



The History of Religious Liberty in America

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[00:00:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the senior director of Town Hall programs. In this episode, we explore the historical evolution of religious liberty in America, including the perspectives of the nation's founders on this topic and what it means today.

[00:00:28] Tanaya Tauber: Religious liberty experts, Marci Hamilton and Michael McConnell joined NCC President and CEO Jeffrey Rosen for a special Constitution Day discussion and to celebrate the opening of the center's new First Amendment Gallery. This program was streamed live on September 18th, 2023. Here's Jeff to get the conversation started.

[00:00:51] Jeffrey Rosen: Ladies and gentlemen, welcome to the National Constitution Center and Happy Constitution Day! It has been such an inspiring day here at the NCC. We began in the morning with a reading of the preamble of the Constitution for middle school kids across America. We had a ceremony for new citizens here on this stage. And there's nothing more moving than to see new citizens be sworn in. We had a panel with judges talking about judging and the First Amendment. We had an amazing concert with Simon Tam, whose Supreme Court case, *The Slants*, established a crucial precedent. And he sang songs about the 18th and 21st Amendments.

[00:01:36] Jeffrey Rosen: And then we had scholar conversations about founders like James Wilson, and Gouverneur Morris, and Madison, and Hamilton. And finally, we had Mary Beth Tinker talk about the black armband that she's lent the Constitution Center and is at the centerpiece of the new First Amendment Gallery that we're here to celebrate tonight. We're going to focus on the first words of the First Amendment having to do with religious liberty.

[00:02:04] Jeffrey Rosen: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. And the First Amendment Gallery talks about the inspiring principles at the heart of that amendment. And to learn about it tonight, we have two of America's greatest scholars on religious liberty, both of whom advised the First Amendment Gallery. Both have crucially important books on the Free Exercise Clause and the Establishment Clause, and it's just such an honor and a thrill to share their light with you tonight.

[00:02:36] Jeffrey Rosen: Before we jump in, I want to give special thanks to the people who made the religious liberty gallery possible. In particular, the Lilly Endowment, they had a vision that it was important that there be a religious liberty component to the First Amendment Gallery. And through their great generosity, made it possible, along with Mike George and Bill Slaughter and the contributorship. So it's just so meaningful to thank all of them.

[00:03:06] Jeffrey Rosen: I'm going to just introduce each of our phenomenal panelists by their latest books, because I hope you'll be inspired to read those books after hearing our discussion tonight, and then we'll just jump right in. Michael McConnell is Richard and Francis Mallory professor and director of the Constitutional Law Center at Stanford. And his most recent book is *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*.

[00:03:34] Jeffrey Rosen: And Marci Hamilton is professor of practice in the Department of Political Science and Fox Family Pavilion, non-resident senior fellow in the program for research on religion at the University of Pennsylvania. And her recent book is *God Versus the Gavel: The Perils of Extreme Religious Liberty*. It's such an honor to welcome both of you. And Michael, your book is such a clear and clarifying distillation of the core principles of the Establishment Clause and the Free Exercise Clause as you see them. Let me begin by asking the obvious question. How would you describe the core principles of the Establishment Clause and the Free Exercise Clause and the relation between them?

[00:04:18] Michael McConnell: So, the First Amendment begins with these two clauses, but they're actually yoked together in a single grammatical unit. So it says, "Congress should make no law respecting an establishment of religion or prohibiting the free exercise thereof." So that doesn't even say the two. The religion is only stated once. It's the only provision of the Constitution that's

grammatically this way where it has two different verbs, or technically gerunds, but the same object.

[00:04:55] Michael McConnell: And I think that suggests that the two are, very closely, they march together. They are not, as the Supreme Court so often has said, in tension with each other. But that doesn't mean they're the same. I think that the Free Exercise Clause focuses on the ability of individuals and institutions, churches, synagogues, et cetera, religious communities to be able to practice their religion. So it's an individually-focused right, sort of easily understood as a liberty similar to, I don't mean in content, but in... it's like an individual liberty, like freedom of speech.

[00:05:43] Michael McConnell: The Establishment Clause is, I think, more of a jurisdictional limitation on the power of the national government to be able to do what? To establish or have a law respecting an establishment of religion. And establishment is a more complicated combination of legal arrangements. They knew what they were talking about at the time because they had the Church of England. Some of them liked it, some of them didn't like it, but they were all agreed that they didn't want to have the equivalent of that at the national level.

[00:06:27] Michael McConnell: There was disagreement at the time of the founding about establishments of religion at the state level, and in fact about half of the states as of the adoption of the First Amendment, had some form of an establishment of religion. But... So you think about the Church of England, you know, what was it? First of all, it was a government-controlled church. The Parliament had had established its articles of faith. The king would nominate...or would appoint the archbishop of Canterbury. It was so the doctrines and liturgy of the church were actually adopted by law, and then there was legal compulsion to attend and contribute.

[00:07:16] Michael McConnell: So government control combined with coercion, and I should also say combined also with penalties for practicing religion outside of the Church of England. So the leading statute of establishing the Church of England is called... I think it's very revealing, it's called the Uniformity Act. So, the idea was uniformity. They wanted to bring about unity on this important question of religion, but they do it around the Church of England. So, until 1689, it was actually not permitted to have public worship services outside of the Church of England.

