

Spring 2015

Clark Memorandum: Spring 2015

J. Reuben Clark Law School

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J. Reuben Clark Law Society

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CLARK MEMORANDUM

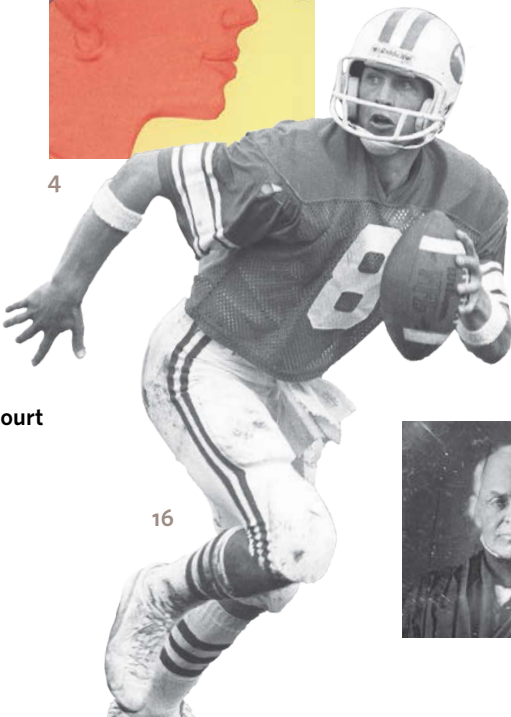
J. Reuben Clark
Law School
Brigham Young
University
Spring 2015



2	Dean's Message <i>James R. Rasband</i>
4	Watchmen on the Tower <i>D. Todd Christofferson</i>
12	Studying Law in the Light <i>Brett G. Scharffs</i>
16	On Becoming a Spiritual Athlete <i>Steve Young</i>
22	The Copyright Predicament <i>Clark D. Asay</i>
28	The Case Against the Supreme Court <i>Erwin Chemerinsky</i>
37	MEMORANDA MEMORIAL LOUNGE THE PRIVILEGE TO SERVE CALENDAR



4



16



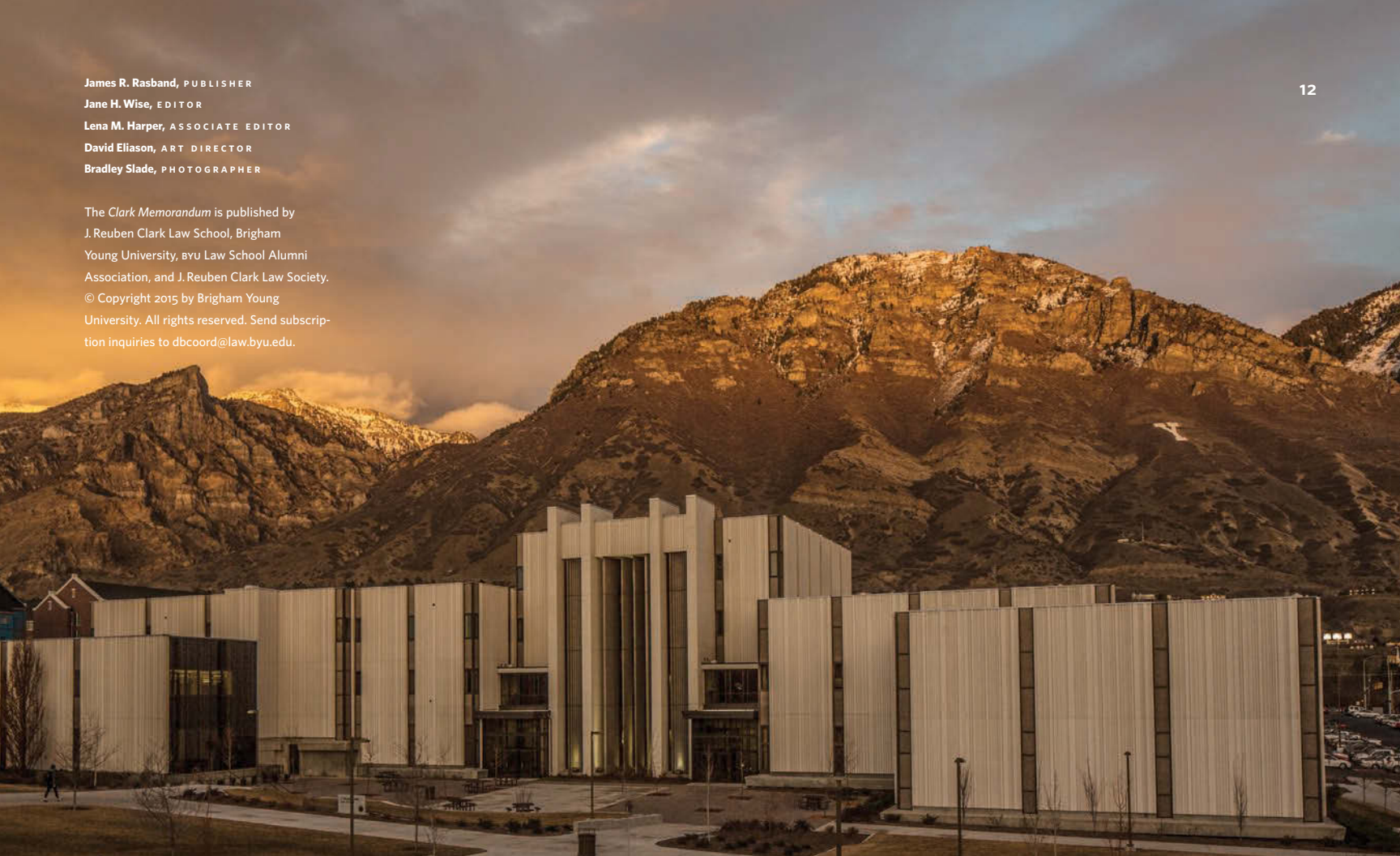
22

28

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12





DEAR ALUMNI AND FRIENDS,

Last fall I had the opportunity to teach the professional seminar course for the first time. The course, which is designed to help students integrate religious and moral values into their service as attorneys, has a venerable tradition at the Law School and is one of the distinctive parts of our curriculum. It is always a joy to be in the classroom, but I particularly appreciated the chance to read and ponder articles—many from past issues of the *Clark Memorandum*—about the roles and core obligations of lawyers in society. Although we often fall short of our noblest aspirations, I found myself energized by the reminder of the fixed stars that should serve as our professional compass.

As most will remember, medieval and early modern tradition recognized only three true “professions”: law, clergy, and medicine. These days it seems as though every job is labeled a profession, partly, I imagine, because of the historical connotation of privilege and authority associated with the “professional” label. At the same time, the understanding of law as one of the original noble professions seems to be dissipating. To fight the former would seem to be a misplaced focus on retaining a privileged position in the hierarchy of job categories. But we should not give in to the latter trend of allowing law to drift from its noble professional moorings.

Various explanations have been offered for why law, clergy, and medicine were separated out and labeled “professions.” Partly, it was the idea that they were held to a specific code of ethics and required some form of oath to uphold that code, thereby “professing” to a higher standard of accountability. The expectation was that professionals would use their privileged position and specialized knowledge for all who required it and not simply for personal advantage.

Another key attribute of these original three professions was that each enjoyed the privilege and obligation of confidentiality. Elder Bruce C. Hafen once explained why: “They are all healers—those to whom we open up our innermost secrets when something seems to threaten our very lives, physically, spiritually, or in some other way that would destroy our liberty or our property—our chance to live. And we go to them to be healed—to be made whole, and to regain control over our lives.”¹

At one of our graduations, Utah Supreme Court Chief Justice Matthew B. Durrant made a similar point: “Often the fact that a person comes to a lawyer means that something has gone terribly wrong in that person’s life. People come to lawyers with broken marriages, broken partnerships, broken bodies, broken lives. They come when they have been done an injustice or stand accused of one. They come when their fortune, or even their freedom, is at risk. In short, people will come to you with a problem, often at a time in their lives when they are most vulnerable. It is how you see that problem that will define you as a lawyer. Do

you see in it the potential for your own profit, or do you see in it an opportunity to serve?”²

As I considered, along with my professional seminar students, the articles by Chief Justice Durrant, Elder Hafen, and others, I was grateful for the reminder that we are not only a learned profession but a healing profession.

That tradition is evident in the pages of this issue of the *Clark Memorandum*, where you can read about David and Chelom Leavitt’s efforts to promote a stable and ethical legal system in Ukraine, Moldova, and Rwanda, as well as Elder D. Todd Christoferson’s charge to “live your faith so that others—inside and outside the legal community—will see your good works, experience your genuine love and friendship, and feel the Spirit working through you.”

I hope you enjoy this issue of the *Clark Memorandum* and that you’ll drop by and visit us at the Law School if you are in Provo. I’d love to give you the nickel tour of our building renovations, introduce you to some of my extraordinary new colleagues, and find a way to involve you in our efforts to prepare students for a learned and healing profession.

NOTES

- 1 Bruce C. Hafen, “To Beginning Law Students on Professionalism” (unpublished manuscript, 1973).
- 2 Matthew B. Durrant, “The Lawyer as Peacemaker,” *Clark Memorandum*, Fall 2008, 12–13.

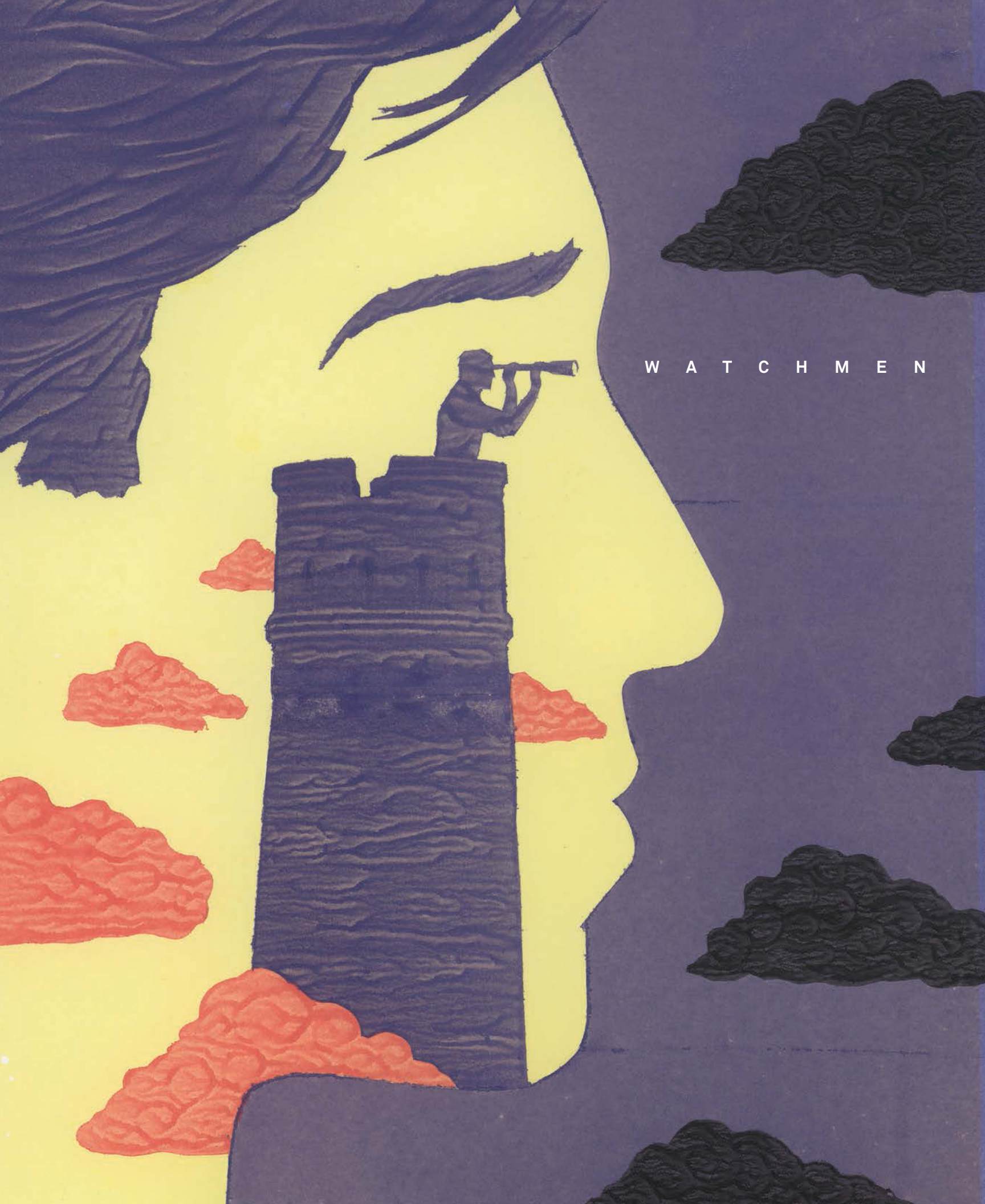
Warm regards,



JAMES R. RASBAND



I FOUND MYSELF ENERGIZED
BY THE REMINDER OF THE FIXED
STARS THAT SHOULD SERVE
AS OUR PROFESSIONAL COMPASS.



W A T C H M E N

Elder D. Todd Christofferson

Of the Quorum of the Twelve Apostles

O N T H E T O W E R

Religious Freedom in a Secular Age

It is a pleasure for Kathy and me to be here in this stunningly beautiful place among friends and fellow lawyers. (Those aren't always the same thing, by the way.) I honor the ideals of this great society, and I commend you for gathering to discuss important issues that affect people and institutions of faith.

The mission statement of the J. Reuben Clark Law Society “affirm[s] the strength brought to the law by a lawyer’s personal religious conviction” and calls on its members to “strive through public service and professional excellence to promote fairness and virtue founded upon the rule of law.”¹ At no time has that mission been more important. So thank you for the invitation to speak here today and for your support of this important society.

ILLUSTRATIONS BY ALEX NABAUM

This
address was
delivered
to members
of the
J. Reuben
Clark Law
Society
in Alberta,
Canada,
on October
17, 2014.

Background and Basic Principles

I especially appreciate the opportunity to share a few thoughts about freedom of religion. As a Church and as individual Church members, we face difficult challenges to our fundamental right to live according to the dictates of our faith. Our basic understanding of morality, marriage, family, and the purpose of life is becoming foreign to the secular cultures in which we live. As President Thomas S. Monson has noted, “Where once the standards of the Church and the standards of society were mostly compatible, now there is a wide chasm between us, and it’s growing ever wider.”² Values we once shared with the great majority of our fellow citizens are now often considered outdated, naïve, and sometimes even bigoted. Because a society’s deepest values drive law and public policy, and because those values in many Western nations are now almost entirely secular, government is increasingly enforcing secular values at the expense of religious ones. And society itself—even without the force of government—can ostracize, stigmatize, and discriminate against religious believers in overt and subtle ways, leaving people of faith marginalized and sometimes even despised. As this happens—and it is happening more rapidly in some countries than others—the space for us to freely and openly live out our deepest beliefs will tend to shrink and our ability to participate in civic life as free and equal citizens will tend to diminish. We indeed face challenging times.

