Religious Liberty

Part 1 of 2: Foundations of Religious Liberty
with Darrell Bock, Kelly Shackelford
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Welcome to The Table where we discuss issues of God and culture. And our topic today is Religious Liberty, and our guest is Kelly Shackelford who has been involved in religious liberty cases now for how long, Kelly?

Kelly Shackelford: 25 years. Over 25 years.

Darrell Bock: 25 years. So talk a little bit about your background and how you came into getting involved with cases on religious liberty.

Kelly Shackelford: Well back – For me, it really goes back to even in high school. In high school I analyzed my gifts and thought – I really realized my gifts were in analytical thinking and speaking. And I thought, “Well, with that set of gifts, I either need to be a pastor or a lawyer.” And people thought that was kind of a God or Satan choice, you know pastor or lawyer.

Darrell Bock: [Laughter]

Kelly Shackelford: I talked to my youth pastor. And he said, “I’ll tell you this, if you’re called to be a minister, it’s a wonderful calling. But we do have a lot of Christian ministers, and we sure could use some more Christian lawyers.” And as I really analyzed my DNA and how God had made me, I thought I was probably better on the law side. I felt a little more called to the law. I don’t know how good of a counselor I would have been, [Laughter] and really felt like law was where I was really being called. So I went to law school, but my heart was still for ministry. So even when I was at law school, I spent a lot of my time leading the discipleship ministry for the college students at my church, and really didn’t study as much as the other people did, and entered with average intelligence, compared to the rest of the students. It’s really kind of a bad approach, but I was making all the high grades. And it was just the Lord’s way to show me, use your legal skills, but combined with ministry.
The Table Podcast  Religious Liberty

So, when I got out, I clerked for a federal judge, which you do for a year. You help research and write opinions. You know what it’s like on the other side of the bench. You get all these really nice offers to come work for the big law firms, ‘cause they want the people who have that understanding of what it’s like, what influences, what doesn’t. And I had all those offers. And I just thought, “I think I’d suffocate, going into the regular law thing. I just don’t feel like that’s where I’m called to do.” And so I thought, “Well, what do you want to do?” And I thought, “Well, I want to use my legal skills, but I want to help pastors and churches and religious freedoms and our founding principles, and I’d even like to go to seminary part time.” And I thought, “Well, there’s no job to pay you to do any of that stuff.” And about two weeks later, two guys called me for the major law firms. I’d never met these guys before in my life. And they said, “Will you go to lunch?” And I said, “Sure.” And they said, “Look. We started donating our time for religious freedom. We’re getting so many calls now it’s hurtng our ability to make a living. And so, we were wondering, would you be willing to come on, do legal cases, help pastors, churches, religious freedoms, our founding principles? And you can even go to seminary part time if you want to.” And that was 25 years ago. And those guys paid me out of their pocket. I was making $28,000 as a clerk, so I didn’t have a huge upkeep at the time. And 25 years later, Liberty Institute’s the largest legal organization in the country that focuses exclusively on religious liberty in the United States.

**Darrell Bock**  
So you run Liberty Institute, basically?

**Kelly Shackelford**  
I do. And so it’s one of those American stories of something that didn’t exist that God created because I think he knew we were especially now gonna need it, ‘cause it’s never been to the level of attack and case levels that we’re having to do now.

**Darrell Bock**  
So you’ve been involved in religious liberty for some time. Now, let’s talk a little bit about where the concept of religious liberty comes from, because when we look at the Constitution, of course, we’re dealing with the Bill of Rights. And I’m gonna keep this real basic for people, ‘cause some people understand this and some people don’t. So, which amendment of the Bill of Rights are we dealing with here, when we talk about religious liberty?

**Kelly Shackelford**  
Both of the clauses – the first two clauses – in the first amendment.
Darrell Bock  Okay.

Kelly Shackelford  So which, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” So the purpose of those was the fullest and most vibrant free exercise of religion without the government establishing for us some sort of denomination or religion which therefore would take away from our full, free exercise. So the idea is the founders wanted there to be freedom of conscience, freedom of religion. And so the first two clauses of the first amendment are dedicated to protecting that very freedom, the first freedom, the freedom of religion.

