



REPORT from the Capital

High Court protects religious entities' right to hire ministers

In unanimous decision, justices rule 'ministerial exception' grounded in First Amendment

WASHINGTON — In a unanimous decision Jan. 11, the U.S. Supreme Court ruled that a First Amendment doctrine that bars most employment discrimination lawsuits by ministerial personnel against their employers applies in a dispute between a church-run school and a former teacher commissioned by the church.

Baptist Joint Committee General Counsel K. Hollyn Hollman commended the ruling. "It is a helpful decision explaining the important and unique way that the Constitution protects religious organizations in matters of internal governance," she said.

While widely accepted by lower courts, the "ministerial exception" had not been explicitly recognized by the High Court until this decision. In it, the justices declined to adopt a rigid formula for deciding when an employee qualifies as a minister and rejected a purely quantitative assessment of duties. Instead, the Court focused on the employee's religious functions and her designation as a commissioned minister within the ecclesiastical structure of the employer.

"The interest of society in the enforcement of employment discrimination statutes is undoubtedly important," wrote Chief Justice John Roberts for the Court. "But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.

"When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us," the opinion continued. "The



church must be free to choose those who will guide it on its way."

The BJC filed a friend-of-the-court brief in the case arguing that the ministerial exception is a "clear and crucial implication of religious liberty." The brief, which was also joined by the Christian Legal Society, the National Council of the Churches of Christ in the USA and the National Association of Evangelicals, said the doctrine "protects the fundamental freedom of religious communities to select their leaders, church autonomy and the separation of church and state."

"It should be remembered that at any point in time any given religious community is a mere generation away from extinction, and that teachers in religious schools are commonly on the front line of conveying the faith to children and forming them morally," the brief stated. "Given our nation's deeply rooted commitments to religious freedom and church-state separation, an employment-related lawsuit in a civil court is not a permissible vehicle for second-guessing a religious community's decision about who should be responsible for keeping the next generation."

The case is *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, et al.*

— Staff Reports

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High Court declines review of policy on churches' use of schools

On December 5, the U.S. Supreme Court declined to review a lower court decision that upheld a New York City School Board policy prohibiting use of school facilities for conducting "worship services."

The High Court's refusal was the latest development in a protracted legal battle that began in 1995, when the evangelical Bronx Household of Faith first sued the board of education for denying the church's application to use school facilities for its weekly Sunday worship services.

After it won an injunction against the initial ban, the church began holding services in 2002 at P.S. 15 in the Bronx.

In the ensuing years, the school district revised its community use policy, promulgating a new standard that prohibited use of school property for "religious worship services, or otherwise using a school as a house of worship." In 2007, when the church reapplied to renew its use privileges under the new policy, the board again rejected the request. A district court subsequently enjoined the school from enforcing the new policy, but in June 2011, the 2nd U.S. Circuit Court of Appeals reversed.

According to the appellate court majority, school officials had "a strong basis to believe" that allowing weekly religious services to be conducted in schools could be construed as violating the First Amendment's prohibition on an establishment of religion.

In upholding the school policy, the court found that "[w]hen worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity." Writing for the court, Judge Pierre N. Leval added: "The place has, at least for a time, become the church."

The church argued that the ban violated its First Amendment guarantee of religious expression because the city allowed other community groups to use schools for their activities.

Leval distinguished the church's worship services from other types of expression, like that of Bible study groups which are allowed to meet after-hours in public schools. In a 2001 decision, the U.S. Supreme Court held that when a school opens its facilities for community use, it may not exclude a particular group because of its religious viewpoint. In the case of Bronx Household of Faith, by contrast, the 2nd Circuit concluded that the school's policy excludes only a type of activity, not expression of religious beliefs or devotion.

The 2nd Circuit's two-judge majority opinion has been sharply criticized as drawing an untenable legal distinction between expression (such as prayer, singing hymns and discussing Scripture) and "worship services" as a discrete activity, even though the event typically involves individual elements of religious expression. At what point, critics ask, does "worship" (which appears permissible) become "worship services" (which the New York City School Board's policy prohibits)? Does the policy in this case provide an enforceable basis for differentiating between the two?

