

Are Religious Charter Schools Constitutional?

Thursday, May 1, 2025

Visit our media library at constitutioncenter.org/media-library to see a list of resources mentioned throughout this program, listen to the episode, and more.

[00:00:00.7] Jeffrey Rosen: On April 30th, the Supreme Court heard oral arguments in *Oklahoma Statewide Charter School Board v. Drummond*, which explores the constitutional issues raised by funding or not funding religious charter schools. 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 nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. To explore this and other religion cases recently heard by the court, I'm honored to welcome two of America's greatest scholars on the history of the religion clauses of the Constitution. Michael McConnell is the Richard and Frances Mallory Professor and Director of the Constitutional Law Center at Stanford Law School, and a senior fellow at the Hoover Institution. His latest book, co-authored with Nathan Chapman, is *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and the Freedom of Conscience*. Michael, it is always wonderful to welcome you to We the People.

[00:01:08.3] Michael McConnell: Thanks for having me back, Jeff.

[00:01:10.3] Jeffrey Rosen: Steven Green is the Fred H. Paulus Professor of Law and Affiliated Professor of History and Religious Studies at Willamette University. He is the author of six books. The most recent is *Separating Church and State: A History*. He wrote an amicus brief in *Oklahoma Statewide Charter School Board v. Drummond*. Steven, it is wonderful to welcome you to We the People.

[00:01:30.8] Steven Green: Thank you, Jeff.

[00:01:32.9] Jeffrey Rosen: Let's begin with *Oklahoma Statewide Charter School Board v. Drummond*. Michael, what are the issues in the case?

[00:01:42.2] Michael McConnell: Well, this case is the first ever case involving a religious charter school actually operated by, in this case, the Archdiocese and Diocese in Oklahoma, and to be operated as if it were a full-fledged private religious school, but nonetheless a charter school. I believe it's the only example in the country. And the question is, I think it comes down to is it a public school or not? Because public funds can be provided to religious private schools on a neutral basis as long as the families choose the schools themselves. But public schools, at least since the early 1960s, have been under quite strict and increasingly strict requirements of

not inculcating religion. That doesn't mean they can't teach about religion, but prayer, Bible reading, actual religious instruction is not permitted in public schools. So if this charter school is a public school, it could not do what it intends to do, but if it's a private school, it can. And I think that's really the question in the case.

[00:03:03.4] Jeffrey Rosen: Steven Green, how would you state the main issues of the case?

[00:03:07.1] Steven Green: Well, I think Judge McConnell is correct. This is, in a sense, a case of first instance, but it is also just the next case along the line of cases the Supreme Court has ruled on that has increasingly opened the door to the funding of religious institutions and has, to a certain extent, also kind of confused the question even about religion in public schools, as we saw a couple of years ago with the high school football coach case out of Seattle, Washington area. And so in some ways, it's not a surprising next step for the court to be considering this issue, but at least I find it a troubling step.

[00:03:54.0] Jeffrey Rosen: Well, as it happens, both of you are America's greatest scholars of the history of religion in public schools, and you've both written important books about that, which cast important light on the questions in this case. Michael McConnell, tell us about the history that you engage in your book on *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, and what light that history casts on this case?

[00:04:26.4] Michael McConnell: Well, the history here is illuminating about the right of religious institutions in their private capacity to share in government funding on an equal basis, but history is much different when it comes to public schools for the simple reason that there were no public schools at the time of the founding. We only had private schools, and the first sort of comprehensive, what we really would call a public school in the modern sense, came about in as late as the 1830s. And at that time, so these were government-run public schools, common schools, and they were not operated on a secular basis. They taught, the Bible was taught in the schools, almost invariably Protestant versions. There were prayers in the schools. From the very beginning of public education, this led to enormous controversy. Riots broke out in several cities, including Philadelphia and a terrible three-day riot broke out when Catholic students were offered an opt-out from the Protestant instruction in the public schools. But this continued, and without any, I mean, there were State Supreme Court decisions, including some rather important and interesting ones, but as a federal matter, this did not get to the federal courts until after World War II.