[00:08:08] Michael McConnell: It didn't become legal to have public worship services for some faiths, Catholicism and Judaism in particular, Unitarianism, until various states in the 19th century. So that's what establishment meant, and we wouldn't have any laws of that sort at the national level. So the Free Exercise Clause, again, focused on the ability of people to believe and practice the religion that they're convinced of. Establishment Clause keeps the government out of controlling or compelling or favoring one church over another.

[00:08:54] Jeffrey Rosen: Great. Thank you very much for that helpful history and that clear summation at the end. Marci, I want to ask how you see the core meaning of the Establishment Clause and the Free Exercise Clause and the relation between them and whether there's anything in what Michael just said you disagree with?

[00:09:14] Marci Hamilton: So, the United States right now, of course, is at one of its most divisive periods in history. And one of the great disagreements is over the role of the separation of church and state. I don't think you're going to find two people who disagree more on these issues than Michael and I. So I think we can agree that the Free Exercise Clause is intended to protect the religious exercise, speech, conduct of believers. But the caveat, which was reflected in the original constitutions of the states, is that that right to believe must stop short of harming other people.

[00:09:59] Marci Hamilton: That there is no absolute right to act, despite its being motivated by religion, and that the public good actually must come into consideration, whether or not there will be an exercise of religion that is legal. With respect to the Establishment Clause, and I think this is where we have the greatest difference, the two ends of the spectrum right now are this. One is what Professor McConnell is describing, which is that the Establishment Clause is essentially a servant of the free exercise of religion. It is made to be a tool that aids religion and religious believers, but it is not supposed to be limited by any concept.

[00:10:51] Marci Hamilton: My view, and it has been my view for a very long time, is that the separation of church and state, the phrase that was coined by Baptists because they were being killed in Massachusetts and they were being forced to support a church they didn't believe in through the tax system, the way to understand the separation of church and state is as a separation of power. And the reasoning, the understanding, the history that our framers and founders

experienced, was the cruelty of religion holding governing power. And it was not limited to England by any means.

[00:11:33] Marci Hamilton: James Madison wrote quite concisely about the Inquisition and the fears of an Inquisition being able to appear in the United States if one religious faction was capable of taking over. So when you look at the Establishment Clause as a separation of powers in the way that you would look at the separation of powers between the branches, the separation of power between the federal government and the state governments, you now have to be quite frank. Religion historically has the capacity to hold power and to seek greater and greater power.

[00:12:13] Marci Hamilton: And so what the Establishment Clause is supposed to do is it is supposed to put boundaries on the power-seeking instincts of religious organizations and believers. So that it's not a servant to religion, it's actually a limitation on both the government and on religion. And in my view, that is supported by the history and was certainly was supported at the Supreme Court until relatively recently. The conservative Supreme Court has now rolled back most of the limitations that would have protected us from overreaching religion.

[00:12:52] Marci Hamilton: So that we have come to a point in history where religious entities now have a direct line for school funding for their sectarian schools from the government. Where they demand mandated exemptions so they do not have to obey the laws that anybody else does. For example, Title VII, the right, because you're religious, not to hire and not to keep LGBTQ employees. So we're at a dangerous tipping point in my view, and it has to do with power first and foremost and not just about enlarging the size and the amount of religious liberty.

[00:13:34] Jeffrey Rosen: Superb. Thank you so much for that clear expression of your view of the Establishment and Free Exercise Clause and for so well articulating your differences with Professor McConnell, both about the scope of free exercise exemptions, which you said should cease when they cause harm to others, and about the nature of the Establishment Clause, which you said constrains religion as well as government and is centrally concerned with the accumulation of power.

[00:14:04] Jeffrey Rosen: I think it would be helpful to talk about specific cases to help eliminate the agreement and disagreement among you. And as you said, Professor Hamilton, one of the biggest is the most controversial question at the

court today, which is religious exemptions from generally applicable laws. And our friends have read the newspapers about these cases. Most recently, there was the web designer who the Supreme Court said did not have to make her wedding services available to gay and lesbian couples because she disagreed with gay marriage.

[00:14:37] Jeffrey Rosen: And there's the baker who didn't bake the cake. And there is the nuns who didn't want to have to provide mandatory contraception coverage and cases involving COVID mandates and vaccines, and it's just a constitutional feast for students of the Constitution and very hotly contested in the country. So Michael, for this big question, maybe set out your view of what the religion clauses say about religious exemptions and whether or not you think the court is correct in the most recent cases. And we might as well begin with the web designer case because the court just decided it.

[00:15:20] Michael McConnell: So what the Free Exercise Clause says is that the government - we now treat "Congress" as meaning applying the limitation to a state and local government as well - cannot prohibit the free exercise of religion. When you look at this against its historical backdrop of natural rights law, this is not an absolute right, never has been understood as an absolute right. You, you can't... if you have a religious conviction that you ought to murder your law professor, you can't do that. The way in which the founders would have articulated this is that this right does not extend to the disturbance of public peace and order or the private rights of others.