Of course, the Church has *always* faced challenging times and thus has always been concerned about religious freedom. In the early years the Church and its members faced severe persecution, both official and unofficial—and it was often violent. That persecution drove the Saints from New York to Ohio, Missouri, and Illinois. Yet even in Nauvoo, where the Saints had their own city and a large militia to protect them, official and unofficial persecutions continued. The Saints eventually had no choice but to leave the United States, settling in the desert of present-day Utah, then a part of Mexico. Many died as a result of those persecutions,

including the Prophet Joseph Smith and his brother Hyrum, and many more were abused, beaten, and stripped of their property. And, as you know, the persecutions didn’t end when the Saints settled in Utah. As government harassment found its way there too, some Saints migrated north to Canada, seeking peace, security, and freedom. So the history of the Church in Canada has important links to the quest for religious freedom.³

The Church’s commitment to freedom of religion is rooted in its most basic doctrines. The 11th Article of Faith declares: “We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege,

let them worship how, where, or what they may.”⁴ The path of discipleship and exaltation is one of faith-filled obedience and humble service—of willingly giving our lives to the Lord. But faith cannot be forced, and so moral agency is essential to the plan of salvation.

Thus, at a time when religious differences were often the cause of intolerance and violence, the Prophet Joseph Smith proclaimed toleration and equal rights for all faiths. He said:

The Saints can testify whether I am willing to lay down my life for my brethren. If it has been demonstrated that I have been willing to die for a “Mormon,” I am bold to declare before Heaven that I am just as ready to die in defending the rights of a Presbyterian, a Baptist, or a good man of any other denomination; for the same principle which would trample upon the rights of the Latter-day Saints would trample upon the rights of the Roman Catholics, or of any other denomination who may be unpopular and too weak to defend themselves.

*It is a love of liberty which inspires my soul—civil and religious liberty to the whole of the human race.*⁵

Notice the Prophet’s concern about the rights of vulnerable, minority religions that lack sufficient popular support “to defend themselves.” That has always been a core issue when addressing freedom of religion.

More recently, Elder Dallin H. Oaks has emphasized the importance of religious believers of all faiths standing up for religious freedom:

[I]t is imperative that those of us who believe in God and in the reality of right and wrong unite more effectively to protect our religious freedom to preach and practice our faith in God and the principles of right and wrong He has established.

. . . All that is necessary for unity and a broad coalition along the lines I am suggesting is a common belief that there is a right and wrong in human behavior that has been established by a Supreme Being. All who believe in that fundamental [principle] should unite more effectively to preserve and strengthen the freedom to advocate and practice our religious beliefs, whatever they are. We must walk together for a ways on the same path in order to secure our freedom to pursue our separate ways when that is necessary according to our own beliefs.⁶

That task will be difficult and will require constant vigilance, but it is of vital importance. As Elder Quentin L. Cook has said:

Extraordinary effort will be required to protect religious liberty. Our doctrine confirms what the U.S. founding fathers and political philosophers have advocated.

“No government can exist in peace, except such laws are framed and held inviolate as will secure to each individual the free exercise of conscience” (D&C 134:2).⁷

As you review these and other statements by modern apostles, notice that the freedom being spoken of is not merely what political philosophers have referred to as the “negative” freedom to be left alone, however important that may be. Rather, they speak of a much richer “positive” freedom—the freedom to live one’s religion in a legal, political, and social environment that is tolerant, respectful, and accommodating of religion. For the faithful, religion is not just a private hobby but a way of life bound up with one’s personal identity and dignity.

Naturally, virtually everyone in the Western democracies claims to believe in the *principle* of religious freedom. It is the application of the principle that creates controversy. Threats to religious freedom typically arise when religious people and institutions seek to say or do something—or refuse to say or do something—that runs counter to the philosophy or goals of those in power, including political majorities. As the experience of

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apostles and prophets, ancient and modern, invariably demonstrates, religion is often counter-cultural and thus unpopular. Likewise, religious freedom, while generally supported in principle, is often vigorously opposed in practice.

I was in Houston the day before yesterday. An article in the paper that morning reported on subpoenas being issued by the city government to a number of pastors, from Southern Baptist to nondenominational clerics, to turn over copies of any sermons and pastoral communications dealing with homosexuality, gender identity, or Annise Parker, the city’s openly lesbian mayor. The *Houston Chronicle* reported that opponents of Houston’s new antidiscrimination ordinance had filed a lawsuit, and the city’s attorneys had responded by issuing the subpoenas to pastors. The pastors are not part of the lawsuit, but they have opposed the ordinance. One pastor responded, “This is an attempt to chill pastors from speaking to the cultural issues of the day. The mayor would like to silence our voice.”⁸

So how are principles of religious freedom to be advocated in Canada, the United States, and in other places around the world? In secular societies that prize secular values more than religious truths and that increasingly see religion as an impediment to social progress, those who support religious freedom must carefully distinguish between what is vital and what is less critical. Think about these difficult questions:

- ① What protections are essential so that Church members and families can have sufficient freedom to live the gospel and pass on their faith to their children?
- ② What protections are central to the ability of the Church to carry out its divine mission to preach the gospel of Jesus Christ, administer the ordinances of salvation to the living and the dead, and strengthen home and family?
- ③ How and when should the Church get involved in social and moral issues that affect religious freedom?

Some answers to these questions remain constant. For example, the Church must be able to select its own priesthood leaders without any outside interference. But with some questions, answers will turn on the diverse situations the Church faces in different countries around the world.

Recent Church Experience in Canada—The Same-Sex Marriage “Reference” Case

The Canadian same-sex marriage case provides a useful example of the pragmatic approach the Church must sometimes take in matters of religious freedom. As you know, the Church has been very clear in its teachings and public statements about the Lord’s pattern of marriage. “The Family: A Proclamation to the World” states “that marriage between a man and a woman is ordained of God” and “is essential to His eternal plan.”⁹ Marriage and family are

central “to the Creator’s plan for the eternal destiny of His children.”¹⁰ The proclamation calls on Church members and people of goodwill to raise their voices in support of the Lord’s pattern of marriage because it is best for children, families, and society.

Accordingly, in the United States and other nations, often in concert with other religious groups, the Church has exercised its right to express its view that public policy should retain and support the traditional husband-wife definition of marriage.

But same-sex marriage also presents serious religious freedom challenges for Latter-day Saints and other believers. These challenges are often not well understood, even by faithful Church members. Without going into great detail, suffice it to say that a legal system and a society that define and protect marriage as the union of two people regardless of gender will tend to be more hostile toward—and less tolerant of—religious institutions and people of faith who teach that God has ordained marriage to be the union of husband and wife. A government and a society committed to the “genderless” marriage model will tend to suppress traditional marriage beliefs and practices as invidiously discriminatory.

Thus the Church’s opposition to same-sex marriage entails both deep concern for the welfare of children and families *and* concern for the freedom of the Church and its members to teach and live the gospel of Jesus Christ.



THE CHURCH NEEDS TO KNOW,
BASED ON YOUR EXPERTISE AND POSITION,
ABOUT THREATS TO RELIGIOUS FREEDOM.
IT NEEDS TO KNOW ABOUT GATHERING STORMS.

Nevertheless, the Church is keenly aware of political and social realities. In the public realm, the Church must make difficult, pragmatic decisions about how and when it expresses its views on marriage and which public policies it advocates or opposes, even as it upholds and defends the purity of its doctrine.

This brings us to the Canadian same-sex marriage case. As many of you may know, by 2003 several provincial courts had interpreted the Canadian Charter of Rights and Freedoms to grant same-sex couples the right to marry on equal terms with husband-wife couples. Rather than resist this trend in the Supreme Court of Canada, the federal government decided to redefine marriage to include same-sex couples. Politically, there appeared to be little or no chance that the government would change its mind or that a majority of Parliament would reject the government’s proposal.

Parliament nevertheless sought Supreme Court clarification on several important points. Through the established “reference” procedure, the government referred four questions to the Supreme Court:

- ♦ The first two asked whether the Parliament of Canada had the authority to determine legal capacity for marriage and, if so, whether its proposed Act was consistent with the Canadian Charter of Rights and Freedoms.

- ♦ The third asked whether “the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter protects religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs.”
- ♦ The fourth asked whether the traditional opposite-sex definition of marriage is consistent with the Charter.¹¹

Through an admirably open process, diverse groups from across Canada were allowed to submit legal arguments to the Supreme Court. The Church could have chosen to argue against same-sex marriage itself, as it has done in other contexts. It could also have lent its support to other groups opposing the same-sex marriage legislation in Parliament. But because it was apparent that Parliament was headed that way regardless of contrary views, the Church instead chose to focus on the religious freedom issue, where it believed it could have the most influence.

Working through our legal counsel at Kirton McConkie in Salt Lake City, the Church selected superb local counsel with experience in advocating before Canada’s appellate courts. One of those lawyers, Peter Lauwers, now serves as a justice on the Court of Appeal for Ontario.

The Church’s legal teams sought to broaden the issue beyond the narrow right of religious officials to refuse to solemnize same-sex marriages, as important as that is, to include the institutional rights of churches themselves. They crafted an argument for the Church’s factum (or brief) urging the Court to recognize that churches need autonomy to govern their internal affairs, select their leaders, and control their sacred properties—even if that means not participating in, accommodating, or recognizing, for religious purposes, same-sex marriages and related celebrations.

The Church intervened in the case, and its legal counsel presented oral argument before the Supreme Court, which was well received by the Justices. The approach was successful. While technically not covered by the reference questions, at the Church’s urging the Supreme Court nevertheless reaffirmed its commitment to religious freedom not only for religious officials in the performance of marriage rites but also for religious

institutions in their ownership of sacred properties. In its decision, the Court made a number of critically important statements that shored up religious freedom in Canada:

- ① First, the Court made a very important and broad statement affirming religious freedom generally. It said: “The right to freedom of religion enshrined in section 2(a) of the Charter encompasses the right to believe and entertain the religious beliefs of one’s choice, the right to declare one’s religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice. The performance of religious rites is a fundamental aspect of religious practice.”¹²
- ② On the specific issue of clergy being forced to solemnize same-sex marriages, the Court stated: “It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under section 2(a) of the Charter.”¹³
- ③ The Court then went on to address religious property issues, which as a practical matter means property owned by religious institutions: “The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised [and here the Court was referencing the Church’s legal argument] about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. *The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages suggests that the same would hold for these concerns.*”¹⁴

Notice some of the important things the Court emphasized as falling within the protection of the Charter: (1) the right to believe and choose one’s religion; (2) the right to declare one’s religious beliefs openly; (3) the right not only to hold a belief but to “manifest” it “by worship, teaching, dissemination and religious practice”; (4) the right of religious officials to control the performance of religious ceremonies; and (5) the right not to have sacred properties used for the celebration of same-sex marriages—and, by implication, for *any* activities that are contrary to a religion’s doctrines and norms.

These are significant acknowledgments of vital rights. The Church’s participation helped to shore up these critical legal protections for religious officials and churches. Religious freedom isn’t absolutely protected in Canada—or anywhere, for that matter—but what the Church helped secure from the Canadian Supreme Court was a strong wall of protection that so far has served the Church and its members in Canada well.

Protecting Religious Freedom Generally and the Role of JRCLS Members

The Church’s experience in the Canadian same-sex marriage case highlights the sort of principled, faithful pragmatism that must guide the Church in navigating difficult religious freedom issues in secular societies that are increasingly suspicious of religious viewpoints. It has required the Church to distinguish between the ideal and the essential.

For example, as I asked earlier, what religious freedom protections are central to the ability of *the Church* to carry out its divine mission? Clearly the rights mentioned by the Canadian Supreme Court are essential. But that was by no means a comprehensive list. The following rights are also vital:

- ① the right of the Church to define its own doctrine;
- ② the right of the Church to select its own priesthood and other leaders based on its own policies and divine inspiration without *any* interference from government;
- ③ the right to determine who may and may not be a member of the Church and the privileges and limitations of membership;
- ④ the right to own property and build Church meetinghouses and temples free from unreasonable restrictions;

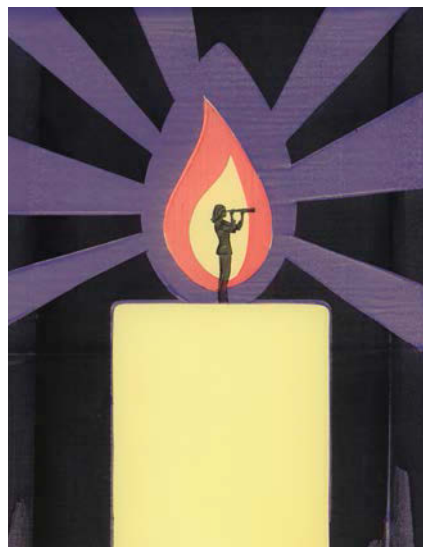
- ⑤ the right to peacefully gather for worship, activities, and socializing;
- ⑥ the right to receive and control sacred funds donated by Church members;
- ⑦ the right to operate schools and universities on equal terms with other religious and secular groups; and
- ⑧ the right not to be retaliated or discriminated against by government—such as by the denial of tax-exempt status—because of the Church’s beliefs and teachings.

This is by no means a comprehensive list either, but you can begin to see some of the areas in which conflicts might arise.

And what about the rights of *individual Church members*? What protections are essential so that members and their families can be free to live the gospel and pass on their faith to their children? That is not an easy question. Obviously the rights mentioned by the Canadian Supreme Court go a long way toward protecting individuals from outright oppression. But what about the ability to teach your children the gospel without having them or their beliefs directly targeted for ridicule or suppression? Should parents have the right to opt out of certain social or school programs that might teach their children concepts contrary to Church doctrine?

What about the right of Church members to earn an honest living in professions like the law and social work without abandoning their beliefs about marriage and family? Should, for example, a Church member who openly believes in the Church’s teachings regarding marriage and the law of chastity be barred from being a social worker? Should a qualified LDS attorney who graduated from BYU’s law school, which has an honor code that forbids sexual relations outside a husband-wife marriage, be precluded from practicing law in Canada? A growing number of voices would answer yes to both these questions.

You may be aware of the travails of the prospective Trinity Western University School of Law in British Columbia. Trinity Western University (TWU) is a private religious school in Langley. Like BYU, it has an honor code—or, as they call it, a “covenant”—that all students are required to sign. It includes a commitment to not



engage in sexual relationships outside of heterosexual marriage. TWU has approval to open a law school in 2016, but the board of governors of each provincial law society determines whether to recognize degrees from the law school. A number of provincial law societies have voted to do so, but we are now seeing increasing fire from activists who oppose TWU because they consider the school’s covenant “discriminatory.” The board of governors in British Columbia recognized the law school earlier this year. The Church was one of the entities that filed a letter in support at the request of the sponsoring religious institution. Some provincial law society members, however, have challenged the board’s action, and now the matter will be put to a referendum this month.¹⁵

Obviously, Church members should be legally protected, like all other religious groups, from discrimination in employment, housing, and places of public accommodation. But should members of the Church who own small businesses have the right to decline to facilitate same-sex marriages just as members of the clergy have the right not to solemnize them? Does it matter if there are plenty of other business owners willing to provide the same services at a comparable price?

These and many other related questions raise sensitive issues and can be very difficult to answer in the different contexts in which Church members live around the world. A principled, faithful pragmatism must guide the Church when addressing such issues.

Therefore, What?

I come back to the J. Reuben Clark Law Society and what you as LDS attorneys can do to help protect religious freedom. Again, without presuming to offer a comprehensive list, let me focus on three areas.

