

DALE WHITMAN RETURNS TO BYU

Author, scholar, dean, professor—all of these titles apply to Dale Whitman, who after 13 years has returned to teach at the J Reuben Clark Law School

Teaching has been the focus of Whitman's illustrious legal career. After graduating from Duke University Law School in 1966, he went to work for the firm of O'Melveny & Meyers in Los Angeles. During the year and a half he was at the law firm, Whitman came to the conclusion that he would rather be a professor than a "practicing" lawyer.

"I became a professor because students are smarter and nicer than clients," says Whitman. "I've never had any reason to question that. I've dealt with a lot of students and a lot of clients, and on the average the students are way ahead."

In addition, Whitman says, "One of the things that lawyers seldom want to admit is that litigation and negotiation both involve a lot of stress. It's just inevitable. Some people tolerate stress better than others, but it is stressful. It's the adversary system. I don't like stress or conflict. I suppose I don't like adversarial behavior. But I do like law. I like the intellectual puzzle, the challenge of it. So teaching has turned out to be a way of having the good news without the bad news; it's worked out really well for me."

Whitman began his teaching career at the University of North Carolina at Chapel Hill, where he

taught for three years, primarily in the field of property. He then served as a visiting professor at UCLA from 1970 to 1971. Taking a diversion from teaching, Whitman worked as a deputy director for the Federal Home Loan Board in Washington, D.C., and then for HUD as a senior program analyst in the Federal Housing Administration. It was then that BYU President Rex Lee stopped by Whitman's office and told him he "ought to move to Provo."

Along with a handful of others, Whitman helped get the J Reuben Clark Law School under way in 1973. When asked what it was like to assist in organizing a law school, Whitman says: "It was great. Most of us had prior teaching experience, and therefore some preconceptions about what a law school ought to be like. We tended to follow traditional patterns in creating a curriculum and the overall organization of the school. Those of us with experience had taught at some very good law schools, so that wasn't a bad pattern to follow. We had a lot of fun."

"Some people thought we would have a political agenda, but we did not. In fact, we tried quite consciously to avoid that," Whitman says. He tells the story of a young man who approached Lee when the law school was being organized. "Brother Lee," he asked, "is this going to be a constitutional law school?" President Lee thought a minute and replied, "Well, it sure isn't going to be an *unconstitutional* law school."

After five years at BYU,



Dale Whitman

Whitman decided to move his family to the Pacific Northwest to become the associate dean of the University of Washington Law School. He remained there for four years before accepting a position as dean of the University of Missouri Law School in 1982.

Commenting on his deanship, Whitman explains that the construction of a new law school building occupied most of his attention. "It worked out well. We dedicated the law building in 1988 and that is when I resigned as dean." Whitman remained at Missouri as a faculty member until the end of 1991 and then moved back to Provo.

To his former students and colleagues, Whitman's return is seen as a major coup. "From the beginning of our law school," says Lee, "it became apparent to everyone that Dale Whitman had all of the qualities needed in a law faculty member. He is a scintillating, inspiring, and

provocative teacher, as evidenced by his selection as the first Professor of the Year at the J Reuben Clark Law School. Dale is a nationally recognized scholar, preeminent in matters of real estate finance." Lee adds that Whitman is an excellent colleague and friend, always concerned about the progress and success of others.

Whitman has collaborated on five books since 1975. The first was a casebook on real estate finance, *Real Estate Transfer, Finance, and Development*, which he co-authored with Grant Nelson, a former colleague from the University of Missouri Law School. Nelson also collaborated with Whitman on a treatise in the real estate finance field, *Real Estate Finance*. "It was actually a revision of George Osborne's mortgages hornbook. The two books make a nice package because they are on the same subject, by the same

authors, and follow the same organizational pattern. Each of them feeds the other. We also did a student outline book for West as part of its black-letter series in real estate finance, *Land Transactions and Finances*. Now there is a complete set—a book for everybody in the field.”