[00:16:18] Michael McConnell: This does not, however, set up some sort of an all-purpose harm principle where anytime, an exercise of free exercise right has any harm to someone else. Every constitutional right, when exercised in particular ways, in particular contexts, can do injury to somebody else. When a criminal defendant invokes their Fourth Amendment rights, it means that the victim of that crime is very likely not going to get justice. Freedom of speech can certainly, harm people.

[00:17:05] Michael McConnell: The, very first, and actually the only, specific exemption on basis of religion that was debated in the first Congress had to do with military draft exemptions. Well, when one person is drafted and one person is not required to be drafted, that harms anyone else. It increases their odds of having to be called up. But no one has ever thought that that meant that right did not exist. The Supreme Court has rejected this, the sweeping harm principle, over and over.

[00:17:45] Michael McConnell: Just this year there was a case involving an employer who did not give a worker, insisted that worker work on their day of Sabbath. And the Supreme Court unanimously, you know, nine-justices held the civil rights laws protect the worker from being required to work on their Sabbath. But is there somebody on the other side? Of course, there is. Just as there's somebody on the other side with every case involving an assertion of rights. You asked me if it's particularly the web designer or baker case.

[00:18:32] Michael McConnell: So, the web designer case is actually not a religion case at all. It is completely irrelevant to her constitutional claim that her belief happened to be rooted in religion. Now, she cares because that's... we all care why we have a belief. What was significant is that she was providing services that were stipulated by both sides to be expressive in nature. She was in effect, she was being paid to express an idea. It's also stipulated that when she does a web design, she's expressing not only her client's view, but her view as well, and it was stipulated that people would understand that.

[00:19:20] Michael McConnell: So, the holding of that case, which I think... was a hundred percent correct, is that the government cannot require, cannot use the coercive power of the state to force people to express themselves, to speak in a way which is contrary to their conscience. And when you think about other applications of the principle that the state of Colorado was pushing, I don't think anybody would... Can the state force a political consultant to provide, to advise, to write speeches for somebody that they disagree with?

[00:20:04] Michael McConnell: The Rockettes refused to dance for the Donald Trump inaugural. In this country, we are constantly refusing to do business with people when it would amount... when our business would amount to our endorsing a view that we disagree with. And the only reason those cases were controversial is because people care so intensely about the same-sex marriage issue, right? That's it. But our freedom of speech rights don't go away just because people feel intensely that we're wrong.

[00:20:46] Michael McConnell: There have been other periods of our history. It would have been something else. It would have been opposition to the war or maybe refusal to salute the flag or maybe it's blasphemy. At different points in our history, people care intensely about certain things. It so happens that the state of Colorado is very interested and very committed to same-sex marriage. But freedom of speech applies across the board.

[00:21:20] Jeffrey Rosen: Thanks so much for that. Marci Hamilton, so eager for your response. And, and among other things, Professor McConnell said that for him, the Free Exercise Clause forbids only serious harms that are tantamount to violence or serious incursion on the rights of others and otherwise exemptions are permissible. And he stressed coercion as something that the government can't do. But short of that, exemptions may indeed be appropriate. What is your view of the religious exemptions?

[00:22:04] Marci Hamilton: So, I'll start with that and then move to 303 Creative. So it's not just my view, it's the history of the Supreme Court has taken the view that those who break the law do not have an automatic right to break the law just because they're religious. You don't have a right to be polygamist just because you're religious. You don't have a right to run a stop sign just because you're on the way to church. The laws apply to you, unless you have a legislative exemption. And our legislatures have been extremely generous with exemptions for an unbelievable amount of conduct in the United States, including faith healing.

[00:22:50] Marci Hamilton: So that in the state of Idaho, we have faith healing groups that, for religious reasons, let their children die with no treatment and have cemeteries where there are more babies than adults. That's the kind of system we have. That's severe harm. That's severe harm. That should be stopped. But the notion that, just because you're religious, you have the right to then get around the law that applies to everyone else. It's not what the Supreme Court endorsed. I actually was clerking at the United States Supreme Court for Justice O'Connor the year that *Employment Division v. Smith* was decided. And I can tell you that not a justice in the court, because I have the notes, believed that religious believers should be able to break the law.

[00:23:43] Marci Hamilton: But let me get over to 303 Creative. So, I published a long essay about this case and the false history it rests on in The Guardian several weeks ago. But let me just summarize the points that I made. The case indeed is about religious speech. In fact, the court gets so giddy about religious speech, it's called pure speech, which trumps everything. And what does it trump? It trumps the public accommodations laws. So, you have someone, she's not just speaking, she can stand on the corner in Denver and talk day and night about her beliefs. She wants to make money through having a website for weddings and for anybody except gays.

[00:24:37] Marci Hamilton: So, essentially, the model here is that you have someone who is engaged in a practice that's open to the public that is governed by the public accommodations laws, which ended Jim Crow and ended a marketplace where you need to look at the window to see if you're going to be served. The court, in a huge turnaround from prior cases, says, "This is such valuable pure speech. It goes above and beyond the public accommodations laws." It's such an extraordinary opinion. It gives maybe a page to the value of public accommodations laws that stop discrimination, and spends most of its time extolling the value of having a woman refuse to cater to same-sex couples, even though the vast majority of what you do with a wedding website... and I know because I'm planning my daughter's wedding, ... is plug-and-play, right?