First, it is important that you become informed about existing and potential threats to religious freedom. In the United States at least, and I suspect it is the same here, whenever any sort of construction project is proposed, environmental groups are quick to recognize any adverse environmental effects that the project may create. They have spent the time and effort needed to understand the issues so they can detect threats to the interests they care about. In like manner, we need lawyers who care enough about religious freedom and are well enough informed that they can recognize both existing threats and those that are likely to materialize in the future.

To do that in a truly helpful way, you need to excel in your chosen field of practice, to maintain the highest professional and personal standards, and then to get involved in the important institutions and forums that pertain to your field. You need to be among the best and most respected in your area of the law. As you strive toward this goal, you will gain the expertise to detect religious freedom threats in specific areas of the law and public policy. You will have the respect of your professional colleagues, so they will listen to you as you raise concerns. And in some instances you will be in a position—perhaps even within government—from which you can directly propose and help enact positive solutions.

So pursue excellence in your chosen area of practice; be attorneys of the highest integrity; earn the personal and professional respect of your legal peers; get involved where it matters in your field; and be, as it were, “watchmen on the tower” of religious freedom.

Second, we need you to keep the Church informed of risks and concerns—and then to be patient. The Church needs to know, based on your expertise and position, about threats to religious freedom. It needs to know about gathering storms. We need appropriate and orderly mechanisms so the Church can be better informed of potential threats to religious liberty, and those mechanisms are something we will be developing in the months ahead.

But we also need you to understand that, just as with the Canadian same-sex marriage case, the Church must make prudential decisions based on what can realistically be accomplished given the Church’s resources, vulnerabilities, and other goals. That may mean that the concerns you raise do not result in the Church’s taking action. (If it is of any comfort, you should know that not all of my opinions and recommendations are heeded either.) But it will also mean that when the Church decides to act, you will be ready to assist in the best way possible.

Finally, and more broadly, the Church and society need you to be examples of the believers, in word and deed. Elder Cook has said, “One of the reasons the attack on moral and religious principles has been so successful is the reluctance of people of faith to express their views.”¹⁶ We need you to speak up—to express your views and defend the faith. And we need you to do so with respect for the beliefs of others and with dignity and decency as disciples of Jesus Christ.

And, just as important, you must live your faith so that others—inside and outside the legal community—will see your good works, experience your genuine love and friendship, and feel the Spirit working through you. Because as they do, they will want to listen to you and understand when you say your religious freedom is being abridged. They may not agree with you or even understand entirely the issue that is so important to you. But if they know you and respect you because you are a true disciple of Christ, they will be far more inclined to work toward a solution that respects the religious freedoms of both you and the Church.

Conclusion

Brothers and sisters—fellow attorneys—ours is a noble profession. At its highest, the legal profession defends the vulnerable, secures God-given rights, promotes justice and order, mitigates and often avoids conflict, and brings peace. May we strive for excellence in all we do so we will be ready when the Lord calls us to defend the cause of righteousness and freedom. May we stand as watchmen on the tower, ever vigilant against forces that would harm essential liberties. May we build bridges to all around us by living as true disciples. And may we, as advocates and mediators, strive in all things to emulate Jesus Christ, our Advocate and Mediator with the Father. In the name of Jesus Christ, amen. CM

NOTES

- 1 *Mission Statement*, J. REUBEN CLARK LAW SOCIETY, http://www.jrcsls.org/?folder=about_us&page=mission_statement.
- 2 Thomas S. Monson, *Priesthood Power*, ENSIGN, May 2011, at 66.
- 3 For more on the Church in Canada, see THE MOR-MON PRESENCE IN CANADA (Brigham Y. Card et al. eds., 1990), and REGIONAL STUDIES IN LATTER-DAY SAINT CHURCH HISTORY: WESTERN CANADA (Dennis A. Wright et al. eds., 2000). A summary of the persecution of the Saints is available in Lisa Bolin Hawkins, *Persecution*, in 3 ENCYCLOPEDIA OF MOR-MONISM, 1076–77 (Daniel H. Ludlow ed., 1992).
- 4 THE ARTICLES OF FAITH OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, no. 11, *available at* <https://www.lds.org/scriptures/pgp/a-of-f/1.11?lang=eng>.
- 5 Joseph Smith, Discourse in Nauvoo, Illinois (July 9, 1843), as reported by Willard Richards, in HISTORY OF THE CHURCH 5:498–99.
- 6 Dallin H. Oaks, “Preserving Religious Freedom,” Speech at Chapman University School of Law (Feb. 4, 2011), (transcript available at <http://www.mormonnewsroom.org/article/elder-oaks-religious-freedom-Chapman-University>).
- 7 Quentin L. Cook, *Restoring Morality and Religious Freedom*, ENSIGN, September 2012, at 38.
- 8 Todd Starnes, *City of Houston Demands Pastors Turn Over Sermons*, FOXNEWS.COM, Oct. 15, 2014, <http://www.foxnews.com/opinion/2014/10/14/city-houston-demands-pastors-turn-over-sermons/>.
- 9 The First Presidency and Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* (Sept. 23, 1995), *available at* <https://www.lds.org/topics/family-proclamation>.
- 10 *Id.*
- 11 *Reference re Same-Sex Marriage*, 2004 SCC 79, 3 S.C.R. 698 at paras. 2–3.
- 12 *Id.* at para. 57.
- 13 *Id.* at para. 58.
- 14 *Id.* at para. 59 (emphasis added).
- 15 Following this address on October 30, 2014, it was reported that members of the British Columbia provincial law society voted 5,951 to 2,088 to withdraw accreditation from the proposed Trinity Western University School of Law. See Ian Mulgrew, *B.C. Lawyers Vote Down TWU Law School*, VANCOUVER SUN, Oct. 30, 2014, <http://www.vancouversun.com/news/metro/lawyers+vote+down+school/10339932/story.html>.
- 16 Cook, *supra* note 7.

STUDYING

LAW

IN THE

LEGHT

God's laws
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yardstick
but rather as
a source of
illumination.

BRETT G. SCHARFFS'

WHEN I was a student at Georgetown University, as one of two Latter-day Saint, or Mormon, undergraduates, I was invited to say the prayer at a university event honoring a Mormon businessman, Bill Marriott. I remember worrying acutely about how I should close my prayer. I was at a Catholic university—should I pray according to Catholic conventions? What would Bill Marriott think if I, the handpicked Mormon student, was not praying in a Mormon fashion? Finally I asked Father Timothy S. Healy, SJ, who was the president of the university and from whom I was taking a poetry class. Father Healy told me to pray in the usual Mormon way, which is to end a prayer by saying, “In the name of Jesus Christ, amen.”

.....
*This address
was given at the 2014
Conference of
Religiously Affiliated
Law Schools at
the University of
St. Thomas School
of Law on September
18–19. The conference
was titled “Religious
Identity in a
Time of Challenge for
Law Schools.”*
.....

PHOTOGRAPHY BY BRADLEY SLADE



Years later I was at a luncheon hosted by leaders of The Church of Jesus Christ of Latter-day Saints as part of one of our annual International Law and Religion Symposium at BYU Law School. Elder Henry B. Eyring, first counselor in the First Presidency of the Church, was speaking to a group of professors, religious leaders, and government officials from approximately 40 countries and a variety of religious traditions.

At the end of his remarks he left a blessing, and his choice of words made an impression on me. He said, “Let me conclude in my way—with respect for your ways—in the name of Jesus Christ.”

In a setting like this, a conference of religiously affiliated law schools, I hope you will forgive me as I speak quite personally in my way—with respect for your ways—about how we think about our vocations and stewardships as scholars of faith at BYU Law School.

Of course I must begin with a larger-than-usual disclaimer: I will be talking about our ideals, not necessarily our successes in measuring up to those ideals.

Our Mission to Study Law in the Light

The BYU Law School’s mission statement begins: “The mission of the J. Reuben Clark Law School is to teach the laws of men in the light of the laws of God.”

This statement can be traced to the charge given by another Church leader, President Marion G. Romney, a counselor in the First Presidency of the Church, during the opening ceremony on the first day of classes at BYU Law School on August 27, 1973. On that occasion President Romney said the board of trustees established BYU Law School “so that there may be an institution in which you, the members of this class, and all those who shall follow you, may ‘obtain a knowledge of . . . [the] laws of . . . man’ in the light of the ‘laws of God’ [D&C 93:53].”

We repeat this mission statement often, but it took me about five years to pick up on something important: President Romney did not charge us to study the laws of men “in light of” the laws of God. “In light of” would seem to suggest “as measured against,” or using the laws of God as a kind of yardstick. Rather, he challenged us to study the laws of men *in the light* of the laws of God. This articulation suggests that God’s laws serve

not as a yardstick but as a source of illumination. In shorthand fashion, we speak of studying “law in the light.”

God’s Light

What might it mean to study law in the light of God’s laws? To my mind, the most important doctrine common to the Abrahamic faiths—the Jewish, Christian, and Muslim religions—is that God created all of us, His children, in His image. In the first chapter of Genesis we read, “And God said, Let us make man in our image, after our likeness. . . . So God created man in his own image, in the image of God created he him; male and female created he them” (Genesis 1:26–27).

Reflecting upon this idea, the philosopher Jeremy Waldron helped me see something new in the New Testament story in which a group of Pharisees sought to entangle Jesus using a question about whether or not it is lawful to give tribute to Caesar. Jesus, sensing their motives, asked to see the tribute money and asked his interlocutors whose image was superscribed on the penny. When they answered that it was Caesar’s image, Jesus said, “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s” (Matthew 22:21; see also verses 15–22).

I had thought of this scripture as providing a justification for obeying civil laws or as an awareness of two kingdoms—the kingdom of God, on the one hand, and the kingdom of man, on the other. But Waldron provocatively asked: What is it that we are to render unto God? What is it that bears a superscription of the image of God?

It is you and I, His children, who are created in His image.

I had missed the important part of the story—that we are to render unto God the things that are God’s, and that it is you and I who are stamped with God’s image and who are His.

When we strive to love and serve God we seek to have His image engraved upon our countenance. A Book of Mormon scripture written by the prophet Alma asks, “I say unto you, can ye look up to God . . . with a pure heart and clean hands? I say unto you, can you look up, having the image of God engraven upon your countenances?” (Alma 5:19).

In response to the question What is the most important part of God’s law? Jesus said, “And thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind, and with all thy strength: this is the first commandment” (Mark 12:30). I believe that as scholars of faith our obligation is to strive to serve God with all our “heart, might, mind and strength” (D&C 4:2)—with an emphasis, given our chosen vocations, on serving Him with our minds.

Becoming a Graduate Program of Real Consequence

Brigham Young University’s mission statement also says something important with respect to our work as scholars of faith. BYU is primarily devoted to undergraduate teaching and education. The university has more than 30,000 students but a relatively small number of graduate programs. The idea, I think, is to prepare students to pursue graduate studies at other leading universities in the United States and around the world. Indeed, the Law School is the only graduate-only program at the university.

But the university’s mission statement promotes “scholarly research and creative endeavor among both faculty and students, including those in *selected graduate programs of real consequence*.” As a law faculty, when we gather together to reflect upon our work during retreats and in other settings, we often discuss whether we are meeting this charge of being a graduate program “of real consequence” and what that means.

Producing Influential and Enduring Legal Scholarship

As part of its mission statement, the Law School also articulates seven goals, including one that relates directly to becoming a graduate program of real consequence through our scholarship.

This goal is to “produce influential and enduring legal scholarship.”

In our reflective moments, we also think about the adjectives *influential* and *enduring*. *Influential* suggests something that is authoritative, forceful, weighty, significant, important, and crucial (according to the Merriam-Webster and the Oxford online thesauruses). And *enduring* carries the

EACH
OF US IS A
SOURCE
OF ILLUMI-
NATION.

connotation of something being continuing or long lasting.

I am not sure what the precise recipe is for producing scholarship that is influential and enduring, but perhaps I can offer a few general suggestions.

Influential and enduring scholarship will

- focus on large as opposed to small questions;
- focus on lasting issues, not just those of contemporary interest or fashion;
- focus on theory and policy (yes, even morality) as opposed to just precedent or new needs;
- focus on important questions, not just pressing questions;
- subject itself to external standards and not just strive for internal coherence;
- seek to illuminate rather than to obscure or problematize; and
- seek truth, not just to persuade.

This last point is perhaps the most important. As scholars of faith, our scholarship should be not just about the production of scholarship—or even its publication in prestigious outlets or even citation counts—but rather, at its best, about the pursuit of truth.

In the Mormon tradition there is a broad understanding of what the sources of truth are and what it means to seek truth.

The Hebrew sage Maimonides said: “You must accept the truth from whatever source it comes.”

The first Latter-day Saint prophet, Joseph Smith, said something similar: “The first and fundamental principle of our holy religion is, that we believe that we have a right to embrace all, and every item of truth, without limitation or without being circumscribed” (“Copy of a Letter from Joseph Smith Jun. to Mr. Isaac Galland,” March 22, 1839, in *Millennial Star* 7, no. 4 (February 15, 1846): 51). This explains Joseph Smith’s skepticism of the various religious creeds of his day, which he viewed as limiting. “I cannot believe in any of the creeds of the different denominations,” he said, “because they all have some things in them I cannot subscribe to, though all of them have some truth. I want to come up into the presence of God, and learn all things” (*History of The Church of Jesus Christ of Latter-day Saints*, ed.

B. H. Roberts [Salt Lake City: The Church of Jesus Christ of Latter-day Saints, 2nd ed. revised, 1950], 6:57).

Joseph Smith’s nephew, President Joseph F. Smith, who also became a prophet, expressed this idea as follows: “We believe in all truth, no matter to what subject it may refer. No sect or religious denomination in the world possesses a single principle of truth that we do not accept or that we will reject. We are willing to receive all truth, from whatever source it may come; for truth will stand; truth will endure” (“Devotion to the Cause of Zion,” Editor’s Table, *Improvement Era*, June 1909, 673).

Mormons, of course, including me, a Mormon scholar of faith, are not always so courageous or open minded. But this is the standard against which we are encouraged to measure ourselves and the ideal to which we are encouraged to aspire. This is the light in which we are encouraged to study the law. Another Mormon scripture says, “The glory of God is intelligence, or, in other words, light and truth” (D&C 93:36).

To Strive to Study Law in the Light

I will end where I began: by repeating the opening sentence of our mission statement: “The mission of the J. Reuben Clark Law School is to teach the laws of men in the light of the laws of God.”

I like to think of different faith traditions as well as nonreligious perspectives and each of our efforts to understand and find meaning within those traditions as sources of illumination. We can each learn the law in the light of each other, for each of us is not just a collection of positions, with which others of us may agree or disagree. Each of us is a source of illumination.

Perhaps, then, this is an ambition that can be shared by all scholars of faith—to strive, even as we fall short in our striving, to study law in the light. 

NOTES

- 1 Francis R. Kirkham Professor of Law and associate director of the International Center for Law and Religion Studies, J. Reuben Clark Law School, Brigham Young University; BS, BA, MA, Georgetown University; BPhil, Oxford University; JD, Yale Law School.

