

REPORT FROM THE CAPITAL

Magazine of the Baptist Joint Committee for Religious Liberty



99 faith groups tell Congress: Don't politicize our houses of worship

HOLLY HOLLMAN delivers lectures on religious liberty in real life

AMANDA TYLER shares a two-kingdom view of religious freedom

NEIL GORSUCH'S church-state record

A THREAT TO ANYONE'S RELIGIOUS LIBERTY IS A THREAT TO EVERYONE'S RELIGIOUS LIBERTY

Rabbi David Saperstein to speak at Religious Liberty Council Luncheon



RABBI DAVID SAPERSTEIN will deliver the keynote address at the 2017 Religious Liberty Council Luncheon on Friday, June 30, in Atlanta, Georgia.

Tickets are now on sale for the event, which is a great time to connect with the BJC and other supporters of religious liberty.

Rabbi Saperstein served as the U.S. Ambassador-at-Large for International Religious Freedom from December 2014 until January 2017. In that role, he headed the State Department's Office of International Religious Freedom and monitored religious freedom abuses around the world. Previously, he led the Religious Action Center of Reform Judaism (RAC) for 40 years, and he now serves as the organization's

senior advisor for policy and strategy.

Rabbi Saperstein was elected the first Chair of the U.S. Commission on International Religious Freedom in 1999, and in 2009, he was appointed by President Barack Obama as a member of the first White House Advisory Council on Faith-based and Neighborhood Partnerships.

The RLC Luncheon is open to the public, but you must have a ticket to attend. Tickets are \$40 each, and tables of 10 are available for \$400. Young ministers with 5 years or less experience have the opportunity to purchase tickets for a discounted price of \$20.

To purchase tickets and learn more about the annual event, visit BJCOnline.org/Luncheon.

Revised Executive Order removes refugee religious test, but concerns remain

On March 6, President Donald J. Trump signed a revised Executive Order on immigration that, while no longer explicitly preferencing refugees based on religion, still raises concerns.

The president's action revoked the Executive Order he issued January 27, which various courts had halted over claims that it violated due process and the Establishment Clause.

The revised Order temporarily bars citizens of six majority-Muslim nations from entering the United States, removing Iraq from the list of seven countries in the first Order. It also retains the temporary ban on refugee admissions into the United States, but it no longer explicitly preferences future refugees who are facing religious persecution if they are a religious minority in their country of nationality.

"By removing the preference for refugees of minority religions, the revised order acknowledges a fundamental principle of our constitutional guarantee of religious freedom: We do not preference certain faiths over others," said BJC Executive

"The Baptist Joint Committee remains concerned that this administration is using religious identity as a proxy for 'security threat' and a reason for exclusion."

Director Amanda Tyler.

"The Baptist Joint Committee remains concerned that this administration is using religious identity as a proxy for 'security threat' and a reason for exclusion," she continued.

"To respond to these concerns and the widespread perception that this order perpetuates religious discrimination, President Trump must renounce his prior comments calling for a Muslim ban and condemn anti-Muslim bigotry in all its forms," Tyler said.

The BJC referred to the January 27 Executive Order as a "back-door bar on Muslim refugees" that "sends the un-American message that there are second-class faiths." The president also made statements on the day of the signing regarding a need to preference persecuted Christians for entry.

At press time for *Report from the Capital*, the revised Order was facing court challenges.

From BJC Staff Reports

A two-kingdom view of religious freedom

By Amanda Tyler, BJC Executive Director

Difference is not always discriminatory. Tendencies to conflate those words – “difference” and “discrimination” – have troubling implications for religious liberty and religion itself. And the threat goes to the very heart of religious practice – the church.

We hear calls for “equal treatment” for churches and other houses of worship in the context of both government funding and political involvement. Baptists have long fought not for equal treatment, but for special treatment of church and religion, in recognition of the church’s distinct role and in order to protect religious liberty.

