

JURISPRUDENCE AND RELIGIOUS FREEDOM

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MODERATOR: PROFESSOR ROGER ALFORD

This morning's session is on religious liberty, which is an issue that is near and dear to all of our hearts, especially at this event which is focused on international human rights, because there are parts of the world where religious liberty is in jeopardy or is compromised. We also struggle with this in the United States. In the abstract, religious liberty is not controversial; it is in the Universal Declaration of Human Rights; it is in the United States Constitution; it is something that countries happily and willingly sign on to in terms of treaty obligations. But, when the rubber hits the road, we know that there are many instances in which religious groups are subject to religious persecution, or at least the fear of religious persecution. This is something that we, as the Christian Legal Society, should be very concerned about, especially when we know that our fellow believers in other parts of the world are subject to religious persecution.

Today we have two wonderful speakers. Professor Zhang Shoudong is a professor of political science and law at China University. He has taught about religious liberty for many years. He teaches comparative constitutional law and has been a visiting professor at numerous law schools here in the United States. He has been extremely influential at Pepperdine University, where I have the privilege of teaching under Ken Starr. There we have done a lot of initiatives related to religious liberty, partnered with other religious liberty non-governmental organizations, and have a clinic in which we try to focus on religious liberties issues.

SPEAKER: PROFESSOR ZHANG SHOUDONG¹

Dear brothers and sisters, I am Zhang Shoudong from China. I teach law at Beijing Law School. I feel privileged to be here and to be able to speak to you. I would like to talk about the interaction of church and state in China. I want to tell you my personal experiences in dealing with the local police, the university, and the local government since I became a believer thirteen years ago in 1995.

One day this past April, I heard someone knock on my door. I answered the door and it was two police officers. They came to visit me without calling me first. I welcomed them in, and they did not tell me why they came. After talking with them, I figured out that they came just to make sure there would be no trouble in their jurisdiction with the coming of the Olympic events. The police officers asked me questions about my Christian students' fellowships and they tried to persuade me to let them come to my Christian Sunday services.

I asked them why they came to my home about this now because I have had a house church at my home for law students since 1995. Over the last thirteen years, the local police had never visited me to ask if they could come to my Sunday service. I told them that there were no local inhabitants in my house church, only university students. Our university in Beijing belonged to the direct control of Beijing city police, and we were outside of the jurisdiction of the local police. I just argued that there were no local inhabitants at all in my house church and that I would not cause any trouble during the Olympic Games.

But they still insisted on coming to my Sunday service. They wanted to sit in the back row so they would not be recognized by my fellow Christians. I told them we are only a fifty member church and we know each other very well. Even if they sat in the back row, they would be recognized by the students. Then they asked if they could wear plain clothes and not be recognized. I told them that also would not work because we are a small fellowship; even with plain clothes the students would still recognize them.

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They didn't want to come to stop my church service. They just wanted to monitor us and make sure that there was no trouble and that everything was going well during the Olympic Games. I assured them that we were good law students and citizens and that we were no trouble at all. I assured them saying, "Don't worry." While we were talking, they were very polite, and there was no intimidation. They eventually left, and it turned out that they never came back. I am happy for that.

This is a story to show that everything is politically sensitive in China. Why would the local police never visit me until just before the Olympic Games? It was not because our house church would be illegal during the Olympic Games, but only because the Communist regime wants to keep everything under control, especially during these politically sensitive times. I was trained as a law student by professors under the Communist regime; I went into law school in 1981. I was one of the first few law students in China, so I know how the government works. I use their government language, their government law, to argue with them.

As for my relationship with my law school, ever since I started a Christian fellowship for the law students in the fall of 1995, I have tried to maintain a delicate arrangement with our law school. Before 2005, ten years had passed and the law school never talked to me about my fellowships. Why? Because from 1995 to 2005, we were just law students participating in Sunday services and Bible study groups. We had never gotten the university into trouble.

But, in the spring of 2004, one of the students in my fellowship had applied for a Communist Party membership and did not tell me. In 2005, one year later, this student was supposed to apply for a formal party membership. (The Communist Party requires one year of preparation before becoming eligible for a formal membership.) However, the student told the Party committee of the university that she no longer wanted a formal Communist Party membership because she was now a Christian. She then called me and told me what she just said to the Party committee of the university. I thought that it was very unfortunate that she did not consult me until after she had already spoken to the Party committee.

She should not have told this to the Party committee because the Communist Party believes that it has the right to educate the young generation without any interference of religion. The Communist regime thinks that religious influence is a political threat to their national stability and national security. They are really leery of anyone who seems capable of taking over the young generation.

In response to this situation, the law school dean, Party secretary, and other law school officers each met with me individually. The Party secretary of the law school argued, interestingly, that even in America they uphold the separation of church and state. I was surprised to hear this because my leading of a house church has nothing to do with the separation of church and state. For example, I never proselytize or preach the Gospel in the classroom or on campus. I never did that. So what is it about separation of church and state? That's the Chinese version of separation of church and state. When she kept on referring back to her erroneous understanding of the American separation of church and state, I explained to her that separation of church and state in America just means that the state has no power to interfere with a church.

The Party secretary confused the American idea of separation of church and state with Article 36 of the Chinese Constitution, which states that no one may use religion as a tool to influence the educational system. This is the Chinese version of separation of church and state. So we have two versions. I need to make them know that there are different kinds of separation of church and state. In America it is not that a church should not influence a state, but that a state should not interfere with the church.

The dean of the law school told me that I should lead a student fellowship that consists of other university students and not ours. I just could not implement this proposition.

The university officers did not care whether or not I was a believer. They do not care whether or not I lead a Bible study group. Their only concern was that I not get them into trouble. I promised them that I would avoid getting into any further trouble by telling my students to never apply for a party membership. I will never get into trouble anymore, I make sure.

