



## The Constitutionality of Florida's Education Bill

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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 non-partisan, non-profit chartered by Congress to increase awareness and understanding of the constitution among the American people. At the end of March, Florida Governor Ron DeSantis signed into law house bill 1557, also called the Parental Rights and Education bill. Critics call it the don't say gay bill. And we're here today to discuss whether or not it is constitutional and what it means. And we're honored to be joined by two of America's leading scholars, two great friends of We the People, and two thoughtful commentators to help us understand the best arguments on both sides of this important issue. Joshua Matz is a partner at Kaplan Heckler & Fink, and co-author of Uncertain Justice, The Roberts Court and the Constitution. He and his team have filed a federal complaint against the bill on behalf of Florida, parents, teachers, and students. Joshua, it is wonderful to welcome you back to the show.

**[00:01:13] Joshua Matz:** Thank you for having me. It's a pleasure to join the conversation.

**[00:01:16] Jeffrey Rosen:** And Eugene Volokh is Gary T. Schwartz distinguished professor of law at UCLA School of law. He is the author of the textbook, The First Amendment and Related Statutes and founder of The Volokh Conspiracy blog. Eugene, it's wonderful to you... have you back as well.

**[00:01:30] Eugene Volokh:** Always a very great pleasure. Thanks for having me.

**[00:01:33] Jeffrey Rosen:** Joshua, let us begin with an important question. What does the law say and what does it mean? I'm just gonna read one relevant sentence, uh, from lines 97 to 101. "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade three or in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards." Tell us what that and other parts of the law say and what they mean.

**[00:02:07] Joshua Matz:** Thanks so much, Jeff. You know, and I, I think the text of the law is absolutely the right place to start here. One of the claims in the case is that the law is unconstitutionally vague. So I'm gonna tell you what the law says and how it works. I'm gonna struggle a little bit to tell you what it means. We actually think that's one of the problems with the law. But I'll highlight the specific ways in which I think the law creates some real uncertainty

in ways that, uh, have quite rightly caused a lot of alarm and led some people to derogatory refer to it as the don't say gay law. So as you mentioned, what the law most immediately prohibits and its relevant part is quote, "Classroom instruction by school personnel or third parties on sexual orientation or gender identity." It says that that may not occur at all in kindergarten through grade three, or for students above that all the way, presumably up through the end of high school in a manner that is not quote, "Age appropriate or developmentally appropriate." End quote.

**[00:03:05]** And at some point in the next year or two, the state will issue standards to define what's appropriate for students in grades four through 12. Um, but the law goes into effect immediately. And so that, that's, that imposition actually takes, takes effect in, in July. So that's what the law says. The way the law is enforced is that if the parent of a student has a concern about compliance with these requirements, they can either go and file a complaint with the school. And if they don't get a satisfactory or timely resolution, they can go to state officials and get a special magistrate appointed, or they can just file a lawsuit directly against the school board seeking damages, seeking money damages on the theory that the violation of the law, that they would allege entitles them to some kind of financial recovery. So that's the basic operation of the law.

**[00:03:51]** Let me just sing a few notes about what we think the concerns are here, and then maybe Professor Volokh and I can go back and forth, 'cause I'm sure we'll have some different thoughts about how this works in practice. Here's where I would start. This is not a sex education law. Florida already has laws that govern sex education, and that require that any ex- education about human sexuality occur in an age or developmentally appropriate manner. And we're perfectly... everyone is perfectly comfortable with that rule. Um, so this is not a law that aims at sex education. That's already taken care of. This is a law that goes further than that. It prohibits something else. It prohibits quote, "Classroom instruction by school personnel or third parties on sexual orientation or gender identity."

**[00:04:34]** So one big question in thinking about this law is what counts as quote classroom instruction? Is that something that's part of the formal curriculum that is created by the state or by the school board or by the teacher, or does it instead include essentially anything else that happens in the classroom? Interactions between teachers and students, interventions by teachers in disciplinary matters, uh, times where the teacher is just talking about their summer vacation or their free time, uh, moments where the teacher is answering off the cuff questions from students or during recess?

**[00:05:05]** So one, one set of questions is around what it means for something to be classroom instruction and how much conduct this covers. And there's at least some indication that it isn't just limited to formal, formal curricular instruction because it also refers to third parties and not just school personnel. And ordinarily, we don't think of school personnel and third parties as engaging in curricular instruction. So there's some suggestion that it goes beyond what the teacher says, that it covers all school personnel and anyone else that engages in something like classroom instruction. For example, wonder if a parent comes in during career day and talks about their job and makes a reference to their spouse and how their spouse has provided such loving support for them. Are they providing classroom instruction in the meaning of the statute?

The second potential issue that I would identify here is what it means to provide instruction that is quote on sexual orientation or gender identity.

**[00:05:57]** That's another really, uh, complicated term to parse. And you can imagine a lot of questions here. Presumably it doesn't just mean on being LGBTQ. Heterosexuality is a form of sexual orientation, you know, adhering to and, and identifying as the sex you're assigned at birth or being cisgender is a form of gender identity. And so when a statute prohibits any instruction on sexual orientation or gender identity, that could reach an enormous amount of stuff. If you think about all of the ways in which a student in a classroom might learn about what it means to have a sexual orientation or a gender identity. And I'll give another hypothetical, you know, imagine that a teacher assigns their students a book, you know, and this is a kindergarten class, it's a book about a kid who comes home and their parents are there and they tell them about their day and all the crazy adventures they had at school.

**[00:06:48]** A question is if the student goes home to their mommy and daddy, is that a form of instruction on sexual orientation? And if the student goes home to their mommy and mommy, is that a form of sexual orientation? Um, and if one of those is seen as a form of sexual orientation and the other isn't, then I think you've got some real questions about whether the law is discriminating by really only singling out variations from what is presumed to be the default sexual orientation or gender identity. The third, uh, and final area of ambiguity identify... and this, there are others, but these are the main ones, is what it means for education to be age appropriate or developmentally appropriate. So the law does provide that the state will provide standards to give some guidance as to the meaning of those terms, but those standards don't have to come out for a couple years.