[00:06:20.8] Michael McConnell: Now, part of this is because the Establishment Clause and the rest of the First Amendment did not... were not considered to apply to the states at all until somewhat later. But in any event, once these issues began to come to the US Supreme Court, it was then not until the early 1960s in the first school, the school prayer and Bible reading cases, that the Supreme Court held that public schools could not have a curriculum that involved materials of either prayer or worship, invocation of religion. And since then, with a few hard cases along the way, including the one that Professor Green referred to about the *Kennedy v. Bremerton School District*, some were borderline cases, but the court has quite consistently held that public schools cannot inculcate religion, cannot lead students in prayer, cannot teach the

truths of religion. Although they are perfectly free to have elements, having you can read parts of the Bible in a literature course.

[00:07:41.9] Michael McConnell: When I was in 10th grade, we read the book of Ecclesiastes in 10th grade English, and my school was quite strict about separation of church and state. So it isn't that religion is completely kept out, but it is kept out as a subject of inculcation so that government doesn't place its authority behind the teachings of any particular religion. And I don't see any appetite for on the part of the, at least the majority of the Supreme Court for backing away from that. And in that case, again, the Seattle football coach case, for example, none of the justices were saying that it's perfectly okay for teachers to lead their students in prayer. The whole question was, what was the status of this particular coach's own prayer activity. I don't think there's any appetite for reconsidering this line of cases. And so to my mind, the case is really about how to classify this charter school, whether it belongs on the public school side of the line or is essentially a private school.

[00:08:57.1] Jeffrey Rosen: Thank you so much for that. Steven Green, in your brief and in your definitive books on this subject, you say that the question is not whether public funding of religious schools was sometimes thought constitutionally permissible, it's whether states must fund religious schools when government also funds other forms of education. And on that question, you say the history is clear, and it answers the question in this case. From very early in this nation's history, you write, States and Cities across the country declined to fund religious schools, even as they funded other educational institutions. Tell us about that history.

[00:09:34.6] Steven Green: Yes, I agree with Judge McConnell's, overview of this. There are some nuances, though. He's correct, that public education as we think of it now, did not exist at the time of the founding. And part of this makes it difficult to apply the courts re-emphasis or new emphasis on history and traditions to understand what the meaning of various constitutional amendments are, because the history was, there were no public schools, and so, we kind of were left in a guessing game. What was going on at this particular point in time is yes, any education that took place was in either the private academies, tutors were more common, some private schools. But as common schools were created, there was a significant trend away from funding private religious education. And this happened actually before the influx of Catholic immigration.

[00:10:35.9] Steven Green: We saw in 1818, the Connecticut Constitution added its provision to prevent the funding of religious education. In 1826, Massachusetts passed its comprehensive, the first comprehensive common school act. And as part of that, Horace Mann made a definitive decision that he would try to de-emphasize the Protestant nature of public education that was evolving at that particular point in time. And he caught flack from both sides. He caught flack from the Catholics who said, wait, this still looks kind of Protestant, actually, they said, it looks really kind of unitarian, which man was. But then also from the Evangelicals, they said, this just was not religious enough. When we're thinking about historic trends to get back to Supreme Court's standard, though we can't freeze this issue in time, we have to see it as an evolving issue. And quite clearly, at least my research and my couple of books on this, has been that the evolving issue was to not fund religious education and also to slow movement toward the secularization of public education.

[00:11:46.8] Steven Green: Those were the two trends throughout the 19th century. And in the 19th century when there was not... When school districts, states decided not to fund any remaining religious schools, as my brief points out or our brief points out, no one was raising a free exercise claim against that. No one said, oh, this is discrimination against religion. And so there was an understanding, at least under principles of non-establishment that was evolving at this particular point in time, is the government should not be funding religious based education. And then over time, that also came to mean the government also should not have religious instruction in its own schools, too.

[00:12:37.8] Steven Green: And so that's where we went to. And so I agree with Judge McConnell that I don't think the Court is going to challenge that core finding in that second principle about not having religious instruction in public schools. But they are kind of narrowing what that means. And we, certainly, the courts have held equal access, Bible clubs in public schools. I'm not as sanguine as Judge McConnell is about the *Kennedy* case, because the facts in *Kennedy* actually were that he was engaged in religious activity with his team players many times prior to the lawsuit that came into being. And so I have a concern about the creep that's going to take place when you actually do start allowing teachers to engage in religious activity in their school capacities, in their official capacities on school time. I think that's problematic.

