



Death Row, Religious Freedom, Legislative Censure, and Free Speech

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. Last week the Supreme Court handed down two nearly unanimous opinions in cases involving the First Amendment.

[00:00:31] One was an eight to one decision in *Ramirez v. Collier* about a death row inmates claims to have the religious leader of his choice touch him and pray with him in the execution chamber. The other was a unanimous decision in *Houston Community College v. Wilson*, which said that legislative censure did not violate the free speech rights of the respondent. To help us understand what these two opinions can teach us about the First Amendment and the future of the court, we have invited two of America's leading First Amendment experts.

[00:01:05] It's such an honor to convene both of them. And I'm so looking forward to learning from both of them as always. Michael McConnell is Richard and Francis Mallory Professor of Law at Stanford and director of the Constitutional Law Center. He filed an amicus brief in support of the petitioner in *Ramirez v. Collier*, which was cited by the court. Michael, welcome back to We The People. It's so wonderful to be with you.

[00:01:27] Michael McConnell: Thank you, Jeff.

[00:01:28] Jeffrey Rosen: And Eugene Volokh is Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He's the author of the textbook, *The First Amendment and Related Statutes* and founder of the Volokh Conspiracy Blog. Eugene, thank you so much for joining. It's great to have you back.

[00:01:44] Eugene Volokh: Always good to be on.

[00:01:46] Jeffrey Rosen: Michael, let's begin with the obvious question. What did the *Ramirez* case hold and why is the case important?

[00:01:54] Michael McConnell: Uh, so this is the latest in a series of cases that have been that s- started about three years ago ha- having to do with the right of, uh, persons facing, uh, execution a- as it happens by lethal injection, uh, to have a clergy person of their choice

accompany them. And there've been like a, a whole series of questions. Th- th- this most recent one, the Ramirez case, uh, had to do with whether the prisoner, uh, could, uh, not only have a clergy person present, a spiritual advisor present, but for that person to pray audibly, uh, uh, in the, uh, execution chamber with him and, uh, to touch him, that is lay, uh, lay hands u- u- upon him.

[00:02:43] The reason this is important really requires just a little bit of, uh, backstory because the policies here and, and especially in Texas have changed rapidly. Uh, up until about three years ago, uh, the policy was that only the prison chaplains, that is the official employees of the prison that are p- that are chaplains, uh, could accompany the prisoner to enter the execution, uh, chamber. Um, that had not been challenged before.

[00:03:15] But the problem with that is that the chaplaincy was entirely made up of, uh, Christians and Muslims. No other faiths were represented. And so about three years ago, there was a Buddhist, uh, prisoner. And he, he said, "Well, this is, uh, this is religious discrimination. Um, maybe even an establishment clause problem to allow, uh, only Christian and Muslim, uh, clergy to be present." And the Supreme Court agreed with that.

[00:03:46] And so Texas then responded by saying, "Well, okay, if that's your view, uh, nobody gets it." So they eliminated, uh, the practice of clergy presence altogether. Uh, and then there were further, uh, Supreme Court decisions. And then the Texas, uh, prison authorities reversed course yet again, uh, and said, "Well, you can have a, a clergy of your choice present." When I say of your choice, this person has to be vetted and has to be, has to be trained. It's not an unfettered choice.

[00:04:21] Uh, but in this case, uh, the particular pastor who is a Baptist pastor, um, met all those qualifications. And there's no... The Texas authorities had no problem with this particular, uh, individual. But they said he can be there, uh, but he cannot either audibly pray or touch, uh, the prisoner. So he can be in the room and he can be of course, silently praying, but no more than that.

[00:04:47] And, and then that's what this case is about. And the court held that, uh, the R-Religious Land Use and Institutionalized Persons Act protected the prisoners right here. Now that act... It, it's a statute. It... This is not technically a First Amendment case, but of course it's very closely related to the free exercise clause because Congress passed that statute in the wake of the Supreme Court's famous, uh, Employment Division v. Smith peyote decision in which the court held that the free exercise clause does not protect against applications of neutral laws of general applicability.

[00:05:29] Well, there are... The, the two probably most frequent eas- easily documented and frequent areas of free exercise violation have to do with land use and zoning and, and, and so forth, but also institutionalized persons, prisoners where their p- problems come up with respect to, you know, uh, kosher and halal food and, uh, and worship services and prayer books and a, and a variety of different...

[00:05:57] Sweat lodges. Uh, a wh- a whole variety of questions come up in the prisons. Uh, when, when everything is controlled by the government, there could be no separation between church and state. And so the state has to, uh, provide and make opportunities for these things, uh, to happen. And that's what the statute... I'm gonna s- say the name of it again. The Religious Land Use and Institutionalized Persons Act. This is universally pronounced as RLUIPA. Uh, and s- Uh, it, it, it sounds like, uh, a joke. But RLUIPA.

[00:06:31] Uh, and the court held that RLUIPA protects Mr. Ramirez's claim, uh, in this case. And in the course of getting there the court makes, uh, extensive reference to the history of the presence and services of clergy at executions going way back. My, my personal favorite was, uh, King Charles I, uh, who was of course executed, uh, uh, in 1649 and with, and with, uh, with his chosen priest, uh, present.

[00:07:02] Uh, George Washington allowed clergy to be present at executions of, uh, prisoners during the American Revolution. There's a long history to this, and the court was true to that. There's only one dissenter. Uh, that was, uh, justice Thomas. And he didn't really dissent on the substance. He dissented on procedural grounds, uh, that... Uh, he, he's concerned and this is a legitimate concern. Although I think perhaps not in this case. But he's concerned that death row inmates often make very last minute, raised last minute legal claims, uh, in order to thwart, the, uh, execution. And he was very concerned about the timeliness of, uh, Mr. Ramirez's, uh, application.

