

## **Religion and the Constitution**

What Happens Next - 09/23/23

Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, political science, and culture.

Today's topic is Religion and the Constitution.

Our guest is Stanford Law Professor Michael McConnell who recently published a new book *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*.

Michael believes that under the first amendment the government should not endorse any specific religion, and that the separation of church and state does not mean that the government should always require a secular position.

Let's begin this podcast with Michael McConnell.

Michael McConnell:

This book is about the Establishment Clause, which is part of the first amendment of the Bill of Rights about religion. There are two parts to the religion clause: the Free Exercise Clause and the Establishment Clause. The Establishment Clause is a restraint on government not to try to run, promote, affect the religious life of the people. The Establishment Clause has to do with prayer in the schools, private education and public monuments. It's fundamentally about how the religious aspects of our culture will be organized. There's no provision of the Constitution that has undergone so much change in the last 40 years as the Establishment Clause. The main reason is that there was a period of time beginning somewhere in the 1960s during which it was given a heavily secularist interpretation—as if the purpose of the Establishment Clause was to ensure that any aspect of the culture affected by the government had to be strictly secular.

We contend that it is both historically and more normatively attractive to say that the purpose is not to be secular but rather to be neutral, to leave questions about the religious nature of the American culture to the American people.

Larry Bernstein:

Why did the Supreme Court reinterpret the separation of church and state to mean that the government should be secular?

Michael McConnell:

Part of it is the matter of biography of individual justices. Hugo Black, for example, had been what the Grand Kleagle of the Ku Klux Klan. People forget that the Klan wasn't just anti-black but also quite anti-Catholic. His grandson said, "my grandfather wasn't a racist. He was in the Klan because he didn't like Catholics."

But there are other explanations as well. The assault on private education was under the misimpression that religious schools in the large cities would be a haven for white flight from public schools as they were being desegregated. Now we know that religious schools in the large cities tended to be the most successfully integrated schools in the system and were particularly more successful than the public schools in reaching poor minority children. So, this was an empirical guess that turned out not to be true.

Larry Bernstein:

Martin Luther King said that the most segregated hour in the week was 11:00 AM on Sunday. Does the government have any role in desegregating churches?

Michael McConnell:

I think absolutely not. This is debated in Congress in the 1870s when the very first civil rights laws are being passed after the Civil War. One of the main reasons for segregation in churches is that churches were one of the only culturally important institutions in which African Americans could run their own show. Especially after slavery, Black Americans thronged to Black churches because they were tired of being bossed around by white people. And so, they formed their own institutions. I don't think we should view this as something that white powerhouses ought to be meddling with.

Larry Bernstein:

Under what circumstances can the state regulate religious institutions? For example, the applicability of Obamacare for employees or banning discrimination based on race or gender.

Michael McConnell:

Churches are freer from government control than any other institutions that I can think of. Half of the separation between church and state is making sure that religion doesn't take over government. But it is also to make sure that government isn't able to control religion. A lot of regulation is specifically tailored to protect religious liberty. The Civil Rights Act of 1964 exempted religious institutions from the non-discrimination requirements of that law. And since then, the Supreme Court leading case was unanimous, written by Chief Justice Roberts with especially strong concurrence written by liberal Justice Elena Kagan. This unanimous decision that churches have an absolute right to choose their ministers for themselves without regard to discrimination laws, labor laws, whatever. And by minister, the court has made clear that that's

not just somebody wearing investments or with an ordination, that's anyone who is performing the teaching and preaching and leadership function of the church. So that's a very broad protection. And all three branches of government have contributed to this.

Larry Bernstein:

What about if a church only allows a man to be a minister?

Michael McConnell:

Churches have an absolute right to decide who their ministers and priests are going to be. And if that weren't true, the Catholic church, Orthodox Jewish synagogues and most Islamic centers would be in violation, a certain number of Protestant churches as well. The prohibition on female clergy is extremely common in religion, both in America and around the world. And both the courts and the Congress have recognized the importance of allowing churches to be able to decide these things for themselves.

