

JRCLS Religious Liberty Fellowship Notes
October 7th-8th 2022

Jane Sandberg's Notes:

October 7th

Nick Reaves, Counsel at Becket: "Foundations of Religious Liberty: Constitutional and Statutory Protections"

Establishment Clause- Separation of church and state is not meant to remove religion from the public sphere entirely. The Lemon Test was discarded by the Supreme Court, where do we go now? When discussing cases with the establishment clause: is the government acting in ways that truly establish a state church? Other establishment clause doctrines to keep in mind are coercion and excessive entanglement. Does the government coerce citizens into one religion or are they entangled past the separation of church and state? American Legion Case: the monument was also historical, so taking it down would make a bigger statement than leaving it. Becket favors a more historical approach to the Establishment Clause. When defining religion: think about religiosity and sincerity

Free Exercise Clause- Congress shall make no law prohibiting the free exercise of religion. Tiers of scrutiny: compelling interest and least restrictive means. In Employment Division v. Smith, Scalia redefined the clause. If the legislature allowed religious exemptions to all, there would be chaos. Legislatures should pass laws that are generally applicable and neutral, and not single out one religion. The Religious Freedom Restoration Act or RFRA was a response to the Smith case. It reestablished scrutiny.

Brian Grim, President of the Religious Freedom & Business Foundation: "Faith ERGs and Religious Liberty in Corporate America"

How is religious freedom restricted? Government and society. How is religious freedom advanced? Business can be a powerful ally. Advocacy is very important, but so is "building." "Building" is a more business-focused approach. Employees should be able to bring their whole selves to work. A great way to do this is to have religious employee resource groups in the workplace. One example of this is Google's Interbeilef Network. It is important to portray religion in a positive light in the media. Making space for religious freedom can improve overall productivity in the business sector. What can lawyers do? They can advocate for faith-based groups and ensure that other groups have the same support.

Religious Liberty Careers Panel:

Annika Boone Barkdull, Attorney, Schaerr Jaffe: Focus on clerkships, fellowships, and other opportunities. Find ways to get involved in religious liberty while still in school. She felt called to the work but was told that there were not many opportunities for people interested in religious freedom. She still persisted and found ways to be involved.

Tanner Bean, Attorney, Fabian VanCott: He was interested in religious liberty, but also found it hard to get into the field. He organized a conference to balance conflicts between LGBTQ and religious groups. There are so many ways to work with religious liberty-related cases even if that is not your full-time job.

Daniel Ortner, Attorney, Foundation for Individual Rights and Expression: He currently works at the FIRE office. His specialization is primarily in public interest law. Public interest law is not discussed heavily in law school, but there are many professional opportunities available in that field. He loves to work in litigation for topics he feels passionate about.

Morgan Farnsworth: J. Reuben Clark Law School, Brigham Young University '22: There are so many opportunities out there for law students. She served a mission in Russia, and her interest in religious freedom was sparked when missionary work was banned there. She works in international relations law with a focus on post-soviet countries. Recently she lived in Geneva and worked at the UN Commission for Human Rights. She read and responded to letters from individuals who had their human rights violated. It was heavy work, but she was grateful for the opportunity to be involved and make a difference in people's lives.

Each of the participants discussed how much BYU's law conferences and symposiums impacted them and their careers.

Congressional Panel:

Celeste Maloy, Counsel, Congressman Chris Stewart: Works with the FFA & other religious freedom-related bills/acts. She got her undergraduate degree in agriculture, then got a law degree to work with water and public land. Although she had no interest in religious freedom, she is involved in policy work that often involves religious freedom along with water and public land. Her two main pieces of advice were to be kind to everyone and to not worry about graduating at the top of your class.

Matt McGhie, Counsel, U.S. Senate: He went to law school wanting to write legislation. He writes legislation on international religious freedom issues, particularly when there are violations. In the international sphere, he emphasized the importance of being familiar with the UN's Human Rights Statement. It's important to look internationally to find religious freedom issues to resolve. His office is strictly non-partisan, and they take proposals and put them into legislative wording.

Gene Schaerr, Partner, Schaerr Jaffe: "U.S. Supreme Court Religious Liberty Updates" Schaerr presented an overview of the decisions of the Rehnquist and Roberts Courts regarding religious freedom. He believes that the court has generally been a protector of religious liberty. In the Rehnquist Court, 75% of religious liberty claims were protected. In the Roberts Court, 86% of religious liberty claims were protected. An important aspect of working in the field of religious liberty law is being familiar with the justice's past decisions and predicting how they will vote in future decisions.

Becket Fund: “Religious Liberty Client Panel”

Eric Baxter, Betty Odgaard, and Leo Katsareas

Betty Odgaard: She and her husband owned a wedding venue and refused to rent it to same-sex couples. They got sued and ended up needing to close the venue, which led to them working with Becket.

