Religious Liberty

Part 2 of 2: Litigation and Religious Liberty
with Darrell Bock, Kelly Shackelford
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Darrell Bock  

You have to recognize that if you move into this neutrality area you actually do open yourself up for all kinds of possibilities. We took four sabbaticals in Germany. In Germany, the first day you go to class, if you’re a child, you have to declare your religious commitment, because they have religion classes in the schools. And so my children were asked if they were Katholisch or Evangelisch, which is Catholic or Protestant. And my girls, at the time – they were nine and eight – didn’t know the answer to the question. And so they said, “Well, we’re just Christian. Can that be okay?”

Kelly Shackelford  

[Laughter]

Darrell Bock  

And so once we got that all sorted out, they did end up in schools that covered all kinds of religious beliefs. So they heard about Buddhism, and Confucianism, et cetera. They even heard about Satanism in a way in which the teacher, one year, for one of the classes for one of my daughters, focused on that for almost inordinately. But that comes with the territory. And we were feeling like we were going through this experience completely opposite from the type of experience you go through in America with our kids in the schools. And our feeling was, “Well, we’d rather have that open public square environment, recognizing that means you’re gonna hear all kinds of things, than to have the kind of environment that says you can’t even talk about this at all.” Because we actually think that’s more a reflection of the real world that we live in. People have religious beliefs of all kinds and sorts. And you’re going to be relating to people who relate out of those realities in terms of how they perceive their take on the world. So being aware of that’s actually a pretty important part of engaging, not just in American society, but in society at large. And so it seems to me to be not just a legally wise policy, but just a practically wise policy.
Kelly Shackelford  No, I think you’re right. The example that comes to mind the most for me is graduations. There’s been a case at the Supreme Court that I think is just a badly decided case where they didn’t allow prayer at graduations. And it was an incredibly innocuous prayer, by the way. I think it was by a Jewish speaker, and it was declared unconstitutional. Justice Kennedy was the swing vote and ruled that way. And so, if we could step back from the legal a second – and, by the way, we’re fighting a lot of cases now where people say, “Well, since they couldn’t do that, then when a valedictorian wants to say something religious, we have to stop that.” We’re like, “Oh, no. That’s not what the case says.” The case is about the government establishing a prayer as part of the graduation. That’s very different from a valedictorian who wins the right to speak, and then expresses a religious thought. Now, if the government interferes, they are violating the Constitution very clearly. But, just stepping back from a policy side, ‘cause I think this is good to think about, and I’ll be in debates with atheists or agnostics on this and I’ll say, “We’re trying to get to how you live in a diverse society.” One approach is shut down everybody who says things that make you uncomfortable. That’s never been our approach in this country.

Darrell Bock  That makes for a lot of silence. [Laughter]

Kelly Shackelford  Yeah. The better approach is let people say what they’re gonna say, and then talk to your children. This is a graduation. The parents are there. If you’re really concerned that, “What if somebody said something different from your religion?” I was like, “Well, if the rabbi got up I would probably expect him to say something slightly different from my religion.” Whatever faith it is, I would see that as a wonderful opportunity to talk to my children. “You know, hey, they believe that. Here’s how we differ. We love religious freedom. We’re glad they can express what they believe and live that fully, and we can, too.” That’s the answer. On a policy side, that’s a much better way to deal with those situations than this idea of shutting down valedictorian – The last valedictorian case we had, there was literally an order from a federal judge telling the students, the children, that if they mentioned God or prayer at the graduation, that they would violate his order, and then he would enforce his order by “incarceration.” He literally threatened jail if kids mentioned God. And so, we actually had to jump in on behalf of the valedictorian and go all the way to the federal court of appeals. We won. But this was not some yahoo or some crazy person on the radio or on TV. This was a federal judge who had issued this order.
So we’re talking about the difference, really, between engagement and a kind of censorship, that really is not a reflection of the kind of open society that we would hope would have been created.

Let’s go – time is slipping away from us, here. I’m getting nervous.

Let’s talk about some specific cases. I remember the first time I heard you speak on this. You mentioned a case that involved veterans. And I remember thinking about this case and going, – what was being done and said about it and how it worked – and I went – it’s almost unbelievable. So, talk about this case. This is a California case. Talk about this case and what it went through, and how – ‘cause it kinda illustrates the problem.