Darrell Bock  And that was a very unique kind of move in forming a government at the time at which it was done, wasn’t it?

Kelly Shackelford  Absolutely. And the founders wrote about – they called it the first freedom. That’s what they – and the first liberty. And the reason for that is – and I’ll – ‘cause a lot of times I’ll talk about religious freedom to audiences that maybe they’re not religious people. And so the natural question that comes is, “Should I care about this?” And the answer is yes. The founders wrote on this. And the concept is, it’s the first liberty because, if you don’t have it, you won’t have any liberty. Ultimately, when you talk about freedom of religion, really it’s about the right of a person to their conscience. And if the government can violate that – and it could be your belief in not believing in God – once you’ve crossed that threshold, it’s all gone. I think a good way for people to understand it is, when totalitarianism comes in, the one thing that totalitarianism can never allow are citizens who have an allegiance to one higher than the government. So, when totalitarian comes in, it’s always gonna – you’re gonna see religious freedom as the first attack, because they’re gonna say, “Wait. You’re allegiance is not to the government.” And you will see these types of fights. And so, the founders understood. And when I speak, I have a lot of people from other countries who’ve come to the United States, and they say, “I’m not religious. You don’t know how true this is. When you lose religious freedom, you lose all your freedom.” And I think that’s what the founders understood.
Darrell Bock: Yeah. The importance of conscience is important. Also, the importance to the founders of just having a discussion in the public square of what virtue is and what religion contributes to virtue. I’ve just – I’m actually in the process of working on a book myself on biblical values and political issues. And Michael Novak wrote a book called On Two Wings, which is a very good treatment of the influence of the Enlightenment, and the influence of religious commitment in our founding. And those were the two wings. And it’s an interesting combination, ‘cause most people think the Enlightenment and religious belief work against one another.

Kelly Shackelford: Right.

Darrell Bock: But in this particular case they worked alongside one another. They made a big point – he makes a big point, for example, of how you have Thomas Jefferson, who isn’t exactly the most orthodox religious figure in the history of the country, and John Adams, who helped to form this government, and put together this combination of rights and privileges that allow us, on the one hand, to have a government that we’re committed to, and on the other hand to keep our freedom of conscience. So it’s a very, very foundational and important area. It was unique at the time. It was designed to protect – I think we have to be honest about this – it was designed to protect a reaction that the founding fathers had to being under a king, and having a state church. So it was protecting that. It was a protection against the bad side of religion, if I can say it that way, that had led to many religious conflicts, bloody religious conflicts in Europe in its history. I tell people, if you go through a 30 years’ war – and that’s not even the bad one, you’ve got a hundred years war that comes along side of it – then you can understand why there were efforts to marginalize aspects of religion. But it was never the intent to remove religious reflection from our society and from our public square.
That’s right. It’s funny. We’re talking about this – and we can talk about this later – but we were talking about this today when the Supreme Court issued a decision about prayer. And the main – really the guts of the decision, if you look at it very quickly, is how can we say that this is unconstitutional when this is the essence of what the founders exactly did? This is what they did when they passed the constitution. They had prayer. They established a chaplain the same day that was paid from the federal treasury to say prayers. So, they clearly – this idea that our constitution or our founders established something to push religion to the corners and, “Oh, we’re not gonna be religious,” that’s really – you have to try to change what this country is, its history. It’s just, they wanted religious freedom for everybody in that context. They didn’t have the problem with the government being pro religious in general. The just wanted everybody to have the freedom between them and God to live out their faith in their own conscience.

Yeah. If we’re gonna deal with that we probably ought to take some Wite-Out to the Constitution and wipe out the word Creator.

