Vouchers, Prayers, and Religion in American Schools

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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. National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. The Supreme Court just handed down two major religious liberty cases, Carson versus Makin held that the state of Maine can't withhold public funding from families who want to attend religious schools and Kennedy versus Bremerton came out in favor of a public high school football coach who lost his job after leading prayers on the 50-yard line.

[00:00:42] Here to explore the implications of these cases for the First Amendment and religious liberty, we've invited two of America's finest First Amendment scholars. Michael Moreland is the university professor of law and religion and director of the Eleanor H. McMullen Center for Law, religion and public policy at the Villanova University Charles Widger School of Law. Michael, welcome to We The People.

[00:01:06] Michael Moreland: Glad to be with you, Jeff.

[00:01:07] Jeffrey Rosen: And Erwin Chemerinsky is dean of Berkeley Law. He's the author of 14 books, including leading casebooks and treatises and his most recent books are Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights and The Religion Clauses: The Case for Separating Church and State. Erwin, it is an honor to welcome you back to the show.

[00:01:28] Erwin Chemerinsky: Truly a pleasure. Thank you for having me.

[00:01:31] Jeffrey Rosen: Let us begin with Kennedy and Bremerton, the praying coach case, Michael, what were the facts of the case and what did the court hold?

[00:01:41] Michael Moreland: So in Kennedy versus Bremerton School District, Coach Kennedy was the assistant coach at this high school in Washington State and the facts are a little hard to get a, get a clear beat on, but basically over several years, he had engaged in some inspirational speeches, some leading students in prayer in the locker room and so forth. And the school district had begun to voice some concerns about this and so he stopped doing, uh, various things. He stopped leading students with prayers. He stopped doing inspirational talks. Uh, but then, the, uh, October of 2015, over the course of three games, he continued to pray quietly by himself at the 50-yard line after the games, and as a result of that, he was dismissed from his job.

[00:02:35] And so he brought a claim based on Free Speech and Free Exercise, saying that his dismissal is the disciplining of him based on his wanting to engage in personal private prayer, uh, violate his constitutional rights and six to three in an opinion by Justice Gorsuch. Uh, the court agreed with him and said that the school district's defense that it needed to discipline him because of its worries about the Establishment Clause were unfounded.

[00:03:00] Jeffrey Rosen: Thank you so much for that. Erwin, how would you describe the facts of the case and the court's holding?

[00:03:05] Erwin Chemerinsky: I would disagree Professor Moreland's characterization that he's prayed quietly or by himself. He was at the 50-yard line in a crowded statement. Often, the players from his team and the other team would join him. And indeed, in those last instances, he delivered a Christian inspirational message that included a prayer. So this was neither silent prayer nor alone. I think what the Supreme Court held, especially Moreland says, is that it violated Coach Kennedy's Free Speech rights and Free Exercise rights to not be able to pray in this way.

[00:03:38] Jeffrey Rosen: Thank you so much for that. Michael, if you think it's helpful, any more thoughts about how to resolve the dramatic difference in the way the majority and the dissent characterize the facts? Justice Gorsuch indeed characterized it as the private prayer and Justice Sotomayor included a photograph of the coach praying surrounded by students. And then help our listeners dig into Justice Gorsuch's reasoning and tell us on what grounds he held that firing Coach Kennedy violated the Free Exercise clause.

[00:04:08] Michael Moreland: Right, so, uh, there is this disagreement between the majority and the dissent about the facts. And often in these kinds of podcasts, I'm sure the, you know, sort of nuances of facts don't come up very much, but they do, they do in this case. Because of the way that the majority says that he was disciplined because of his conduct at these three games in October and that not, not for things he had done before that he wasn't joined by any members of his own team, he was joined by some members of the public and the opposing team, uh, but that basically he wanted to simply engage in personal prayer at the 50-yard line at a time when everyone else was dispersing and could do other things and so forth.

[00:04:51] Justice Sotomayor, in dissent, had some photographs showing, uh, actually one instance that was before the October sequence, but then, uh, s- some photographs from the October events that showed the members of the opposing team and some members of the public, but again, no one from his own team. But that it turns out it makes a difference because in Justice Sotomayor's view, the school district was entitled to discipline him because of the whole context of his engaging in, uh, let's say, prayerful activities over the course of, in several years actually. Whereas Justice Gorsuch wants to focus on the fact that he was actually disciplined and the reasons given, uh, in the district court that were found for the reasons for his being dismissed from his position where the fact that he was continuing to engage in this, uh, this personal private prayer in the October sequence in 2015.

[00:05:46] More broadly, uh, the opinion by Justice Gorsuch, having taken that version of the facts, is that, uh, because he was on his personal time, this is not government speech, it's his own

private personal speech, uh, and therefore, uh, he can't be punished for exercising it and that, with regard to Free Exercise, that the treatment of Coach Kennedy, uh, violated what we call this area in Free Exercise violated both neutrality and general applicability. Basically, he was singled out for his religious, uh, activity, uh, that he was treated unfairly compared to other employees with regard to this. And, and furthermore, and this really is, I think, one of the most important aspects of the case that the Establishment Clause defense of the school district saying that, "We had to do this because, otherwise, the reasonable observer would think that we, the school district, are endorsing religion." And we can get into that the Endorsement Test and other tests for the Establishment Clause.