[00:07:48] **Jeffrey Rosen:** Thanks so much for that. Great introduction. I'll ask you more about the history and tradition in a moment. 'Cause you're brief of the Becket Fund was crucial and the court cited it. But I want to ask Eugene about out his thoughts about how the case is important and how it fits into recent free exercise claims. Eugene, justice Kavanaugh noted a, a series of different kinds of claims of inmates.

[00:08:12] First, religious equality. Could a Buddhist priest be present if a Christian priest was there? Second, religious Liberty. Uh, could inmates have a advisor at all? And now a new claim about, uh, the advisor being able to engage in audible prayer and physical touch. Not all of those previous cases were unanimous. D- Is the fact that this case is unanimous say something about the future of both free exercise and RLUIPA as Michael called it? And, and why do you think this case is significant?

[00:08:39] **Eugene Volokh:** Well, I do think the, the new unanimity in this case, uh, is a reminder that, uh, uh, uh, there is broad consensus on the court in favor of applying at least religious liberty statutes, uh, relatively broadly as they are written. So for example, uh, uh, some 15 years or so ago in the Gonzales v. O Centro case, the court unanimously held, uh, that, uh, under the Religious Freedom Restoration Act a, uh, uh, s- very small religious group coming out of Brazil, uh, was entitled to use ayahuasca, which is, is a hallucinogen that is v- that is prohibited by American drug laws, but that they had an exception under America's religious freedom law.

[00:09:22] Um, likewise in Holt v. Hobbs several years ago, the court, uh, unanimously held that a Muslim prison inmate was entitled to an exemption from the prison's no beards policy. So

every so often you hear of about cases that are... In fact, often you hear about cases, uh, that are, uh, sharply divided like the Hobby Lobby case. Uh, uh, uh, religious freedom cases that are sharply divided like the Hobby Lobby case.

[00:09:42] Or, uh, that are at least divided on the, the underlying legal theory as in the *Fulton v. City of Philadelphia* case recently having to do with, uh, uh, City of Philadelphia policy that, uh, basically, uh, uh, required, uh, organizations working with the foster care system, uh, not to, uh, not to discriminate based on sexual orientation related matters.

[00:10:07] So some of those cases are, uh, sharply divided. And there's a sense then that there's real disagreement about religious even though there isn't some measure. But in many situations there's very broad agreement. Uh, the recognition that Congress has decided that there ought to be a presumption of religious exemptions from various kinds of laws, federal statutes generally. That's RFRA. And from, uh, yeah, uh, laws including, uh, state laws and state policies, uh, um, in, uh, in prisons that, uh, as well as related to land use. That's our RLUIPA.

[00:10:39] So we have, uh, we have very broad consensus there. Um, and, uh, uh, that, that's important because, again, these are, these are, uh, claims that, uh, uh, were and remain cons- uh, contr- highly controversial when it comes to the free exercise clause. Remember in *Employment Division v. Smith* some 30 years ago, the court held basically, uh, by a, uh, uh, five to four votes. I oversimplify here slightly.

[00:11:05] But basically that there is no right to religious exemptions from generally applicable laws under the free exercise clause. In *Fulton*, the court, uh, seems to be divide sort of there, three, three on that question. Uh, so, so there's real disagreement about how to interpret the federal free exercise clause. But when Congress steps in and when state legislatures, uh, uh, step in as they have in, uh, basically a couple of dozen states and say there is a, uh, uh, general right, uh, of religious exemptions, uh, the court, uh, and courts generally do apply that and apply it often quite broadly.

[00:11:45] Jeffrey Rosen: Thank you very much indeed for that, Michael, the court twice cited your brief for the Becket Fund, um, including on behalf of the proposition that as for audible prayer there's a rich history of clerical prayer at the time of the prison's execution dating back well before the founding. And the chief justice gives your example of how a Newgate Prison and Anglican priest would stand and pray with the condemned in their final moment.

[00:12:09] Your brief is fascinating both for the historical examples of audible prayer and physical touch. And also for your claim that the court can translate these practices in light of new execution practices. As in the *Kyllo* case, it took account of new technologies to translate the Fourth Amendment. I think it would be interesting just for you to give some more of your favorite examples from your brief to give us a sense of this rich history and tradition, and then tell us about the significance of the court's reliance on history and tradition in reaching its decision.

[00:12:45] Michael McConnell: Each of the examples is quite engaging in its own right. Uh, but there's a, an overall, uh, theme to them, which is that, uh, even some of the most despicable

[laughs] prisoners, uh, facing execution in, you know, the last several hundred years and people who, whose ideas are, you know, completely anathema like, you know, Nazi war criminals and, and the like. Uh, e- even in these circumstances in the Anglo-American, Anglo illegal tradition, we have respected their right to the consolation of clergy at the, uh, at, at the last moment, which just goes to show how important, uh, this is.

[00:13:25] And, you know, why does that matter for modern constitutional, uh, doctrine? The reason is, uh, that, that Smith decision, the, the peyote case that both Eugene and I have been talking about wa- was closely divided from the beginning and it remains highly contestable. Uh, today that's what the, the Fulton case that, uh, Eugene was talking about really divide... The court really divided on the question of whether, uh, the court should overrule that decision. Justice Barrett, uh, Amy Coney Barrett in a concurrence said, "Well, she's very sympathetic." That Smith seems to be wrongly decided. But what are we going to replace it with?

[00:14:06] And there's no simple answer to that. But in a variety of constitutional areas in the last say, 20 years including, uh, the establishment clause, the other half of the religion, uh, clauses, the court has, uh, frequently, uh, turned to historical practice as its guide for what is the, you know, what are the core freedoms that are, uh, to be, uh protected. And this, this is happening in, you know, a, a wide range of cases.

[00:14:41] And, uh, one of the points that we made in, uh, the Beckett Fund, uh, a- amicus brief is that historical practice could be useful as at least part of a replacement for Smith. And when you see, uh, a particular right like the right to the consolation and, and audible prayer and touch of, uh, clergy at, uh, uh, in the final, uh, moments in the execution chamber, when you see that, it's so, it's f- it's firmly ingrained as it is.