The fourth book Whitman co-authored was a property hornbook, *The Law of Property*, with William Stoebe of the University of Washington and Roger Cunningham of the University of Michigan. It has been “a good, solid book,” says Whitman, “and it is used by a lot of judges and lawyers, because it is the only modern one-volume hornbook in the field.”

The same authors reconvened with Grant Nelson and Olin Browder in 1989 and revised an existing property book, *Basic Property Law*, bringing the number of books Whitman has been involved with to five.

Whitman’s scholarship has had and will continue to have an effect on the Law School. In 1975, when Whitman was working on his first book, he made this comment in an article in BYU’s Law School newspaper: “To the extent that this book gets adopted by other law schools around the country, people will associate the name of BYU with what is hopefully a good product. That, in the long run, rubs off and creates a good reputation for the school on a national level that will help all of our graduates over time.”

With his return to BYU, Whitman’s work will again be associated with this law school, and students will

have the opportunity to use texts in the area of real property written by one of their professors.

Whitman is now working with Grant Nelson on the *Restatement of the Law of Mortgages* for the American Law Institute. This is the first Restatement covering the mortgage field the Institute has done in its near-75-year history. “We have to go through a very elaborate process to get our work approved,” Whitman explains. “But, on the other hand, the reporters are the authors, and if they can get the membership of the Institute to vote for what they do, it becomes the Restatement.”

Whitman says it is important to make the Restatement as complete, comprehensive, and accurate as possible because it will probably have a life of about 50 years. “I think I am probably taking greater pains and working harder to get every word right with the Restatement than I have with any of the other books.”

Whitman also shared his perspective on legal education. He says he believes that “perspective” is one of the important aspects that law students—and lawyers—need to incorporate into their lives. He questions whether “we deal enough in law school with ethical and moral issues. I don’t mean legal ethics. I don’t mean formal ethics. I mean how you approach your profession as part of your overall life. How much time do you spend at it, how do you allocate your effort between that and your family, church, and the other responsibilities. Many

lawyers have problems with that. They tend to be workaholics. Law is a difficult profession to manage. Part of the reason is that your income depends almost exactly on how much time you spend at it. So there is always the temptation to spend more time and make more money, no matter what you’re giving up.

“I wonder if perhaps we ought to be talking more with our students about those issues,” Whitman continues. “They don’t really come up officially in any class, and they tend to get lost in the shuffle. It’s also hard to discuss these issues with the students because until a person has actually practiced law it’s difficult for that person to appreciate the dilemmas associated with practicing law. It’s a hypothetical discussion until you have been there.”

Whitman’s former students continue to keep in touch with him, asking him questions and keeping him on his toes. “I like to hear from my students because they usually raise interesting questions,” he says. “Sometimes they are even questions that I can use in class. Since I don’t practice myself, except by consulting for other lawyers, I think a moderate amount of consulting is helpful. It keeps me in touch with issues that are arising in the real world. It’s also fun just to see how people’s careers have worked out.”

Will Stoddard, a former student, along with members of Stoddard’s Las Vegas law firm—Albright, Stoddard, Warnick & Albright—consult with Whitman regularly about

complex legal issues relating to real property. “His superb ability to quickly understand the facts, analyze issues, and then render counsel, advice, and opinions is unequaled,” says Stoddard. “Indeed, his national reputation and expertise, coupled with his unique ability to communicate in clear and concise language, make him an invaluable asset to BYU.”

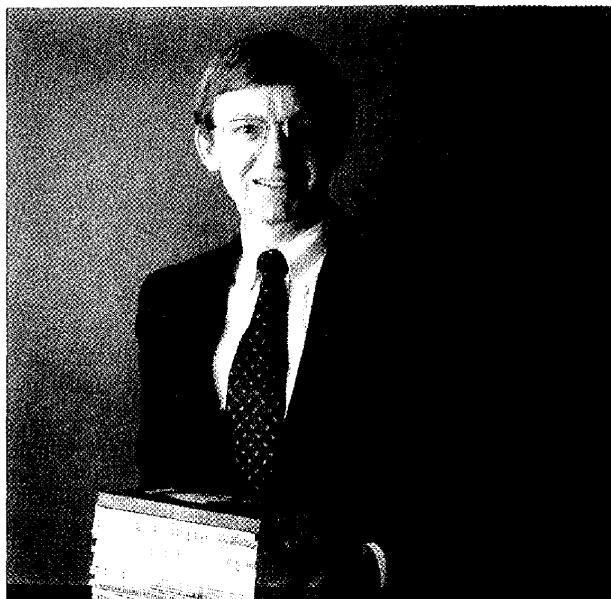
Former student Bill Marsden, currently with the law firm of Jardine, Linebaugh, Brown & Dunn in Salt Lake City, agrees, saying, “I use what I learned in Dale Whitman’s course more than anything else I learned in law school. My partners and I use the Whitman/Nelson hornbook on a daily basis. It’s the best one-volume reference in the property field.”

