

Spring 1998

## Clark Memorandum: Spring/Summer 1998

J. Reuben Clark Law Society

J. Reuben Clark Law School

Follow this and additional works at: <https://digitalcommons.law.byu.edu/clarkmemorandum>



Part of the [American Politics Commons](#), [Legal Biography Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Religion Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

J. Reuben Clark Law Society and J. Reuben Clark Law School, "Clark Memorandum: Spring/Summer 1998" (1998). *The Clark Memorandum*. 23.

<https://digitalcommons.law.byu.edu/clarkmemorandum/23>

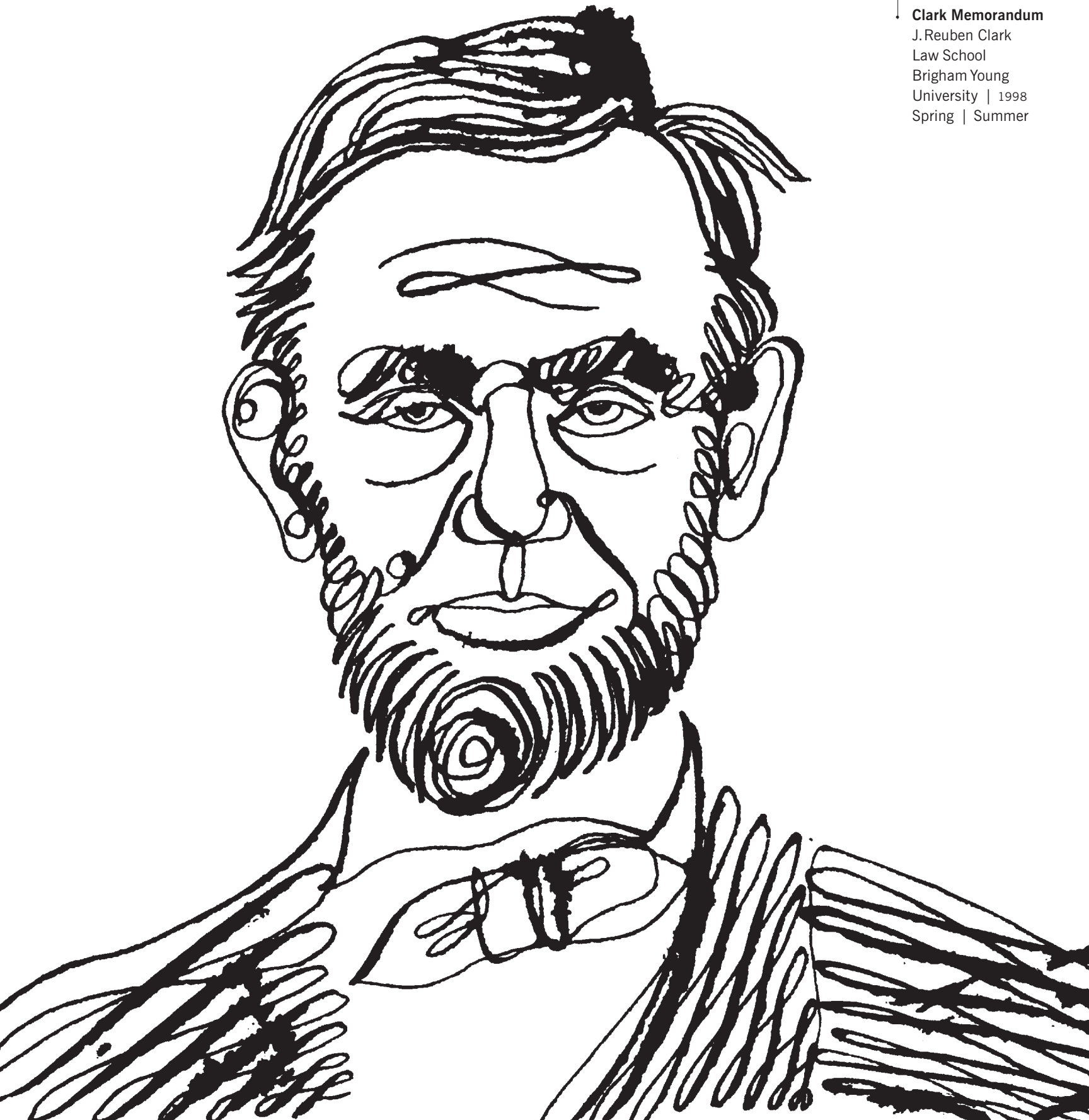
This Article is brought to you for free and open access by the Law School Archives at BYU Law Digital Commons. It has been accepted for inclusion in The Clark Memorandum by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

Remembering Lincoln the Lawyer

CM

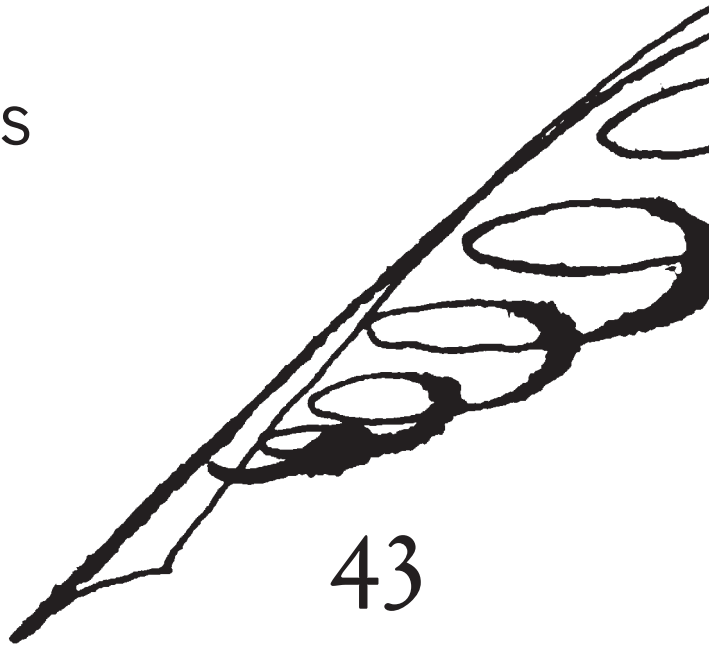
Clark Memorandum

J. Reuben Clark  
Law School  
Brigham Young  
University | 1998  
Spring | Summer





# contents



## 38

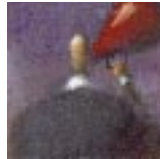
### Portraits

*LeGrande Fletcher*

*Steve Averett*

*Kristin Gerdy*

*Lorena Rizzo*



## 20

Testimony Before the  
Senate Committee  
on the Judiciary

*Elder Dallin H. Oaks*

Religious Freedom  
and the LDS Law  
Community

*W. Cole Durham, Jr.*

## 34

Civility:  
A Necessity,  
Not a Luxury,  
in the American  
Political System

*Patrick A. Shea*



## 12

Mourning Boerne

*Hugh Hewitt*

## 2

Remembering

Lincoln the  
Lawyer

*Kelly L. Andersen*

## 43

### Memoranda

Seeing the Elephant:

12 Western Legal

History Sources

Is This a Regional or  
National Law School?



## 24

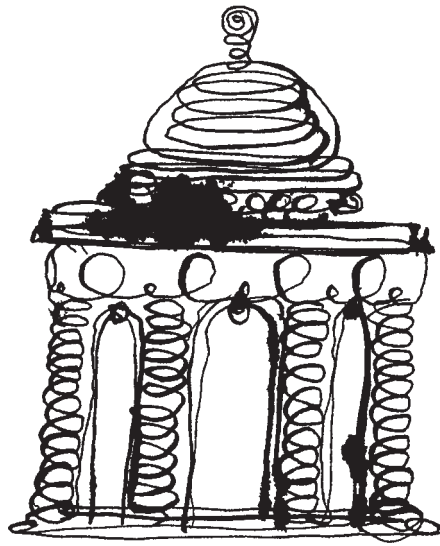
Weimar on  
the Wasatch?  
Mormon Political  
Alienation and the  
Search for Power

*Timothy E. Flanigan*

H. Reese Hansen, *Dean*  
Scott W. Cameron, *Editor*  
Charles D. Cranney, *Associate Editor*  
Linda Sullivan, *Art Director*  
John Snyder, *Photographer*

The Clark Memorandum  
is published by the J. Reuben  
Clark Law Society and the  
J. Reuben Clark Law School,  
Brigham Young University.  
© Copyright 1998 by  
Brigham Young University.  
All Rights Reserved.

# REMEMBERING



Kelly L. Andersen · Illustrated by Elvis Swift

# INCOLN

As a child I was taught to respect and admire our 16th president, yet I really did not comprehend why he was so great a man. I suspected it had something to do with the Gettysburg Address or, in general, that he had been president during the Civil War. Yet beyond that vague feeling I really knew little about him. Not long ago, while visiting a bookstore, I noticed a one-volume edition of Carl Sandberg's monumental six-volume epic biography of Lincoln<sup>1</sup> and decided that although I could not afford the time to read six volumes, I most certainly could read one. Besides, I reasoned, Sandberg was unquestionably an excellent writer and deserved to be read, even if the study of Lincoln was inconsequential. • I was not disappointed in the book. It not only inspired a great respect for Lincoln, but it also bathed me with desire to know more and more about this most admired of all U.S. presidents. I soon returned to the bookstore and bought Lincoln biographies written by William H. Herndon<sup>2</sup> (Lincoln's law partner for more than 16 years), by Ward Hill Lamon<sup>3</sup> (Lincoln's law associate in Danville, Illinois, where Lincoln traveled on the Illinois Eighth Circuit), and by Isaac N. Arnold<sup>4</sup> (an attorney who practiced before the same bar as Lincoln and who served in Congress during Lincoln's administration). • After reading these well-written biographies, I also read—for good measure—comprehensive biographies by Stephen B. Oates<sup>5</sup> and David Herbert Donald.<sup>6</sup>

• These, written more recently, drew upon hundreds of sources not available to biographers who lived during Lincoln's lifetime or even Sandberg's. All these books, added to my own two-volume set of Lincoln's writings and speeches, have given me a great appreciation for Lincoln the man as well as Lincoln the *lawyer*.

THE

AWYER

To understand Lincoln's greatness, it is first necessary to visit the vast challenges that confronted him as president. By understanding the greatness of the last four years of his life, it is then possible to work backward and understand how the practice of law served to form his character and intellect.

Between the time of his election as president and his taking the oath of office, a handful of states had seceded from the Union, and many more were poised to do so. The previous president, James Buchanan, in sympathy with the South and in anticipation of secession, had allowed many federal forts and arsenals to fall into the hands of secessionists and had permitted the treasury to be looted by them. Chief justice of the U.S. Supreme Court, Roger Taney, also well known for his Southern bias, had strenuously used his office to influence the interpretation of the Constitution to guarantee slavery. The now infamous *Dred Scott* decision, holding that blacks were not people but merely property, was the Supreme Court's last word on the most divisive issue of the day.

Most of the great military talent of the nation was composed of men of the South, including Robert E. Lee, a military genius said to be a talent worth the equivalent of 50,000 infantry soldiers. (The aged and retiring General Winifred Scott told Lincoln this in early 1861. Not until Ulysses S. Grant was appointed in early 1864 would Lincoln have a commanding general who was not afraid of Lee.)

On top of these problems, Lincoln had to contend with unbelievably diverse opinions about how to deal with a civil war—and eventually about whether the war was even worth the unfathomable cost in blood and treasure. The rainbow of his critics included “peace Democrats,” who favored a restoration of the Union, with slavery guaranteed in all states and territories; “conservative Republicans,” who wanted the Union preserved but slavery undisturbed in the South; “liberal Republicans,” who wanted slavery prohibited in all new territories and states but were willing to have it gradually abolished in the South; and, finally, “abolitionists,” who wanted slavery abolished in all states and territories but were sometimes divid-

ed as to whether or not the Union itself should be preserved. One of the great ironies of the Civil War, as noted in Michael Shaara's classic novel *The Killer Angels*,<sup>7</sup> was that the North was *divided* in fighting for the *Union* while the South was *united* in fighting for *disunion*.

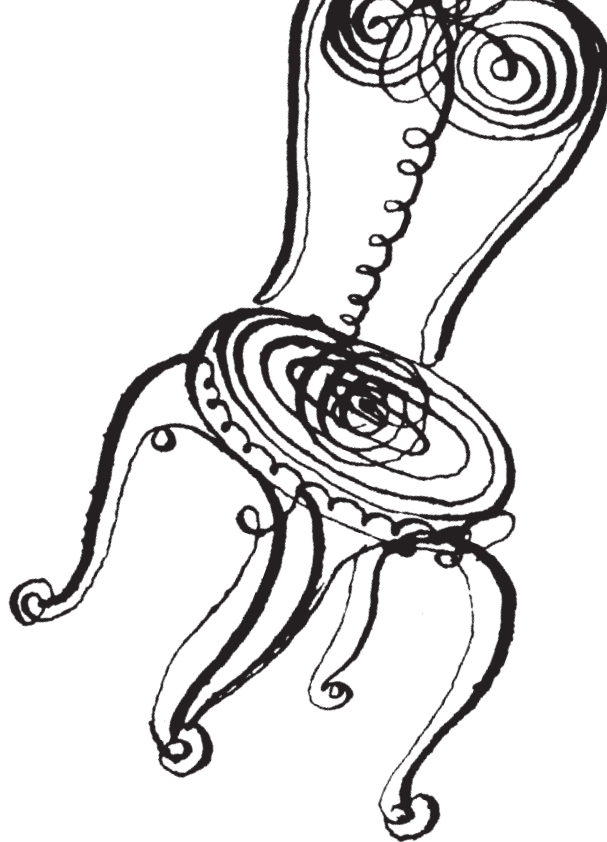
As the North suffered one humiliating military defeat after another, many naturally blamed Lincoln. Discontent exploded in 1864 when George McClellan, discharged general of the Army of the Potomac, campaigned against Lincoln for president on a platform to immediately end the war. Smoldering antiwar embers flamed into a roaring, antiwar movement, which dwarfed anything witnessed in our generation during the Vietnam War.

To understand just how bloody the Civil War was—and how vibrant the antiwar movement became—it is necessary to put some statistics in perspective. The Civil War, with its 600,000 dead, was the bloodiest war ever fought by American soldiers—bloodier, in fact, than all other American wars *combined*. If fought today with our U.S. population approaching 300 million people, we would be appalled at 600,000 casualties. But this war was fought at a time when the U.S. population—North and South combined—was 30 million people, or just *one-tenth its present size!* If the same war were fought today, it would take *six million* casualties to affect a proportionate number of hearts and homes.

The Vietnam War—with its 50,000 casualties, spread out over 10 years—drove from office Lyndon Johnson (a “seasoned” former congressman, senator, majority whip, and vice president) under pressure that he could not endure. By contrast, Lincoln had no prior federal government experience, except for a two-year term in Congress 12 years before he became president; yet he had to deal with far greater complexities, far fewer resources, and far more casualties than Johnson.

The bloodiest single day of the Civil War was the climax of the battle of Antietam, fought in Maryland in September 1862, in which more than 25,000 soldiers fell (North and South combined, in about equal numbers). With the country then one-tenth its present size, a comparable battle in our lifetime would have 250,000 war dead *in a*

Smoldering antiwar  
anything witnessed



embers flamed into a roaring, antiwar movement, which dwarfed in our generation during the Vietnam War.

*single day!* When finally in 1864 Lincoln turned command of all Northern armies over to Ulysses S. Grant, battle casualties mounted at appalling rates—over 50,000 Union casualties in the late spring and early summer of 1864, or what would be 500,000 casualties today (more than all of the U.S. casualties in World War II) if measured in proportion to our present population. With such enormous costs, and as yet an uncertain outcome, came pressure upon Lincoln to do something—*anything*—to end the war and bring peace to what Carl Sandburg described as a “wailing humanity.”

By August 1864 Lincoln was so despised as to appear unelectable to a second term. Even Republicans who had nominated him for a second term only months before were now openly asking him to resign his candidacy and thus give way to someone who had a chance of being elected. Even formerly die-hard Unionists were now calling for peace, offering either to recog-

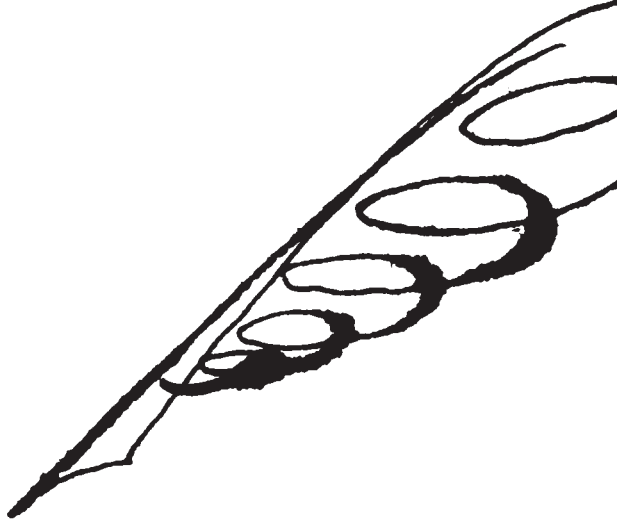
nize the South as an independent nation or allow a restoration of the Union with slavery guaranteed.

And yet Lincoln—with consummate political skill and inspired judgment—somehow managed to hold the fragile and weary Union together and preserve a nation. Had he failed, the map of the continent upon which we live would be divided not just between North and South, but European interests likely also would have intervened to claim continental soil. Even the South—born with an acknowledgment that any state could secede from a central government—would likely have further fractured. And, comparable to the United States coming to the aid of European democracies in World Wars I and II, even the face of the world map would likely have been dramatically altered. Little wonder that General Grant, on learning of Lincoln’s reelection, said that the news was “better than a battle won.”

It is to this enormously gifted man that I pay respect—not as a *president* but as the country *lawyer* he was before he became president.

Lincoln’s legal career began September 9, 1836, when at the age of 27 he was licensed to practice in the courts of Illinois. In spite of having less than one year of formal education, he had realized the absolute need as a young adult to know grammar. Accordingly, he had assiduously studied a grammar primer book until he knew the accepted rules. He had acquired some interest in the law as a youth while watching trials at the county courthouse, but he would work as a rail-splitter, a store clerk, a surveyor, a postmaster, a volunteer soldier, and a state representative before he would actually practice law.