STEVE YOUNG

ON BECOMING A SPIRITUAL ATHLETE

FIRST, LET ME THANK BYU LAW SCHOOL, DEAN RASBAND, PRESIDENT WORTHEN, AND PARTICULARLY FORMER DEAN REESE HANSEN. DEAN HANSEN HAD THE VISION TO NAVIGATE MY ADMISSION TO LAW SCHOOL THROUGH ROUGH SEAS BY PETITIONING THE ABA SO THAT I COULD ATTEND ONLY WINTER SEMESTER LAW CLASSES FROM 1988 TO 1994. TWO OF THOSE SEMESTERS I WAS FOUR WEEKS LATE BECAUSE I WAS PLAYING WITH THE 49ERS IN THE SUPER BOWL. ALL THOSE YEARS I WAS LATE TO THE FIRST CLASSES OF THE SEMESTER BECAUSE OF PLAYOFF GAMES THAT WENT DEEP INTO JANUARY. I WOULD ATTEND CLASS THE DAY AFTER THE SUPER BOWL, AND JIM GORDON OR RICHARD WILKINS WOULD ASK FOR MY NOTE FROM HOME FOR BEING LATE.

ILLUSTRATION BY EVGENY PARFENOV



This address was delivered at the annual Founders Day commemoration in Salt Lake City on August 27, 2014.



There were many benefits of attending law school, but one negative aspect was the number of times that a defensive player would hit me late and then yell, “What are you going to do about it—sue me?”

I would always answer that I had retained the chief legal counsel for the NFL. That would create enough doubt to hold them back for a few plays.

I am very proud of my JD. My dad was very proud of my JD too. Throughout my 18 seasons of professional football he kept asking, “When are you going to get a real job?” He pushed me to be prepared. He said, “What are you going to do when the day comes that you aren’t playing football anymore?”

Law school has been a platform for success in my life as I have transitioned from professional football. The day after I retired in 2000 I woke up to the realization that the one thing I was really, really good at was over. Having my law degree opened up opportunities, like my becoming a partner in a large private equity company, that would have been impossible without it.

THE NEW JOE MONTANA

While I was attending law school in the winter I was playing football in the NFL from July through January. In 1991, in the midst of my law school experience, I was thrust into the starting lineup for the San Francisco 49ers. Joe Montana was hurt, and I held the reins of the most successful team of the decade. The feeling of responsibility was enormous. I struggled with every fiber of my being to try to keep the flame of success going, but the team was floundering. It seemed as though all my efforts fell short of the “Joe Montana standard.” I had to remind teammates and fans that Joe had thrown an interception once and had actually lost a game or two. It was in this environment that an op-ed was written in the *San Francisco Chronicle*: “The Gulf War: It’s Steve Young’s Fault.” I mean this is as tough as it gets—like trying to replace Jim McMahon at BYU with his 83 NCAA records. It was a frustrating time.

I found myself on a plane from Salt Lake City to San Francisco sitting next to Stephen R. Covey. I opened up to him and unloaded all of my frustration and fear about how hard it was, how difficult it was to please so many people, and how I wasn’t living up to their expectations. “There are too many guys on the field—11 is unmanageable,” I told him. “There are too many variables of focus and preparation with so many people. I should have played golf or tennis.”

TOO MANY PEOPLE AND A DIFFICULT PLATFORM

He agreed that it was a difficult situation no one would walk into voluntarily. He told me that the optimal number for efficient interaction with people in a group is seven. Once an eighth person is added, it becomes geometrically more difficult to work efficiently. He

agreed that 11 was very difficult to manage. But he also said that working with “too many people” offers the most rewarding outcomes in life—the very experience we need with agency is being balanced with opposition. Succeeding in large numbers is the point of it all. It is difficult, yes, but also “messy but joyous,” as he put it.

He reminded me that I had a wonderful platform from which to succeed with “too many people.” I had the greatest coach in Bill Walsh, a once-in-a-lifetime mentor in Joe Montana, and an organization that was the best in football. I was looking at an opportunity to find out how good I could be on a platform that was a dream to most people.

I told him that I hadn’t thought of it that way. It flipped a switch in my mind. After that I felt relieved and invigorated to see all of my negative perceptions as challenges that helped me discover how good I could be as a leader, a teammate, and a quarterback. I was really facing a perfect storm of opportunity.

I understood, and it changed me for the better and stayed with me for the rest of my football career. I remember racing to the practice field the next day hoping that I hadn’t been moaning so much that I had lost my job. I was looking forward to this opportunity to find out how good I could be not just as a physical athlete but as a spiritual athlete too. It became a quest beyond winning and losing; it was about my growth as a human being. It didn’t become easier; it just became more clearly worth it for much bigger reasons.

The call of a spiritual athlete is gaining perspective from higher vistas. It is refining and pruning our worst parts and honing and strengthening our best parts as we accept the difficult circumstances ahead. In fact, just as Stephen Covey explained, it’s the degree of difficulty we tackle that creates the refining steel of our spirits. By eternal decree, the formula of “too many people” coupled with incessant opposition and then agency to choose our reaction to every breadth of experience becomes the pruning force for good.

SPIRITUAL ATHLETICISM

Spiritual athleticism is driven by a conscious self-awareness. The sacrament helps in this process. It can become a valuable weekly

evaluation between the Lord and us in which we ask for His help to see clearly—“What lack I yet?”¹—and then seek His help to achieve the changes that are necessary.

A goal at my private equity firm is to recruit the best and brightest people from the top schools in the country. But despite the incredible intelligence and expertise of the candidates, some are missing the ability to make the subtle and not-so-subtle day-to-day course adjustments for navigating the intricacies of “too many people” and a difficult platform. The algorithms of math are easy compared to the algorithms of human interaction. The ability to look beyond ourselves, to be in the moment, to see the dynamics of the situation, and to respond accordingly seems to be more difficult than finding an open receiver. Developing the ability to gain perspective is essential.



BEING IN THE MOMENT WITH CHARITY

This idea of handling dynamics “in the moment” was brought home to me many times by the great Reggie White. Reggie was *the* dominant defensive lineman of my generation. Six feet six inches and at least 300 pounds, he was as fast as the wide receivers and as strong as anyone on the field. He played most of his career with the Green Bay Packers, and he easily entered the Pro Football Hall of Fame. He was a devout Christian and his team’s spiritual leader.

For most of the 1990s, the 49ers and the Packers were locked in a battle to see which team would go to the Super Bowl each year. These games were always heavy with implications for the championship. *Frenzied* would not overstate the atmosphere around 49er-Packer games during that time. When we played the Packers, the number-one concern was always how to stop Reggie. We would try with two or three or even four players dedicated to slowing him down, but Reggie was a fierce competitor and was almost impossible to stop.

Unfortunately, I saw him a lot. If he wasn’t sacking me for a loss, he was tackling me as I scrambled. But what I remember is that he was never vicious. The atmosphere of the game, with all that adrenaline, sometimes got to us. Pressure brings out stuff we would rather hide. Reggie, however, would knock me down and immediately transition into a friend. Reaching out his hand, he would say, “Sorry about that. You okay?” or “How’s your family? Say hi to your dad for me.” My dad and Reggie had become friends when we were rookies going into the USFL. Reggie had a lot of questions about agents, and my dad, who was a corporate attorney, was a trusted resource for him.

Honestly, there were times I could tell that Reggie had forgotten where he was. I had to remind him that as much as I wanted to chat, I had to get back to work. I would tell him, “Let’s not meet again until after the game, and then we can catch up.”

Despite those awkward exchanges that I remember so well, over time I have come to understand what an incredible non-football talent Reggie had acquired: the ability to be in the moment—and when I say that, I mean really in the moment—having every ounce of you physically and emotionally invested at that moment on the field, and then to transition from competitor to friend so completely. He was above the moment, looking down and seeing it in all of its potential for good. I guess you could say it in another way: Reggie knew how to be in the moment but not of the moment. It takes spiritual discipline. It also demands eternal perspective to see beyond yourself, not just in quiet reflection but right now, in the din of play.

Steve Young (8) scored touchdowns by running, passing, and receiving when the Cougars defeated Missouri 21-17 in the 1983 Holiday Bowl. BYU’s game-winning touchdown came on a halfback pass from Eddie Stinnett to Young that barely cleared the outstretched arms of a Missouri defender.

As Latter-day Saints we are constantly urged to see our personal interactions through the eyes of charity. We know that charity in this context is not simply the charity of giving our material goods to others. Charity is the pure love of Christ—to see others as God Himself sees them. This is not gained by any earthly act or acts. It can only come as an endowment from our Heavenly Father as we learn to love His Son with all our hearts and our fellow beings with this same fervor.

Charity allows us to see opponents, litigants, and adversaries for their own eternal potential. As an integral part of our profession as lawyers, we are called to be adversarial. It takes a spiritual athlete to be adversarial and charitable at the same moment. Reggie was a living example of this gift. Reggie has been gone now for a few years, but he is sorely missed and often remembered. The more I live, the more situations I encounter in which charity becomes the defining element of the interaction. This quest for the endowment of charity from on high is the most worthy of efforts.



Steve Young (8)
is pressured by
Green Bay Packers
defensive lineman
Reggie White (92)
during an NFL
playoff game on
January 11, 1998, in
San Francisco.

WORKING THROUGH MISTREATMENT

But there is another degree of difficulty beyond the competitive and adversarial bruising; there are the deeper wounds of mistreatment, resentment, grudges, and ill will of every sort. These are the things that are not self-inflicted but that are done to us. How can we carry charity into every corner of hurt? I turn to the Old Testament and the story of Abigail and David. James Ferrell, in his book *The Peacegiver*, recounts this interaction so well. Abigail, wife of Nabal, had come to intercept David as he and his men sped toward Nabal's home to exact revenge.

Nabal had abandoned David and his men at a pivotal moment, even though David had spent time and effort protecting Nabal's flock. I agree with Ferrell that "being mistreated is the most important condition of mortality, for eternity itself depends on how we view those who mistreat us."²

Abigail brought provisions to David and pled for his forgiveness for Nabal's mistreatment. Abigail said:

I beg for my house [Nabal], yes, but for thee also, my lord, that this shall not be an offence of heart unto thee, either that thou hast shed blood causeless, or that my lord hath avenged himself. For the Lord will certainly make thee a sure house because my lord fighteth the battles of the Lord, and evil hath not been found in thee all thy days. So it ever may be so, my lord, I pray thee, forgive the trespass of thine handmaid.³

Abigail was begging David to not sin by avenging his mistreatment. She was placing herself between Nabal and David, hoping to dissuade David from seeking revenge against Nabal.

Ferrell wrote:

The atonement is as much for the benefit of the sinned against—the victim of sin—as for the sinner. . . . It suggests also that one of the effects of sin is to invite those who have been sinned against—David, in this case—to become sinful themselves, and that the atonement provides the escape from such provocation to sin.⁴

PHOTO CREDITS
Pages 18, 19, 21: Mark Philbrick
Page 20: AP Photo/Greg Trott

A higher level of spiritual athleticism is to realize that we cannot righteously hold resentment, grudges, or ill will for mistreatment we have suffered. The Savior stands between us in these interactions. Ferrell wrote:

The Lord, by taking the sins of our Nabals upon his head, extends us the same mercy. “Upon me let this iniquity be,” he pleads. “Let me deal with it if there is any dealing to be done. But you, my dear son or dear daughter, let it go. Let me take it, as I already have done. Forgive.”

... When we withhold forgiveness from others, ... we are in effect saying that the atonement alone was insufficient to pay for this sin. We are holding out for more. We are finding fault with the Lord’s offering. We are in essence demanding that the Lord repent of an insufficient atonement. So when we fail to forgive another, it is as if we are failing to forgive the Lord—who ... needs no forgiveness.⁵

We here need to become the best spiritual athletes as we negotiate the difficult balance of being in the world but not of the world among “too many people” and on the platform that is ours. It sounds like I need to go stretch my spiritual hamstring just saying that. We are asked to wrestle with justice and mercy and, coincidentally, to deftly work with the ironies of life with way “too many people.”

GAINING TRUE PERSPECTIVE

I want to close with a story about perspective on the football field. I am six feet tall. Linemen are taller than that. There were times I couldn’t see an open receiver because of the linemen looming over me. I couldn’t jump up on stilts; I couldn’t spring up and look around and throw. This happened to me on more than one occasion. I would see Jerry Rice—my favorite receiver—just moments before. I knew he was headed in the right direction and I knew where he was going, so I decided to throw the ball—blindly, in faith, with only a gut feeling. I started doing that more and actually became very good at it. Looking back, some of my greatest memories on the football field were ones where I would drop back to pass and couldn’t see the receiver, but I knew where he was going and I would throw anyway.

I remember in Atlanta one time when I dropped back to pass and got knocked down. Just as I was getting hit I threw the ball, even though I couldn’t see Jerry. He caught the pass while I was at the bottom of the pile. I remember thinking to myself as the crowd quieted and we looked like we’d won the game, “This is the greatest moment of my career; I’ve thrown another ball blind.”

What’s interesting about this is that it was never in the newspaper. People didn’t say, “Oh, Steve Young throws blind.” It was always something that was internal. Perspective is gained in incremental moments as we gain the perspective of the Savior and become a spiritual athlete. 

NOTES

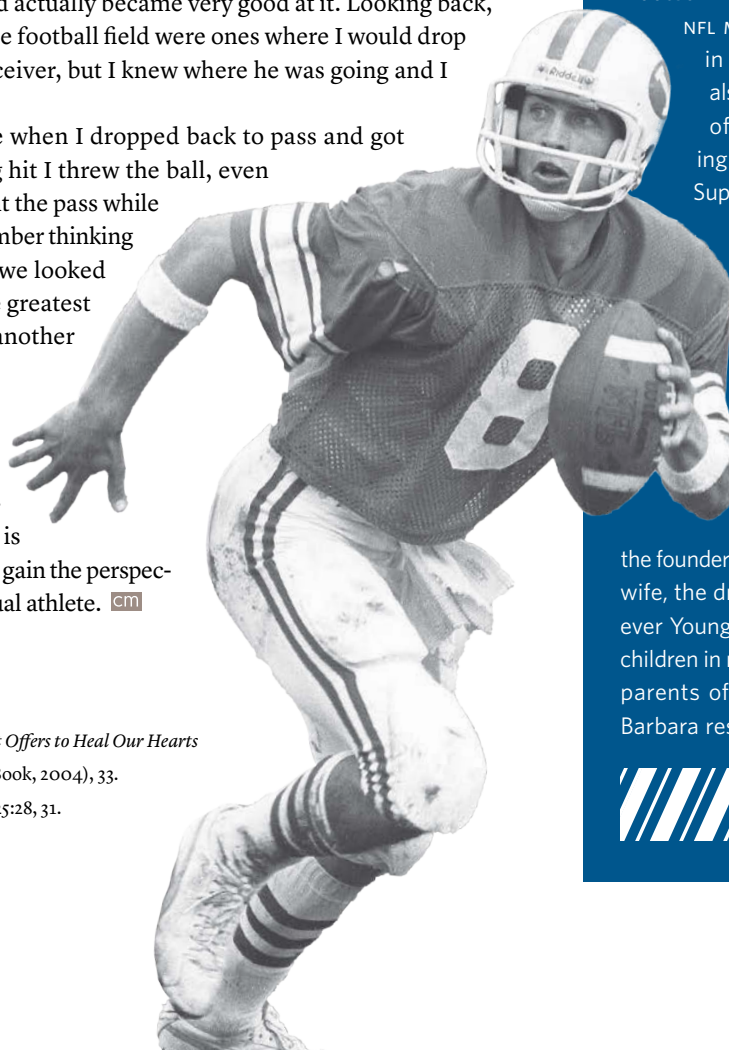
- 1 Matthew 19:20.
- 2 James L. Ferrell, *The Peacegiver: How Christ Offers to Heal Our Hearts and Homes* (Salt Lake City, Utah: Deseret Book, 2004), 33.
- 3 *Id.* at 36–37; emphasis added; see 1 Samuel 25:28, 31.
- 4 *Id.* at 52.
- 5 *Id.* at 65–66.

