

REPORT

from the Capital

‘Genius of America’ based on individual rights, rabbi says

Baptists and Jews, both having suffered historically as minority faiths, share a strong commitment to religious liberty, Rabbi David Saperstein said during the inaugural Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State April 4-5.

Saperstein has directed the Washington-based Religious Action Center for Reform Judaism for 30 years. At the Shurden Lectures, this year at Mercer University, Saperstein said that “robust religious liberty, free of government interference, is the indispensable component” that Jewish and Baptist communities share in common.

The lectureship was created through a gift to the Baptist Joint Committee for Religious Liberty from Walter and Kay Shurden. Walter Shurden is the founding executive director of Mercer’s Center for Baptist Studies. The Georgia Baptist Convention founded Mercer in 1833, although the convention recently severed the affiliation.

BJC Executive Director Brent Walker and Saperstein, both attorneys, work closely with lawmakers on religious freedom issues and have jointly taught classes on First Amendment church-state law at Georgetown University.

The “genius of America,” Saperstein said, is that rights are granted to individuals rather than to groups, from which an individual can be excluded or excommunicated.

“It doesn’t matter if all 290 million Americans ... believe your way of worshiping is wrong,” Saperstein said, adding that individuals retain freedom of religious expression.

Saperstein also said the Framers of the U.S. Constitution “did something revolutionary” in clearly stating that citizenship does not depend on one’s religious convictions.

Those who claim America as “a Christian nation,” Saperstein said, must look to the early Puritan settlers who “really believed they were the new Israel” and “created a political structure based entirely on God’s law.”

Those who later framed the U.S. Constitution “captured the spirit” of religious liberty that has been upheld by the courts through the years, Saperstein added.

He noted that now-retired Supreme Court Justice Sandra Day O’Connor provided the deciding vote outlawing government-sponsored prayer in public schools. “Sandra Day O’Connor is not there!” said Saperstein, expressing concern about whether new justices will continue to keep Americans free from majoritarian religious views and control.

Saperstein said Jews—“the quintessential victims of religious persecution”—have not won cases before the Supreme Court but have benefited from decisions on cases brought by Seventh-Day Adventists and other religious minorities.

No country in the world, Saperstein said, has more people participating in religious communities than the United States. He also said the claim that “separation of church and state is anti-religion or anti-God” is not true.

The principles of complete religious liberty advocated by Baptist pioneers Isaac Backus and John Leland “have served us,” Saperstein said. “Jews I know who care about this study the Baptists.”



Photo courtesy of Mercer University

Rabbi David Saperstein, director of the Religious Action Center for Reform Judaism, speaks at the inaugural Shurden Lectures on Religious Liberty.

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Walker delivers Maston lectures at Logsdon School of Theology

ABILENE, Texas—The separation of church and state is not only a good idea, it is essential to the maintenance of religious liberty, said J. Brent Walker, executive director of the Baptist Joint Committee, lecturer for the sixth annual T. B. Maston Christian Ethics Lectures at Hardin-Simmons University's Logsdon School of Theology.

The annual T. B. Maston Christian Ethics Lectures series explores the application of the Christian faith to life. Maston was known for his pioneering writing and teaching in the areas of biblical ethics, race relations, family life, the Christian and vocation, church and state and character formation. "Young Maston Scholars" from Texas Baptist universities were also presented as part of the series.

April 10 and 11, Walker delivered two lectures. The first, "Telling the Truth About Church-State Separation," debunked some of the myths about church-state separation and highlighted its importance for ensuring religious liberty. The second lecture, "The Religious American Citizen," asserted that the separation of church and state does not divorce religious ethics from public policy and offers guidance for people of faith as they enter the political fray.

"Experience in history shows us that as soon as government starts meddling in religion or takes sides in religious disputes, someone's religious liberty is at that point denied," Walker said. "America's maintenance of a separation of church and state allows Christianity to flourish."

"We can't have true religious liberty without a separation of church and state," he said. "It doesn't have to be a hostile separation, and it doesn't have to be an impenetrable wall, although I like that metaphor."