In one of these ventures—the store—he and his partner failed miserably, partly because of poor management and partly because the community of New Salem,





where they lived, was dying economically. The two men ended \$1,100 in debt—a sizeable sum for the time. When Lincoln’s partner died in 1835, Lincoln agreed to pay the entire debt alone, even though Illinois law at that time may have absolved him of his partner’s share of the debt.

To understand just how monumental that debt was, it is necessary to understand the value of a dollar in 1835. The governor of Illinois earned \$1,400 per year, and a nice home could be bought for \$1,100. Today some state governors might earn \$140,000 a year, and a comfortable home can be bought for \$110,000. Though economists might point out many distinctions, in a rough way the value of a dollar then was a hundred times what it is now. Lincoln’s debt, therefore, would roughly equal \$110,000 today.

Illinois attracted townsfolk who attended as a form of recreation. A great lawyer of that day carried an aura much like the super-athlete of today. The profession attracted some of the brightest and best, not only for the intellectual and economic rewards, but also for the sheer glamour and prestige of being a prominent actor in the scenes of life. Courtrooms were exciting, even for spectators, and no doubt a public hanging buzzed with spectators praising or lamenting the attorney’s skill—or lack of it—who had achieved—or failed to prevent—this death sentence.

Ward Lamon Hill, who was 18 years younger than Lincoln but assisted him in many cases, wrote:

*My personal acquaintance with Mr. Lincoln dates back to the autumn of 1847. In that year*

widely within Illinois and eventually even into other states, campaigning for presidential candidates and against the expansion of slavery into new territories. Except for the years 1853 to early 1858, when he tells us he practiced law “more assiduously” than at any time before, he always maintained a very busy political calendar while simultaneously practicing law.

Despite his relentless political involvement, his law practice was a thriving one. In addition to trying all manner of jury and bench trials in both law and equity, and regularly riding the 400-mile circuit on horseback or in a buggy, he still managed to argue 240 cases before the Illinois Supreme Court. This is a daunting number of appellate cases even for an attorney who practices a lifetime, does only appellate work, and has no political commitments.

However, when Lincoln’s partner died in 1835, Lincoln agreed to pay the entire debt alone, even though Illinois law at that time may have absolved him of his partner’s share of the debt.

It took Lincoln years to pay this debt—which he and his friends sometimes referred to as his “national debt.” Since he devoted his earnings to paying it before he rewarded himself, it would be eight years after he passed the bar before he would own a home. The act of paying the debt, in combination with many other similar acts of uncompromising integrity, earned him the well-deserved nickname “Honest Abe.”

During the years Lincoln was paying this debt, he confided to a friend: “I made it a point of honor and conscience in all things, to stick to my word, especially if others had been induced to act on it.”<sup>98</sup>

The practice of law in Lincoln’s day was quite different than it is today. With no theaters or movies or other cultural outlets in what was then considered the western United States, the courtrooms of

*... left my home in ... Virginia, and settled at Danville, Vermillion County, Illinois. That county and Sagamon, including Springfield, the new capital of the State, were embraced in the Eighth Judicial Circuit, which at that early day consisted of fourteen counties. It was then the custom of lawyers, like their brethren of England, “to ride the circuit.” By that circumstance the people came in contact with all the lawyers in the circuit, and were enabled to note their distinguishing traits. I soon learned that the man most celebrated, even in those pioneer days, for oddity, originality, wit, ability, and eloquence in that region of the State was Abraham Lincoln.<sup>99</sup>*

Though Lincoln loved the practice of law and the powers of logic and reason it tested and required, he was also constantly involved in politics. He frequently traveled

In a note written for a young man aspiring to have a thriving law practice, Lincoln revealed how he was able to accomplish so much:

*The leading rule for the lawyer, as for the man, of every calling, is diligence. Leave nothing for tomorrow, which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done. When you bring a common-law suit, if you have the facts for doing so, write the declaration at once. If a law point be involved, examine the books, and note the authority you rely on, upon the declaration itself, where you are sure to find it when wanted. The same of defenses and pleas. In business not likely to be litigated—ordinary collection cases, foreclosures,*

*partitions, and the like,—make all examinations of titles, and note them, and even draft orders and decrees in advance. This course has a triple advantage; it avoids omissions and neglect, saves your labor, when once done; [and] performs the labor out of court when you have leisure, rather than in court, when you have not.*<sup>10</sup>

In time Lincoln would handle some of the biggest cases of the day, including the rights of counties to tax railroads, and the competing rights of railroads and riverboats. Yet his practice remained so diverse that he would also try a murder case (just months before becoming president).

His first law partner, John Logan, said Lincoln was not a wide reader of the law but that he would “work hard and learn all there was in a case he had in hand” and that he was “useful in getting the good will of juries” by putting himself “at once on an equality with everybody.”<sup>11</sup> His third and last law partner, William Herndon, agrees that Lincoln was not a wide reader, Herndon claiming that no man “read less and thought more” than Lincoln.

Isaac Arnold, who practiced in the same courts as Lincoln, observed that Lincoln’s fees were “ridiculously small and that his wants were few and simple.”<sup>12</sup> Yet by sheer volume of work he earned between \$2,000 and \$3,000 per year (between \$200,000 and \$300,000 in today’s currency).

Arnold says that a stranger’s first impression of Lincoln was that of a “kind, sincere and genuinely good man of perfect truthfulness and integrity. He was one of those men whom everybody liked at first sight.”<sup>13</sup>

Ward Hill Lamon, Lincoln’s “local partner” in Danville and later in Bloomington, records that

*whenever it was known that Lincoln was to make a speech or argue a case, there was a general rush and a crowded house. It mattered little what subject he was discussing—Lincoln was subject enough for the people. It was Lincoln they wanted to hear and see; and his progress round the circuit was marked by a constantly recurring series of ovations.*<sup>14</sup>

Lamon provides an example of Lincoln’s wit by recalling an occasion when Lamon

ripped the seat of his trousers in a wrestling match outside the courthouse. His short coat did not cover his resulting embarrassment. As he faced the jury—a cheek exposed to the row of attorneys behind him—some of the attorneys, quietly chuckling, started a “subscription paper” to buy Lamon a new pair of pantaloons, one of them noticing that he was a “poor but worthy young man.” The various attorneys in the courtroom behind Lamon added many humorous comments, but Lincoln topped them all when he wrote, “I have nothing to contribute to the end in view.”<sup>15</sup>

On another occasion Lincoln and Lamon represented a conservator appointed to safeguard a fund of \$10,000 (\$1,000,000 in present currency). A “designing adventurer” (according to Lamon) sought to remove the conservator so that he might get at the fund. A contested hearing had been set and a protracted contest was expected. Anticipating a great fight, Lamon had charged a fixed fee of \$250 (\$25,000 today). Unexpectedly, the case was tried in less than 20 minutes and to the complete satisfaction of the client, who promptly and happily paid the full fee. When Lincoln learned of the charge he insisted that Lamon refund the client at least one-half the fee. Lamon protested that the fee had been fixed in advance and that the client was perfectly satisfied. “That may be,” replied Lincoln, “but *I* am not satisfied. This is positively wrong. Go, call him back and return half the money at least, or I will not receive one cent of it for my share.”<sup>16</sup>

Another time Lamon observed that Lincoln had won a railroad case. As the judge was about to announce the dollar amount of the judgment, Lincoln rose to say that the opposing side “had not proved all that was justly due to them in offset” and then added that justice required an offset against his client for a certain amount.<sup>17</sup> Such acts no doubt helped confirm Lincoln’s reputation of unflinching integrity.

Lincoln’s first two partnerships were relatively brief (each being only a few years), but his last partnership, with William Herndon, lasted 16 years and was so amiable that Lincoln intended to

return to the practice of law with Herndon after he served as president. The firm of Lincoln and Herndon constantly grew in the volume and quality of cases it handled. Herndon was himself a colorful character. He was a wide reader, having probably the largest private library in Springfield, and he was a chatterbox talker, enthusing about a vast array of subjects and theories. On occasion Lincoln would relax on the sofa in the law office and ask Herndon for an update on his latest reading.

According to witnesses, neither Lincoln nor Herndon was a tidy office keeper. One client even claimed to have seen seeds sprouting in accumulated dust along the edges of the walls of their somewhat dilapidated second-story office. According to Herndon, Lincoln was not highly organized or systematic. As Herndon analyzed Lincoln’s lack of system, Herndon began to keep a binder wherein he noted the latest cases of importance to the practice. He would then feed Lincoln the most germane legal opinions pertaining to Lincoln’s appellate work. The partnership worked like magic, the younger Herndon adoring “Mr. Lincoln,” as he called him, and Lincoln appreciating his young partner, whom he consistently referred to as “Billy.”

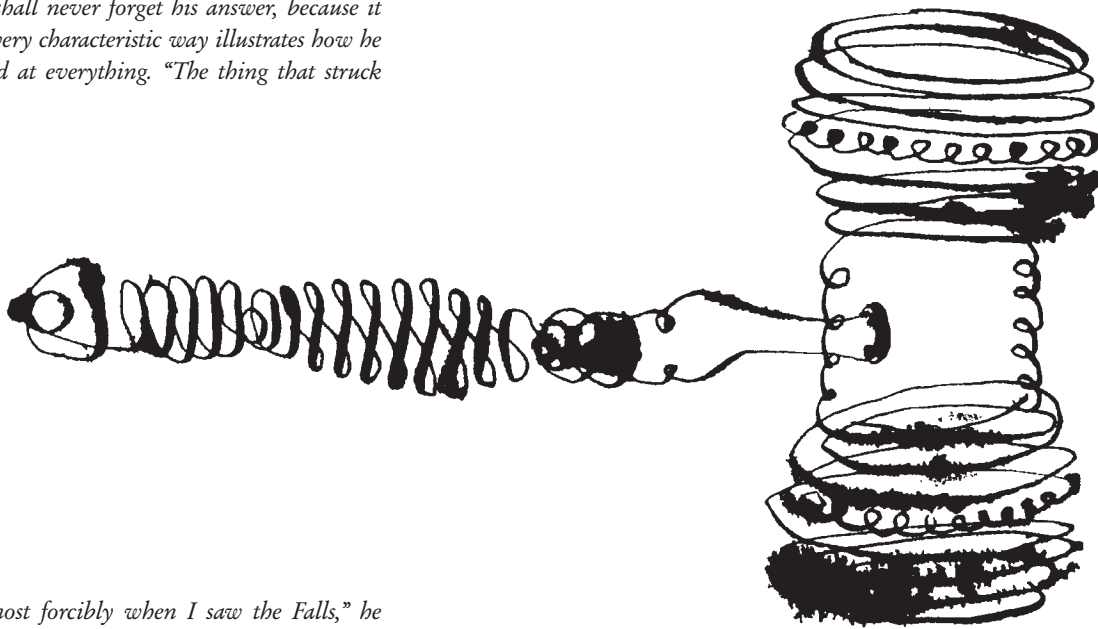
They equally divided their fees, and the accounting was simple: when Lincoln collected a fee he would divide the money and put Herndon’s share in an envelope, writing “Herndon’s half” on the outside, and Herndon would do likewise. Neither ever had any occasion to suspect that any fee was ever withheld from the other.

Almost every description I have read of Lincoln’s success as a lawyer includes a comment about his great ability to get to the “nub” of a case and articulate it’s essential *justice* in language everyone could understand. He would readily give up minor points in order to give greater emphasis to essential points.

Herndon tells us that Lincoln’s mind was continually searching for the “first cause” of things. As an example, he says that after Lincoln returned from a trip east, where he had seen Niagara Falls, he and Herndon were conversing in the office regarding its beauty. Herndon writes:

*I was endeavoring to entertain my partner with an account of my trip, and among other things described the Falls. In the attempt I indulged in a good deal of imagery. As I warmed up with the subject my descriptive powers expanded accordingly. The mad rush of water, the roar, the rapids, and the rainbow furnished me with an abundance of materials for a stirring and impressive picture. The recollection of the gigantic and awe-inspiring scene stimulated my exuberant powers to the highest pitch. After well nigh exhausting myself in the effort I turned to Lincoln for his opinion. "What," I inquired, "made the deepest impression on you when you stood in the presence of the great natural Wonder?"*

*I shall never forget his answer, because it in a very characteristic way illustrates how he looked at everything. "The thing that struck*



*me most forcibly when I saw the Falls," he responded, "was where in the world did all that water come from?"*

*He had no eye for the magnificence and grandeur of the scene, for the rapids, the mist, the angry water, and the roar of the whirlpool, but his mind, working in its accustomed channel, heedless of beauty or awe, followed irresistibly back to the first cause. It was in this light he viewed every question. However great the verbal foliage that concealed the nakedness of a good idea, Lincoln stripped it all down till he could see the way between cause and effect. If there was any secret in his power this surely was it.<sup>8</sup>*

Although Lincoln's fees were generally small ("the lawyers of the circuit often complained that his fees were not at all commensurate with the service rendered"<sup>9</sup>), he

However great the verbal foliage that concealed the nakedness of a good idea, Lincoln stripped it all down till he could see the way between cause and effect.

could, on occasion, charge a whopping fee. The best example was his work for the Illinois Central Railroad in a case commonly known as the McLean County Tax Case. The issue was whether a county could tax the railroad. The railroad maintained that only a state could levy such a tax. If McLean County won, other counties would soon levy a similar tax. It was, according to Lincoln's pre-engagement letter, the largest case then going in Illinois.<sup>20</sup>

Lincoln charged a retainer of \$200. Again, using the general rule that the value of a dollar was a hundred times then what it is now, the \$200 retainer would be the equivalent of \$20,000 today. The case was long and protracted, but Lincoln was ultimately successful in the case, saving the

Herndon concluded his description of this affair by noting: "[M]uch as we deprecated the avarice of great corporations, we both thanked the Lord for letting the Illinois Central Railroad fall into our hands."<sup>21</sup>

Isaac N. Arnold, who often saw Lincoln in court, said:

*Lincoln was, upon the whole, the strongest jury lawyer in the state. He had the ability to perceive with almost intuitive quickness the decisive point in the case. In the examination and cross-examination of a witness he had no equal. He could always make a jury laugh, and often weep, at his pleasure. His legal arguments addressed to the judges were always clear, vigorous, and logical, seeking to convince rather by*

Washburne of Cincinnati, Ohio. McCormick was represented by a Reverdy Johnson, one of the most renowned attorneys in the United States. Lincoln looked forward to the contest and the opportunity to go against Johnson. Just before trial, and unknown beforehand to Lincoln, his client also hired Edwin M. Stanton (later secretary of war in the Lincoln administration), a nationally prominent attorney from Philadelphia.

Throughout the trial Stanton treated Lincoln rudely and with a great air of superiority. Through an open door Lincoln heard Stanton inquire of another: "Where did that long-armed creature come from, and what can he expect to do in this case?"<sup>23</sup> Though Lincoln's feelings were deeply hurt, he stayed with the case but played only a minor role,

He was so straightforward, so direct, so candid, that every spectator was impressed with the idea that he was seeking only truth and justice.

railroad millions of dollars in taxes (hundreds of millions by today's currency). Upon completion of the work, he billed the railroad \$2,000 (\$200,000 today) minus his \$200 retainer. The railroad gasped at the fee: "This is as much as Daniel Webster himself would have charged," complained railroad management, refusing to pay the fee.

Stung by the rebuke, Lincoln inquired of other attorneys whether or not they felt the fee was fair. The consensus was that he had charged *too little* for the incredibly valuable services he had performed. The somewhat miffed and normally inexpensive Lincoln had had enough and decided that under the circumstances the railroad should pay \$5,000 (\$500,000 today). He presented an amended bill and sued the railroad when it refused to pay, calling upon six prominent attorneys as expert witnesses. He obtained a judgment for the full amount, collected it, and—amazingly—continued to represent the railroad in other matters *during and after the litigation.*

*the application of principle than by the citation of cases. A stranger going into court when he was trying a cause would, after a few moments, find himself on Lincoln's side, and wishing him success. He seemed to magnetize everyone. He was so straightforward, so direct, so candid, that every spectator was impressed with the idea that he was seeking only truth and justice. He excelled in the statement of his case. However complicated, he would disentangle it, and present the real issue in so simple and clear a way that all could understand. Indeed, his statement often rendered argument unnecessary, and frequently the court would stop him and say: "If that is the case, Brother Lincoln, we will hear the other side." His illustrations were often quaint and homely, but always apt and clear, and often decisive. He always met his opponent's case fairly and squarely, and never intentionally misstated law or evidence."*

As Lincoln's reputation grew, so did the quality and magnitude of his cases, especially in federal court. In 1857 he was hired to defend a patent infringement suit brought by McCormick Manufacturing against a Manny

Stanton taking advantage of Lincoln's generosity in offering him a leading role. Lincoln was also disappointed in the judge of the case: "If you were to point your finger at him, and a darning needle at the same time, he never would know which was the sharpest."<sup>24</sup>

One of Lincoln's last jury trials involved Duff Armstrong, the son of Hannah Armstrong, who had befriended Lincoln when he was penniless and unknown. Duff was accused of murder, the state's primary witness claiming that he could see Duff commit the act "by the light of the moon." The high drama of the trial occurred when Lincoln produced an almanac showing that on the night in question the moon had set three minutes before midnight, so that it could not have been "straight overhead" as the witness claimed it was when the alleged murder occurred. The witness was visibly overcome by apparent uncertainty, and his prolonged pause proclaimed volumes of reasonable doubt.