In practice, recognizing the uniqueness of houses of worship often means that churches are treated more favorably than other entities, including other nonprofit organizations. Churches are, for example, exempt from requirements to file 990 tax forms, to register with the IRS as a nonprofit organization and to comply with the Lobbying Disclosure Act. In other situations, particularly when taxpayer funds are involved, limitations on the church may be necessary to guard against interference by and entanglement with the state. Treating churches differently does not automatically mean the state is mistreating them.

But that discrimination claim is exactly the argument that is being made in *Trinity Lutheran v. Comer*, set for oral argument before the U.S. Supreme Court on April 19. (You can read more about the case and the BJC’s *amicus curiae* brief at BJCOnline.org/TrinityLutheran.) Missouri denied Trinity Lutheran Church’s application for taxpayer support to improve its playground, citing the state constitution that prohibits direct aid to churches. The church sued and has since appealed rulings against it, arguing that Missouri is required to fund its playground improvements.

Trinity Lutheran Church’s position has far-ranging implications because 39 states have “no aid” provisions in their state constitutions that effectively prohibit direct payment to churches. Those protections, like the “no establishment” clause in the First Amendment, are grounded in the historical experience of Baptists and other religious minorities who suffered under state-supported churches. James Madison wrote that any amount of taxpayer support – even “three pence only” – was too much. To oppose government funding for houses of worship as a protection for religious liberty is an originalist position.

As the BJC’s brief in support of Missouri’s position explains, there are many good reasons to prohibit government funding of houses of worship. “No aid” principles preserve church autonomy, avoid religious conflict in the legislative and administrative process, and protect taxpayer conscience by not requiring citizens to support religion. Far from discrimination, treating churches differently shows respect for the distinct role of religion in general and houses of worship in particular.

Similar sentiments of equal treatment appear in arguments made by those who want to “destroy the Johnson Amendment,” which has become code for changing the tax laws that currently set apart charitable nonprofits and private foundations from the morass of partisan candidate campaigns. These 501(c)(3) organizations are not only tax-exempt, but they also benefit from tax-deductible donations. In exchange for that most-favored tax status, the groups agree to refrain from endorsing or opposing candidates.

This long-standing arrangement, which has been in the tax code for more than 60 years, has served the nonprofit sector and particularly houses of worship well. Pastors see the many pitfalls that would come with political endorsements, including divisions in the congregation, distractions from the core mission of being church and dilution of the Gospel. It is not surprising that when surveyed, large majorities of Americans oppose candidate endorsements in church, and the level of opposition is even higher among clergy.

Notice the underlying assumption of the proposal: that church is just another place to hear a political ad. Church is much more than that – a place of fellowship, a house of worship and a sanctuary of peace. These unique qualities are exactly what draw many people to church. Removing the protections in the law could very well lead politicians to pressure pastors to use their pulpits for campaign speech, alienating churchgoers in the short term and, in the long term, fundamentally changing the role of church in our society.

Jesus’ admonition to render unto God what is God’s and to Caesar what is Caesar’s gives us a two-kingdom mentality as a framework for religious freedom. Arguments for Trinity Lutheran Church and for encouraging churches to electioneer mix the kingdoms in troubling ways. The former would make Caesar support God’s house and the latter could lead pastors to render to Caesar in God’s house. Neither approach bodes well for religion or religious liberty.



BJC General Counsel Holly Hollman speaks at Campbell University Divinity School's Butler Chapel in Buies Creek, North Carolina.



Photo: Ian Butts



Hollman on religious liberty in real life

BJC General Counsel discusses religious freedom in the real world during the 2017 Shurden Lectures

What does it look like to live out religious liberty in real life? How are we supposed to uphold the First Amendment and stay true to our Baptist legacy in the middle of running errands or while we are on our daily commute?

Holly Hollman guided students at Campbell University in Buies Creek, North Carolina, toward understanding religious liberty as it is protected by law and as it can be modeled in day-to-day life. She spoke on campus March 27-28 for the 2017 Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State. The lectures were hosted and co-sponsored by Campbell University, a school informed and inspired by its Baptist heritage whose mission statement includes preparing students for purposeful lives and meaningful service.