Lee speaks for Whitman’s former students and colleagues when he says that Whitman’s return is “one of the most significant days in the history of the Law School.” A sentiment the *Clark Memorandum* believes will be shared by Whitman’s future students and colleagues.

PROFESSOR NAMED EDITOR OF BYU STUDIES

John W. Welch, a professor of law at BYU since 1980 and a noted religious studies scholar, has been named editor of *BYU Studies* by President Rex Lee and Provost Bruce Hafen.

Welch will replace Edward A. Geary, a professor of English who has served eight and a half years in the post.



John W Welch

Welch says it is an honor to edit the university's main scholarly journal, which, with 32 years of service to LDS scholars and general readers, "is the oldest and holds a significant place of honor among all LDS scholarly journals

"I have always viewed *BYU Studies* as a voice for a broad community of LDS scholars," the new editor says "I remember how impressed I was with *BYU Studies* when I was an undergraduate here at BYU in the late 1960s. I even stood outside the Smith Fieldhouse during registration as a volunteer trying to sell subscriptions to students. I think it fills an important function, giving perspective to many Latter-day Saint issues. I hope to see it grow in scope, relevance, and readership.

"We live in dynamic times," Welch adds, "and the gospel gives needed orientation as the world faces a steady stream of new challenges. The Law School and every department at BYU are poised to be active con-

tributors in these developments, offering meaningful insights that emerge from the interaction of faith and scholarship "

Hafen notes that *BYU Studies*, which is a quarterly journal, is being expanded to offer a wider range of material and to extend an interdisciplinary, scholarly dialogue about religious topics

"Jack Welch is superbly qualified to direct such an enterprise," Hafen says "He himself is an astonishingly productive scholar in multiple disciplines, and he has both the imagination and the leadership skill to direct the work of other scholars with both creativity and rigorous standards "

In addition to serving on the Law School faculty, Welch is director of special projects for the BYU Religious Studies Center He is one of the editors of the recently completed *Encyclopedia of Mormonism*, published by Macmillan

Welch is general editor of *Collected Works of Hugh Nibley* and *Ancient Texts and Mormon Studies*

He is director and former president of the Foundation for Ancient Research and Mormon Studies and has had more than 60 scholarly works published He is responsible for organizing the first-year professional seminars at the Law School and creating and teaching a course on ancient Near Eastern law in the Bible and Book of Mormon

The Boston native earned simultaneous bachelor's and master's degrees in history and classical languages at BYU, studied Greek philosophy at Oxford University, and obtained his juris doctorate at Duke Law School, where he was articles editor of the *Duke Law Journal*

At BYU, he was awarded "Highest Honors" by the Honors Program, was named a Woodrow Wilson Fellow, was appointed valedictorian in the College of Social Sciences, and was named Outstanding History Senior.