[00:15:15] That it's really quite peculiar than just because Smith comes down, uh, that, to, to just s- say, "Well, okay. All, all, all that's over." Uh, our society has really not repudiated that. It's, it remains part of our, uh, commitment to religious, uh, freedom. And our point in the brief is that whether or not it's a neutral and generally applicable law, when there's a s- like uh- an unbroken practice of that sort, uh, respecting, uh, a claim of constitutional right, uh, that it ought to be a considered constitutionally protected, uh, and not just protected under statutes, which after all can, uh, be repealed.

[00:15:59] Jeffrey Rosen: Thank you so much for that. Eugene, justice Kavanaugh has been a champion in a series of cases about the relevance of history and tradition. And he wrote an interesting concurrence about how the court should apply the test of strict scrutiny. And you wrote a interesting commentary on his concurrency. You've long been interested in the question and you think he cast some, uh, light about how to balance various considerations under strict scrutiny. Tell us about justice Kavanaugh's concurrence and why you think it was interesting.

[00:16:29] Eugene Volokh: Sure. So let's just step back a bit. As a general matter, the, the, uh, uh, federal statutes referring to our RLUIPA and against state statutes in about two dozen states. Then state constitutional provisions is interpreted by state height courts. And another dozen or so states they all recognize that sometimes religious exemptions ought to be granted. And I think that's pretty broadly understood.

[00:16:53] For example, you go to court and you are wearing a baseball cap. The judge may say, "You need to take that off 'cause it's disrespectful." There's a rule that says no hats because it's sort of seen as disrespectful to wear hats inside. It's just sort of a cultural convention, but an important one. Okay. But let's say you go there wearing a yarmulke cap because you're an Orthodox too.

[00:17:12] Presumably most judges would not say, "Oh, you need to take it off." Because they recognize that, uh, this rule, ought, there ought to be an exception for, for religious headgear. And yarmulke is just one example. The same thing would be for a Sikh turban or a, uh, uh, a Muslim woman's, uh, head scarf or whatever else. Uh, so, so it's pretty broadly understood that there ought to be some exceptions. And, again, federal statutes, uh, uh, demand them.

[00:17:37] On the other hand it's also pretty broadly understood that you can't have a rule of exemptions from all or even almost all laws. I mean, let's say somebody says, "You know, my religion requires me to kill blasphemers. Or maybe not kill them, just beat them up." Well, your religion might require that and may substantially burden your religious practice to forbid you from doing that, but you, you don't get to do that, right?

[00:18:00] Likewise, imagine somebody says, "You know, on Volokh's land I think I saw an apparition of the Virgin Mary. So I have have a religious duty to, to take a pilgrimage Volokh's land." Well, you know, that's not a matter of life and death. It's a matter... But it's a matter of my property rights and my property rights prevail. Uh, uh, at least one would assume. I don't know of any such cases, but I think it's broadly understood that people don't get the right to come onto my property just because their religion calls them to do so generally speaking.

[00:18:28] So the question... And the same is true for, for a wide range of other laws as well. So it's very broadly understood at least in many, as to many anti-discrimination laws. Not all in all situations, but in many situations you don't get to violate anti-discrimination laws just because you say, "My religion requires me not to hire, uh, women with small children." As some people have indeed claimed. And those ones are gonna reject.

[00:18:49] Likewise you say, "My religion requires me not to pay taxes because I think this is an unjust government." You don't, don't generally get an exemption from that. So there's gotta be some way of reconciling that. Uh, or... That is to say some way of, of drawing the line. And the statutes talk about, uh, the so-called strict scrutiny test. Uh, that exemptions have to be given unless there's at least, uh, unless denying the exemption is the least restrictive means of serving a compelling government interest.

[00:19:15] So put it in another way, uh, if there are less restrictive means of serving a compelling government interest, well then exemptions, uh, ought to be given because the government should use those less restrictive means rather than burdening people's religious practice. But one thing that Justice Kavanaugh points out I think quite soundly is that tests sounds like, uh, kind of offers a good framework for figuring out an answer. It's familiar from other areas of constitutional law. But in the religious freedom context, maybe in other context as well, it's actually pretty hard to apply because, you know, you can always find a less restrictive means of serving the government interest.

[00:19:55] It just will often also be less effective or at least potentially less effective. I mean, if somebody, uh, if, uh, uh, somebody, for example, claims an exemption from tax laws, you know, there's a less restrictive means of raising money. You could maybe raise taxes on someone else, but maybe that's less fair. Maybe it's... Maybe those taxes will be less easily collectible and the like.

[00:20:18] Um, so likewise in this kind of situation, justice Kavanaugh says, "You know, there are potential security problems with, uh, having somebody, an outsider in the execution chamber, especially in a position where he's actually touching, uh, uh, the, the, uh, the condemned. Uh, and, uh, you know, the court points out other ways of serving the interest in protecting the condemned and protecting the security of the overall process. You know, maybe they're not gonna be as effective. We can't know for sure.

[00:20:46] So one of the things that justice Kavanaugh says is especially important at that point is to look to history tradition. Now, the statute requires applying strict scrutiny, applying this compelling interest test. Justices Kavanaugh can complain about it and I think he has good reason for complaint, but Congress has told them to do that. But the question is how do you actually apply it in a sensible way?

[00:21:06] And he says, "You know, history and tradition are an important way of doing that." So I think there's a lot to be said for that. And in general, I agree with a lot of criticisms of the strict scrutiny test. One question I wanted to ask Michael though, uh, with regard to the history and tradition test, which I, I'm sure he has a good answer to. But I, I think it would be good, good to air that answer.