They also tried to stop my Bible study and my house church. I told them that I could not obey them because my God would not allow me to stop the house church. God tells us never to stop meeting.

The third story I want to share is about our house church's application for legal status. I used to be an elder of a much larger house church, one with about five hundred members in downtown Beijing. The local government came to us and asked us to apply for registration. And we said, "Yes, we can do that if you want us to do that." We agreed and went to register. As it turned out, they actually did not want us to get registered. The government denied our registration for two reasons. First, our pastors were not qualified because they were not approved by the municipal city church. Second, there was already

a city church in our district. According to their districts, if you have a McDonalds in a district in China, they won't allow another McDonalds in the same district – that kind of argument. So, they didn't allow one more church. Our church did not agree with the government's reasoning, so we just continued on meeting.

In China, you never ask the question, "Is it legal?" You just ask the question, "Does it work?" I think I enjoy freedom of religion because, although the government wants to stop us, we just insist on continuing our Sunday services and Bible study groups. And it works. That is my version of freedom of religion and the interaction of the church and state in China. Thank you.

SPEAKER: DEAN KEN STARR²

Thank you very much. That was a very edifying introduction into the tensions of religious freedom in China. Let me begin by saying thank you to Professor Alford for moderating. It is a great honor to be here, especially with Professor Zhang. Thank you for your contributions here at this conference and, more importantly, for what you do in your beautiful country.

I think what Zhang has lifted up is a vision of the interaction of religion and culture and politics. My humble remarks are going to necessarily be somewhat particularistic to the American experience, especially given that we are gathered together as a people in a presidential election year when religious references are frequent and, at times, quite controversial.

Part of the struggle in the post-Christian era has been the discomfort that much of American society feels with religious references as we move ever more into a secular environment. It shouldn't surprise

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us that we, as lawyers and as scholars, struggle with doctrine. So let me begin with the text of the Constitution itself, particularly the Bill of Rights.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” It seems that the framers had in mind a very healthy and robust set of rights which intertwined and related to one another. These are not four or five amendments, rather, they are one. There is a textual proximity of freedom of religion particularly to freedom of speech. That textual connection has been helpful in the development of modern doctrine about religious freedom in one limited but important area.

Let me begin with the words of Professor Alan Brownstein, a scholar who is not a believer, on the First Amendment’s interconnections. The title of his law review article is *Taking Free Exercise Rights Seriously*, which is very encouraging. However, part of the difficulty in making the juxtaposition, or seeing the juxtaposition, between freedom of religion and freedom of speech or religious liberty more generally is demonstrated by Professor Brownstein when he writes:

For the most part, we do not consider freedom of speech to privilege those who speak over those who remain silent because expression has so much importance and utility for everyone, and because we do not see a conflict between those who exercise this right and those who do not. Religion is different.

There it is: “Religion is different.” If our friends from the American Civil Liberties Union were here, I think we would hear an echo of what Zhang was lifting up. “Please keep religion entirely private. Please don’t allow religion in any form to be projected into the public square. Don’t cause trouble.” There is a desire for a certain unity of perspective; yet in our culture it does not work.

I want to call to the stand the Supreme Court of the United States. As my American colleagues know, every session of the Supreme Court of the United States begins with the historic and traditional “Oyez” interjection. What, dear friends, are its concluding words, after which the marshal bangs the gavel and you can be seated? I want this wonderful sentence to be lifted from the rafters. What is the sentence? “God save the United States and this Honorable Court!” There it is. We have projected “religion,” very broadly defined, into the public square – into the seat of government – where it is not welcome. But it is. We are deeply torn; we are deeply ambivalent.

How about when the President of the United States takes the oath of office on January 20, 2009? He will place his hand on a Bible, and I have a feeling that President Obama or President McCain will use a family Bible of some kind. The Bible will be held by a beloved member of the family. The Chief Justice of the United States, while not holding the Bible, is, nonetheless, going to be sanctioning this placing of the hand, the presidential hand, on a Bible. What is the concluding sentence of the Presidential oath? "So help me God." There it is again. Don't you just hate this projection of religion into the public square? Can't we just keep it private?

On March 24, 2004, Michael Newdow stood before the Court to argue pro se that the Pledge of Allegiance was just fine except for two words. What are those two words? "Under God." There it is again. Can't we just keep religion out of the public square?

Michael Newdow comes to argue bottom side, since he has prevailed in the Ninth Circuit. The first question to Michael Newdow came from Justice Sandra Day O'Connor: "Mr. Newdow, you stood there a few moments ago when the marshal cried out," and then she repeated the unrepeatable words, adding grievous insult to deep injury, "'God save the United States and this Honorable Court.' Do you have any objection to that?"

I expected to hear from Michael – "objection!" However, Michael Newdow had gone through eleven moot courts; he was smooth, he was silky, and he had control. I expected an intellectually honest answer from Michael, which is, "Of course I do." Yet we heard Michael Newdow, the exquisitely prepared advocate, give the response, "Oh, none at all." Right there in the transcript is one of the most radical separationist visions ever to be articulated from the podium of the Supreme Court of the United States conceding to the invocation of the presence of God in these proceedings. Justice O'Connor had a follow up question, "Oh you don't? Well, then what is the basis of your objection for the Pledge of Allegiance having the words 'under God?' Help me understand the consistency of your theory." Michael Newdow then replied with the claim that his impressionistic child is coerced into recognizing the existence of God. Ah, that is much more limited, isn't it?

I do not know of anyone who seriously argues that we should have compulsory prayer in the schools. Is anyone suggesting that these days? I don't think so. I don't hear it. No one is crying out for the return of compulsory Bible reading or state framed prayers, such as the New York Board of Regents prayer which was at issue in *Engel v. Vitale*.