Yeah. I know the case that you’re talking about is the Mojave Desert Veterans Memorial case. And this really starts back in 1934. These were World War I vets who came back from the war. To be honest, they weren’t particularly religious people. They didn’t pray over their meals, or really do anything. But they saw a lot. And, to be honest, a lot of people died in World War I from the Spanish flu. So they were actually advised by doctors to go into a very dry climate. So this group went into the desert, the Mojave Desert, to prospect. And that’s where they lived, in the desert. And they just decided they wanted to do something to remember those who had given sacrifice. So in the middle of 1.6 million acres of desert, they put a seven foot cross, just a lone cross. And the bottom they had their VFW post number. And it just said, “For the dead of all wars.” And so, I don’t think they meant anything religious by it. They just were recognizing people who had died.

Commemorating death and sacrifice.

Exactly. And sat there for 70 years until the ACLU brought a lawsuit. I don’t know if they were –

Someone must have been on a drive.
Yeah. Well, you really have to look to find this. It was actually – they found a park ranger who worked out there at one point and knew about it, and filed a lawsuit to have it torn down, after 70 years. And fortunately, we hooked up with the last living World War I vet, before he died, turned to this other guy, Henry Sandoz. And he said, “Henry, when I pass away, will you watch over this memorial?” And so for 25 years, Henry and Wanda, his wife, would go out there and check on it in the middle of the desert, just make sure it’s okay. Sometimes vandals would do things, and they’d just reconstitute it and make sure it was in place, ‘cause he wanted to honor those veterans. And so he was just appalled that there was not only a lawsuit, but the federal judge – both the district court and court of appeals – ordered, “Tear it down.” And so at that point, we realized, okay, this is – they’re gonna tear down a veterans memorial that’s been up for 70 years. And we could talk about in a minute what that would mean beyond this one case, but it was just horrifying enough for that one case. And so we were contacted by all the major veterans groups, the American Legion, the VFW, the American Ex Prisoners of War, Military Order of the Purple Heart. And on their behalf we filed a motion in the Supreme Court to say, “Oh, no. Don’t allow this to happen.” And our brief ended up getting cited 13 times in the Supreme Court’s opinion when they reversed the – But this is – I don’t know if people could see this, but this is what happened on appeal.

If you give it to me I can – there’s a camera over here.

That is what happened on appeal. They ordered that this cross, this memorial, be covered in a bag. And there’s a chain around the bottom with a padlock on it. And you look at that picture and you think, “What country is this in?” And it’s in the United States.

Looks like a collapsed air balloon, or something.
Kelly Shackelford: Yeah. And you could tell – the thing that’s frightening is – you could tell that’s a cross in there. And they’re trying to suffocate the cross. Well, yes, we won. And so people say, “So why you make a big deal? The ACLU lost their lawsuit. You got a victory at the Supreme Court.” Well, that was 5-4. So, that picture is the law if you change one justice. Just shows people how close we are to maybe losing some things. And it’s not over. We have five more of these that we’re doing right now, veterans memorials that are being attacked. Probably the most well known is Mt. Soledad outside of San Diego, which is – that’s a memorial that’s been there since 1956. It’s got 3400 plaques around it. It’s a cross with about 3400 plaques to soldiers of all faiths, with menorah – all kinds of symbols, stars of David things on their plaques. And again, there’s now an order to tear that down within 90 days. And we got a stay while we’re going on appeal. But, there is an attempt – a clear attempt – by the ACLU and these groups, they want the religious symbols down.

Darrell Bock: It’s interesting. If you survey the war cemeteries in Europe where American soldiers live, it’s pretty interesting to walk through those cemeteries where you see a mixture of crosses and stars of David, et cetera. And there’s something about the personal identity of the person who’s buried that is being commemorated on the grave stone that’s a part of – this is a part of who this person was. What right does the government have to censor that part of our identity?
Kelly Shackelford  