[00:21:24] Is, uh, um, that's you could imagine the history and tradition tests in this area running against the very strong norm of religious equality that the free exercise clause already demands, and that I'm sure, that, that Congress actually wanted to serve with RFRA and our RLUIPA as well. So it... So there are some religions, uh, that, religions that are either new or new to kind of Anglo-American life, uh, that have, uh, have practices that are not easily fit within history tradition.

[00:21:54] So for example, the use of hallucinogen, whether it is peyote in American-Indian churches or ayahuasca in the Gonzales case. Or, uh, not quite hallucinogen, but marijuana by Rastafarians. How do you fit that? Now, I suppose you could analogize to alcohol, which is used in, uh, uh, Christianity. But in Christianity alcohol is used, uh, uh, in very m- small amounts in ways that are I think not quite psychoactive.

[00:22:19] Maybe you can analogize it to alcohol being used in some Jewish religious rituals where you do drink a considerable amount. But how much of a tradition is there, uh, given the Judaism while an important part of American history has always been a very small religion in America? What about, for example, Sikhs, uh, who have a, a religious obligation to carry... I oversimplify here. But basically to carry daggers that are so-called kirpan.

[00:22:46] And different Sikhs interpret that obligation as more or less strict in various ways. And you could, you could argue that in fact sometimes that should be accommodated. Some

courts have said it should be, and sometimes it be not. But it doesn't seem to me that that's easy to fit within history and tradition in, in American or Anglo-American jurisprudence just because there haven't been a lot of Sikhs in, uh, America or in England until recently. There have been of course in India, which England governed, but I'm not sure how much that reflect, that, that translated into, into specifically English law.

[00:23:18] Um, so, Michael, do you wanna talk a little bit about how history and tradition could be, could be used in a way that also kind of fairly treats, uh, religions which I just do not have much of a history and whose practices don't have a much of a history in America?

[00:23:34] Jeffrey Rosen: I think that's a great question. And, Michael, as you answer it, maybe broaden out and give us your thoughts about why it is that the conservative and liberal justices were u- were u- nearly unanimous on this question involving history and tradition, whereas they're so divided about other questions involving religious exemptions.

[00:23:53] Michael McConnell: I don't think anyone argues that, uh, h- history and tradition is the ceiling for protection of constitutional rights. I think the point is that, uh, w- when we're looking at a, a constitutional provision that says that government shall not abridge, uh, these freedoms. That they serve at least as a, uh, a- as a floor, as a... That, that we know that, uh, historically protected, uh, freedoms are part of it. And then I think it's actually to the advantage of the newer, less familiar, uh, religions to be able to draw analogies.

[00:24:33] Uh, this actually happened in the very first, uh, published, uh, free exercise case under the New York constitution, uh, uh, way back in the '18 teens, uh, when Roman and Catholicism was, was... It was so despised at the time that, uh, that, uh, John Jay, the future Chief Justice tried to get the New York constitution of 1777 to forbid Catholics from, uh, from, uh, being citizens of, of New York.

[00:25:02] That was how bad it was for... But in, in a case involving, uh, whether a Roman Catholic priest could be required to divulge secrets that, uh, he learned in the confessional, uh, the court analogized to Protestant sacraments. And he said, "Look, uh, of course." I mean, and, and anyone would, would agree that the Protestant sacraments are constitutionally protected. Well, this is a Catholic sacrament and they're, uh, entitled to know less.

[00:25:32] And so what I think what we... The way the, the history and tradition fits with the equality principle is that the history and tradition helps establish things that are enviable. And then the equality principle requires extension of not just those identical practices, but, uh, but comparable, uh, practices to, uh, newer perhaps, uh, less, uh, familiar, uh, groups. And in the cases involving, uh, psychedelic, uh, sacramental substances that Eugene referred to, actually the Supreme Court has used John on the analogy to the Volstead Act during prohibition.

[00:26:12] That when we had prohibition, Congress carved out an exception for the sacramental use of, of wine. And, uh, the court, uh, has, uh, didn't have any difficulty saying, "Well, you know, for the same reason, uh, the sacramental use of, of, uh, some of these other substances, uh, is entitled to protection as well." Now it might have been different if there were evidence in

those cases that the, these newer s- substances like peyote or, or aya- ayahuasca actually presented serious, uh, health risks.

[00:26:46] But since the evidence on that was, uh, at worst inconclusive, uh, the court believed that the analogy to, uh, the Volstead Act and to the treatment of, uh, Christianity and Judaism was precise.

[00:27:04] Jeffrey Rosen: Thank you so much for that. Eugene, your final thoughts on the Ramirez case and, and what it can tell us about this broader debate about strict scrutiny on the court. The big division between the liberals and the conservative is whether, uh, if Smith were overturned, strict scrutiny would require exemptions from generally applicable anti-discrimination laws, for example like the baker who doesn't wanna bake the wedding cake for the gay couple.

[00:27:30] And the quality principles would mean this would take a huge chunk out of lots of generally applicable laws. Does this Ramirez case tell us anything about that debate or not? And what are your thoughts about that debate?

[00:27:41] Eugene Volokh: Not really. Uh, I think part of the problem with the sc- scrutiny test is it says compelling interest without telling us what counts as a compelling interest. So justice Kavanaugh talked a little bit about the least restrictive means issue, uh, but the compelling interest issue is even more, more complicated. So for example, when it comes to say... Uh, let's take the example of, of the baker.

[00:28:01] The Supreme Court, by the way, has a case right now involving I wanna say a website designer, which is a free speech case. In which I think it might and in fact, I think it should say that as a matter of free speech doctrine a person cannot be compelled to create speech products for, uh, same sex wedding or for anything else. That a person couldn't be compelled, for example, to create a website for the Scientologists notwithstanding laws banning religious discrimination.