[00:25:42] Marci Hamilton: So, it is not normal in the United States to say that someone should have a religious liberty right not to serve anybody in the marketplace. That is a new introduced idea. It's new for the last 20 years. It's not something the Supreme Court has ever endorsed until recently. And it's the beginning in my view of the end of what the Framers believed. Which is that religious speech is protected, but it's not as highly protected as political speech, and it certainly doesn't overcome the most important laws. And I would put to you that the public accommodations laws are what keep our country together.

[00:26:25] Jeffrey Rosen: Thank you for that. And we're very fortunate to have this crucially important debate mooted by the best possible people on both sides. Professor McConnell, I want you to spell out your argument that your robust version of religious exemptions is rooted in framing our history. You know how interested I am in freedom of conscience.

[00:26:47] Jeffrey Rosen: Our First Amendment exhibit begins with Jefferson's bill for establishing religious freedom, which said that the opinions of human beings being dependent on evidence contemplated by their own minds cannot be surrendered to others and that crucial idea that I can't give you the right to tell me what to think because I can't entirely tell myself what to think. My thoughts are the product of my reason. I can't be coerced by government or the church.

[00:27:12] Jeffrey Rosen: It was so crucial to Jefferson. And Jefferson, as we were just describing in that bill, says that you can only restrict speech, religious or otherwise, if there's a serious injury and an imminent threat. Is that a source of your view that religious exemptions are generally permissible, and religious speech can't be restricted in the absence of serious threats. And in responding to Professor

Hamilton, describe more extensively how you think your view is well-rooted in framing history?

[00:27:46] Michael McConnell: First, let me acknowledge this is a very serious academic disagreement and I would not claim that all the evidence is on one side. I'm a little surprised. I didn't remember that you were there for the very case in which Justice O'Connor was the leading dissenter saying, "Yes, the Free Exercise Clause does provide for exemptions."

[00:28:12] Marci Hamilton: Well...

[00:28:13] Michael McConnell: Now, now it is true that-

[00:28:14] Marci Hamilton: No. No. No, no.

[00:28:15] Michael McConnell: ... when you state it as saying that you get an automatic exemption from all laws, that's never been anybody's position.

[00:28:23] Marci Hamilton: Including hers.

[00:28:24] Michael McConnell: But the position that Justice O'Connor took in a case involving a criminal. This involves the criminal law in the state of Oregon, the drug laws, and whether there is an exemption for members of the Native American church when they are engaged in their sacramental practice of ingesting peyote. And Justice O'Connor said she thinks that the law was important enough to override. But she disagreed with the majority, that there's no claim there. It was, of course, Justices Brennan and Marshall and Blackmun - by the way, not notorious right-wingers - who defended the right to do this.

[00:29:19] Michael McConnell: But what is the original evidence? Some of it is of a philosophical nature. I think that James Madison's work in particular is best read as endorsing this view. But at a legal level, I think the best evidence is to look at the various state constitutional provisions of the 13 states. Of the 11 that had Bills of Rights they all...a Free Exercise Clause or Freedom of Conscience Clause, was in all of them and they varied in their wording, but the most common wording... by the way you can look in the First Amendment Gallery and they're all right there. And the most common wording was to say something like this: "that all persons have the right of free exercise of religion provided that this should not be construed to excuse acts that are contrary to public peace and order."

[00:30:26] Michael McConnell: So why would there be this caveat? You know, it doesn't excuse, you know, the more serious violations of public peace and order, if there wasn't an exemption to begin with. You wouldn't need to carve out an exemption from the exemption. So, it seems pretty clear that what those caveats are doing is that they're stating the limits on the exemption from generally applicable laws. Now in the courts there's very little and there's no federal case for a very long time.

[00:31:06] Michael McConnell: The first time the United States Supreme Court has a free exercise case is in 1879. But there were cases in the state courts and they tended to go both ways. I think, in my opinion, the one that is most thorough, the most persuasive, and I highly recommend it to you, was a New York case where the judge was Dewitt Clinton. And it had to do with whether a Roman Catholic priest would be required to testify in court to information that he had learned in the privacy of the confessional. And the court said, no, that that is a part of the free exercise of religion, and it did not rise to the level of disrupting the peace and safety of the state for a Roman Catholic priest to be able to do that.

[00:32:07] Jeffrey Rosen: Professor Hamilton, it's a strong argument that the state constitutions that Madison drew on when he drafted the Bill of Rights said that religious speech and conduct, the free exercise of religion, was protected unless it threatened the public peace and order, and that should support broad religious exemptions.

[00:32:28] Marci Hamilton: Well, it's true that the Constitution said that. The state constitutions, he didn't. What he said is that we need to be fearful of the way in which religion exercises power, and that, in the United States, the accumulation of religious power could be every bit as severe as the Inquisition. He uses the phrase Inquisition. If you read carefully what Madison has written, he was deeply concerned about factions, about the fact that you're going to have this religious faction and that religious faction and this economic faction. Why was he concerned about that? Because in Europe you translated those disagreements into death, right?