Serving as general counsel of the Baptist Joint Committee since 2001, Hollman brought her experience in the legal world and in her daily interactions to share with students. She has written numerous friend-of-the-court briefs dealing with religious liberty, and Hollman regularly speaks to the media, churches, panel discussions and other groups about the legal and spiritual ways religious liberty is protected in this country.

“As individual Christians – or just as thankful Americans who inherited a legacy of religious freedom – we want to do our part to uphold the separation of church and state and embrace not just the law but the spirit of religious liberty in daily life,” she said.

For her first presentation, Hollman spoke to hundreds of undergraduate students in Campbell's Connections program, which seeks to educate, challenge and prepare students to live and act responsibly in the world. Acknowledging the anxieties about new developments in the law and changes in the culture, she reminded them not to be fooled by those who play on fears and present easy answers to complex problems.

“There is a need for smart students like you to understand how we got here and engage in deliberate dialogue with people from different perspectives, and to affirm core principles of religious liberty to keep our differences from dividing us too deeply,” she said. “We need to recognize the importance of the separation of church and state as a means for ensuring religious liberty for all and reclaim the historic role of Baptists.”

Hollman explained that religious liberty is the right to believe and exercise or act upon religious conscience without unnecessary interference by the government.

“The right to believe, sometimes referred to as freedom of conscience, means you can make up your own mind about ultimate things — your place in the universe, your relationship to God or other Supreme Being and your relationship to other people,” she explained. “We are lucky in this country that we don't fight too much about the right to believe, but that is not to be taken for granted. Prior to the founding era, reli-



Photo: Ian Butts

Hollman delivers the 12th installment of the Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State.

religious tests and oath requirements for political positions were common.”

While the law in the United States protects our right to believe or not to believe and our right to exercise our beliefs (if we have them), Hollman explained how religious freedom claims can conflict with other laws and require courts to find an appropriate balance.

She pointed out that it is important to know what religious liberty is not. “Religious liberty does not mean that the law must reflect all of your religious values, even if your religion is the majority faith; it does not mean that the government can perform your religious duties for you or that you can use the coercive power of the government to make others conform to your religious beliefs,” she said.

Hollman explained that the American tradition includes the two Religion Clauses of the First Amendment to protect religious liberty for all: one protects the free exercise of religion and the other prevents a government establishment of religion.

She described how those two clauses create a “separation of church and state,” which is a phrase used as shorthand for a deeper truth: religious liberty is best protected when the institutions of church and state remain separate and neither tries to perform or in-

terfere with the essential mission and work of the other.

“At the BJC, we embrace the separation of church and state because it is important to the protection of religious liberty. We don’t want government to unduly restrict religion, and we don’t want government to try to promote religion,” she said. “After all, whose religion should it promote? And where does that leave those who are not in the chosen religion?”

“When the government tries to aid religion — financially or otherwise — it not only runs the risk of discriminating among faiths, it also tends to regulate it and often waters it down, robbing religion of its vitality and independence,” Hollman continued. “That certainly does nothing for the cause of Christianity or any other religion.”

Hollman discussed the Baptist commitment to religious liberty for all in colonial America, and she encouraged the students to think about what this means when they encounter religious liberty ideas or conflicts at a deeper level as they continue their studies or engage with others.

“As you do, remember the promise of religious liberty that Baptists fought for, that our constitution and other laws have protected, and find ways in your life to affirm, protect

and live out the promise of religious liberty, so that we secure it for the future and for each other,” she said.

For her second lecture, Hollman spoke at the Campbell University School of Divinity’s Butler Chapel to divinity students, church leaders and others from the greater community. She continued her call to embrace religious liberty every day.

“How will you affirm religious liberty in the opportunities that come your way?” she asked. “The first and perhaps most common way you will get to affirm religious liberty is when people ask that typical get-to-know you question: What do you do? Or maybe they’ll ask where you went to school or what you studied.”

Hollman encouraged everyone to claim their position in ministry in conversations, no matter if you are a full-time minister or just someone with knowledge of Baptist principles. When you engage in religious conversations in our religiously free and diverse society, she explained, you are upholding religious freedom.