[00:13:31.5] Jeffrey Rosen: Thanks so much for that. Michael, my first question is, why are you confident that the Originalist Justices won't and shouldn't re-examine the school prayer cases? As you wrote, note in your history, Horace Mann, in championing non-sectarian religious education, was accused of co-opting public schools for teaching his own brand of Christianity. Why are those decisions in the 1960s that ban school prayer consistent with that history? And then after you give a sense of that, maybe respond to Steven's claim that there is an evolving tradition of not funding religious schools?

[00:14:14.0] Michael McConnell: So why am I confident that the Originalist Justices will not revisit the school prayer decisions? Part of it, it's just there's no evidence that they have any interest in that. There have been no concurrences. There have been no... The originalist justices in lower courts have not been doing this. So it's basically an observation. But I think originalism doesn't press very easily into this because of the absence of public schools. I mean, if we really wanna be originalists, maybe we should have only private education and with government financial support 'cause that's the way it worked at the beginning. I don't think they're gonna go there. But we don't have powerful originalist evidence against. And that forces us to a somewhat higher level of generality to the principle that the government cannot use its authority, including such things as taxing everyone and requiring people to attend. It cannot use its authority to promote any one religion or religion in general. That this is simply that the teaching of religion is a matter between each individual person and their God and not to be intermediated by governmental authority. And public schools are the closest thing we have to establish churches these days.

[00:15:52.9] Michael McConnell: Those are the institutions in which the government imparts values to the next generation. And if you believe that establishments of religion were forbidden and you believe that that applies to the states and those are of course issues on which some

people are going to disagree. But if you believe in that, it seems not a big step to say, well, when the government is taxing everyone and requiring people to go, that it can't deliver this education with a dollop of religious inculcation. And then there's one other reason which is that that 19th century history to which Steve Green refers was so heavily infected with anti-Catholic bias that it is not an aspect of our history that I think we should be looking to. The late 19th century was a time of virulent anti-Catholicism. The principal reason why states decided not to support, not to provide assistance to private education was precisely because Catholics were the predominant, almost the overwhelmingly predominant religious private education. And they didn't want that. They made this extremely clear with the Blaine amendment and otherwise. And I don't think we're going to look to that history as a guide for the future when that history is of that nature.

[00:17:51.0] Jeffrey Rosen: Thank you for that. Steven, in your brief you discussed the Blaine amendment, and you say that the Oklahoma Constitution's no funding provision are not the products of anti-Catholic bigotry. This came up in the oral argument as well, with Justice Alito pressing this question. Tell us why you think a different history describes Oklahoma's stricture in this case?

[00:18:12.6] Steven Green: Well, I would disagree a little bit with what Judge McConnell's characterization of this. Without doubt, the Blaine Amendment itself was motivated by political partisanship to use anti-Catholicism as a way of rallying support for Republicans. But the no funding principle clearly predates the Blaine Amendment. It clearly predates actually the great influx of Catholics in the 1840s, 1850s. And so it stands on its own legs. And many of the no funding provisions that followed the Blaine Amendment, which was 1876, just so we have that as a marker in some of the states borrowed from some of the pre-existing no funding provisions in the states that predated the Blaine amendment. And so you can't just paint with a broad brush and say all of these no funding provisions are directly tied to the anti-Catholicism that may have been evident during the Blaine Amendment. This was actually in relation to Oklahoma, Oklahoma becoming a state so late writing its constitution in 1906, I think what it was. We worked... I did a big outline and did some of the writing and then we kind of handed off the brief to the Yale Appellate Litigation Clinic and they did some really nice research.

[00:19:41.0] Steven Green: And I was a little taken that I had not really considered this before, looked at this before, and they saw that actually the origins of the no funding provision in the Oklahoma Constitution really arose out of the really as Judge McConnell was just talking about, the bad history. Well, this is another bad history. They were reacting to this bad history of forced conversion that had taken place in the religiously run mission schools for Native Americans. They were not responding to kind of the Blaine amendment type anti-Catholicism. And in fact, one of the other authors of the constitutional provision also said we're looking at the Pennsylvania Constitution of 1776 as our guide for the no funding principle. And so I think it's a little... We need to be careful about how we go characterizing these no funding provisions.

[00:20:36.8] Jeffrey Rosen: Well, let's turn to the question you both identified as central in the case, which is are charter schools public schools or not? Michael, tell us why you and supporters of Oklahoma here argue that charter schools are not public schools?