Lincoln produced most of what he wrote in longhand, even after becoming president. His writings are distinctively Lincoln, such

that a paragraph written by him on a subject not familiar to the reader could nevertheless be recognized by one familiar with the rest of Lincoln's writings. His genius was in untangling and then expressing in simple language—often in single syllables—the most complex ideas imaginable. Isaac N. Arnold notes the following passage as representative of the whole of Lincoln's writings: "Let us have faith that right makes might, and in that faith let us to the end do our duty, as we understand it." Arnold notes that only two words in the whole sentence have more than one syllable.<sup>25</sup>

Not only is his language beautiful and comprehensive, but his logic and reasoning—honed no doubt by his years of practicing law—are the admiration of any careful student of his writings. What he wrote, however, was not always easily produced. Lamon notes that it took Lincoln five hours of "intense mental activity" to compose the following paragraph:

*It has been intimated to me that the gentlemen who have acted as the legislature of Virginia in support of the rebellion may now desire to assemble at Richmond and take measures to withdraw the Virginia troops and other support from resistance to the general government. If they attempt it, give them permission and protection until, if at all, they attempt some action hostile to the United States, in which case you will notify them, give them reasonable time to leave, and at the end of which time arrest any who remain. Allow Judge Campbell to see this, but do not make it public.*

Lincoln weighed, balanced, and intensely thought through the likely effect as well as endless other possible side effects of each word. At issue was a deep legal question that four bloody years of war had still not settled—whether the elected representatives of a state in rebellion against the national government had authority to legally act for and on behalf of the state. Had Lincoln recognized the right of the legislature to withdraw the Virginia troops, he would also have admitted their legality to act in other matters, thus dooming an attempt to reconstruct governments in rebellious states. On the other hand, Southern troops would not recognize the authority of any but the state legislature

that had acted during the war. Thinking through all the possible consequences that could flow from the exact wording of the message, Lincoln eventually referred to "the gentlemen who have acted as the legislature of Virginia," later explaining—when his letter was in fact misconstrued as he feared it would be—that he "did this on purpose to exclude the assumption that I was recognizing them as a rightful body. I have dealt with them as men having power de facto to do a specific thing."<sup>26</sup> Would to God that politicians of our day did as much thinking and had as much wisdom!

Lincoln had an uncanny memory for stories and the good judgment and skill to weave a moral into them. He used stories, he said, as "labor saving devices." He maintained that a good story can bring home a point more eloquently than pages of explanations.

On one occasion he told Lamon a story that Lamon found so humorous that his laughter disrupted the courtroom and Judge David Davis fined him \$5 for contempt (\$500 in today's currency). At the next recess Lamon paid the fine but, still laughing, told the judge the story was worth every cent, whereupon the judge, in spite of himself, asked Lamon to repeat the story. Unfortunately the story itself has not survived, perhaps because its humor lay largely in how Lincoln alone could tell it.

In reading Sandburg's biography, which contains hundreds upon hundreds of Lincoln's stories in the context of the situation Lincoln told them, I wondered how anyone could possibly remember so many apt tales and know precisely when to use them. Soon his stories became legendary, and many have been repeated by generations of school children for more than a hundred years.

During the intensely satisfying quiet moments I have spent studying Lincoln's life and words, I have been most impressed by his ability to think so clearly and write so well. In an age where modern presidents have speech writers, letter writers, and note-takers and are fed canned briefs by subordinates who have done the thinking for them, I am not surprised that our nation has not produced another Lincoln. He seemed to know that the struggle to clearly express an idea is an important part

of coming to correct conclusions. His presidential decisions proved dazzlingly deft and inspired. No doubt the experience of his prairie years as a country lawyer served him and his country well during the four years of our nation's most intense struggle to define itself. The eternal wisdom of his immortal words would also help "bind up the nation's wounds" long after his death.

## Notes

1. Carl Sandburg, *Abraham Lincoln, the Prairie Years and the War Years*, One-Volume Edition, Harcourt Brace & Company, Copyright 1954.
2. William H. Herndon and Jesse W. Weik, *Herndon's Life of Lincoln*, Da Capo Press, Inc., Copyright 1983.
3. Ward Hill Lamon, *Recollections of Abraham Lincoln 1847–1865*, University of Nebraska Press, Copyright 1994.
4. Isaac N. Arnold, *The Life of Abraham Lincoln*, University of Nebraska Press, Copyright 1994.
5. Stephen B. Oates, *With Malice Toward None: A Life of Abraham Lincoln*, Harper & Row, Copyright 1997.
6. David Herbert Donald, *Lincoln*, Simm & Schuster, Copyright 1995.
7. Michael Shaara, *The Killer Angels*, David McKay Company, Inc., Copyright 1974.
8. *Abraham Lincoln: Speeches and Writings, 1832–1858*, The Library of America, 1989, at 38.
9. Lamon, p. 14.
10. *Speeches and Writings 1832–1858*, p. 298.
11. Quoted in Herndon, p. 210.
12. Arnold, p. 82.
13. Arnold, p. 83.
14. Lamon, p. 16.
15. Lamon, p. 18.
16. Lamon, p. 18.
17. Lamon, p. 20.
18. Herndon, p. 238–9.
19. Lamon, p. 17.
20. *Speeches and Writings 1832–1858*, p. 298.
21. Herndon, p. 284.
22. Arnold, p. 84.
23. Herndon, p. 287.
24. Herndon, p. 287.
25. Arnold, p. 343.
26. Lamon, p. 310.

*Kelly L. Andersen '79 (andersen@cadsnet.net) practices in Medford, Oregon, primarily handling plaintiff's personal injury, product liability, and wrongful death claims.*



# MOURNING BO **E R N** E

I am here to talk a little about religion and law today. I'm really here not because I'm a law professor, I think, so much as because I'm a journalist who reports a lot in the area of religion.

*Illustrated*

BY PAUL

ZWOLAK

HUGH

HEWITT

spent a full year preparing a series for PBS called *Searching for God in America* that involved interviews with leaders of religious faith—leaders as diverse as Elder Neal A. Maxwell, the Dalai Lama, Thomas Keating, a Benedictine monk, and Chuck Colson. I've interviewed Robert Funk of the Jesus Seminar, author of *The Five Gospels* and a debunker of Christ's divinity; Adin Steinsaltz, a rabbinic scholar of great tradition; Greg Laorie, a new evangelical force; and assorted New Agers. *The Celestine Prophecy*, by James Redfield—a genuinely wretched book—sold 10 million copies, so I interviewed him. Marianne Williamson is another producer of works that cannot be considered good literature at all, but they are somehow selling more than anything else available on the United States publishing scene. I like to talk with people about what they believe and why they believe it. Today I'm here as a believer talking with a community of believers.



am an elder in the Presbyterian Church of the United States, and I think matters of faith and their intersection with law produce the most interesting debates. But I don't come as an expert. I'm not a Mike McConnell, one of the country's leading First Amendment scholars. I'm sure you have similar experts on your faculty as well. I am rather that most dangerous of lecturers, the aggressive amateur. I'm going to deliver a polemic but not a philippic.

I BELIEVE THAT THE  
 ADMINISTRATIVE STATE, AS IT GROWS,  
 HAS BECOME INCREASINGLY  
 HOSTILE TO BELIEF . . .  
 BECAUSE THE PEOPLE WHO POPULATE THE  
 ADMINISTRATIVE STATE ARE LARGELY HOSTILE  
 TO BELIEF.

**A FIRST AMENDMENT  
 POLEMIC**

Now that's the one thing I want you to remember. Years from now, when you can't remember who I was or what I said, I will have at least introduced you to the distinction between a polemic and a philippic.

A polemic is an aggressive attack, an argument with someone, and my aggressive attack, my argument, is with Justice Scalia.

A philippic is also an aggressive attack, but it is a bitter one, drawn from Demosthenes' verbal attacks on Philip II of Macedon when Philip was attempting to take over Greece. Demosthenes was angry and bitter.

I'm not bitter about what I've seen the United States Supreme Court do in recent years regarding First Amendment protections, but I am concerned. And so my polemic, my aggressive attack, is aimed at persuading you to agree with what I say. But I'm not making a bitter argument. I think Justice Scalia remains a man of great wisdom, conviviality, and learning, but I do not understand what he has done to the free-exercise clause of the First Amendment.

**THE FREE-EXERCISE  
 CLAUSE**

Many of you have probably already studied this. If you haven't, I'm going to give you a brief layman's approach to what has happened in the last seven years to the First Amendment and to the free-exercise clause. The clause says, "Congress shall



make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” What does this mean? Well, the Court has been struggling with the question for many years.

Before 1990 the Court had reached a way station of stability. And the rule had evolved that the government could not, without a compelling reason, substantially burden the practice of someone’s religious belief, even if it didn’t intend to. This is to say that if the government were driving down the street, so to speak, not minding its own business too carefully, and accidentally ran over a religious belief, the government would have to go back and correct its action.

#### THE SMITH DECISION

Then came the case of *Employment Division v. Smith*. Alfred Smith and Gailan Black were drug rehabilitation counselors. However, they were also members of the Native American Church and, as part of the rituals of that church, they ingested peyote. Rehabilitation center officials found this practice inconsistent with continued employment—not a surprising decision on their part—and fired Smith and Black.

The two plaintiffs applied for unemployment benefits from the State of Oregon, but they were denied. In common practice, if you are discharged for cause, you’re not entitled to unemployment insurance. It had long been the rule of the Supreme Court that if you were discharged for cause that was part of your religious practice, even if it did not allow you to participate in the orderly conduct of the work, then that cause could not be used to deny you unemployment benefits. For example, if you were a Seventh-day Adventist and your work compelled you to work on Saturday and as a result you quit or were fired because you refused to, then you could not be denied your unemployment benefits.

In 1990 Justice Scalia—in an opinion strongly supported by his colleagues on the bench—repealed the effects test and embraced a much more sweeping test, one more adverse to religious belief: If a law is neutrally conceived and neutrally applied, no matter what its effects are on

religious belief, it will be upheld against the charge that it is interfering with the exercise of religion. Justice Scalia wrote that any society adopting such a system as an effects test is courting *anarchy*. And the danger, in his opinion, increases in direct proportion to the society’s diversity of religious beliefs. In other words we *can’t possibly* accommodate the free exercise of all the religions that we have in the United States, and as a result we’re just going to have to stop proceeding on a case-by-case, effects-test basis.

#### THE LAW: A GODSEND

The reaction to this was swift. By 1993 a coalition for the free exercise of religion, larger than any previous political coalition organized on a matter of religious belief, had sprung into being, and it was so powerful that by near-unanimous votes the House and the Senate passed and President Clinton signed into law the Religious Freedom Restoration Act of 1993 (RFRA). It is a small act, which is itself remarkable, but it said simply that it was about restoring the prior test, prior to *Smith*, and I quote:

*Government shall not substantially burden the person’s exercise of religion, even if that burden results from a rule of general applicability unless the government demonstrates that the application of a burden to the person (1) is in furtherance of a “compelling governmental interest” and (2) is the least restrictive means of furthering that interest.*

So the Congress attempted to send the law back to where it had been; RFRA was a rejection of the *Smith* approach, a rejection of the idea that here neutrality wins. Ninety-five cases quickly followed. RFRA was a powerful tool for people like me, who are occasionally in a pro bono or some other setting representing an interest of a church. I’ve made that a hobby of mine because I believe that the administrative state, as it grows, has become increasingly hostile to belief. It is aggressively hostile to belief because the people who populate the administrative state are largely hostile to belief. Therefore, individuals like me, who are believer-lawyers, must be

willing to defend the church against burdens placed upon it.

RFRA was a godsend. It allowed me to walk into any city council meeting armed with a clear statute. And that's where I normally find the intersection of church/state problems: land use and churches—and city councils that don't care about the architecture of worship.

One such case, not one of mine, involved a small Roman Catholic church in the city of Boerne, Texas (*City of Boerne v. Flores*). The church had been there for many years and could only hold 230 worshippers. About 40 to 60 people were turned away from each mass. The city council denied the congregation permission to tear down the old church and expand, arguing that the church could simply add a few more masses, bring in another priest, or do whatever was necessary.

Acting through its archbishop, the Roman Catholic Church said, "No, we have a right to tear down our church. We have a right to build our new church. The architecture of worship matters." To me this is a truism. Evidently it is not for people who are not believers.

I don't believe you can simply turn over the architecture of worship to a historic landmark commission and declare, as the city of Boerne did, "What you decide about a church is the last word." The suit proceeded, and the church won under RFRA because it is a burden on a church to prevent its expansion.

#### A SETBACK

Just this past summer, however, the court struck down in this case the Religious Freedom Restoration Act—and not by a close margin. J. Brent Walker, general counsel of the Baptist Joint Committee for the Commission on Public Affairs, wrote recently for a symposium I edited on *Boerne*, and said, "Only a handful of people thought RFRA was poor policy or thought it was unconstitutional. That is the good news. The bad news is that seven of them sit on the United States Supreme Court" (2 Nexus 2, Fall 1997).

Two levels of argument exist in *Boerne*. One that I will not discuss is the extent to which the 14th Amendment allows

enabling legislation to be passed. That's a different area of constitutional law. The other level is the discussion about the 1990 *Smith* case. Today's talk is all about *Smith*. It's about the role of religion in the United States. It's about the role of religious belief and how much deference ought to be paid to that. It's about what the Framers thought about the Constitution.

If you read these opinions, you'll see two great friends—Justice O'Connor and Justice Scalia—*screaming* at each other through the footnotes over who knows the original intent of the Constitution better. They can marshal their experts on one side or the other. I could walk you through what they say, but I couldn't give you a dispositive answer. However, I think that if you put the proposition to the Framers that church architecture should be decided by those who are not members of the church, the Framers would find the idea to be a bracing assertion and one that was not part of their tradition.

Four questions come out of *Boerne*. The first is a trio of technical problems. What do we do with RFRA now? Does it still apply to federal law? Should we pass many RFRAs around the nation?

The second is, Are churches really vulnerable? And for those of you who are Mormons, you might ask, Is the Mormon church vulnerable because of *Boerne*?

The third question is, What was Justice Scalia, this hero of the conservatives, thinking about? Can we carefully examine his opinion and ask, What was this very brilliant justice trying to accomplish?

And, finally: What are people of faith to do as a result of this?

#### TECHNICAL MATTERS

As to the technical problems, I will only say cases are presently being litigated over whether RFRA still applies to federal law. There's a good argument that it does. If it does, then what about a church I once represented that could not build on land it had long held because the endangered California gnatcatcher was found on the property? This case will be an argument about whether that church can go forward under the old RFRA. In every state of the union where the coalition

continues to organize, an effort exists to have states pass their own RFRAs because, as you know, states can protect rights to a greater degree than the feds can if they choose to do so. Free exercise might mean a lot more to the legislature of California than it did to the Supreme Court majority of seven. And so the debate over many RFRAs is going on around the country. It's kind of a traveling road show. Marci Hamilton, a professor at Benjamin Cardozo Law School in New York, testifies, "What a horrible thing; you can't do this. It violates the establishment clause—bad, bad, bad." And then a whole bunch of other people show up that say, "No we need this; our church is being imposed upon."

#### CHURCHES ARE VULNERABLE

Are churches vulnerable? This is where the experience of practice informs my professorial and my journalistic approach. If you only knew what went on regarding churches in planning commissions across the United States. If any of you have had personal experience of what the culture of disbelief now does to believers who attempt to organize and practice their faith, you understand that churches are not only vulnerable, they are *very* vulnerable.

I will give you a couple of examples.

In my own Presbyterian church, where we recently built a sanctuary, the building inspector arrived and said, "You have a little step-up (actually two step-ups), and so we want handrails onto the platform where worship is conducted." Of course, no one goes up there except the pastor. That's where he preaches. So we engaged in an ultimately successful eight-week rigmarole that exhausted us and took much effort. We had to organize and use up political capital and approach the city council to get the requirement of handrails removed from ruining our architecture of worship.

You might say, "Well, that's not really a big deal is it, Hugh? That's something that you ought not to have to be able to cite RFRA for." But I would ask you: "If a handrail can be required, why not then a veil? If a veil can be required, why not a



THERE IS A GREAT  
DESIRE FOR RATIONAL, SMART,  
EVEN SOMEWHAT SCHOOLED  
PEOPLE TO EXPLAIN WHY THEIR FAITH,  
WHICH THEY INTUITIVELY KNOW THROUGH REVELATION TO BE TRUE,  
IS ALSO  
CONSISTENT WITH THE NATURAL ORDER THAT WE CAN SEE  
AND DISCOVER THROUGH THE  
SCIENTIFIC PROCESS.

wall? And if a wall, why not then regulate the entire architecture of worship?”

Anyone connected with church work throughout the United States will tell you that the current u.s. administrative state—the regulatory apparatus, be it environmental, be it land use, be it any of a thousand faces that state, local, and federal governments show—is hostile to belief.

Professor Phillip Johnson, a well-known evangelical Christian from the University of California, Berkeley, Law School and a prolific author and a constitutional scholar of no small note, believes that the court and elite opinion (especially within the administrative state) have “a long-term program of making constitutional law congruent with agnostic liberal rationalism” (2 Nexus 2, Fall 1997).

I agree with that. There is an active hostility to belief in the United States culture of elite opinion right now. Johnson also quotes approvingly from psychologist Peter Berger: “If India is the most religious country in the world and Sweden is the least religious, then the United States of America is a country of Indians who are ruled by Swedes” (Id.).

The trend is ominous because the antibelief mind-set, the culture of disbelief, comes at a time and in a culture of mockery where, if you are a person of faith and you take that faith into the secular world, you will not only be met by argument but more often than not you’ll be met by mockery. “It Is Irrational to Believe” is the u.s. cultural context I’m talking about. The ability to destroy belief without really ever engaging with it is so dominant that churches are being stripped of the one constitutional protection that was originally theirs. At least the free-exercise clause had occasionally slowed down the state in its collision with organized faith, until *Smith* came along with its hostility to faith and the Supreme Court destroyed the one protection that was there, the effects test. Then it struck down RFRA. In other words, it’s raining very hard, and the government is busy taking down the levies. That’s what the Supreme Court did. That’s why I argue with Scalia.

#### WHAT WAS SCALIA THINKING?

What was Justice Scalia thinking about in the *Smith* decision? He said in effect that any society adopting such a system, an effects test, is courting anarchy, and the danger increases in direct proportion to the society’s diversity of religious beliefs.

Clearly we do have a lot of fringe faith in the United States. Remember Heaven’s Gate? Folks who depart from their San Diego mansion to join comet Hale-Bopp are not by any means orthodox.

You have the Koresh disaster and tragedy in Waco, Texas.

You have the Jim Jones People’s Temple.

I can find you fringe cults in any u.s. city that will scare you and everyone else concerned about fringe cults. There are many, and those concerns are well based, theologically. We have to worry about them.

Nevertheless, are they more dangerous than the resulting loss of freedom? Was Scalia really concerned about our safety? Whereas there will occasionally be headline-grabbing disasters like those I’ve just named, it’s not really an issue that drives most people through their daily lives.

Perhaps he may have been suggesting a kind of Darwinian approach to organized religion: truth will win out, and genuine faith will prosper. Therefore, an effects test will only protect that which ought not to be protected. If there is transcendental truth and it can be discovered, then genuine faith will find its way out.

This is not, however, what I think he was saying. His argument is only “We can’t afford to do this.”