Many plans are now under way to enhance and expand *BYU Studies*, Welch says "While working on the *Encyclopedia*, I became aware of much that has been written in the past, but I also saw that much remains to be done. There are some surprising gaps in our collective scholarly coverage of important topics. I hope we can fill a few of those gaps "

Welch says he plans to produce a cumulative index of the journal from 1959 to the present and to make the best of past issues widely

and inexpensively available, including on computer disks. "We are also exploring the possibility of holding workshops, sponsoring projects, and giving the publication a larger format, with more departments, more reviews of a wider range of books, improved graphics, and broader appeal to general readers For example, I would like to publish a special issue of *BYU Studies* on law, religion, morals, and the legal professional "

BYU Studies accepts articles, essays, short stories, poetry, historical documents, analytic notes, work studies, book reviews, and other items of interest to a general Latter-day Saint audience Many people think of *BYU Studies* as an esoteric journal written at BYU, about BYU, and for BYU, Welch says "But its purpose is much broader than that I think it is appropriate to describe *BYU Studies* as the flagship of all LDS journals "

Past editors have included Clinton F Larson, Dean B Farnsworth, Charles D Tate, and Edward A Geary Guest editors of special issues have included Truman G Madsen, Spencer J Palmer, Ray C Hillam, Neal A Lambert, Lamar C Berrett, Dean D Jessee, Ronald W Walker, and Edward L Kimball.

BYU Studies is regularly placed in 295 scholarly libraries, and subscribers are located in almost every state and 23 foreign countries The subscription rate is \$10 per year For further information, contact Welch at 522 JRCB, BYU, Provo, UT 84602; (801) 378-3168

**MONROE G. MCKAY
INSTALLED AS CHIEF
JUDGE**

With a reminder from Justice Byron R. White that the job of chief judge can be "tough," the position of chief judge of the U.S. Court of Appeals for the 10th Circuit was handed over to Judge Monroe G. McKay in a ceremony at BYU's J. Reuben Clark Law School in September.

Judge McKay, who was a member of the BYU law faculty when he was appointed to the appellate bench in 1977 by President Jimmy Carter, replaces retiring Judge William J. Holloway, Jr.

Justice White of the Supreme Court presided over and conducted the investiture. "I've seen chief

judges come, and I have seen chief judges go, but I always wonder how a chief judge could stand to do the jobs they do. It's a tough job," White said.

McKay is the first former BYU faculty member to hold both the position of appellate judge and chief judge in a federal court. He is also only the second member of the LDS Church to hold the position of chief judge. The first is Chief Judge Clifford Wallace of the U.S. Court of Appeals for the 9th Circuit.

As chief judge, McKay will oversee the activities of the 12 other judges in the 10th Circuit, which includes Utah, Colorado, Wyoming, New Mexico, Kansas, and Oklahoma. He will also become a member of the Judicial Conference of the

United States, the 27-member governing body of the nation's federal courts.

Elder James E. Faust of the Council of the Twelve of the LDS Church spoke at the ceremony along with Judges James K. Logan and John P. Moore of the 10th Circuit. Additional remarks were given by BYU President and former Law School Dean Rex E. Lee, former U.S. Congressman Gunn McKay, and Judge Holloway.

Elder Faust told of McKay's pioneer heritage and the long service of his family. He spoke specifically of Bessie McKay, who was left a widow when Monroe was a boy, and of how she taught her children to always "remember who you are and what you stand for."

A native of Huntsville,

Utah, the 63-year-old McKay graduated from BYU in 1957 and from the University of Chicago Law School in 1960, where he was named to the Order of the Coif and Phi Kappa Phi honor societies.

After a clerkship in the Arizona Supreme Court, McKay practiced law in Phoenix from 1961 to 1974, taking a two-year break to serve as director of the Peace Corps in the southern African nation of Malawi from 1966 to 1968.

In 1974, he joined the faculty of the newly formed

Senior Judge Robert H. McWilliams (left) and Justice Byron R. White attended the investiture of Chief Judge Monroe G. McKay (right).