[00:06:41] Justice Gorsuch's opinion goes to great lengths to say that, "That is not the right approach to thinking about Establishment Clause violations. We've abandoned the Lemon Test and, and the Endorsement Test and that school districts and other government actors can't rely on worries about endorsement by way of punishing people for engaging in protected religious activity."

[00:07:03] Jeffrey Rosen: Thank you so much for that. And I'll ask you both to unpack that important overruling of the Lemon Case that you just described and holding that impermissible government coercion rather than the appearance of a government endorsement of religion is the proper standard for Establishment Clause violations. Erwin, with your thoughts about how to resolve this factual dispute, as Michael just said, the, Justice Gorsuch is focusing just on the conduct he was fired for and Justice Sotomayor, on the, on what was leading up to that conduct, how does the Supreme Court ordinarily resolve factual disputes like this and then help us unpack this important doctrinal shift where the court overrules the Lemon Case which has been praised and criticized since the 1970s and instead says that historical practice and tradition are the appropriate standard for judging a violation of the First Amendment?

[00:07:55] Erwin Chemerinsky: Usually when there's factual disputes, appellate courts defer to the trial court's factfinding, but that's not what happened here. Justice Gorsuch recharacterized the facts. Justice Sotomayor relied on the facts that the trial court in the Ninth Circuit had found. Also, I want to focus on something Professor Moreland says. This was, "The coach's personal time." I don't know how being at a football game as a coach is part of personal time, but this is very troubling to me because it was then seen by this analogy that a school teacher in the classroom, before classes began or recess, when the children have their heads down or at lunch or after school can engage in explicit prayer, if the students want to join the teacher, they can. This undermines 60 years of precedent limiting prayer in public schools.

[00:08:47] In terms of the Lemon Test, it's a case from 1971, it said that the government violates the Establishment Clause if its purpose is to advance religion or if the primary effect is to advance or inhibit religion or if this excess of government entangle with religion. I think the Lemon Test was about embodying. These were the views of Thomas Jefferson, that this should be a wall that separates church and state, that our government should be secular, that the place for religion is people's homes, churches, synagogues, mosques, but not in the government. It's clear that a majority of the justices, the six conservatives reject any notion of a wall separating church and state.

[00:09:28] They say, "Look to history and tradition," but I don't know of any history or tradition that allowed coaches to do prayers at football games. I challenge anyone to find an instance in 1791 of a coach doing prayers at football games. Beyond that, as President Moreland says, court says it only violates the Establishment Clause if there's coercion. One key fact in this case is that a parent complained that his son, who was a football player, was an atheist, felt pressure to participate in the prayers or loss of playing time, but that's not enough for coercion for the majority. The bottom line from this case, and the other we'll talk about, is the court is obliterated any notion of a wall separating church and state.

[00:10:11] Jeffrey Rosen: Michael, isn't Erwin correct if this represents a major change in the law? The Lemon Test has been long criticized and it's now overruled along with its twin as the court calls it the Endorsement Test. And instead, the court embraces a test which had been urged by religious liberty groups, the Coercion Test. Is this a big change in the law, and then, is Erwin correct that this opens up the possibility that prayer led by teachers voluntarily in the classroom and a series of other forms of school prayer, as long as voluntary, might be now constitutional?

[00:10:50] Michael Moreland: Well, I guess it depends how you characterize a major change in law. I think, uh, my view is that Lemon itself was a distortion. Uh, it was a product of an extremely strictly separationist view about, uh, church-state matters that came to, uh, zenith in the 1970s that was not part of the historical tradition or understanding of the First Amendment. I think the work of people like Philip Hamburger and others, which I commend to your listeners, kind of showed that this idea of separation of church and state and the overuse of the wall metaphor are, a, historical and are lifting out only one little part of the tradition of the Establishment Clause to the exclusion of others. And this is a rightful corrective to return to something like a history and tradition approach to what kinds of practices and symbols are permissible, consistent with the Establishment Clause.

[00:11:44] And as Justice Gorsuch points out, in some ways, he was just reporting the news. The court has not used the Lemon Test in a lot of its most prominent recent Establishment Clause cases, the Maryland cross case from a couple of terms ago, the legislative prayer cases. So Lemon was only, you know, at, at best, uh, limping along, uh, as, as a viable way of understanding the doctrinal approach to the Establishment Clause. And this was just kind of pointing out that basically, uh, the court had abandoned it a long time ago. So that's with regard to Lemon. You asked about school prayer. I think that there is still a, uh, tenable and, and valid distinction between prayer that is led by teachers that is incorporated into the school's curriculum or activities.

[00:12:32] Uh, and so cases like Engel versus Vitale or Lee versus Weisman, uh, those kinds of cases, I think, are not touched by what happened here. Uh, I think that in this case, to the extent, one can make the case and I think it is a strong case that this was indeed personal time, his own personal activity. There was no coercion. That as long as all those factors are present, Coach Kennedy wins and it doesn't mean that the rest of the school prayer cases are called into doubt.

[00:13:03] Jeffrey Rosen: Erwin, your thoughts for our listeners about how major a doctrinal shift this is. Lemon had indeed been hotly criticized, but remained on the books and the

Endorsement Test, which was endorsed by Justice O'Connor in Lynch v. Donnelly had been the law of the land. How major a shift is it that it's been replaced by the Coercion Test? And then what do you make of Michael's distinction that although the Coercion Test might allow private prayer like this, it wouldn't call into question prayer led by teachers and incorporated into the school curriculum?