Is he thinking of a test that he really can’t put forward (because it would be considered so absurd in political and legal circles), which is that this is an overwhelmingly Judeo-Christian nation, and, as a result, the free-exercise clause protects the free exercise of Christianity and Judaism? If you go back to Washington’s letter to the Newport congregation, however, the concept would be included among the founding documents.

If you proffer that argument in today’s America, the pc police will lynch you before you get home. You cannot make that argument anymore.

I think Justice Scalia ought to have supported an effects test that leans toward traditional religion. That’s how I want to conclude today, by talking about what ought to be the response of people of faith to this opinion and to this turn of events.

#### CAN WE CORRECT THE SITUATION?

I have recently finished a book called *The Embarrassed Believer: Reviving Christian Witness in the Age of Unbelief*, and it’s about trying to correct the last 45 years of cultural attack on religious faith in the United States. This attack is now triumphant, and outside the religious ghetto, outside what I call the parallel universe of believers, you can find very few instances showing that the United States is generally a people of great faith. Yet *every* week 100 million Americans will go to their church, their temple, their synagogue, their mosque, whatever—100 million!

In spite of this fact, if you look deeply at modern American culture, you will find that this faith is not reflected there at all. There is a *mocking* aspect toward those who believe, manifest in high culture by the opinion elite, that is pervasive. How did we get there?

Proposition One has been a problem since the Enlightenment. Those who believe that rationality simply cannot be reconciled with religious conviction have triumphed in many ways. They’re winning the field. My book *The Embarrassed Believer* plays off that of another book, this one from the early ’50s: *The True Believer* by Eric Hoffer, a longshoreman turned charming philosopher-rogue.

Hoffer wrote from the rationalist perspective. He’s a great intellectual and a fine writer who had a powerful effect on the culture of the ’50s, which has carried forward. Hoffer said, “Don’t believe in anything. It’s all a fraud. The genuine person of integrity is not part of a project that involves many people.” This posture has a profound attraction to those who want to be unique and have a great deal of praise

from the community. It is particularly attractive to journalists. The media loves practicing the oppositional theory against the true believer.

Pick up a copy of the *True Believer*, and you'll be astonished. You will see Christianity being equated with communism and fascism. Hoffer's argument is subtle and well developed, but it's there. His argument that all beliefs are alike—religious belief, political belief, ideological belief—and that all leaders are alike—Stalin, Hitler, Christ, the Pope—made it easy for the mass media (which was just coming of age in the United States then) to adopt a hostility toward belief. It is a hostility that now infects the courts and infects decision makers vis-à-vis religious practice. So what are we supposed to do in this culture? If you carry your faith out of your law school and into any kind of work setting, you will be sanctioned, or you will be finding yourself marginalized. What is a believer to do when we have this constitutional new structure that says "no intent to harm, no protection?"

#### A RETURN TO APOLOGETICS

First, it's my belief that our important project for early next millennium is apologetics. People of faith who have intellect have to make belief respectable again in the culture at large. Because people of faith have abandoned the public square and have generally not engaged in the apologetic project, it allows a group of the faithless—largely drawn to politics because they need meaning and significance in their lives—to take an "Oh, religion; it's like the Rotary; and the Rotary's like a school; and it's like . . ." They'll lump together the variety of clubs in the category of communities. They'll treat any religion as just another club, because the apologetic project has completely failed.

Nonbelievers think we're all nuts because we really take this stuff seriously, that it's some kind of imbalance in our chemistry. We haven't helped them understand that we believe it because it's rational—something that is defensible.

Much of this has to do with the defeat of fundamentalism in the *Scopes* trial, where the appeal to naked prejudice and the appeal not to reason but to orthodoxy lost a lot of attraction for intellectual leaders. As a result, in academia around the country today you will find very few believers outside a sectarian enterprise like BYU, Notre Dame, and the like (at least very few who are public about it, fearing as they do the swift and certain punishment within an academic atmosphere).

So how do we get back to apologetics? I interviewed LDS Elder A. Neal Maxwell last year for *Searching for God in America*. He's an apologist. He's attempting to make rational the beliefs of LDS people for an unchurched PBS audience. There is a great desire for rational, smart, even somewhat schooled people to explain why their faith, which they intuitively know through revelation to be true, is also consistent with the natural order that we can see and discover through the scientific process. We need to address this desire.

As more of that occurs, and it needs to occur in a huge volume, this adverse culture can at least be neutralized if not turned. In a neutral culture a historic landmark commission will *know* how important it is that the church be allowed to organize its masses according to a schedule and in a sanctuary it designed. They would know that, for example, a new Mormon stake center must be controlled for theological reasons by the church, not by local land-use authorities. By changing the culture, then, you can neutralize the *Smith* decision.

#### DEFENDING TRADITION

Second, I think it's very important to defend the historic tradition of America—and this may be a hidden motive of Justice Scalia. I know that you're not supposed to say on the air—though I occasionally say it—"It's a Christian country, folks. That's what is was originally. That's what it remains predominantly." We've got to be able to name that which is traditional and revered in the United States in order to protect it—and to do so without fear of being thought intolerant. It is common sense that the traditions of the

United States, when it comes to religion, are Judeo-Christian traditions.

Now, finally, I don't know if the court can adopt a traditions test. I'm not advocating that. It would require a great deal of courage to define free exercise as meaning something other than free exercise for all, anytime, for anything that calls itself religion—because if Justice Scalia is correct, U.S. prisons would have to permit animal sacrifice. This is a caricature of the argument, but it's true to a certain extent. If you allow everyone to practice their religion free of substantial burden, and animal sacrifice is part of that ritual (as it has been in the Caribbean-based religions now prevalent in Texas and Florida), and prisoners feel the need to practice their religion within prison systems, then, Justice Scalia's argument runs, "Slippery slope—you're going to have animal sacrifice in the prisons. Since we can't go there, we have to have a neutral law test."

I don't think we have to go there. If you use some common sense about the traditions on which free exercise is hung, you'll be okay. Those are Old or New Testament traditions.

#### POLITICAL DIRECTNESS

Let me close with the last argument: politics, and the extent to which there ought to be religious politics in the United States. This is a divisive issue—something I struggle with because there is a great danger in politicizing faith and in saying that "my faith made me do it." Still, it seems to me that, at least for the short term, people of faith have to become more active in asserting the primacy of faith in U.S. politics. And that means asking not just the president but especially local officials what their views on belief are—not what they believe but what their views are on the centrality of belief.

Does religious freedom have a future? Yes! But only to the extent that those who believe in it pursue it vigorously.

*Hugh Hewitt is a journalist, lawyer, and law professor from Irvine, California. This article was adapted from a speech given at the J. Reuben Clark Law School on February 5, 1998.*



The Religious Liberty Protection Act of 1998

( S. 2148 )

STATEMENT BEFORE  
THE SENATE COMMITTEE  
ON THE JUDICIARY

June 23, 1998 | Introduction by Senator Orrin G. Hatch

Our first witness will be Elder Dallin H. Oaks. Since 1984 Elder Oaks has been a member of the Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints. In addition to his church service, Elder Oaks had an extensive legal career. He served as a law clerk to Chief Justice Earl Warren, practiced law with the Chicago firm of Kirkland and Ellis, was a law professor at the University of Chicago, was executive director of the American Bar Foundation, and served as an associate justice on the Utah Supreme Court. He also served for nine years as president of Brigham Young University, the nation's largest private university. He is the author of nine books and over one hundred articles on the subjects of religion and law.

Mr. Chairman

I am privileged to appear before you to testify in support of Congressional enactment of s. 2148, the Religious Liberty Protection Act of 1998. I am here as a representative of The Church of Jesus Christ of Latter-day Saints to present the official position of that church. As the Chairman has noted in that biographical summary, I speak from considerable experience with the law of church and state. HISTORY The history of The Church of Jesus Christ of Latter-day Saints (sometimes called Mormon or LDS) illustrates why government should have a compelling interest before it can pass valid laws to interfere with the free exercise of religion. No other major religious group in America has endured anything comparable to the officially sanctioned persecution imposed upon members of my church in the 19th century by federal, state, and local governments. Mormons were driven from state to state, sometimes by direct government action, and finally expelled from the existing

ELDER DALLIN H. OAKS | ILLUSTRATED BY PAUL ZOWLAK

borders of the United States, only to be persecuted anew when those borders expanded to include the territory of Utah.

This is not academic history to me. My third great-grandmother, Catherine Richard Oaks, lost most of her possessions when a Missouri state militia drove the Mormons out of that state in 1838. Seven years later, when state authorities stood by while a lawless element evicted the Mormons from Illinois, she lost her life from exposure on the plains of Iowa. My wife's second great-grandparents, Cyril and Sally Call, hid in a cornfield as a mob burned their home in Illinois. My great-grandfather, Charles Harris, was sent to prison in the Utah Territory in 1893 for his practice of plural marriage. His oldest daughter, my great aunt, Belle Harris, was the first woman to be imprisoned during federal prosecution of Mormons in the 1880s.

#### THE "COMPELLING GOVERNMENTAL INTEREST" TEST MUST BE RESTORED

The conflict between religious-based conduct and government regulation of religious practices remains today. The free exercise of religion, enshrined in our Constitution, is in jeopardy and cries out for protection. There is nothing more sacred than a devout person's worship of God—nothing more precious than that person's practice of his or her religion.

With the abandonment of the "compelling governmental interest" test in the case of *Employment Division v. Smith*, the Supreme Court has permitted any level of government to enact laws that interfere with an individual's religious worship or practice so long as those laws are of general applicability, not overtly targeting a specific religion. This greatly increased latitude to restrict the free exercise of religion must be curtailed by restoring the "compelling governmental interest" test.

#### RELIGIOUS BURDENS UNDER SMITH

The testimony of other witnesses will show that in the half decade since the *Smith* case numerous religious practices

have already fallen victim to the increased government power it unleashed.

In addition, I wish to put into the record of this Committee the entire testimony given at a recent hearing of the House Judiciary Subcommittee on the Constitution by Professor W. Cole Durham of Brigham Young University. His testimony provides compelling evidence that the *Smith* test is burdening religious freedoms in many areas.

For example, he reported a land-use study he conducted with attorneys of the prestigious Chicago law firm of Mayer, Brown & Platt. This study examined reported cases involving free-exercise challenges to land-use regulation. It started from the basic proposition that if land-use laws and decisions are really being generally and neutrally applied, land-use decisions and policies should impact all religions (and other land-use applicants as well) in a consistent way.

The joint study not only failed to find consistency in the application of land-use laws to different religious associations; it found a huge disparity.

Professor Durham testified: "Minority religions representing less than 9 percent of the population were involved in over 49 percent of the cases regarding the right to locate religious buildings at a particular site." Thus, the proportion of land-use challenges to minority religions disclosed in this study is more than *five times* the number we would expect if minority religions experienced such challenges in the same proportion as their proportion of the total population.

Professor Durham testified: "There may, of course, be other factors that explain some of the disparity, but the differences are so staggering that it is virtually impossible to imagine that religious discrimination is not playing a significant role."

#### THE RELIGIOUS LIBERTY PROTECTION ACT OF 1998

Mr. Chairman, when I last testified before a Congressional Committee, it was to support enactment of the Religious Freedom Restoration Act (RFRA). Now that the Supreme Court has held RFRA unconstitu-

tional, you and many of your colleagues have worked hard to develop alternative legislation, using Congress' well-tested commerce and spending clause authorities to reinstate the "compelling governmental interest" test throughout the nation. We applaud this approach. The Religious Liberty Protection Act of 1998 is a very sophisticated piece of legislation. We strongly endorse its enactment.

#### CONCLUSION

The Bill of Rights protects principles, not constituencies. The worshipers who need its protection are the beleaguered minorities, not the influential constituent elements of the majority. As a Latter-day Saint, I have a feeling for that reality. Although my church is now among the five largest churches in America, we were once an obscure and unpopular group whose members, including many of my own ancestors, repeatedly fell victim to officially sanctioned persecution because of their religious beliefs and practices. We have special reason to call for Congress and the courts to reaffirm the principle that religious freedom must not be infringed unless clearly required by a "compelling governmental interest."

It is nothing short of outrageous that the Supreme Court currently extends extraordinary constitutional protection to words that cannot be found within the Constitution, such as the "right to privacy," while abandoning the vital "compelling governmental interest" requirement that is needed to ensure the effectiveness of the express Bill of Rights language guaranteeing the free exercise of religion. The fact that the Constitution has two express provisions on religions suggests that religious freedom was meant to have a preferred position, but the Supreme Court's *Smith* decision has now consigned it to an inferior one.

Religious organizations and religious worship and practices have been forced out of their constitutional sanctuary and into the public square, to be treated like every other organization and activity without unique constitutional guarantees. We appeal to Congress to use its legislative power to restore religion to its rightful sanctuary.

Thank you, Mr. Chairman.



# RELIGIOUS FREEDOM AND THE LDS LAW COMMUNITY

by W. Cole Durham, Jr.

Elder Dallin H. Oaks' recent testimony supporting the Religious Liberty Protection Act of 1998 (RLPA) is part of the latest efforts to legislatively compensate for reduced judicial protection of religious liberty after *Employment Division v. Smith* (494 U.S. 872 [1990]). Then, the U.S. Supreme Court jettisoned its insistence that incursions on religious liberty be justified by a compelling state interest. Congress sought to remedy the resulting gap by passing the Religious Freedom Restoration Act (RFRA), but in June 1997 the Court struck that legislation down in *City of Boerne v. Flores* (117 S. Ct. 2157 [1997]) holding that Congress lacked power under Section 5 of the 14th Amendment to pass it.

Senators Orrin Hatch and Ted Kennedy jointly introduced RLPA in the Senate, and many LDS senators and representatives have signed on as cosponsors of the Senate and House versions (Senate Bill S. 2148; House Bill H.R. 4019). Elder Oaks' testimony is the most prominent LDS contribution to the broad-based effort for RLPA, but many other Church members have played a significant role.

A month after the *Boerne* decision, Elder Lance B. Wickman, general counsel for the Church, obtained First Presidency approval to convene an ad hoc Religious Freedom Advisory Committee. In addition to Elder Wickman, this group included Boyd J. Black ('78), associate general counsel for the Church; Marcus G. Faust ('77), and Von G. Keetch ('87), who have served as the Church's representatives to the Coalition for the Free Exercise of Religion; BYU Law School professors Frederick Mark Gedicks, Richard G. Wilkins ('79), and myself; and three other Church members with relevant constitutional expertise: Timothy Flanigan, Gene C. Schaerr, and Alexander Dushku ('93). With the benefit of advice from this group, recommendations for an LDS response were developed. The advisory committee considered how best to continue

cooperating with the Coalition for the Free Exercise of Religion, a broad-based organization with representation across the entire political and religious spectrum that played a key role in RFRA's adoption and defense and then sprang into action again when *Boerne* was decided. (The LDS Church has been an active member of the coalition since its creation.) Over the next several months, Von Keetch and Marcus Faust worked with the coalition on formulating concrete legislative recommendations.

The coalition has chosen to pursue legislative remedies rather than a constitutional amendment because of the difficulty and delay involved. It has taken the position, yet to be tested before the Supreme Court, that *Boerne* only invalidated RFRA insofar as it relates to state actions infringing on religious freedom, and that RFRA remains valid in federal contexts. The *Boerne* decision makes it difficult to achieve an across-the-board remedy with the strength, simplicity, and elegance of RFRA. Instead, what has emerged is a more piecemeal approach that seeks to invoke acknowledged bases for Congressional power, such as the commerce and spending powers, to the extent possible.

The first initiative along these lines is the Religious Liberty and Charitable Donation Protection Act of 1998, signed into law on June 19, 1998 (Pub. L. No. 105-183, 112 Stat. 517 [1998]). Essentially, this legislation is aimed at preventing normal contributions to religious or charitable entities from being treated as fraudulent conveyances under bankruptcy law. Because this law deals with bankruptcy, a field in which Congress clearly has power to regulate, there can be no doubt about congressional authority in this area.

RLPA, the subject of Elder Oaks' testimony, is more general legislation providing that, in areas where Congress' spending or commerce power applies, state action can burden religious exercise only if it can meet

the compelling state interest/least restrictive alternative test. In addition, RLPA contains special provisions that address the field of land-use regulation. These provisions are also based on spending and commerce power, to the extent those apply, but in addition, they are based on congressional power under Section 5 of the 14th Amendment. *Boerne* left open the possibility that Section 5 can be used as a basis for legislation aimed at remedying free-exercise-rights violations. If adopted, this provision will help ameliorate the recurrent problem faced by many smaller and less popular faiths when they attempt to acquire and develop sites for religious purposes. RLPA also amends RFRA to limit its applicability to federal settings and addresses other more technical issues, such as attorneys' fees.

LDS scholarship has been particularly significant in showing both the need and the justification for RLPA's land-use provisions. The amicus brief submitted on behalf of the LDS Church in *Boerne* (coauthored by myself, Fred Gedicks, Richard Wilkins, Von Keetch, Alexander Dushku, and several distinguished church-state lawyers at Mayer, Brown & Platt in Chicago) included an appendix that showed a substantial pattern of discrimination against smaller and less popular churches in the land-use context. This study has been cited by Von Keetch in his testimony in support of the House version of RLPA on March 26, 1998; it was expanded upon in my own testimony before Congress on June 16, 1998; and it was again referred to in Elder Oaks' testimony. The study has turned out to be particularly important because it provides crucial evidentiary support that there is a pervasive pattern of religious discrimination in land use. This finding, in turn, warrants congressional exercise of power under Section 5 of the 14th Amendment to remedy the violation of religious freedom principles, even after *Boerne*.

WE IMMIGRATE on the WATCH?

Mormon Political Alienation  
and the Search for Power

Timothy E. Flanigan

Photography by  
Jayne Hinds Bidaut

**I** want to discuss two stories that bear  
on how government succeeds or fails.  
They are not precisely polar opposites,  
but they are sufficiently distinct to shed light not  
only on the ideal of good government but on  
the current state of democracy  
in our nation in general and among  
Latter-day Saints in particular.

The first story is that of the Weimar Republic. "Weimar" is the story of the rise and fall of an experiment in democracy in Germany following the end of the Great War. In late September 1918 the German general staff concluded that the front, which had remained remarkably static throughout most of the war, could be pierced at any moment by the Allies. They demanded of their government an immediate cessation of hostilities. As events unfolded over the following weeks, it became even more apparent that Germany—which had been the greatest military power in the world a few short years before—was now on the brink of a total collapse.