“Bringing your whole self, including your religious perspective, to conversations is an act of religious expression and recognition of religious liberty,” Hollman said.

All of us are protected in bringing our beliefs

Photo: Ian Butts



Divinity School Professor Tony Cartledge and Amanda Tyler



Charles Watson Jr. speaks to a class



Lynn Brinkley, Director of Student Services and Alumni Relations at Campbell University Divinity School; BJC Executive Director Amanda Tyler; BJC Education and Outreach Specialist Charles Watson Jr.; Shurden Lecturer and BJC General Counsel Holly Hollman; Campbell University President J. Bradley Creed; BJC Communications Director Cherilyn Crowe.

to the public conversation, no matter if we are part of the Christian majority, members of minority religions or not religious, she explained.

“We need conversations. When we hear Christians or others complain that their religious freedom is threatened, we should pay attention,” she shared. “Conversations can help us understand what the fears are and what is at stake; and, when on closer examination the threat is not what it appears to be, how we can work together to ensure religious liberty for all.”

During Hollman’s lectures, she reminded people to be aware of the myriad ways you can see religious freedom in everyday life – from meeting people to being asked to pray to sharing your opinion in a political debate.

“Just as the BJC will continue our work in Congress and the Courts, the legacy we inherited likewise depends on each of us to live out religious liberty in real life to secure this freedom for the future,” she concluded.

While on campus for the lectures, other BJC staff members also engaged with students and the community.

BJC Executive Director Amanda Tyler delivered a sermon during the Divinity School’s chapel service on March 28, discussing what it means to love and know our neighbors.

“The dramatic surge in hate rhetoric and violence directed at religious minorities over the past several months is as much a threat to religious liberty as any law passed by Congress or executive order signed by the president,” she said. “And these individual acts require both a response from our officials but also from we the people. Not only must law enforcement investigate and prosecute criminal acts and political leaders denounce bigotry, but we as citizens and co-sustainers of our democracy must not abandon the important roles we play in protecting religious liberty.”

“We must be upstanders, not just bystanders,” Tyler proclaimed. “When we see bigotry, intolerance, and ignorance, we must speak up for our neighbor.”

The Baptist Joint Committee also visited classrooms at Campbell. BJC Education and Outreach Specialist Charles Watson Jr. gave presentations on the BJC’s work in undergraduate and graduate classrooms, and Communications Director Cherilyn Crowe discussed her work in a class called “Ministry of Writing” at the Divinity School.

To conclude the campus visit, Watson gave a presentation to hundreds of undergraduate students Wednesday morning, discussing how his previous work as a hospital chap-

lain led him to embrace standing up for the religious freedom of all people, and he connected his passions for music and caring for others to his passion for religious liberty.

J. Bradley Creed, the president of Campbell University, said he was pleased the BJC staff engaged students on campus with issues at the intersection of church and state.

“The Baptist Joint Committee has been a tireless champion for historic principles of religious liberty which sustain crucial freedoms for all in the United States,” he said. “The lectures from BJC leadership Amanda Tyler and Holly Hollman were challenging and informative, and the classroom visits and interactions with students on campus by BJC staff members were highly effective and well-received.”

The Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State began when the Shurdens, educators in Macon, Georgia, endowed the series in 2004 to educate others about the importance of religious liberty.

For more information on the lecture series and to watch videos from this year’s event, visit BJCOnline.org/ShurdenLectures.

By Cherilyn Crowe

Representatives of Baptist, Jewish, Muslim and Catholic groups deliver letters on behalf of 99 different faith organizations to every member of Congress asking to keep current laws in place that protect houses of worship from politicization.



Religious groups tell Congress: Do not politicize our houses of worship

Almost 100 faith groups ask Congress to keep the 'Johnson Amendment'

Religious groups are urging Congress to maintain current law that protects houses of worship and other religious nonprofit organizations from political pressure and additional dangers that come with endorsing and opposing candidates.