Yes. Yes, and the Declaration. They don’t like that. Because the way these people often read the two clauses, is they read the establishment clause in such a bizarre fashion that they say that the government can’t be pro religion in general. And the problem with that is then that means that the free exercise, which is pro religion in general, would be unconstitutional. [Laughter] The founders weren’t – they didn’t want the government telling any of us what to believe, but they didn’t have a problem with the government being pro religion, like having a chaplain, so that there would be prayers. Our first military, George Washington had chaplains in our military, made Bibles available for all the soldiers. So, again, I think – I wish people were honest in saying, “Well, that’s not what the constitution says, or what the founders did, but I want to change the country to something new,” that would be fair. The truth is – and we’ve got a lot of these monuments cases, where they’re attacking religious monuments. And what I try to tell people is, “Look. We’re a country with a history of both secular and religious,” kind of like you’re talking about, “both The Enlightenment and a more biblical framework, all coming together. And so guess what, when you look around for monuments, you’ll see secular monuments and religious monuments. And that’s who we are as a people. It’s okay.” And this idea that you’re supposed to sniff around and find the religious monuments and tear them down is nowhere in the law, although it’s what is being attempted in the law.
Darrell Bock: It’s interesting, and you led into my next question, and that is, how do we deal with the rights and sensitivities of someone who isn’t religious in the context of our public square, which is designed to be diverse? I think we have to be honest about that. And so how do we deal with that? And my initial reaction is to say, “Well, if someone’s an atheist, I’m not inherently offended by that. That’s their choice. And hopefully they’ll recognize the same thing for me for being a religious person.” It seems to me that that is how it was designed to function, versus some other way.

Kelly Shackelford: Absolutely. No, absolutely. And so you provide freedom for everybody, to their own beliefs, to their own expression. But there’s this new sort of intolerance, this I have a right – Well, there’s a group that calls themselves the Freedom From Religion Foundation. And they run around the country, filing letters and trying really change the country. As somebody who practices in this area, it’s just such a foolish phrase. There’s no freedom from religion if there’s freedom of religion. There’s no freedom from speech if there’s freedom of speech. The whole point of living in a free society is you hear things that you disagree with. And that’s okay, that people have a right to express things you disagree with. And that includes religious things that you disagree with. So to have freedom of religion means citizens don’t have some sort of right to be free from hearing about other people’s religion. They’re going to in a free society where the exchange of ideas occurs. And this attempt to push it into the outskirts – and they do it through different ways, sometimes much more subtly than others. One of the favorites is the use of the term which, of course, is not in the Constitution, but the concept of separation of church and state. But then the read that in a really wooden, kind of bizarre way, to mean that everywhere the government is, religion can’t be there. Well, the government’s everywhere. So what that would essentially mean is, religion goes into the corners of society, and religious expression in the corners of society. And that is what some people really want. They want religious freedom to mean, you have the right to your religion in your church, in your synagogue, and in your home, and that’s it. And so, things like being able to exercise your faith in your workplace, or – And that’s what we’re seeing these cases on. Hobby Lobby and others, that’s what these cases are really ultimately about. We’re representing people as Christians who are losing their job because they’re living their faith out in their workplace, which is against the law. We have laws protecting against that. But this is this whole philosophy that wants to sort of – They think the country would be better if religion was removed from public society.
Darrell Bock