Immediately before the guns fell silent in November 1918, the kaiser abdicated. A new German republic was proclaimed from the steps of the Reichstag Building in Berlin. By February 1919 delegates had convened in a national assembly to draft a new constitution. The assembly was held in the Prussian city of Weimar to avoid exposing the delegates to the turbulent and at times dangerous atmosphere of Berlin.

The constitution that was hammered out in Weimar was a remarkable document, reflecting—as did the constitution crafted in Philadelphia in 1789—an amazing assortment of compromises intended



to help bring together states that saw themselves as independent. The Weimar Republic was born, and Germany had entered the era of modern democracy.

But the Weimar era is remembered not for the hopeful start of a young democracy but for its tragic end. The seeds of the tragic end of the Weimar Republic were sown at its founding. The tools of peaceful compromise and change on which democracy is built were never fully accepted by Germany during this period. Political terrorism from the far right and the far left unraveled the rule of law as fast as a few devoted statesman such as Walter Rathenau could knit it together. The spirit of the time is captured in the oft quoted lines from Yeats' *The Second Coming*, written in 1919:

*Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and  
everywhere  
The ceremony of innocence is drowned;  
The best lack all conviction, while the worst  
Are full of passionate intensity.*

Weimar was ultimately overrun by the blood-dimmed tide of National Socialism, and the First World War thus begat a Second.

The causes and effects of these developments are complex, and my real interest today lies elsewhere. What is significant for present purposes about the Weimar paradigm are some simplified explanations as to *why* the center could not hold, why democracy ultimately gave way to totalitarianism.

Like the collapse of the Soviet Union in our day, the dissolution of the German Empire stemmed ultimately from a want of legitimacy. As the German historian Erich Eyck put it, "Neither hand grenades nor machine guns destroyed Imperial Germany, but rather a lack of faith in its right to exist."

This lack of faith manifested itself in forces external and internal. External forces included the passion of the First World War's European victors for reparations and the continued occupation of Germany's industrial heartland in the Ruhr Valley. But even more interesting are the internal forces. The Weimar Republic failed ultimately because of a paradox. Political feeling among German citizens ran at the same time too hot and too cold.

On the one hand, extremism on both the right and the left overwhelmed public debate and ultimately beat down the fledgling democracy. Communists and nationalists used violence as a means of

destabilizing the regime. Street fighting and murder were accepted means of political change. Weimar, like the empire before it, ultimately failed because the majority of the people preferred extremist arguments to those in support of democracy. Coupled with street violence, this intellectual conflict overwhelmed the political debate. Many who in saner times might have evolved into citizens of a working democracy felt compelled to choose sides in the more dramatic conflict of right vs. left. The lesson here is that violence and hard intellectual opposition can undermine democracy.

On the other hand, Weimar is also remembered for the profound political apathy that prevailed among many who ought to have been the anchors of democracy. Extremism's triumph was made possible because liberal-minded men and women refused to participate in what they viewed as the dirty world of politics. When the processes of government by which the democratic will is formed, transformed into policy, and carried into action are repugnant to the average citizen, those processes quickly become a charade and their popular derision grows apace.

From the very beginning the Weimar constitution lacked an important advantage enjoyed by the government founded



144 years earlier at Philadelphia. Weimar was a democracy without democrats, a republic without republicans. Germany had acquired a form of constitutionalism but denied the power thereof.

Thus the outcome of Weimar was determined as much by those who were silent as it was by those who were shouting and marching. Some who could have provided effective leadership to the center in Weimar chose instead to stay home, close their doors and windows, and pull in their doormats. Disillusioned by the horrors of war and spiritually lost in the carnality of the 1920s, they simply chose not to get involved.

Two scenes from the show *Cabaret* tell this story very clearly. In an opening scene, the cabaret is filled with fun-loving hedonists. They appear willfully ignorant of the turmoil outside the doors of their pleasure house. Songs invite them to view life itself as a party, a cabaret. In the final scene the songs are the same, but the audience has changed. At every table are men wearing the uniform of Hitler's army.

Another example is Max Frisch's play *Herr Biedermann und die Brandstifter* (*Mr. Everyman and the Arsonists*). It tells the story of a simple citizen who opens his own home to men who are transparently arsonists burning down homes throughout the city. As his wife complains to her husband about their strange and dangerous behavior, Herr Biedermann steadfastly refuses to get involved. In the end his apathy is engulfed in the flames that destroy his home.

My third example is closer to home. It is the story of The Church of Jesus Christ of Latter-day Saints and its early interactions with the government. Once again, time does not permit a thorough review of this history. There is a rich variety of available sources.

What interests me in particular is what the leaders of the Church had to say in response to situations in which their government failed to live up to their expectations that it would ensure basic safety for them in the free exercise of their religion.

Much of this experience occurred during a period when the federal constitutional protections we take for granted today did not exist as such. The Bill of Rights was seen only as limiting federal

power; it was not applicable to the states. The only source of legal limitations on the power of state governments in most cases was state constitutions as they were interpreted by state courts.

Joseph Smith, among others, found this circumstance to be wholly unacceptable, and he was very direct in criticizing what he saw as the failure of the federal Constitution to provide effective enforcement for important rights such as freedom of religion. Speaking in Nauvoo, Joseph said:

*It is one of the first principles of my life, and one that I have cultivated from my childhood, having been taught it by my father, to allow every one the liberty of conscience. I am the greatest advocate of the Constitution of the United States there is on the earth. In my feelings I am always ready to die for the protection of the weak and oppressed in their just rights. The only fault I find with the Constitution is, it is not broad enough to cover the whole ground.*

*Although it provides that all men shall enjoy religious freedom, yet it does not provide the manner by which that freedom can be preserved, nor for the punishment of Government officers who refuse to protect the people in their religious rights, or punish those mobs, states, or communities who interfere with the rights of the people on account of their religion. Its sentiments are good, but it provides no means of enforcing them. It has but this one fault. Under its provision, a man or a people who are able to protect themselves can get along well enough; but those who have the misfortune to be weak or unpopular are left to the merciless rage of popular fury. [History of the Church, 6:56–57]*

Having diagnosed the problem, Joseph was ready with a prescription:

*The Constitution should contain a provision that every officer of the Government who should neglect or refuse to extend the protection guaranteed in the Constitution should be subject to capital punishment; and then the president of the United States would not say, "Your cause is just, but I can do nothing for you," a governor issue exterminating orders, or judges say, "The men ought to have the protection of law, but it won't please the mob; the men must die, anyhow, to satisfy*

*the clamor of the rabble; they must be hung, or Missouri be damned to all eternity." Executive writs could be issued when they ought to be, and not be made instruments of cruelty to oppress the innocent, and persecute men whose religion is unpopular. [Ibid., 57]*

Capital punishment as a remedy remains largely outside the scope of modern civil rights law, apparently reserved for those cases in which a conservative black judge is nominated to sit on the Supreme Court.

Nonetheless, Joseph's fundamental criticism of the ineffectiveness of guaranteed religious liberty was answered in some measure when the Supreme Court in 1940 "incorporated" the Free Exercise Clause of the First Amendment into the constitutional limitations applicable to the states under the 14th Amendment (*Cantwell v. Connecticut*, 310 U.S. 296). What mischief the Court has done in recent years in interpreting the *substance* of those rights is another topic for another day.

The experience of Joseph Smith and, indeed, most of the early Latter-day Saints with American constitutional government was initially mixed and ultimately tragic. It is therefore remarkable that, like Joseph Smith, the Saints steadfastly proclaimed themselves to be loyal "friends" of the Constitution. Had the Constitution or the governments it supported been half as friendly to the Latter-day Saints as they were to the Constitution, the story of Church origins and the Mormon exodus would be remarkably different.

Although mob violence reached its peak before the migration, the deprivation of civil and political rights continued to increase after the Church was established in the West. The polygamy issue ignited a national condemnation of the Church and resulted in various laws that ultimately had the effect of disenfranchising Church members and confiscating Church property.

Let me focus on one example from this period: In 1862 Congress passed the Morrill Act, which prescribed punishments for the crime of bigamy in United States territories. Sponsors of the Morrill Act acknowledged that the purpose of the law was to prohibit the Mormons from practicing polygamy.

The Morrill Act was not the most effective step ever taken by the United States Congress. Bigamy requires proof that a person has been simultaneously married to two or more persons. Prosecutors will recognize this as a difficult evidentiary problem, particularly where the marriages were performed not in public but in private religious ceremonies in temples from which the public was excluded. Nevertheless, the Morrill Act hung like a cloud over the Church.

In 1875 a test case was brought before the Utah territorial courts. George Reynolds, private secretary to Brigham Young and the husband of two wives, was convicted by a mostly Mormon jury of bigamy. The idea was to gain a definitive ruling from the Supreme Court regarding the constitutionality of the antipolygamy law.

After some procedural delay, the case was presented to the United States Supreme Court for resolution. Counsel for Brother Reynolds argued that the Morrill Act was a direct violation of the First Amendment's prohibition that "Congress shall make no law prohibiting the free exercise of religion." In 1879 the Court unanimously upheld Reynolds' conviction and the Morrill Act on the grounds that the First Amendment limited only legislation designed to suppress religious opinion. It did not, in the Court's view, prevent Congress from criminalizing religious actions.

The narrow impact of this ruling was that Brother Reynolds was sentenced to two years in prison, which he served in the state penitentiary in Lincoln, Nebraska. Reynolds was certainly inconvenienced by this ordeal. He later served as a member of the presidency of the Seventy and is remembered as a prolific writer and careful student of the scriptures.

The broader effect of the ruling was nearly devastating to the Church. Emboldened by the Court's remarkable holding that religious conduct could be proscribed, Republicans in Congress redoubled their efforts to eradicate polygamy.

I have in my home a copy of the front page of the *Daily Graphic*, a New York illustrated newspaper from the last century, dated August 21, 1883. It depicts a savage mountain man labeled "Mormonism,"





dragging women by the hair and confronting the goddess of liberty, labeled “the U.S. Congress.” The savage is trampling on a piece of paper labeled “the Edmunds Bill.” The caption reads, “The Modern Blue Beard. The Survivor of the Twin Relics—What Does Congress Propose to Do About It?” The reference to the “twin relics of barbarism” is to the Republican Party/Know Nothing platform of 1856, which called for the eradication of slavery and polygamy as the twin relics of barbarism.

The illustration adequately captures the anti-Mormon attitude prevailing in that day, especially among Republican members of Congress. The Edmunds Act of 1882 addressed the shortcomings of the Morrill Act by prohibiting “bigamous cohabitation.” It was easier to prove that a man was living with two or more wives than that he was actually married to them. The Edmunds Act also barred persons living in polygamy from serving on juries, holding public office, or even voting.

Taking it a step further, the Edmunds-Tucker Act of 1887 disincorporated the Church and authorized seizure of Church property. The territorial government of Idaho required an oath of all registered voters that excluded Mormons and even former Mormons from the franchise.

As I review the statements of Church leaders from the Utah period responding to the gross deprivations of religious and other liberties inflicted on the Church and its members during that time, I note their occasional bitterness at being thus treated by the nation they supported. I also am impressed with their flashes of humor.

Let me cite a single example. On July 4, 1855, a meeting was held in the bowery in Salt Lake City. Midway through the meeting during an address by Elder G.A. Smith, a table that had been placed on the stand to hold the papers of a federal judge (who had been invited to address the Saints) toppled over, fell off the stand, and split in two, making a loud noise. Without missing a beat, Elder Smith said, “So, the end cometh suddenly, the day of corruption is short, and its downfall is sure” (*Journal of Discourses*, 7:72). The *Journal of Discourses* records that there was “great laughter” in the bowery.

But what most impresses me from the statements of the Church’s leaders during this period is their exalted view concerning government and the need for citizens to support good government. Despite being hounded nearly to extinction by the actions and derelictions of government officials, they maintained a fierce commitment to the principles underlying that government. They also displayed a remarkable vision of the role of the Church and its members in ultimately preserving constitutional government.

Speaking in 1882, Elder Erastus Snow reacted with barely controlled rage to allegations in the Eastern press and in Congress that Mormons were abusing their children and raising them in ignorance and squalor. After vigorously denying those charges, he said:

*And we are satisfied that ere long [the children of polygamous marriages] will be a tower of strength in the land, . . . [W]hen the nation, ripe in sin and iniquity, led on by reckless demagogues and politicians, shall applaud the acts of the legislators and judges and leading men in laying the axe deep in the tree of liberty, until they shall sap the juices that give life to our institutions, and thus undermine the foundation of good government, it will be sons and daughters of polygamous Utah, that will be found the true friends of human liberty, the true friends of that heaven-born freedom that has come to us through the fathers of our nation. The love of liberty is born in them, and human liberty is a part of the everlasting gospel; and God Almighty has decreed—and let Judge Edmunds and Congress and all the world bear it—that the gospel of the kingdom is established, never more to be thrown down or given to another people, that its destiny is to grow and increase and spread abroad until it shall fill the whole earth, and no power in earth or hell can stop it. [Journal of Discourses, 23:232–33]*

Elder Snow’s statement that members of the Church would one day be singled out as the true friends of liberty and freedom is echoed in a later comment made by George Q. Cannon. Elder Cannon spoke frequently on the subject of politics and the kingdom of God and delivered some of the most remarkable statements concerning the future role of the Church

in government. I want to use one of his great statements as a bridge to my next topic. Elder Cannon said:

*The time will come in this land—I tell you now, ye faint-hearted ones, the time will come when the counsels of the servants of God will be sought for in our own land and in all the states where our people live, because our conduct and our management will stand out in such bold relief in comparison with the management and conduct of others, that they will want to get our counsel and our help in their extremity. This will be the case, not only right here, but elsewhere. [George Q. Cannon, Collected Discourses, vol. 5, April 5, 1897]*

With that marvelous legacy, that glorious vision of the Latter-day Saints as the true friends of liberty, we are to be an ensign to the nations, not just in matters of religion but in government as well. The role envisioned for the members of the Church is almost breathtaking.

In light of that vision, it is fitting to ask: How are we doing? Are we ready to assume our place as a mecca for good government and political culture? Are we well on the road to fulfill this destiny, or is there something of the ashes of Weimar that clings to us? Are we tolerant of political violence? Are we apathetic, shunning the world of politics as “dirty business”?

Many of my observations concerning Mormon political culture are, I readily admit, based almost solely on anecdotal evidence. Even more important, as an observer of Mormon political attitudes, I am not ideally situated, since my home and almost all of my activities are not in Utah but in the Washington, DC, area. Nevertheless, I would be an unfaithful observer if I did not report that from my vantage point, Latter-day Saints have not yet fully lived up to their potential—their destiny—to be an example of good government to other nations.

With respect to tolerance for political violence, we must confront the truth that Utah and Idaho remain homes to some of the more virulent strains of the militia movement. It is indeed disheartening to hear that some of those groups appeared to find succor in communities that are predominantly Mormon.

But the more serious Weimar disease afflicting Mormons may be political apathy. Too many members of the Church of my acquaintance proudly tell me that they are not involved in politics, that they don't even vote anymore. These are, in all other respects, broad-minded people who have good values. They have simply come to view the world of politics as too infused with self-interest, corruption, and greed to merit their serious attention. They are more concerned with maintaining a good environment for their children at home than with society at large.

These politically disaffected are not unique to the Church. Political parties have come to recognize that these people are a major force in politics today.

Do I have any evidence that this is a problem in the Church other than my own casual observations? Perhaps.

Let me begin with the basics: voter registration and turnout. Focusing on the 1996 general election, we note that Utah's percentage of voter-age population registered to vote was 78.8 percent—somewhat higher than the national percentage of 74.4 percent. But Utah was nowhere near the national leader in voter registration. Even allowing for differences in voter registration procedures, Utah does not stand out as a leader in having its citizens registered to vote in a presidential election year. Montana with a voter registration percentage of 90.05 percent, Colorado with 81.98 percent, and Oregon with 81.38 percent could be more accurately characterized as leaders. Alaska with 97.6 percent and Maine with 105.96 percent are truly lights shining on a hill. (I can't explain how Maine managed to register more voters than it had citizens. Perhaps some of Utah's voters inadvertently registered to vote in Maine.)

Utah's voter turnout figures are even more lackluster. Utah barely cleared the national average of 49 percent with a voter turnout of 49.93 percent. Indeed, Utah's voter turnout percentage was exceeded by every Western state except California and Nevada. Once again, Maine had national bragging rights with a voter turnout of 71.9 percent.

OK, so much for quantity. What about quality? Are Utah's elected representatives known for their outstanding abilities and

integrity? Here the picture is frankly somewhat brighter. Focusing on Utah's congressional delegation, it is fair to say that they are well respected nationally. However, with the exception of Orrin Hatch, who appears from time to time on lists of possible presidential candidates, none of Utah's congressional delegation has real national recognition. To be sure, Governor Leavitt strongly impressed the leadership of his party at the Republican National Convention in San Diego last year. But his prospects for national prominence are uncertain.

Indeed, after Senators Hatch and Bennett and Governor Leavitt, the most recognizable Utah political figure among a group I consulted in Washington remains Edith Greene (formerly) Waldholtz.

But I am wandering from my central point, which is that Latter-day Saints generally are not sufficiently engaged in the process of good government and politics to justify putting a check mark indicating "fulfilled" by the prophecies I quoted above. I think that I am on firm ground when I say that we as a people have not so perfected the art of good government that the world is now ready to beat a path to these mountains to learn our unique ways of political administration. The need for members to be active was strongly underscored in a recent First Presidency letter that

*strongly urge[d] men and women to be willing to serve on school boards, city and county councils and commissions, state legislatures, and other high offices of either election or appointment, including involvement in the political party of their choice.*

How will this challenge and the prophecies mentioned above be fulfilled? More important, who will fulfill them? I believe that, to a great extent, it will be the rising generation that will bring renown to the Church and to our communities of Saints, not only on the Wasatch Front but wherever the Saints are congregated throughout the world. As you contemplate your lives on the "outside," please bear in mind the religious imperative each of you carries to be the best sort of citizen, to be actively involved in promoting good government, and to render public service in the course of your career.

In conclusion, I would like to offer a few thoughts concerning public service—"do's and don'ts," if you will.