Well, there’d be none. That’d even be a stronger case. But I think that’s where it leads. Let’s say – they didn’t win Mojave – but let’s say the Mt. Soledad, which has been there since 1956, what if this order to tear it down were to win out in the courts all the way up the court of appeals? Well, number one, everybody would see that on TV. They would see, kind of like the Saddam Husein statue going down. They would see the bulldozer to this memorial. Be a horrifying, I think, thing for all the veterans to see, and even people of faith to see. But, what precedent does that set? If that one has to come down, then you’ve got to go to Arlington Memorial. There’s a 24 foot cross there, the Cross of Sacrifice, that’s not on a person’s grave. It was given to us by Canada. It’s the Cross of Sacrifice. There’s the Argonne Cross, which is ten feet tall. There’s the tomb of the unknown soldier that says, “Known but to God.” You’ve got to sandblast that off. The kind of religious cleansing that would have to occur across the country – every community of every state of this country – I think would be beyond anybody’s understanding. And this is what we were talking about earlier, that this country has a religious heritage. You’re gonna find secular monuments and religious monuments, and that’s okay. It’s okay to have all those things. This sort of mission to tear down and to sand blast all the religious things away is really not compatible with our country, our constitution. But this is the attempt, and this is what they want. You take down – And some people sometimes say – I know I was this way at first, “Oh, it’s a symbol. What do you care about –” Symbols are really powerful. They actually bring together a lot of ideas into one concrete image. And if you notice what like the USSR and these group, when they take over, the first thing they do is take down all the religious symbols and put up the new government symbols. So, it is really important. I think these symbols are very important that we have in our public arena, both religious and secular symbols.
So we really are – We’ve worked hard at describing the scene. But I think what’s really important about the conversation is we’re not just talking about the defense of Constitutional rights, although that’s important. But we’re also talking about the character of the society that we’re gonna live in. And what kind of society is it gonna be? Is it a society of engagement? Is it a society of censorship? Is it a society that says, “Oh, you can’t do that because I’m offended.” But if you get to do what you want to do then the offense just simply is in reverse. And so – So how does that work? And does that really – The odd thing is, the ironic thing I think is, is that the people who sometimes are arguing for this are contending they’re defending diversity, when in fact they’re actually not.
Kelly Shackelford

No, you’re exactly right. And I could – There’s a lot of examples of this. And I just think of the past couple of weeks of our cases alone. A little second grader who was told she couldn’t read her Bible during free reading time. A little five year old girl who was actually stopped from praying over here meal at school, ‘cause that was “not good,” is what she was told. And I think of all these. But probably the one that really, I think, gets your point across that you’re making there is, had a little girl we represented. I’m thinking she was probably seven, eight, nine years old. They did this, when you ran a certain distance, you could – at a certain time – you would trace around your foot, and you’d put it up on the wall. Well, she did it. And it was her turn. And everybody would write a little something on there like, “Jenny loves Johnny,” or whatever. Well, she wrote, “Jesus loves me.” Very innocent. That’s what she wrote. And well, the teacher rips this down and says, “You can’t put this up here.” Well, she goes home crying to her dad saying this is what happened. Well, he calls us, and we call the school. And by this time they realized, “Oops.” And so they go back to her, without telling the parents or us, trying to correct it before we could even get there, and they say, “Go ahead and do another one.” She does another one. It’s exactly like the first one except, instead of Jesus loves me that’s out there where everybody – there’s a little bitty cross in the corner. That’s all you can see. And I thought, that’s a picture of what happened to her internally. She learned to hide her faith, to be ashamed of it. And you hope that she can break out of that, but it’s gonna be hard, ‘cause she – they’re very impressionable at that age. And I thought, “What a disaster,” that that’s what we do to children. When you create that atmosphere in society that the crosses and the religious things aren’t allowed anywhere, it’s like the new pornography. That goes all the way down to the children and really affects them, and how they can grow up and be open and honest about who the are and what they believe, and what their faith perspective is. And I think that’s very damaging to the country, but that whole approach is so important in so many different ways.

Darrell Bock

Now, we’re not gonna have enough time to explore this, but I’m gonna get it started, ‘cause it gives me an excuse to invite you back and talk for more.

Kelly Shackelford

[Laughter]
**Darrell Bock**  
But we have another set of cases, and I would say there are two types that are out there that also impact this area. And the two types are the cases where someone is asked to participate in their right that by conscience they feel uncomfortable participating in in support of same sex marriages and the cases of – we had the case of I think it’s the flower shop and the photographer, in two different states. That’s one kind. And then the other are the requirements of health laws that are asking schools, religious schools and churches and, well, whoever has to cover employees, even for profits, to engage in practices that, morally, they have questions about. These are two other major areas. We’ve just talked about the general area, really. But these are two specific kinds of cases that are coming down the pike, and that we’re looking at. How should we – I’m gonna ask a generic question, ‘cause there’s no way, in the time we have left, we can cover this. But, how should we look at these kinds of cases? Because they do present some interesting additional contrasts than the straight religious right question.