On April 4, a diverse coalition of 99 faith groups delivered a letter to House and Senate leaders reminding them that the current tax code safeguards “the integrity of our charitable sector and campaign finance system.”

“A broad section of America’s faith community is delivering a message loud and clear: We don’t want and we don’t need a change in the tax law to pursue our mission,” said BJC Executive Director Amanda Tyler. “As soon as the church joins at the hip with a particular candidate or party, its prophetic witness – its ability to speak truth to power and not risk being co-opted by the government – is hindered.”

The letter reminds Congress that houses of worship already can speak to issues, and leaders can endorse or oppose candidates in their personal capacity. “Current law simply limits groups from being both a tax-exempt ministry and a partisan political entity,” the letter states.

“The American Muslim community watches with dismay the use of religion by politicians in many countries and feels horrified by its disastrous consequences for all,” said Dr. Sayyid Syeed of the Islamic Society of North America.

“In America, this wall has protected us from politicizing our houses of worship and prevented our pulpits from being dragged on to the political stump,” he said.

The greater nonprofit community also is calling for the law to remain. The following day, nearly

4,500 nonprofits delivered a letter to Congress asking to maintain the current law that protects 501(c)(3)s from being hounded for partisan political contributions and endorsements.

The groups are united against any calls to repeal or change the so-called “Johnson Amendment,” which has become shorthand for a provision in the tax code that applies to all 501(c)(3) organizations. Groups that choose that most-favored tax status must refrain from endorsing, opposing or financially supporting political candidates.

“Most pastors know that endorsing candidates would divide their diverse congregations, distract from their core purpose, and dilute their message,” Tyler said. “All clergy can – and do – speak out on the great moral issues of the day, but encouraging houses of worship to intervene in campaigns with tax-deductible offerings would fundamentally change them. Churches are not political action committees, nor should they be.”

Polls consistently show that vast majorities of Americans and members of the clergy do not want tax-exempt nonprofits engaging in political campaigns. Most recently, Independent Sector’s March 2017 research revealed that 72 percent of all Americans want to keep the current law. The National Association of Evangelicals found that nearly 90 percent of evangelical leaders do not think pastors should endorse politicians from the pulpit in its February 2017 survey.

Read the letter and hear from other faith leaders at BJCOnline.org/CommunityNotCandidates, and join the conversation on social media with the hashtag #CommunityNotCandidates.

By Cheryln Crowe

Ensuring true religious freedom: The First Amendment is not enough

By Michael Lieberman
Washington Counsel, Anti-Defamation League

As readers of *Report from the Capital* know well, religious liberty is a fundamental tenet of the United States and a bedrock principle for our notions of democratic pluralism. Our First Amendment's guarantees – that the government may not establish or endorse religion and may not interfere with a citizen's free exercise of religious practices – have no modern day parallel and no historical precedent. They are unique.

And insufficient.

You can't practice your religion freely if you don't feel safe in your house of worship – or if you are anxious, every day, about wearing your hijab, turban or kippah on the street. Structural and constitutional protections provide no certain protection from anti-Semitism, Islamophobia and other forms of religious bigotry. Religious intolerance poses a danger of being attacked, but it also sends a daily, dispiriting message – that minority religion adherents are outsiders, the other, not welcome here.

Over the past six months, there has been a dramatic uptick in incidents of racist, xenophobic and religious harassment, threats and violence across the country. The Jewish community has faced a disturbing increase in bomb threats, cemetery desecrations, assaults and vandalism at our synagogues. A suspect (disturbingly, an Israeli Jew) has now been arrested and charged with the vast majority of the bomb threats. We cannot know the intent or motivation of this individual, but we do know, clearly, the impact on the daily lives of people at each of more than 150 selected targets (including the Washington Office of the ADL, which is where I work).

Of course, there's a context for these incidents; anti-Semitism is an ancient hatred. We have seen prejudice lead to discrimination, lead to violence.