First, don't be so consumed by your many other responsibilities that you do not take time to become involved in good government. I have occasionally heard members of the Church say that they have sacrificed their careers or their political activities for their families or their service in the Church. Although this trade-off may be appropriate in individual circumstances, it seems to me to rest on a unexamined notion of the word "sacrifice." As often as not, sacrifice, when applied to how we budget life's short day, means not giving up one worthy activity for another. Rather it means doing *both* worthy activities and giving up some cherished but nonessential third activity.

Second, join a political party and be active in it. Being active in a party gives you credibility and an outlet to express your views. This advice is not a recruitment seminar for Young Republicans or Campus Democrats. I am a registered Republican and am active in my party. But I don't believe that Republicans have a corner on good government or decency. Good people in each party are closer together than they might think. In the long run, it doesn't matter as much as you might think which party you join. Just pick the one you think best expresses your point of view.

Of course, the Church is neutral on matters of partisan politics. The Church's stance has been made clear repeatedly and in the strongest possible terms.

*The Church, while reserving the right to advocate principles of good government underlying equity, justice, and liberty, the political integrity of officials, and the active participation of its members, and the fulfillment of their obligations in civic affairs, exercises no constraint on the freedom of individuals to make their own choices and affiliations. I am authorized by President McKay to say that any man who makes representation to the contrary does so without authority and justification in fact.* [Stephen L. Richards, in Conference Report, October 1951, p. 114–115; emphasis added]

The outcome of Weimar was determined  
as much by those who were silent as it was by  
those who were shouting and marching.

Some who could have provided effective leadership  
to the center in Weimar chose instead to stay home,  
close their doors and windows,  
and pull in their doormats.

Mormons are viewed by many political observers—and indeed by many members of the Church—as being most closely associated with the Republican Party. This is a deep irony. In the 19th century the Republican Party’s “demagoging” of the polygamy issue as one of the “twin relics of barbarism” was the wellspring of much ill feeling toward the Church. Indeed, the brethren had to actively encourage a few members to join the Republican Party to specifically avoid being viewed as a one-party people.

Being identified with a single party has practical consequences as well. The current assumption in political circles that the vast majority of Mormons are “safe” Republican votes is comparable to the assumption that African-American voters are “safely” democratic. Indeed, the experience of the two groups illustrates important political truths: A group identified with a single political party runs the risk of losing a great many political battles. Also, ideologically safe constituencies tend to be taken for granted by their own parties.

Third, volunteer to work for a candidate whose principles are compatible with your own. You may begin by stuffing envelopes, but you will be surprised how quickly your talents and interests are recognized.

Fourth, put quality into your political efforts. Too much political and governmental work, particularly writing, looks like it was done by amateurs. The extra effort to do quality work is minimal in light of its effectiveness. Remember, it will be the quality of our approach to good government that will attract the notice of the world.

Fifth, never confuse your political choices with doctrine. Don’t view those who disagree with you as anything other than fellow citizens who happen to be

wrong. One of the problems of the Christian Coalition and other conservative groups until very recently has been that you can’t disagree with them on one issue. If you are against them on one issue, you are anathema to them. Remember the advice of Ronald Reagan: Just because someone disagrees with me 20 percent of the time doesn’t make him my enemy. He is my ally.

Sixth, if you are given the opportunity to serve in government in any capacity, keep your personal integrity. Most who serve in federal or state government do so only after taking a solemn oath. Remember that oath. It is not a personal oath of the sort administered to German troops in the Nazi regime to support the ideas of one man. It is a constitutional oath that binds the individual to protecting constitutional government. Know beforehand what your principles are. Occasionally we have seen how the moral lapses of a member in a conspicuous position of trust can bring discredit to the Church. Keep the commandments. To use a metaphor of some relevance at this institution, it is a bit like knowing your limits when you are dating. Appropriate limits are difficult to set when temptation is presented. Wear your values comfortably, not on your sleeve, but like a mantle that fits you well.

Seventh, develop a sense of history. I am amazed at how often issues recur in our system of government and how unaware most participants are that near precedent exists for the positions they are taking. Knowing history can save you a great deal of trouble.

Finally, remember that the good news about your political involvement is that

you can change the world. The bad news is that you just might change it for the worse. Be as certain as you can possibly be of the correctness of your principles, but avoid hubris. Remember the best and the brightest are often the most dangerous folks in town.

You have a great advantage over many others who enter government service and politics. From your service in the Church, I hope you have learned how to work effectively with people and to make them feel a part of both problems and solutions. You may have had the opportunity to apply the counsel given by Elder M. Russell Ballard over the course of several recent addresses in general conference and in his recent book concerning the power of councils. Much of this knowledge has a direct application in the world of politics and government.

Even more important, you have an embedded system of values that make you like precious gold in the moral wasteland that is late 20th-century America. Be true to those values. Teach them to your families. They are precisely what are needed in the coming era.

It is my sincere hope that you will be the generation that reaches the full potential for the Church to be an ensign to the nations in matters of government.

*Timothy E. Flanigan graduated from BYU with a degree in history in 1977. He received his law degree from the University of Virginia in 1981 and served as a senior law clerk to the late Chief Justice Warren E. Burger. Tim lives in Great Falls, Virginia, and is currently writing the authorized biography of Warren Burger. This address was given as an Honors lecture at Brigham Young University on October 9, 1997.*



Patrick A. Shea

City Creek Canyon  
Photography  
by John Snyder

# Civility :

A Necessity,  
Not a Luxury,  
in the American  
Political System

In recent years American society has undergone a marked deterioration in civility, especially as it relates to political discourse. *Ad hominem* arguments, which seek to demonize those with opposing views, have become all too common in today's political debates. This is a disturbing trend, because civil discourse is a "precondition of a democratic society," as Jesuit theologian James L. Connor has observed. • John Adams, notes Connor, recognized the threat of uncivil discourse to the emerging American democracy in a letter he penned in the spring of 1776. "We may please ourselves with the prospect of

free and popular governments, God grant us the way," Adams wrote. "But I fear that in every assembly members will obtain an influence by noise rather than sense, by meanness rather than greatness, and by ignorance and not learning, by contracted hearts and not large souls."

• This "influence by noise rather than sense" is particularly evident today in the negative political commercials and shallow news coverage we see on television, which places a premium on catchy, often inflammatory "sound bites." This sound-bite superficiality encourages incivility in our society because, as Elaine Chao, distinguished fellow at the Heritage Foundation,



*One of Brigham Young's first actions after arriving in Utah was declaring City Creek Canyon off-limits to logging, mining, or any other activity that could pollute the creek next to growing Salt Lake City.*



points out, "It encourages people to jump to conclusions, and to speak without thinking, and to say bombastic things in order to capture attention."

I became acutely aware of how much noise we have in our lives after spending 15 days in relative solitude going down the Grand Canyon in a wooden dory. After that trip I was amazed at the amount of sound we impose on ourselves each day through televisions, radios, and CD players. In such a noisy environment, it is perhaps not surprising that some have concluded that the way to win an argument is to shout louder, rather than reason better, than one's opponents.

But civil discourse does not mean inhibited or boring debate. Thomas Mann, director of the governmental studies program at the Brookings Institution, perceptively notes: "It's incivility that frustrates the democratic ambition of fully airing honest differences." Incivility inhibits hon-

est, vigorous public debate, because many people who would like to engage in such discussions don't do so because they are (rightly) concerned that they will be subjected to character assassination.

"Too often in today's politics, battles are waged as a choice between truth and falsehood, not between competing truths," Mann observes. This type of argumentation creates an "us vs. them" mentality, which has been evident in antigovernment rhetoric and acts of antigovernment violence—the most horrible of which was the April 19, 1995, bombing of the Murrah Federal Building in Oklahoma City.

The "us vs. them" mentality manifests itself in a variety of public policy matters, including public land issues involving the Bureau of Land Management. Frequently the issue at hand has to do with whether certain natural resources on the public lands should be developed or conserved, with commodity interests

supporting development and environmentalists favoring conservation. Unless each side engages the other in a civil manner, an “us vs. them” mentality can set in, with the opponents framing the particular issue in black-or-white, “development vs. conservation” terms.

Moving beyond this “us vs. them” mentality requires adversaries in a democracy to recognize that they are generally offering “competing truths” rather than truth or falsehood. When it comes to public land issues, the “competing truths” of commodity interests and environmentalists reflect the fact that the BLM’s land-management mission involves the “competing truths” of development and conservation.

The BLM’s mission, as Congress set forth in the Federal Land Policy and Management Act (FLPMA) of 1976, is to manage the public lands for multiple uses. FLPMA defines multiple-use management as “the management of the public lands and their various resource values so that

was essential for survival. One of Brigham Young’s first actions after arriving in Utah was declaring City Creek Canyon off-limits to logging, mining, or any other activity that could pollute the creek next to growing Salt Lake City. The passage of time vindicated Young’s decision, showing how seeming opposites—conservation and development—can actually complement each other.

While not every public land issue (or every public policy issue) lends itself to a recognition of competing truths, it is possible for ideological opponents—even in debates over highly volatile subjects—to treat each other with respect. This approach to argumentation is not merely civil but more effective than *ad hominem* attacks. This is recognized by elected officials who practice civility. For example, Rep. James E. Clyburn (D-s.c.) has cited numerous legislative successes resulting from what he calls his “kinder, gentler” approach “to life in

vants and their public discourses but equally to members of the press, with their important First Amendment duties. This latter group, in our day and age of technological revolution, have an obligation to each of us, as well as to their families, to “print the news fit to print” and not slip down the slippery slope of smut and mire.

Promoting civility in public life, of course, “has to mean something more than mere politeness,” note Guy and Heidi Burgess, codirectors of the Conflict Resolution Consortium at the University of Colorado. “The movement will have accomplished little if all it does is get people to say, ‘Excuse me please,’ while they (figuratively) stab you in the back. Civility also cannot mean ‘roll over and play dead.’ People need to be able to raise tough questions and present their cases when they feel their vital interests are being threatened.” The key, the Burgesses write, is to identify and carry out constructive advocacy strategies that, wherever possible,

---

**Too often, today’s political battles are waged as a choice between truth and falsehood, not between competing truths.**

---

they are utilized in the combination that will best meet the present and future needs of the American people.” By defining multiple-use management so broadly, Congress gave the BLM a complex “both/and” mission—that of promoting *both* development *and* conservation.

From an “either/or” or a “truth/falsehood” point of view, the BLM’s mission consists of two conflicting tasks rolled into one. But from a “both/and” or a “competing truth” perspective, the BLM’s mission contains two complementary components: that of facilitating the development of public land resources *and* that of preserving the public lands for the use and enjoyment of future generations.

My Western heritage is, no doubt, one of the reasons why I see no contradiction between conservation and development. My mother’s family were Mormon pioneers, and the pioneers who settled in the Salt Lake Valley knew that conservation

general and politics in particular.” “Other approaches may make more headlines,” Clyburn writes, “but I question if they will make much headway.”

Besides inhibiting many people from participating in public debate, the decline of civility has undoubtedly deterred many good men and women from running for public office. This deterrence is completely understandable, as office seekers enter an arena where abusive detractors can make one question whether running for office is really worth the effort. If America is to thrive as a democracy in the 21st century, we must restore civility to political debate so that we can attract good people to run for public office and stop driving out good individuals who already hold office.

With recent revelations and reveling in Washington, DC, the ability to attract good and vigorous people to public service will be a significant challenge. The concept of civility must apply not just to public ser-

allow adversaries “to reframe the conflict in ways which transform win-lose confrontations into win-win opportunities.”

As director of the BLM, I am committed to civility—meaning constructive advocacy and debate—in connection with public land issues, as well as all other public policy matters. In a democracy, whose hallmark is nonviolent dispute resolution, this civility is a necessity, not a luxury. As John Adams put it in 1776: “There is one thing . . . that must be attempted and most sacredly observed, or we are all undone. There must be decency and respect and veneration introduced for persons of every rank, or we are undone. In a popular government, this is our only way.”

*Patrick A. Shea is director of the United States Bureau of Land Management. This article was adapted from a speech given at the J. Reuben Clark Law School on October 18, 1997.*

## I Want to Be Like Steve

Steve Averett's smile is contagious. Last fall his smiling face was seen silk-screened onto numerous T-shirts along with the popular slogan "I want to be like Steve." Steve himself smiles as he talks about his gratitude for the law students' T-shirt campaign. But he is visibly embarrassed when he encounters students wearing "his" T-shirts. Trying to prevent the conversation turning toward him, he quickly changes the subject from himself to the students by pointing out their accomplishments. However, Steve's proficiencies in the professions of teaching, law, and librarianship set an example of excellence for all the students and faculty at the J. Reuben Clark Law School. Indeed, he personifies to many the slogan "I want to be like Steve."

Growing up in Price and Springville, Utah, Steve saw examples that taught him the virtue of serving others in all aspects of life. His mother served people in her profession as a librarian, and his father helped others as a life insurance salesman. His father's deep concern for others even carried over into the proper care of the family's animals. One year spring was late, and they didn't want an expectant sow's piglets to freeze. Steve and his Dad cleared out part of the basement to make room for them. "We were the only family in town with pigs living downstairs," Steve chuckles. "My father was very generous, to the point of being tenacious in his giving. I owe a great deal to my father's example." Another role model in Price was Steve's Church leader, Bishop Don Keller, a practicing attorney. He was kind and caring and took a genuine interest in others, including young Steve, who now says, "When I think of good lawyers, I think of Bishop Keller. He is my example of the kind of lawyer I'd like to be someday."

Steve singles out his Springville High School debate teacher as another major influence on "a painfully shy and intro-

verted young man." She spent hours with him, had him practice "being mean" in the mirror, and taught him to present himself and his ideas in a persuasive manner. "I want to help students the way she reached out and helped me," he says. While Steve served as an LDS missionary in Taiwan, his desire to become a good teacher increased. Later he studied education in college for four years, then taught in the Nebo School District in Springville for seven years. Steve continued to perfect his teaching skills, not knowing that his future would bring him many more occupational opportunities.

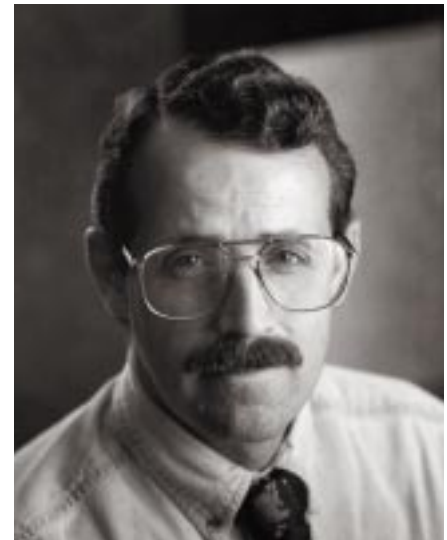
Change came as Steve considered further training. He and his wife, Susan, had three of their seven children while he attended graduate school. In 1985, while teaching in Springville, Steve received his master of library science degree with an emphasis in school librarianship—completing

*"I want to be like Steve." Steve himself smiles as he talks about his gratitude for the law students' T-shirt campaign. But he is visibly embarrassed when he encounters students wearing "his" T-shirts.*

his master's thesis on ways teachers motivate students to read. He worked as a librarian in Springville for awhile, yet he felt unsettled—something was missing. Then he remembered his high school interest surveys suggesting an aptitude for law, teaching, and writing. He decided to pursue a legal education and enrolled in the J. Reuben Clark Law School, where he became fascinated with the ability of the law to help people resolve their problems. During this time Steve clerked briefly for BYU's Office of General Counsel, participated in divorce mediation cases, and was case note edi-

tor for the law school's *Education and Law Perspectives* journal.

Steve spent the next few years developing his skills as a teacher, lawyer, and librarian. He clerked for Judge B. Lynn Winmill in Idaho for a year, then returned to Utah, where he taught school for another year. He taught legal bibliography classes to the graduate students at the BYU library school and served as judge pro tem for the Fourth Circuit Court in Utah Valley. He also spent two years handling domestic relations and public bene-



fit cases as a staff attorney at Utah Legal Services in Provo.

"I can't say enough good things about Steve's work as a public service lawyer," says Susan Griffith, the managing attorney of Utah Legal Services when Steve worked there. "He was the most prepared attorney I ever saw in court. He spent the extra time preparing because he cared so deeply for his clients. He'd get excellent results by hard work, not by yelling the loudest."

Steve's service to others continued in early 1993 when he moved to Oxford, Mississippi. He served as public services



librarian, assistant director, and then acting director of the University of Mississippi Law School Library. In 1994 he was named outstanding law school staff member of the year, and in 1995, outstanding law professor of the law school.

A chance to move closer to home brought Steve and his family to Boise, Idaho, where he helped automate the Idaho Supreme Court Law Library as its director. Two years later he was offered a position at BYU. Steve smiles as he says, "When the BYU law school/law library position came open, I felt I was coming home." Susan Griffith, now assistant director of BYU's law school externship programs, shares her gratitude for Steve's return: "When we heard he was coming, we screamed, danced for joy, and then we cried. I knew how good he was, and what a difference he'd make in whatever he did at BYU. The law students have a true friend in Steve Averett."

Other Law School staff echo similar praise. Curt Conklin, the law library's head of technical services, comments, "Most law librarians focus either on being lawyers or on being librarians. Steve is the first one here to be professionally trained as a teacher and then as a lawyer and librarian. That's why he cares so deeply and so well for the students." Gary Hill, the law library's associate director adds, "Steve is extremely thorough in all he does—his classes, his reference work, and his genuine relationships with others. His willingness to help all types of people is contagious, and just being with him makes me want to be a better person."

Steve smiles as he expresses similar sentiments about the Law School: "The quality of the students, staff, faculty, and librarians at this law school is tremendous. I'm humbled to work with the people here, to see what they are accomplishing, and to be a small part of their work. This is one of the greatest law schools in the country because of the dedicated and strong people here."

Truly, Steve's dedication and strength as a teacher, lawyer, and librarian motivate others to want to be like him, many of whom proudly wear the words "I want to be like Steve."

## LeGrande Fletcher: One of a Kind

BYU's last JD/MLIS graduate has returned. G. LeGrande Fletcher joined the Howard W. Hunter Law Library staff in November 1997, four years after earning the last dual law and library-science degree given out at BYU. Other J. Reuben Clark law graduates attended library school, but he was one of a select handful to do both simultaneously. With the close of the BYU library school in 1993, his education and training became even more unique. Now that he is here, LeGrande feels very fortunate to have attended BYU and have the opportunity to



*"Law librarianship is a people profession, and my own background shows how important other people are to what I do now."*

work here. He is anxious to use his background and experience to help other members of the BYU Law School community.