Let me conclude by saying that there are, in fact, glimmers of hope in all the doctrinal inconsistency. This is not a unifying theme of the First Amendment. The true unifying theme of the First Amendment was articulated years ago by Michael McConnell, who is now a judge, which is, "Liberty is the baseline and liberty is the goal; what is the theory or approach that maximizes liberty?" That's what the Bill of Rights is all about – maximizing liberty. So do we have interpretative approaches that will maximize religious liberty? It seems to me a useful conceptual framework for all of us to have aspiration, regardless of our cultures and our backgrounds. It is certainly consistent with what Roger Alford lifted up in regard to the Universal Declaration of Human Rights. What is the interpretation of our particularistic language of our own constitutions with respect to religious liberty? Let's maximize liberty.

Freedom of speech has been helpful because a lot of its doctrine has been imported into the doctrine of the religion clauses. A very brief example, familiar to my American friends and colleagues, is the *Lamb's Chapel* case. I could use others, but the reason I love to use this case is that the Supreme Court was unanimous. Briefly stated, Lamb's Chapel, an evangelical, nondenominational congregation on Long Island, wanted to display Focus on the Family films at the town center. The city authorities, guided by counsel, refused to display the films because it would be a violation of the Establishment Clause. Such an action would bring religion out of the house church, out of Lamb's Chapel, and into the public square.

During discovery, however, there were concessions that Planned Parenthood would be welcome to display films about family planning, including abortion because it was not a religious organization. My dear friends, the Supreme Court of the United States unanimously condemned what the city council did on the basis of the equality principle. What was underway there was an act of speech, an act of an expression of a viewpoint. While I think Professor Brownstein understandably is concerned about free exercise of religion because of the exotic nature of some religious practices, most of what we are trying to do in the world of religious freedom is simply to be able to meet, to gather together, and to worship without fear of molestation.

We simply want to be left alone to worship. Maybe we are even moving our friends at the ACLU, by virtue of large and longstanding cultural traditions in the United States, to at least an uneasy understanding that they will not succeed in excising from public life all official references to God.

I want to close with this. Through my church here in northern Virginia, I have been part of an outreach to inner city areas, and I found myself volunteering at Anacostia Senior High School in southeastern Washington, D.C. The student body of Anacostia Senior High School is entirely African-American. Early on during my tenure as a volunteer in this school, the public address system came forward with this announcement: “The Anacostia Senior High School Gospel Choir will be rehearsing at 12 noon in the such and such room.” That arrested my attention. The Anacostia public high school *gospel choir* will be rehearsing, and the voice giving the announcement was not that of a Jacobin revolutionary who had seized control of the public address system. It was the duly anointed principal of the school! I was encouraged.

I mentioned this to one of my ACLU friends not long after and asked if they had considered mounting a constitutional challenge against what I understand is ubiquitous in the African-American community, namely gospel choirs. Gospel choirs are just there; they are part of their culture. And my friend from the ACLU said, “Not on your life.”

My dear friends, in a dark and dreary world there is hope – especially as the church moves to the south.

MODERATOR: PROFESSOR ROGER ALFORD

Occasionally when you’ve been to conferences, you have heard speakers rush out to catch a plane. Now the moderator is going to rush out, and so I have asked Ken Starr if he would moderate the remaining discussion. Thank you so much speakers. That was absolutely wonderful and delightful. I am so impressed by the size of this crowd on a Saturday morning – it’s a phenomenal statement of your dedication and interest in this subject. So thank you very much.

MODERATOR: DEAN KEN STARR

Thank you. Zhang, would you like to comment at all before we open the floor up to discussion? Is there anything you would like to say in response?

SPEAKER: PROFESSOR ZHANG SHOUDONG

I’m very privileged to be a co-panelist with Ken Starr. He is my star, you know. He has defended our faith in America so forcefully. I

admire him. I met him four years ago in McLean, Virginia, and ever since then I keep telling others that I have met Ken Starr. Thank you.

MODERATOR: DEAN KEN STARR

No, thank you. Let's open it up to comments and discussion.

AUDIENCE MEMBER 1:

Doesn't the First Amendment protect not only the right to gather and worship together, but also the freedom to proclaim the Gospel in the culture that we live in without fear of being jailed? Years ago, when I went to Russia as a teenager, they would talk about religious freedom, but it was only the freedom to go and worship and to otherwise be completely silent. You could not proselytize. You could not tell other people about your faith. You could go to church and nobody was going to bother you, but you were not allowed to tell anybody else about it. You were free to believe what you wanted – just keep your mouth shut. That is a whole lot different than what you were saying about the freedom of speech and the freedom of expression – that it is not just limited to gathering together and worshipping together, but also includes the freedom to confront and challenge the world that we live in.

DEAN KEN STARR:

Yes, and that seems to me part of the unity of the First Amendment. Sometimes we chop it up into different components, and the First Amendment lends itself to that both intellectually and structurally, especially with the placement of semicolons and commas. So, I understand that. I think the Supreme Court has managed to successfully develop a logical free speech jurisprudence, even with the semicolons and connections. Freedom of speech obviously means that you can speak in places other than just your home.

AUDIENCE MEMBER 2:

Dean Starr, I have some constructive criticism on your last point about wanting to be left alone. From the ACLU's point of view, I think it is precisely that we do not want to be left alone. We want to change the culture. The root of all this is that we want to impose our narrow-minded, sexually-repressed, homophobic agenda on the rest of the country.

DEAN KEN STARR:

It's a fair point, and I accept that without fear of molestation. However, I think we would expand that outward to say that means being able to go out into the world without fear of molestation – a governmental prohibition.

AUDIENCE MEMBER 3:

Since the majority of Americans are Protestant Christians, do you include the speech of cults in religious speech freedom? The example you gave, *Lamb's Chapel*, and several other cases involve the speech of protestant Christians. Do you suggest that we protect cult speech, and the speech of other small religious groups, to the same degree as we protect the speech of the religious majority? Also, are you familiar with *Pleasant Grove City v. Summum*? If so, what is your opinion on that case?