The Anti-Defamation League has been tracking anti-Semitic incidents in America since 1979. In 2015, ADL tracked almost 950 anti-Semitic incidents, a three percent increase over 2014, with a significant increase in the number of assaults. Early indications are that the trend is continuing through 2016 and the first three months of 2017. The New York Police Department also reported that anti-Semitic acts have nearly doubled in early 2017 compared to 2016. In addition to these overt acts, the League has documented a virtual tsunami of vicious "trolling" of Jews on social media, such as Twitter.

The FBI has been tracking hate crimes in America since the enactment of the Hate Crime Statistics Act in 1990. In 2015 (the most recent data available) and in almost every year since 1990, religious-based hate crimes have been the second most frequent hate crime reported (race has always been the most frequent, with



crimes against African-Americans most numerous). Religion-based crimes increased 23 percent in 2015. Crimes directed against Jews increased nine percent and reported crimes against Muslims increased 67 percent – to a total second only to the many backlash crimes in 2001, after the 9/11 terrorist incidents. Disturbingly, Jews and Jewish institutions have always been between 50 and 80 percent of the reported religion-based hate crimes – especially distressing since Jews constitute about two and a half percent of all Americans.

Anti-Semitic incidents, like all bias-motivated crimes, are designed to intimidate the victim and members of the victim's community, leaving them

feeling fearful, isolated, vulnerable and unprotected by the law. By making members of minority communities fearful, angry and suspicious of other groups – and of the power structure that is supposed to protect them – these incidents can damage the fabric of our society and fragment communities. There is no doubt that the extraordinarily polarizing and divisive election campaign – which featured harshly anti-Muslim rhetoric and anti-Semitic dog whistles – has coarsened the public discourse and emboldened white supremacists and other anti-Semites and bigots to believe that their views are becoming mainstream.

But the many incidents of religious intolerance have also provided extraordinary opportunities for interfaith support rallies and coalition networking. In many communities, people of many faiths have come together to speak out against vandalism, cemetery desecrations and violence. And on Capitol Hill, all 100 senators(!) came together to write to Attorney General Jeff Sessions, FBI Director James Comey and Department of Homeland Security Secretary John Kelly to urge them to address threats against the Jewish community and other religious institutions.

These statements of solidarity are heartening and encouraging. And they show that it is the bigots – not the religious minorities – that are marginalized.

Baptists and Jews share a history of religious discrimination and persecution. We understand the danger of government coercion and restrictions on our religious practices. And that's why the BJC and the ADL have been stalwart allies defending the wall between church and state.

The First Amendment is vitally important. But it's not our only guarantor of religious liberty. Teaching respect and understanding for other religious beliefs and promoting acceptance of other religious practices are necessary to create an environment in which people can freely practice their religion without fear, and religious liberty can truly flourish.



The U.S. Supreme Court and religious liberty: What does the selection of Neil Gorsuch mean?

By Holly Hollman, BJC General Counsel

The composition of the U.S. Supreme Court was an important election issue to many Trump voters. When Justice Antonin Scalia died in February 2016, the Republican-led Senate refused to hold hearings on President Barack Obama's nominee, Judge Merrick Garland. This political move created the opportunity for the next president to try to maintain or shift the balance of the conservative-leaning Supreme Court. Specific issues of concern for many included abortion, gun rights and religious liberty.

President Donald Trump's nominee, Judge Neil Gorsuch, has been praised as a conservative suitable to fill Scalia's seat. Gorsuch served for ten years on the 10th U.S. Circuit Court of Appeals, and a couple of studies comparing Gorsuch's judicial record with Scalia's and the records of members of the current Court indicate he may be more conservative.

The Baptist Joint Committee for Religious Liberty examined Gorsuch's church-state record. Now that he has been sworn in as our newest Supreme Court justice, these previous rulings and statements give an idea of how he might rule in the future.

What does having Neil Gorsuch on the Supreme Court mean for religious liberty?

Political labels of "conservative" or "liberal" are not particularly indicative of strong support for religious liberty for all. The American legal tradition protects religious liberty, through the First Amendment and other laws, by ensuring the right to exercise religion and prohibiting the government from establishing religion. Some conservatives may place more emphasis on free exercise or majoritarian religion, and some liberals may place more emphasis on "no establishment" and protecting minorities, but principles in support of both Religion Clauses are essential and deserving of bi-partisan respect.