**[00:07:33]** The law however, goes into effect in July. Which means that starting in July and after that parents can potentially sue their school boards for damages, if they feel that all the way up through the end of high school classroom instruction on these subjects is occurring in a way that is not age or developmentally appropriate. And obviously people might have a lot of differences of opinion about that. So I'll add one just final thought, and then I wanna pass it back to Professor Volokh, who I'm sure will also have some thoughts on the meaning of the law. Um, because of all these ambiguities that we see, that many other people see, one of the concerns is that where every parent in the state, every parent of a child in the state can sue the local school board for money damages if they think something inappropriate has happened, there will be a massive chilling effect.

**[00:08:16]** This is where the idea of don't say gay comes in. It's not that the law expressly prohibits teachers or anyone else from using the word gay, but it's that by having such a broad, vague indeterminate prohibition on what happens in and around schools and classrooms, the anxiety is that teachers and schools will be so scared about what the law might mean. And many of those fears may well be reasonably placed that they will err, in favor of just abolishing any recognition whatsoever of the existence or reality or integrity of LGBTQ people and families. And the results will be to essentially erase and write those people out of, of the narrative and of the life of the school entirely, in a way that really does in fact prohibit teachers, principles and so

many other people from literally even saying the word gay. And so that's a quick primer on the law and some of the concerns that led to our lawsuit.

**[00:09:09] Jeffrey Rosen:** Thank you so much for all that. Eugene, you've heard Joshua's arguments about the vagueness of the phrases, classroom instruction, sexual orientation, or gender identity and not age appropriate or developmentally appropriate. Uh, what do you think the law says and means? And what is your response?

**[00:09:27] Eugene Volokh:** Uh, right. Well, let's just step back a little bit and think about two ways of writing statutes. One way is you might think of the tax code way, although maybe even the tax code isn't fully this way. Which is, you define all the terms and you have a very long statute, maybe a whole volume of the U... uh, of, uh, the United States code that's, that's all about all of the various details. Um, even there, there may be some ambiguities, but you try to make it as unambiguous as possible because you know, there's a lot of money, uh, uh, turning on that and people need to know what, what they can do. That's... so that's one way, and there's a lot to be said for that way. There's another way, which is you set forth, uh, relatively general terms and then you count on courts to give them meaning.

**[00:10:11]** So for example, the copyright statute, uh, provides an exception for fair use and it's says, "Well, fair use, here's some general guidelines, some general factors to consider, but we'll... it was developed by courts in the first place, we are gonna leave it to courts as well." Uh, and then there are mixes, like the copyright act is an example of a very long statute, but some parts of it do leave a lot of decision making to the courts. Historically, by the way, most American statutes, uh, have been really fairly general and have left a lot to, uh, to courts to interpret. This seems to be a little bit in the second category, although not entirely. So it's true, classroom instruction might be ambiguous. If I just say in class... uh, uh, tomorrow in my law school class, uh, uh, "Oh, and I'm going, going out with my wife tonight," or if I were gay and were married to man, "I'm going out with my husband tonight." Is that classroom instruction on sexual orientation? I'm inclined to think not.

**[00:11:06]** Um, uh, on the other hand, if I were to teach a class about sexual orientation in the law, or even one particular class session, or even half an hour of my class session, that sounds like it may be class room instruction, at least on sexual orientation in the law. So I think this is the kind of term that has considerable meaning. It's not like classroom instruction, "What on earth does it mean?" Now we have a pretty good sense, but you know, there may need to be some working out by courts as to, as to meaning, that's what I expect will happen. Likewise, what is on sexual orientation or gender identity? I totally agree that that includes heterosexuality, uh, and non-transgender status as well. Uh, my sense is most... is that most of the references to just ordinary heterosexual life, which is the majority of human life, uh, uh, is, uh, not going to count as classroom instruction, but there is some uncertainty as to what that means.

**[00:12:02]** I, I don't think that there's that kind... same kind of a certainty as to sexual orientation or gender identity, which after all are terms that are used routinely in anti-discrimination statutes and the like. Then there's this question about state standards. And as I interpret the statute, it prohibits two things. It prohibits classroom instruction, again, whatever that means on, uh, sexual

orientation or gender identity in kindergarten through grade three. And then it separately prohibits in a manner that is not age appropriate or developmentally appropriate in accordance with state standard. So my sense is before there are state standards published that second prohibition just doesn't kick in. Because nothing that I might teach if I were a seventh grade teacher would be, uh, not appropriate in accordance with state standards, because there are no state standards that tell me it's inappropriate. But once there are state standards, I would have to adhere them.

**[00:12:52]** Um, so, and the, the, the last thing that I wanted to mention about the purely interpretational question, uh, is about the, uh, third parties. I think it's quite normal to have instruction by guest speakers. So if I were to invite... if I were say a second grade teacher and I were to invite a guest speaker, who's, who's going to be instructing the students about, about, uh, uh, say, uh, lesbianism or, uh, being transgender. Then in that case, that would be prohibited because one could indeed have a guest speaker instruct. On the other hand, if the guest speaker's talking about, uh, uh, what, what it's like to work... uh, to be a justice of the State Supreme court and in the process mentions, "And by the way, I decided a case having to do with sexual orientation." Or for that matter, my... uh, the speaker is a woman and she says, "My wife, uh, is a real... was really supporting me well on this."

**[00:13:46]** I don't think that would count as instruction, whether it's coming from a third party or from school personnel. So that's what I think, uh, uh, is likely... we are likely to see. As with many, many new statutes, and certainly as with constitutional provisions, which are famously left to courts to decide in considerable measure, first amendment being one example, um, there's going to be some judicial decision making. There's gonna be some litigation and some of the costs and some of the uncertainties of litigation. But I imagine that, that things will settle down pretty quickly and there will be a pretty clear, uh, line... as with all lines, there'll be some vagueness long the edges, but still relatively clear line as to what counts as in- as instruction, whether by school personnel or third parties. And then we'll also... presumably we're gonna have state standards on this, uh, uh, with the very same forces that produce the bill presumably would produce... uh, would cause this standards to be produced.