As the church's lawyer reportedly noted, the Supreme Court's decision to decline review "did not affirm the lower court ruling, or repudiate any of [the Court's] earlier opinions supporting equal access for religious groups." Further, the 2nd Circuit's holding is not binding precedent in other federal circuits.

As many as 60 churches currently use New York City public school buildings as meeting places. It will now fall on the New York City Department of Education to determine which groups are using school facilities for "worship services" in violation of the policy upheld by the 2nd Circuit.

For more on the Supreme Court's decision not to hear *Bronx Household of Faith v. Board of Education of the City of New York*, see page 6 of this edition of *Report from the Capital*.

—Religion News Service and Staff Reports

BJC, coalition ask for information on Obama policy on federally funded hiring discrimination

WASHINGTON – A diverse coalition of religious and civil rights organizations, including the Baptist Joint Committee for Religious Liberty, has asked the heads of faith-based offices in 13 federal agencies for information on how the Obama administration determines whether religious organizations may discriminate in hiring for government-funded positions.

This is the latest effort by members of the Coalition Against Religious Discrimination to follow up on then-candidate Barack Obama's 2008 pledge to restore anti-discrimination protections and end policies instituted by the George W. Bush administration that permit discrimination on the basis of religion in federal employment.

"Instead of reversing the Bush-era policies," the letter states, "various Administration officials have stated that hiring discrimination is now being reviewed on a 'case-by-case' basis." While administration officials have repeatedly made this claim, they have "never explained the standard it

applies or the process [the administration] uses for the analysis."

In November 2010, President Obama issued an executive order primarily designed to shore up the legal basis of existing federal policy on partnerships between the government and faith-based and community-based social service groups. It implemented many of the recommendations of a diverse advisory council designed, in part, to advise and reform the White House Office of Faith-based and Neighborhood Partnerships. But while the amendments seemed likely to reduce the risk that government money will be used to promote religion, they did not address the hiring issue.

"This divisive issue cannot be kicked down the road forever," said BJC General Counsel K. Hollyn Hollman. "The Baptist Joint Committee and the Coalition Against Religious Discrimination will keep sounding the alarm that our government should not subsidize religious discrimination."

—Staff Reports

REFLECTIONS



J. Brent Walker
Executive Director

What 'secular' really means

"Secular" is not a bad word as many religious people and some politicians believe. In fact, it is a good word and, properly understood, is useful to describe our political culture and church-state configuration.

The Dec. 17, 2011, Metro Section of *The Washington Post* contained two articles that illustrate what I mean. One was a full-page obituary of Christopher Hitchens. This Brit turned denizen of the United States since 1982 was an acerbic contrarian, proud atheist, "secularist on steroids," and a no-holds-barred critic of all that is religious. The other, on the religion page, was an article about a class on the study of secularism at the Jesuit-controlled Georgetown University, taught by Jacques Berlinerblau (a self-professed "Jewish atheist") with a focus on church-state relations.

Can the word "secular" carry the weight of how the term is used in both of these contexts? I think it can, but we must always be clear about what we mean. In his helpful book *Divided by God*, Noah Feldman, a Harvard Law professor, talks about a "strong secularism." This kind of secularism — atheistic, anti-religious, and almost always intolerant — would banish religion to the backwaters of privatized faith. We have seen this form of secularism in the past with people like Clarence Darrow, Robert Ingersoll and H. L. Mencken. Their intellectual heirs today would be the likes of Richard Dawkins, Sam Harris and, yes, Hitchens. These so-called "new atheists" have gained a lot of popularity over the past several years.

Of course, this kind of secularism and those that espouse it are entitled to robust constitutional protection (free speech, free press, etc.) and enjoy the full panoply of rights and privileges associated with living in the United States. They should not have their patriotism questioned or political viability impugned because of their lack of religious conviction. However, this brand of hard-edged secularism is worthy of our stringent critique. It erroneously treats all religion — good religion and bad religion — the same. It thinks that all religion is bad. It often comes off as narrow minded, intolerant and intellectually arrogant.

The other kind of secularism, what Feldman calls "legal secularism," is a friendly form of secularism embraced by many people of faith who simply believe, as I do, that government and our legal institutions should be secular in the sense of being non-religious or religiously neutral.