[00:13:33] Erwin Chemerinsky: I think the overruling of Lemon is a major doctrinal shift. We need to remember is in 1947, when the Supreme Court said that the Establishment Clause applies to state and local governments, all nine justices said that it embodies the separation of church and state. For decades, the Supreme Court said that the Establishment Clause about the idea that our government should be secular. Lemon was the embodiment of this idea of a separation between church and state. Justice O'Connor modified the Lemon Test and said, "The focus should be on whether or not the reasonable observer would see the government action as an endorsement of religion."

[00:14:14] Now, the Supreme Court has rejected separation of church and state, it's rejected the Endorsement Test. It said that the government violates the Establishment Clause only if it coerces behavior and social pressure doesn't seem enough for this court to be coercion. This is a dramatic change in the law that leaves little for the Establishment Clause. Now, in terms of prayer in schools, I agree with Professor Moreland in the sense that if a teacher leads a prayer in the classroom as part of the curriculum, that would violate the Establishment Clause. Least, I think the court will continue to say so, but I disagree with Professor Moreland that this isn't a major shift with regard to school prayer.

[00:14:55] Take for example a 2000 case, Santa Fe Independent School District versus Doe, where the Supreme Court said that student-led prayers at high school football games violate the Establishment Clause. I think that case would no longer be decided the same way or take Lee versus Weisman from 1992 where the court said that clergy-delivered prayers at public school graduations violate the Establishment Clause. Justice Kennedy's opinion focuses very much on the pressure that individuals will feel to participate in such prayers. I think this court rejects that. I think unless there's actual coercion, there's no violation.

[00:15:32] So I'll go back to what I said earlier, if the teacher by himself or herself wants to pray in the classroom before classes start or at recess or at lunch or after school and students want to join the teacher, there's no problem. This leaves very little to the ban of prayer in public schools.

[00:15:48] Jeffrey Rosen: Michael, let's squarely join this part of the debate, the Coercion Test seems amorphous. As Erwin says, it seems that social pressure doesn't count as coercion, at least in the case of the praying coach. Erwin suggests that student-led prayer or clergy-led prayer high school graduation, which the court had previously struck down, might now be upheld on the grounds that the coercion wasn't significant. Do you agree with that distinction? And tell us more broadly where this Coercion Test come from with regard to historical practices and understandings, which the majority says now are the touchstone of Establishment Clause violations.

[00:16:29] Michael Moreland: Take one step back and just, uh, I want to say, uh, a bit about the shortcomings of endorsement, right? And so we're looking for what the alternative is, but endorsement, which is the court says was the kind of progeny or cousin of the Lemon Test, that that itself was very hard to administer, hard to administer for school district administrators, hard to administer by judges and lower courts because it relied on this hypothetical observer who's looking at some scenario, coach praying at the 50-yard line or a cross erected to memorialize victim, uh, victims of a war and had to ask, "Well, does this look like something that says the government is endorsing religion?"

[00:17:09] And so that was itself an unworkable and amorphous test and so that's where we then have this substitute now that's an offer of looking to historical practices and traditions. Uh, so things like for example, if a community has for long, a long time use religious symbols, uh, then that is incorporated into the historical practices of that community, and then, as you say, this worry about coercion which historically, at least, is linked back to some of the core concerns of the Establishment Clause with things like forced assessments for clergy, forced attendance at religious services, things like that that would have been very much on the mind of both English and American writers on religious toleration in the 18th century.

[00:17:58] And so you can kind of draw a thread from those historical concerns to things like coercion today. And yes, it can be very hard to figure out in certain kinds of cases at the boundary what does coercion look like. The majority and the dissent in Lee versus Weisman, I think, uh, you know, engaged in this very, very deeply. I mean, Justice Kennedy and his majority opinion says that, at this graduation, where nonsectarian prayers are being offered by a member of the clergy that you can have a kind of social pressure and coercion. Whereas Justice Scalia, in his quite forceful dissent in Lee versus Weisman says that that's relying on, you know, a kind of inchoate understanding of what counts as coercion and, uh, shouldn't be something we should worry about under the Establishment Clause.

[00:18:40] So sure, under coercion and history and tradition, there will continue to be some hard questions, but it's not like the Endorsement Test gave us much of a better alternative and it was, a, historical and unrooted in the First Amendment to boot.

[00:18:53] Jeffrey Rosen: Erwin, there's been an important debate among the liberal and conservative justices, this term about the role of history and tradition and in the abortion case, Dobbs, and in the New York gun case and now here. The liberals say that the conservatives are playing fast and loose with history and that historical practices are being used to justify things that the original understanding of the Constitution wouldn't have justified. And, and basically here the claim is that, although as a matter of original understanding and the dissenter's view, the Free Exercise Clause and the Establishment Clause reinforced each other. Now subsequent practice, which tolerated a lot more prayer throughout most of American history than the court has since the 1947 is being used to justify. So to help us unpack, what's the nature of the liberals' critique of the conservatives use of history and tradition is and how much prayer might this justify in the future?

