VILLANOVA UNIVERSITY SCHOOL OF LAW

THE THIRTY-FIFTH ANNUAL

DONALD A. GIANNELLA
MEMORIAL LECTURE

EMPLOYMENT DIVISION v. SMITH IN HINDSIGHT: MINISTERS, PEYOTE AND THE SUPREME COURT

Speaker

THE HONORABLE MICHAEL W. MCCONNELL
Richard & Frances Mallery Professor and Director of the Constitutional Law Center, Stanford Law School

March 21, 2012

DONALD A. GIANNELLA MEMORIAL LECTURE

Through the generosity of Professor Giannella's family, colleagues, Law School alumni and other friends, an endowed fund has been established to honor the distinguished scholar and beloved teacher who died in 1974. The lectureship brings a leading scholar to Villanova each year. The paper presented at the lecture is published in the *Villanova Law Review*.

1977—Harry W. Jones
"Lawyers and Justice: The Uneasy Ethics of Partisanship"
23 *Vill. L.. Rev.* 957 (1978)

1978—Philip B. Kurland
"The Irrelevance of the Constitution"
24 *Vill L. Rev.* 3 (1978-1979)

1979—T. Brian Hogan
"Crime, Punishment and Responsibility"
24 *Vill. L. Rev.* 690 (1978-1979)

1980—Monrad Paulsen
Dean, Benjamin N. Cardozo School of Law
{Lecture unpublished}

1981—Roger C. Crampton
"Crisis in Legal Services for the Poor"
26 *Vill. L. Rev.* 521 (1980-1981)

1982—John C. Smith
"Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England"
27 *Vill. L. Rev.* 1179 (1981-1982)

1983—Donald W. Dowd
"The Pit & the Pendulum: Correctional Law Reform from The Sixties into the Eighties"
29 *Vill. L. Rev*. 1 (1983-1984)

1984—Norval Morris
"The Danger in 'Dangerousness' in Civil Commitment"
{Lecture Unpublished}

1985—Rex E. Lee
"The Role of the Religious Law School"
30 *Vill. L. Rev.* 1175 (1985)

1986—Elizabeth Holtzman
"Women and the Law"
31 *Vill. L. Rev.* 1429 (1986)

1987—Wayne R. Lafave
"The Fourth Amendment Today: A Bicentennial Appraisal"
32 *Vill. L. Rev.* 1061 (1987)

1988—Derrick A. Bell, Jr.
"White Superiority in America: Its Legal Legacy,
Its Economic Costs"
33 *Vill. L. Rev.* 767 (1988)

1989—Lynn Hecht Schafran
"Lawyers' Lives, Clients' Lives: Can Women
Liberate the Profession?"
34 *Vill. L. Rev.* 1105 (1989)

1990—Winston P. Nagan
"South Africa in Transition: Human Rights,
Ethnicity and the Law in the 1990s"
35 *Vill. L. Rev.* 1139 (1990)

1991—Ernest F. Roberts
"Bats, and Owls and the Insane Moon: The Search for
The Republic's Unwritten Constitution"
36 *Vill. L. Rev.* 1559 (1991)

1992—The Honorable Cruz Reynoso
"Ethnic Diversity: Its Historical and Constitutional Roots"
37 *Vill. L. Rev.* 821 (1992)

1993—John Frohnmayer
"Should the United States Have a Cultural Policy?"
38 *Vill. L. Rev.* 195 (1993)

1994—James L. McHugh
"Zen and the Art of Lawyering"
39 *Vill. L. Rev.* 1295 (1994)

1995—The Honorable Marjorie O. Rendell '73
"What is the Role of the Judge in Our Litigious Society?"
40 *Vill. L. Rev.* 1115 (1995)

1996—Gerald Abraham
"The Cry of the Children"
41 *Vill. L. Rev.* 1345 (1996)

1997—Stephen M. Bainbridge
"Corporate Decision-Making and the Moral Rights of Corporate Employees: Participatory Management and Natural Law"
43 *Vill. L. Rev.* 741 (1998)

1998—Douglas Laycock
"Religious Liberty and the Realignment of Religious Conflict"
{Lecture Unpublished}

1999—Michael J. Perry
"What is 'Morality' Anyway?"
45 *Vill. L. Rev.* 69 (2000)

2001—Ira C. Lupu & Robert W. Tuttle
"The Distinctive Place of Religious Entities in Our Constitutional Order"
47 *Vill. L. Rev.* 37 (2001)

2002—Kent Greenawalt
"Natural Law and Public Reason"
47 *Vill. L. Rev.* 541 (2002)

2003—John Witte, Jr.
"Between Sanctity and Depravity:
A Protestant Contribution to the Theory of Human Dignity"
48 *Vill. L. Rev.* 727 (2003)