**[00:14:36]** And then of course the question will be what the state standards are like? Or maybe the state standards are very bad or very vague. That would be bad, but we'd have to wait it for those standards to appear. Now there's a separate question of even if it is vague, is that a constitutional problem? And I'm not sure it is, but I think, uh, uh, uh, we're quite right to, to talk first about the interpretation of the statute. And then I'm hoping right now, perhaps we're gonna turn to the constitutional issue.

**[00:15:02] Jeffrey Rosen:** Thanks so much for that. And yes, indeed, let's turn to the constitutional issue. Joshua, your complaint argues that the vagueness of the law reveals its discriminatory purpose and effect, that it causes tangible harms to LGBTQ parents, teachers, and students, and that it violates the due process clause of the 14th amendment, the equal protection clause of the 14th amendment and the first amendment right to receive information and the first amendment right to freedom of expression. Tell us about those constitutional objections to the bill.

**[00:15:33] Joshua Matz:** Absolutely Jeff. And, you know, before I, before I turn to the constitutional issues, it probably makes sense to spend just another minute on the, on the statutory interpretation. But I, I will say this about the vagueness point, 'cause it will come, it will come back to it. A law is unconstitutionally vague under the constitution, under the due process clause, if, uh, a reasonable person, an ordinary person wouldn't understand what the law allows and prohibits or if it invites a regime of arbitrary and discriminatory enforcement. And as I think we'll see as we talk about the statute, both of those concerns are fully implicated here.

**[00:16:08]** Um, and, and I think that actually makes sense to go back to some of what Professor Volokh said, which I thought was very helpful. You know, the, the, the first reaction I have to what he said is, you know, of all the interpretations that might be adopted, I, I would love it to be the case, if an interpretation, as narrow as his came to prevail, you know, to the extent the law is allowed to stand at all, you know, if it were really limited in the way he suggests.

**[00:16:32]** But I have to be honest, you know, I, I read legal texts for a living, so does Professor Volokh. You know, the, the moves that he made to arrive at that interpretation are hardly self-evident. And there are a lot of arguments that I have no doubt will be made. And some of which already have been made, that it applies a lot broader than that. And so on the face of the text, you know, Professor Volokh confidence in his interpretation is admirable, but I have to say as much as I would prefer some narrowing interpretation of the law, I, I think a lot of people have understood it to apply more... a lot more broadly. And that's not because they're failing to read the statute correctly. It's because the statute is extraordinarily broad. And while it's true that we allow standards, broad standards in some area of our law, sometimes the presence of those standards... that... sometimes they're so broad that it raises constitutional questions. And sometimes they're so broad that it invites on constitutional discrimination. And that's the kind of concern we're talking about here.

**[00:17:25]** And I, I should emphasize before... you know, and I will get back to the vagueness point, I promise. But one of the, the real difficulties is that not only are Professor Volokh's, interpret of the statute hardly self recommending, there, there are many people who read it differently, is that they're really inconsistent with what the people who wrote and enacted the statute, and many of the people who support the statute say and believe it means. And so it's great that a law professor out in California reads the statute this way, but a lot of officials and legislators and the Governor in Florida have read it quite differently. And when you look at how they talk about how the law will operate, there have been very clear, homophobic and transphobic comments, very clear statements about wanting to prevent gay people from feeling like celebrities.

**[00:18:08]** Uh, the suggestion that if you oppose this law, you must be a groomer or a pedophile, or looking to try to somehow recruit children into sexual activity. Uh, these are some of the ugliest tropes of a frankly bigoted worldview. And the notion that acknowledging the very existence and reality and integrity of LGBTQ people and their families, some how inappropriately sexualizes children, or somehow recruits them to the cause. I mean that, that kind of talk, that kind of thinking, which is all over the place right now... If you, if you live in Florida, if you live in some of the states where these bills are being considered, that rhetoric, isn't just

reserved to ugly corners of the internet, it's increasingly reserved to sort of open discussion in certain political circles. And it's increasingly embraced by some of the folks, including those who wrote and enacted this law and who gave those as reasons for why they wanted to do it.

**[00:18:59]** And when you see them talking about how they expect the law will work in practice, none of them believe that this would prohibit a kindergarten teacher from assigning a book in which a kid comes home to their mommy and daddy. But they most certainly believe it prohibits the assigning a kindergarten a book in which a student comes home to her mommy and mommy. And so it's... the, the idea that this law was written to discriminate and to chill and to terrify and to scare teachers and students and parents into feeling like they can't acknowledge at all, any, you know, LGBTQ identity. Um, that's not some fanciful idea, that's not an overreaction. It comes from a reasonable reading of the law. And it comes from the messages that a lot of people are hearing from people who wrote the law and are charged with enforcing the law.

**[00:19:41]** And, and that's where I think it's important to emphasize the, the sort of social meaning and context of this statute separated in a lot of important ways from say the copyright act or some of the other types of statutes that Professor Volokh had in mind. And, you know, at the risk of stating the obvious, the short term, the immediate effects of this law, you know, he seems... Professor Volokh is sort of... fairly copacetic about like, "Oh, it'll take a few years and it'll work itself out." You know, I might have a kid myself in school in just a few years, uh, my husband and I. You know, and it really concerns me to think that if, if a student in their class says, "You know, why does Johnny have two daddies?" That there could be a real cloud of legal uncertainty, that the school could suffer money damages if the teacher gives any kind of an answer at all to that question.

**[00:20:26]** And that's what parents are facing in real time. Parents are afraid that their kids will be going to school and learning that their families and they are different and less than. And worse, their parents are afraid that they can't themselves participate in the life of the school. Teachers are afraid to talk about their own families or to engage with their students in a way that creates an open and welcoming educational environment. And schools are scared that parents on every side of the political spectrum, we're gonna sue them in really expensive ways, uh, that lead them to adopt policies that really chill LGBTQ rights. And we already... I don't have to guess about that. We see it happening all over the state of Florida. So I, I would just put all of that on the table as food for thought, as we think about the questions Professor Volokh raised, and as we reflect, and I'm happy to keep doing this on the vagueness of the law.