Larry Bernstein:

Some religions condemn homosexuality, does the state have a role in undermining that discrimination?

Michael McConnell:

This is not an issue about homosexual rights. It's about the autonomy of religious organizations. Same-sex marriage and other aspects of sexuality are no different than anything else. There's no special rule for this, but the general rule is churches get to decide their own doctrine, their own personnel, their own worship services. Churches cannot be compelled to perform same-sex marriages. But that's not because there's something special about same-sex marriages. It may sound shocking to our ears today, but they can't be forced to perform interracial marriages either. We think the government is a fountainhead of liberality and non-discrimination. But it has cut both ways. One of the early cases about religious autonomy in the early 20th century was Berea College against Kentucky. Berea College, which still exists, was an evangelical college that was committed to educating black and white children together at a time when the government said you can't. So, it can go both ways.

Larry Bernstein:

In 2018, the Supreme Court decided the case of the Masterpiece Cakeshop vs. Colorado Civil Rights Commission where a baker refused to frost a cake to celebrate a same sex marriage. He was willing to sell them the cake but not make a creative frosting pattern because his religion did not recognize same sex marriage. Does the first amendment protect religious individuals from being required to do things that violate their religious beliefs?

Michael McConnell:

The baker case and the more recent case having to do with a website designer do happen to be about people with religious convictions. And we have to think about free speech rights as well as rights of freedom of religion. So, people who are artists or have engaged in expressive activities cannot be forced to use those expressive talents to communicate ideas that they disagree with. And so if you want to go to the modern-day Michelangelo and ask for a painting for your Sistine Chapel, that is something that Michelangelo doesn't believe in. He has a right to say no. If you go to a florist on Easter Sunday, churches are usually festooned with white lilies because the white lily is a symbol of the resurrection, the rebirth of the Lord Jesus Christ.

And if you go to a Jewish florist and ask the Jewish florist to create an Easter Sunday lily decoration to convey the reverence for the resurrection, that florist can say no. The only thing that makes the cases that you refer to controversial is because the support for same-sex marriage is so powerful and people think, oh, it's bigoted not to believe in same-sex marriage. Well, there are a lot of bigoted things people can believe in this country and not be forced to use their artistic talents or their voice to oppose it. We are actually free in this country to hold beliefs that are unpopular contrary to government policy and even bigoted.

Larry Bernstein:

Aaron Tang spoke on What Happens Next a couple of weeks ago. He thought in the baker case and the website design case, he believed that these cases should be decided under the least harm principle. We should look at which party would be harmed the least when we have two constitutional issues in conflict. Do you think that the Establishment Clause should be applied using the least harm principle, or do you think that we should allow religious people to do things as their faith requires even if it is problematic for the other party?

Michael McConnell:

I'm very proud of my former student, Aaron Tang. There certainly is a harm principle that plays a part in First Amendment doctrine. Most rights are not absolute, and the government gains its authority to act only when it has what the Supreme Court calls a compelling governmental interest. What our framers would've said was that to protect peace and safety and the private rights of others. That's a quote from Madison. And so, when there is someone else who is going to suffer some grievous harm as a result of your exercise of rights, that may give the government the authority to step in. One of the reasons these baker cases and the more recent website designer cases have been so compelling to many people is that there's virtually no harm on the other side.

That is in both cases it was clear there were dozens of bakers within a few blocks who would be very happy to take your business or website designers. What was really the harm in those cases is the insult, the fact that you go in and you're not being served because that person disapproves of

you, and I'm not making light of that. It is an insult, but we are not protected against people insulting us. The Supreme Court has said that in a variety of contexts.

Larry Bernstein:

A year ago, I did a podcast with Jason Bedrick on Hasidic education. The New York Times had run a front-page attack against NY yeshivas because they teach a lot of religious classes and the teaching is in Yiddish, Babylonian Aramaic and Hebrew and not so much in English. The New York Department of Education and some state legislators want to go after the Satmars who are the most religious yeshivas. In that podcast I proposed finding common ground, where NY state would provide teachers to educate students in secular subjects at the state's expense as the Yeshivas do not have the money for more educators. Does the first amendment limit the state's ability to provide secular resources in religious schools?