STEVE YOUNG

*This bio was delivered by
Ryan Tibbitts, ’84, at the annual
Founders Day dinner.*

Steve Young graduated from BYU in 1984 with a BA in international relations. He earned an NCAA postgraduate scholarship for his outstanding performance on the football field and in the classroom. Concurrent with his education, he was a consensus All-American quarterback, the runner-up in the Heisman Trophy race, and the winner of the Davey O’Brien Award for being the best quarterback in college football. He set numerous passing records at BYU and in the NFL. Young graduated from J. Reuben Clark Law School in 1994, and during his time in law school he won two Super Bowl rings with the San Francisco 49ers. He is a member of the BYU Hall of Fame, the College Football Hall of Fame, and the Pro Football Hall of Fame. A three-time NFL MVP and eight-time player in the NFL Pro Bowl, he was also the most valuable player of Super Bowl xxix, throwing six touchdown passes—a Super Bowl record. He has had his jerseys retired by both BYU and the 49ers.

Young is an analyst for ESPN and a founder and managing partner of Huntsman Gay Global Capital, a private equity firm with more than a billion dollars under management. He is also the founder and, along with Barbara, his wife, the driving force behind the Forever Young Foundation, which serves children in need around the world. The parents of four children, Steve and Barbara reside in northern California.





Why the *Garcia v. Google*
decision was wrong
and why it might prove
disastrous for the future of
intellectual property law.

CLARK D. ASAY

ASSOCIATE PROFESSOR OF LAW,
BRIGHAM YOUNG UNIVERSITY
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THE COPYRIGHT TRENCHMARCH

The Ninth Circuit's recent opinion in *Garcia v. Google Inc.*¹ has attracted significant attention across the legal, political, and business worlds because of its possible implications for copyright law, free expression, and existing business models in the entertainment industry.² The plaintiff, Cindy Lee Garcia, made several requests to Google's YouTube to take down an anti-Islamic film hosted on that service that included a brief performance by her. Google denied each request. Garcia then sought a preliminary injunction against Google, but she lost at the district court level.³

ILLUSTRATIONS BY JON KRAUSE

On appeal, the Ninth Circuit held that the district court was wrong in its denial of injunctive relief, in part because Garcia likely had a copyright interest in her performance in the film.⁴ The court reasoned that although Garcia was not a joint copyright owner of the film, she could still own an independent copyright in her performance within it.⁵ While the court later amended its opinion, its basic holdings remained the same.⁶

Some argue that the court erred in so ruling because Garcia’s performance does not actually satisfy the Copyright Act’s requirements; others suggest that the court’s analysis is wrong because it fails to properly take into account important legislative and constitutional protections of free expression; and yet others contend that the result is mistaken because of its likely practical effects on certain business models.⁷

In contrast, this essay articulates a theory for why we should be uneasy with the outcome of *Garcia*. I argue that *Garcia* is bad law because it is the epitome of “ex post incentives” leading to “ex post IP.” I define “ex post incentives” as incentives to claim intellectual property (IP) rights that are incidental to the creation of the work; often they arise in contexts such as *Garcia*, where parties seek to use IP law to protect interests beyond those that IP law was meant to serve. I define “ex post IP” as IP rights whose scope is exceedingly unclear even after creation of the work; the rights must be determined, if at all, after the fact in a court of law.

I suggest that scenarios involving ex post incentives and ex post IP contravene the theory and purpose underlying the constitutional provision that provides for copyright law. Furthermore, this theoretical framework is helpful in identifying and assessing other thorny problems in IP law as well. In particular, I argue that this framework provides a better theoretical understanding for why we should disfavor patent trolls, or patent owners who do not make products but sue others who do.

GARCIA’S PREDICAMENT

The plaintiff in *Garcia*, Cindy Lee Garcia, found herself mired in a potentially dangerous controversy. She agreed to perform a script provided to her as part of a low-budget amateur film titled *Desert Warrior*. For her three and a half days of filming she was paid \$500. Subsequently, the scene was altered and used in *Innocence of Muslims*, an anti-Islamic film. Once the film became available on YouTube, outrage in the Islamic world and elsewhere ensued. Protests erupted around the globe, with some suggesting that the attack on the U.S. embassy in Benghazi, Libya, was in response to the film.⁸ Garcia eventually even received death threats.⁹

Understandably, Garcia wanted to stop access to the film. What were her options? She could sue the film’s producer for breach of contract or some form of fraud. But each of these suits would take time to resolve, and meanwhile the film would remain accessible.

Instead Garcia requested that Google remove the film from YouTube because, she claimed, it violated her copyright interest in her performance in the film. Garcia made such requests pursuant to the Digital Millennium Copyright Act (DMCA), which generally shields online service providers from copyright liability so long as they meet certain requirements, one of which is to respond expeditiously to takedown notices from authors claiming that infringing material is located on their service.¹⁰ But, as noted, Google declined each of her requests. Her request for a preliminary injunction at the district court level similarly fell on deaf ears.

COPYRIGHT’S PREDICAMENT

The Ninth Circuit, by contrast, remanded the case, ruling that Garcia had likely met her burden of demonstrating a copyright interest in her performance in the film. The court reasoned that her performance was “fixed,” as required by the Copyright Act, and appeared to include some amount of creativity—another requirement of the Copyright Act—despite being based on a script provided to her.¹¹ That creativity may include her “body language, facial expression and reactions to other actors and elements of a scene.”¹²

Rebuttals of the court’s reasoning have been numerous. Some argue that the court misconstrued copyright law in a way that will lead to disastrous consequences. For instance, if each contributor to a larger work such as a film is deemed to possess a copyright interest in her contribution, each such contributor is then able to prevent access to the larger work (i.e., precisely the result in *Garcia*).¹³ Applying copyright law in this manner can thus lead to problems with holdup and censorship while also making the work generally unusable due to the fragmented nature of ownership.¹⁴

To help address these and other issues, Congress created the concept of “joint work[s],” in which larger works are created “by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁵ According to the majority view, the joint authors of the resulting work are only those who at the outset are intended to be coauthors of the overall larger work; these authors possess copyright interests in the work.¹⁶ Other contributors to the work, conversely, do not.

Concerns with fragmented ownership form the basis of several amici briefs submitted to the court. For instance, Netflix and several prominent news organizations and broadcasters submitted briefs to the court, arguing that their business models were in danger should such a decision be upheld.¹⁷

Others argue that the court failed to properly take into account the likely ramifications for free expression. For instance, some argue that the decision failed to address important safe harbors found in section 230 of the Communications Decency Act.¹⁸ Section 230 provides robust immunity to online service providers for many types of third-party content hosted on their sites and constitutes, according to some, the “legal foundation for many of the most popular websites” in the world.¹⁹ While section 230 does provide an exception for intellectual

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Printed by permission of the board of trustees of the Leland Stanford Junior University, from the *Stanford Law Review Online* at 67 STAN L. REV. ONLINE 37 (2014). Originally published as “Ex Post Incentives and IP in *Garcia v. Google and Beyond*.” For more information visit stanfordlawreview.org.
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property claims, commentators argue that parties such as Garcia increasingly exploit that exception in order to remove content that they simply do not like.²⁰

Relatedly, others suggest that the court improperly applied the standards for granting injunctive relief by discounting vital First Amendment considerations and the public's interest in accessing the film as part of a larger political debate. And it did so solely on the basis of a dubious copyright claim.²¹

THE IP CLAUSE AND GARCIA'S THEORETICAL PROBLEMS

Each of these arguments certainly has merit, but more fundamentally the decision contravenes the purpose of and theory behind copyright. Article I, Section 8, Clause 8 of the U.S. Constitution empowers Congress to grant authors "the exclusive Right to their respective Writings" in order to "promote the Progress of Science and useful Arts." The most ubiquitous understanding of this clause, often referred to as the "utilitarian" or "economic incentives" theory of intellectual property law, argues that without providing these incentives ex ante, society would suffer because prospective authors would be unwilling to create the works for fear that others would simply copy them, thereby undermining any potential market for the works.²²

The Constitution's IP Clause also appears to contemplate granting rights in discernible "Writings" and other creative works. This seems to be one important implication of the reference to "respective Writings," because if the boundaries of a work are not discernible, it becomes difficult, if not impossible, to distinguish between the respective creative works of one author over another. Blurry rights would also reduce ex ante incentives to create, since creators would not be able to prospectively assess the risks inherent in their creative activity.

The Constitution's IP Clause and the utilitarian theory behind it, then, appear to justify granting intellectual property rights in cases where ex ante incentives are necessary for the author to create the work in the first place. They also appear to favor these incentives, leading to the creation of what I call ex ante IP, or rights of authors whose boundaries are fairly certain even before authors have created the works or such rights have been litigated before a court.

GARCIA'S PREDICAMENT REVISITED

In *Garcia*, rather than ex ante incentives leading to ex ante IP, ex post incentives resulted in ex post IP. For instance, Garcia appears to have latched on to copyright as a means of removing the film once other options were deemed less than ideal. Indeed, in her initial complaint she failed to even assert a copyright claim, instead relying on claims of defamation, misrepresentation, and fraud.²³

Hence, she had ex post incentives to claim copyright in order to limit access to the film. But copyright does not appear to have functioned as an ex ante incentive necessary for her to create the work; the incentive for her performance was three days' worth of pay. For Garcia, copyright was a move of last resort rather than an ex ante lure.

And what exactly are the contours of Garcia's rights in her performance? The performance was based on a script provided to her; she simply performed in accordance with it. The Ninth Circuit acknowledged that her copyright interest in the performance was thus

derivative of the underlying copyrighted script and further suggested that the scope of her rights was somewhat murky.²⁴

In other words, the court ruled that Garcia likely has some rights in the performance, even if it would be hard pressed to say what those rights are. Her alleged rights exemplify ex post IP, or IP rights that are exceedingly unclear until after a court has declared what they are. And they may remain unclear even after a court's determination, as in *Garcia*.

In contrast, the rights attendant to ex ante IP are known with a good amount of certainty even before creation of the work and absent any court opinion. To illustrate: when an author writes a book, the author



has certain rights that in some respects are well defined. The author knows that in nearly all cases no one can copy the book in its entirety without her authorization. Furthermore, if someone wants to translate the book into another language or make a movie out of it, the author knows that in nearly all cases she will need to authorize that activity as well.

However, some potential rights in the book are less certain. For instance, can someone copy a large portion of the book in order to criticize it and society in general without the author's consent? What about simply using some passages from the book, or perhaps following its general structure, without copying the exact contents? The answers to these questions are uncertain at best, even upon creation of the book, and

in order to be answered definitively, the questions would need to be litigated. These types of ex post IP rights are similar to the rights that the Ninth Circuit determined *Garcia* likely has in her performance: unclear without litigation and perhaps still unclear even after a court ruling.

THE IP CLAUSE AND IP THEORY REVISITED

Clearly not all uncertainty associated with IP rights can be eliminated; courts will remain necessary to interpret and apply the law. Some even suggest that in certain cases uncertainty in IP law plays a positive role.²⁵ But generally, greater certainty leads to greater predictability, which typically should promote greater innovation and creativity as parties are able to more accurately take into account the risks of their activities. As a general theoretical, constitutional, and practical matter, in most cases we should favor ex ante IP over ex post IP rights.

The same conclusion holds true when comparing ex ante incentives to ex post incentives. The constitutional basis for granting IP rights is to promote innovative activities by holding forth ex ante the lure of exclusive rights. If that lure is unnecessary and society receives the creative works without it, society is overall better off.

When ex post incentives combine with ex post IP rights, the theoretical, practical, and constitutional justifications for IP law are at their nadir. The *Garcia* decision is a clear example of such a scenario. *Garcia* claimed copyright only in order to protect her bodily interests, not her expressive ones. And even once she claimed copyright, it isn't clear, even according to the court, what interests she was claiming. Ex post incentives combined with ex post IP rights in *Garcia* to leave us all in doubt.

A THEORETICAL STRIKE AGAINST PATENT TROLLS

The theoretical framework drawn from *Garcia* can be applied to other vexing problems in IP law as well. For instance, one of the more contentious issues in patent law today concerns patent trolls, or those patent owners who do not practice their patents but sue others who do.

Commentators often react negatively to the activities of such entities but without offering a clear theoretical reason as to why we should disfavor them. I suggest that, similar to *Garcia*, we should disfavor patent trolls because they are, in the patent world, the epitome of ex post incentives leading to the creation and/or claiming of ex post IP rights. Patent trolls, for instance, often acquire their patents from corporations that have no real need for the patents and simply sell them off in order to monetize them.²⁶ The patent trolls, therefore, have ex post incentives to acquire the patent rights; by definition the patents are not acting as ex ante incentives to their (lack of) innovative activity.

But even if patent trolls do not have ex ante incentives, the corporations and other parties from which they acquire the patent rights may. For instance, some almost certainly pursue innovative activity in pursuit of patent rights; the ex ante possibility of patent rights—including the ability to sell them at a later date—may inform their decision to pursue the innovative activity in the first place. In this light, patent trolls may be an important piece of the innovation puzzle rather than an overall detriment to it.²⁷

While this line of reasoning may hold true in some cases, in many others it seems dubious. Corporations often acquire patents not for ex ante incentive reasons but because they simply lack business sense not to pursue patents for innovations that the corporations are already pursuing. Indeed, in many cases they may feel compelled to pursue patents simply because others do. But the resulting patent nuclear-arms race should not necessarily be construed as evidence that parties would not innovate but for the lure of patents; it may be better construed as evidence that patent law's strict liability regime requires acquisition of patents for defensive purposes.²⁸ In other words, an incentive to acquire patents may exist, even if the patent itself is not acting as a necessary ex ante incentive to innovation. Other factors, such as competition, may be the true catalysts to the innovative activity in many cases.²⁹

The problems associated with ex post IP are also manifest in the activities of patent trolls and patent law more generally. For instance, one pervasive complaint with the patent system is that the boundaries of patents are often difficult to discern and that patent trolls exploit this feature to their advantage in order to force parties to settle what are often otherwise weak legal claims.³⁰ That is, because the costs of paying off the patent trolls are less than

IP LAW RUNS THE RISK OF
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litigating the matter to determine precisely the boundaries of the patents, many of the accused simply settle. In such cases, ex post IP remains ex post IP. And society suffers as a result.

In sum, the lessons of *Garcia* can be applied more broadly to IP law in general. While at first blush *Garcia* and patent trolls may appear to have little in common, the theoretical framework laid out in this essay connects them in a way that enables us to better assess the common problems in each.