[00:20:53.9] Michael McConnell: Well, I don't argue that. Under state law they are public

schools. The argument that the supporters of the program make, is that there is sufficient neutrality in the overall structure of this program that they are effectively private. Even though under state law they are public schools. And the reasons for that is that essentially anyone, any, both individuals and entities, groups, are entitled to propose a charter school. And if they meet certain criteria, they can start one and they can run one, and that the curriculum is determined then by those private parties. So I think the argument is that for purposes of federal constitutional law, this entity is effectively a private entity, even though under state law it's classed as public. We've never seen...

[00:22:11.6] Michael McConnell: There's been no case before about that. We don't really know which way the Court is going to jump, but it's by no means clear to me that they're going to uphold this. The Oklahoma Supreme Court did strike it down. And we have the unusual circumstance here that one of the Justices, and who one guesses, might be particularly supportive of this charter school recused herself. And so there are only eight justices. And all it requires in order to affirm the decision of the Oklahoma Supreme Court by equally divided vote is one justice on the conservative side. And the Chief justice did not, he kept his cards close to the vest. During the argument, he asked both sides difficult questions. There's no indication that he's leaning one way or the other. So we're just going to have to see.

[00:23:21.1] Jeffrey Rosen: Thank you so much for that. During the oral argument, Justice Sotomayor said the question is not whether a school is a government agency, but whether it's a state actor. And she suggested that the test should be who created the institution and does it become a component of the state. Steve, tell us about her test and yours. Why is it that you think that charter schools are effectively acting as public schools?

[00:23:54.3] Steven Green: Let me preface that with just kind of an explanation of where we are prior to this case, that again, we've had publicly funded public education, we've had privately funded private education. But what the Court has done gradually over the years has allowed for increased funding of different aspects of private education. Normally it was health, welfare type issues. And then in 2002, the court actually upheld tuition vouchers, which I think are a bad thing, but generally speaking, that's water under the bridge. But at least we had two separate components or two separate entities. We had the public and we had the private. And it's clear that a private religious school is not a government actor. The difference here is, as with the expansion of public school choice within the public school context, that those... That kind of fine, not fine line, that firewall, if you wanna put it, between the difference between public education and private education has somewhat blurred. The difference here, and why this is not a voucher type situation is that the charter school system is created by the state. It is closely regulated by the state, meaning they have to... Charter schools have to accept all students.

[00:25:15.5] Steven Green: They can't charge tuition. They cannot discriminate. They're required to take the general advancement test, the same kind of test there are in public schools. Consequently, this really is closer to the public side of this. One thing I found that actually was a little bit troubling in the arguments is that I did not really hear very much of any deference to the Oklahoma Supreme Court by the conservatives on the court, any deference to the Oklahoma Supreme Court's interpretation of their own state law. But this is, in fact, a public institution. And so this is different from Catholic Charities applying for a grant from the city of Philadelphia

to do some social services, because Catholic Charities is separately incorporated, separately created, and runs on its own, whereas here we just have a group coming together. This just so happens to be the archdiocese who says, we want to be part of your public education system. But oh, by the way, we still wanna be Catholic, we still wanna be religious. And so that's the dilemma the Court is facing now. Is this kind of a... Is this a natural extension of kind of the way we think about vouchers, or is this really a significant shift in the way we think now about public education?

[00:26:45.2] Jeffrey Rosen: Michael, how did you see Chief Justice Roberts grappling with that question? He noted that the state's involvement in charter school education is much more extensive than regulating a mat in a playground, which the Court had previously said could get public funding if it was part of a religious school. And also he grappled with the distinction that the school with the rubber mat and the adoption agency in the *Fulton* case weren't created by the state, whereas here the charter school system was created by the state. Talk about how he grappled with those questions.

[00:27:21.9] Michael McConnell: Well, he asked very penetrating questions of both sides. I don't think he necessarily got great answers from other sides. I suspect he went away feeling not particularly enlightened by the argument. Who creates it? I don't think that's actually the best question here, because it's a... The state creates the framework, and then the private entity creates the actual school. And I'm not sure how different that is from a number of other things. One thing that Professor Green mentioned I do think is very important is whether the charter schools are permitted to favor their own Students of their own faith. And the state law seems to say no, religious schools can. And I think that's a very important difference that points toward the decision of the Oklahoma Supreme Court. I suspect, and I think there was a lot of emphasis upon this in some of the briefing, that if the answer is that this charter school can be religious, there are gonna be a number of second order questions that they're going to have to face, like does it violate the free exercise clause to prevent the school from favoring its own?