**[00:21:11]** And, and I would end with just a couple... I wanna be specific 'cause I... Professor Volokh identified, you know, "Well, if the teacher came in and instructed on lesbianism, that would be prohibited." I don't know any teachers who in kindergarten are coming in and delivering day long lectures on lesbianism, but fine. If that's what he thinks this law was enacted to prohibit, so be it. You know, and then he says, "It would presumably be fine if they just said, I'm going out tonight with my same sex spouse." I have to tell you, there are a lot of teachers in Florida who don't feel the comfort about that, that he does, uh, and for good reason, and for good reason. And there are certainly parents who I am confident would sue a school if a teacher did say that in class and it could, create some real short term harm.

**[00:21:49]** So I would just... I would highlight... and I wanna give a couple hypotheticals, 'cause this might sharpen the issue here. Think about a circumstance where Johnny comes into school and one of his classmates raises their hand and asks the teacher, "You know, why does Johnny have two mommies?" What can happen next? Or a circumstance where a teacher asks a bunch of first grader to draw a picture of their families. And a few of the students draw pictures of their families that include same sex parents, is the teacher allowed to put those pictures up on the classroom bulletin board with all of the other kids families? Can none of them go up on the school board because instructing kids to draw their families that include opposite sex and same sex marriage is inherently instruction on sexual orientation?

**[00:22:31]** Or imagine a teacher that wants to have a picture of their spouse on their desk, same sex or opposite sex and sits behind that picture the whole day. So their students see it the whole day as they look up at the teacher, instructing them is that instruction. These are not hypothetical. These are questions that thousands of teachers are going to have to answer and school districts and parents and students. And, and this is where... I'll be honest, it's not clear to me that the law is quite as clear or easily amenable to a resolution as the professor suggests it might be.

**[00:23:01] Jeffrey Rosen:** Thank you so much for all that. Eugene, uh, you've heard Joshua's arguments, including the fact that the law's discriminatory purpose and in fact are revealed in its legislative history. And he raised a series of hypotheticals, including, uh, the claim that teachers can't answer questions about why Johnny has two mommies or can't post pictures of same sex families or photos of same sex spouses without uncertainty about whether they're violating the law. What is your response?

**[00:23:27] Eugene Volokh:** Well, so this is actually a good opportunity to start, start talking a little bit about the constitutional questions because they, they end up of course overlapping. Um, so one thing again, to keep in mind is that, uh, uh, there's a good reason why many courts are reluctant to look at legislative history. Lots of legislators say lots of things. Uh, lots of public advocates say lots of things. The real question is going to be how judges interpret the statute because that's their job that for even in the vagueness analysis, we usually interpret the statute, determine whether it's vague or not, as it has been interpreted by courts, including maybe by this very court, rather than just looking at the text. That's... the nature of our, of our legal system may be different than other countries, which take a more civil law approach where it's all about the words, at least supposedly about the words of the statute. But, uh, uh, but we have judges figure out what a statute means and I wouldn't focus, uh, unduly on, on what, uh, state legislators say.

**[00:24:28]** So how might a judge interpret this? So one way of thinking about it is, imagine that Mr. Matz had, uh, uh, on the wall behind him right now, a picture of himself and his husband. Would we think he is in... this is instruction on sexual orientation? Uh, I doubt it. I doubt it. Uh, I just, I don't think that fits within the normal English language meaning of instruction generally speaking. And I think courts are likely to interpret it t- this way. At the very least it's, it's something that, uh, uh, that I, I would hesitate to say the statute is unconstitutional vague until we give the courts chance, uh, uh, to, to interpret it, uh, that way. On the other hand, if, uh, if a student asks, "Well, what does it mean to have two mommies?" It does sound like he's asking for



some instruction. One way of thinking about it is let's imagine that there was a law that prohibited instruction on religion in public schools.

[00:25:24] If a teacher were to have a picture of himself at the, uh, at, uh, I don't know the... uh, uh, the christening of his child on his... uh, uh, or even had a Bible on, on his own desk, I would say, that's not instruction. It's true some people might look and say, "Oh, this person must be Christian. Maybe they're interested in Christianity as a result," not instruction. On the other, if somebody asks, say, you know, "Teacher I've heard all this stuff about transubstantiation, what is that?" Or even, "There's Catholics and Protestants, tell us of the difference between Catholics and Protestants?" Then maybe the teacher might say, this could be instruction, not in religion to be sure, but instruction about religion. And you could imagine a school saying no instruction in religion, uh, from first, uh, to third grade. And then, um, beyond that only in a matter that's, uh, uh, consistent with state standards.

[00:26:16] So, but now let's turn a little bit to the constitutional question. So the vagueness doctrine is tremendously important when the government tells people what they may or may not do on pain of being thrown in prison or on pain of them personally being sued. But when we're talking about the government issuing instructions to its political subdivisions, right, the, uh, uh, governor issuing instructions to agencies, let's say if he's in... if controls them. Or for that matter, uh, a, uh, state issuing instructions to local school boards, that due process clause of vagueness doctrine just doesn't apply. And in fact, it's quite common for within a, an hierarchical organization, whether it's a... uh, including a governmental organization to have general guidelines. You have to provide efficient service. You have to be polite to customers. So without, without any clear definitions, it would be, it would be clearly unconstitutional if that were a criminal statute, but not when the government, uh, uh, tells, uh, say school boards or the legislature tells school boards what to do.

[00:27:20] So here's an, here's a quote from the case, *Ysursa v. Pocatello Education Association* from the Supreme court in 2009. That was a first amendment case, but the analysis is the same. Um, "A private corporation enjoys constitutional protections, but a political subdivision created by a state for the better ordering of government has no privileges or immunities under the federal constitution, which it may invoke in a position to the will of its creator." So that law authorizes, uh, lawsuits against a school board. Uh, but, uh, that's just the government, state government kind of telling its uh, uh, subdivisions that they have to do certain things. And I don't think the due process vagueness doctrine applies here. Now to be sure, of course, that also applies to government employees, who are ordinary people, they're not political subdivisions.