And it’s amazing, ‘cause again, if you look at the history of our country, you can look at – there’s a very famous citation from George Washington in his farewell address, talking about how important virtue and religion is to the stability of a society. You’ve got John Adams making this same point as one of the founders. Thomas Jefferson makes the same point even though he, as we’ve already said, isn’t necessarily an orthodox Christian. People see the value of the pursuit of virtue as a stabilizing force in the culture. And yet we’ve got this push to kind of almost have anything goes, which actually is – it may, to some people’s minds, protect them, but it actually undermines the society that they are a part of.
No, that’s exactly right. And that’s what’s so funny about these cases. If these folks ever got what they really wanted, what they’d really have is the government having power over people’s conscience. Freedom from religion. If the government could tell us that we’re not gonna talk about religion in public, we’ve given incredible power to the government over the marketplace of ideas, and people’s conscience and expression. And what they don’t understand is, for the atheist, they lose freedom, too, when that happens, because the government power that has just been given will be used against them, as well. So, we really all should be for full, vibrant religious freedom, for those of faith, and those who don’t have faith at all. Now, as Christians, we believe that we don’t need an unfair advantage, because all we need is freedom to speak the truth, and let the Holy Spirit and God do what he will. But that’s the fight. It seems like people want to push it to the corners. And some people want to use the government for their religion in a way like we talked about earlier. You think especially some of the Muslim countries where there’s just a complete meshing of government and religion. And certainly there’s not religious freedom in those places. That’s a very different idea from ours. And I’ll tell you one of the things that people miss a lot. One of the things that’s so unique about our country and what you’re talking about, about this the Enlightenment as well as the biblical values that came in, is that that leads to a central core idea in our country that our freedoms, our liberties, come from God, and no government can take them away. That makes us very unique. You go around the world and find countries that believe that, and I think that’s what contributes a lot to this – I don’t know – renegade spirit, this independent mindset America that says, “You’re not gonna take my liberty.” And I think that’s a very healthy thing for a free society, and I think it’s really unique. But I think, ultimately, it comes from that idea right at the beginning of the Declaration of Independence, that these rights come from our creator. And it’s on that presupposition that the nation is built. It says – I think the next line is, our foundations are built. And so that’s where it starts. It starts with God giving us liberty, not government. And then the government is built upon that truth.
Darrell Bock  

Yeah, it is an interesting starting point. If someone just sits down and reads the Declaration of Independence, that document really is a justification for why the country declared independence. And it’s almost a justification before God – and I think the phrase in the Declaration is “a Providence.” I think that’s how they talk about God. And there is also writing on the other end of it. When the colonies came to see how they were successful in the war of revolution, they talk about Providence a lot, as well. And I don’t want to get into a kind of Manifest Destiny point of view, but there is very much the sense that what was taking place was taking place before God, with God’s awareness. And if we had the wall of separation build as some would have it, then when we go back and read our history, we not only would have to take Wite-Out to certain portions of the Declaration of Independence, we’d have to take Wite-Out to whole portions of the explanation of what was going on.

Kelly Shackelford  

No. You’re exactly right. I think it takes an incredible – what’s the word I’m looking for? It’s not faith. I can’t imagine – you read the book – read something like 1776. Not a Christian book. Just written on the history of what happened in 1776 by McCullough. Excellent. It was a best seller and everything. You can’t help but see God’s hand. We should not be here as a nation. Our army was a joke, somewhat. And the things that happened to allow for victory, I think – Our founders all were very – very much believed that this was a miracle of God that this nation even came into existence, fighting the most powerful army in the world with very little. So I think that imbeds through everything they do. And that is why you had great times of prayer in the legislature. That is why they established chaplains. So again, there’s a great religious heritage and religious history in our country. The great thing about it is, it’s not like some other countries, and other religions, to be honest, that what they do when they are giving freedom to everybody, no matter what their faith is, or even if they have no faith at all.