[00:28:53.6] Michael McConnell: I mean, there are very good reasons, especially for smaller religious minorities, why they would not want their schools to be open to everyone. For example, there're Jewish day schools that are very high quality and if they didn't limit their student bodies to Jewish students, they'd be overwhelmed. It'd be almost impossible to have a Jewish school if it were sort of swamped by everybody joining, you know, and how many... And I think one thing that the chief was pointing to was the much more extensive regulation and involvement of the state and charter schools than they have in private schools. Now, private schools are not free from government involvement. There are accreditation standards and so forth, but charter schools, much more so. And the more government involvement there is going to be, then the more potential there is down the road for second order issues to lead to complications. What's the science curriculum going to look like? What is... And so forth. And I think that's what was on John Roberts mind as he was asking these questions.

[00:30:17.2] Jeffrey Rosen: Steve, talk about the consequences of a ruling that states are required to create and fund religious schools. Respondents say there'd be profound consequences, in some states a ruling for petitioners could pose an existential threat to all charter schools because many state constitutions require a single statewide public school system and

prohibit the use of public funds outside that system. And a ruling against Wisconsin would call all that into question. Tell us about the consequences.

[00:30:47.9] Steven Green: Well, it's easy to sound alarmist and I think there are some significant implications. The Chief Justice three years ago, two and a half years ago, in the last church state case, the court was considering about funding some kind of private education, religious education. He said, of course, the state can decide only to fund public schools, can only offer, if it wants to only offer secular education. But increasingly public schools are doing contracting out services to private entities here and there. Even though I think the core of public education will remain secular, the more that states feel they're obligated to provide choice options for parents, that it really will open the door for who knows what type of other applications. I mean, I can't remember if it was Justice Sotomayor or Justice Kagan.

[00:31:49.2] Steven Green: They both may have asked the question about can a new charter school now refuse to teach evolution and decide it wants to teach creationism? Or can they teach traditional family gender roles? Can they possibly ban certain types of curriculum literature they might find disagreeable? And all of these will tend to kind of match the religious sensibilities potentially of the sponsoring entity for these new charter schools without them necessarily having to be overtly religious or indoctrinated at the same time. We'll end up having charter schools with extremely watered down curriculum that again will not be offensive to the religious beliefs of the sponsors of that charter school and for all intents and purposes will look like a private religious school, but for the religious indoctrination that may go on within the school itself. And I think that's a distinct possibility.

[00:32:52.5] Jeffrey Rosen: Michael, are you concerned about any of the consequences? And how do you think the religion clauses of the First Amendment would resolve questions including our teachers entitled to the ministerial exception? Or what happens when a religious school disciplines a student for failing to participate in required worship? Talk us through some of those possible issues in the future.

[00:33:16.9] Michael McConnell: I do think that the simplest way for the Court to address this is to draw a fairly straight formalistic public private distinction that would eliminate most of these questions going forward. Whether that is theoretically the best answer, who knows? The alarmists have been shouting from the rooftops about problems all along. They didn't even want rubberized playground equipment to be on a neutral basis. And the problems have never turned out to be as severe as the alarmists say. So who knows about this. But it would not surprise me if someone who does not want the courts to become micromanagers of the education systems might just say, let's not get into this, let's just leave it as it is. And the fact this is the only one of these schools, I think may be influential as well, that cutting off private schools from equal funding had enormous implications for institutions already on the ground.

[00:34:49.8] Michael McConnell: This would be nipping it in the bud. And because there are not a lot of them already, you know, it's not going to... The consequences would not be that severe. I also, I mean, if we're just... If we're partly in the predicting the Supreme Court mode as opposed to telling them what the best answer is, you know, I ask myself the question, why did the court grant certiorari in this case? And I think it is at least possible that they granted cert and

they must have known at this point that it was gonna be a 4-4 or an 8 justice court. But it wouldn't surprise me if the court took this case in order to show that the religious side doesn't win in every case, that this will be an example of where the court goes the other way. Because if you look over the last, I don't know, 20 years or so, the religious side has won in almost every case. And I think that's because they were on the right side of most of these cases. Most of this was reversal of mistaken decisions from the past. But I think the court may be worried about the optics and look at this as an opportunity to score one the other way.