Walker listed some myths about the separation of church and state. Among them:

— *Generalizations made about the Founding Fathers' personal religious convictions, either that they were all Christians or all Enlightenment rationalists.*

Such statements are "difficult and dangerous," Walker wrote in his essay, "Telling the Truth about Church-State Separation," which formed the basis for the lecture. "We cannot speak in monolithic terms here," he wrote. "... Some were orthodox Christians, some were rationalists; yes, some were Deists; and even an atheist or two were thrown in."

Most of the Founding Fathers came out of a Christian

heritage and tradition, Walker said, but they were a mixed lot when it came to their religion.

"But, we can say with confidence that they were committed to ensuring religious liberty rather than enshrining their own particular religious opinions," he said.

— *There is no separation of church and state because those words are not in the Constitution.*

Neither is "federalism," "separation of powers," and "right to a fair trial," Walker argues. "The Constitution may not have those words in it, but those who wrote the

Constitution and the Bill of Rights and other early observers certainly had those words in them," he said.

The concept is a shorthand way of saying that religious liberty is best protected when church and state are institutionally separated, neither interfering with the essential mission of the other, he said.

— *The United States is a Christian nation. Not in law or fact, Walker said.*

"No one can deny that Americans are a very religious people," he said. "... But our civic compact, the Constitution, is a decidedly secular document."

The Constitution never makes any mention of Christianity, and the Bill of Rights prevents the government from establishing or privileging any religious tradition, he said.

"We have a constitutional democracy in which all religious beliefs are protected," Walker said.

— *The Ten Commandments form the basis of the American legal system.*

They do not, Walker said. Instead, our legal system draws its inspiration from the common law of England, which extends back in part to sources extant long before the Christianization of Britain that prohibited killing, stealing and bearing false witness, among other crimes.

— *The idea that God has been kicked out of public schools.*

Voluntary student religious expression is protected as long as it does not disrupt the educational process and respects others students' right to participate or not, Walker said.

— *God has been kicked out of the public square.*

The institutional separation of church and state does not mean a segregation of religion from politics, God from government or the right of people of faith to speak forcefully in the public square, he said.

— *From reporting by Brian Bethel, Abilene Reporter News, Hardin-Simmons University and staff reports*

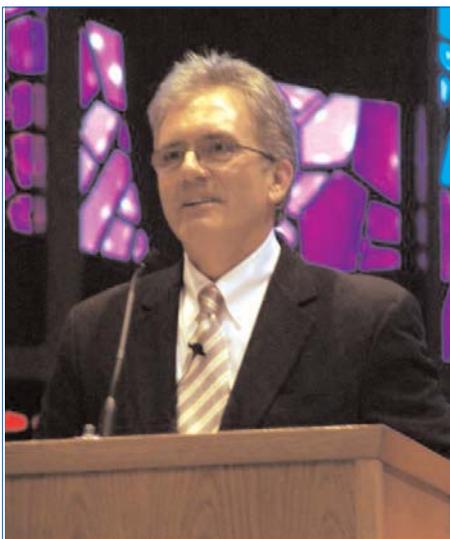


Photo courtesy of Hardin-Simmons University

BJC Executive Director J. Brent Walker speaking at the annual T. B. Maston Christian Ethics Lectures at Hardin-Simmons University's Logsdon School of Theology.

REFLECTIONS



J. Brent Walker
Executive Director

Three reasons we should care about religious liberty

Recently I had the privilege of speaking at the First Baptist Church of Dalton, Ga. It was part of an eight-week Sunday evening series on a variety of topics. Each presenter was asked to speak on “Why I Should Care About ... ?” My topic, of course, was religious liberty. This was a good exercise for me. We often *assume* the importance of religious liberty and then barge ahead to analyze the church-state issue *de jure*.

It's helpful, however, to go back and examine exactly why we value religious liberty in the first place. What would you say to a skeptic who doesn't accept your *a priori* assumptions and convince him or her of religious liberty's importance? This is what I came up with.

It is not too facile to say up front that we should care about religious liberty because so few do nowadays. Many, including Baptists who ought to know better, take their own religious liberty for granted. Even those who care about their own often do not care about the liberty of others. No one should be able to claim religious liberty for himself or herself unless he or she is equally concerned about the liberty of everyone else.