J. Reuben Clark Law School, where he taught courses in trial procedure and property until his appointment to the appellate court

Active in many legal and philanthropic organizations, McKay is a member of the American Law Institute and the Arizona State Bar. He served as president of the Arizona Association for Health and Welfare from 1970 to 1972 and as president of the Maricopa County Legal Aid Society from 1972 to 1974

**BILL OF RIGHTS
SYMPOSIUM
HIGHLIGHTS ANNUAL
MEETING**

by Stephen R. Kelly

A symposium on the Bill of Rights highlighted the third annual meeting of the J. Reuben Clark Law Society and the BYU Law School Alumni Association on September 27, 1991. Other sponsored events included the annual dinner at the Excelsior Hotel, where Provost Bruce C. Hafen was the featured speaker (His address, "The Coriolanus Syndrome: Is it Virtuous to be Obstinate?" begins on page 20.) Several class reunions (1976, 1981, 1986), a softball game between the classes of 1981 and 1986, and a BYU football game made up the balance of the activities

In addition, Gary S. Anderson was elected president of the J. Reuben Clark Law Society. Anderson, who joined the San Francisco firm of Farella, Braun & Martel in

1968, has distinguished himself as a trial lawyer in a variety of practice areas. He received his bachelor's degree from BYU and his juris doctorate from Boalt Hall School of Law, University of California at Berkeley.



Gary S. Anderson

Nearly 300 participants attended the symposium, gaining information and insights on the Bill of Rights, as well as receiving continuing legal education credit. Scholars and special guests discussed the history, current impact, and import of the Bill of Rights and considered the struggles that the Supreme Court and Congress have had with the interpretation and meaning of the document.

President Rex E. Lee opened the symposium and introduced the keynote speaker, Chief Judge Monroe McKay of the United States Court of Appeals for the 10th Circuit. Other speakers included Bruce Reese, executive vice president of Bonneville Communications; Tim Slover, BYU professor of theater and film and writer of the screenplay, *A More Perfect Union*; and BYU Law

School Professors Cole Durham, Frederick Gedicks, Michael Goldsmith, James Gordon, Edward Kimball, and Richard Wilkins.

In his remarks, Lee noted that the Bill of Rights has stood the test of time and is now a foundation stone for "our American way of life and our American system." He said that it is interesting and important to make the comparison between the perspectives we have on the Bill of Rights and those that existed when the Bill of Rights was written in 1787. Much of the discussion throughout the symposium focused on comparing and contrasting these perspectives, as well as studying their effects on individual versus community rights.

Arguing for original intent, Richard Wilkins maintained that the advocates of states' rights believed that a Bill of Rights was necessary to protect the sovereign states from undue intrusion by the federal government. However, he said, this protection has become "an engine for further subjugation of state power." He said he believes that the advantages of America's federal structure have been undermined by its continued emphasis on a centralized government and that the structure of the nation has been undeniably altered by ceding the residual power retained by the states following the Constitutional Convention.

Wilkins said he agrees with Justice Sandra Day O'Connor, who in *Gregory v. Ashcroft* pointed out that a dual system of government

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Wilkins argued that a substantial number of innovations in the federal government had first been implemented at the state or local level and that a disregard for states' rights may interfere with state as well as federal experimentation.

Judge McKay, on the other hand, explained that he is not persuaded by "original intent" arguments and espouses a modern approach to interpreting the Bill of Rights. He contends that those who pretend to recapture 18th-century constitutional interpretation are missing the spirit and significance with which people ought to be approaching the Bill of Rights. Knowledge of "original intent," according to McKay, disappeared almost immediately after the Bill of Rights was written. Furthermore, he said, even those who—for whatever reasons—wish to go back and discover "that elusive notion of original intent would not tolerate the society that it would impose upon them."

Unlike Wilkins, McKay said he believes that Americans must "get to the 14th Amendment to fully understand the scope of the Bill of Rights, because the

Bill of Rights is more than just those 10 amendments. It is the context in which those amendments have been applied."

McKay also maintained that it is incorrect to cite James Madison as opposing the Bill of Rights. He said that a more correct view was that Madison failed to support the Bill of Rights because he did not think it was necessary. Madison felt that the states, rather than the federal government, were the greatest threat to fundamental human rights. He believed the federal government had no power to abuse those rights. Yet history, according to McKay, has shown that Madison was "just dead wrong."

McKay further emphasized his position that the Bill of Rights has survived because, on the whole, people can find redress in the federal courts if they believe that they are or have been tyrannized as a minority. He believes that many of us are the beneficiaries of this without knowing it and that much of the personal security Americans have is due to the Bill of Rights.