DEAN KEN STARR:

Let me take your first question first. The short answer is yes – all speech is protected. The non-discrimination principle is extremely powerful and protects all speech, no matter how odd or idiosyncratic. So, Wiccan speech is protected.

There are doctrinal limits to freedom of speech; for instance, the rules regarding speech tending to incite people to lawless action. Within established doctrinal limits, speech is going to be completely protected regardless of how odd or unusual it is. In fact, that's the power of the freedom of speech in the United States. It is designed to protect minority speech, as opposed to majority speech.

With respect to your second question, yes, the Supreme Court of the United States is going to have an opportunity to revisit the issue of the presence of a monument of the Ten Commandments in a public place and the desire of an unusual religious community to place its tenets of faith on an equal footing with the Ten Commandments display. The display of religious materials or statements on public property is an issue that has vexed the United States Supreme Court terribly. Here are the two Ten Commandments cases from three years ago: Texas [*Van Orden v. Perry*] – yes, the Ten Commandments can be displayed, and on the same day, Kentucky [*McCreary County v. ACLU*] – no, the Ten Commandments cannot be displayed. However, I'm not going to make a predictive judgment as to the decision in *Pleasant Grove v. Summum* because I have not yet studied the case.

Who would like to comment on the likely result with a new Court? By the way, the Ten Commandments cases were decided in the very last day of Chief Justice Rehnquist's public service. He remained as Chief Justice of the United States for another month, but the day those two opinions were issued was his last day on the bench. He voted to uphold the display of the Ten Commandments in both the Texas and Kentucky cases. He was in the majority in one and in the dissent in the other.

AUDIENCE MEMBER 4:

Dean Starr, I worked with Attorney General Abbott on the Texas case. If you want to reconcile the Texas and Kentucky cases with the new case coming to the Court, the Texas case dealt with a monument on the state capital grounds that had been there for years and years. Therefore, it could be treated as sort of a remnant of history, as opposed to a statement of faith.

The Kentucky case dealt with a new display that was, as initially proposed, overtly religious in nature. When that display was initially rejected, they revised the display, reducing some of the religiosity of it. They submitted it again, and it was rejected again. They revised it a third time and were ultimately successful. So, the Court could arguably have said that this is a new commitment to these religious ideals which we cannot tolerate under our new and enlightened understanding of separation of church and state, rather than treating it as ceremonial deism or honoring our historical heritage.

Therefore, I would predict that the group that is advocating the addition of their display will lose if they apply the same principle. However, a point of encouragement for them is the body of crèche cases, where the display is perfectly acceptable as long as you have Rudolph the Red-Nosed Reindeer next to your crèche, so people may have some more pluralistic understanding of religion.

DEAN KEN STARR:

Let me say, with gratitude for the illumination and the doctrinal note at the very end, please don't leave out Rudolph. One of my favorite dimensions of the Texas Ten Commandments case – which has been very helpfully described – is the appendices that appeared at the end of the opinions of Justice Breyer in the majority in Texas and Justice Stevens in dissent.

There are two appendices to Justice Breyer's opinion. The first is a photograph literally taken from the capitol steps. So he is putting this

in context, showing that these are vast grounds, with many acres and a lot of very obscure kinds of monuments. In case the reader does not get the picture literally, he also has a chart showing how vast the grounds are, the location of the Capitol, the location of the Daughters of the American Revolution, and so forth. You get the idea.

Justice Stevens, I just love it, doesn't want the gentle reader to be looking at the eagle version of all this. He wants to use the zoom feature. What factors do you choose jurisprudentially to emphasize? Do you want the zoom in? And he would say: "This was placed here by the Fraternal Order of Eagles in the wake of the wonderful Cecil B. DeMille Ten Commandments movie as Ten Commandments fever swept across America." Go figure. A movie was made and things started happening. People started putting up Ten Commandments paraphernalia. The Fraternal Order of Eagles saw that Cecil B. DeMille was on to something – the Ten Commandments – and said that they would save America. And suddenly there was a monument on the Texas capitol grounds.

AUDIENCE MEMBER 5:

This is a question for Professor Zhang with respect to minority religions. Should there be free exercise for a group like the Falun Gong. What is your opinion on that?

PROFESSOR ZHANG SHOUDONG:

From my own personal knowledge, I know that the Falun Gong spiritual followers have been persecuted severely. I know that a special prison was built in 2000 to jail the Falun followers.

So I think that the Falun followers have been persecuted illegally, regardless of whether their belief is wrong or right. Their freedom of religion has been violated – even according to the Chinese Constitution. In terms of the law, I admire those who appeal for the Falun followers.

However, Falun Gong is a complicated issue because, before they were being persecuted by the Chinese government, they persecuted anyone who tried to oppose their beliefs. For example, in 1995 or 1996, the Beijing city television station broadcasted a short documentary on the practice of Falun Gong and did not give it any favorable commentary. The Falun Gong followers then besieged the Beijing city television station because it displayed the documentary without any positive commentary. I think that the way the Falun Gong followers

responded was wrong. Regardless, that was not a reason for the Chinese government to persecute them for their beliefs.

AUDIENCE MEMBER 6:

I have one comment to Professor Zhang and one question to Ken Starr. I just want to caution you in using the word "persecution," especially when you compare the persecution of Falun Gong by the whole government to Falun Gong's public demonstrations. At some point, you should call it civil disobedience. After all, they are a minority religious group and they have no other way to display their view of being persecuted by the government.

My question is this: The United States Supreme Court opens with "God save the United States and this Honorable Court," but in China there is no such tradition. What do you think is the most effective way for those in China to defend religious liberty other than what they are doing now, which is applying the Chinese constitutional freedom of belief without any guaranteed right to manifest that belief? There are no other laws or clauses for religious freedom in China.