In light of this, we should care about religious liberty for three reasons:

1 It is the **right** thing to do. Liberty is precious, primal and prescient. It is based on who we are as humans and who God is as our sovereign. It has to do with “soul freedom”—a God-given freedom of conscience that we enjoy not because we are Baptists or Christians, but simply by virtue of our basic humanity. God has made us all free agents—free to say yes, free to say no and free not even to make up our minds. To be sure, our faith is nurtured in the womb of the church, but it's a decision each of us has to make for ourselves. Religious freedom, as Baptists throughout history have reminded us, does not result from any act of toleration on the part of the state. Religious freedom is not just a warmed-up leftover from the Enlightenment. It has theological import. So, the fight for religious liberty is an effort to ensure against others doing, or the church doing, or the state doing, what God will not do: to violate conscience or to force faith.

2 It is the **fair** thing to do. Religious liberty goes beyond its theological moorings; it has ethical import. It often has to do with simple fairness, common sense and good citizenship. What we wish for ourselves and our families, we should want for everybody else. Concern for religious liberty requires us to heed what Charles Haynes and Os Guinness commonly refer to as the three R's of civic life: rights, responsibility and

respect. We must treasure the rights God has given us, take seriously our responsibility to exercise them wisely and respect those who have a different point of view about our religious beliefs. In the long run, the rights I enjoy are no stronger than your willingness to stand up for them, and your rights are no more secure than my courage to defend them.

Another way to talk about this concept is to couch it in terms of a golden rule. The sheer reasonableness of the golden rule is acknowledged by almost everyone—people of faith and people of no faith. The golden rule of religious liberty goes something like this: “I must not ask government to promote my religion if I don't want government to promote somebody else's religion. I must not permit government to harm somebody else's religion if I don't want government to harm my religion.” How much better off we would all be—in the United States and abroad—if everyone or even most of us would adhere to this time-honored principle of fairness.

3 It is the **expedient** thing to do. In addition to fundamental rightness and demonstrable fairness, raw self interest should impel us to care about religious liberty. Even if successful in obtaining official governmental sanction for one's own religion, it's still playing with fire. Once you establish the precedent of knocking down the wall of separation for your own benefit, it's hard to deny it to somebody else when they take over or gain control. One day it might be somebody else's religion. Just consider the fast growing religious groups: Mormonism, Islam and various others. While these religious traditions deserve our respect, the idea of a theocracy governed by the president of the LDS Church or even a moderate Imam is not something most Baptists would welcome. And finally, even if that never happens—or in the meantime before it happens—it's still a bad idea. Experience has demonstrated that the merger of church and state, even in the hands of a *benevolent* government, waters down religion and robs it of vitality. This in part explains why some western European democracies, where religion is replete in the public school and square but church pews are empty, are talking seriously about disestablishing their privileged churches.

So this was my best shot at it—three reasons why we should care about religious liberty. You may think of others. If you do, let me know.

No one should be able to claim religious liberty for himself or herself unless he or she is equally concerned about the liberty of everyone else.

In a unanimous decision announced this Spring, the Supreme Court bolstered the Religious Freedom Restoration Act ...

A CLOSER LOOK AT THE UDV CASE POST-DECISION

By K. Hollyn Hollman

The Supreme Court's unanimous decision in *O Centro Espírita Beneficente União do Vegetal (UDV), et al vs. Gonzalez*, issued February 21, was welcome news. We typically have to wait until the last day of the Court's term for the results of religious liberty cases. In the midst of winter in the nation's capital, the decision felt like a sign of spring.

The decision was a solid victory for the continuing vitality of the Religious Freedom Restoration Act (RFRA). The Court firmly rejected the Government's argument that it had a compelling interest in the uniform application of the Controlled Substances Act that would not allow exceptions to accommodate UDV, a religious sect with origins in Brazil. As part of its religious ceremonies, UDV members ingest tea that contains a substance that is regulated by the Controlled Substances Act. The Court enforced RFRA according to its terms, leaving the burden on the government to prove that its infringement on religious practice was warranted under a strict legal standard. The case prompted applause for the BJC's commitment and its leadership role in the Coalition for the Free Exercise of Religion. It also offered an occasion to reflect on the history and importance of RFRA and the changing face of the Supreme Court. Here are some questions and answers that may help explain the decision.