[00:33:16] Marci Hamilton: So when Queen Mary was in charge, of course, Protestants did not thrive. When Queen Elizabeth was in charge, Catholics did not thrive. During the Inquisition, many of the Protestants didn't thrive and the counter-reformation. So my point is this, in the United States we have a real tendency to paint religion as a neutral, benign factor. That somehow it's always

good for you and therefore there's no harm in letting it do whatever someone believes. But I think we're way past thinking like that, right? We can start with 9/11, right? Remember President Bush saying that 9/11 was caused by people who were Muslims, but they weren't true Muslims.

[00:34:09] Marci Hamilton: No, they were extremist religionists. They were there for religious purposes. Look at the Catholic Church and child sex abuse. The Catholic Church continues to this day to argue in the courts that it cannot be held accountable for thousands of victims of child sex abuse it knew about because it has a right to what it calls church autonomy, that it is autonomous from the law. They've actually watered down what some of the attorneys generals have done with respect to these serious crimes, based on arguments by their lawyers about autonomy. They're not obligated to the law.

[00:34:54] Marci Hamilton: So first, the very first thing, which is where Madison started, is that religion has a capacity for great good. It also has capacity for great harm. And therefore, the laws that are duly enacted and apply to everyone should apply to them unless they can persuade the legislative branch that they deserve an exemption. And, as I said, we have hundreds and thousands of them. So the framers did not just... and the founding generation, did not just limit religious actors to not interfering with the public good. They also limited them from engaging in what they called licentiousness.

[00:35:40] Marci Hamilton: Licentiousness was moral harms, it was polygamy, it was sex abuse that was widely thought. And so the idea that we're limited to what the state constitution said for the limitations on religious conduct is just not factual. There was a wide array of harms that were thought to be inappropriate, even if someone is religious.

[00:36:10] Jeffrey Rosen: Michael McConnell, Marci Hamilton just said if you wanted an exemption at the time of the framing, you'd have to persuade a legislature to grant it. And you mentioned that Madison had sought a constitutional exemption for Quakers from serving in the military, but that didn't pass. Were there examples of courts that ordered exemptions from generally applicable laws in the founding era? And what about all this other history of regulating licentiousness and health safety and morals and the polygamy cases, which seem to suggest much less tolerance for individual religious expression than the libertarian view suggests.

[00:36:51] Michael McConnell: So, yes, there were cases. They were all in state court. We didn't have any federal cases until after the civil war. And they went both ways. I've described one of them, the one involving the priest-penitent privilege. There was another one in, in which a member of a group called the Covenanters took literally the Jesus's words, "Judge not lest ye be judged," and they refused to serve on a jury. They were exempted from jury service and the world didn't come to an end, even though I guess there was harm to some other people because they had to call somebody else to the to the jury. Now, Marci is quite right that I think licentious, does appear in... I know it appears in one, maybe two of the, state constitutions. And it isn't-

[00:37:47] Marci Hamilton: At least one.

[00:37:47] Michael McConnell: ... actually my argument that the federal provision is, strictly to that we can argue about what kinds of laws are sufficiently important that they override religious practice. And, I don't even know how much we disagree with that, all of your examples. I think I agree with, and although I... we, could get to-

[00:38:16] Marci Hamilton: Yeah. Yeah.

[00:38:16] Michael McConnell: ... disagreement later about -

[00:38:17] Marci Hamilton: Yeah.

[00:36:18] Michael McConnell: ... about the exaggerations of the claims that are being made.

[00:38:25] Marci Hamilton: Woah, woah, woah.

[00:38:26] Michael McConnell: Catholic Church has never claimed that the autonomy-

[00:38:27] Marci Hamilton: Are you talking about the sex abuse claims?

[00:38:28] Michael McConnell: ... gives them the right to do whatever they want to do. It's a very specific claim addressed to a particular version of the argument. So, we could discuss that, but the fundamental point is that we have a world of civil liberties in which constitutional rights come first. They can be overridden.

You know, peace and safety, maybe even licentiousness, which by the way was also used very frequently in the free speech area as well. The slogan was liberty, not license. And we've tended to rise beyond that, that licentiousness is not a term that we now find very compatible with civil liberties. But we could talk about that, but there's no need to talk about what kinds of things override unless there's a constitutional right to begin with.

[00:39:31] Marci Hamilton: Well the, the elephant in the room is the Religious Freedom Restoration Act. So, the Constitution actually does not require exemption for every law just because someone's religious. Quite to the contrary. But in 1993, in response to the peyote decision that Professor McConnell just discussed, the Religious Freedom Restoration Act was passed. The Religious Freedom Not Restoration Act, very cleverly named, but it did not replicate prior case law. It is a standalone statute and it has introduced concepts about religious religious liberty that go way beyond what the Constitution has ever required.

[00:40:27] Marci Hamilton: So RFRA is the reason we talk about vaccines. It is inconceivable to me as a matter of the First Amendment that you have a right to engage in activity that is going to kill others if you don't get the vaccine. It's simply under the First Amendment. But under the Religious Freedom Restoration Act, which is hyper-protection, which essentially does provide a mandate for exemption for the religious believer, we have plenty who've won. So, don't be fooled by what's out there. The universe now of religious liberty, most of it that's being discussed is really about RFRA.