[00:36:21.4] Jeffrey Rosen: Steven, your final thoughts on *Drummond*. How do you think the court will go? Might it rule against religion in this case as an example, as Michael suggested? And if it does rule in favor of the schools, how big a deal would it be and how much would it threaten the no funding principle?

[00:36:44.3] Steven Green: Yeah, this is a close case. I mean, the chief initially was asking some difficult questions of the petitioners and distinguishing or trying to see if there's a distinction between this situation and then the previous voucher type situations. But then later he turned around and talked about that this was just discrimination against religion to prohibit this religious applicant from being able to get to charter school when you allow non-religious applicants to do this. Part of the problem with this, I teach education law as well as constitutional law and always do a segment on charter schools and I give the students various examples of various state charter school provisions and they're to a certain extent, very well, all over the map in a sense. Some are very restrictive, some are very permissive. You have just a variety of systems. You can have a for profit charter school in some states, Arizona, I believe. You can just have a group of people get together and they can create a charter school without any kind of experience. And there's no prohibition against that group of people all being members of the same church and creating a charter school. So I think the implications there are for a reversal will create some confusion and some mischief that will be there.

[00:38:05.2] Steven Green: I appreciate Judge McConnell's suggestion that maybe the court took this to kind of just draw a line and say this is as far as we're gonna go at this point and possibly not any further. I hope that is what the outcome will be here because there may be some unintended consequences too. Because if the court does open the door to this type of religious charter school funding, you may see some states cutting back in the availability of that option for the future because of trying to avoid is potentially, I think, severe entanglement that may take place because Judge McConnell is completely correct. If you open the door to religious charter schools, then the next round of questions is gonna be how far then do the free exercise principles come to the surface about ministerial exceptions like you suggested, or whatever. And those are gonna be very, I think, troubling questions for the courts to have to address. And maybe Judge McConnell is correct. Maybe the court wants to kind of draw the line here so it can avoid those more troubling questions.

[00:39:14.5] Jeffrey Rosen: Well, let us take a beat on the two other big religion cases that the court just heard. Let's talk first about *Catholic Charities Bureau versus Wisconsin Labor and Industry Review Commission*. Wisconsin excluded the Catholic Charities from a religious tax exemption, and challengers argue that that is unconstitutional due to a violation of church autonomy, entanglement of church and state, and religious discrimination. Michael, tell us about

those arguments and whether or not you think they should succeed?

[00:39:49.0] Michael McConnell: I think this is a really easy case. It just seems to me the reasoning of the Wisconsin Supreme Court here is, to my mind, just completely off base. The law exempts these religious institutions operated for religious purposes. And the Wisconsin Supreme Court disqualified of all things Catholic Charities, which is the charitable arm of the Catholic Church. It's owned and operated and run by the bishops. It's part of the church. And saying that that is not a run for religious purposes just kind of staggers the imagination over their reasons. Catholic Charities serves people without regard to religion as if that were not the practice. And the court said, by the way, that these are not the way religious organizations usually operate. Well, religious organizations doing charitable work have been serving people other than members of their own denominations for centuries. This is a really strange understanding of the, understanding of charitable endeavor. And they don't include worship or religious training. Well, you know, there's a divided, you know, some do, some don't. Salvation Army, I gather, would require attendance at religious services. I don't know if they still do this, but when they're providing meals and shelter.

[00:41:39.1] Michael McConnell: But lots of religious organizations have never done this. There's a raging debate and has been for decades on the ethics of mixing the provision of services with mandatory participation in religious practices. Religious groups are on both sides of that line. And to say that you become not religious when you're on one side of it seems extremely strange. And what the Wisconsin Supreme Court's decision does is it doesn't just discriminate between religion and non-religion. It actually discriminates between religions. So that some religions are going to get the exemption and some aren't, depending upon whether the Wisconsin Supreme Court thinks that what they do is typical of other religions. Well, that's just not the business of the courts to be doing to decide what's typical of religions and everybody. If you don't conform to that, you don't get the exemption. I wouldn't be surprised if this case is unanimous.

[00:42:51.4] Jeffrey Rosen: Many thanks for that. Steven, your thoughts on the case at the oral argument, the Justices did appear sympathetic to the Catholic Charities argument that Wisconsin was engaging in religious discrimination. Justice Kagan said, "I thought it was pretty fundamental. We don't treat some religions better than other religions." At the same time, they were less sympathetic to the church autonomy argument. How did you see the court responding and how do you think they should respond?