Does this unanimous decision indicate a positive turn in the Supreme Court's Free Exercise jurisprudence?

While the case is a good one for religious liberty, it is based on the statutory protection provided by Congress and signed into law by former President Bill Clinton in the 1993 Religious

Freedom Restoration Act (RFRA). It does not address the question of a religious claim under the First Amendment's Free Exercise Clause.

What does the case tell us about the newest members of the Court and their approach to religious freedom?

The decision was unanimous, written by Chief Justice John Roberts in his first religious freedom case. Because the case was decided on statutory grounds, however, it does not tell us about the new Chief's approach to the Religion Clauses. Justice Samuel Alito took no part in this case because he did not hear oral argument.

Has Justice Antonin Scalia changed the position he took as author of *Employment Division vs. Smith*?

In the 1990 free exercise case of *Employment Division vs. Smith*, Justice Antonin Scalia famously said that "we could not afford the luxury" of deeming presumptively invalid all regulations that burden religion that do not protect interests of the highest order. The BJC decried the *Smith* decision as a "bombshell" and led the Coalition for the Free Exercise of Religion that worked tirelessly for the passage of RFRA. The UDV case, however, does not indicate any change in Justice Scalia's approach to free exercise, only his willingness in this case to follow the statute Congress passed. At oral argument, Justice Scalia noted that "Congress didn't like *Smith*" and passed RFRA to alter the effects of that case. His concerns were echoed in the opinion: "We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by

this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.”

What does the Court’s decision tell us about the continuing vitality of the *Smith* decision?

Smith is now not exactly “super-doooper” precedent, to use the language of recent judicial nomination hearings, but it is now more than 15 years old. Since that 1990 decision, only a few dissenting opinion attempts have asked the Court to revisit the decision. While it is unlikely the court will overturn the 1990 decision anytime soon, early attempts were made to have the Court revisit it. In 1993 Justice Souter argued in *Church of Lukumi vs. City of Hialeah* that *Smith* was contrary to both Free Exercise Clause history and legal precedent and that it should be reexamined.

Are constitutional questions over for RFRA?

When the Supreme Court heard its first RFRA decision in the 1993 *City of Boerne* case, the Court held that Congress lacked the power to extend such broad protections to actions of the states. RFRA remained in effect with regard to federal law, with few questioning its constitutional legitimacy. In the UDV case, the Court did not rule on that issue explicitly, but its decision enforcing RFRA according to its terms makes such challenges more difficult.

Have states responded to the *Boerne* decision?

Thirteen states have now passed legislation similar to RFRA that requires their state courts to grant free exercise protections consistent with the pre-*Smith* standard. Several other states are considering or have considered similar bills. Courts in ten additional states have interpreted their state constitutions to grant greater free exercise protections than granted by the Supreme Court in *Smith*.

Is this case a dangerous decision that opens the door for other controversial practices in religious services? Are there religious practices that the BJC would not support?

As the Court recognized in its decision, the case is limited to the facts. In this case, the Government did not dispute that the religious practice at issue was an exercise of their sincerely held religious beliefs, circumscribed to religious ceremonies. The Court upheld the preliminary injunction that had been granted to UDV because the Government failed to meet its burden to show a compelling interest in stopping this particular religious practice. This does not mean that a case with different facts would have the same result.

The BJC supports the legal standard enacted in RFRA; we do not endorse specific religious practices. While our mission is to promote religious freedom for all, we recognize that government has responsibilities to protect the health, welfare and safety of citizens that will sometimes conflict with and override religious freedom claims.

Does the case mean that all federal laws will have exemptions for religious claims?

The Court stopped short of finding that the Government would never have a compelling interest in the uniform application of a statute. In this instance, however, the Government’s argument that the Controlled Substances Act could bear no exemptions was fatally undermined by the longstanding exemption for religious use of *peyote* by Native Americans.

What happens next to UDV?

The decision upheld preliminary relief granted to the church, which means that the case goes back down to the district court for additional proceeding to determine if the ruling will be permanent. While the Court rejected the Government’s claim under the Controlled Substances Act, it held that *hoasca* was covered by an international treaty. The lower court will determine whether the Government’s interest in the application of that treaty to UDV is sufficient to prevent an exception under RFRA.