DEAN KEN STARR:

Far be it from me to make a suggestion as to how another country should interpret its constitution. I do think that we do poorly in this country when we seek to have the government take additional steps in acknowledging our religious traditions and heritage. I believe it is much more effective for us to seek to preserve traditions that are well-established among the people and then to vigorously support the expression of religious liberty of each and every person, including persons in public life. If the President of the United States in his or her speeches makes frequent reference to God or makes a specific reference to Christ, then that should be zealously protected as an act of individual religious liberty. This is why I was very much not an admirer of what Chief Justice Roy Moore was seeking to do in bringing the Ten Commandments into court. I know a number of people will disagree vehemently with me. I thought it was misguided to try to bring something into the secular courthouse that was not previously there. I think we do better to be preservationists – "Don't try to remove the cross from the Los Angeles County seal," as opposed to, "Let's now put a cross on the Los Angeles County seal." That simply will not do given where we are culturally as a pluralistic society.

AUDIENCE MEMBER 7:

Before I ask my question, the people in the room may be interested to know that, in British Columbia, the British Columbia Civil Liberties Union (BCCLU) actually intervened on behalf of a group of Christian students who had their pro-life demonstration shut down by the university council.

DEAN KEN STARR:

Our friends at the ACLU would agree in terms of freedom of speech. They would agree with *Lamb's Chapel*.

AUDIENCE MEMBER 7:

We seemed to hear yesterday from our keynote speaker that we were making a mistake as Christians in articulating a jurisprudence of a constitution founded on freedom, and that we should instead be seeking a jurisprudence based on the theory of natural rights, with certain metaphysical underpinnings. There seems to me to be a tension between the thesis that was advanced yesterday and what I'm hearing today: that human beings should be free and left alone to pursue matters of conscience because to be a human being is essentially to be a free moral agent. There seems to be a tension as to what sort of political or philosophical anthropology ought to be driving our jurisprudence as Christian scholars. I'm just interested to hear comments from the panel on that tension and what philosophical anthropology should be guiding our jurisprudence.

DEAN KEN STARR:

On philosophical anthropology, I will leave that to others far more qualified than yours truly. I will simply say my perspective as an advocate is driven, not surprisingly, by what I see out there, though I am not entirely uninformed with respect to thoughtful commentary and doctrinal reflection. What I see working in terms of the public marketplace is not "we need to restore Natural Law." I do not see that as working. I'm just being very pragmatic.

Now, that having been said, I do want to add a huge caveat. At gatherings such as this, we hear about the baleful developments in certain countries such as: "We have the rule of law here and the rule of law is that Christians should be persecuted. This is an Islamic Republic. No other religions are permitted and certain sanctions will there-

fore attach to any kind of religious activity including speech.” What do we repair to there? We do need to have something higher. In light of the nature of our pluralistic global community, I tend to put it not in philosophy – I understand the philosophic underpinning – but in organic documents. And that’s why I think the rallying cry for Christians is universal declaration of human rights, which of course is freedom focused.

The final point I will make is that I do understand fully the danger that we are potentially on the slippery slope in terms of individual autonomy and our place in this mysterious universe (*Planned Parenthood v. Casey*) and radical autonomy. I understand the potential danger. But it seems to me that we are talking about a somewhat more limited universe – namely the ability of individuals to come together and meet, as well as individuals in their individual capacity, and then to go forward as a community of faith. If we can establish that, then we will have done much. God bless Justice Scalia and God bless Justice Thomas who continue to reflect on Natural Law traditions. However, right now we need tools that will work in dealing with essentially the baleful consequences of Legal Realism. Legal Realism says that this is just a matter of power, and our friends in Iran are demonstrating where Legal Realism can lead. If there is no sort of higher law to repair to that has wide, if not universal, acceptance, then it seems to me that we are in a great deal of trouble.

AUDIENCE MEMBER 8:

Thank you for that answer. I think that was very interesting. I just want to add to that question by saying that I think inherent in that question is the cry and plea to make sure we are checking in with a Biblical anthropology going forward.

DEAN KEN STARR:

It seems to me that at the root of Biblical anthropology we believe in free will – freedom of conscience – which, translated into the language of the marketplace, is freedom and free expression. You find those roots, of course, in foundational pieces of the Western legal tradition – go read again John Locke’s “A Letter Concerning Toleration” or read John Milton’s “Areopagitica.” These are overtly Christian and one might say that they are too narrow or too particularistic – that the reader is asked to have a Christian worldview. But even Madison’s “Memorial and Remonstrance” is very theological and individualistic. It is not communitarian. It states that religion is the duty that the indi-

vidual owes to his or her creator and you do not interfere with that. That is the Madisonian post-Enlightenment perspective and it is very individualistic.

AUDIENCE MEMBER 9:

I heard that President Bush or the Bush administration was sued for having Franklin Graham pray in the name Jesus during the presidential inauguration. Is that still in court?

DEAN KEN STARR:

That I don't know. All I can say is good luck and godspeed to Franklin Graham because that again is religious liberty. So the idea of trying to eliminate, through litigation, Christological references wanted by the President of the United States is not going to be successful, at least at this stage in our history.

Speaking of successful, how about a round of applause for Zhang and all that he is doing in his country and for his wonderful courage and example. And thank you all. You've been a wonderful community.

APPENDIX

ANNOTATED BIBLIOGRAPHY*

Books and Pamphlets

ALAN BROWNSTEIN, *THE ESTABLISHMENT OF RELIGION CLAUSE: THE FIRST AMENDMENT: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* (2008).

Brownstein discusses the Establishment Clause with three distinct sections: (1) diverging accounts of the history of the Establishment Clause; (2) various perspectives on government endorsements of religious messages; and (3) issues concerning government funding of religious institutions.