[00:28:24] But if we set aside the speech issue and focus on baking, which I think, although not everybody does, but I think doesn't really involve speech that much. Or let's say, take another example. Imagine a limo driver who says, "I don't wanna drive people to, uh, to same sex weddings." Um, then the real question is, is there a compelling interest in preventing every single instance of discrimination in which case a law that bans all such discrimination is narrowly tailored as the least restrictive means of serving that interest?

[00:28:55] Or is there just a compelling interest in making sure that people have meaningful and basically roughly equal access to various, uh, uh, uh, good and services without regard to the sexual orientation, religion and such. In which case, uh, in many places given that people could just hire a completely d- a different limo driver or go to a different baker, the less restrictive alternative might be to let them go to this other baker.

[00:29:21] Uh, even if they're annoyed or upset by being denied service from the first, you know, they still have access, uh, to, to, to wedding cakes. And in the rare case where there's only one wedding baker on, well, then maybe imposed the obligation only on him as essentially kind

of essential facility. So that's gonna be the question in a lot of those cases. And that's a question that, you know, the term compelling government interest doesn't really resolve. So that's going to be the, the, the real difficulty.

[00:29:47] Uh, setting aside the, the, the somewhat separate or related question of speech related services like website design, photography, videography, calligraphy for wedding invitations and the like.

[00:29:59] **Jeffrey Rosen:** Thank you very much for that. And we will certainly be discussing the web designer case and others down the line. Michael, let's turn to the Houston Community College System v. Wilson case. This was a unanimous opinion by justice Gorsuch. Uh, what did the court hold and why is the case important?

[00:30:18] **Michael McConnell:** So this is a case involving a, a member of this elected public body who, uh, succeeded in making himself thoroughly, uh, obnoxious to the [laughs] other members of the board by criticizing what they were doing persistently and, and, and so forth. I, I don't know enough about their issues to, [laughs] to know o- other than that they found it very o- offensive and they ended up passing a resolution censuring him, uh, for his, uh, uh, some of his statements.

[00:30:51] Um, I gather at one point they also declared that he, that they wouldn't elect him to certain positions within the body. But that aspect of the case disappeared. So that as it went to the Supreme Court, the question was whether it violate at his free speech rights to have a pure resolution of censure not accompanied by any material, uh, consequences. And the court held unanimously that the free speech clause did not protect him from this.

[00:31:22] Uh, I think that... I, I don't know what Eugene thinks. I think that seems perfectly logical. Again, if you look at the idea of history and tradition as being at least a, a part of the analysis, uh, bodies of encensuring their own members for cantankerous behavior for a, a very long time. There were two things I thought were particularly interesting about the way the case was written.

[00:31:51] Uh, it's, by the way, a unanimous decision written by, uh, uh, Neil Gorsuch without any, uh, concurrences. Uh, there's one paragraph in the opinion, in which, uh, the court says, "Well, you know, n- not only is, did this particular member have the right to say what he wanted to say, but the censure itself was a form of speech." Uh, implying that the body, that this board had a free speech constitutionally protected right to pass the resolution of censure.

[00:32:29] It maybe doesn't make that quite so clear, but I think that's the implication of the paragraph. I think that's wrong. Uh, I think free speech rights attached to individuals and that public bodies do not have any free speech right, uh, to, uh, to speak on anything. If, if they're govern- If, for example, the governing documents of the, you know, setting up this board said, "And, and you shall not, you know, censure anyone." I don't think there'd be any constitutional, uh, problem with that.

[00:33:00] So I, I, I thought that one paragraph of the opinion was, uh, at least gesturing maybe in, in a wrong, uh, direction. The other interesting thing about the opinion though was its

sensitivity to closely related cases that are quite different. The court ends by emphasizing the narrowness of the decision that it applied only to pure censure, no material consequences, and only to the censure of members of, uh, the particular, uh, elected body.

[00:33:36] That, uh, there are a number of cases in which public f- bodies, uh, criticize or censure private citizens, uh, that are, might very well present a different case. Uh, and, uh, I think it's interesting. For example, just a few days ago, the, uh, Princeton University was rebuked by the Academic Freedom Alliance, which is a, a broad bipartisan, uh, group that stands up for academic freedom for, uh, the univer- An el- A, uh, censure at the university, uh, attacking a professor at, uh, Princeton for remarks they, they said were racist and doing this to the incoming freshman first year class, uh, at Princeton.

[00:34:24] Thus poisoning, uh, that class against this professor. And the Academic Freedom Alliance, uh, condemned, uh, Princeton for allowing this. This is a kind of cen- official censure. But, uh, but the sort of thing that the court I think was right, quite careful not to imply would be protected. That when you have, uh, governmental bodies that under many circumstances, not all circumstances, but many circumstances for them to reach out and, and have official condemnations of people is, uh, uh, is problematic.

[00:35:01] And there's a little history on this too. In fact, I think the very first public controversy that had anything to do with the First Amendment, uh, happened in the 1790s, uh, when, uh, the... At, at pre- president Washington's instigation, uh, the Congress debated, uh, uh, cen- censuring the so-called Democratic Republican clubs, uh, for being secrets society, secret self-selected societies that were gathering and criticizing, uh, a government policy.

[00:35:35] And James Madison championed the view that it is inappropriate for the government to do that. He said that in a free society, uh, it's the people who have the right of censoring the government, not the government that has the right of censoring, uh, the people. So in the end, I think this Houston, uh, case was, uh, quite properly confined narrowly to a, a body censoring its own memory, uh, and leaves, uh, un- unaffected and unaddressed the, uh, myriad circumstances in which governmental bodies might, uh, uh, censure, uh, private people.

[00:36:13] Jeffrey Rosen: Thank you so much for that. And as you say, the court emphasized the tradition of censure of public bodies from a letter from president Jefferson that the Senate read in 1811 to the Congress's censure of Senator McCarthy in 1954. But there is an interesting paragraph, uh, suggesting that the only adverse action here was a form of speech from Mr. Wilson's colleagues that concerned the conduct of public office.