[00:19:52] Erwin Chemerinsky: To start with, there's a major disagreement of whether the meaning of the Constitution today should be limited to what historically it's been. Originalists would say, "The Constitution means the same thing today as when a provision was adopted." Progressives would say, "The Constitution should be regarded as a living, evolving document." Second, something occurred this term with regard to the use of history and tradition that hasn't been seen before. Previously, conservatives who are originalist would say that history and tradition is used to define the content of a constitutional provision. What does Free Exercise mean? What does the Second Amendment mean?

[00:20:30] This term with the conservatives have also said, "When the government can act is only what was allowed by history and tradition." Take the Second Amendment case that you alluded to. It's not only the Justice Thomas' opinion uses history and tradition to define the meaning of the Second Amendment, he says explicitly that the government can't regulate guns, even if it needs strict scrutiny, unless it's a type of regulation that was historically allowed. Justice Gorsuch's opinion in Kennedy suggests that there can only be limits on religious speech and prayer. It was a kind that was historically allowed. Now, of course, this also assumes the history was clear and how do we want to characterize the history here?

[00:21:13] I would say, there's no evidence that football coaches were praying on the field in 1791, so there's no basis for saying it is permissible. conservatives would say, "Well, there was no prohibition of football coaches in 1791, so we can allow it." Of course, there weren't public schools and football coaches in 1791, so it's a ridiculous question to even ask.

[00:21:35] Jeffrey Rosen: Michael, tell us about this debate, even among the conservative justices about the relation between history and tradition and original understanding. In her concurring opinion in the guns case, Justice Barrett said we're not resolving the role of what she called liquidation, which means the degree to which subsequent history and tradition can trump the original understanding of a provision and the liberal justices and Erwin say that this is a big shift. It used to be that originalists only asked what the content of a constitutional provision was to look to history. Now when the government can act is defined by history and tradition and it's just not clear when subsequent practice gets to trump the original understanding.

[00:22:14] So tell us about this debate, even among the conservatives because it, it hasn't obviously been resolved and then Erwin's claim that this, this, again, is a change in the law.

[00:22:23] Michael Moreland: Well, sure. I mean it's a question that originalist have grappled with for many years about, for example, the way in which original understanding and modes of constitutional interpretation that begin with original understanding have to take into account subsequent history and precedent and historical practice. Uh, and as you say, this is a, a debate that even occurs among the conservatives on the court, uh, and scholars within the, uh, who favor originalism. And yes, to some extent, it is a shift away from a more progressive living constitutional Warren Court-inspired view about what is, uh, what the task of constitutional interpretation involves. Uh, but that's because in many respects, uh, the originalist have won the day, at least politically in terms of appointments to the court, uh, and in terms of their ability to make arguments about what the modes of constitutional interpretation should be.

[00:23:23] And, but as I said, that doesn't mean that there aren't still going to be some debates about, you know, what, what does history and tradition actually mean with regard to particular cases in this Establishment Clause area for example or with regard to the Second Amendment, uh, as you mentioned. Uh, but the originalist claim, of course, is that this is closer to what the rule of law and predictability and what a written constitution and its provisions and how to interpret them actually should be than what the alternative has been and that opens up, you know, big questions about constitutional interpretation that we won't be able to resolve here in the next half hour. Uh, but that's, I think, as you say, that's kind of where the, where the playing field is right now.

[00:24:04] Jeffrey Rosen: Erwin, Michael just said it's the originalist one and now history and tradition is the benchmark of constitutional interpretation. To what degree have this really been on the radar screen? There have been many debates in the academy and on the court before about history and tradition, but we haven't seen it so front and center until this term where in the guns, religion, and abortion cases was the touchstone. And what's your distillation of the essence of the liberal justices' critique of this history and tradition approach which is essentially that the conservatives are playing Whack-A-Mole with history and tradition and are selecting the relevant time period to suit their preferred result in all three cases?

[00:24:43] Erwin Chemerinsky: The conservatives won in this case and the ones this term because Donald Trump got to pick three justices and joined at least two other conservative justices, Thomas and Alito and Roberts will often join them. Let's not make this an intellectual victory. Let's be clear that it's a political victory. I think that you're absolutely right that it's Whack-A-Mole, that the conservatives are glad to use history and tradition when it serves their purpose and will ignore it when they don't. To give an example, next October, the Supreme Court is going hear two cases, but with an overall precedence that a lot of college universities engage in affirmative action.

[00:25:20] If there's anything that's clear about the history of the 14th Amendment, it's that the Congress that ratified it also allowed race-conscious programs like the Freedmen's Bureau. I predict we will see no mention of originalism in those opinions. When the Supreme Court struck down key provisions of the Voting Rights Act, there was no mention of history and tradition. But also the reality is that history is ambiguous and what goes on is the conservatives pick the examples that support what they want and ignore the others. In the gun control case, Justice Thomas' majority opinion looked at the history that supported them and ignored the long history regulation of concealed weapons, including it being a lot adapted in New York in 1911.

[00:26:03] It's really about law, this history. It's about picking the examples. It's like somebody said, "You're going to a cocktail party and look to your friends," the justices look for the historical examples that support them and ignore the rest. I actually believe if we wanted to be originalist, we should support and believe in a strong separation of church and state. I think that's what the framers of the First Amendment wanted.