Michael McConnell:

Interesting that you should ask about that. It so happens that one of the cases I lost in the Supreme Court, five to four, I was defending a federal law that funded secular teachers going onto the premises of religious schools, the most important aspects of this being remedial English and math. And the Supreme Court at that time said it was unconstitutional under the Establishment Clause because it might indicate symbolic support for religious education. It was a terrible loss for the children who would've benefited from that. I'm happy to say that 15 years later, that was one of the cases that the court overruled. Now the harder question would be if schools were required to accept those teachers.

These schools have been in existence for generations. This is a vibrant community, and I am very skeptical that the harm has been well-documented. New York ought to pay a little bit more attention to having its own public schools teaching English and not worry about so much about when people choose to learn Yiddish.

Starting in 1971, the court began to say that assistance to religious private schools were unconstitutional. I want to emphasize every one of these cases involved neutral aid to the school. So this is aid that went not just to religious private schools, but to secular private schools and to public schools as well. And they started with cases having to do with salary supplements for teachers. And then they moved into tax credits for tuition and maintenance and repair grants for school buildings. And then in the 1970s, there's can you give money for bus rides to schools? Can you give money for bus rides from the schools to a secular location on a field trip? What about school lunches? What about hearing and speech diagnostics? And the court during this period was just gradually tightening from what had been a somewhat loose lines to an increasingly, rigid lines. And then in 1985 came these two major cases: Aguilar against Felton and Grand Rapids versus Ball in which the court essentially shut the door on almost all kinds of

funding that weren't grandfathered in from prior precedent. It was only a few years thereafter that the court began to go the other way.

Larry Bernstein:

I attended New Trier public high school in Winnetka, Illinois, and during my senior year English class we read the story of Job from the King James Bible. Is that constitutionally kosher?

Michael McConnell:

I also went to public school in Kentucky, and we read Ecclesiastes in 10th grade. It was considered dicey. But the Supreme Court has consistently said all the way back to the early sixties that it is permissible for the Bible to be used as part of the secular curriculum for literature. New Trier was right to have Job in the curriculum. There have been cases about whether choirs can have religious music as part of their repertoire. And the answer has almost invariably been yes.

Larry Bernstein:

And at my graduation, a minister made an opening prayer, is that ok?

Michael McConnell:

No. In a case called *Lee versus Weissman*, the court held that the graduation ceremony, even though it isn't mandatory, it's nonetheless an official school function and there cannot be a prayer as part of the official school day.

Now that's to distinguish this from Bible study groups that can meet. Another interesting twist on all of this is what about the valedictorian who gets to give a speech on any subject? Most have said that if the valedictorian chooses to include a prayer, it's the valedictorian that's doing that. And the government is simply being neutral and allowing the speaker to say whatever he or she wants.

Larry Bernstein:

There was a Supreme Court case last summer related to a football coach who after a game would kneel and pray at the 50-yard line. Can teachers pray after a ball game on school property?

Michael McConnell:

This was a difficult and controversial case. There are sensible people on both sides of this, but the question is, a teacher who is engaging in a religious act for themselves, but during the school day while they're on the clock, is that problematic? This coach had led his team in prayer before the games in the locker room and had religious references during his inspirational talks. And when he would go out on the 50th yard line, sometimes his team would come with him. There

was testimony from one of the parents that their son felt pressured to join because after all the coaches decides whether you get to play or not.

But by the time the case got to the Ninth Circuit, the coach had agreed that he would not do prayers in the locker room. He would not include religious material in his inspirational text. Here's I think the most important thing is that he waited until his team was off the field and away, out of sight, doing their own thing. I think they were doing the fight song before he would go out to the 50-yard line. The important thing is a matter of general principle that we should not prohibit teachers who themselves are rights bearers from being able to exercise free exercise during the school day. I think particularly of Muslim teachers in the Islamic religion, there's a requirement of a prayer five times a day at specified hours. One of those falls during school day.