[00:43:17.8] Steven Green: I think the church autonomy argument is somewhat of a red herring. It's really not going in and affecting the internal operations of the Catholic Archdiocese or Catholic Diocese or Catholic Charities. I do, however, agree with Judge McConnell. The justices almost overwhelmingly, I think Justice Jackson seemed to be not quite as much, but overwhelmingly or siding with Catholic Charities. I'm not an expert in unemployment compensation law, let's put it this way. But from what I understand, the Wisconsin statute, though, tracks the federal statute and tracks most other state statutes. And at some point you have to draw lines. You have to draw lines about who is going to be covered and who is going to be exempt from this. And we're clearly going to exempt maybe ministers, members of clerical orders, et cetera. But how far down the line do you go with your employees? And the distinction

that Wisconsin statute made in the Wisconsin Supreme Court, adhered to in some ways is a compromise way of trying to deal with drawing these lines. And it is that a religious motive for your services is just not enough. People can be motivated for their actions from a religious perspective.

[00:44:33.9] Steven Green: But are you engaged in religious activity? And you can pay attention that the title is Catholic Charities, but actually this lawsuit deals with four subsidiaries of Catholic Charities, all of whom are engaged in solely non-religious activity. The social service has had no religious component to it at all. And so consequently, Wisconsin, like a lot of states, kind of drew the line. If it looks like a duck and it walks like a duck and it quacks like a duck, then it's probably not religious activity. And so the specter of discrimination certainly looms large in this case. But I don't think the distinction is as dangerous as it's been made out to be. And there are a lot of other federal statutes, Title VII and other ones try to make similar type distinctions sometimes about religious motivation versus religious activity.

[00:45:31.1] Michael McConnell: Jeff, could I just jump in and just say something for the church autonomy argument in the case?

[00:45:37.5] Jeffrey Rosen: Sure.

[00:45:37.5] Michael McConnell: I agree it's a little bit more difficult than non-discrimination, but unemployment, this is not just a tax. The unemployment compensation system is not just a tax. When they decide whether somebody is entitled to... A discharged employee, for example, is entitled to be covered, the question is whether they were discharged for good cause. And if a religious organization discharges an employee because why? Because they've been acting contrary to the faith because of, I mean, there could be any number of highly disputable religious decisions very similar here to the reasons behind the ministerial exemption. So I don't necessarily predict that the court is going to go down this more difficult route because they don't have to. But if they did have to, I think there's actually a pretty good church autonomy argument in the specific context of unemployment compensation taxes.

[00:46:44.8] Jeffrey Rosen: Thank you for that. Well, Steve, maybe I'll ask you to set up *Mahmoud v. Taylor*, which involves the question of whether public schools burden parents religious exercise when they force elementary school kids to participate in instruction on gender and sexuality against their parents religious convictions. Here the Justices seemed to embrace the petitioner's argument that the refusal to provide an opt out from reading LGBTQ themed books violated religious liberty, although they disagreed about whether or not unlawful coercion was involved or whether it was a mere exposure to unwanted ideas. How would you frame the case?

[00:47:27.0] Steven Green: Well, Jeff, I think you've actually framed it well. The question becomes, is mere exposure enough to create some type of free exercise violation? Part of the issue involved here is just the difficulty of possibly providing multiple opt outs to parents and notifying them when any type of material may have a potential offensiveness to the children and also the extent to which the materials just may be available or may be used. I can remember when my daughter was in middle school that she had an English teacher who had some LGBTQ books available for the students to read if they wanted to read them. And so she let the students

know those were available, but they were optional readings. So is the mere announcement that this is available for your children to partake in this, is that gonna necessarily raise the threshold of now we need to provide notice to the parents in advance some type of opt out.

[00:48:34.7] Steven Green: And so I think the concern here is the disruptive nature of this. I would probably anticipate Judge McConnell, and I'll probably agree with him, is I think discrete opt outs, when you can show there is a clear conflict with someone's religious understanding, religious beliefs, when it's able to take place, yes, I think that's a good thing. But the petitioners, the plaintiffs in this case are really asking more for a widespread type of opt out privilege to them. And the court has generally said that if you're gonna have a free exercise burden, you need to show some kind of either discrimination or coercive nature involved. And we don't know how the teachers are using a lot of these materials, and so far as we know, they certainly are not proselytizing an LGBTQ perspective in doing these. So even though I have some sympathy for the petitioners, I think for the general operation of public schools, that they're probably just asking for a little bit too much.