[00:28:11] But at least in K through 12 schools, the answer rightly or wrongly might be different in colleges, public colleges and universities, but as the K through 12 schools, generally speaking employees speaking on behalf of the government, as teachers are in a class room, don't have first amendment rights, or I would say due process clause void for vagueness doctrine rights, vis-a-vis the government when the government tells them what to do. So, one example is you could have a state statute that says, teachers shall not be rude to parents, and if they are rude, they might be fired even. You know, maybe that's a little on the vague side, but I don't think that's, that's gonna be [inaudible 00:28:48] on as unconstitutionally vague.

[00:28:50] Uh, likewise, if the, uh, statute says, teachers may be fired for poor quality education. If somebody says, "You can be thrown in prison for offering a poor quality education," that's clearly unconstitutionally vague. But when this is a guideline for government employees, then it seems to me, even phrases that are that vague just are not unconstitutional, uh, when you're talking about the government telling employees either of the state or of state subdivisions, such as local governments, uh, what, uh, what to say.

[00:29:19] So that's why I'm pretty skeptical that avoid for vagueness, uh, argument or a first amendment argument would work here. Now, there is of course also the separate question of the first amendment rights of students, but the Supreme court has made clear that the government is entitled to control school curriculum. Now withstanding any first amendment rights of students, that's in the Pico case, I think majority of the court agreed on that. So, you know, if a student says, "You know, I feel I have a first amendment right to get in... to get education on any subject... let's say free speech clause, right, to get education in, any, any subject." The answer is always no, it's up to the, the government to decide what education to offer.

[00:29:59] You know, you could certainly have a first amendment right to acquire this information outside the public school, or maybe even in the public school library, that's an interesting question. But when it comes to the curriculum, it's for the government to set. The last point I wanna mention just because it came up, and of course we'll have plenty more opportunity I'm sure, to, to, to focus on the constitutional questions is, well, is this an equal protection violation, uh, uh, equal protection rights of gay, lesbian, transgender, uh, parents and children and such? I don't think so. I don't think that the equal protection clause controls school curriculum. If the school wanted to teach, not that I would encourage it to teach, but wanted to teach that look, same sex marriage is constitutionally protected, but we're not in favor of it. And we would like people... more people to be, to be straight than gay. Even if some people don't have a choice in this, if you're BI, we would like you to be, to, to... if you're in preference, we would like you to be straight in action.

[00:30:51] That's not something I would encourage the government to do. And in fact, under this law, the government wouldn't be allowed to do it in the first three grades or later, uh, except consistent with state standards. And I hope state standards wouldn't allow that. Uh, but I don't think there's... would be anything unconstitutional, but I think the government can express preference for, uh, certain sexual orientations or, or sexual identities. And I think to the extent the government controls its own curriculum to reflect that, it seems to me that that's not unconstitutional. Although if that were what was happening, then it may very well be unwise.

[00:31:23] **Jeffrey Rosen:** Lots to respond to, uh, Joshua, including Eugene's claims that first, when a state government tells a subdivision what to do the void for vagueness doctrine doesn't apply. Employees speaking on behalf of the government don't have first amendment rights or void for vagueness rights. The government is entitled to control school curriculum, not withstanding the first amendment rights of students. And there's no equal protection violation as well. Your response.

**[00:31:49] Joshua Matz:** Of course. You know, and, and I should say, first of all, there's a lot there, so I'm... I probably won't get to all of it and I, I apologize. Second, I, I just wanna emphasize how much I appreciate Professor Volokh thoroughness and thoughtfulness about this. I just wanna... it's sort of worth pausing to say that I'm about to say somethings that are pretty sharply critical of what he just said. But I wanna highlight that, you know, one of the things I love about this podcast is that it models a form of civic discourse on these types of issues that is, I think so often lacking, um, and certainly the [inaudible 00:32:16] on the left and right about this law. Some of them have been quite extreme. Um, in my view, particular... I, I don't view there as a moral equivalence between people on the left worrying about a don't say gay law and people on the right accusing all gay people of being groomers or pedophiles.

**[00:32:30]** So I don't think there's a moral equivalence in the extremeness of the discourse around this. Um, the right wing discourse around this has endangered the very lives and safety of LGBTQ people and their children. But, um, but I would highlight that I, I do think this way of talking about it, uh, is such a virtue. Uh, and, and I... so I do appreciate what Professor Volokh said. That said, I have to admit, I, I'm not moved by a fair amount of it as you might expect. Um, and I guess where I would start though, 'cause I do wanna start with where we agree is, we do agree that schools have broad control over their curriculum. We do agree that the government has broad control over what its employees say in their capacity as public employees. We do agree that students do not in general have a constitutional right to demand a particular curriculum, um, with some important exceptions that I'll talk about.

**[00:33:15]** And we do agree that laws that are standards are permissible, that not... you know, you don't need to understand every jot and tittle and every conceivable application of a statute for it to be constitutional, if that were the case the Supreme court would be outta business, 'cause they spend most of their time trying to interpret some pretty complicated laws. So there is some common ground. Where I think we differ is that I think there are some limitations on those principles, um, that Professor Volokh probably agrees in some degree, maybe we agree they exist in theory and we disagree on whether they apply here. But I do think there are some limitations. And I'd like to start... I'm gonna try to work in reverse order of the points that the professor made. Um, but I wanna start with this point, which is that he didn't actually give an answer to any of my hypotheticals, nor has he explained how you would answer most of the hypotheticals we pose in our complaint. And uh, you know, and if he gave an answer, I have to admit I missed it.

**[00:34:03]** You know, he, he thinks that a teacher sitting at a desk behind a picture of their spouse is probably okay. Maybe that's the one I identified that he responded to. I have to tell you, there are a lot of parents in Florida who I'm sure won't agree with that. And there are some people who wrote this law who definitely think that's not okay. And you know, th- this idea that a lot of really hard questions are gonna come up, but like, let's just leave it to the judiciary and hope for the best over the next few years is something that will be extremely cold comfort to, you know, parents like me who are sending their children to school and don't want their children to get a second rate or a skim milk education because they're made to feel like outcasts and they're made to feel like their families are different and less than, or because they're made to feel

like their families can't even be talked about and their existence and their integrity can't even be acknowledged in schools.