Justice Scalia had a notably weak view of both clauses, one that provided little protection for free exercise and allowed government to favor religion so long as it didn't prefer one religion over another.

Justice Scalia's weak view of the Free Exercise Clause was evident in his majority opinion in the infamous 1990 *Employment Division v. Smith* case, which gutted the Free Exercise Clause and eventually inspired congressional action to pass federal statutes to provide a higher standard of protection for religious exercise. The Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) were both passed with broad bi-partisan support at the urging of a coalition of religious and civil liberty organizations led by the Baptist Joint Committee. Those statutes, more often than the Free Exercise Clause, now provide the basis for religious claims in the courts.

In Establishment Clause cases, Justice Scalia never found a challenged government action violated the Establishment Clause. His view of "neutrality" was much weaker than one that requires government to stay out of religion. Justice Scalia even said that there is nothing wrong with government favoring religion over irreligion. In his decisions, he described the Establishment Clause as prohibiting the government from favoring one religion over another but as permitting the favoring of religion – particularly majoritarian religions – over nonreligion.

If Gorsuch is a justice in the model of Scalia on church-state matters, the closely divided decisions that have marked much of the Court's jurisprudence in this area for a long time will likely continue. Unanimity or strong majorities are possible at times, as the Court has shown especially where statutory protections apply, or as in a case like *Hosanna-Tabor Evangelical Lutheran Church v. EEOC* (2012), where principles of free exercise and no establishment supported the Court's decision to uphold the "ministerial exception" that recognizes broad autonomy rights for church ministries. In most other cases, however, the Court will be sharply divided over determining the breadth and boundaries of religious liberty.

While serving on the 10th U.S. Circuit Court of Appeals, Gorsuch heard several cases dealing with religion that give some insight to how he may approach religious liberty cases.

Judge Neil Gorsuch on the two Religion Clauses of the First Amendment

Free exercise of religion

In cases decided pursuant to federal statutes designed to protect religious exercise, Judge Gorsuch has often given thoughtful attention to religious claims and statutory elements. RFRA and RLUIPA have the same three main components: the government may not (1) substantially burden a person's exercise of religion unless it is (2) to further a compelling governmental interest using (3) the least restrictive means. For the BJC, what matters is whether a judge approaches each case with fairness and fidelity to the law to protect religious liberty for all, not whether a particular claim succeeds or fails.

In *Yellowbear v. Lampert* (challenging a prison's refusal to allow a Native American prisoner any access to its sweat lodge), Judge Gorsuch's decision evaluated each of these three components in a thorough and thoughtful manner. Unfortunately, he did not apply this attention to these same statutory elements in other instances. As has been widely reported, Gorsuch had a role in two RFRA cases that challenged aspects of the Affordable Care Act's contraceptive mandate, cases that eventually went to the U.S. Supreme Court: *Hobby Lobby Stores, Inc. v. Sebelius* and *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell*. In both cases, Gorsuch sided with the employers who made religious claims to avoid legal duties to provide certain employee health benefits.

"... Gorsuch repeatedly summarized the RFRA/RLUIPA standard as protecting sincerely held religious beliefs instead of using the statutory text calling for the protection of religious exercise."

In his written opinions and testimony during his confirmation hearings, Gorsuch repeatedly summarized the RFRA/RLUIPA standard as protecting sincerely held religious beliefs instead of using the statutory text calling for the protection of religious exercise. In two cases involving non-Christian prisoners, Judge Gorsuch discussed the substantial burden inquiry as leaving room for a burden that would be less than substantial. For instance, he wrote that missing an occasional meal or having less than at-will access to a sweat lodge may not be substantial but total exclusion from meals or the sweat lodge would be. But, in *Hobby Lobby* and *Little Sisters* (cases involving Christian beliefs of for-profit and nonprofit organizations), he fully defers to the plaintiffs' self-determination that their burdens are substantial. Also troubling in *Hobby Lobby* is his failure to consider that a compelling government interest necessarily encompasses impact on third parties. The government's interest in health care is not to protect a vague and abstract concept but to protect the health of real identifiable people. Using the same limited record as the 10th Circuit, the U.S. Supreme Court found a compelling government interest that Judge Gorsuch and the rest of the 10th Circuit majority were unable to find.