[00:36:41] And, uh, that the quotation there was to Madison's Virginia resolutions, which emphasized the right to examine public characters and measures through free communication as, as the guardian of every other right. But the court stressed that there were other issues that it didn't mean to address including verbal reprimands or censure that might give rise to First Amendment retaliation claims.

[00:37:02] Eu- Eugene, you wrote a really fascinating brief for the fire of the foundation for individual rights and education on support of neither party emphasizing the formal reprimands of

licensed professionals based on protected speech could violate the First Amendment. So could formal reprimands of students and formal reprimands of public employees. Do you feel that the court adequately those cases? And what was your view on the breadth or narrowness of the court's opinion?

[00:37:30] Eugene Volokh: Uh, yeah. I liked, uh, what the court did. Uh, yeah. I think it, um, it, uh, uh, r- did recognize, I, I think not wearing my hat as a lawyer for fire here, but did not take a stand on the line. But as, as an academic, I tend to agree with, with Michael. But there is a very long tradition of government bodies, uh, censuring their own members. It's hard to see the First Amendment displacing that tradition even when the censure is based on the member's speech or other political activity.

[00:38:00] And, uh, part of the rationale for allowing this in many people's eyes, uh, uh, is, "Well, that's just a form of government speech." It's not firing someone, it's not imprisoning someone, it's not fining someone. It's just speaking about them. Then you could ask whether that's constitutionally protected speech, uh, by the government. And here I think it's a little bit more complicated. Uh, uh, it's a little bit of a complicated question.

[00:38:27] I totally agree that, uh, local governments and state government entities don't have protections against their own states because they're just branches of the state. But it is an interesting question whether a state or local government has First Amendment rights with respect to the federal government. Returning to the late 1790s, imagine that Congress wanted, uh, uh, to impose some punishment for the Kentucky and Virginia resolutions, which are created by the state, by the state legislatures. Uh, or which were at least officially promulgated by the state legislatures.

[00:38:56] Uh, would that violate the First Amendment? An interesting question. So you could say this is government speech. But even if it's not constitutionally protected as government speech, you could just say it's at least not a constitutional violation because it's mere speech. So that was one possible way of reaching the result. And the court indeed mentioned that as part of... It said, "Rationale."

[00:39:16] Our point in our brief was, well, in some situations, uh, when the government is speaking basically about people it regulates especially individuals or corporations that it regulates or that it, has the power to fire has the power to expel. Uh, that is something that could seriously chill their speech. That if, uh, a lawyer is told, "We will issue a formal reprimand of you for supposedly racist speech or unpatriotic speech or anti-war speech, uh, or, or the like."

[00:39:46] Or if a, a government employee is told this, or if a public university student is told this, uh, then that will sharply deter these people from engaging in such speech for fear of what they, the people who, who can fire them or, uh, or expel them, or do other things beyond just speech to them. Like for example, um, uh, disbar them, uh, or might do to them.

[00:40:09] So we wanted to make sure that if the court talked about government speech as being a justification for such censures, which it did, it also acknowledged that some kinds of government speech might be so cohesive. Uh, that they might indeed violate the First

Amendment, which the court also did. So we're very happy, uh, with, uh, uh, with, with the result there.

[00:40:30] At least, I'm very happy and I imagine that people that fire probably would be as well. One thing just, just to keep in mind just stepping back. I think part of the court's rationale is, look, if you become a, essentially a politician, if run for office, then you've got to be able to deal with things that other people might be made much more timid about. Uh, you've gotta be able to deal with criticism and even the risk that, well, maybe the consequences will you'll lose your elected post because the voters will throw you out of office, or even because you're in some situation like be expelled pursuant to state law from your position as many legislatures have the power to expel their members.

[00:41:08] Well, you know, you've gotta be able to deal with that. You've gotta realize that you shouldn't view politics as a career and say, "Oh, you know, I've gotta be super timid." Uh, whereas people who really are, say government employees who do have careers at stake, uh, might be much more timid as a result of the threat of employer censure.

[00:41:28] **Jeffrey Rosen:** Thank you so much for that. Well, Michael, let's dig into these edge cases that both you and Eugene are concerned about. The court said it may be that government officials who reprimand, censure students, employees or licensees may impair First Amendment freedoms. The citation was to a case called *Ibanez* that as it happens was one of justice Ginsburg's favorite cases.

[00:41:49] Uh, she told me that this case, uh, where she wrote for unanimous course, the State of Florida violated the First Amendment rights of a lawyer and public accountant who truthfully advertised herself as a certified public accountant, um, was a violation of the, the First Amendment. And then the court goes on to say there's a category of cases involving censures or reprimands issued by government bodies against government officials who don't serve as members of those bodies.

[00:42:16] And those might involve, uh, public censuring their professors. So tell us about what you're concerned about in those cases, what category of those cases there are and how you think they should come out?

[00:42:26] **Michael McConnell:** Uh, I am not actually sure. I think this is a very difficult area because we don't want to press the First Amendment so far that it protects against things that are not, you know, real con- uh, constitutional injuries. And exactly, uh, what that boundary is going to be is, is rather difficult. One of the reasons why I was pleased that the court in this *Houston* case distinguished and mentioned some of these other areas is that sometimes the court's constitutional rulings serve not just as a, as legal rulings but as a kind of blessing.

[00:43:06] And I think that there are many instances in which governmental condemnation of private people is unjustified and, and, and really oppressive and wrong even if I'm not quite sure that there'd be a free speech violation, uh, involved. I certainly... You know, I live in universities most of the time, and I think universities are way too, uh, free and university presidents way too, uh, promiscuous in their condemnation of the speech of, uh, of, of students.