CONCLUSION

The Ninth Circuit's *Garcia* decision was wrong for a number of reasons. This essay has focused on identifying constitutional and theoretical reasons why it was wrong and applying that framework to other controversial IP topics, such as patent trolls. This theoretical framework suggests that denying ex post IP rights where primarily ex post incentives are at play would improve the efficacy of IP law in general. Others have suggested a variety of reforms to IP law,³¹ and this essay provides those and other reform proposals with theoretical guidance on the best way to implement them. Without such reforms and a consistent theory behind them, IP law runs the risk of expanding and morphing in ways that hinder rather than promote innovation and creativity. And in so doing, IP law flouts the very reasons for which it was instituted. cm

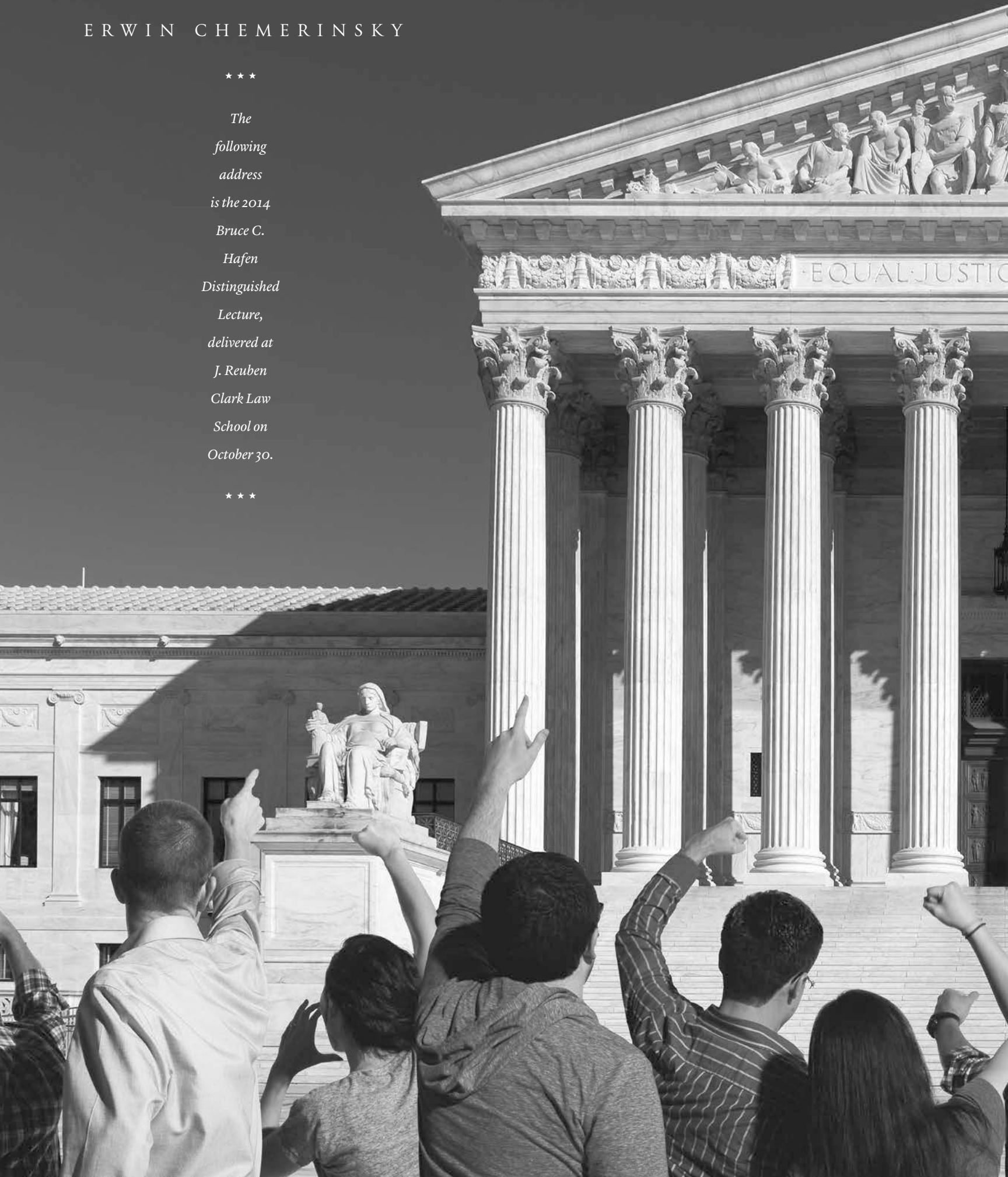
- 1 *Garcia v. Google Inc.*, 743 F.3d 1258 (9th Cir. 2014), amended by 2014 WL 3377343 (9th. Cir. July 11, 2014).
- 2 See, e.g., Eriq Gardner, *Netflix Asks Appellate Court to Reconsider “Innocence of Muslims” Ruling*, HOLLYWOOD REP. (Apr. 15, 2014, 11:25 a.m. PDT), <http://www.hollywoodreporter.com/thr-esq/netflix-asks-appellate-court-reconsider-696226> (arguing that if the result is not overturned, Netflix’s business model faces serious difficulties that may well undermine it); Corynne McSherry, *Bad Facts, Really Bad Law: Court Orders Google to Censor Controversial Video Based on Spurious Copyright Claim*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2014), <https://www.eff.org/deeplinks/2014/02/bad-facts-really-bad-law-court-orders-google-censor-controversial-video-based> (suggesting that the outcome of the case represented a weak copyright claim trumping important free-speech considerations, particularly in light of an important political discussion surrounding the film); Schuyler M. Moore, *Garcia v. Google: Hard Cases Make Bad Law*, HUFFINGTON POST BLOG (Mar. 5, 2014, 2:40 p.m. EST), http://www.huffingtonpost.com/schuyler-m-moore/garcia-v-google-hard-case_b_4900376.html (arguing that the *Garcia* decision misconstrued copyright law in order to reach the political result that the court wanted).
- 3 For background and some analysis of the case, see Stefan M. Mentzer and Priya Srinivasan, *The Garcia v. Google Controversy and What It Means for Content Owners and Users*, LEXOLOGY (Mar. 20, 2014), <http://www.lexology.com/library/detail.aspx?g=3b6ff140-49a1-4a85-9f90-b27d5987937a>.
- 4 *Garcia*, 743 F.3d at 1262–65.
- 5 *Id.*
- 6 See, e.g., Corynne McSherry, *Ninth Circuit Doubles Down in Garcia v. Google*, ELECTRONIC FRONTIER FOUND. (July 11, 2014), <https://www.eff.org/deeplinks/2014/07/ninth-circuit-doubles-down-in-garcia-v-google> (indicating that while the amended decision recognizes some of the concerns raised by amici, it keeps intact the original decision’s key findings). The most substantial addition that the amended decision made was to suggest that the district court on remand was free to disagree with the court’s analysis, which may be difficult to square with the court’s finding that individual performances are copyrightable as a matter of law. *Accord* Rebecca Tushnet, *Amended Aggravation: Garcia v. Google*, REBECCA TUSHNET’S 43(B)LOG (July 14, 2014, 8:02 AM), <http://tushnet.blogspot.com/2014/07/amended-aggravation-garcia-v-google.html>.
- 7 See *infra* notes 13–19 and accompanying text.
- 8 Scott Shane, *Clearing the Record About Benghazi*, N.Y. TIMES (Oct. 17, 2012), <http://www.nytimes.com/2012/10/18/us/politics/questions-and-answers-on-the-benghazi-attack.html> (highlighting that Susan Rice, then U.S. ambassador to the United Nations, suggested that the film helped cause the attacks).
- 9 *Garcia*, 743 F.3d at 1262.
- 10 See *id.*
- 11 *Id.* at 1263–64.
- 12 *Id.* at 1263.
- 13 See Brief of Amici Curiae Professors of Intellectual Prop. Law in Support of Google Inc. and YouTube LLC’s Petition for Rehearing En Banc at 3, *Garcia*, 743 F.3d 1258 (No. 12-57302).
- 14 *Id.*
- 15 17 U.S.C. § 101 (2012); see also *id.* §§ 106A(b), 201(a); Brief of Amici Curiae Professors of Intellectual Prop. Law in Support of Google Inc. and YouTube LLC’s Petition for Rehearing En Banc, *supra* note 13, at 3. Of course, another purpose of the concept of joint works may be to facilitate their creation by awarding each contributing author of the larger work a copyright interest in the whole.
- 16 Michael B. Landau, *Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation*, 54 IDEA 157, 166–71 (2014).
- 17 See Amicus Curiae Brief in Support of Defendants-Appellees Google Inc. and YouTube LLC by Cal. Broadcasters Ass’n, *Garcia*, 743 F.3d 1258 (No. 12-57302); Brief of Amicus Curiae Netflix Inc., *Garcia*, 743 F.3d 1258 (No. 12-57302).
- 18 See Brief of Amici Curiae Internet Law Professors in Support of Google Inc. and YouTube LLC’s Petition for Rehearing En Banc at 4, *Garcia*, 743 F.3d 1258 (No. 12-57302).
- 19 *Id.*
- 20 *Id.* at 7–15.
- 21 See McSherry, *supra* note 2.
- 22 Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 736–38 (2012).
- 23 Complaint, *Garcia v. Nakoula*, No. BC492358 (Cal. Super. Ct. Sept. 19, 2012), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1688&context=historical>.
- 24 *Garcia*, 743 F.3d at 1264–65.
- 25 See, e.g., Kristelia A. Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313943 (arguing generally that uncertainty can improve market efficiency in cases where rights are unclear because this lack of clarity functions as a penalty default that encourages more efficient private ordering solutions).
- 26 Mark A. Lemley and A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2149 (2013) (indicating that patent trolls generally acquire their patents from third parties).
- 27 For a defense of the activities of patent trolls and patent rights generally, see Nathan Myhrvold, *Patents Are Very Valuable, Tech Giants Discover*, BLOOMBERG VIEW (July 11, 2011, 8:40 p.m. EDT), <http://www.bloombergvew.com/articles/2011-07-20/patents-are-very-valuable-tech-giants-discover-nathan-myhrvold>.
- 28 For a discussion of a proposal on one way to relax patent law’s strict liability regime and the potential benefits of doing so, see generally Clark D. Asay, *Enabling Patentless Innovation*, 74 MD. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289326.
- 29 For discussions of industries in which competition appears to be the catalyst for innovation, see Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 960–62 (2001) (Internet); Arti Kaur Rai, *Evolving Scientific Norms and Intellectual Property Rights: A Reply to Kieff*, 95 NW. U. L. REV. 707, 709–10 (2001) (biotechnology); and Howard A. Shelanski, *Competition and Deployment of New Technology in U.S. Telecommunications*, 2000 U. CHI. LEGAL F. 85, 85 (telecommunications).
- 30 See Lemley and Melamed, *supra* note 26, at 2173 (discussing this phenomenon in the IT industry in particular).
- 31 For some recent proposals that, if pursued, may help address some of the problems of ex post incentives leading to ex post IP, see Asay, *supra* note 28 (discussing one way to relax patent law’s strict liability regime and thereby allow parties to partially opt out of the patent system); Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014) (discussing how a certain application of the fair use doctrine in copyright law can help address the rise of copyright trolls); and Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294774 (discussing the need for greater policy diversity in patent law in order to better assess what actually promotes innovation).

ERWIN C H E M E R I N S K Y

★ ★ ★

*The
following
address
is the 2014
Bruce C.
Hafen
Distinguished
Lecture,
delivered at
J. Reuben
Clark Law
School on
October 30.*

★ ★ ★





THE CASE
AGAINST THE
SUPREME
COURT

It is truly a privilege to deliver this lecture today. I should tell you that I feel a special relationship to your law school. When I was part of creating the law school at the University of California, Irvine, the school we most modeled ourselves after and ultimately learned the most from was this law school. So it is really special to be with you today.

Carrie Buck was born in 1906 in Charlottesville, Virginia. She went through the local elementary school and junior high school; she passed every year along with her grade. In all accounts, she was a normal child.

But her father left her mother, and her mother was destitute. Her mother lacked resources to take care of Carrie and Carrie's sister, Doris, so she put her two daughters in foster homes. Carrie stayed with her foster family doing chores and housework. When she was 17, she was raped by her foster father's nephew, and she became pregnant as a result of the rape. Her foster parents were humiliated by her pregnancy and had her institutionalized. She was placed in what was called "a home for the feeble minded." There she gave birth to a daughter.

Soon after, the state of Virginia began proceedings to get Carrie surgically sterilized. Virginia, like states across the country, had adopted eugenic laws. A brief hearing was held. An expert said that he had administered an IQ test to Carrie—this was a very new test—and that her IQ was below normal. (I should note here that many years later, Stephen Jay Gould, then a Harvard professor, went and found Carrie Buck. He administered a contemporary IQ test, and her IQ was in the normal range.) A social worker testified at the hearing that she had looked at Carrie's baby, who was six months old at the time, and "something didn't seem right about the baby girl." The hearing officer ordered that Carrie be surgically sterilized.

The case came to the United States Supreme Court. It should have been an easy case for the Court. The Constitution and the Eighth Amendment of course prohibit cruel and unusual punishment. Wasn't this exactly what was being done to Carrie Buck? After all, she had done nothing wrong. Before this time the Supreme Court had held that the due process clause protected fundamental rights. Isn't the right to procreate one of these fundamental rights? But the Supreme Court, in an 8 to 1 decision, ruled against Carrie Buck. Justice Oliver Wendell Holmes, one of the most renowned Justices to ever serve on the High Court, wrote the decision and used some of the most insensitive and offensive language found in the *United States Reports* when he wrote, "Three generations of imbeciles are enough." As a result of the eugenics laws and this 1927 Supreme Court decision, *Buck v. Bell*, 60,000 American citizens were involuntarily surgically sterilized.

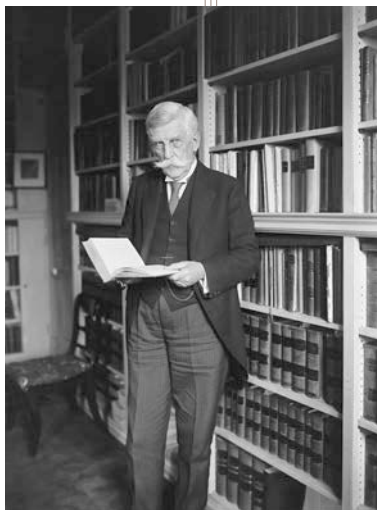
THE SUPREME COURT AND THE CONSTITUTION

I have now been a law professor for 35 years, and I teach *Buck v. Bell* each year. A couple of years ago my students were particularly outraged by the decision, and I found myself making excuses for the Supreme Court. But the more I thought about it, the more I realized that on many occasions I had made excuses for the Supreme Court when teaching particularly outrageous and offensive decisions, like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*. So I forced myself to think more critically about the Supreme Court.

I realized that the Court has often failed in its most important tasks in its most important times, and I started to write a book about this. The book, titled *The Case Against the Supreme Court*, was published last month.

Now, obviously if I am going to say that the Supreme Court has failed, I need criteria to evaluate its performance. I think we can all agree that the Court exists, above all, to enforce the Constitution, but this requires us to think about why we have a constitution. Whenever I teach constitutional law, to law students or undergraduates, I always ask them on the first day to think about this question, and of course this requires that they reflect on how the Constitution is different from all other laws. The answer is that the Constitution is much more difficult to change. Any statute or ordinance can be changed by the next session of the legislature or in the city council, but to change the Constitution requires two-thirds approval of both houses of Congress and passage by three-quarters of the states.

But then I ask my students, “Why should a nation that sees itself as a democracy, that believes in majority rule, constitute itself in a document that is difficult to change?” After all, none of us voted to approve the Constitution. My guess is that few of us had ancestors in this country in 1787 who approved the Constitution.