Secularism of this ilk is not a threat to religion but an essential mechanism to ensuring its liberty.

This is the way Professor Berlinerblau understands the term and how he teaches his course. According to *The Washington Post* article, Professor Berlinerblau tells his students his goal is "to disentangle atheism from secularism." The article points out that he has his students read Martin Luther and John Locke for whom, according to Berlinerblau, the term "secular" is not about personal religious belief but about the relationship between church and state.

This version of secularism has informed not only the Reformation (Luther) and the Enlightenment (Locke), but Baptist thought, at its best, as well. Indeed, this is what Roger Williams was getting at when he argued that the magistrate had no authority over the souls of his subjects. More recently, J.M. Dawson, the BJC's first executive director, defended the use of the word in articles, speeches and even his 1964 autobiography. Although acknowledging "secular" sometimes connotes atheistic humanism and materialism, Dawson argued that "when one says ours is a secular state or that our public schools form a secular system, he means they are outside church control, simply that."

This is the sense in which we at the BJC continue to employ the word. Using "secular" to mean "religiously neutral" is very much a part of the fabric of our constitutional and political system. The First Amendment's No Establishment and Free Exercise clauses require the government to be neutral toward religion, not taking sides in matters of faith, but leaving it to voluntary, individual decisions and private religious associations.

One of Berlinerblau's students, described as a conservative Catholic from Long Island, N.Y., learned his lesson well. After taking the class, he proudly declared himself a "secularist," telling *The Washington Post*, "[Secularism] does not mean abandoning any notion of religiosity; it's saying you're in favor of toleration and liberty of conscience and of allowing others to have the same rights in terms of government as you."

I think this student got it exactly right. Secularism, properly understood, is not a bad word. While our government must not be hostile to religion, it should not try to help it either. Our government must remain religiously neutral and, in that sense, properly be described as "secular."

"Using 'secular' to mean 'religiously neutral' is very much a part of the fabric of our constitutional and political system."

Religious freedom panel gets 11th-hour reprieve

WASHINGTON — With a last-minute vote in December, Congress saved an independent religious freedom watchdog commission that was about to shut down.

The bill reauthorizing the U.S. Commission on International Religious Freedom (USCIRF) was held up in the Senate for almost three months before passing with an amendment on Dec. 13. The House approved it three days later, the same day the commission was set to close.

"I'm very pleased to see that the Congress has reauthorized the commission, and we can get back into the business of doing what we do best, which is monitoring conditions for religious freedom around the world," said USCIRF chairman Leonard Leo.

The panel was established by the 1998 International Religious Freedom Act, approved by Congress and then-President Bill Clinton. Not formally part of any branch of the federal government, USCIRF issues an annual report of "countries of particular concern" on religious rights abuses and provides foreign policy recommendations to the president, Congress and the State Department. It has nine commissioners and a staff of 17. Its annual budget was just over \$4 million, but the budget was cut to \$3 million in the reauthorization bill.

Senate Majority Whip Richard Durbin, D-Ill., who had reportedly held the bill as leverage in a dispute over an unrelated issue, proposed several tweaks to the reauthorization bill.

Durbin's amendment will limit the appointment of USCIRF's commissioners to a maximum of two, two-year terms. The term

of any current commissioner who has served at least two full terms expires in March, 90 days after the legislation's enactment. That stipulation means the majority of commissioners must vacate their positions.

Rep. Frank Wolf, R-Va., who helped establish USCIRF in 1998 and who wrote the reauthorization bill, said the reauthorization "sends a clear message to repressive regimes around the globe that international religious freedom is a U.S. foreign policy priority." He continued, "The commission's work is of the utmost importance. It speaks plainly about religious freedom abuses wherever they occur in ways that the State Department can rarely muster, during Republican and Democrat administrations alike."

Others have been critical of the role of USCIRF. Joseph K. Grieboski, chairman of the Institute on Religion and Public Policy, said that instead of reauthorizing USCIRF, the Office of International Religious Freedom at the State Department should be given a bigger budget and more staff.

"It should be the job of the State Department to engage in these issues," Grieboski said, according to Religion News Service. "It shouldn't be some external institution that doesn't have either the constitutional or the legal basis to be engaging in U.S. foreign policy."