[00:41:08] Marci Hamilton: So the right of Tom Green, who owned Hobby Lobby, to refuse to provide three types of contraception to his female employees, that's a RFRA claim. That's a ridiculous result that he would win, that he could use his personal faith to decide that his employees cannot get contraception he doesn't approve of, right? Those women's benefit rights were just tossed aside because of RFRA. So, pay attention. When you're reading in the news about religious liberty, sometimes you're reading about the Constitution, but a lot of time in this day and age you're reading about RFRA, and RFRA takes us so far that I do charge it with a lot of the divisiveness in our country right now.

[00:41:59] Marci Hamilton: Because the message of RFRA is this, you owe no one anything. Your religious conduct is valuable and you should be able to do it without consideration of the harm to others. And that's why you get public health decisions going the wrong way and that's why you get Title VII decisions going the

wrong way that are now paving the way for LGBTQ to be routinely excluded from employment places.

[00:42:28] Jeffrey Rosen: Professor McConnell, do you agree or not that it is RFRA and not the First Amendment that is responsible for these exemptions? And do you agree or not that these results are ridiculous?

[00:42:39] Michael McConnell: So, Marci is entirely right. Most of what we talk about is religious freedom claims today at the state and local level, not the federal level, but at the state and local level are Religious Freedom Restoration Act claims, or Religious Land Use and Institutionalized Persons Act claims. I would have thought, Professor Hamilton, that you would celebrate this. I could have sworn just, 15 minutes ago you said that the framers did not believe in exemptions except when they were enacted by the legislature.

[00:43:14] Michael McConnell: Well, these statutes were passed by overwhelming bipartisan majorities of the United States Congress. They were passed by the legislature. But they don't say that the religion side always wins. They provide for a careful balance of the religious claim against the governmental interest. And if you look at the numbers, they're... I can't remember whether it's 50%, ...60%, or 60/40, but, the cases go both ways. And, are these results ridiculous? They're only ridiculous if you describe them in a ridiculous way. But when you actually look at what was being claimed, I think, I don't agree with all the cases, but I think that the that the courts have actually dealt with these in a quite sensible way.

[00:44:08] Michael McConnell: And, you know, when we could talk about other cases like the Muslim prisoner who was being forbidden to wear a beard, and which is required by his faith. The Supreme Court unanimously says he does have a right. That was under one of these statutes. The vast majority of the of the claims have actually been, prisoner claims so that they're able to practice their religion in prison. So I...do we do agree with all of them? I don't agree with all of what the Supreme Court does on anything, but they do a pretty good job.

[00:44:54] Jeffrey Rosen: Professor Hamilton, one more beat on RFRA, and just so we understand the terms of debate on the court, is it right that some of the justices like Justices Gorsuch and Thomas believe that the First Amendment Free Exercise Clause on its own creates the same strict scrutiny for exemption claims

that RFRA does? And, why are you concerned about that view? Where do you fear that it might lead?

[00:45:18] Marci Hamilton: The court's in flux right now. Since the decision in Philadelphia about whether the Catholic foster agency could exclude gay couples from service, we don't know where the court is really on these cases. But with respect to RFRA, you ought to just read my book, *God Versus the Gavel*. The name of it-

[00:45:47] Michael McConnell: Available on Amazon.

[00:45:48] Marci Hamilton: Available on Amazon. But, you know, the subtext is *The Perils of Extreme Religious Liberty*, which is a call to the American public to understand that our values are at risk because we have a law that says that just because you're religious you get to break the law. And I totally disagree with Michael in terms of interpretation of it. It was meant to be and it is this concept of mandated exemption. Many cases have been won against the use of vaccines in the military. And Title VII now is being gutted by it, with respect to contraception and with respect to whether LGBTQ have a right to be in the office.

[00:46:42] Marci Hamilton: So I vie- as I said before, and I'm not exaggerating. I'm a really normal person who sees a disaster. What's going on is we have a law in place that is inviting Americans to believe that you don't have to care about what harm you do so long as it's your religious belief. And that is disastrous. And that's what's making the workplace unequal right now.

[00:47:20] Marci Hamilton: That's what's making public health disastrous. We have a dramatic downturn in vaccines that is part and parcel of what the RFRA claims fomented. Who dies from not getting a vaccine? Maybe not the child who should have had it, but the person who dies is the adult who needed it. But the other people who die are the elderly, the pregnant, and the immunocompromised, those with cancer, and those with immunocompromised illnesses.

[00:47:40] Marci Hamilton: So I view this as really our greatest challenge right now, but we're still walking around as Americans. Religion's always good for you, we should always be good to it, and therefore, we don't have to worry about the severe harm it can do.

[00:47:56] Jeffrey Rosen: Professor McConnell should the Free Exercise Clause, in your view, be interpreted to require exemptions unless there's a threat, a serious threat, that would fail RFRA? In other words, do you think RFRA and the First Amendment require the same high scrutiny for burdens on speech? And is that the view of Justices Thomas and Gorsuch or not?

[00:48:20] Michael McConnell: That is what I've believed. I was shocked when the peyote case came down, as were, I think, the vast majority of law professors and civil libertarians and every civil liberties group, from the ACLU to the National Association of Evangelicals. And it, the peyote case, was a shock and Justice O'Connor found it a shock. She came on the court just slightly...or no, she was right there and found it a shock right on that day and, never, I think, budged from that.