K. Hollyn Hollman
General Counsel

Political rhetoric wrongly claims persecution of Christians in America

The careless use of persecution language to describe the state of religious liberty in America today demeans [our Baptist] history.

The BJC, and others who share our commitment to religious liberty, has long been familiar with claims of “hostility toward religion,” often used by those who have a very different understanding of the First Amendment. The assertions appear from time to time in political debates, analysis of court decisions, and sometimes even in judicial opinions. But lately, the declarations seem to be more prominent, even in areas where

Christians make up an overwhelming majority of the population and hold most positions of power and influence. Strikingly, the charges are being recast as more than mere hostility, but as war.

The “War on Christians” was the theme of a recent two-day conference in Washington, sponsored by Rick Scarborough’s “Vision America,” an organization working to mobilize “values voters in 2006.” The conference

material included prominent conservative religious activists, as well as former majority leader Rep. Tom Delay, R-Texas, and a few U.S. senators. According to news reports, the event featured personal accounts by those who believe Christianity in America is under attack by forces of secularism and pluralism. Examples ranged from an artist whose religious works were rejected from a city-sponsored display to a military chaplain who asserts he was persecuted by his commander’s response to the content of a prayer at a memorial service.

The theme of the conference is not an isolated example. Such allegations demand a response. First, though it is tempting to dismiss such claims out of hand, we should always listen carefully and respond appropriately. Certainly, there are instances where Christians, even in this country, are treated unfairly. The desire to avoid conflict sometimes leads to an unnecessary repression of religious expression. While guarding against government advancement of religion, we also must ensure that “separation of church and state” is not used to quiet religious conversation. Often assertions are misleading, but at times we can learn a great deal from listening and even find common cause on issues of moral concern.

Second, when claims are patently false or obviously exaggerated, however, we should not hesitate to say so. When we fail to respond to misleading or unsubstantiated assertions in the media, such assertions receive an undeserved appearance of authority. While the contrast between the freedom Christians enjoy in America today and the experience of our forebears may seem obvious, we know that many Americans (including many Baptists) know little about the historical struggles for religious liberty.

Responding to outlandish claims offers an opportunity for education about the roots of religious liberty in American and Baptist experience. The BJC’s day-to-day work is informed by our Baptist heritage and history. Our history includes the stories of early Baptists in England, and later in Virginia, who were jailed, whipped and banished from their homes because they practiced their religion. This history of persecution continues to inspire our commitment to fight for religious freedom for all and against laws respecting an establishment of religion. The careless use of persecution language to describe the state of religious liberty in America today demeans that history.

Finally, we should not ignore the blatant misuse of these claims for political purposes. In today’s political environment, we are sure to find politicians eager to capitalize on the sentiment or inflame it for political gain. During the “War of Christians” conference, Delay was introduced as someone who had suffered greatly because of his Christian beliefs. In his remarks to the audience, he reportedly basked in a standing ovation after railing against the “enemies of virtue.” The eagerness of elected officials to fan the rhetorical flames and claim virtue should be viewed with suspicion.

With mid-term elections coming up this fall, we are unlikely to see an end of the inflammatory rhetoric. The attendance at the recent conference, however, was far less than expected. As the country concludes its third year at war in Iraq, perhaps more Americans will reject attempts to make “wars” out of our religious differences at home and look for ways to exercise our freedoms responsibly through reasoned dialogue.

Jim Towe to leave White House faith-based post for academia

President Bush's lieutenant for promoting government funding for faith-based social programs announced April 18 he is leaving his post.

Jim Towe, director since 2002 of the White House Office of Faith-Based and Community Initiatives, will leave at the beginning of June to become president of St. Vincent College, a small Benedictine Catholic school in Latrobe, Pa.

In his role, Towe has pushed hard to boost the faith-based plan—garnering him both plaudits from some religious conservatives and criticism from supporters of strong church-state separation.

The White House released a statement from Bush April 18 thanking Towe for his service. "Under his leadership, the Office of Faith-Based and Community Initiatives has applied the compassion of America to help solve some of our most challenging problems," he said. "His work on behalf of the poor and the sick has improved lives. I admire Jim for his compassion, his faith, and his sense of humor."