[00:43:42] I'm not s- I don't think that the, that the answer to this is never. But I think that when students engage in sort of legitimate public discourse that is then can be characterized as, uh, racist or sexist or, or all the various, uh, uh, isms that, uh, uh, that are, uh, uh, triggers in the modern academic world. Uh, I think that m- many of those times university president oughta just, uh, stay out of it.

[00:44:14] That, uh, that, that authority figures should not be, uh, intervening to, um, you know, to try to take sides in controversies among students over, o- over matters of, of public policy. And it's partic- Uh, the particularly common way this often occurs is that, uh, is that there'll be calls to actually censure or punish a student for political expression. And then the university will issue a statement saying, "Well, we, we're not gonna... They can't be punished because they're protected by f- free speech, but, uh, aren't, they, you know, terrible people for having, uh, said something like this?"

[00:44:56] And I think, uh, universities need to be much, should be much more, um, hands off, uh, with respect to legitimate disputes that take place. And that often involve strong language and maybe even offensive language. And, and that, uh, they should be so quick to ride to, to one side's, uh, uh, defense or another.

[00:45:22] **Jeffrey Rosen:** Thank you so much for that. Well, Eugene, let's talk about this crucial category of formal reprimands of students based on their constitutionally protected speech. Your brief cites a number of cases which have held that, that could violate the First Amendment including the Holman case from the Eleventh Circuit, which said that a teacher singling out a student in front of the entire class for failing to recite the Pledge of Allegiance, uh, might be a kind of verbal censure that's a form of punishment.

[00:45:49] Tell us about other cases involving student speech when courts have held that they violate the First Amendment. You believe they're troubling as Michael said, even when they may not formally violate the First Amendment.

[00:46:00] **Eugene Volokh:** As a general matter, uh, courts say that retaliation against speech, uh, is, uh, uh, potentially a constitutional violation when it would tend to deter a person of reasonable firmness from engaging in such censure. So we can imagine a, you can imagine a, a wide spectrum of, of this. One situation is threat of being thrown in prison, obviously. Uh, or being, uh... Or, or actual firing of someone, uh, for that.

[00:46:30] That, that pretty clearly is unconstitutional retaliation assuming the speech is constitutionally protected. On the other hand, imagine that I, I write something and my dean tells me, "Uh, you know, I, I didn't like that." Uh, well, all right. If that, she just tells me that in a conversation, uh, uh, I could be a little annoyed. I'd be especially annoyed, uh, or worried perhaps if I were not tenured. But, you know, the fact is also as a dean, as a colleague, a fellow professor, she should be entitled to express her disapproval.

[00:47:03] And you could expect that, that employees would, would deal with that disapproval. On the other hand, if this is a public reprimand, uh, it, especially done in some formal sense, or even a non-public, a private reprimand that goes into my employment file, for example. Well,

that might be something that's quite different. In fact, my understanding is, and I've seen... I, I, I, I looked that up in the University of California rules, and that is in fact the rule, that at least certain kinds of reprimands are treated as formal employment actions just under, under the existing policies of various institutions under some, uh, uh, under, um, uh, basically due process rules that they set up themselves.

[00:47:48] Uh, because I, I think that that's how they're, they're perceived. That certainly is the case when it comes to, uh, to, uh, professionals. When they're, when they're reprimanded like a lawyer is reprimanded by the bar, public reprimanded and private reprimand are actually generally speaking listed as formal actions. They're not just like somebody at the bar saying, "Look, look, well, like, you know, that brief you filed, that's kind of shotty. We sort of expect better from, from, uh, from our lawyers."

[00:48:16] You know, that, that kind of casual thing might just be speech. No, the, the actual reprimands that are issued after investigation are viewed as a disciplinary action and I do think are intended to chill people from engaging in the reprimanded conduct. Now, in the student context, my sense is that universities don't have a formal reprimand process. At least not that I have seen.

[00:48:42] On the other hand, when there is a public condemnation, whether in front of classmates or, uh, or in a, in a public announcement by the dean, uh, uh, of a, of a particular student, I do think that the message to the student is, "You aren't the nice dude. Uh, if you keep saying this stuff, maybe the next thing that'll happen to you will be worse." Even if there is no such formal escalating discipline, uh, policy, that's how it's going to be generally understood.

[00:49:11] So there are some lines that need to be drawn here, but I do think it makes sense that, uh, that formal reprimands or public reprimands or formal public reprimands, uh, are something that outside the specialized context of elected officials, uh, reprimanding each other within the same body, uh, those, uh, uh, those kinds of formal reprimands, whether in a university or in a bar or medical licensing board or in a government employment do raise serious potential First Amendment problems if they're based on protected speech.

[00:49:42] Jeffrey Rosen: Thank you very much for that and for proposing that bright line, that formal public reprimands by universities or other public employers of students or teachers or employees for their speech may raise First Amendment issues. Michael, your thoughts on this. As you say, it is a, uh, p- one of the most important and complicated areas because many of the universities are private and often their reprimands are not formal but just may involve denunciations of unpopular speech.

[00:50:10] But you've given the example of Princeton. And this is where much of the action on free speech on campus is. What can the First Amendment case law, if anything, tell us about how these situations should be dealt with? And is the First Amendment adequate to prevent the chilling of speech? Eugene gave the test of deterring a person of reasonable firmness from making a speech. Um, the, the, the great chilling of speech that fear of these reprimands in public censure may bring.

[00:50:37] Michael McConnell: Well, of course the First Amendment does not apply to, uh, private universities. Uh, although in California, there is a statute, uh, which, uh, called the Leonard Law, which prohibits even private universities from, uh, disciplining, uh, students for a speech that would be, uh, constitutionally protected if it were a, a private university. And also many, perhaps most private universities, uh, have committed themselves to protecting freedom of speech in various ways in their student handbooks and official documents, uh, and, and so forth.