Darrell Bock  

Yeah. Well, it’s an important area. And I think that if you learn to equate freedom of religion and freedom of conscience, and recognize that those two things very much go together, then there shouldn’t be any sense of feeling threatened about the fact that this right exists, and that it’s a very important part of the way our country is structured.
Okay. Well, that kind of lays the background and the foundations for what we’re gonna talk about. You’re here because you work in this area. You’ve worked the law in this area. And for some people, law is just a very strange part of existence. So help us make sense out of this. When did the effort start to work on first amendment issues? And what have we seen in the last say several decades that has changed the nature of the conversation?
Kelly Shackelford  I think what happened, to be honest, is we got asleep at the wheel, a little bit. You assume that things are gonna continue as they were, where there are other groups that have very different agendas. And so there were groups forming in the early 1900s to begin to take the country in a different direction on some of these issues – especially on religious freedom, to move towards what you would call a strict separation, to really push religion to outside the public square, and certainly, nowhere near anywhere that government is. And so you had, for decades, groups like the ACLU and others that had an agenda that they were trying to accomplish, and literally no one on the other side. And so, while they lost most of those cases, every once in awhile they’d win one. And then they would eventually win another, and win another. And you start to build some things that way. And so it really was a long time. We started to see, I think, the law move – especially in the ‘60s – in a direction that was not really true to what the founders and what the Constitution meant. But they didn’t have as much intellectual firepower on the other side of the briefing. And I think, eventually that started to move back, I’d say in the 1980s. There were groups that do like what I do, that started to be involved, provide better scholarship. There were also professors, law professors writing on some of these things. And I include in that, not just people who are religious law professors – ‘cause most of them probably aren’t – they’re people who are agnostic and others, but who understand religious freedom, and began to write on it and how important it was, and how we’d missed the mark a little bit on what some of the directions we were going. So, I would say that for a good while there, we really were moving in a bad direction, and really pulling back on religious freedom, and somewhat trying to deny our heritage, that we – we do have a religious history and religious heritage in this country. Nothing wrong with that, as long as you provide freedom for everybody. And I think we’ve started to get that back, but I say that as a guy who’s been doing this for 25 years, the last – it’s really ticking up, the attacks. And there’s really a movement afoot of people who – and I think maybe it comes from sort of a belief that the non-moral absolutes crowd. And they just don’t want to hear those kinds of concepts and phrases. And so they’re literally trying to shut things down. And the uptick in the attacks – I know we have a – we just do a survey of all the challenges across the country, every attack on religious freedom, and there’s about ten a page on this, and it’s just beyond what can even believe. And this was double from the year before, the number. And it includes everything from an eight year old boy caught in his classroom praying over his meal at the lunch cafeteria, taken to the principal’s office and told to never do that again, to senior citizens told that their meals were gonna be taken away because they were federally funded, and they were praying over their meals, and that violated separation of church and state.
And so you see how – it can be young, it can be old, it can be the north, the south, it’s every situation now. There’s literally nowhere to avoid these kinds of situations. You could go into a retirement home. There’s plenty of retirement home cases about somebody tries to put up a Christmas decoration, and there’s a lawsuit to, “Oh, no. We’re not gonna allow you to,” even though it’s a government run facility. So, these are the type of things that are happening now. And it’s just at a level I’ve never seen. And, I’ve even seen it in the past year or so especially move to something I really am uncomfortable with, which is away from sort of a what you can do to now an attack on what you believe. And I’ve seen that in a number of different cases. We have, for instance, a well known sports broadcaster who got a job working for a major network. Did a fabulous job. And then was fired. And when asked why he was fired, this is what they told the newspaper, it was that they had found out that when he ran for office two years earlier, he had been asked about marriage, and his answer about what he believed about marriage was that God says that marriage is a man and a woman. And that was the reason. They said that those kind of views didn’t play well in their LA Human Resources department. And so he was fired, not because of anything he did, but because of his beliefs, his religious beliefs, that had nothing to do with his job performance. And so I could give you a lot of those examples. But it’s that kind of conscience thing that I find really disturbing, because it’s not even, “Well, you’re doing something.” And then I say, “Well, I’m doing it because of religion.” That’s the typical case. And they go, “Well, we don’t care why you’re doing it. We’re not gonna allow you to do this.” That’s different from the government coming to you, or employers coming to you and saying, “I’d like to know what you believe. And then I’m gonna treat you differently, based upon what your religious beliefs are.” That’s something that is very new, I think, in the last few years.