[00:49:03] Michael McConnell: I think it was wrongly decided, and I would like to see the court go back to the interpretation that they had before that which was based upon an opinion. I clerked for Justice Brennan not Justice O'Connor, Justice Brennan, as I'll show my age here, but he's like the liberal progressive lion on the Supreme Court. He wrote the opinions first recognizing these rights of exemption in the Supreme Court, and he stuck with that all along.

[00:49:38] Michael McConnell: And in between those initial cases and the peyote case, the Supreme Court decided a case in the term that I clerked, it Jehovah's Witness who did not want to be compelled to produce. He was in a steel mill foundry, he didn't want to be on the line that produced armaments for tanks. And he won 8 to 1, Justice Rehnquist was the only dissenter in that case.

[00:50:14] Michael McConnell: There was another: Wisconsin against Yoder, about the rights of Amish parents. That was unanimous. And then, we were in a civil liberties regime that recognize these rights right up until the peyote case, and I don't see any reason we shouldn't go back to that.

[00:50:36] Jeffrey Rosen: We have some great questions from-

[00:50:38] Marci Hamilton: Can I quickly respond to that?

[00:50:39] Jeffrey Rosen: Oh, please-

[00:50:39] Marci Hamilton: Just very quickly.

[00:50:40] Jeffrey Rosen: Yeah, of course.

[00:50:41] Marci Hamilton: The only fly in the ointment for Professor McConnell's theory is that I did win *Boerne v. Flores*, which challenged the constitutionality of RFRA successfully. And the opinion in *Boerne v. Flores* says, the court says, that RFRA was not even close to what their doctrine was. So I find it very hard to believe that anybody is still trying to make the argument that it was radically different. But you need to make it if you want the mandated approach. But please, questions from the audience.

[00:51:15] Jeffrey Rosen: This is a question from Merlin Dorfman. And the obvious question is, can you refuse to do business with Black or Jewish people or other protected classes like gay people under the Free Exercise Clause? Professor McConnell?

[00:51:30] Michael McConnell: I'm sorry, can you refuse what?

[00:51:32] Jeffrey Rosen: Can you refuse to do business with Black or Jewish people or other protected classes like gay people?

[00:51:33] Michael McConnell: You can refuse to speak or use your expressive talents or produce art or other expressive things, if, in support of an occasion that you disagree with, not because of who the person is, but if you disapprove of same sex marriage, for example, or if you disapprove of the war or anything else you can disapprove of. You have a right not to use your expressive talents to support that. And it is true that Laurie Smith in the case was trying to make money on her web design, right? But we do not hold that people lose their First Amendment rights because they're making money.

[00:52:26] Michael McConnell: New York Times against Sullivan, probably the most important First Amendment case ever. The New York Times is a profit-making corporation. They didn't lose their protection because they were making money selling newspapers. Artists, generally speaking, make money on their art and they have a right not to have the state come in and say, "You have to use your artistic talents to support something you don't believe in." If you're an actor, you make money acting, but you don't have to take a... the state can't force you to take a role that communicates something you disagree with. I think that this is free speech 101.

[00:53:11] **Jeffrey Rosen:** I think I know your answer to the question, but are you concerned, Professor Hamilton, that if the court does overturn the *Smith* case and embrace Professor McConnell's view of the Free Exercise Clause, then there might be efforts, by individuals not to do business with Black or Jewish people or other protected classes that go beyond coerced expression.

[00:53:40] **Marci Hamilton:** We've already had claims of religious believers in the South that don't want to do business with Blacks. There are plenty of faiths in the United States that don't believe in anything but white supremacy.

[00:53:53] **Michael McConnell:** And no court has ever entertained... they.... has ever found in favor of those people.

[00:53:59] **Marci Hamilton:** But no court has ever said that a business-

[00:54:01] **Michael McConnell:** people make claims all the time.

[00:54:05] **Marci Hamilton:** No, no, no, no, no. The slippery slope, you have to take credit for the slippery slope. When you open the door to a business that is serving the public and that business is engaged in expressive conduct, she doesn't have pure speech. The court made that up. Classic First Amendment doctrine. It's not pure speech, it's expressive conduct. She's a business. So the question that must be asked after 303 Creative is, will there be any other class of Americans who can be excluded from business other than LGBTQ? And just wait. We have over a hundred thousand sects of religious believers in the United States. They'll come.

[00:54:48] **Jeffrey Rosen:** Question from Jim Moss on Zoom. Has the Supreme Court ever been confronted with the argument that a tax deduction for a charitable donation, to a religious organization is a law respecting an establishment of religion?

[00:55:03] **Michael McConnell:** Yes, this is *Waltz v. Tax Commission*. Decided in 1970, unanimous. No, actually Justice Douglas dissented in the case. So, 8 to 1 decision, tax exemptions do not, I mean...even including religious organizations in tax-exempt status does not violate the Constitution. The main reason for that is there are any number of non-profit organizations. Professor Hamilton was telling me about the one that she founded. I guess, I bet people can contribute to your organization and deduct their contributions from their taxes. I think so. And-

[00:55:47] Marci Hamilton: Yeah, we're...