President Barack Obama signed the bill reauthorizing USCIRF on Dec. 23. Its next term will expire on Sept. 30, 2014.

—Religion News Service and Staff Reports



Honorary and to the Baptist

**In Honor of
Carmen and Ron Anderson**
By Lauren and Thomas Young

**In Honor of
Marion and Jean Bass**
By Ouida Wyatt

**In Honor of
Marjorie and P. Joseph Brake**
By Wendy and Richard Brake

**In Honor of Hardy Clemons &
In Memory of Ardelle Clemons**
By Jeanette and John Cothran

**In Honor of
Marilyn and James Dunn**
By Thomas Mullen

**In Honor of
Holly Hollman**
By Jo and Harold Hollman

**In Honor of
Irene Clarke and Patton Ingle**
By Patricia Gillis

**In Honor of
Walter Shurden**
By Diane and Charles Bugg

**In Honor of
Brent Walker**
By Philip Kingston
Layton McCann
Stephen Stookey

**In Honor of
Betsy and Mark Bass
Anne and Bill Carpenter
Kathleen and Kerry Campbell
Barbara and Coy Carson
Jeanette and John Cothran
June and Richard Ferguson
Anita and Don Flowers**

Appeals court rules Oklahoma referendum on Sharia ban unconstitutional

Oklahoma's referendum against state judges considering Islamic law is unconstitutional, the 10th U.S. Circuit Court of Appeals ruled on Jan. 10, upholding a lower court ruling that had blocked the measure. The Baptist Joint Committee joined a friend-of-the-court brief in the case, arguing that the amendment violated the Establishment Clause.

The ruling could affect more than 20 other states where laws against Sharia are under consideration.

In a 37-page ruling, the 10th Circuit's three-judge panel dismissed assertions by lawyers for Oklahoma that the law did not discriminate against Muslims.

"[T]hat argument conflicts with the amendment's plain language, which mentions Sharia law in two places," wrote 10th Circuit Judge Scott Matheson.

The Denver-based judges said that courts should be wary of meddling in voter referendums, but that minorities' constitutional rights must be protected.

Some 70 percent of Oklahoma voters approved the referendum in November 2010. Muneer Awad, head of the Oklahoma chapter of the Council of American-Islamic Relations, sued to block the measure, saying it discriminates against Islam and violates church-state separation.

"This is an important reminder that the Constitution

is the last line of defense against a rising tide of anti-Muslim bigotry in our society," Awad said in a statement, according to *The Denver Post*.

According to the brief signed by the BJC, "The amendment's dual specific references to Sharia law — and to no other religious tradition — have the unambiguous effect of communicating official disapproval of Islam." It also argued, "For purposes of the Establishment Clause, there simply is no meaningful distinction between a purpose of targeting Islam and a purpose of targeting Islamic law."

The brief was signed by several other religious liberty advocates, including the American Jewish Committee, Americans United for Separation of Church and State, and the Center for Islamic Pluralism.

Last year, a U.S. District Court Judge in Oklahoma City also found the ban unconstitutional and issued a temporary injunction preventing it from taking effect.

The case now returns to the district court in Oklahoma, which is expected to issue a permanent injunction against the law.

If Oklahoma Attorney General Scott Pruitt decides to appeal that case, it would return to the appeals court, and could eventually be heard by the Supreme Court.

—*Religion News Service and Staff Reports*



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K. Hollyn Hollman
General Counsel

The significance of Supreme Court review

So far this term, the U.S. Supreme Court has declined to review lower court decisions in two high-profile religious liberty disputes, one involving cross displays erected along Utah's highways and another concerning a New York church's long-term use of a public school building for its weekly Sunday worship services. In the former case, Justice Clarence Thomas issued a 19 page dissent — atypical at the petition stage — expressing his disagreement with the Court's decision not to grant review. In the latter case, some observers were surprised by the denial because the case could have offered the Court a chance to clarify its own precedent concerning equal access principles.

While it's hard to know what considerations motivate the Court to deny review of any specific case, these examples present an opportune time to discuss the process and significance of seeking Supreme Court review, which begins when one party files a petition for a *writ of certiorari*. The cases also illustrate how challenging religious liberty cases can be due to their fact-driven, context-specific nature. So often these disputes are resolved on narrow grounds, and the two cases denied this term are no exception.