I don't think we want to say that teachers can't do that. The Coach Kennedy case really pushed the envelope but I think the fundamental idea that when the students aren't even there and they're not being coerced and they're not being led in prayer and they're not being asked to engage in a religious activity, that teachers should not be prevented from engaging in those things for themselves.

Larry Bernstein:

After the American Revolution, several states had established religions. The First Amendment applied only to the Federal Government and not the states. After the passage of the 14th Amendment, the Supreme Court decided to apply the Establishment Clause to the individual states. Why is that?

Michael McConnell:

The 14th Amendment says among other things that no state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States. And so the question is what are the privileges and immunities? And this is a huge historical controversy with good scholars on both sides, but there is good evidence for the proposition that the rights listed in the Federal Bill of Rights. The Establishment Clause is the hardest of those to understand because it is not strictly speaking an individual rights provision. It is a provision that keeps the Federal government from using its authority to control religion.

So, for example, we have a right not to be compelled to give money to a church. We have a right not to be compelled to attend a church. We have a right to attend the church of our own choosing. There are a lot of things that really are recognizable individual rights under the Establishment Clause. And the court has never distinguished between these things. But since the late 1940s, the court has consistently held that the Establishment Clause applies not just to the Federal government but also to the states. I think that there's very good both historical and normative reason to approve of that.

Larry Bernstein:

Next topic is religious ornaments and monuments in public space.

Michael McConnell:

No one at the founding believed that the use of religious symbology in the public was a problem. Benjamin Franklin and Thomas Jefferson were charged with drawing up a seal for the United States. What they came up with was a woodcut showing Moses with Pharaoh in the background, the parting of the Red Sea and said, "resistance to tyranny is obedience to God." They were invoking a religious incident familiar to everyone as a patriotic invocation of the United States.

Thomas Jefferson allowed churches of various denominations to meet in public buildings. One met in the Capitol that Jefferson sometimes attended. The very first monument is the Washington Monument. And at the top of the Washington Monument is a religious statement. I don't think that anyone was arguing that religious symbols are an establishment of religion until the late 1940s. I suspect that it just never really occurred to anyone that symbols are compulsory. You don't have to believe them. Government action that's unconstitutional is almost always some coercive action.

Confederate flags are certainly much more tied up in racist ideology than a Christmas tree is in religious ideology and much more offensive. But how have we dealt with Confederate flags? We don't go to court and say they violate the Equal Protection Clause because they reflect racist ideology. What we have done is we fought it out in the political arena and state legislatures debate whether to eliminate the Confederate flag from their flag. It's not treated as a constitutional issue. It's very peculiar that we don't treat religious symbols the same way. The very first case that got to the U.S. Supreme Court about a religious symbol on government property wasn't until 1983 and that was a nativity scene as part of a holiday celebration in downtown Pawtucket, Rhode Island. It was co-sponsored between the city and the Downtown Retail Merchants Association and it was not being done to push Christianity. It was to try to get people to come downtown and shop.

Larry Bernstein:

Why did the Supreme Court introduce the concept of passage of time for whether to keep a monument?

Michael McConnell:

The most recent case had to do with a very large cross that was erected along the highway in Bladensburg, Maryland. It was 120 feet tall, and it was erected shortly after World War I as a memorial to fallen soldiers. Nobody complains about it until very recently. And then the lower



court said, "Hey, that's unconstitutional to have a cross on government property" and said either take it down or cut off the side bars so it won't be a cross anymore.

It is a practical solution because things that have been around a long time, their purpose was something much more benign. When things are conspicuously erected today, Judge Roy Moore putting up the eight-foot-tall monument to the 10 Commandments at the courthouse in Montgomery, Alabama. Those things that's not really honor to God. Its purpose was to stick the thumb in the eye of your political opponents. But by eliminating litigation about symbols that have been around for a long time and have not attracted controversy, I think the court may have done us all a very good favor.