CHINA AND CHRISTIANITY: BURDENED PAST, HOPEFUL FUTURE (Stephen Uhalley, Jr. & Xiaoxin Wu eds., 2001).

The selected articles explore some of the past and modern trends of religious life in China, such as home churches and cell groups. The essays examine past efforts by Protestant and Catholic missionaries, present day relations between churches and the government, and indications for future advancements of Christianity.

DAVID AIKMAN, *JESUS IN BEIJING: HOW CHRISTIANITY IS TRANSFORMING CHINA AND CHANGING THE GLOBAL BALANCE OF POWER* (2003).

Aikman discusses the possibilities of the dynamics of Christianity and China. In the next thirty years, nearly one-third of China's population could become Christian, thereby making it one of the largest Christian nations in the world. In turn, these Christians would also be guiding one of the world's largest economies.

DAVID M. ACKERMAN & KIMBERLY D. JONES, *THE LAW OF CHURCH AND STATE IN THE SUPREME COURT REVISITED* (2005).

Akerman and Jones summarize the decisions of the Supreme Court since 1980 and evaluate the shift to a greater separation of church and state.

* This Annotated Bibliography was compiled by the editorial staff of the Regent Journal of International Law.

FORREST CHURCH, *SO HELP ME GOD: THE FOUNDING FATHERS AND THE FIRST GREAT BATTLE OVER CHURCH AND STATE* (2007).

Church describes the culture war that raged from George Washington's presidency to James Monroe's. Federalists, Congregationalists, and New Englanders believed that God was the only legitimate ruler of men. On the other side, republicans, Baptists, and Virginians were supporters of the Enlightenment and the French Revolution and believed that the preservation of man's freedom would come from the separation of church and state.

FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* (2007).

Religion clause jurisprudence is in a state of disarray. Ravitch posits that when principles of equality and liberty are utilized, there is a failure of distinguishing between groups and individuals. Religion clause jurisprudence might be better served if the court varied its notion of neutrality.

JAMES MADISON, *MEMORIAL & REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT* (1785), *reprinted in* JAMES MADISON ON RELIGIOUS LIBERTY, at 55 (Robert S. Alley ed., Prometheus Books 1985).

Madison wrote the *Memorial & Remonstrance* in opposition to a bill proposed by the Virginia General Assembly which would have used tax dollars to support various "Teachers of the Christian Religion." Madison insisted that such a law would be an abuse of power. He believed that people should not be taxed to support religion, and that cruel persecutions would follow if people were forced to do so.

Jason Kindopp, *Fragmented Yet Defiant: Protestant Resilience Under Chinese Communist Party Rule*, in *GOD AND CAESAR IN CHINA* 122 (Jason Kindopp & Carol Lee Hamrin eds., 2004).

Kindopp presents an overview of Protestant Christianity in communist China beginning in 1949. He also discusses the resurgence of Protestant Christianity in China and the governmental response.

JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2008).

Toobin discusses the Establishment Clause in depth and speaks to some of the important religious liberty victories advocated by Jay Sekulow and the American Center for Law & Justice.

JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

Schlegel recovers a largely ignored aspect of American Legal Realism, a movement in legal thought in the 1920's and 1930's that sought to bring the modern notion of empirical science into the study and teaching of law. In this book, he explores individual Realist scholars' efforts to challenge the received notion that the study of law was primarily a matter of learning rules and how to manipulate them. He argues that empirical research was integral to Legal Realism, and he explores why this kind of research did not, finally, become a part of American law school curricula.

JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (James H. Tully ed., Hackett Publ'g 1983) (1689).

Locke argues that civil government should tolerate differing religious views that do not threaten the security of the realm because the power of the civil government relates only to "outward" things (life and liberty) and, therefore, cannot care for the spiritual needs of the people. Allowing civil government control over spiritual matters would make a citizen's "eternal Happiness or Misery" dependent on the nation of their birth.

JONATHAN SMITH, *RELATING RELIGION: ESSAYS IN THE STUDY OF RELIGION* 101-16 (2004).

Smith analyzes religions and specifically discusses the relationship between religion and the United State, as interpreted by the Supreme Court. Smith believes that the government has overstepped its bounds by defining religion where academia and other methods should have been defining religion. He states that an example of this can be seen in the United States Tax Code where exemptions are set out for "religious" workers and "non-profit" organizations. He asserts that the government does a poor job of defining religion.

LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed., rev. Univ. of N.C. Press 1994).

Levy discusses the Establishment Clause and argues that the Framers of the Constitution did not intend for the government to aid any particular religion, even on an impartial basis.

MARK REED LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

Levin opines on the power the Supreme Court has shown in upending the Constitution. He also speaks about the Establishment Clause and the recent decisions involving the Ten Commandments.

Mickey Spiegel, *Control and Containment in the Reform Era*, in *GOD AND CAESAR IN CHINA* 40 (Jason Kindopp & Carol Less Hamrin eds., 2004).

Spiegel discusses the regulation of religion in China by the communist regime, including the way its regulations are carried out through governmental bureaucracy.

ROBERT AUDI AND NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGION CONVICTION IN POLITICAL DEBATE* (1997).

Each author states his position on the role of religion in political debates and then responds to and analyzes opposing viewpoints.

ROBERT DRINAN, *CAN GOD AND CAESAR COEXIST?: BALANCING RELIGIOUS FREEDOM AND INTERNATIONAL LAW* (2005).

Professor Drinan, a Catholic priest, argues that international law has not gone far enough to protect religious freedom on a worldwide scale. The failure to enact a legally binding international covenant or world tribunal to monitor freedom of religion allows for countries to punish those who practice an unfavorable religion.

ZHIBIN XIE, *RELIGIOUS DIVERSITY AND PUBLIC RELIGION IN CHINA* (2006).