**[00:34:49]** You know, when you think about Obergefell and Windsor major premises of those decisions were not about just the integrity of same sex marriages, but about their children and about the families they form. And this is a law that is designed in purpose and that will in effect risk subjecting the families, say LGBTQ families, uh, and, and children in schools to, to real concrete disadvantage, uh, in an environment where the goal should be to create an open, welcome environment that socializes people and allows them to grow and, and, and become educated. Um, there's, there's a risk that it will, it will reinforce and draw some pretty ugly lines. So that's, that's the first point I would make. And, you know, there's a lot of other hypotheticals I could give.

**[00:35:28]** Can a parent, like I said, talk about their, their, their loving spouse at their career day? And that the answer seems to be, well, it depends on how much they say. You know, if you have students that are bullying each other on, on overtly homophobic grounds, can the teacher respond to that other than to generically say that bullying is bad, right? If a student says in class, "I think all gay people should burn in hell." Is the teacher allowed to offer any response to that at all? Or do they just have to be quiet for fear that someone's gonna sue them when they say something in response? You know, and the example that Professor Volokh gave, which was, "Well, let's think about how we handle religion." I have to admit, I thought it was an interesting one because the way we think about religion now, and this might change at the, at the Supreme court, but the way we've thought about religion for some time in this country is that teachers can teach about religion.

**[00:36:15]** They can identify religious diversity, they can celebrate religious diversity in classes, they can talk about and teach about things like what, what is Hanukkah? What is Easter? It'd be weird if there were... if, if, if a student said, "It's Christmas, what's that?" And the teacher were like, "I can't tell you." Uh, you know, what they can't do is proselytize. And what they can't do is engage in overtly sectarian religious behavior in the classroom that disenfranchises or alienate students. And, you know, I don't know of a lot of gay people who come into the classroom and wanna... we're not talking about a circumstance where you have a teacher teaching about the existence of same sex marriages, where you have teachers talking about these sort of existence in reality of LGBTQ people and their families. I don't think of that as proselytizing.

**[00:36:58]** I think of that as falling on the same side of the line that we think of as... when schools are able to teach and talk about religion and to knowledge and welcome religious diversity. And the instinct I have to admit that you hear from some of the people who enacted this law is they think that by their very mere presence, or by the mere acknowledgement of the reality of LGBTQ people, they are doing something like proselytizing, the words they use are grooming or **[predaning 00:37:21]** or recruiting, right? It's the same instinct that somehow the very presence or reality of LGBTQ people is somehow nefarious, somehow trying to win people over to the cause. I have to admit that strikes me as just prejudicial and unfounded for many reasons. Um, but, but when you think of about the religion sexual orientation analogy, I would just emphasize, I actually think it can be a very productive one.

[00:37:45] And that the way that we think about schools allowing people to talk about and instruct on and welcome religious diversity without proselytizing, um, is may- maybe a useful model for the way we would think about this. But let me just offer some very, very quick points about Professor Volokh's point. The fir- the first is that on the equal protection side, I'll work backwards. His... what, what you... what I took the professor to be saying is that the school basically can express an anti-gay message, um, or an anti-trans or an anti-bi message, it just can't in fact, discriminate against students. Title IX, uh, a federal law would prohibit that in Title VII would prohibit as to their teachers and public employees. I wonder if the professor feels that the school could have is, its official curriculum that like white people are better than black people or that one, uh, ethnic group is better than another? I'm assuming he doesn't. I hope he doesn't. If he doesn't-

[00:38:33] **Eugene Volokh:** No, I, I don't believe that's unconstitutional. It would be a very bad idea, but I just wanna make clear, I don't think that's unconstitutional.

[00:38:41] **Joshua Matz:** Fine. Okay. Then look then maybe you and I just disagree on this. Which is that I, I do think the establishment clause and the equal protection clause impose some limits on government speech. The Supreme court has acknowledged that in numerous cases, many justices of the court have done so. And the idea that when the government speaks, it can express whatever message it wants, especially in public schools where it's shaping the next generation of citizens, is one that to me is deeply concerning. But look, if that's our disagreement, it is what it is. You think that schools can do that, I don't think they can constitutionally. I think a lot of laws supports me on that. Um, and [laughs], you know, and sort of that is what it is.

[00:39:14] On the vagueness and the first amendment points, again, I read the same cases you do. You know, my reading of them is that where the state lacks a legitimate pathological purpose or where it acts with the intent to discriminate on the basis of protected characteristics or where it acts on the basis of an impermissible ground, it really does hit up against the outer limits of its power to shape the curriculum in the school environment. Uh, and that when designing a curriculum, there are some lines that can't be crossed. And we think this is that extreme law that does hit up against those lines, especially given the apparent expectation of those who drafted it, that it won't apply to sexual orientation generally, or to gender identity generally. But that it will in fact, narrowly target for singling out an exclusion specific sexual orientations and gender identity, and the children of people who, who come from that, who come from that background. And so we, we think we have a, a pretty strong, constitutional case here that we're prepared to, to present to the court.

[00:40:10] **Jeffrey Rosen:** Uh, Eugene, I hear you and Joshua disagreeing first about whether the equal protection clause imposes limits on the messages that schools can offer to their students, as well as whether the vagueness and first amendment doctrines limit a state when it lacks a val- valid pedagogical purpose, um, from crossing certain curricular lines. What is your response? And do you think there are any limits to what a legislature can compel a school to teach or not?

**[00:40:40] Eugene Volokh:** Let me just, just step back. And, uh, let's think about the question of curriculum. Somebody's gotta decide what's gonna be taught in the classroom. It could be a teacher. And in fact, in universities, that's been the practice that the teacher generally decides with very, very loose guidance, uh, what's gonna be taught in the classroom and how it's gonna be taught. It could be the principle, but I'm sorry. So that, that, that... so you, you could have that, that's generally not the approach that K through 12 schools take. Although they often do leave considerable discretion to the teacher, just because micromanaging can be ineffective in various ways. Could be the principle. The principle could either say in the first instance, "Here's how you teach things and here's what you teach." Or could say, "Look, you can teach how you like, but if I don't like it, then I'll tell you to change."