[00:26:23] Jeffrey Rosen: Thank you so much for that. Michael, a response to Erwin's suggestion that history is being used opportunistically and that original understanding, in fact,

support stronger separation and then if you would, introduce our readers to the facts and holding of Carson versus Makin.

[00:26:39] Michael Moreland: Sure. Well, I knew that Dean Chemerinsky, by the way, whose criticism I often commend to my students. So even though we're disagreeing sharply and we'll continue to do so for another half hour or so, but it's an honor to be with him, but I knew we were going to disagree about this. And on this question, I think that the ... Again, I cited Philip Hamburger's work and I think a lot of other work by Michael McConnell and others with regard to original understanding the Establishment Clause is much more consistent with what Justice Gorsuch says in his opinion about rejecting Lemon or abandoning Lemon and a history and tradition approach to the Establishment Clause than anything having to do with a kind of, uh, in my view, a kind of hypersensitive wall of separation metaphor that, uh, that is only as I said earlier, only one little shard of historical, uh, of the historical record in, in the, in the face of I think a lot of other ways in which the Establishment Clause was understood to allow for cooperation between church and state in various ways. But we will just have a disagreement about what the original understanding implies.

[00:27:38] And then with regard to the cherry picking, again, I, I think, sure, there will always be hard questions about what kinds of historical evidence to use, uh, but that's, uh, at least I think in the views of the originals on the court, uh, much surer and more, uh, more legally sound way of adjudicating these disputes than, uh, kind of unmoored, um, you know, sort of moral reading of the Constitution, uh, that, that substitutes the judges, judgment of judges for that of legislators. Uh, so that's, uh, that's all by way of, um, you know, kind of wrapping up that part of our discussion.

[00:28:11] So Carson versus Makin which is our next case, I'll introduce very briefly. This was a case involving a Maine scholarship program. So Maine is the most rural state, uh, in the union and, uh, several school districts do not have high schools. They don't have the resources or the population to support a high school. So to address that issue, Maine has this scholarship tuition program that allows parents, uh, to send their kids to either public, other public or private schools and Maine then pays, uh, for that tuition up to a specified amount. But Maine had a provision in this scholarship program that they would not pay for children to attend sectarian schools. They had to attend nonsectarian schools and then they had the definition of what that counted for.

[00:28:56] Uh, and so basically meant that any school that had a kind of serious religious mission, uh, was excluded from participation in the program. And so the court in a six-to-three opinion, uh, written by Chief Justice Roberts, followed on its precedents from the last several years involving similar kinds of cases about the exclusion of religious participants from these kinds of public benefits and held that the exclusion of religious schools from the Maine tuition program, uh, violated the Free Exercise Clause's guarantee of nondiscrimination.

[00:29:28] Jeffrey Rosen: Erwin, how would you describe the facts of Carson versus Makin and what the court held?

[00:29:35] Erwin Chemerinsky: I agree with Professor Moreland here. It's a situation where there are parts of Maine that are true rural to support public schools. Maine said that these areas

school administrative units would give money to the parents to send their children to private school. That's about 5,000 students in Maine and the money had to be used at secular private schools, couldn't be used to "sectarian private schools". What I disagree with Professor Moreland about is I think that he doesn't give enough weight to Maine's interests here. Maine says it wants to provide a free secular education to all children in the state of Maine. Maine says, really echoing thoughts of James Madison, that it's wrong to tax some people to support the religion of others.

[00:30:19] And the Supreme Court held in the opinion by Chief Justice Roberts that when the government subsidizes secular private education, it must also subsidize religious education. And that has enormous and very troubling implications.

[00:30:34] Jeffrey Rosen: Michael, tell us more about Chief Justice Roberts' reasoning. He said that the court's decision was an unremarkable application of prior decisions in two other cases, which, which he wrote, Trinity Lutheran Church and Espinoza versus Montana Department of Revenue. Tell us what those cases held and why Robert said it was an unremarkable application of those cases to hold, as it did here.

[00:30:56] Michael Moreland: Right. So Trinity Lutheran in 2017 was the first of this line of cases which involved grants from the state to fund resurfacing of playgrounds in, in a program that used, uh, scrap tires. And the state of Missouri though excluded religious participants from that program and so this Lutheran school wanted to get a grant and the state said, "Well, your grant application is pretty good, but we're going to exclude you from the program because you're a religious school." And so that was the first in this line of cases when the Chief Justice who wrote that opinion as well said that excluding a religious participant purely on the basis that it is a religious institution that that runs afoul of the Free Exercise Clause and isn't required by the Establishment Clause.

[00:31:45] And then in Espinosa, it was, that was a Montana scholarship program, somewhat similar to Maine, but instead of talking about sectarian or nonsectarian, Montana excluded religious schools just in general on, on ... If they had any religious character, they were excluded. And so the court there held that that was unconstitutional, also an opinion by Chief Justice Roberts. And so the Maine program was like the next turn of this, of the sequence where the state made the argument that, "Well, it's one thing if," and the First Circuit, which upheld the Maine program in the court below here said, "Well, it's one thing as an Espinosa to exclude religious schools based on their status, but we can still exclude a religious schools if the use to which they're putting the scholarship funding goes to things like religious education, uh, and so forth." And that's what the Chief Justice said.