Renowned
Supreme
Court Justice
Oliver Wendell
Holmes played
a hand in the
controversial
Buck v. Bell
decision
regarding
eugenics in
1927.

The answer I then give is that I believe that the Constitution is an attempt by society to restrain itself. The Constitution puts our most precious values—values about the structure of government and values about individual freedom—in a document that is intentionally difficult to change. I believe that this is, in part, to protect minorities, because the majority can usually protect itself through the democratic process. It is minorities who need a Constitution and a judiciary for protection.

I also believe that the Constitution exists to restrain what the government can do in times of crisis. The framers knew of world history: history illustrates that in times of crisis there is a tendency to centralize power and take away freedom. The Constitution, then, is an elaborate edifice to make sure that our short-term passions don’t cause us to lose sight of our long-term values. If you’ll accept these goals of the Constitution and these purposes for the Supreme Court, then I think I can make the case for you that the Supreme Court has so often failed throughout American history in the most important tests in the most important times.

The first third of the book *The Case Against the Supreme Court* looks at the Supreme Court historically, the second third looks at the Roberts Court, and the final third asks what we should do about this problem.

THE SUPREME COURT AND ISSUES OF RACE

I believe that any analysis of the Supreme Court and its historic performance has to begin with the area of race. I believe that historically, and even now, the Supreme Court has a dismal record with regard to race. From 1787 to 1865, a period of 78 years, the Supreme Court aggressively enforced the institution of slavery and protected the rights of slave owners. In your constitutional law class you might have read *Prigg v. Pennsylvania*. Pennsylvania adopted a law that prohibited the use of force or violence in removing a slave who had escaped there from a slave state. The Fugitive Slave Clause in Article 4 of the Constitution said that a slave who had escaped to a free state would have to be returned. Pennsylvania didn’t prevent that from happening; it just prevented force or violence from being used. Doesn’t every state have an interest in preventing force and violence? But the Supreme Court declared that Pennsylvania law unconstitutional.

Justice Joseph Story wrote the opinion of the Court. Justice Story is also one of the most celebrated Justices to ever serve on the Supreme Court and the youngest to ever be appointed to the Court. At Harvard Law School there is a dorm named after him. In Iowa there is a statue of him. Yet, shouldn’t his reputation be tarnished by this decision that so aggressively protected the rights of slave owners?

I am sure that in your law classes on the Constitution you have talked about *Dred Scott v. Sandford*, which held that slaves are not citizens, even if they are born in the United States, but are simply property of their owners. The Court declared unconstitutional the Missouri Compromise, which helped precipitate the Civil War. Then, from 1896 to 1954, a period of 58 years, the Supreme Court aggressively enforced the doctrine of “separate but equal.” The Court’s decision in *Plessy v. Ferguson*, and those that followed it, upheld Jim Crow laws that segregated literally every aspect of Southern life.

As I mention these examples to you, maybe your reaction is, “That was then; it is different now.” So let me give you examples from now. Let me talk about a Supreme Court case from a year ago June. On June 25, 2013, the Supreme Court declared unconstitutional key provisions of the Voting Rights Act of 1965. The decision, *Shelby County, Alabama v. Holder*, was the first time since the 19th century that the Supreme Court has declared unconstitutional

a federal civil rights law dealing with race. I think that the Voting Rights Act of 1965 is one of the most important federal laws adopted in my lifetime. Congress knew that litigation to enforce this prohibition would be expensive and difficult. Congress was also aware of how especially Southern states were continually changing their election systems to disenfranchise minority voters.

Do you remember the old game Whac-a-Mole—knock the mole down in one place and it pops up in another? That’s what Congress thought was going on, especially in the Southern states. A law would be adopted to disenfranchise minority voters; it would be struck down,

only to be replaced by another that was just as bad. So Congress added Section 5 to the Voting Rights Act. It says that jurisdictions with a prior history of race discrimination in voting must get preclearance from the attorney general to change their election systems. Section 4B of the Act determines which jurisdictions need to get preclearance. Under the current version, this includes nine states, almost all the South, and local governments that are scattered across the country.

These provisions were scheduled to expire in 1982. Congress held extensive hearings and then voted to extend these provisions another 25 years. President Ronald Reagan signed them into law. The provisions were scheduled to expire in 2007. In 2006 Congress held 20 hearings and compiled legislative history 16,000 pages long documenting continuing race discrimination in voting in the covered jurisdictions. The Senate voted 98 to nothing to extend these provisions another 25 years. Can you imagine the Senate today voting anything 98 to nothing? There were only 33 “no” votes in the House. President George W. Bush signed the provisions into law.

Shelby County, Alabama, is south of Selma, Alabama. It is in a jurisdiction with a long history of race discrimination in voting. It brought a challenge to this law. On Tuesday, June 25, 2013, the Supreme Court, in a 5 to 4 decision, declared unconstitutional Section 4B of the Voting Rights Act. Remember that this is the provision that determines which jurisdictions need to get preclearance. Once this provision is invalidated, no jurisdictions need to get preclearance. Chief Justice John Roberts wrote the opinion for the Court. He said, “Race discrimination in voting is largely a thing of the past.” He also said, “The formula in Section 4B was based on outdated statistics,” and, “This violates the principle of equal state sovereignty, that Congress must treat all states alike.”

But where in the Constitution does it say that? Now, I’m not an originalist. I don’t believe that the meaning of the Constitution is limited by what its framers intended. But if there is anything about which I am confident when talking about original intent, it is that the Congress that ratified the 14th and 15th Amendments didn’t believe that Congress had to treat all states the same. That Congress is, after all, the Congress that passed the Reconstruction Act and created military rule over the South.

Immediately after this 2013 decision, states such as Texas and North Carolina put into effect discriminatory voting laws that denied preclearance.

But the story doesn’t stop there. Let me talk about an event as recent as a week ago Saturday, October 18, 2014. At 5:30 a.m. the Supreme Court allowed to go into effect the Texas law that had been found by a district court to likely keep 600,000 African Americans and Latinos in Texas from voting in the coming election on Tuesday, November 4. A federal district court judge in Texas had held a nine-day trial. She issued a 143-page opinion finding the Texas photo ID law the most restrictive in the country, keeping, as I said, about 600,000 people from voting. She found that the purpose and the effect of this statute was to disenfranchise minority voters. A three-judge panel had come to the same conclusion in 2011 and had kept preclearance from being granted, only for the verdict to be made irrelevant after the *Shelby County* decision.

Now as you may know from your classes, a preliminary injunction from the district court can be overturned only if it is found to be an abuse of discretion. It is hard to imagine how this could be an abuse of discretion. Four federal judges have come to the same conclusion.



Joseph Story, a celebrated Justice of the Supreme Court, wrote the opinion of the Court for the racial decision made in *Prigg v. Pennsylvania* in 1842.

DEAN ERWIN CHEMERINSKY

Introduction by James R. Rasband, dean of BYU Law School

I am pleased to welcome Erwin Chemerinsky, the Raymond Pryke Professor of First Amendment Law and founding dean of the University of California, Irvine School of Law. The Hafen Lecture is the preeminent public lecture given at the Law School each year, and Dean Chemerinsky fits well within the group of distinguished speakers we have had the last several years: Michael McConnell; Dean Anthony Kronman; Professor Deborah Rhode; Dean John Garvey, now president of the Catholic University of America; and Sarah Barringer Gordon. Dean Chemerinsky really adds luster to this extraordinary list. This lecture is designed to honor Bruce C. Hafen, a member of our founding faculty, former dean of the Law School, former president of Rick's College (now BYU–Idaho), former provost at Brigham Young University, and an emeritus General Authority of our sponsoring church. Hafen was an internationally recognized scholar of family and educational law with particular interest in the legal rights of children and the legal status of marriage.

Dean Chemerinsky is what all law school deans would like to be when they grow up. In addition to serving as dean at UC Irvine School of Law, he teaches a full load of classes, lectures to undergraduates, publishes books, and continues to pour out a steady stream of influential articles, op-eds, and magazine pieces.

His extraordinary energy is only outshone by his generosity of spirit. Students and colleagues all attest to his good heart, his kindness, and his infectious energy. I have felt the same on the occasions when we have been together. He has the capacity to make you feel as though he is honored to spend time with you, when the real privilege flows in the other direction.

Dean Chemerinsky was born on the south side of Chicago and earned his bachelor's degree at Northwestern University. He received his law degree from Harvard. Prior to accepting the deanship at UC Irvine he taught at the Duke, University of Southern California, and DePaul law schools, with some visiting stints at UCLA School of Law. His areas of expertise are constitutional law, federal practice, civil rights, and civil liberties, but the truth is that he is a renaissance legal scholar who engages with a full range of law and policy. His energy simply cannot be contained to a narrow set of issues. He frequently argues cases in front of the nation's highest courts, including the United States Supreme Court. In the best tradition of the law, Dean Chemerinsky has also given himself to public service and has done a wide range of pro bono work. He serves on such a wide array of commissions, task forces, and boards that I won't even try to recite them all; he simply gives of himself over and over to building the communities of which he is a part.

Earlier this year the *National Jurist* wrote that Dean Chemerinsky was *the* most influential person in legal education in the United States. That is high praise, but it is deserved. Despite his national reputation, what is clear is that to his students there is never any doubt that they are at the center of his passion. Three years ago the *National Jurist* put him on the list of 23 law professors to take before you die. Now you are going to be able to remove hearing from Dean Chemerinsky off your bucket list, even if you don't receive a full semester's worth of instruction. It is such an honor to have him here.

The first of those federal judges held a nine-day trial. She wrote a 143-page opinion. But on Saturday morning, October 18, the Supreme Court, in what seems to be a 6 to 3 ruling, allowed the Texas law to go into effect. The Justice of the majority issued no opinion—not a word of explanation. Justice Ruth Bader Ginsburg wrote a blistering dissent.

THE SUPREME COURT IN TIMES OF CRISIS

I want to give a second example of the Supreme Court's failings throughout American history—how it has enforced the Constitution in times of crisis. If you will buy my premise that a preeminent role of the Constitution is to protect rights in times of crisis, again I think the Supreme Court has dismally failed.

Let me give a few specific examples. During World War I, in 1917 and 1918, Congress adopted statutes that made it a federal crime to criticize the draft for the war efforts. The first major case concerning freedom of speech to be decided by the Supreme Court rose from one of these statutes. If you have studied First Amendment law, you are familiar with it; it is a case called *Schenck v. United States*.

It involved a man who circulated a leaflet that argued that the military draft was unconstitutional as a form of involuntary servitude. There wasn't a shred of evidence that his leaflet had the slightest adverse effect on military recruitment or the war effort. But just

for circulating that leaflet, not doing anything else, he was convicted and sentenced to 10 years in prison. The Supreme Court, in an opinion again by Justice Oliver Wendell Holmes, affirmed the conviction in a sentence. If you remember this case at all, this is when the Supreme Court said that the government can punish speech if there's "a clear and present danger" of harm. This is also when the Court said that there's no right to falsely shout "fire" into a crowded theater. But if anything is the antithesis of a clear and present danger—a falsely shouted "fire" into a crowded theater—isn't it Schenck's harmless leaflet?

Another case decided that same year involved the socialist leader Eugene Debs. He gave a speech to a group of college students in which he said, "You are fit for something better than slavery and cannon fodder. There's more I'd like to say but I can't for fear of imprisonment." For that speech he was convicted and sentenced to 10 years in prison. Again the Supreme Court upheld his conviction in one sentence. Debs ran for president while in prison; he died soon after his pardon.

We can also talk about World War II, when 110,000 Japanese Americans, aliens and citizens—70,000 of whom were United States citizens—were uprooted from their homes and placed in what President Franklin Roosevelt called concentration camps. Race alone determined who would be free and who would be put behind barbed wire. Many of these families were literally housed in horse stalls. The case, *Korematsu v. United States*, came to the Supreme Court in 1944. Whenever you take constitutional law, you will read this case. I think the decision should have been easy for the Supreme Court. This was race discrimination, pure and simple. In England procedures were devised to screen those of German ancestry to see if they were a threat to national security. Nothing like that was done in the United States. Race was used to determine who would be free and who would be in prison. The Supreme Court, in a 6 to 3 decision, upheld the evacuation of Japanese Americans. Justice Hugo Black wrote the opinion of the Court. He said, "War is about hardship, and these are just the hardships that Japanese Americans will have to bear."

Or we can talk about the McCarthy era. It was truly the age of suspicion. Merely to be suspected of being a communist was often enough for a person to lose a job or even liberty. The leading Supreme Court case during this time was *Dennis v. United States*. You actually have to read the dissenting opinion to figure out what these individuals were convicted of. There was a group of individuals who wanted to teach the works of Marx, Engel, and Lenin. For this they were convicted of the crime of conspiracy to advocate the overthrow of the United States government. They weren't convicted of plotting the overthrow the government; they weren't even convicted of advocating the overthrow of the government. Their crime was conspiracy to advocate the overthrow of the government. Nonetheless, the Supreme Court approved their conviction. Chief Justice Fred Vinson wrote the opinion for the Court. He said, "When the evil is as grave as the overthrow of the United States government, there doesn't have to be any proof that the speech increases the likelihood of it happening."

Again, I know of the temptation to say, "Well, those cases were a long time ago. We're more enlightened now." So let me give an example from now. We could start by talking about those who have been detained and continue to be detained as part of the War on Terror. In fact, let me ask each of you to engage in a thought experiment: How many people has the United States government detained, or how many does it continue to detain as part of the War on Terror? I am confident that none of you knows the answers to those questions because the government has not told us the answers. Several years ago I debated with Michael Chertoff, head of the Department of Homeland Security, in front of a group of federal judges. When I asked him these questions, he said, "I can't tell you; it's classified." We still don't know.

But we do know that approximately 169 individuals remain in Guantánamo Bay, Cuba, and some of them have been there since the spring of 2002. I have represented one detainee, Salin Garebi, since the summer of 2002. To this day he has never had a trial or a meaningful factual hearing. He has been in custody now for 12 and a half years—longer than any war in



During World War II, Justice Hugo Black of the Supreme Court was part of the *Korematsu v. United States* decision, which supported the placement of approximately 110,000 Japanese Americans in concentration camps.

American history—and yet the Supreme Court has not provided any relief to Salin Garebi or to the others in Guantánamo.

I can think of one more example of how the Court has made poor decisions in times of crisis, again drawing from the War on Terror: it is a Supreme Court decision in 2010 called *Holder v. Humanitarian Law Project*. Some Americans wanted to help some Kurdish individuals; specifically, they wanted to help teach them about how to use the United Nations in international law for peaceful resolution of disputes. Other Americans wanted to help a Sri Lankan group of foreigners apply for international humanitarian assistance. It is important that you know that all the parties to the litigation agreed that this is what the Americans wanted to do. No one said that these Americans were trying to teach the foreigners how to engage in terrorist acts or were giving them money that could be used for terrorist acts. The question that arose was that for doing just what I have described and nothing more, could they be convicted of the crime of giving material assistance to a foreign terrorist organization? The Supreme Court, in a 6 to 3 decision, said that this speech and this speech alone was enough material assistance to terrorist organizations. Chief Justice John Roberts wrote for the Court; Justice Stephen Breyer's dissent lamented that there wasn't any evidence whatsoever that this speech would pose any threat or increase the likelihood of terrorist activity.