LeGrande is no stranger to libraries, particularly those associated with higher education. He was a librarian for the LDS Institute of Religion in Huntington Beach, California, before he graduated from Goldenwest Community College with an associate degree in communications. The Harold B. Lee Library hired him to organize materials in its archives part-time for two years while he finished his bachelor's degree in history (with a Spanish minor). He also did a short internship in the archives and spent a great deal of time in the library doing historical research.

Later, during his second year of law school, LeGrande began to look at librarianship as a career and not solely a means of getting through school. He reminisces, "I was working part-time at the BYU history/religion reference desk as a second-year law student and realized I enjoyed law and librarianship. I felt like a fish swimming every day between two different, enjoyable places, and I wanted to bring them together." He talked to other librarians and began looking for ways to combine his interests.

The opportunity to do more with librarianship and law came sooner than LeGrande expected. At the end of his second year of law school, he was hired to work full-time as a catalog paraprofessional for the BYU Harold B. Lee Library. This was more than a summer job; he eventually worked four years as a library paraprofessional full-time while he finished law school part-time. LeGrande comments, "I was fortunate to get very practical, hands-on training in library technical services during my years at the Lee Library. Many people there took the time to teach me to help library users by doing the behind-the-scenes work well. At first some of them did not understand why a law student would be working in a nonlaw library, but they were patient with me anyway."

LeGrande's library experience helped him in law school, too. His research abilities assisted him as a member of the Law School's Jessup International Law Moot Court team, as executive editor and lead articles editor of the Law School's *International and Comparative Law Annual*, and in compiling a legal research guide for Cole Durham's eastern European seminar.

## Kristin Gerdy: Able to Balance

“LeGrande Fletcher’s broad library experience helped many other students when he worked with ICLA,” says Professor Durham. “He was a ‘bluebook whiz’ as well and always willing to help others improve their legal research and writing skills.”

When the BYU library school announced it would be closing, LeGrande was admitted to its last class. He hammered out a dual-degree program, which allowed him to finish his law and library-science degrees together in August 1993. “I had permission from the university, the Law School, and the library school—and my wife—not to sleep for about six months,” says LeGrande.

His first professional law library position came shortly thereafter, when he was hired as the technical services librarian for the Washoe County Law Library in Reno, Nevada, in April 1994. His wife and four daughters moved to northern Nevada, where LeGrande learned about computers and people in law libraries. He planned and carried out a conversion of the law library’s paper files to computer files, set up the library’s Internet access, and created a Web page. Bruce Beesley, chair of the board of trustees of the Washoe County Law Library, noted that LeGrande’s efforts resulted in technological advancements well ahead of when otherwise expected. LeGrande’s other emphasis in Reno was helping people directly. He helped attorneys, judges, and the public find library materials daily, and he worked to improve relations between his library and others in the state. Sally Kinsey, 1997 president of the Nevada Library Association, adds, “LeGrande has a good mind and an understanding spirit and has been a very positive influence for Nevada libraries. He is truly an ambassador for good in all he does.”

LeGrande points out the good influence other librarians, lawyers, and law professors have had on him, especially as he returns to BYU: “I am very grateful to the many people who took the time to help me learn better how to serve others. Law librarianship is a people profession, and my own background shows how important other people are to what I do now.” Hired as government documents and microforms librarian, LeGrande hopes to contribute his unique talents to helping the law students, faculty, and others at BYU.

Kristin Gerdy has spent more time than many balancing legal and religious studies. While attending law school she worked for Religious Education on campus, including the Department of Church History and Doctrine. Her advanced legal writing paper was on “Incorporating the Laws of God into the Practice of Law.” Since graduating cum laude from law school in 1995, she has continued in her desire to better integrate the study of law and religion.

As one of the newest members of the Howard W. Hunter Law Library staff, Kristin says she feels an even stronger need to emulate the life of President Howard W. Hunter and to help law students learn how he balanced his religious devotions and legal practice. “It is not easy,” says Kristin, “but we can try to better balance the study and practice of religion and law. I do not claim to have all the answers nor even to know all the questions, but I have spent some time looking for them.”

Kristin’s time studying religion began in earnest when she joined the LDS Church at age 12 in Colorado with her parents and two younger sisters. She put a great deal of effort into discovering all she could about Mormonism. Kristin comments, “I missed all the Primary-aged classes for young Mormon children and felt like I needed to catch up somehow.” As a teenager in high school, Kristin was so motivated to learn about her new religion that she never missed a day of seminary in four years. Her interest continued when she applied to attend Brigham Young University.

As a journalism major at BYU with a minor in English, Kristin acquired another strong interest—law. She was intrigued by the many facets of law she encountered in her journalism courses. Her communications law class with Dallas Burnett sparked an intense desire to study law; she received the highest grade in Burnett’s course and wanted to know more. Kristin’s writing skills and interest in law led to her

invitation to present a paper at the Western Journalism Historians Conference at UC Berkeley. As one of only two undergraduates invited to speak at the conference, she talked about politics and the American Society of Newspaper Editors. Kristin graduated from college in April 1992 and spent the summer working as a business reporter for the *Daily Camera* newspaper in Boulder, Colorado. Her interest in legal issues also led to her application and acceptance to the J. Reuben Clark Law School.

Kristin began law school in August 1992 and “loved everything” about it. Getting to know the faculty was a highlight for her, as were the friendships she made running the first-year moot court competition. She enjoyed observing how religious law students and law professors live their lives and studied how religion and law interact and what LDS Church leaders teach about the relationship between the two. She worked as a legal-writing teaching assistant and as a research assistant for Religious Education.

During her first law school summer, Kristin analyzed religious issues from a different perspective, reporting for the *Daily Camera* on Pope John Paul II’s visit to Denver for the Eighth World Youth Day in August. Her second law school summer, she compiled all of President Howard W. Hunter’s speeches and writings for the Religious Education area. While doing so she looked closely at President Hunter’s twin commitments to law and religion, how his legal training helped his Church work, and how his Christian values influenced his legal practice. During her last year of law school, Kristin taught religion classes and compiled copies of articles and talks discussing the relationship between religion and law. She wanted to help herself and others be “better able to balance” responsibilities to one’s profession and one’s creed.

Kristin’s study of law and religion motivated her to reach out and share with others what she had learned. After finishing

law school in 1995, she tried to help college and high school students learn more about religion. Continuing to teach part-time for the BYU Department of Church History and Doctrine, she began teaching LDS seminary classes to students attending Oquirrh Hills Middle School in Riverton, Utah. When a part-time position as a reference librarian and legal research instructor came open at the Howard W. Hunter Law Library, she hoped she could teach law students some of what she had learned. She worked part-time for Religious Education



*“It is not easy, but we can try to better balance the study and practice of religion and law. I do not claim to have all the answers nor even to know all the questions, but I have spent some time looking for them.”*

as well as the Law School until her law library position became full-time in the summer of 1996. In the meantime she published articles and made conference presentations on legal research issues to members of the legal community and law library profession.

As a full-time faculty librarian, Kristin says she encourages law students to address the issues involved in integrating religious and legal demands. Pointing to the examples of BYU law professors, the

many graduates of the Law School, and other LDS attorneys and Church leaders, she hopes to help students recognize potential conflicts, solutions, and consequences before they begin legal practice. Howard W. Hunter and J. Reuben Clark, Jr., are her models of those who have excelled in law and religious devotion and in coordinating the demands of both. “Law takes time. Religion takes time,” Kristin says. “And balancing them takes time.”

---

Glenn V. Bird

## Lorena P. Riffo: Living Life *con Ganas!*

In the Latino culture, there is an expression that embodies the remarkable life of Lorena Riffo. When one does something with enthusiasm, determination, and great vitality, she or he is said to be doing so *con ganas!* Lorena has lived her life *con ganas* since she and her parents left Chile as political refugees in 1980. She has also filled each moment of her life with activity and action. She laughingly admits to having been a hyperactive child and suggests this as an explanation for her great energy.

Lorena’s father was the head of Chile’s Association of Artists. In 1973 a successful coup overthrew the regime in power. The leaders of the new government tortured Lorena’s father, trying to persuade him to modify his beliefs. So as soon as he could, he and his family left his homeland and settled in Salt Lake City. This was a move that would prove to be traumatic, especially for the children, but it was necessary in order to survive.

Lorena has always approached life with a sense of adventure and optimism,

which has aided her in her struggles and setbacks along the road to success. Memories of her sister bravely climbing back into bed during the Chilean coup, refusing to lie on the floor one more minute to avoid the machine gun fire, also inspired her to greatness.

Without knowing a word of English, the 13-year-old Lorena was placed in the Salt Lake City public school system. After years of struggle and determination, she graduated from Highland High School in 1985. Now, with just a hint of an accent in her voice, she looks back on her experiences with a sense of pride. She also acknowledges how difficult it was to learn a new language and to adapt to a foreign culture.

According to a recent article about Lorena published in the *Deseret News*, from the time she was very young she has been guided by her mother’s words: “If you want change, you have to make the change.” As a child, she witnessed her parents “practicing what they preached.” Following that example, Lorena continues to work for positive change for herself and those around her.

Typical of Lorena’s energy and character, she entered the University of Utah after graduating from high school, driven to gain as much diverse knowledge as possible. That’s why, in 1989, she was awarded a bachelor’s degree in sociology—and a certificate in criminology and a minor in French. Her success displayed a great aptitude for academics.

Lorena next set her sights on a law degree. She enrolled in the J. Reuben Clark Law School and graduated in 1993. While still at BYU she worked for Senator Orrin Hatch and former Senator Jake Garn. She also clerked for Federal District Court Judge David Sam. Rubbing shoulders with important people was nothing new to Lorena. Her home in Chile was constantly visited by high-profile guests.

The year following her graduation, Utah Governor Michael Leavitt appointed Lorena director of the State Office of Hispanic Affairs. Before this appointment she worked as a juvenile justice project-and-programs specialist for Utah’s Commission on Criminal and Juvenile Justice. She was also an important contributor to the Governor’s Hispanic Advisory Council,

and her participation in the Utah Hispanic Women's Leadership Institute was considered vital to the program's success. On the national level, she was a resourceful member of the United States Senate Committee on Hispanic Affairs. Although Lorena underplays the significance of her achievements, the excellence of her performance has always spoken loudly.

There have been career disappointments, but they have not deterred her. One example is her nomination by Governor Leavitt to be the staff director of the Committee for Consumer Services. Her nomination was not confirmed, because critics felt she lacked the necessary background and her legal training was not directed toward utilities law. The governor expressed his complete confidence in Lorena and said he did not regret the nomination in the least. He was her biggest supporter throughout the confirmation process.

As director of the Utah State Office of Hispanic Affairs, Lorena was characterized by some as a "ball of fire." Coworkers marveled that her job was essentially a 24-hour-per-day job, because she was always on call. She spent much time in

can help all people to see each other as individuals, not just as members of a group." Her grandmother would undoubtedly praise Lorena for this attitude and for her enthusiasm.

Lorena had her staff working on several diverse projects, one of which involved Wendover, Utah—a target community because of its large Hispanic population. Not long ago, Governor Leavitt's wife, Jackie, drove there to deliver a 45-minute speech for a conference on Hispanic rela-



*"Our biggest challenge as a state is understanding that we are a diverse community made up of taxpayers. I think Utah is an incredible place."*

the office, but she also tried to attend as many cultural events as possible that affected the Hispanic community.

Conscientious in her duties with Hispanic Affairs, Lorena was responsible for three staff people and two shared secretaries. As she told the *Deseret News*, "Our biggest challenge as a state is understanding that we are a diverse community made up of taxpayers. I think Utah is an incredible place. I always tell my friends that my family left a life of wealth in Chile for a life of freedom in America. Utah is a place of immigrants, a safe haven for people who have not been accepted in other places. My hope is that our office

assessments. Another part of the program was a well-received short performance by Ballet West. Lorena believes the warmth and generosity of the Wendover Hispanic community could well serve as a model for other areas. "Parents tell me their children feel safe there," she says. She also recognizes "a feeling of sharing," which she would like everyone in Utah to feel.

Assessment visits were completed in St. George, Ogden, Logan, and Park City. While visiting St. George, Lorena resolved to instigate a statewide program to help Driver's License Division officers better understand the needs of the Latino community. Working with Bart Blackstock,

head of the Driver's License Division, a program of diversity training was initiated that is in effect today.

Programs for Hispanic Affairs also included coordinating efforts with other ethnic groups. In addition, several important celebrations, like the Cinco de Mayo Festival and the Hispanic Festival in August, have become cultural showcases.

Lorena's overall strategy for improving conditions for the Hispanic residents of Utah was breaking down walls and building foundations through the arts, religion, politics, business, and the education system. She helped accomplish her goals by being approachable. "My door is always open," she continues to say, promising that "when you phone I may not be in, but I'll get back to you."

Continuing her educational quest, Lorena was awarded a master's degree in public health by the University of Utah in June 1997.

New challenges came Lorena's way when she became the assistant director of the Utah State National Business Development Office. A part of the Department of Community and Economic Development, this office is generally charged with recruiting new businesses to the state. Lorena was instrumental in bringing the Malt-O-Meal corporation to Tremonton. This \$300-million-dollar-per-year investment will be a real boon to northern Utah.

Lorena is currently director of the Division of Corporations and Commercial Code. Her office registers all businesses in Utah each year. They also commission notary publics, monitor limited liability partnerships, and regulate bonding collection agencies. She has given herself one year to implement a plan of allowing businesses to do filing and submit annual reports through electronic mail.

Lorena is married to Ken Jenson of Price, Utah. They dated four years and have a happy and successful marriage. She credits her supportive husband for much of her success. For his part, Ken realizes what a find he has in Lorena. And he knows she will live each day *con ganas!*

*Glenn V. Bird is a freelance writer from Springville, Utah.*

# Seeing the Elephant: 12 Western Legal History Sources

G. LeGrande Fletcher | Pioneers and settlers of the American West faced—and resolved—unique legal situations. If you are researching their legal history, you face various challenges as well. In fact, studying western United States legal history, often called “law for the elephant,”<sup>1</sup> sometimes seems like the old fable from India about the six blind men and the elephant.<sup>2</sup> In the story, each blind person runs into a different part of the elephant (leg, trunk, ear, tail, etc.) and then they argue vehemently over whose perception of the whole animal is correct. “Though each was partly in the right, . . . all were in the wrong” in their interpretations “about an elephant not one of them [had] seen” completely.<sup>3</sup>

## Law v. History

Western and American legal history suffer from similar debates over definition and perspective.<sup>4</sup> Many of these differences exist because some legal historians are history-trained and others are law-trained.

Many lawyers and judges are interested in legal history as a history of a state or region’s laws, with an emphasis on constitutional, judicial, and legislative histories. Their “history” sources are legislative debates and records, judicial and attorney general opinions, case law, and law review articles. The interest is in an intellectual history of the law and its jurisprudence.<sup>5</sup>

In contrast, legal historians with history graduate degrees often view legal history as a history of the state’s legal practitioners—biographies of attorneys, judges, and support staff. Often law enforcement professionals are included. The sources used are similar to those of traditional historians, such as biographies, memorials, and memoirs, as well as personal papers, newspapers, bar publications, and history journals.<sup>6</sup>



A third and related classification for many history-trained legal historians is legal history as a history of an area’s legal and quasilegal institutions. These include courthouses, jails, county and city governments, and state agencies. Sheriff and police departments are sometimes included, as well as vigilante actions, lynchings, and extralegal methods of keeping

the peace. The sources are archival and personal papers, as well as court and county records, legal codes and ordinances, business archives, and political/historical journals. The focus is on the interplay between law and society and law and society’s institutions. Such social and organizational legal histories are closely related to, and sometimes considered, political histories.

The varieties of sources and perspectives are multiplied across locations, historical time periods, and areas of law (water, mining, American Indian, etc.). In addition, there has not been a comprehensive legal history written for any area or state in the western United States.<sup>7</sup> So, if you seem confused<sup>8</sup> at where to start researching or reading western legal history, perhaps you can take some consolation from the elephant riddle “How do you eat an elephant?” Answer: “One piece at a time.”<sup>9</sup>

## Top 12 Sources

For a little guidance as to where to start chewing, here are my top 12 sources for beginning legal history research on American western topics, in order from very useful to useful: The first four are bibliographies and guides to further research. The next two are literature reviews. Sources 7 to 10 are legal histories of various aspects of the West, and the last two are a dissertation and another bibliography. Most university and law school libraries in the western United States have these sources. All of them are available at Brigham Young University.

This article is excerpted from G. LeGrande Fletcher’s “200 Nevada Legal History References: A Selective Annotated Bibliography and Introduction,” published in the winter 1998 issue of *Nevada Law Review*, with earlier excerpt versions published in *Westpac News* 3–4 (Sept. 1994) and the *Nevada Public Lawyer* 17–18 (Spring 1995).

1

Jenni Parrish, *A Guide to American Legal History Methodology with an Example of Research in Progress*, 86 LAW LIBRARY JOURNAL 105–127 (1994).

This guide is a very useful introduction for those who want to write and research u.s. legal history. It includes examples of regional legal history (southern United States). Don't overlook this article, despite its nonwestern legal history focus.

2

Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICHIGAN LAW REVIEW 953–1011 (1987).

Considered the best western legal history bibliography, this reference does a good job of describing all of the elephant. Wilkinson has his own top-12 list on the West at 959–960.

3

John P. Reid, *The Layers of Western Legal History*, in LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 23–73 (John McLaren et al eds. 1992).

This reference complements Wilkinson's bibliography (listed above as source 2) and updates it. A fine synthesis of the many definitions of western legal history, it is part of an entire symposium on western legal history. "Law for the beaver" refers to fur companies and western Canadian legal history.

4

Articles of Related Interest, WESTERN LEGAL HISTORY.

This list of "citations to recent articles from other journals relating to western legal history" is the best way to find current articles on the subject and has been published in every issue of *Western Legal History* since its 1988 inaugural issue. The entire journal is recommended.

5

Kermit L. Hall, *The "Magic Mirror" and the Promise of Western Legal History at the Bicentennial of the Constitution*, 18 WESTERN HISTORICAL QUARTERLY 429–435 (1988).

This literature review is by a well-known writer and bibliographer of American legal history.

6

Charles F. Wilkinson, *Law and the American West: The Search for an Ethnic of Place*, 50 UNIVERSITY OF COLORADO LAW REVIEW 401–425 (1988).