**Kelly Shackelford**  
Well, I think they’re very important. And it’s like we talked about earlier. If you lose – If you give the government the power over people’s religious conscience, even if you’re an atheist you’ve now lost, because they have a right over your conscience, too. And once they wedge in there – and this is why, again, the founders called this the first freedom, because if you lose it you’re gonna lose all your political freedom. And it’s because that’s probably the most powerful place the government could have over you if it controls this. Let’s take the health care cases. I think most people, when they see the Little Sisters of the Poor, a bunch of nuns being told that they have to provide sterilization for the other nuns, which violates their faith, and abortion causing drugs, which violates their faith, I think almost everybody goes, “What? You’re trying to force them to do what?” And all of these – We have a number of these cases around the country with religious schools, and organizations, as well as for profit.

**Darrell Bock**  
Yeah. I’m on the board of Wheaton College. We’re in the middle of one of these cases. I’m actually on a task force that’s looking at this issue.
Kelly Shackelford

Well, and here’s the issue, and the thing that, to me, is a way to really simplify it. If the government wants to provide these morally objectionable things, then the government should provide them. But the idea that they have the right to force you or me or people that are watching this to violate their conscience to accomplish the government’s goals – that’s just morally wrong. And it’s exactly why we have religious freedom. One of the reasons – and you reference this earlier – why religious freedom exists, and why the founders knew they needed to provide it is, if you force people, ultimately, to choose between their God and their government, many people would choose God, and you will have anarchy. And that’s what they’re courting with this type of thing, where they’re trying to force people to violate their conscience. That’s why you have all these stories of Hobby Lobby saying, “This company was built on these Christian principles and prayer. We’re not gonna do this. We’re not gonna provide things and violate our faith.”

Certainly The Little Sisters of the Poor, the nuns, are not gonna violate their faith. And I think a lot of people around the country will say, “No. I won’t do it.” And that’s why I say this is a very important concept. You don’t want the government to have the right to come in. It’s different from you doing something, and the government saying, “Stop that,” and you saying, “But I’m doing this out of my faith.” Those are important cases, and we fight over those cases. This is the government saying, “I’m gonna force you to affirmatively do something that violates your faith.” That is like the ultimate intolerance. ‘Cause the government doesn’t have to have you do it. There’s no reason why somebody else can’t provide – They don’t have to have the religious employers provide the thing that violates religious faith.

Darrell Bock

That’s the tragedy in this for me as I look at it, is why is it that you force the employer or the school or the church to provide this when it would be just as easy, in a generic way, to underwrite it, pay for it. And then it becomes the – as long as the person has access to it – if we’re gonna create a neutral playing ground, as we’ve talked about – as long as a person has access to it, and they make the choice about what they are dealing with, why do you force another person to make a choice they don’t want to make?
Kelly Shackelford: Yeah. And it’s just a power that, if you ever give the government, it’s chilling. If the government can now tell anybody in the country to engage in affirmative acts that the government mandates that violate your faith, I don’t know what’s left, at that point. So it’s a very important – these cases are very important cases. I think the other cases you mentioned are similar. They’re a little different, because the government’s involvement is – they’re being brought in as the stick at the end. But the thing about those is there’s some similar issues, which is the idea that, as a – if you’re in a state where it’s now, under the laws there, two men can go and be married, or two women, I really don’t think that there’s a lack of photographers or florists or bakers. So what these case really are is a hunting around to find the person that has a religious objection, and then to see if we can use the government to really put the screws to them to force them to violate their conscience or punish them. And I just think that’s really sad. That’s not what our country was built to do, at all. Again, I think, let people follow their beliefs. I understand people are gonna disagree about the issue of marriage. Certainly those of faith that follow biblically are gonna stand on God’s definition. But whatever – And even if people disagree with that, I would fight for their right to disagree with that. That’s how our country’s supposed to work, not, “Well, let’s see if I can find – I found somebody who disagrees with me. Let’s see if I can get the government to really punish them for disagreeing with me.” I don’t even comprehend that mindset.

Darrell Bock: It’s an in your face approach to things.