Other symposium speakers, however, argued that the specific provisions of the Bill of Rights, originally designed to regulate the interaction of the government with the individual, have been expanded to direct or even control the purely personal interaction of private individuals through the doctrine of "privacy" or "autonomy." One might argue that this broad interpretation of the Bill of Rights does not provide all Americans with an equal feeling of personal security, said Wilkins, par-

ticularly if a person is one of those "individuals" who has not yet been deemed an "individual" or if a certain right that a person deems "fundamental" has not yet been deemed "fundamental" by whoever is defining the terms at the time.

Wilkins quoted BYU Provost Bruce C. Hafen, who has said, "It is easy for the contemporary mind to forget that the concepts embodied in the Bill of Rights were originally intended to define only the political relationship between individual citizens and the [Government]—not the domestic and personal relationships among the citizens themselves."

This generalized "right of privacy" lies at the heart of the current role of the Bill of Rights, said Wilkins. He argued that even though the Supreme Court in *Griswold v. Connecticut* clearly recognizes a right of privacy, one cannot be certain of the precise constitutional niche for the result announced in that case. Possibly more troubling are questions pertaining to what the privacy right includes and who decides which rights are fundamental. There are currently two opposing views: the first approach would permit justices to *create* rights they deem fundamental; the second approach would restrict the right of privacy to rights that have been historically and traditionally recognized as fundamental. It is simply not clear, said Wilkins, which of the two approaches dominates.

Citing the example of *Bowers v. Hardwick*, Wilkins said that a majority of the Supreme Court adhered

closely to the second approach, concluding that "homosexual conduct was not entitled to heightened constitutional protection, because, far from being 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition,' homosexuality had long been rejected by Western culture as deviant behavior."

Justice Blackmun, by contrast, concluded that history and tradition were irrelevant, because state prohibition on homosexual conduct intrudes upon "the most comprehensive of rights and the right most valued by civilized men—the right to be let alone." In this context, autonomy—not history, tradition, or community values—determines the content of the privacy right.

In *Roe v. Wade*, the Court adhered to the first approach, deciding that the "right of privacy" included the right to terminate a pregnancy and that all considerations except the woman's own reproductive desires were irrelevant. As a result, the interests of all other individuals affected by a pregnancy (including the biological father and the unborn child), as well as society's traditionally held interest in protecting unborn life, were ignored. These divergent approaches to defining the content of the privacy right raise difficult questions for the future.

While many would champion the Court's decision in *Bowers v. Hardwick* or a likely reversal or limitation on the Court's holding in *Roe v. Wade*, others believe that these so-called

"victories" by the religious conservatives have distracted some on the religious right from less congenial developments by the Court in recent years. Frederick Gedicks, in his address, said that "the Supreme Court's recent treatment of the religion clause can only be understood as a product of the return to the 19th-century relationship of church and state, while retaining the rhetoric of 20th-century secularism." This, he said, "is the reason for a series of weird opinions—results aside."

Gedicks said he believes that 19th-century Americans generally understood the Constitution to require separation of church and state only at the institutional level (meaning that the constitutionally prohibited establishments of religion were created when the government coerced funding of a particular denomination or conformity to its practices). Beyond these measures, the people did not see any reason to restrict religion to private life. As a result, from shortly after the founding era until early in the 20th century, church/state relationships were governed by what Mark De Wolfe Howe termed "the de facto Protestant establishment," the premise being that Protestant values were the foundation of civilized society. These assumptions came under serious political pressure early in the 20th century.

This shift from the de facto Protestant establishment to secularism—or "secular neutrality"—plays itself out first in the free

exercise cases and then in the establishment cases, according to Gedicks. The free exercise clause is centered upon whether or not individuals can be excused from complying with laws that contradict their religious beliefs. This exemption permits believers to ignore any law that requires them to perform any act prohibited by their beliefs and, conversely, allows them to ignore any law that prohibits them from performing any act required by their religious beliefs.