Leo Katsareas: He is in the process of suing the United States Navy for the right to keep his beard, which is part of his Muslim faith. He enlisted in the military under the impression that he could keep his beard, but when he submitted his request, he was denied.

Eric Baxter: Lawyers working on cases like these need to have compassion and understanding for their clients. Choosing to sue is a difficult and taxing experience, and they need emotional support throughout the process. These clients feel compelled or called by God to follow their conscience, so even if Becket lawyers do not agree with the beliefs, they still work to protect their religious liberty.

Mark Gillespie, Law Clerk, U.S. Supreme Court: “Judicial Perspectives”

He clerked on the 11th Circuit, and now he clerks for Chief Justice Roberts. When looking for clerkships, it is very important to get a feel for the judges before committing to one. Good clerks and judges remember that petitioners are people too. It is important to recognize that laws go both ways and that even decisions you mostly agree with may not fully align with your beliefs.

October 8th:

Robin Fretwell Wilson, Director, Institute of Government and Public Affairs, University of Illinois: “Legislating the Balance of Religious Liberty & LGBT Nondiscrimination at the State Level”

Robin discussed the SOGI (Sexual Orientation and Gender Identity) protections by state. Over 53% of Americans can be denied housing and other things based on their SOGI. She has done lots of work with the Utah Legislature and worked on drafting the Utah Compromise. The Utah Compromise is 2 bills that protect LGBTQ rights nondiscrimination and religious freedom.

According to her, the role of lawmakers is to deal with explosive issues, give clear and constructive reasonable answers, and change hearts. In terms of the present clashes, there are many. Robin brought up dueling claims of discrimination in an adoption case. Gay couples allege discrimination by religious adoption and foster care agencies, and religious adoptions and foster care agencies allege discrimination by state and federal governments. She also touched on competitive advantage and trans-athlete eligibility and the nuances of that issue. She ended by speaking about the fact that we are smart enough to find solutions to these problems, but they are difficult to apply to politics.

Rev. Marian Edmonds-Allen, Executive Director, Parity: “Intersectionality and Religious Liberty: How Understanding Your Neighbor Can Advance Mutually Advantageous Policy & the Fairness for All Act”

Rev. Edmonds-Allen shared her experiences working with homeless youth in Salt Lake City, Utah. There is a high density of youth who have been kicked out of their homes because of religious reasons, and Utah laws do not allow unaccompanied youth to stay in shelters. This was a huge issue, so she spent many years working with both communities and lawmakers. Something that surprised her was that even after being kicked out, most of the youth did not resent their parents, and they wanted to reconcile. Rev. Edmonds-Allen also shared about a friend who became a great asset to her center for LGBTQ youth. Her friend Laura brought a new perspective and a new set of resources to the cause. She did not share the same religious beliefs, but they came together on something they both felt passionate about. Her main piece of advice to the fellows was to find things that they are passionate about and then connect with others who share those passions but have different backgrounds and beliefs. This allows new pathways to be formed and can help individuals come together and reach goals.

Kelsey Dallas, National Religion Reporter & Associate Editor, Deseret News: “Religious Liberty in the Media”

Kelsey’s remarks were focused on the importance of headlines. Journalists have the difficult job of needing to catch people’s attention and also wanting to stay semi-neutral and not fan the flames of controversial topics or completely take a stance on one side. She shared the Deseret News headline guidance which was to be accurate, interesting, concise, conversational, and to think about the audience. It is tempting for reporters to write bad quality headlines where they over-emphasize things or leave them too dry. They need to strike a balance somewhere in between. Media outlets face an uncertain future. These changes affect the way the public understands religious freedom. Be mindful of what you share. What you click and tweet holds power—if you continue to support crazy stories, they will receive more traction than other more honest outlets that do not over-exaggerate things. Seek out good journalism sources.

Honorable Ryan D. Nelson, Judge, United States Court of Appeals for the Ninth Circuit: “Religious Liberty at the Court of Appeals for the Ninth Circuit”

Judge Ryan Nelson’s presentation mainly focused on the Kennedy v. Bremerton case and his insights on the Establishment Clause. After summarizing the facts of the case, he pointed out that the court said it had deserted the Lemon Test long ago, which reversed the 9th Circuit. He then discussed his observations about this case. The Supreme Court does not usually overrule a precedent in this way. They never explicitly said they overruled it. Instead, they evaluated on history and tradition. This case illustrates the Supreme Court’s shift to using strict interpretations of the original documents. He also said that courts should no longer rely on Lemon. Not every case that cited it in a decision should be overturned, but those that heavily relied on it should be re-examined. Over-reliance on one case (Lemon) causes judges to forget the actual

wording/meaning of the Establishment Clause. Going forward, history and tradition will be the standard to rely on.