The Bladensburg cross case by being 7-2 is the first of these cases that wasn't closely divided, and it eliminates the litigation over a vast number of symbols. One other thing to say is that something that was around and didn't bother people for a very long time probably is not that big a problem.

Larry Bernstein:

What about other religious aspects to public life? In a courtroom you swear on a Bible promising you'll tell the whole truth. Our currency says in "God We Trust," or "One Nation Under God" in the Pledge of Allegiance?

Michael McConnell:

Someone who wants to swear but not on the Bible is entitled to do so. Jews have been allowed to swear on the Hebrew Bible. I think the currency in God We Trust is very peculiar. If we were doing it afresh, we wouldn't do that. It comes under the principle of it's been around for a very long time and hasn't really bothered people and let's not make a big issue out of it. The Pledge of Allegiance I think is very troublesome because it is coercive in a way. The Under God part was added under Eisenhower. I think that's really problematic. But note that when all this went to court, there was a huge commotion and the Senate voted 98-2 to reaffirm the Pledge of Allegiance as it was.

Larry Bernstein:

Here we have the state demanding us to pledge allegiance to various symbols and ideas, but you mention God and uh oh.

Michael McConnell:

Well, actually the state cannot require the pledge of allegiance. Even this was a key case that came down in the middle of World War II when Jehovah's Witness kids were being punished for refusing to say the pledge and under God wasn't in it. They purely objected to the pledge itself and they won.

Larry Bernstein:

I think there were two Jehovah Witness cases. The Supreme Court voted against the Jehovah's and there was violence against them and then the Court quickly reversed itself. The Court seemed pragmatic. They didn't realize the consequences of their actions and when they did, they reversed.

Michael McConnell:

That is a good description of what happened. There were hundreds of incidents of violence against the Jehovah's Witnesses in the wake of that decision because they continued not to say the Pledge of Allegiance. And in the middle of World War II, this was a matter of considerable affront. I once represented a Jehovah's Witness family where in the course of a tort automobile accident case. The surviving husband was African-American was put on the stand to testify. His wife died as a result of the automobile accident. One of the questions he was asked on cross-examination was, "were you willing to serve in the United States military?" "No." "Are you willing to say the Pledge of Allegiance?" "No."

Larry Bernstein:

Why did the judge allow that? That should have been tossed out.

Michael McConnell:

I think it should have. And it went up to the Court of Appeals. They split two to one. The very distinguished judge on the Eighth Circuit Court of Appeals, Richard Arnold, dissented on this point, religion was not irrelevant to the case. The big issue was that she refused a blood transfusion, and she probably could have survived the accident, but she refused a blood transfusion and died. And so the defendant's claim their defense in this automobile accident case was, don't blame us. It was her religion that caused the problem.

Larry Bernstein:

I think the case is about if you're unwilling to mitigate by not having the blood transfusion, does that change the damages owed by the individual who caused the harm?

Michael McConnell:

That's exactly the question. I was hoping the Supreme Court would take the case, but they didn't.

Larry Bernstein:

Is democracy incompatible with an establishment of religion? For example, Israel is both a Jewish state and a democracy. The United Kingdom has the Anglican Church.

Michael McConnell:

The Establishment Clause is an important protection for democracy because when the state is officially allied with any ideology that makes it quite difficult for competing thought to be recognized in the public square. But there have been a few functioning democracies that have an established church. I don't think it's ideal, but I don't think that it is so incompatible that there are going to be some places where religionists are so deeply entwined that to try to do otherwise is hard.

Maybe it's more important to have established liberal institutions and with a mild and non-coercive establishment. And at our founding we had this establishment at the national level, but we allowed establishments at the state level, but every state guaranteed free exercise of religion. So, at the beginning of America, there's establishment of religion coupled with protection for dissenting religions.