No establishment

We have only a limited view into Judge Gorsuch's Establishment Clause jurisprudence since he has never been on a 10th Circuit panel that decided an Establishment Clause case. He has responded, however, to two 10th Circuit decisions which found religious displays on government property unconstitutional: *Green v. Haskell County Board of Commissioners* (a Ten Commandments monument outside a courthouse) and *American Atheists v. Duncan* (12-foot-tall roadside memorial crosses to honor fallen highway patrol officers). In both cases, Judge Gorsuch disagreed with the panel's decision and advocated that a review by the entire 10th Circuit was appropriate.

"Under [the reasonable observer] test, a religious display is unconstitutional if it sends a message to adherents of being political insiders and consigns nonadherents to the status of political outsiders. Judge Gorsuch criticizes his colleagues' application of the test and, at times, the test itself"

In doing so, Judge Gorsuch made clear that he thinks some of his colleagues on the 10th Circuit routinely misapply the "reasonable observer" test, also known as the endorsement test. This test, frequently used in religious display cases to help a court decide whether or not the monument is a government establishment of religion, highlights the importance of a community's history and the display's context. Under this test, a religious display is unconstitutional if it sends a message to adherents of being political insiders and consigns non-adherents to the status of political outsiders. Judge Gorsuch criticizes his colleagues' application of the test and, at times, the test itself, but he fails to offer an alternative.

Conclusion

Gorsuch is an experienced judge with impressive academic credentials. In religious liberty cases, his record is mixed.

At times, he has given thoughtful attention to religious claims and carefully applied federal statutes designed to protect free exercise. In other cases, he has been deferential to religious claims beyond what the law requires. That approach puts religious freedom at risk, as does a view of Establishment Clause cases that would allow government endorsement of religion.

*Additional research provided by
BJC Associate General Counsel Jennifer Hawks
and BJC Blogger Don Byrd*

Gifts to the Baptist Joint Comm



At the end of 2016, Brent Walker retired as the executive director of the Baptist Joint Committee. Throughout the year, many gave to the BJC in honor of his 27 years of service, including purchasing tables at the Religious Liberty Council Luncheon, participating in Giving Tuesday and sending a gift at the end of the year. We are thankful for Brent's religious liberty legacy and its continuation, which your support makes possible.



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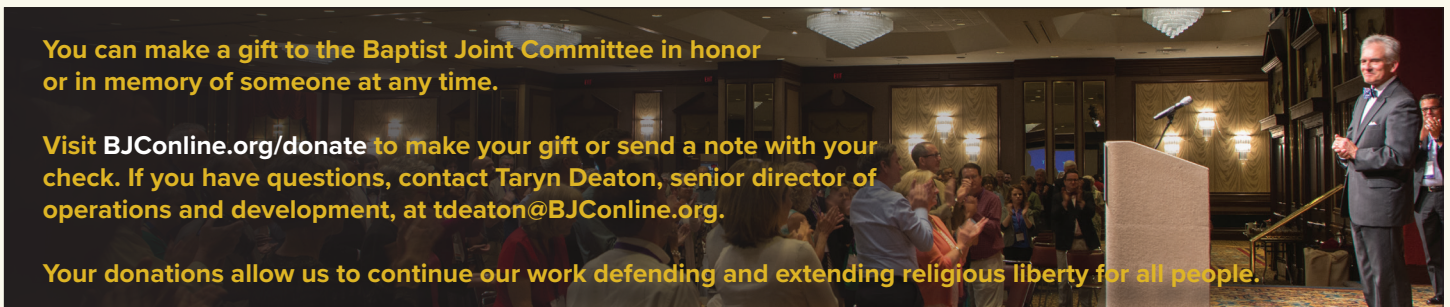
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