**[00:41:24]** It could be the local school board. It could be the state legislature. There are great public policy arguments for any one of those positions. But I think as a constitutional matter, I don't think there's any constitutional right of the teacher to make that decision. I think that the teacher is an agent of the state, an employee of the state, to the extent he's an employee of the local school board, that is a subdivision of the state. And there's basically... uh, the first amendment does not speak to who makes that decision. Now, it is true that the established clause has been read as limiting the power of anybody, whether the teacher or the, uh, school board or the state legislature, or the principal, uh, limiting their power to advocate for, or perhaps against any particular religion. Uh, you can debate whether that's right or wrong, but in any event that's been quite limited to religion.

**[00:42:19]** As to the, the equal protection clause, I know people have made this argument, uh, former colleague of mine, uh, a law... a prominent law professor, uh, made an argument that, uh, uh, for example, including the Confederate flag... uh, on some state flags is unconstitutional because it conveys a racist message. I don't think courts have generally accepted that. Courts have read the establishment clause as limiting teaching in favor or against a particular religion, but I don't think they have as to equal protection clause. This may end up being a tremendously important issue because at least some of the things that some people are... want to see taught in schools about white privilege and in some situations, at least the argument is white guilt for certain kinds of, uh, kinds of past, past actions are perceived rightly or wrongly, but are perceived by some as being racist against whites.

**[00:43:08]** Uh, and, uh, uh, I, I think we've already begun to see lawsuits along these lines. And we certainly we'll see more, claiming that a school may not teach racial responsibility or racial guilt or other things that a reasonable person would perceive as reflecting badly on whites, or certainly reflecting badly on blacks and Asians and, and others as well. Uh, I am not the supporter of those kinds of lawsuits. I'm not a supporter of teaching about white privilege in school either, but that's my own particular position. I just don't think the first amendment or the equal protection clause speaks to the question of what theories can be taught. Likewise, with regard to sex. You know, there are definitely differences between men and women as a statistical matter, certainly physical, possibly mental as well. It's an interesting question. And if a school were to try to teach that men are better than, uh, women at some things and women better than

men at other things, I wouldn't be wild about the school doing that, but I don't think the equal protection clause speaks to that.

**[00:44:08]** Conversely, if a state legislature wants to pass a law saying, "We do not allow any of our public schools to teach certain things with regard to race or with regard to sex." I don't think the first amendment speaks to that either. I think that the setting of the curriculum, even with regard to hot topic issues such as race and sex and sexual orientation and gender identity is a matter for the political process. Again, with the religion, the court rightly or wrongly said that's different because of the establishment of the religion clause, but setting that aside, it's a matter for the political process. The political process might screw up in very serious ways on this, but I don't think that, that either the first amendment or the equal protection clause authorizes judges to say, "Well, no, this way of setting the curriculum is racist or sexist or, uh, or, uh, anti-gay or whatever else," whether it's racist against blacks or whites or anybody else.

**[00:45:01] Jeffrey Rosen:** Joshua, Eugene has argued that with the exception of the establishment clause, uh, the first amendment does not limit or speak about what theories can be taught in schools, nor does the equal protection clause. Uh, as you listen to him, is that the nub of your disagreement? Tell us why you disagree and, and what you... what limits you think the Supreme court has and would impose. And maybe I'll put on the table now, a, a Mississippi law, which has passed and prohibits K through 12 and higher education institutions from directing or compelling students to adopt or affirm certain ideas related to sex, race, ethnicity, religion, or national origin, or make distinctions or classifications of students on the basis of race. How, how, how do you think We the People listeners should think about a law like that?

**[00:45:49] Joshua Matz:** Sure. All, all good questions. And you know, this has been a productive discussion, I think. The contours of the disagreement are, are coming out and, you know, there are reasoned arguments on both sides of this. I'll do what Professor Volokh has done on a few and just take a step back, right. So this, this law was enacted supposedly in the name of parental rights. The, the animating instinct behind the law as explained by its proponents is that they don't want schools to be in a position of teaching or instructing students on certain things. The difficulty is that when a, when a school is prohibited from potentially even acknowledging the existence of LGBTQ people and their families, or from, uh, welcoming them into the community that is itself not neutral, and it actually works great harm to the many other parents who also have rights and to the children who also have rights who want to be educated in an environment that isn't discriminatory and that doesn't through word indeed express that they are second class citizens that are unworthy of being treated with respect.

**[00:46:51]** And it's unfortunate to think of this into terms of a clash of rights. You know, and, and maybe a, a, a different way of coming at it is to say that, you know, schools do have broad control over a curriculum. You know, Professor Volokh is right. Someone has to decide what's gets, what gets taught. Generally speaking, that shouldn't be federal judges. However, there are circumstances where, where federal courts need to step in because the constitution isn't so indifferent, um, as the professor suggests to what happens in public schools. The establishment clause is a classic setting where that has been the case. Um, he and I read the cases differently. I think it's pretty clear that the equal protection clause does apply in, in school settings.

**[00:47:27]** And, you know, the, the, the, the world we would live in, if it didn't is a potentially concerning one, especially as we live in a more divided society with more polarization and an increasing distrust amongst some of the communities in this country toward each other. Because, you know, a circumstance where every local school board or every state can sort of without limit adopts is, its curriculum, that you should fear and despise and dislike and treat worse, or even refuse to acknowledge the existence of people that a majority of people in that school district don't like would, would be, I think it's fair to say pretty disruptive for our democracy. And that, you know, it, every parent has the right to raise their kids. Um, and you know, it's not like schools are meant to usurp that role. Um, and parents continue to have important involvement in schools.

**[00:48:15]** But one of the things that schools do in our democracy is sort of help create a shared foundation and socialize people into citizenship and inculcate very basic values and introduce us to people who aren't like us and give us the opportunity to figure out who they are and who we are and how we're gonna live together in a diverse pluralistic society. You know, and the, the, the understanding of the constitution of the school system, that Professor Volokh is describing is one that would really be across purposes with that understanding. And that I think would invite some really unfortunate trends as we think about what it means to live together in our country. And, you know, the, the wave of laws that we've seen recently, um, uh, challenge... you know, laws like this, you know, so call, don't say gay law in Florida, other laws that are meant to signal a repudiation of schools having, uh, talking about, or having views on, on protected characteristics of various kinds.