Larry Bernstein:

How do you feel about when the state requires students to learn content that conflicts with religious dogma?

Michael McConnell:

There is very little compelling reason for the government to decide what our moral and political and philosophical views are on anything. It is not consistent with liberal democracy for our public schools to be taken over by any ideology. When the schools are teaching things that parents disapprove, the better practice is to allow the children to be excused from that.

Larry Bernstein:

I want to give a hypothetical, if Martin Luther King had lived and been elected President, would he be limited in his religious behavior? Could he be a preacher in his church on Sundays? Could he make religious statements as part of his executive function?

Michael McConnell:

Oh yes. Jimmy Carter taught Sunday School while he was president. I don't see anything wrong with that.

Larry Bernstein:

Could he have said a prayer during the State of the Union address?

Michael McConnell:

Washington said a prayer in his first inaugural address. He said it was peculiarly important in my first public act to give thanks to Providence. State of the Union addresses have tended to be quite secular. Inaugurals have not. There have been prayers at all but a tiny handful of inaugurals

including Joe Biden and Barack Obama, even Donald Trump, not a very religious man, had a prayer at his inaugural.

Public figures have private lives too. I found it inspirational that Jimmy Carter walked across Lafayette Square to teach Sunday school. I thought that was beautiful.

Larry Bernstein:

Aaron Tang in his podcast said that if the Supreme Court doesn't moderate its decisions, he would recommend that the court be neutered. The method that he suggested was that Congress could prevent the Supreme Court from having jurisdiction on specific pieces of legislation. Is this a good idea?

Michael McConnell:

These proposals, they're not new. They just go from left to right. I'm old enough to remember Impeach Earl Warren bumper stickers because people thought that the Supreme Court was too far left in the 1980s, there were very serious proposals being made in Congress to limit the jurisdiction of the Supreme Court. And I'm proud to say my mentor, Paul Bator, former professor at Harvard and Chicago, who was Deputy Solicitor General testified in Congress on behalf of the Reagan Administration against these bills. One reason, which is very practical, which is that eliminating the jurisdiction of the Supreme Court leaves all the Courts of Appeals and the 50 State Supreme Courts to continue to reach constitutional rulings but differing from one another. Maybe Aaron doesn't like some of the decisions that are now being made, but does he really want 70 different interpretations of the Constitution all over the country?

Larry Bernstein:

I end each podcast with a note of optimism. What are you optimistic about as it relates to constitutional religious liberty?

Michael McConnell:

We are in a better position than we have been certainly in my lifetime that the Supreme Court's interpretations of the Establishment Clause more closely resemble the historical meaning of the clause than before. And that historical meaning is also very attractive as a civil libertarian position because instead of giving government the power to secularize society, it leaves this question of religion to us as a people to decide.

Larry Bernstein:

Thanks to Michael for joining us today.

If you missed last week's show, check it out. The podcast was Disruption in Higher Education.

Our first speaker was Michael D. Smith, a Professor of Information Technology and Marketing at Carnegie Mellon, who has a new book entitled *The Abundant University: Remaking Higher Education for a Digital World*.

Michael expects online education to disrupt the university in-person model. He thinks that if we can tackle the university monopoly on credentialism, then there will be a radical movement away from the \$250,000 four-year degree.

Our second speaker was my son Jonathan Bernstein who is a senior at Northwestern who offered the student's perspective. He discussed how he is using online courses to learn at institutions like Wall Street Prep, and how he applies Chat GPT to study.

I now want to make a plug for next week's podcast with Asa Hutchinson who is the former Governor of the State of Arkansas. Asa is currently running for the Republican Nomination for President of the United States. I want to learn from Asa what it takes to run for president in this election, what the important issues will be, and what it will take to beat the front runner Donald Trump.

You can find our previous episodes and transcripts on our website [whathappensnextin6minutes.com](http://whathappensnextin6minutes.com). Please subscribe to our weekly emails and follow us on Apple Podcasts or Spotify.

Thank you for joining us today, good-bye.