"Unfortunately, Towe never seemed to recognize that people of faith criticized the [faith-based] initiative precisely because of their faith."

— BJC General Counsel K. Hollyn Hollman, on the resignation of Jim Towe, director of the Office of Faith-Based and Community Initiatives

In a press conference following his announcement, Towe told reporters he still believed in the project. "President Bush's faith-based and community initiative is deeply rooted in America's heartland. It's established. It will continue to bear fruit for years and years to come," he said.

Towe's tenure, and the office itself, have proven controversial. Opponents of direct government funding for pervasively religious charities cited church-state concerns in criticizing Bush's initiative. Some have successfully sued programs funded under the faith-based plan for violating the First Amendment's ban on government endorsement of religion.

Both his predecessor in the office, John DiIulio, and a former Towe aide, David Kuo, ended up criticizing the White House's handling of the issue following their departures. They and other former supporters of the initiative have suggested Bush's political operatives have simply been using the plan to gain support among religious voters—without actually expanding funding for social services.

Towe's sometimes-pugnacious rhetoric in defense of the plan has frustrated its critics. For instance, during his departure press conference, Towe twice called those critical of the initiative "secular extremists," echoing a charge he has made in the past.

One critic of the faith-based plan, Holly Hollman of the Baptist Joint Committee for Religious Liberty, said that sort of rhetoric is unnecessary. "On several occasions, the BJC voiced its concerns to him and sought ways to work together more constructively," she said.

"Unfortunately, Towe never seemed to recognize that people of faith criticized the initiative precisely because of their faith. The initiative diminishes the role of religion by threatening the independence of houses of worship, funding religious discrimination and blurring the line between church and state that protects religious freedom."

—ABP

Navy asks chaplains to practice 'nonsectarian' religion in public

A new U.S. Navy policy has become another point of contention in an ongoing battle over the appropriate role of religion in military ranks.

The Feb. 21 "instruction" from the secretary of the Navy has prompted protests at recent Washington events hosted by evangelical Christians and in a letter from a Virginia-based legal firm known for defending religious rights.

"I am a Navy chaplain and I pray in Jesus' name," said Navy Chaplain (Lt.) Gordon James Klingenschmitt, drawing a standing ovation at a "War on Christians" conference in Washington in late March.

While the Norfolk, Va.-based chaplain interprets the new rules as preventing him from praying as he wishes outside worship services, others say the rules justifiably call for greater inclusiveness under some circumstances.

Outside chapel services, "religious elements for a command function, absent extraordinary circumstances, should be nonsectarian in nature," reads the instruction. It adds that "religious elements" included in such cases will occur under "the commander's guidance."

Lt. William Marks, a Navy spokesman, said of the new regulation, "There's nothing in that new instruction anywhere that forbids anyone from praying to Jesus or praying in Jesus' name."

But Marks said when chaplains give an invocation at a ceremony marking a promotion or retirement, "we ask that they be inclusive."

The regulation notes that chaplains have the right to conduct worship services "according to the manner and forms" of their religious organizations.

The Rev. Herman Keizer Jr., chairman of the National Conference on Ministry to the Armed Forces, notes that a Department of Defense directive calls for chaplains to agree to serve in a religiously diverse environment.

"There ... is a changing demographic within the military that makes us acknowledge the fact that we have to attend more to the differences that we have," he said.

—RNS

"There's nothing in that new instruction anywhere that forbids anyone from praying to Jesus or praying in Jesus' name."

— Navy spokesman Lt. William Marks, on instruction from the secretary of the Navy



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REPORT from the Capital

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Walter B. Shurden to address annual Religious Liberty Council luncheon at CBF General Assembly

Noon to 1:45 p.m.
Friday, June 23, 2006
Omni Hotel at CNN Center, Grand Ballroom E (North Tower)
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Tickets: \$25 by mail or at the BJC exhibit in the Cooperative Baptist Fellowship Resource Fair

Buddy Shurden will be the featured speaker. Dr. Walter B. Shurden is the Callaway Professor of Christianity in the College of Liberal Arts at Mercer University. A nationally noted church historian, Dr. Shurden is also the executive director of The Center for Baptist Studies at Mercer University. He is the author or editor of 15 books.

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