In *Reynolds v. United States*, the Court refused to find a constitutionally compelled exception for Mormon polygamists. This important case was the first articulation of the belief-action doctrine, which essentially says that while the government may not punish people for their beliefs, it has full authority to regulate religiously motivated actions as long as it has a rational basis for doing so. As history has shown, the government can always come up with a good reason for regulating the actions of individuals. The belief action doctrine was perfectly tailored to enable state and federal governments to regulate and to penalize religions whose members strayed too far from the generally accepted cultural baseline of Protestant piety.

This doctrine was thought to have been dismantled by two more recent decisions. The first of these was *Sherbert v. Verner*, in which the Court ordered the state to pay unemployment benefits to a Seventh-day Adventist who refused to make herself available for employment on Saturday

(her Sabbath) as state law had required in order to receive these benefits. The Court in *Sherbert* held that the government could burden a fundamental right like the free exercise of religion only if it was protecting a compelling interest by the least intrusive means. In *Wisconsin v. Yoder*, the Court held that the Amish were not required to send their children to public school past the eighth grade, because it violated their religious beliefs. Here the *Sherbert* doctrine was further strengthened by requiring the state to "justify its denial of an exemption to religious objectors by a compelling interest."

Gedicks maintained that "both *Sherbert* and *Yoder* are consistent with the Warren and Burger Courts' respective emphases on individual rights," while *Reynolds* "clearly assumes that society is more important than the individual." The de facto establishment posited traditional Protestant values as the basis of society. Those who did not live in accordance with those values, such as polygamous Mormons, were "challenging the very foundations [of] society" and thus not deserving of any relief from law that "burdened their subversive religious practices." By contrast, the secular neutrality regime tries to "remain aloof from the choices that religious Americans make in their private lives." In this view, even those religious practices that would be viewed as subversive by the de facto establishment would be protected by secular neutrality unless they "clearly threaten important and legitimate state interests."

In *Employment Division v. Smith*, the more "conservative" Court "brought free exercise jurisprudence full circle by reaffirming the belief-action doctrine," said Gedicks. In *Smith*, the Court upheld a state's denial of unemployment benefits to two Native Americans who were dismissed from their jobs for smoking peyote as part of tribal religious rituals. The opinion expressly stated that the only protection offered by the free exercise clause was in its prohibition of laws motivated by a desire to disadvantage religion, on the theory that such laws impose an intentional burden, not merely an incidental one.

Smith did, however, approve of the legislative practice of writing religious exemptions into laws. Hence, there still remains a constitutionally permissible exemption under the establishment clause. Gedicks, who said he is alarmed by such an exemption, noted that this exemption may only protect politically powerful religions that are able to lobby successfully for exemptions, while the free exercise of politically powerless religions—those most in need of constitutional protection—will be wholly dependent upon the goodwill of political majorities. "*Reynolds* and *Smith* themselves are evidence that politically powerless religions will often fail to obtain legislative exemptions for their religious practices," he explained.

Evidence of this reliance on the goodwill of political majorities is found in opposition to the Religious Freedom Restoration Act,

designed to re-establish the *Sherbert/Yoder* doctrine by statute, which the LDS Church supports. The act is being opposed by politically powerful groups, such as the Roman Catholic Church, because they fear it could be used to bolster abortion rights, even if *Roe v. Wade* is overturned. Gedicks said he believes that while such groups can "afford to give politics a higher priority than survival," those religions with relatively little political power—like the LDS Church—may suffer greatly if the Court were to decide that any practice of a church had strayed too far from the generally accepted cultural baseline of the community as a whole.

As demonstrated by the differing viewpoints presented at the symposium, any interpretation of the Bill of Rights presents difficulties that must be addressed by both legal practitioners and members of society. These interpretations or ideals raise continuing and complex questions about the proper role of federalism in America and indicate a need to address the effect of modern interpretations of the Bill of Rights.

The symposium speakers helped listeners reassess their views of individual versus community rights and the role the Bill of Rights has played in providing (or taking away) those rights. Other Bill of Rights' issues involving the religion clauses will be the focus of the next annual meeting of the J. Reuben Clark Law Society and the BYU Law School Alumni Association, scheduled for October 9, 1992.