Zhibin Xie argues two points: 1) contributions of religious individuals and groups to the public and political arena should greatly aid religious liberty in China, and 2) that public roles of religion should be recognized but constrained under a theory of "liberal-constrained public religion."

The Court and Its Procedures, <http://www.supremecourtus.gov/about/procedures.pdf> (last visited Mar. 15, 2009).

This article explains the welcome that the Supreme Court Justices are given at the start of each day.

Law Review Articles

Alan E. Brownstein, *Taking Free Exercise Rights Seriously*, 47 CASE W. RES. L. REV. 55 (2006).

This article examines the seemingly all or nothing proposition of current free exercise case law. There are two other alternatives acknowledged: (1) an ad hoc basis, or (2) that the courts come up with a clear nuanced jurisprudence for deciding religious free exercise cases.

Eric R. Carlson, *China's New Regulations on Religion: A Small Step, Not a Great Leap, Forward*, 2005 BYU. L. REV. 747 (2005).

Carlson discusses, *inter alia*, China's 2005 Regulations on Religious Affairs.

Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799 (1961).

Jones defines legal realism and compares and contrasts it with natural law. He believes that natural law is not incompatible with classical legal realism.

Joel A. Nichols, *Dual Lenses: Using Theology and International Human Rights to Assess China's 2005 Regulations on Religion*, 34 PEPP. L. REV. 105 (2006).

Nichols discusses China's approach to religious freedom, focusing specifically China's 2005 religious liberty policies and their impact on Christianity.

Karl Llewellyn, *Some Realism About Realism*, 47 HARV. L. REV. 1222 (1931).

Llewellyn is a self-proscribed legal realist who was a pioneer behind the modern legal realism movement. He wrote this article to defend and define realism in response to an article by Roscoe Pound who had criticized legal realism.

Kim-Kwong Chan, *China's Socioeconomic Changes and the Implications of the Religion-State in China*, 2004 BYU. L. REV. 325 (2004).

Chan describes China's evolving approach to religious expression. He uses historical events and modern political events to explain why the Chinese government is taking particular steps regarding religious freedom.

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456-66 (1990).

Judge McConnell discusses his view on the development of the free exercise doctrine in the United States. Specifically, he discusses how the Free Exercise Clause was viewed before the Constitution was written, after it was written, and today. Essentially, Judge McConnell believes that there should be liberty of thought, belief, and action regarding religion.

Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU. L. REV. 611 (2001).

Judge McConnell offers the argument that the public in general and the legislature are often more tolerant of religious freedom and exercise than the judicial system. Because of this, he argues that the legislature will offer greater protection for religious groups.

Vincent Martin Bonventre, *The Fall of Free Exercise: From No Law to Compelling Interests to Any Law*, 70 ALB. L. REV. 1399 (2007).

Bonventre offers a solid perspective on the modern much-narrowed view of the Free Exercise Clause. He discusses the lowered deference that the Supreme Court now gives to Free Exercise scenarios. Whereas the Constitution absolutely prohibits laws restricting the free exercise of religion, the Court now merely requires compelling interests as sufficient justification to proscribe free exercise.

Journal Articles

Eric Kolodner, *Religious Rights in China: A Comparison of International Human Rights Law and Chinese Domestic Legislation*, 12 UCLA PAC. BASIN L.J. 407 (1994).

Kolodner analyzes religious rights in China through a comparative legal approach. He examines the international human rights regime regarding religious freedom, the protection of religious rights accorded by the Chinese Constitution and other Chinese legislation, and the methods used by the Chinese government to control religious activities. He then discusses whether Chinese domestic legislation comports with international norms regarding religious freedom, and whether China is violating any of its international legal obligations.

Greg Sergienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 OHIO ST. L.J. 1263 (1996).

Sergienko argues that the neutrality tests used by the Supreme Court of the United States as the yard stick by which to measure Free Exercise Clause claims and Establishment Clause claims is incorrectly interpreted. He contends that the Court should interpret the term "neutrality" according to the Framers' understanding of the federal Constitution as a social contract. Sergienko believes this would strike a consistent balance between Free Exercise and Establishment Clause jurisprudence.

H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU. J. Pub. L. 203 (1999).

House explores the tension between America's increasingly secular stance and its Christian legal foundations. In particular, he discusses the Supreme Court's tendency to give the Establishment Clause greater weight than the Free Exercise Clause.

Lawrence Cox, *Freedom of Religion in China: Religious, Economic, and Social Disfranchisement for China's Internal Migrant Workers*, 8 ASIAN-PAC. L. & POL'Y J. 370 (2007).

Cox argues that the only way to truly understand religious freedom for China's migrant factory workers is to examine other national policies, both cultural and economic. These non-religious policies have had a profound impact on this particular segment of the Chinese population.

Micah Schwartzman, *The Relevance of Locke's Religious Arguments for Toleration*, 33 POL. THEORY 678-705 (2005).

Schwartzman offers a deep discussion regarding Locke's toleration treatise. Specifically, he argues that Locke's theological arguments for religious liberty are still relevant today, despite having been overlooked in today's secular era.

Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455 (2007-08).

Danchin reconsiders the historical emergence and evolving structure of the right to religious freedom in international law. He concludes that an abstract, universal right cannot lead to a concrete right.

Sonia M. Kim, *Old World Religious Persecution in a New World Setting: How International Relationship Can Affect China's Treatment Towards Its Religious People*, 2 RUTGERS J. LAW & RELIG., 2000-01, at 2.

Kim identifies the Chinese government's concept of religious freedom as a legal fiction and a violation of international customary law standards. He also explores whether existing standards can be used to provide possible alternative means or lead to no religious persecution in China.

Magazine Articles

Daniel H. Bays, *Chinese Protestant Christianity Today*, CHINA Q., June 2003, at 488-504.

Bays discusses how Protestantism has been the most rapidly growing religion in China in recent years due to the efforts of many western religious organizations.