This article comprises a literature review and observations by the same author as source 2.

7

David C. Frederick, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941 (1994).

One of the Ninth Judicial Circuit Historical Society's many fine contributions to western legal history, this indexed book offers an excellent history of the Ninth Circuit's first 50 years.

8

John P. Reid, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980).

This indexed publication looks at concepts of property law among travelers in the early West.

9

*Law in the West*, 24 JOURNAL OF THE WEST 3–72 (JAN. 1985).

This collection of eight articles covers territorial judges, lawyers, peace officers, justices of the peace, vigilantes, women, and water in the West.

10

Gordon M. Bakken, THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER: CIVIL LAW AND SOCIETY, 1850–1912 (1983).

Common law and contract, water, labor, and corporation law in eight western states—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—are examined in this indexed history.

11

Raymond S. August, *Law in the American West: A History of Its Origins and Its Dissemination* (1987) (unpublished PhD dissertation, University of Idaho), microfilmed on UMI No. 87-16852 (Univ. Microfilm Int'l).

This report examines criminal, community property, mining, and water law in the American West, looking at case law, statutes, actual practice, and demographics.

12

Larry M. Boyer, FRONTIER JUSTICE (1979).

This indexed bibliography on western legal history lists 176 books and 327 articles held by the u.s. Library of Congress Law Library.

**Definitions** | As a final note, the term “law for the elephant” comes from the mid-19th-century expression “to see the elephant.” Although the phrase “to see the elephant” refers to “gaining experience in the world,”<sup>10</sup> it also means going through hardships, such as crossing the Nevada desert to get to the California gold rush<sup>11</sup> or facing military battle with little training.<sup>12</sup> Perhaps these sources will help your western legal history research before you reach the point of “seeing the elephant.”

1. Definitions are given in this article’s last paragraph.  
 2. John Godfrey Saxe, *The Blind Men and the Elephant*, in ARTHUR ASA BERGER, *BLIND MEN AND ELEPHANTS: PERSPECTIVES IN HUMOR* 7–8 (1995) (fable written as a poem).  
 3. *Id.* at 8 (emphasis omitted).  
 4. Source 3 in this article at 23; source II at 2–3.

5. Source I at 106.  
 6. *Id.*  
 7. Source 3 at 23.  
 8. Source II at 2.  
 9. Robert Hornstein, *Mean Things Happening in This Land: Defending Third-Party Criminal Activity Public Housing Evictions*, 23 S.U.L. REV. 257, 276 (1996) (how to handle an “elephant-sized task”). *Cf. In re* EDC,

930 F.2D 1275, 1281 (7th Cir. 1991) (“a mouse was trying to eat an elephant at one sitting”).  
 10. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2055 (1968). *See also* GEORGE P. HAMMOND, WHO SAW THE ELEPHANT: AN INQUIRY BY A SCHOLAR WELL ACQUAINTED WITH THE BEAST (1964).  
 11. Source 8 at vii–x. *See also* THE ELE-

PHANT AS THEY SAW IT: A COLLECTION OF CONTEMPORARY LEVY, THEY SAW THE ELEPHANT: WOMEN IN THE CALIFORNIA GOLD RUSH XV–XVI (1990); R. R. TAYLOR, *SEEING THE ELEPHANT: LETTERS OF R. R. TAYLOR, FORTY-NINER* (John Walton Caughey ed. 1951).  
 12. *See* JOSEPH ALLAN FRANK & GEORGE A. REAVES, “SEEING THE ELEPHANT”: RAW RECRUITS AT THE BATTLE OF SHILOH (1989).



**Regional v. National**

Neither the ABA nor the American Association of Law Schools have issued guidelines defining a “national” law school. Whether a law school is considered national or regional has much to do with that school’s reputation in the legal and greater community. However, schools that have developed a national reputation do share some common characteristics, including prestigious faculties, high admissions standards, and a wide geographic distribution of graduates. If reputation and these other characteristics are taken into consideration, BYU has a national law school. In the short time it has been open, the J. Reuben Clark Law School has become one of the leaders in legal education.

Whereas charter class members remember Dean Rex E. Lee persuading them to attend the Law School, today Scott Cameron, associate dean of Admissions, must determine which of the many qualified candidates will be admitted. In fact, the class of

Vicki M. Huebner | As the assistant director of the Career Services Office, I occasionally have the opportunity to counsel prelaw students about their legal career options. Generally these students are most concerned about the type of job they will be able to find after graduation, especially if they want to practice outside the Wasatch Front.

Two years ago one student in particular caught my attention. She was a gifted young woman who had done well in school, had participated in several extracurricular activities, and was being heavily recruited by many law schools. She had been raised in Utah and had done her undergraduate work at BYU. After graduating from college she had worked as a high school teacher just outside Boston, and as we talked she expressed her desire to return there. She was particularly interested in knowing whether the Law School had any connections in Boston and whether she could find a job.

I started to answer her inquiry with my usual sales pitch: describing the outstanding legal education at BYU, the efforts the Career Services Office has made to attract an increasing number of recruiters, and the Law School’s growing reputation. Halfway through my answer she interrupted me and said, “I know that BYU has a good law school. I just want to know if I can find a job in Boston. Is this a regional or a national law school?”

1999 had one of the highest combined GPA/LSAT entrance scores in the country, scoring above students at many other fine academic institutions.<sup>1</sup>

Furthermore, the faculty was recently ranked as the 28th most productive in the nation.<sup>2</sup> Many of these individuals, such as Gerald Williams, David Thomas, Dale Whitman, Michael Goldsmith, and Richard Wilkins, are recognized nationally and internationally for their expertise in the areas of alternative dispute resolution, property law, RICO, and U.N. policy making.

Finally, as an institution privately sponsored by a world-

The class of 1999 had one of the highest combined GPA/LSAT entrance scores in the country.

wide church, the Law School produces graduates who are able to extend their service beyond that of students from many public schools. Our graduates find satisfying employment throughout the world<sup>3</sup>; and, serving in church callings, they assist many more, often beyond their ward boundaries. The members of those early classes, who were persuaded by Rex Lee to attend the Law School, now serve on the bench and are in leadership positions in academia, government, private practice, and industry. With this increasing presence in the legal community, it is no wonder that the Law School is becoming better recognized throughout the nation.

### **The Law School's Influence Is Meant to Be Felt Beyond the Wasatch Front**

During that exciting time when the Law School was first established, many people wondered why the Church had decided

to invest time, talent, and money in a law school at BYU. Despite these doubts, no official statement of its mission or purpose was issued, nor has it been since. Although many different people have publicly stated reasons for the Law School's existence, Rex Lee summed it up best when he asserted:

*So what is the mission of this law school? I'm not sure. But I'm convinced of two things. The first is that it is multifaceted and probably can't be reduced to a few words, or even a single sentence. The second is that the amalgam of values that constitute the mission of this law school will become more apparent to us over the years. . . .*

*[W]hat I still believe is that the value of this institution—and therefore its mission—becomes more apparent as we see what has come from it.<sup>4</sup>*

What has come from the Law School? Attorneys educated in an environment that affirms the restored gospel, who are able to serve governments, industry, societies, and the Church. To further this accomplishment, the Law School's administrative committee has proposed that the school adopt this mission statement: "We educate and empower lawyer-leaders in a Christ-centered atmosphere to benefit families, churches, nations, and the world." Each graduate has much to offer. As we look now at a few of our alumni who are practicing in various areas, you will notice that each serves the community—through either their legal contributions, their church service, or their willingness to build up the J. Reuben Clark Law Society.

### **Nikolai C. Ivanov: Bringing a New Perspective to the British Isles**

Nikolai Ivanov is a 1995 graduate from the LLM program, which provides foreign-trained lawyers a one-year education in American law. "Although I received my initial legal training in England, I personally identify more closely with the law school at BYU," he admitted. Nik received extensive training in commercial law from his British law school. However, he claimed that he learned how to synthesize law and ethics and find a more balanced perspective through his training at BYU.

Nik currently works as a solicitor for Holman, Fenwick & Willan, a large London-based firm with 34 foreign offices. The firm consists of approximately 160 attorneys specializing in shipping, international trade, and commercial arbitration. After obtaining his LLM from BYU, Nik spent three months in Bulgaria before beginning practice. Thereafter, he worked in the firm's London office as a trainee solicitor and recently qualified as a shipping litigation practitioner. He has worked in the firm's Piraeus, Greece, office this year and will soon return to London.

Nik's practice focuses on the areas of shipping and international trade, representing ship owners in contractual disputes regarding the carriage of goods. Although he works for an English firm, only 5 percent of his clients are English, with the remaining 95 percent located in other countries, particularly Greece, India, and the Far East. He finds that the most rewarding aspect of his job is this international focus. "In any one day I can find myself



speaking with clients in four different continents, with vastly different backgrounds—from government trade ministers to a carrier’s untrained crew members,” he said.

In his travels throughout the world, Nik has found that many people are acquainted with Brigham Young University, if not the Law School. He feels a duty to enhance the Law School’s reputation through his professional conduct, and he especially feels a duty to represent the Church, particularly in areas where the Church is still in its infancy. He hopes that the lessons he learned while at BYU will help him attain professional excellence and an eternal perspective.

### **J. Anthony Jarrett: Adding Southern Hospitality and Charm to the Law Society**

Everyone who knows Tony would agree that he is an outstanding lawyer with great leadership capabilities. After graduating in 1996, Tony began working at Alston & Bird, one of the largest law firms in Atlanta, Georgia. He is currently an associate in the tax department focusing on employee benefits law and ERISA. He was attracted to Alston & Bird because of two J. Reuben Clark Law Society members, who he felt would be wonderful mentors. He finds his work challenging and enjoys the opportunity to work on complex benefits matters.

Since arriving in Atlanta Tony himself has become active in the Law Society, which currently has 50 members in the metro Atlanta area. Prior to their becoming an official chapter, members met informally for a quarterly breakfast. Now they are working to increase

their membership. Regardless of where they attended law school, all LDS attorneys are invited to join the Law Society, which exists to encourage high moral and professional standards throughout the legal profession, serve the professional needs of its members, and assist the Law School in fulfilling its educational and professional mission.

With regard to his involvement with the Law Society, Tony stated, “We would like to see our chapter continue to grow. We realize that to do so, we must attract not only LDS attorneys within our own community to the organization but also more BYU students to this area. I feel it was a great honor to attend BYU, and it is incumbent upon me to assist in the placement of BYU law students.” In an effort to bring more BYU students to Atlanta, Tony requested and received permission from his firm’s hiring partner to recruit on campus last year. He said, “It marked the first year that we recruited at BYU. In fact, it was probably the first year we have recruited at any school located in the West, other than Stanford or Berkeley.” Shortly after Tony’s recruiting trip, Alston & Bird extended one student a summer clerkship offer. Another student who met Tony during on-campus interviewing was able, with some networking assistance from Tony and another Law Society member, Craig Pett, to secure employment at a different Atlanta firm.

Tony adds that Atlanta is a great area to work, live, raise a family, and, of course, enjoy major-league baseball. He also emphasizes that his colleagues in the Atlanta chapter are looking forward to meeting inter-

ested students and attorneys and showing them a little Southern hospitality.

### **Albert Mailo: Serving His People in American Samoa**

If the Law School is measured by how its graduates assist others, then Albert Mailo has done much to enhance the school’s reputation. A member of the charter class, Albert has been practicing in American Samoa, his native land, for the past 20 years. His varied career has included both private and government practice. Some of his notable accomplishments include acting as legal counsel to former Governor Coleman and being appointed the attorney general for American Samoa in January 1997.

Practicing on a small island of 100,000 citizens with a proportionally smaller bar, Albert notes the collegiality among bar members. He explained that this unique setting allows him to personally serve the Samoan people. “Through my professional experiences, I have learned to understand people with different perspectives and have gained access to political leaders, and I now have the opportunity to shape the law. Because of my legal training, I have been able to affect the lives of many people.”

Although another BYU graduate worked in American Samoa for a short time, Albert is currently the only Law Society member there. When asked whether it was difficult to be the only J. Reuben Clark graduate in this area, Albert responded, “No.” He stated that he was able to find good mentors who were willing to assist him in the early days of his career. Additionally, there are many members of the

Church who share his beliefs and values. He adds that for those with a sense of adventure and the willingness to work in a different climate and be exposed to different cultures, practicing in American Samoa can be a rewarding career.

### **John Scukanec: Exploring the Alaskan Wilderness**

“Sometimes I think the best part of my job is looking out the window and seeing the whales swim up Cook Inlet,” John Scukanec remarked. “The worst part of my job is the tree that blocks my view of Mount McKinley.” As you may have guessed, John Scukanec works in Anchorage, Alaska.

John first arrived in Alaska in 1956 when he was five years old, and, except for the time he spent out of state to attend college and law school, he has remained there ever since. He still recalls observing his classmates from the Law School’s charter class scheduling all their interviews during the last hectic weeks of the semester and wondering if they would really find jobs in Utah or anywhere else. However, John was not as apprehensive about his job search, since he had always planned to return to Alaska after graduation. Although he may be living far from Utah, he continues to feel closely attached to the university. His son, Jason, plays football for BYU, and he is looking forward to making a couple of trips to Provo each year to watch him play. (John and his wife and golf clubs are already planning to have their trips include the games in Hawaii!)

Currently an assistant attorney general in the Office of Special Prosecutions and Appeals, John argues criminal

appeals before the Alaska Court of Appeals and its supreme court. The most rewarding aspect of his career is successfully arguing and prevailing on appeals in cases involving violent crimes against children. He commented, “It is very satisfying to know that these offenders are in a place where they cannot harm another child. But you never forget the faces of the victims and the families. You just try to move on to the next case.”

John presently serves as a counselor in the Alaska Bush District presidency. It is one of the largest districts in the Church, covering more than 300,000 square miles from the interior of the state to the tip of the Aleutian Islands, and John says it is the best calling in the Church. He advises those who are considering leaving the Wasatch Front to realize that they will be challenged in every phase of their lives and personal beliefs. However, he adds, it is only by being challenged that you are able to have the experiences needed to strengthen your testimony, skills, and professional ethics. And, perhaps, you may just find yourself in an office with a nice view!

### **Jeffrey Siebach: Conducting Business in the Far East**

Jeffrey Siebach has known he wanted to be a lawyer ever since he was in junior high. His teachers quorum advisor was an attorney who brought in cases for the teachers to discuss during MIA. As a teenager growing up in Wichita Falls, Texas, he never considered working overseas, however. Later, serving as a missionary in Fukuoka, Japan, and living in Tokyo for an undergraduate study abroad program, he

developed a love for the Japanese people and a desire to use his legal talents in that area.

Jeff has spent almost his entire professional career working in Japan or Hong Kong assisting Japanese clients. He is currently working in Hong Kong as the Asia regional counsel for Intel Semiconductor, Ltd. Jeff stressed the important role both his mission and his legal training played in accomplishing this goal: “My mission and the decision to obtain a degree in Japanese were the most important decisions I made. They have determined my career path thus far.” In more than one interview, he saw the words “speaks Japanese” written across his resumé. Additionally, his understanding of Japanese culture was enhanced by a multidisciplinary class taught at the Law School by Walter Ames, a lawyer and professor of anthropology.

The Siebach family has enjoyed the opportunity to live overseas, serve in the Church (Jeff is the bishop of his ward), and travel frequently throughout Southeast Asia. “The most enjoyable aspect of my position is the diversity of legal issues and geographical areas within which I work,” Jeff said. “I work with issues that arise from China on the north to New Zealand on the south to Pakistan and Japan and everything in between. It is a dynamic area of the world in which to live, work, and serve.”

### **Russell and Sarah Jean Watterson: Beginning Their Careers in Canada**

Sarah Jean Tingle, a native of Calgary, Alberta, Canada, decided to attend the J. Reuben Clark Law School for a combination of reasons. Her sister

was accepted into a master’s program at BYU, and they felt it would be a great experience to attend graduate school together. Sarah Jean also felt that attending the Law School and receiving a background in u.s. law would be beneficial when she returned home to Canada.

During law school Sarah Jean met and married one of her classmates, Russell Watterson, a Colorado native. Upon graduation, they were presented with the challenge of finding two jobs in one city. Since they both found positions in Calgary, they decided to begin their legal careers there. They are both members of the Colorado Bar Association but are currently practicing as Students-at-Law during their articling year. Russ is working for Bennett Jones Verchere, the largest law firm in western Canada, and Sarah Jean is practicing at Milner Fenerty, the second largest firm in Calgary.

Sarah Jean is enjoying the rotation system at her firm. She has already spent three months in the financial, property, and personal services practice section and is currently working with the insurance, surety, and construction litigation group. Russ’ firm does not have a formal rotation system, but he is attempting to pursue a variety of projects that are of interest to him. Because Calgary is the corporate seat for several large oil and gas companies, most of whom have international operations, Russ has had the opportunity to begin practicing international law. His Spanish language background has particularly proved to be an asset, since the firm has clients throughout South America. Russ has translated several legal documents from Spanish to

English, and this past October he traveled to Colombia to participate in the acquisition of an electrical plant.

As Russ and Sarah Jean begin their professional careers together, they look forward to being admitted to the Canadian Bar Association and to the many opportunities that will be presented to them in the coming years.

### **Our Worldwide Reputation**

So, is the Law School a regional or a national school? The extrinsic data such as faculty reputation and admission scores certainly point to an affirmative answer to that question. The most important evidence, however—the lives of our graduates—confirms the growth, power, and reach of this institution. Clearly, the J. Reuben Clark Law School has a national, even international, mission.

### **Notes**

1. According to the 1996–97 NAPLA Law School Locator developed by Dr. Joseph Burns at Boston College, the combined average undergraduate grade point average and LSAT scores of BYU students placed them in the second out of 16 matrix cells.
2. Lindgren, James and Seltzer, David, *The Most Prolific Law Professors and Faculties*, 71 *Chicago-Kent Law Review* 781, 794. The authors reviewed articles published in the top-20 law reviews between 1988 and 1992 to make their findings.
3. At press time, the most recent employment statistics were for the class of 1996. Graduates in that class found employment in 25 states and two foreign countries. Fifty-four percent of employed graduates found jobs outside of Utah.
4. Rex E. Lee, “Thoughts After 15 Years,” *Clark Memorandum*, p. 17.

**Clark Memorandum**

J. Reuben Clark Law Society  
J. Reuben Clark Law School  
Brigham Young University