Kelly Shackelford: And it’s not what this country is like. It’s repugnant, which is why even – There’s people like Andrew Sullivan, who’s a very well known gay activist who basically says, “If this is what my movement is about, I’m out.” So there’s even some of those who have said, “This is way too far.” But that’s what those cases are about, and I think they’re wrong. But I think the Supreme Court decision with Hobby Lobby and Conestoga Wood will begin giving us some solution to this. Probably won’t hear until late June. But still, even after that, I still think we’re gonna have to fight all these non-profit cases with Christian colleges, with seminaries, with all them, because there’s a different provision –

Darrell Bock: That’s right. There’s three layers.
Kelly Shackelford  And so I think almost – unless the court just goes ahead and takes care of everything there [Laughter] with some comments, which I – they don’t typically do. They typically decide the case before them. I think we’re still gonna have a fight on the right of these ministries to not be forced to violate their faith, which I think is incredible that we’re even having this kind of a discussion.

Darrell Bock  Yeah. My understanding is – I’m not a lawyer, but I’ve been listening to a lot of lawyers lately [Laughter] – is that there are really three levels in the health care case. There are churches, which are automatically excluded. There are the institutions like the seminaries and the Bible colleges which are seen to be close enough to institutions that they’ve been granted in effect a temporary waiver while all these are being decided. And the for profits are not covered, and that’s the Hobby Lobby case.

Kelly Shackelford  Right.

Darrell Bock  And so we’ve even got gradations on how this is being looked at, as the attempt is to say, “Well, that’s really religious. I guess that’s sort of religious. And that’s not religious at all.” And I guess that’s the basis for the creation of the distinctions.

Kelly Shackelford  Well, and there’s a different provision that’s offered, where they try to – they tried to paper over the non-profit problem by creating an accounting fiction to get around them having to technically pay for. Of course, it doesn’t work. What they don’t understand is, if something violates somebody’s conscience, and they’re the vehicle for making it happen –

Darrell Bock  Seen to contribute to the action, yeah.
**Kelly Shackelford**

They’re not – It’s still a violation of their religious conscience. They’re not gonna participate in that, even if it’s indirectly. They can’t. And so – But, that provision will mean they’re still – No matter what probably happens in those cases, I think we’ve got more litigation. And we represent – we’ve probably got, I don’t know, 20 to 40 Christian colleges alone that we haven’t filed lawsuits on because we’re waiting until this decision, which will then give us more information, so that we can then file those. And so there’s a real battle ahead. But again, I just want people to understand the overall concept. It’s the idea of the government trying to force, in this case, religious organizations to violate their conscience. Groups like a group of nuns. That’s one of the cases. And it just shows how completely out of touch this is. And the really sad thing is, none of it’s necessary. This is all because of a regulation. And to be honest with you, I think most of us know why it’s – it was a political calculation of ginning up the abortion groups that that’s a really important issue within the Democratic Party. And so they worked on that to try to push that, to make that an issue, and in the process created this huge religious freedom issue. And it wasn’t necessary. It still isn’t necessary. And I’m hopeful the court’s gonna say that you can’t force people to violate their faith.

**Darrell Bock**

Yeah. And what we’re talking about here is thinking through the kind of society we’re gonna be a part of, and what the Constitution has outlined for us, and the debates that rotate around that. Well, Kelly, I really appreciate you taking the time to be with us. I say this all the time at the end of these, we only scratched the surface and barely gotten started. And I suspect, when we get the Hobby Lobby decision and we can take a good look at what that actually means, I may invite you back to help us sort through these more particular cases having done a general look at religious liberty. But it is a very important freedom that we’ve been given. It’s a unique part of what our country has been built around. It sets the tone in our society for how we engage with one another in the midst of our differences. It actually is an affirmation of diversity, and it needs to be protected as it was intended, in terms of the way it was originally given to us.
Kelly Shackelford  Well, and I would tell people, if they ever have a question on any of this, they can always call us. We’re free. And we have a lot of educational materials on our web site at LibertyInstitute.org, where like what are the rights of students in public schools? We have what are the rights of people of faith in the military? And an 800 number for anybody in the military to call if they have any incidents or problems, or even as somebody who is in command over others, what they can and cannot do. So all that’s available on the web site, because when people have that information they’re empowered to live out freely how they’re being called to do that.

Darrell Bock  Well, great. I appreciate it, Kelly. And thank you for helping us with this very important area of really political and social discussion in our country. And we thank you for being a part of The Table, where we discuss issues of God and culture.