Interesting. Well, let’s work our way up to where we are. I suspect that if you ask most people about this who know a little bit about it, that the first case that they bring up would be the prayer in school case from the ’60s involving Madalyn Murray O’Hair. So my question to you is, was that really the first ground breaking case? Or was there something before that?
No. Really, the first case was a case in 1947 called Everson. And it’s one of those things that, in law, you understand, sometimes you can win a case. But, if the rationale that’s laid down is not thought through very well, it can be the ticking time bomb that’s gonna really be a disaster in the future. That’s what happened in Everson. In Everson – and to be honest with you, some of this is a result – and there’s been some books written on this. It won’t surprise most Christians, ‘cause there’s a majority of Christians in this country, so you’d think they’d be pro religious freedom. Well, the reason for some of this conflict that happened with the Everson case is that the Protestants were not liking the Catholics. And so, most schools were somewhat Protestant schools. If you went to the public school you were basically at a Protestant school. If you went to the private religious school you were probably at the Catholic school. And so what this case was about was it was a program that was done so that people could get a – they could have a little bit of help on getting their kids to a private school, with transportation, with busing and things. And there was an argument, “Well, that’s unconstitutional.” Well, some of the people behind this argument that it was unconstitutional, justices included, later it turned out were just anti-Catholic. But, this is sort of the case that brought up, well, is it – what if you have a program that says, “Look. Anybody who goes – since we pay for public schools, and you pay for them with your taxes – if you’re paying again to go to a private school, it’s education, it’s a good thing, we will give you a little bit of a write off on your taxes for your transportation.” There’s nothing religious about that. That’s for anybody, whatever school they go to, whatever – in this case – non-profit private school they go to. That should have been a neutral thing that was okay. But what they did in the decision – and they ended up saying it was okay. They said it wasn’t unconstitutional, it didn’t violate the establishment clause. But they laid out what they said the establishment clause meant. And when they did, they used some language that was really extreme. And actually, if they’d followed their own language, they’d have struck it down. [Laughter] But they said the establishment clause essentially – I don’t want to go through all of it, but – essentially they said, “If the government aids religion, then it violates the establishment clause.” Well, guess what’s gonna happen down the line? Anything where the government is doing something that aids religion in general is a violation of the establishment clause. So, now you have the prayer cases, the Engel versus Schempp case and the Madalyn Murray O’Hair case, and those come up, and it’s prayer. And they say that’s anytime the government does anything that aids religion, and so they struck that down. And that’s what started a lot of the other cases that came. They came – cases where you literally couldn’t provide textbooks, secular textbooks that were used in the public schools, you couldn’t provide those same textbooks to private schools that were religious schools, ‘cause that was considered a violation, ‘cause you were aiding religion by providing these textbooks.
Darrell Bock: These wonderful resources for these schools.

Kelly Shackelford: Yeah. So it got really extreme. And again, there’s a whole litany of cases that were struggling through this. And then what eventually the court did is it came back to, I would say, a more rational approach. I still don’t think it’s probably constitutionally right on line. But what they said is neutrality. As long as the government is neutral, it’s okay. Neutral between religion and non-religion. They’re not doing something to pump up a religion or whatever. So, for instance, like in the school bus deals, that would have been okay, because it didn’t matter if you were a religious school or not, everybody got the transportation vouchers, or the transportation write-offs. And so it would apply to any sort of government funding, or these type of issues. And so it began to move back, I think, in a more rational way, but probably still not where the founders were, because again, the founders weren’t – didn’t have a problem with money going to some sort of religion in general, for instance having a chaplain. That chaplain was paid by federal treasury money. And they considered him the chaplain for everybody, even though he was of a particular faith, and a particular denomination. They just saw it as religion in general being a good thing for the country, and they always wanted everybody to have their own individual freedom, but they didn’t see a problem with the government supporting religion in a general way.

Darrell Bock: So as you’re saying this, the coins of our currency flash into my mind. And I wonder, do we go from In God We Trust, to just We Trust?

Kelly Shackelford: Yeah.

Darrell Bock: [Laughter]

Kelly Shackelford: There’s been a number of law suits on that, and there’s been a number of law suits on the Pledge of Allegiance, which says, “Under God.”

Darrell Bock: Right.
Kelly Shackelford  And again, we’ve had two of those lawsuits ourselves, and we’ve won all of those. But again, that’s what the other side wants. And that’s what they’re trying to do with the lawsuits. That’s just really not – if they can find a judge – judges that want to do that, then maybe they’ll win some day. But I hope we never get there, because that’s really not what the Constitution says. It’s not – And it’s what Justice Kennedy says – and I agree with him – would be creating a hostility to religion. And, of course, the founders never wanted a hostility to religion, this sort of secular state that was hostile to religion. In fact, they were very much the opposite. They were very friendly to religion. They just didn’t want to take sides. They didn’t want to say, This denomination over this one,” or “We now have the Church of America,” or – they didn’t want to do that because they came out of that, and that would restrict on freedom of every individual to choose their own faith in accordance to their own conscience.