In the second part of the book, I talk about the Roberts Court and about how the Roberts Court is the most pro-business court since the 1930s, consistently favoring the rights of corporations over those of employees or consumers. I also talk about how the Roberts Court consistently favors government power over individual rights, and I talk about things that we study in civil rights classes, such as how the Supreme Court has dramatically expanded governmental immunity.

FIXING THE SUPREME COURT

So I have to ask the question: What should we do about it?

There are some law professors, even very prominent ones, who argue that the solution should be to eliminate Constitutional judicial review. Harvard law professor Mark Tushnet wrote a book titled *Taking the Constitution Away from the Courts*, in which he says we should eliminate Constitutional judicial review. Former Stanford Law School dean Larry Kramer wrote a book that comes to a similar conclusion and argues for what he calls “popular Constitutionalism,” which leaves the Constitution to the people to enforce. Pulitzer Prize-winning author and Williams College political science professor James MacGregor Burns wrote a book just a few years ago in which he also argues for the elimination of judicial review. These three authors each make the point that other countries have democracy and individual freedom without judicial review. In England no court has ever had the power to declare unconstitutional an act of Parliament. In the Netherlands there is a written constitution, but it specifically provides that no court can declare a law unconstitutional for violating it.

Yet I reject this approach. I believe that *Marbury v. Madison* was right in saying that the written limits of the Constitution are meaningful only if they can be enforced, and enforcement requires the judiciary. I have spent almost 40 years representing people on death row, criminal defendants, a Guantánamo detainee, a homeless man. I know that for my clients it is likely to be the courts or nothing. When was the last time that a legislature passed a law to expand the rights of criminal defendants? For me the solution is not to eliminate the judiciary; I believe it is essential to achieve the goals that I described for the Constitution in the Supreme Court, but I believe we should think about how can we reform the Supreme Court to make such failures as I have described less likely in the future. Consequently, in the last chapter of the book, before the conclusion, I offer a set of ideas for reforming the Court.

I begin by saying that I think we should have the Court clearly declare, and we as a society proclaim, that we see the role of the Court as enforcing the Constitution, especially to protect minorities and to enforce the Constitution in times of crisis. Never has the Supreme Court expressly declared that to be its purpose. I believe that just doing so might help a great deal in the future.

I also argue that we should change the way Supreme Court Justices are selected and confirmed. I argue for merit selection of Supreme Court Justices. I believe that a president could create a merit selection committee that can be bipartisan in its membership, and the president can have more from his or her political party but require that there be a two-thirds recommendation. For example, he could say, “Recommend to me two or three people who you think are the best to be on the Supreme Court, and I promise to either pick from them or ask you for more names.” There are states that have that kind of merit selection system. Alaska is one of them. This has led—even with a conservative governor like Sarah Palin—to picking a liberal for the Alaska Supreme Court, Morgan Christen, who President Obama then put on the Ninth Circuit.

President Jimmy Carter had merit selection for federal district courts and federal courts of appeal. He never got to pick a Supreme Court Justice. I think by any measure his selections were among the very best judges picked by any president—and certainly the most diverse judges to that point to be picked by any president.

I think we need to change the confirmation process to make it meaningful. I think that Democrats and Republicans together should agree to a set of questions that every nominee for the Supreme Court should have to answer, including questions about their views concerning matters that will come before the Court. There are only two possibilities in which we cannot do this. One would be if we think that those who are being nominated don’t have any views on disputed legal issues. When Clarence Thomas and David Souter went before the Senate judiciary committee, they each said they had no views on *Roe v. Wade*. Patricia Ireland, then president of the National Organization for Women, said, “There are only two adults in the United States who don’t have views on *Roe v. Wade*, and now they’re both going to be on the United States Supreme Court.” The other possibility for not asking for their views is that if we know their views, they are no longer impartial. But that can’t be right. We know how Antonin Scalia and Ruth Bader Ginsburg are going to vote when the question comes before them as to whether *Roe v. Wade* should be overruled. No one says that requires them to be disqualified.

I also favor term limits for Supreme Court Justices—18-year nonrenewable terms. Thankfully, life expectancy is so much greater today than it was when the Constitution was written in 1787. Clarence Thomas was confirmed to the Supreme Court in 1991, when he was 43 years old. If he remains on the Court until he is 90, the age when John Paul Stevens stepped down, he will have been a Justice for 47 years. Both John Roberts and Elena Kagan were 50 when they were confirmed to the Court. If they remain until they are 90, they will have been there for 40 years. That is just too much power to be exercised by a single individual for too long a period of time. Additionally, 18-year nonrenewable terms mean that every president will get a vacancy to fill every two years. Too much depends now on the accident of history when vacancies occur. Richard Nixon had four vacancies to fill in his first two years as president. Jimmy Carter had none to fill in his four years as president.

Further, I argue for changing the way the Court communicates with the American people. To pick a single example, I believe there should be cameras in the Supreme Court for every argument and every proceeding so that we can see that branch of government at work. I believe that the ethical rules that apply to lower federal court judges should apply to Supreme Court Justices. No longer should it be left to each Justice to decide for himself or herself whether they should be recused in a case.

I don’t pretend that these reforms singularly or cumulatively will magically change the Supreme Court, but I believe they can make a difference. Justice Louis Brandeis, in his dissent in *Olmstead v. United States*, said, “The greatest threat to liberty will come from people who claim to be acting for beneficial purposes.” He also said, “People born to freedom know to resist the tyranny of despots,” and, “The insidious threat to liberty will come from well-meaning people with zeal, with little understanding of what the Constitution is about.”

I believe that throughout American history, all of our Justices have been well-meaning people of zeal, but I believe that all too often they have failed us. 

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Rex Rawlinson,
president of
the Fritz B. Burns
Foundation

THE FRITZ B. BURNS MEMORIAL LOUNGE

On October 22, 2014, members of the Law School community gathered for the opening of the Fritz B. Burns Memorial Lounge at J. Reuben Clark Law School. After the ceremony, a portrait of Burns was unveiled in the new lobby, where it will hang amid landscapes from Burns's life.



LEFT (2): Rex Rawlinson; Cheryl Robinson, a vice president and director of the Fritz B. Burns Foundation; and Maureen Rawlinson, also a vice president and director of the foundation, with a Law School student and Dean James Rasband before and after the unveiling of Burns's portrait



BELOW: Matthew Richardson, BYU advancement vice president; Curtis Swenson, BYU director of development; and Rex Rawlinson





Ukrainian artist Marina Lukach used fabric, lace, embroidery, and bits of glass and blown-out tires from the 2014 uprising to create this composition, which represents the people and landscape of Ukraine.

THE PRIVILEGE TO SERVE

David, '91, and Chelom, '91, Leavitt—the Law School's 2014 honored alums—started the Leavitt Institute for International Development in 2005 to teach democracy, advocacy, rule of law, and ethics in law schools throughout Ukraine. Currently the Leavitt Institute teaches about 400 law students in 10 international universities each year. Following are excerpts from the Leavitts' Honored Alumni Lecture, given on October 16, 2014, at J. Reuben Clark Law School.

CHELOM Once when I was a five-year-old I wanted a drink of water. I had all these older sisters, so I asked them to get me a drink of water.

Like older sisters do, they said, "No. Get it yourself."

My response was, "I'm too little." I was begging them to help me, but they didn't. So I got the drink of water on my own.

Sometimes when I have been faced with hard things, I feel like I am "too little," or because I have never done something before, it looks really hard. I think we have all fallen into that trap. In social science we call it "learned helplessness"; we call it "learned incompetence" when it becomes a habit. I have learned that whatever it is I am facing, I can learn. I can change my skills. I can gain a new perspective.

After centuries of oppression, the people in Ukraine have also felt that they are "too little." Different nations have controlled and dominated them,

and changing their governmental system has seemed almost impossible.

DAVID In 2004 we had a very busy life. We had a good life. We had six great kids. We had 50 or 60 legal cases that were pressing down on us. And for reasons we couldn't articulate, we felt compelled to drop everything to go to Eastern Europe. We acknowledged that it seemed kind of nuts. Nevertheless, through miraculous ways, in about a three-month period all of our cases resolved themselves. One by one the obstacles to go to Ukraine diminished, and we packed our 42 suitcases and left with six children in tow.

The night we left we were extremely anxious. A solemn sense of foreboding came over us. And we were so busy getting ready that we hadn't looked at a newspaper to see what was going on in Ukraine. Then, in

His own unique way, the Lord spoke peace to us and helped us understand that it would be okay. So we boarded the plane and went to Ukraine.

What we found there shocked us: a country in the grasp of communism and people yearning to break free. We left the United States the day before John Kerry lost to George W. Bush amidst all the color, debate, and fanfare of an American presidential election. We showed up 10 days before Ukraine's election to nothing but blank stares and a sense of utter hopelessness.

We found a system corrupt to its core—in all aspects of society. For example, if you want to go to the university, you have to pay the admissions people to let you in. If you want an A in a class, you have to pay your professor. If you want to register your car, you have to pay a bribe so that the process will be three hours rather than three days. When we arrived, the going

price for a seat on the Ukraine Supreme Court was about \$100,000. The Ukraine Supreme Court salary was around \$700 a month, but judges get the money back during their first year through bribes.

The challenge was to convey to university students that this system wasn't okay. But to convey that message we had to say, "Your responsibility is to sacrifice for your country." We would give this example (not understanding its future relevance): "If Russia was at your border on the east and was coming across, you would expect the army to stand and protect you. You would say to the members of the army, 'If not you, then who?' That's what we also say to you. It takes a stable and ethical legal system for any society to flourish, and if you're going to be the lawyers and if it's not going to be you who stand for that system, then who is it going to be?"

It was a hard method for them to implement both personally and institutionally.

CHELOM Our purpose was to motivate the students to understand that they could stand up to this corruption. While they might not alone change the nation, they could alone change themselves. At the beginning of each semester the students were pretty skeptical. They thought it was unlikely that any change could occur in their country. Then, as our volunteer professionals would shuttle through Ukraine in two-week segments, the students would get a personal look at them. And they would ask these professionals, "What's in this for you? Why did you come to teach us here in Ukraine?"

And, without exception, the response would be, "I'm not getting anything out of this. I

came because I want to make a difference in your country. In fact, I have to pay my own expenses to come here." Each semester, we began to see a change in these students as they saw example after example of people willing to make a sacrifice so they could make a difference in Ukraine. Their minds started to open to the possibility of living a life without corruption—a life of privileged service rather than entitlement.

DAVID It's that kind of sacrifice that changes these students—it's the example we set, how we act, how kind we are.

CHELOM The Leavitt Institute has had 186 professionals volunteer more than 22,000 hours of legal time and has received nearly \$2 million in embassy funding and more than \$500,000 in private donations. If you combine all the in-kind legal work, that adds up to nearly \$4.5 million of private donations. Leavitt Institute professionals have flown nearly three million miles to provide their service. We have had eight LLMS graduate from the McGeorge or BYU law schools and more than 30 Moldovan and Ukrainian interns come to the United States or Canada for three-week internships.

We have often had young people ask us, "What's the most important thing you've done?" Without hesitation I tell them that the most important thing I have ever done is to be a mom. Ukraine has certainly blessed us professionally and personally, but it has also blessed our children. We lived in Ukraine on three different occasions, and they learned about the privilege of service because they were included in the process. Our success would

be pretty meaningless if it had come at the cost of the success in our family.

As an example of our family's growth, when we had been in Ukraine less than a week, I had our twins—they were seven at the time—take the long trip down to the dumpster to take the garbage out. As we passed the dumpster later on our way to church, we saw an old woman digging through the garbage that we had just thrown out, eating the leftovers of our breakfast. My twins cried the whole way to church. On our way home, we talked about what we might do. We certainly could not take care of the whole hunger problem in Ukraine, so we decided that if we had food that was still edible, we would put it in a separate bag, and we would put the bag beside the dumpster so someone didn't have to dig through all the garbage to find it.

DAVID Doing what we can do is all that is required of us. Heaven expects us to try. Service expands us; it makes us into people we didn't know we could become.

I remember a walk Chelom and I took in the early morning so we could talk. We saw an old man who looked ancient. He had a neatly-cared-for suit, but the suit was at least 30 years old. He was gently rummaging through the garbage.

It struck both of us how difficult it must be to be reduced to looking for a meal in the garbage when your life had been so much more. He found a partly eaten apple; examined it, looking for a part that was edible; and took a small bite. It wasn't an uncommon scene, but it reminded us of the scripture "I was an hungred, and ye gave me meat."¹ We had already passed him when we

both simultaneously stopped. We took out all the money that we had and gave it to him. It wasn't much, but he looked at us and in a very old voice said, "Thank you, thank you."

How service presents itself will be different for each of us. For the lawyer it may be that the hungered person is a single mother who can't afford a lawyer. For a businessman it may be a single parent who needs some extra time and understanding to get to work. Whatever our circumstances, we face those who represent the Savior. The critical question is not what we give them but that we give when we can.

CHELOM Wherever you find yourself, there will be limitless need. We don't have to be in a certain geographical spot. We need to have hearts that are soft, ears that hear, eyes that see the need, and then, more than anything, the desire to be an instrument in God's hands. The Lord can do His own work. It is actually a pleasure—a privilege—that we are included in it. He includes us because our development is also part of His work.

"Be still, and know that I am God."² When you start to feel too small, be still and know that you are a part of something bigger, something that will not fail. We live in a contentious world, but we can feel peace. We see the inequities of life, but we don't have to feel overwhelmed. We can know that doing our part is enough, wherever we are and whatever our tasks. Also know that failure is part of success. It builds grit. Failure does not have to define you, but it will refine you. 

NOTES

1 Matthew 25:35.

2 Psalm 46:10.

CALENDAR OF EVENTS

BYU LAW SCHOOL, BYU LAW ALUMNI, AND J. REUBEN CLARK LAW SOCIETY

2015

April 4	General Conference Reception Joseph Smith Memorial Building, 10th Floor Salt Lake City Noon
June 12-19	Alumni and Friends CLE at Sea Alaska Cruise Celebrity Solstice
July 29-August 1	Utah State Bar Convention and BYU Law Reception Sun Valley, Idaho
August 17-21	J. Reuben Clark Law Society BYU Education Week Attorney CLE BYU
August 21	Alumni Welcome Breakfast BYU
August 26	Founders Day Dinner Little America Hotel Salt Lake City 6:00 p.m.
August 27	BYU Law Alumni Golf Tournament Thanksgiving Point Lehi, Utah 8:00 a.m.

REUNION WEEKEND | BYU

September 11	Alumni and Friends Ethics CLE BYU BYU Law Alumni Class Reunion Dinners 1980, 1985, 1990, 1995, 2000, 2005, 2010
September 12	BYU Law Alumni and Friends Tailgate Party BYU Law School West Patio
October 1-2	J. Reuben Clark Law Society Leadership Conference BYU and Aspen Grove
October 3	General Conference Reception Joseph Smith Memorial Building, 10th Floor Salt Lake City Noon
October 8	Speed Networking Lunch with Students Provo

2016

January TBA	J. Reuben Clark Law Society Annual Fireside Conference Center Little Theater Salt Lake City 6:00 p.m.
February TBA	J. Reuben Clark Law Society Annual Conference Location TBA
April 4	General Conference Reception Joseph Smith Memorial Building, 10th Floor Salt Lake City Noon
May 28-31	Washington Weekend Supreme Court Swearing In

For more information visit lawalumni.byu.edu or jrcls.org.

Clark Memorandum

J. Reuben Clark Law School

Brigham Young University