Unlike state courts and lower federal courts, the U.S. Supreme Court is not generally obligated to hear appeals, meaning most litigants do not possess a right to U.S. Supreme Court review. In the Court's October 2010 term, it granted *certiorari* in only 90 cases from an initial docket of more than 9,000 petitions. The Court's rules provide, "[a] petition for a *writ of certiorari* will be granted only for compelling reasons." Determining what circumstances meet that threshold — an historically high one — is at the Court's discretion. Little is known about the justices' internal decision-making process in voting to grant or deny review, other than that at least four of the nine justices must vote to accept a case. The reasons behind the justices' decisions granting or denying review are thus the subject of much speculation and debate.

In practice, certain factors increase the likelihood that the Court may accept a case. Among other considerations, the Court may grant *certiorari* in cases of pressing national significance or where it is necessary to resolve conflicting decisions among lower courts. Still, the calculus is a complicated one, and none of these characteristics guarantee review. Importantly, a denial of *certio-*

rari is not an affirmative statement by the Court about the decision below. It does not mean the Court necessarily agrees with the lower court's decision, and it does not preclude review of similar cases in the future. Instead, it may represent the justices' judgment about the right timing for hearing a case or simply reflect administrative demands.

In *American Atheists v. Duncan*, for instance, the 12-foot roadside crosses honoring individual fallen state troopers were financed by a private, non-profit group and were erected only after obtaining consent from each trooper's family. Nonetheless, the 10th U.S. Circuit Court of Appeals invalidated the crosses, finding they conveyed to a passersby impermissible government endorsement of religion. Despite the crosses' private origins, they were displayed under the auspices of the Utah Highway Patrol and many were erected on state property, lending the appearance of state support. This context distinguished the Utah crosses from veterans' headstones in military cemeteries, which often bear religious symbols that reflect the late service members' personal religious beliefs without violating the Constitution.

Likewise, the holding of the 2nd U.S. Circuit Court of Appeals in *Bronx Household of Faith v. Board of Education of the City of New York* (see page 2) rested on a narrow analysis of the specific school policy being challenged. The New York City School Board policy at issue in that case permits religious expression by groups meeting in public school buildings but prohibits churches from using those facilities for conducting regular worship services. The court's decision denying a church's request for permanent use of school facilities is not binding outside the 2nd Circuit, and the Supreme Court's refusal to review the case did not signal formal approval of that outcome.

It is not uncommon for media reports to incorrectly report that the U.S. Supreme Court affirmed a ruling merely because the Court considered and decided not to review it. By contrast, the granting of *certiorari* is a major event signaling the potential for an important development in the law. The U.S. Supreme Court's decisions that interpret the First Amendment and religious liberty statutes define the extent of our religious liberty. Until certain cases reach the Supreme Court, however, some applications of these provisions simply rely on the efforts of lower courts and other government officials to follow the law.

"[A] denial of *certiorari* ... does not mean the Court necessarily agrees with the lower court's decision, and it does not preclude review of similar cases in the future."

BJC welcomes new interns

The Baptist Joint Committee is pleased to have two interns working alongside its staff in Washington, D.C.

Faye Doss of Hoover, Ala., is a senior at Samford University pursuing a degree in History. She is the granddaughter of Chriss and Harriet Doss and a member of the Vestavia Hills Baptist Church in Vestavia Hills, Ala. Doss plans to enter law school in the fall.

Charles M. Massey of Milledgeville, Ga., is a graduate of the Georgia Military College and currently a senior at the University of Georgia, pursuing a degree in Philosophy. The son of Merritt and Jan Massey, he is a member of Evergreen Baptist Church in Milledgeville and attends First Baptist Tifton, Ga., and First Baptist Athens, Ga. After graduation, Massey plans to enter law school and aspires to hold public office.



Doss



Massey

Clinton hosts summit on religious intolerance

WASHINGTON — Secretary of State Hillary Clinton hosted a summit of international leaders in December to explore specific steps to combat intolerance, discrimination and violence on the basis of religion or belief.

The closed-door meeting on Dec. 14 was the first of an ongoing series called “The Istanbul Process.”