[00:32:38] That too is foreclosed by the First Amendment. And it, it's really, in some ways, it's kind of a follow on also from cases from 20 years ago like Zelman versus Simmons-Harris which said that there's no Establishment Clause violation if the state gives funding to parents who independently then use that money to send their children to religious schools, so that the states may fund religious schooling. And the upshot of these cases is that if the state is going to fund private schools, and the states courts don't have to fund private schools, but if they're going to

allow for private tuition, education benefits in their state programs, they can't engage in antireligious discrimination in the administration of those programs.

[00:33:24] Jeffrey Rosen: Erwin, Justices Breyer and Kagan had concurred in the Trinity Lutheran case, although the dissent in the Montana-Espinoza case. And, and here, Justice Breyer in his 18-page dissent, joined by Justices Kagan and Sotomayor, noted that the Supreme Court had not previously ruled that a state must not may use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public education. Tell us about the core of Justice Breyer's objection and why he viewed this case is so very different from Trinity Lutheran.

[00:33:58] Erwin Chemerinsky: I think you use the keywords may and must. For decades, the issue before the Supreme Court was, "When may the government give aid for religious education," without that violating the Establishment Clause. Zelman versus Simmons-Harris in 2002 said a state may provide vouchers that can be used in religious schools and that doesn't violate the Establishment Clause. The huge shift is in the last five years the Supreme Court has said the government must provide aid to religious schools when it does for secular private schools, but that violates Free Access Religion.

[00:34:35] Trinity Lutheran versus Comer 2017 was the first time in all of American history that the Supreme Court said that the government was constitutionally required by aid to religious institutions. And that was a very narrow case. In fact, in footnote three, Chief Justice Roberts said, "This is just a case about surfacing playgrounds." That's why I think Justice Breyer and Kagan were part of the majority, but to now say that the government has to full out subsidize religious education, anytime it subsidizes secular education is an enormous shift. Simply put, we've gone from decades of, "When may the government have aid that benefits religious schools," to now, "When must the government do so,", that's huge.

[00:35:22] Jeffrey Rosen: Michael, Justice Sotomayor echoed Justice Breyer's warning. In her five-page dissent, she said that the Supreme Court has shifted from a rule that permits state to decline to fund religious organizations to one that requires states in many circumstances to subsidize religious indoctrination with tax, taxpayer dollars. Erwin says that that's a huge shift. Do you agree and, and what's the majority's response?

[00:35:46] Michael Moreland: I, I actually don't think it's a huge shift. It's, it's only pointing out that, again, as I said, if, if the state, a state can keep all of this funding in the public sphere. It can say, "We'll only have, uh, we'll only pay for public education," uh, and Chief Justice Roberts says in Carson, uh, that there are options that Maine could have pursued, uh, to do that. But that once you say, "We will allow private actors to private schools to be recipients, uh, of this kind of benefit," then the state can't go, uh, around picking winners and losers among in between private schools and religious participants. And this was pointed out in oral argument, I thought, very definitely by Justice Alito in a series of questions about, "Well, what about a unitarian school that had a, you know, had a very general kind of religious mission about equality and, and, and toleration and things like that? Uh, would that be okay?"

[00:36:42] And I thought that counsel for Maine really got confused about that question and rightly so because it turns out that it's, it's inconsistent with the First Amendment to have a kind of public benefit program like this that's given to, uh, potentially religious participants and private schools and then for the state to go around trolling through the curriculum and the programs of the school to figure out, "Well, is this to religious? Is this, is this to religious? You know, what, how much indoctrination is going on over here, over there?" that all of that is inconsistent with what the First Amendment requires with regard to treating religion on an equal basis, uh, with other kinds of participants.

[00:37:21] Jeffrey Rosen: Thanks so much for that. Erwin, what is the defense response to the idea that the First Amendment was intended to guarantee neutrality and not to allow the state to troll through, as Michael said, a school's curriculum to look for hints of indoctrination? And how would you describe the dissent's view of the relation between the establishment and Free Exercise Clauses?

[00:37:42] Erwin Chemerinsky: I very strongly disagree and the dissent strongly disagrees. That's Moreland's characterization, that what the religion clause was about was making sure that religion was treated the same as secular activities. That ignores the Establishment Clause of the First Amendment. In fact, I think that the two cases we've talked about this morning really do read the Establishment Clause entirely out of the Constitution. This was Justice Breyer's point in his dissent in Carson versus Makin. It was Justice Sotomayor's point in her dissent in Kennedy versus Bremerton Schools. I don't think that the exclusion of religion is hostility to religion. I think what the Establishment Clause is about is that the government should be secular, that Maine should be able to say, "We'll subsidize secular education, and if parents want religious education, it's for them to pay for it."

[00:38:29] I worry about the implications of this case. Let me give an example. Many public school systems have charter schools. These are schools that are paid for with government dollars but privately operated. California has a law that says charter schools must be secular, but now there's going to be challenges. Religious groups are going to say, "To deny us the public funding excludes religion," where many states have laws that provide money for historic preservation of buildings. Traditionally, they refuse to give it for churches, synagogues, mosques. I was involved in a case in New Jersey where New Jersey refused to give historic preservation money for religious institutions. The New Jersey Supreme Court unanimously upheld that and the Supreme Court denied review, but now I think that would regard as discrimination against religion. This is very much about what James Madison was so concerned about, taxing people to support the religion of others.

