

## DEMISESQUICENTENNIAL

### Foreword

Nearly seventy-five years ago, in May of 1933, Harry Bigelow christened *The University of Chicago Law Review* with the pronouncement that the journal would contain “leading articles . . . by outstanding members of law school faculties and of the bench and bar.” The range of topics discussed in these articles, he hoped, would be “broad,” “always . . . of general interest,” and, as in keeping with the dual national and local aims of the journal, often “of particular local interest.”<sup>1</sup>

Now, on the occasion of the demisesquicentennial of *The Law Review*, Bigelow’s pronouncement seems gratifyingly prescient. In the last seventy-four volumes, *The Law Review* has published articles by Supreme Court justices, illustrious scholars, and famous practitioners.<sup>2</sup> It has grown from its humble beginnings<sup>3</sup> to become one of the most respected and cited journals in modern legal scholarship. It has published on topics ranging from the insignificant<sup>4</sup> to the insane,<sup>5</sup> and has

---

<sup>1</sup> Harry A. Bigelow, *The Establishment of The University of Chicago Law Review*, 1 U Chi L Rev 110, 111 (1933).

<sup>2</sup> A very brief list of notable historical articles include John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U Chi L Rev 13 (1992); William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U Chi L Rev 473 (1973); Tom C. Clark, *The First Amendment and Minority Rights*, 36 U Chi L Rev 257 (1969); Ronald M. Dworkin, *The Model of Rules*, 35 U Chi L Rev 14 (1967); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U Chi L Rev 1 (1967); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U Chi L Rev 9 (1958); Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U Chi L Rev 211 (1957); Soia Mentschikoff, *Letters of Credit: The Need for Uniform Legislation*, 23 U Chi L Rev 571 (1956); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U Chi L Rev 501 (1948); Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U Chi L Rev 224 (1942); John H. Wigmore, *Looking behind the Letter of the Law*, 4 U Chi L Rev 259 (1937); Roscoe Pound, *What Is the Common Law*, 4 U Chi L Rev 176 (1937); William L. Prosser, *Delay in Acting on an Application for Insurance*, 3 U Chi L Rev 39 (1935); William O. Douglas and George E. Bates, *Some Effects of the Securities Act upon Investment Banking*, 1 U Chi L Rev 283 (1933). For an example of an article that has aged less gracefully, see J. Edgar Hoover, *The Scientific Crime Detection Laboratory*, 10 U Chi L Rev 335 (1943).

<sup>3</sup> For the tumultuous early history of *The Law Review*, see generally Alexander Polikoff, *Twenty Years at Hard Labor*, 2 U Chi L Sch Rec 12 (1952).

<sup>4</sup> See, for example, David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U Chi L Rev 466 (1983).

<sup>5</sup> See, for example, Harry Kalven, Jr., *Insanity and the Criminal Law—A Critique of Durham v. United States: Introduction*, 22 U Chi L Rev 317 (1955) (introducing a symposium on the insanity defense).

proven an effective training ground for future judges, scholars, and practitioners. Perhaps this is because, as Gerhard Casper insightfully remarked on the fiftieth anniversary of *The Law Review*, “[n]o law school in the country has an environment more challenging to faculty and student productivity than ours.”<sup>6</sup>

In honor of the distinguished history of *The Law Review*, the current volume will include a series of essays commemorating five of the journal’s numerous influential articles. Each essay, authored by legal scholars with a connection to The University of Chicago Law School,<sup>7</sup> considers the impact of an influential article on its respective area of law and offers a critique of the article’s historical contribution to legal scholarship and practice.

While no limited number of articles can adequately capture the immense technical and theoretical variety published by the journal over its history, the five selected pieces are, by any empirical account, among the most influential ever published by *The Law Review*. Each has been cited by hundreds of other law reviews and journals; some have been referenced in legal treatises and textbooks; and several have been cited by federal courts of appeals and even the Supreme Court. Every article selected has had a demonstrable impact on the course of legal scholarship. Their authors have been recognized widely for contributions to legal scholarship as practitioners, scholars, and judges. Notably, as if to attest to Casper’s remarks in the journal’s fiftieth issue, four of the six authors taught at The Law School and three served on *The Law Review*.

The article highlighted in this issue, Kenneth Karst’s *Equality as a Central Principle in the First Amendment*,<sup>8</sup> is widely cited by courts and scholars<sup>9</sup> for its recognition of an equality component of First Amendment jurisprudence. The article, written as part of a symposium *in memoriam* of The Law School’s Harry Kalven, Jr., is an important example of *The Law Review*’s contributions to constitutional scholarship.