Representatives came from 30 countries and international organizations, including Egypt, Indonesia, Saudi Arabia and Pakistan.

“We are working together to protect two fundamental freedoms — the right to practice one’s religion freely, and the right to express one’s opinion without fear,” Clinton said in her closing remarks.

The goal of the Istanbul Process is to produce a list of best practices for preventing religious discrimination and violence. Ambassador Michael Kozak, a deputy assistant secretary of state, acknowledged that the list would be helpful primarily for countries that already have the political will to protect religious freedom but need practical guidance to do so.

Nevertheless, Kozak said, it could also put pressure on repressive regimes to loosen up.

“By itself, this isn’t going to change their minds. But ... the more countries you get starting to do things in a good way, the more isolated the others become, and then movements develop in their own countries,” Kozak said.

The Istanbul Process grew out of a resolution adopted by the United Nations Human Rights Council in March and then by the U.N. General Assembly in November.

Resolutions in the previous 10 years had supported legal measures restricting the “defamation of religions.” The more recent Resolution 16/18, however, broke with that tradition by calling for concrete, positive measures to combat religious intolerance rather than legal measures that restrict speech.

“It is important that we recognize what we accomplished when this resolution ended 10 years of divisive debate where people were not listening to each other anymore. Now we are. We’re talking,” Clinton said.

The new resolution has faced criticism from some who think it amounts to a concession to Islamic countries. Critics say it could result in the curtailing of any speech that is critical of Islam.

After Clinton’s speech, Andrea Lafferty, president of the Traditional Values Coalition, said her organization has been denied entrance to conferences and hotels for fear of “incitement to violence,” a phrase used in Resolution 16/18.

“We remain concerned about the use of that language,” Lafferty said.

Kozak tried to dispel her fears.

“That whole issue of incitement got debated a lot, and we were clear all along that what we meant by incitement was when ... the speech is part of an act,” he said. “It’s a very narrow concept.”

—Josef Kuhn, Religion News Service

High school juniors & seniors:

Entries are now being accepted for the 2012 Religious Liberty Essay Scholarship Contest!

Grand Prize: \$1,000 and a trip to D.C.
Second prize: \$500 Third prize: \$100

The religious beliefs and affiliations of presidential candidates often become campaign issues. Is that fair? Should presidential candidates talk about their religious beliefs? Are there certain religion-related questions each candidate should or should not have to answer?

In an essay, examine the role religion should play during a presidential campaign.

Visit BJCOnline.org/contest for complete topic, rules and entry forms

Entries due March 15, 2012



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REPORT from the Capital

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2012 Shurden Lectures return to Mercer

Purdue University History Professor Frank Lambert will deliver the 2012 Walter B. and Kay W. Shurden Lectures on Religious Liberty and Separation of Church and State April 17-18 on the campus of Mercer University in Macon, Ga.

Lambert has special expertise in American Colonial and Revolutionary Era history and has written several books on religion in the United States.

Titles include *The Founding Fathers and the Place of Religion in*

America, Religion in American Politics: A Short History, and Inventing the 'Great Awakening.'

Lambert will present three lectures over the two days in April. Campus locations and times for each presentation will be announced later. The lectures are free and open to the public.

In 2004, the Shurdens of Macon, Ga., made a gift to the Baptist Joint Committee in Washington, D.C., to establish the annual lectureship. Designed to enhance the ministry and programs of the Baptist Joint Committee, the lectures are held at

Mercer University every three years and at another seminary, college or university the other years.

For the latest information on this year's Shurden Lectures, visit our website at www.BJCOnline.org/lectures.



Lambert

More on Mercer University

Founded by early 19th century Baptists, Mercer has more than 8,200 students enrolled in 11 schools and colleges on campuses

in Macon, Atlanta and Savannah, and at four Regional Academic Centers across the state of Georgia.

The Shurdens have a deep connection to the university. A nationally noted church historian, Dr. Walter B. Shurden is the founding executive director of the Center for Baptist Studies and a minister at large for Mercer University. He served at Mercer for almost 25 years as Callaway Professor of Christianity. His wife, Dr. Kay W. Shurden, is a retired professor in the Department of Psychiatry and Behavioral Sciences at the Mercer University School of Medicine.