Pitman B. Potter, *Belief in Control: Regulation of Religion in China*, CHINA Q., June 2003, at 317-337.

Potter discusses how the post-Mao government has distinguished between religious belief and religious practice in an attempt to build legitimacy. This distinction brings forth challenges for the regime's efforts to retain political control while still bearing an image of tolerance.

William Martin, *The Christian Right and American Foreign Policy*, 114 FOREIGN POL'Y 66 (1999).

Martin discusses how Evangelicals have increased their efforts to influence a wide range of foreign political policies and then examines whether the world is ready for this message.

Newspaper Articles

Marylou Tousignant, *A Tip of the Hat to Tradition; Every Four Years, Inaugurations Celebrate the U.S. Presidency*, WASH. POST, Jan. 20, 2005, at C15.

Tousignant discusses the inaugural traditions, including taking the oath on a Bible.

Encyclopedia Entries

Encyclopedia Britannica Online, American Civil Liberties Union, <http://www.britannica.com/EBchecked/topic/19400/American-Civil-Liberties-Union>.

This site contains a general summary of what the ACLU is and the areas of law it focuses on.

Court Opinions

Brandenburg v. Ohio, 395 U.S. 444 (1969).

The Supreme Court held that the government cannot punish inflammatory speech unless it is directed to inciting, and likely to incite, imminent lawless action.

Braunfield v. Brown, 366 U.S. 599 (1961).

The Supreme Court supported a Pennsylvania criminal statute which proscribed the selling of certain enumerated commodities on Sunday. Appellant practiced his Sabbath day of rest on Saturday and, therefore, wanted to open his business on Sunday. Appellant argued that the statute was interfering with his free exercise of religion.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

On behalf of his school-aged daughter, Newdow sought to have the words "under God" in the Pledge of Allegiance declared unconstitutional as a violation of the Establishment Clause. The Supreme Court held that because Newdow did not have custody of his daughter he lacked proper standing to bring the suit.

Engel v. Vitale, 370 U.S. 421 (1962).

This was a landmark case in which the Supreme Court held that school officials composing official school prayers and requiring recitation in public schools was unconstitutional. In a school setting, even non-denominational, non-mandatory prayer conducted by school officials is a violation of the Establishment Clause.

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

Lamb's Chapel wanted to utilize school facilities after regular school hours to show religious oriented films regarding child-

rearing and family values. The Court said that denying the group equal access when other groups had been permitted to rent the school after-hours was viewpoint discrimination. This was not be an Establishment Clause violation because a private group may use a school's facilities after-hours.

Lemon v. Kurtzman, 403 U.S. 602 (1971).

This case set the standard for laws that dealt with church and state functions. Pennsylvania had a program that provided financial support to non-public schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials for specific secular subjects. The Rhode Island statute allowed the state to directly pay teachers in non-public elementary schools a supplement of fifteen percent of their annual salary. Both statutes were held to be unconstitutional because the non-profit schools were church-related. The three-part "Lemon Test" is oft quoted. The Lemon test states that: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lynch v. Donnelly, 465 U.S. 668 (1984).

The Court held that Pawtucket's display of a nativity in its Christmas exhibit did not violate the Establishment Clause in part because of the general context in which the nativity scene was set. This case exemplifies what some have come to call the "plastic reindeer rule."

McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005).

A Ten Commandments display in a McCreary County courthouse was held to be a violation of the Establishment Clause because it lacked the integration of a secular message.

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Several Pennsylvania state statutes requiring that certain notification be given to obtain an abortion were challenged as unconstitutional. The Supreme Court delivered a plurality opinion leaving constitutional the parental consent for a minor, informed consent, and a twenty-four-hour waiting period, but struck down as unconstitutional the requirement that a married

woman give notification to her husband before having an abortion.

Pleasant Grove City v. Sumnum, 129 S.Ct. 1125 (2009).

A religious group sought to compel the government to display a monument that listed the tenets of its faith, in the same public park where a donated Ten Commandments monument is displayed. In a unanimous ruling, the Court said that Pleasant Grove could choose to display the Ten Commandments monument while choosing not to display the religious group's monument as a valid exercise of government speech.

Texas v. Johnson, 491 U.S. 397 (1989).

The Supreme Court held the Texas statute prohibiting the burning of the American flag to be an unconstitutional violation of the First Amendment's free speech protections. The Court stated that the government cannot prohibit idea expression simply because it is offensive or disagreeable to society.

Van Orden v. Perry, 545 U.S. 677 (2005).

This case challenged a Ten Commandments monument, which was located on the grounds of the Texas State Capitol, as a violation of the Establishment Clause. The Court held that, when considered in its context, the purpose served by the monument was historical and social rather than an intrusive religious endorsement by the government.

Wallace v. Jaffree, 472 U.S. 38 (1985).

This case addresses the constitutionality of silent school prayer. The Court held that a daily period of silence in public schools for voluntary prayer or meditation is an endorsement of religion that lacks any secular purpose.

Miscellaneous Sources

President George Washington, Farewell Address (Sept. 19, 1796), <http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf>.

This is an example of great Christian expression, as the address cautions against divorcing national morality from religious principle.

Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (Dec. 10, 1948).

This is the United Nation's list of the human rights to which peoples of all nations are entitled. It specifically prohibits violation of these rights on the basis of religion and protects the right to freedom of religion.

U.S. CONST. amend. I.

This is the original assurance to Christians that the right to practice and exercise their religion would be protected by the government.

XIAN FA art. 36 (1982) (P.R.C.).

The Chinese Constitution states that a Chinese citizen enjoys freedom of religious belief, specifically freedom from compulsion to believe in any religion and religious discrimination. A Chinese citizen is also entitled to protection for normal religious activities as long as do not disrupt public order, other citizens' safety, or the educational system.