2004—Steven D. Smith
"Nonestablishment 'Under God'? The Nonsecretarian Principle"
50 *Vill. L. Rev.* 1 (2005)

2005—M. Cathleen Kaveny
"Prophecy and Casuistry: Abortion, Torture, and Moral Discourse"
51 *Vill. L. Rev.* 3 (2006)

2006—Joseph Vining
"The Mystery of the Individual in Modern Law"
52 *Vill. Rev.* (2007)

2007—Richard W. Garnett
"Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses"
53 *Vill. L. Rev.* 2 (2008)

2008—Leon Wieseltier
"Before Law and After: Messianism and the Jews"
{Lecture Unpublished}

2009—Nicholas P. Wolterstorf
"Can Human Rights Survive Secularization?"
54 *Vill. L. Rev.* 411 (2009)

2010—Patrick McKinley Brennan
"Are Catholics Unreliable from a Democratic Point of View"
And What Does it Mean if They Are?"
56 *Vill. L. Rev.* 199 (2011)

2011—Khaled Abou El Fadl
"Conceptualizing Shariah in the Modern State
56 *Vill. L. Rev.* (tba) (2011)

Employment Division v. Smith
In Hindsight: Ministers, Peyote and the Supreme Court

When the Supreme Court decided, in *Employment Division v Smith* (the "Peyote Case"), that the Free Exercise Clause provides no protection against neutral laws of general applicability, this sent shock waves through the religious and civil liberties communities, who almost universally supported the strict scrutiny standard of *Sherbert* and *Yoder*. More than two decades later, the *Smith* decision remains firmly entrenched, but also filled with exceptions. This lecture explores the logic of intermediate positions between *Smith's* formal neutral and the strict scrutiny of prior cases, and the implications of the recent decision in *Hosanna-Tabor Lutheran Church and School v. EEOC* (the "Ministerial Exception" Case) for the future reach of *Smith* and the meaning of Free Exercise of Religion.

Michael W. McConnell

The Honorable Michael W. McConnell is the Richard & Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, as well as Senior Fellow at the Hoover Institution. He is a leading authority on freedom of speech and religion, the relation of individual rights to government structure, originalism, and various other aspects of constitutional history and constitutional law. He is author of numerous articles and co-author of two casebooks: THE CONSTITUTION OF THE UNITED STATES (Foundation Press) and RELIGION AND THE CONSTITUTION (Aspen). He is co-editor of CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Yale Univ. Press). Since 1996, he has been a Fellow of the American Academy of Arts and Sciences.

Professor McConnell brings wide practical experience to bear on his teaching and scholarship. Before joining Stanford in 2009, he served as a Circuit Judge on the U.S. Court of Appeals for the Tenth Circuit. He has argued thirteen cases in the United States Supreme Court, most recently *CompuCredit v Greenwood*, in 2011. Before his appointment to the bench, McConnell was Presidential Professor of Law at the S.J. Quinney College of Law at the University of Utah, and prior to that the William B. Graham Professor of Law at the University of Chicago Law School. He has taught six times as a visiting professor at Harvard Law School. McConnell was Assistant General Counsel at the Office of Management and Budget, and Assistant to the Solicitor General in the Department of Justice, under President Ronald Reagan, and a member of the President's Intelligence Oversight Board from 1988-1990. He served as law clerk to then Chief Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit, and to Justice William J. Brennan Jr. of the U.S. Supreme Court. He is a graduate of Michigan State University (1976) and the University of Chicago Law School (1979). He is of counsel to the law firm of Kirkland & Ellis.

Donald A. Giannella

Professor Donald A. Giannella was born in Paterson, New Jersey, in 1930. After graduation from Fordham Preparatory School in 1947, he attended Harvard College, where he majored in Economics and was awarded a bachelor of arts degree *magna cum laude* in 1951. He also was elected to the Harvard Chapter of Phi Beta Kappa. At Harvard Law School, Professor Giannella served on the Board of Student Advisors and graduated *magna cum laude* in 1955. From 1955 to 1958, he was associated with the New York law firm of Cahill, Gordon, Reindel & Ohl. From 1958 to 1960, he was a teaching fellow at Harvard Law School. He was assistant professor at Villanova University School of Law from 1960 to 1961, associate professor from 1961 to 1963, and was promoted to full professor in 1963. At Villanova University School of Law, he was executive director of the Institute of Church and State. He was also a consultant to the Administrative Conference of the United States.

After fourteen years of distinguished service at Villanova, Professor Giannella died in February 1974.

Villanova University School of Law is a Catholic and Augustinian institution that seeks to reflect the spirit of St. Augustine by the cultivation of knowledge, by respect for individual differences and by adherence to the principle that mutual love and respect should animate every aspect of the Law School's life.