[00:55:51] Michael McConnell: ... religious organizations are just one. When you look at the tax code, I can't even recite it all, but it's religious, educational, charitable, et cetera, et cetera. There are about, I don't know how many adjectives there are. And to exclude religious organizations from non-profit organizations from this would be just rank discrimination against them.

[00:56:20] Marci Hamilton: Well, it all depends on whether the religious organization is in fact a lobbying organization, which does not get tax exemption, or it is in fact a religious organization that engages in other activities. It's a fine line right now. The politicization of religion since Jerry Falwell in the 1980s is extraordinary. So, there are a lot of people, a lot of serious people now talking about that exemption for religious organizations should be done on a case-by-case basis and judged according to what their conduct is and whether it's consistent with the 501[c][3] standards. Is that a huge movement right now? No.

[00:57:04] Jeffrey Rosen: I'm going to ask for closing thoughts in a moment, but I want to say how extraordinarily useful it is to hear such a vigorous debate about these crucial constitutional provisions. And you're hearing the most thoughtful versions of the arguments on both sides, and you're seeing why Supreme Court justices vigorously disagree about these questions but they can do so respectfully, and it's so, it's an honor to, to host this conversation so that you can learn more.

[00:57:35] Jeffrey Rosen: It is Constitution Day, so I want to end with a note of core principles and uplift. It was incredibly inspiring, friends, to be able to begin that freedom of speech gallery with the words of Jefferson and Brandeis, their pay in to freedom of conscience. "The freedom to think as we will and speak as we think," as Brandeis said, quoting the great Roman historian Tacitus. And to remind us that in America, that kind of freedom of speech and thought, "the illimitable freedom of the human mind," as Jefferson said, can only be banned or restricted under the gravest and most serious circumstances.

[00:58:15] Jeffrey Rosen: It makes America the country in the world that more than any other vigorously protects freedom of thought and belief. It can lead to some important disagreements but it ultimately is a shining beacon of our constitutional freedoms. So I'm going to end this Constitution Day, and I would like each of you to give our friends a sense of why you think it is so meaningful to

protect freedom of religion and what aspects of the religion clauses you'd like us to celebrate on Constitution Day? Michael.

[00:58:51] Michael McConnell: Well, I'd like to end on a slightly different note, which is to, to say why I find so many reasons to be happy to be here. But one of them on Constitution Day is that just a couple of blocks from here is the oldest synagogue in Philadelphia. And it so happens that the only petition to the Constitutional Convention that was on the subject of civil liberties came from the leading laymember of that congregation, whose name is Jonas Phillips, and he petitioned to have the Constitution include a provision that all religious sects would be on an equal footing.

[00:59:46] Michael McConnell: Note that he wasn't advocating for some sort of strict separation, but an equality under which all the religions would be on an equal footing. Now as it happens, they didn't add a Bill of Rights at all at the Constitutional Convention. That comes with the First Amendment. But I also do think that this idea of inequality is fundamental to the First Amendment's religion clauses. So, in a way I think Jonas Phillips got what he was asking for, but I feel the emanations from the synagogue whenever I'm here at the National Constitution Center.

[01:00:30] Jeffrey Rosen: Beautiful. I will feel the emanations, too, every time I walk by the synagogue. I'm so glad you shared that incredibly moving story. Marci Hamilton, last word to you. What should we celebrate about the religion clauses on Constitution Day?

[01:00:43] Marci Hamilton: I think the first thing we should celebrate is the National Constitution Center, to be perfectly honest. Yeah.

[01:00:50] Jeffrey Rosen: Here's to the NCC.

[01:00:51] Marci Hamilton: It's been an extraordinary institution from the day it opened its doors and I love that it just keeps expanding and has more and more debate. It's interested in both sides. That's very, very special. Here's what I'll leave you with. We are blessed in the United States that we have an absolute right to believe anything we want. It doesn't have to be from doctrine, it doesn't have to be from any religious organization. We wake up in the morning, we're going to believe something. We have the right to do that and the courts have to be respectful of that.

[01:01:32] Marci Hamilton: We also have a very strong right of religious speech, which is also extremely important, but it doesn't bar people from being harmed. But we also, for the sake of ordered liberty, a phrase that the Supreme Court is repeatedly used, for the sake of ordered liberty. Religious conduct must be regulated according to the law that applies to everybody else unless they can make the case for an exemption. I think that is an extraordinary system, but you know what the most distinctive element of the United States Constitution is compared to the entire world? The separation of church and state. That's extraordinary, and I do hope we'll hold on to it. Thanks.

[01:02:20] Jeffrey Rosen: I'll leave you by asking you to read the books of Professor McConnell and Professor Hamilton, and to join me once more in thanking them for helping us to celebrate the religion clauses of the First Amendment.

[01:02:40] Tanaya Tauber: This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Greg Sheckler and Dave Stotz. Research was provided by Samson Mostashari, Cooper Smith, Derek Shavell, and Yara Daraiseh. Check out our full lineup of exciting programs and register to join us virtually at constitutioncenter.org. As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at constitutioncenter.org/media-library. Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.