[00:39:23] Jeffrey Rosen: Michael, what's your response to the suggestion by Erwin that charter schools that are required to be secular under California law might no longer be allowed to be exclusively secular, that historic preservation money might have to go to religious institutions and, and to Erwin's claim that this is inconsistent with the original understanding of the Establishment Clause?

[00:39:46] Michael Moreland: Possibly a lot would depend on how the state actually structures to charter school programs, if, if, whether they're strictly public or if they do have a public-private partnership. And if they do have a public-private partnership, uh, and they allow private actors, uh, in as operators of charter schools, but then say, "We won't allow religion," then I do think that's going to be seen intention with cases like Carson. But again, this seems to me that where I think Dean Chemerinsky and I have a, a, a, a deep but respectful disagreement, is about how high these barriers are supposed to be between public benefits that are provided on a general basis to all kinds of actors in a, in a program, uh, and that sure, Madison was worried about forced assessments for clergy, uh, training and things like that.

[00:40:36] And so we have cases like Locke versus Davey from 15 or 20 years ago that said that, uh, the exclusion of clergy training from a tuition scholarship program is constitutionally permissible, but that there are lots and lots of other areas including health care and charitable services, and yes, education, where the government funds and cooperates with private actors, including religious actors and the, this line of cases from Trinity Lutheran Carson merely says that when engaging in those kinds of partnerships with private institutions, you can't treat religion in a discriminatory manner.

[00:41:12] Jeffrey Rosen: Erwin, tell us more about the implications of Carson versus Makin. Justice Sotomayor said that her colleagues had up ended constitutional doctrine and she had growing concern for where this court would lead us next. Tell us about other areas involving government involvement with healthcare, education and public benefits where public dollars might now be allowed to go to fund religious activities.

[00:41:34] Erwin Chemerinsky: To put this in context, 20 years ago, there was a debate over whether or not the government could create what's called charitable choice, allowing religious entities to receive government social service money that's traditionally gone to secular entities. And so the question was, "If the government wanted to, could it create give money to religious entities to drug and alcohol rehabilitation programs? Could it give money to religious entities to create child care programs and the like?" But it went to secular entities or what the religious entities have to do is they use to create separate secular arms. And there was an enormous debate over whether or not so-called charitable choice would violate the Establishment Clause.

[00:42:17] We've again here gone from what the government may do to what the government must do. So to answer your specific question, imagine that a government creates drug and rehabilitation funding for programs and the government says, 'We'll fund secular programs, but we don't want to fund programs that are religiously based where drug and alcohol rehabilitation is done based on religious indoctrination. I think based on Carson versus Makin, that would be unconstitutional, because once the government is funding secular private, can't deny it to religion. This is going to be a major shift of government money to religious institutions. And what's most dramatic about it is the court saying it's constitutionally required.

[00:43:04] Jeffrey Rosen: Michael, Erwin puts the point clearly. He said, previously, the court had said that the government may allow private choice to direct public funds to religious

institutions. Now it must do so as long as it funds analogous secular activities. Is that indeed a major shift and what sort of programs do you see might now be eligible for funding in the future?

[00:43:27] Michael Moreland: Again, I, I think that saying that the Free Exercise Clause guarantees a form of nondiscrimination or principle of nondiscrimination, uh, between a religious adherence and participants and programs and nonreligious other private actors, I, I think that that is not a major shift, uh, but, uh it's come to the head because of, uh, Trinity Lutheran and Espinoza and Carson, but I do think that it is there deep in the doctrine and that the government can kind of pick and choose among different kinds of, uh, different kinds of participants or program. And that, as I said earlier, I think especially nefarious here is the idea that somehow the government should be charged with figuring out what sectarian and what's nonsectarian in the kind of way that, uh, this program not only invited but indeed required.

[00:44:19] So I don't think that that's, uh, at all a major shift in the doctrine. I, I suppose I do would acknowledge that with regard to the Establishment Clause concerns, and this does tie back to our discussion in Kennedy, that with regard to the Establishment Clause concerns that again, in my view, the erroneous Lemon-Nyquist line from the 1970s that erected very high barriers to, uh, any government funding of anything having to do with, uh, religious education that those were wrong and that those have now been abandoned as the Court says in Kennedy and that those kinds of Establishment Clause concerns are no longer there as a barrier to, uh, participation in these kinds of programs by, uh, religious schools.

[00:44:58] With regard to other implications and there's, uh, some recent commentary about this, I do think one question will be, uh, to the extent that, uh, religious schools participate in these programs and are, uh, a, and now must be allowed to participate in these programs if the state has them, uh, the question of, "What kinds of conditions can the government put on religious school's participation? What kinds of requirements with regard to the curriculum, with regard to hiring, and so forth?" I think there will be some hard questions there. I think that with regard to say ministerial, so called ministerial employees who perform important religious functions within the schools, I think the schools have a well-recognized first amendment right, uh, to make those employment decisions free from government interference. But there are lots of other potential ways in which the government could put strings on these kinds of, uh, funding programs and, and we'll have to think that will be in some ways, uh, much of the next kind of round of litigation and policymaking in this area.

[00:45:55] Jeffrey Rosen: Erwin, uh, final thoughts on the implication and future litigation that might be unleashed both by the Carson and Kennedy cases?