[00:51:17] I think the wor- the more serious problem is just to draw the line between, uh, types of consequences. And students are particularly vulnerable for a variety of, uh, uh, of reasons. Uh, Eugene touched on, on some of them. But you take an undergraduate, uh, who is formally rebuked by the university president. Well, if... The, one of the things [laughs] that's gonna be on their mind, they may be applying to law school or graduate school, uh, or, or to employers, uh, for jobs.

[00:51:51] And when those entities learn that they, that student got publicly rebuked by the university president, uh, uh, you know, they may very well suffer real consequences, uh, uh, down the line and often without even knowing it or without having any real opportunity to be able to contest the facts or, uh, uh, or anything o- of the sort. And, uh, there's also the problem of investigations.

[00:52:20] Uh, I think a, a lot of universities take the position that they, that an investigation is not itself of punishment. It's a preliminary sort of matter. There's at least one court of appeals it's held at, uh, investigating people for their First Amendment activities is a First Amendment violation. But even aside from the court holdings, it has just... I, if, if you've been around universities very much, you learn that oftentimes the investigation is the punishment.

[00:52:49] That, uh, for students who are in a very vulnerable situation to be, you know, forced to, to appear before some administrator and explain themselves and happy asked to apologize and so forth. That is itself, uh, a real sanction and is, uh, and certainly has a, uh, a chilling effect. There was a recent incident at Yale Law School where a student, uh, sent out a message in which he was inviting people to a party at his home and referred to his home as a "trap house."

[00:53:22] I'd never heard this expression before and still I'm not quite sure, uh, uh, what it means. But other students claim that this was a racist reference of some sort. Uh, and he was hauled before administrators who demanded that he apologized. And said that if he didn't apologize, that it would affect, uh, their, uh, assessment of him for the character and fitness portion of the, of future bar, uh, uh, examination.

[00:53:53] And to my knowledge the administrators who did this have not, not themselves faced any consequences for doing that. Uh, but that is, uh... That's, you know, plainly, uh, uh, a violation of, of what I think almost anyone would think to, to be the free speech rights of, of students. And I emphasize students partly 'cause that's... You know, [laughs] I'm around universities, but also because they're particularly vulnerable people to, uh, uh, to, to the consequences of these, uh, uh, actions. And I also think a lot of university administrators don't really understand what free speech is about.

[00:54:33] Jeffrey Rosen: Thanks so much for that. Eugene, I think the last word in this superb conversation is gonna be to you, uh, focusing on the interest and rights of students. Michael has suggested ways where an investigation itself might be deeply chilling. Do you have any other lines to propose like the one that you began with that formal public reprimands by universities of student speech are presumptively troubling? Are, are there any other forms of university action towards students that raise First Amendment concerns? And how should our listeners think about those?

[00:55:07] Eugene Volokh: You know, I, I, I wish I had much of a, more of a helpful lens. Or, uh, it's an important question. I just haven't thought in great detail about it. I do think that formal public reprimand is a pretty clear example. Uh, but, uh, maybe in informal public reprimands or formal private reprimands too. One problem with investigations, uh, with, uh, prohibiting investigations, of course is often the investigation is needed to figure out what actually happened.

[00:55:33] So was... What exactly was said? Was it constitutionally protected or not? Was there something that was done as well as what was said? If something was said, might it be evidence that something else was done or was being planned? Uh, so it's like, if I say, "I hate Joe Schmo." You know, that's constitutionally protected speech. I probably shouldn't be investigated, uh, based on that unless Joe Schmo ends up dead.

[00:56:01] In which case maybe the police might wanna look around and say, "Did I do more than just hate Joe Schmo?" Uh, so it's... These are complicated questions. I don't, I don't claim to have a clear answer to them, but I do think that this case reminds of us that these are questions that courts are going to have to be grappling with.

[00:56:16] Michael McConnell: Well, I think there is one, uh, sort of bright line for universities, which is that when, uh, s- student speech has complained of student speech and, or conduct, that before the university does anything they should ask themselves the following question. Assuming the accusations are true so that we don't need an investigation, assuming that they are true, uh, would they be something that the university, uh, has authority to punish?

[00:56:46] And if the answer to that is no, then there should be no coercive investigations or, or proceedings. That isn't to say that students can't be counseled because students are actually students and they're there to be... And, uh, the university has a right to counsel them, but, but in a non, but in a non-coercive way. But they simply shouldn't proceed, uh, if the, if the, uh, accusations are in and of themselves not sufficient to, uh, justify punishment.

[00:57:12] Jeffrey Rosen: Thank you so much for that. We will end only on the, uh, promise that you'll both come back to continue this vitally important conversation. On May 2nd, friends, dear We The People friends, the Constitution Center is unveiling our First Amendment tablet. The majestic 50 foot marble words of the First Amendment at the NCC will be having a series of conversations about the history and meaning of the First Amendment over the coming year.

[00:57:44] And this conversation between Michael and Eugene is a vital and illuminating part of it. Michael McConnell and Eugene Volokh for helping us understand these two crucially important Supreme Court cases, thank you so much for joining.

[00:57:58] Eugene Volokh: Thank you. Thanks very much for having us.

[00:58:00] Michael McConnell: Thanks for inviting me to be here.

[00:58:03] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Sheckler. Research was provided by Kevin Closs, Ruben Aguirre, Sam Desai, and Lana Ulrich. Please rate, review and subscribe to We The People on Apple, and recommend this show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional debate. And always remember that the National Constitution Centers is a private nonprofit.

[00:58:25] We rely on the generosity, the passion, the engagement of people from around the country who are inspired by our nonpartisan mission of constitutional education and debate. The crowdfunding campaign has been such a success, and I will look forward to sharing the results with you soon. But I'm so grateful to all of you who've contributed and also who are writing in to say that you like the show or that you have suggestions for improvement. So please go to constitutioncenter.org/wethepeople to donate. Or just write to me jrosen@constitutioncenter.org and let me know what you think of the show. On behalf of the National Constitution Center, I'm Jeffrey Rosen.