncenter.org/wethepeople, all one word, all lower case and give any amount, \$5, \$10 or more. All of your donations will be matched and doubled up to a total of \$234,000, thanks to this great matching grant from the John Templeton Foundation. As I mentioned, we have 71 different donors from 16 states. Uh, that is 34 states to go, and I know that we'll hit our mark. Constitutioncenter.org/wethepeople. On behalf of the National Constitution Center, I'm Jeffrey Rosen.