[00:46:06] Erwin Chemerinsky: I want to address Mr. Moreland's point. This is, this isn't a major shift. I just want to stress something that I pointed out [inaudible 00:46:13] earlier. Prior to 2017, not once in American history had the Supreme Court ever said that the Free Exercise Clause required that the government give money to religious institutions. Now, the court has taken this very far and said, "Anytime there's support for secular private education, the government is required to give it for religious education." I think the implications of both these cases are enormous. Like both will lead to a great deal of litigation. I think that in terms of

Carson versus Makin, it's going to be read as saying, "Whenever the government gives money for any secular program is going to require to give it for religious programs."

[00:46:51] And I think Kennedy versus Bremerton School is going to very much open the door to prayer in schools. As I said earlier, I think any teacher in the classroom before school, recess, lunch, after school can engage in explicit prayer and any students who want to join will be able to do so. I think the court really has demolished any notion of a wall separating church and state.

[00:47:12] Jeffrey Rosen: Well, it's time for closing thoughts in this important and civil discussion about the core meaning of the religion clauses of the First Amendment. Michael, first thoughts are to you. What did the court hold was the relation between the Establishment Clause and the Free Exercise Clause and why do you think the court was correct?

[00:47:33] Michael Moreland: Well, I do think both cases are rightly decided obviously and I do think that the court has corrected some prior errors that held the Establishment Clause to, in my view and in a historical way to have been this wall of separation, uh, that prohibited any kind of, uh, in the case of Carson versus Makin, uh, cooperation and funding that goes from the government to religious participants or in the case of Coach Kennedy versus Bremerton School District, any kind of engagement by a person in, in prayer, uh, on his, on his own time and not as a government actor in that, in that context, uh, from being able to engage in protected religious activity and that the Establishment Clause does not, uh, pose a barrier to that.

[00:48:20] Otherwise, I think that with regard to Free Exercise, because as you say, both cases actually implicate the conjunction of Free Exercise and establishment. And, I, I think and I, I know this will be something that our, our suspecting Chemerinsky will disagree with. I think that these cases show that we don't need to read the Establishment Clause as a kind of cudgel over and against the Free Exercise Clause, that they can be read in unison and they can be read in a way that allows for toleration and respect for religious participants in the public square.

[00:48:51] Jeffrey Rosen: Thank you so much for that. Erwin, last words are to you. How would you characterize, uh, the dissenters' view of the proper relationship between the Free Exercise Clause and the Establishment Clause and why do you think the dissenters were correct?

[00:49:04] Erwin Chemerinsky: It's been a pleasure doing this with Professor Moreland and with you. Professor Moreland ended by saying that the Establishment Clause, this is the cudgel of the Free Exercise Clause. That's because the Supreme Court has read the Establishment Clause out of the Constitution. This was the key point of Justice Breyer in his dissent in Carson-Makin and Justice Sotomayor in her dissent in Kennedy versus Bremerton School. The conservatives give no weight to the Establishment Clause at all. I think it's so important to recognize how radical these cases are in changing the law.

[00:49:36] For decades, the Supreme Court followed the Lemon versus Kurtzman Test and believe in a wall separating church and state. The conservatives on the court now give overruled Lemon versus Kurtzman. The conservatives on the court give overruled decades that followed the idea of a law separating church and state. I think exalting Free Exercise and ignoring the Establishment Clause, it can have huge consequences. It's gonna have consequences in terms of

Kennedy, in terms of bringing religion into public schools in a way we haven't seen since the 1960s, and in terms of Carson versus Makin, it's gonna have enormous implications and requiring the government in an oppressive way to subsidize religion.

[00:50:17] I'd like to include some words from Justice Sandra Day O'Connor who an opinion shortly before she left the court, she wrote, "Those who would renegotiate the boundaries between church and state was therefore answer a difficult question, why should we trade a system that has served us so well for when it has served others so poorly?" Unfortunately, I think the conservatives on the court give us no answer to that question.

[00:50:44] Jeffrey Rosen: Thank you so much, Michael Moreland and Erwin Chemerinsky for a deep, vigorous and civil debate over the core meaning of the religion clauses of the First Amendment. It is urgently important as the Supreme Court disagrees vigorously about these first principles that the National Constitution Center host civil debates, so readers and listeners can make up their own minds and you provided us with a model of that. Erwin, Michael, thank you so much for joining.

[00:51:11] Michael Moreland: A pleasure, Jeff.

[00:51:13] Erwin Chemerinsky: Thank you.

[00:51:16] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Scheckler. Research was provided by Colin Thibault, Vishan Chaudhary, Eliot Peck, Samuel Turner, Sam Desai and Lana Ulrich. Please rate, review and subscribe to We the People on Apple and recommend the show to anyone, anywhere who is eager for civil, thoughtful, deep constitutional debate during these polarized times. And always remember friends that the National Constitution Center is a private nonprofit. Our mission of bringing together people different perspectives for civil debate and dialogue is more urgently needed than ever and you can ensure that we can fulfill that mission. Support us by becoming a member at constitutioncenter.org/membership. Give a donation of any amount to support our work including this podcast at constitutioncenter.org/donate.

[00:52:08] And as always keep reading, listening and learning. I look forward to doing lots of that together in the months and years ahead. On behalf of the National Constitution Center, I'm Jeffrey Rosen.