**[00:49:08]** You know, look, I... my attitude about this is to step back a little bit, at least because, you know, in the context of this case, I think it's fairly clear. Parents do not have a right, schools do not have a right, no one has a right to use public schools to target and discriminate against group... other groups that are protected under the constitution. Nor do they have a right to require schools to teach counterfactual information. Right. It, it'd be weird to think that, you know, there... you can force schools to teach that one plus one is three. And it's equally weird to... you know, to, to think that you could tell schools to, to say, you know, "We can't acknowledge or recognize the reality of LGBTQ people and their families." There have to be some limits. And here, I think what we see is that there's a constitutional floor and the professor and I disagree on maybe whether that floor exist and what it is.

**[00:49:53]** Um, but, but to me, again, just stepping back, you know, this, this statute creates a lot of confusion about what can and can't be said in schools by a great many people. It does so in a way that seems calculated to disadvantage and to exclude and subordinate LGBTQ people and their families. You know, the equal protect and clause imposes limitations on that. Those limitations apply against the government everywhere, not only in some settings. And the schools are a setting where the government acts. And to allow laws like this to proliferate in a wide range of settings is to invite social discord and to entrench forms of division and misunderstanding in the next generation, that in my mind would be radically disruptive and harmful to our ability to live together, uh, in a society where we have to acknowledge and at least respect and live with constitutionally protected differences.



**[00:50:43] Jeffrey Rosen:** Eugene, the last word in this very illuminating discussion is to you. If you could, uh, tell us what you think about the Mississippi law, which prohibits schools from directing or compelling students to affirm or adopt certain ideas about race, sex, religion, and ethnicity, and more broadly, whether you think the equal protection clause imposes any limits, uh, on the ability to tell schools what to teach in the way that Joshua describes.

**[00:51:10] Eugene Volokh:** Sure. So I haven't looked closely at the Mississippi law and I can't speak to it as a policy matter as a result, but I know enough to say that yes, a, uh, legislature is entitled to tell at least public K through 12 schools, the analysis may be different rightly or wrongly, but there's certainly precedent suggesting it's different for colleges and universities. But that it may say to K through... public K through 12 schools, "Here is what you can and can't teach about race." And it may be unwise, uh, uh, but that's left to the political process. More broadly, I think that a lot of the things that Mr. Matz points to which are potentially serious problems are left to the political process, where a lot of different considerations need to be taken to account. So some people think that it's really important that public schools teach certain things with regard to say sexual orientation or gender identity to, to affirm the presence of people like that and to say that, that, that, that it's good, that they are the way they are. Uh, and that, that brings more social cohesion.

**[00:52:13]** Other people take the view that having schools talk about these kinds of highly controversial issues in which we know there's a huge amount of, uh, of disagreement diminishes social cohesion and leads people to wanna pull their children out of public schools and say maybe send them to private schools or set up, or set up other or systems for having more such private schools. And that, that will end up causing more kind of vulcanization. Other people actually think more private schools is actually better for social cohesion. These are interesting and difficult questions. I don't think the constitution leaves them to federal judges. I think that they are generally speaking for the political process.

**[00:52:51]** Among other things, let's look at even one particular thing that I, I hope I recalled Mr. Matz's point correctly. Um, that, uh, the government can't kind of sharply criticize or condemn people based on their exercise of constitutional rights or, um, uh, their constitution, constitutionally protected categories. Well, in fact, there are various constitutionally protected categories, including political ideology that, you know, the government does condemn. Uh, do people have a first amendment right to believe that there is no global warming? They have every first amendment right to believe it, they have first amendment right to say it. First amendment right to join such organizations.

**[00:53:31]** But does that mean that a school can't say, "Oh, well, you know, that's a wrong view. And people who believe that are wrongheaded or even harmful to society?" I think a school would have that right. I would hope that the school, to the extent it does that it does that in a sensitive way that kind of bring in more students rather than, uh, rather than, um, alienates them.

**[00:53:56]** And maybe that's good reason for it not to do that. And of course there are lots of possibilities with regard to global warming and what the possible solutions are and such that, you know, maybe the schools shouldn't be too ideological about it. But I think, uh, we do allow that.

Likewise, you know, I'm a supporter of second amendment rights. The Supreme court has said, you have a right to own a gun. But if a school district wanted to teach kids that, you know, gun ownership is bad and gun owners are, are kind of, uh, [sus 00:54:19] people, I, I don't think that would be a good idea, but I don't think there's anything unconstitutional about that. Uh, so, so I think there are many bad ideas, there are many foolish ideas. There are many ideas that at least there's a good case or bad or foolish, although other people might think that there actually are beneficial in various ways that are left to the political process.

**[00:54:40]** And I think the design of the school... K through 12 school curriculum is one of them, even with regard to matters such as race, sexual orientation, sex, and the... and political ideology and gun ownership, uh, advocacy and the like. Um, and, uh, the establishment clause has been a narrow exception, but it has been tied to the fact there is an establishment of a religion clause and not an establishment of ideology or establishment of sexual orientation or whatever else, uh, clause. So I'm, I'm inclined to think that this is the kind of thing, one of very, very many kinds of things where, uh, it's not a question for judges, but a question for voters and for legislators.

**[00:55:21] Jeffrey Rosen:** Thank you so much, Joshua Matz and Eugene Volokh for a civil, thoughtful and illuminating discussion on, uh, hotly contested and difficult constitutional question. As you both suggested, you've provided a model for thoughtful debate about difficult constitutional issues. Joshua, Eugene, thank you so much for joining We the People.

**[00:55:41] Eugene Volokh:** Thank you so much for having us. And, uh, uh, Mr. Matz, thank you so much for, uh, uh, for, for participating. It's been such a pleasure to discuss this with you.

**[00:55:49] Joshua Matz:** The same to you, Professor. It's been a, an honor to have this discussion with you.

**[00:55:59] Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Greg Scheckler. 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 the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional debate. Uh, no plug for donations this week, except to say that they're always appreciated and what's most appreciated is your engagement in our wonderful community of lifelong learning. It's such a privilege to share it with you every week. On behalf of the National Constitution Center, I'm Jeffrey Rosen.