[00:49:40.7] Jeffrey Rosen: Michael, last word on this case. How did you see the Justices responding and how do you think it'll come out?

[00:49:46.5] Michael McConnell: Well, I don't think this is a mere exposure case. It's quite clear in the record that these materials are being taught to all the students and they're being taught in a way deliberately to cause them to question the beliefs that they were taught at home. It's really pretty shocking what has been happening. But the Supreme Court doesn't have to get into the details of the remedy because this lawsuit was thrown out not on the basis of what they were asking for, but on whether their religious beliefs were burdened in the first place. And I think it's pretty clear that they were. When the state deliberately is teaching things to your early elementary school kids in order to undermine what's being taught at home, that's an abuse of power, and I think the court will see it that way. What the proper remedy is, I'm not sure.

[00:50:54.4] Michael McConnell: Now, we know that there are opt outs all over the country, and there were opt outs in Maryland too, and that they've been, so far as I know, and I don't know the record was not developed on this point. But there's no reason to think that these fairly broad opt outs that have been available, including in Maryland, including to these parents, until the LGBTQ plus advocates got the state to eliminate the opt outs, they seem to work pretty well. And so my hope would be that the court recognizes that there is a constitutional right and that the political system will simply realize that the easiest thing here is to provide broad opt outs, which have worked just fine at other times and in other places, parents are not quick to demand that their children exercise the opt-out elsewhere. At least the record so far as I know, does not support that. It just seems as though this was a case where there used to be a tolerant, inclusive policy and they eliminated it for specific ideological reasons. And let's just go back to the prior policy.

[00:52:27.1] Jeffrey Rosen: Steven Green, how would you characterize the debate on the Supreme Court about the history of the Free Exercise and Establishment Clause, and what light will these three cases cast on that debate?

[00:52:41.0] Steven Green: Well, I'm not the only person who's been making this point over the last several years, but we are seeing the Court certainly provide more weight behind the Free Exercise side of the religion clauses and at the same time minimizing what constitutes an Establishment Clause violation. And I really don't see the Court changing track in that anytime soon. And as someone who thinks that both a healthy Free Exercise and a healthy Establishment together work in tandem to ensuring religious freedom writ large, which involves more than just free exercise of religion, you know, Justice O'Connor's closing statement, I think in her last opinion before she stepped out, she said, you know, why would we trade a system that has worked so well and is the envy of other countries for something that may not be to our best advantage?

[00:53:47.6] Jeffrey Rosen: Thank you so much for that. And Michael, final thoughts on these three cases and their significance in the Court's broader religion debates?

[00:53:54.8] Michael McConnell: Well, I would just say, so the Establishment Clause, which I value very much. But what it's about is the government using its control over taxation and public institutions in order to press upon the American people, the government's favored view. It would be ironic to an extreme if the Court said that somehow that supported Maryland's effort to use its power over public education to press upon the children of Maryland a particular view on this religiously important subject. I'm all for the Establishment Clause. I think this could be resolved as an Establishment Clause case, and it is an establishment of a particular view with respect to these religiously significant things. People should no more have their children taught a particular view about sexual morality from a secular point of view than from a religious point of view. That's not the purpose of the public schools.

[00:55:07.8] Jeffrey Rosen: Thank you so much, Michael McConnell and Steven Green, for a deep, rich and historically informed discussion. Dear, We the People friends, please read Michael and Steven's important books on this subject, and I'm so grateful to both of them for inspiring us to learn about the history of the First Amendment. Michael, Steven, thank you so much for joining.

[00:55:30.1] Steven Green: My pleasure.

[00:55:31.0] Michael McConnell: Thank you, Jeff.

[00:55:36.2] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Gyuha Lee, Samson Mostashari, and Cooper Smith. Please recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Check out the Constitution 101 class at constitutioncenter.org/khan101 sign up for the newsletter at constitutioncenter.org/connect and remember every moment of your waking and sleeping, days and nights that the National Constitution Center is a private nonprofit. This podcast and all of our work is made possible only thanks to the generosity of lifelong learners from across the country who are inspired by our nonpartisan mission of constitutional education and debate. Please consider supporting our efforts by donating today at constitutioncenter.org/donate on behalf of the National Constitution Center, I'm Jeffrey Rosen.