Perhaps the most famous piece ever published in *The Law Review*, Antonin Scalia’s *The Rule of Law as a Law of Rules*<sup>10</sup> has in recent years become one of the defining summaries of Justice Scalia’s jurisprudential framework. It has been cited by justices on the Su-

---

<sup>6</sup> Gerhard Casper, *Foreword*, 50 U Chi L Rev 405, 408 (1983).

<sup>7</sup> Current faculty members Martha Nussbaum, Geoffrey Stone, and David Strauss; former faculty member Albert Alschuler; and former *Law Review* editor Richard Nagereda.

<sup>8</sup> 43 U Chi L Rev 20 (1975).

<sup>9</sup> See Fred R. Shapiro, *The Most-cited Law Review Articles Revisited*, 71 Chi-Kent L Rev 751, 771 (1996). See also, for example, *Community-Service Broadcasting of Mid-America, Inc v FCC*, 593 F2d 1102, 1127 n 18 (DC Cir 1978).

<sup>10</sup> 56 U Chi L Rev 1175 (1989).

preme Court on three occasions,<sup>11</sup> by numerous lower federal courts,<sup>12</sup> and by fourteen Supreme Court briefs.<sup>13</sup> Most importantly, it is perhaps the first concise description of Justice Scalia's judicial philosophy, emphasizing the fairness and predictability of legal formalisms and the virtues of textualism as a source for these formal rules.

The oldest article commemorated in this volume, Harry Kalven, Jr., and Maurice Rosenfield's *The Contemporary Function of the Class Suit*,<sup>14</sup> is placed by some accounts among the most cited law review articles written before 1956.<sup>15</sup> Notable both for its content, a formative analysis of the class action lawsuit in relation to the emerging administrative state, and its authors, who were among the first editors of *The Law Review* (Kalven, Jr., was the Editor-in-Chief of Volume 5), the article remains a classic of early *Law Review* scholarship, which focused on both the functional and theoretical aspects of legal practice.

This functional approach to legal scholarship is also visible in Dallin Oaks's influential article, *Studying the Exclusionary Rule in Search and Seizure*.<sup>16</sup> Until recently the most-cited article ever published in *The Law Review*,<sup>17</sup> Oaks's article is a powerful example of The Law School's contributions to the empirical study of law and economics. Oaks, Editor-in-Chief of Volume 24 of *The Law Review*, uses data gathered from survey results and police reporting to argue that the effectiveness of the canonical Fourth Amendment remedy depends to a large degree on the structural realities of the criminal justice system.

As is aptly demonstrated by the final selection, the contributions of *The Law Review* to legal scholarship have not been limited to empirical law and economics. Robin West's foundational *Jurisprudence and Gender*<sup>18</sup> arose from and contributed to the construction of feminist legal theory in the late 1980s. West's article, which has been cited in numerous law reviews and included in a number of anthologies of feminist legal theory,<sup>19</sup> harshly criticizes a gendered legal system that

---

<sup>11</sup> See *Vieth v Jubelirer*, 541 US 267, 354–55 (2004) (Souter dissenting); *Branch v Smith*, 538 US 254, 298 (2003) (O'Connor); *Republican Party of Minnesota v White*, 536 US 765, 804 (2002) (Ginsburg dissenting).

<sup>12</sup> See, for example, *O'Connor v Sandy Lane Hotel Co, Ltd*, 496 F3d 312, 321 (3d Cir 2007); *United States v International Fidelity Insurance Co*, 200 F3d 456, 460 (6th Cir 2000); *In re Oracle Securities Litigation*, 131 FRD 688, 695 (ND Cal 1990).

<sup>13</sup> Westlaw Search, Jan 29, 2008.

<sup>14</sup> 8 U Chi L Rev 684 (1941).

<sup>15</sup> See Shapiro, 71 Chi-Kent L Rev at 772 (cited in note 9).

<sup>16</sup> 37 U Chi L Rev 665 (1970).

<sup>17</sup> See Shapiro, 71 Chi-Kent L Rev at 769 (cited in note 9). A Westlaw search indicates that Scalia's article is now the most frequently cited.

<sup>18</sup> 55 U Chi L Rev 1 (1988).

<sup>19</sup> See, for example, Robin West, *Jurisprudence and Gender*, in D. Kelly Weisberg, ed, *Feminist Legal Theory: Foundations* 75 (Temple 1993); Robin West, *Jurisprudence and Gender*, in

fails to comprehend and incorporate the physical realities of female experience, and proposes a humanist mode of jurisprudence that recognizes “all forms of being.”

These five essays, even considered holistically, cannot begin to articulate the complex and multifaceted history of *The Law Review*; and any selection of the most influential pieces inevitably fails to consider deserving alternatives. We hope, however, that the selected articles and commentary prove enjoyable and thought provoking. We thank our contributors for their essays and our faculty for their past and continuing support of *The Law Review*. Mostly, however, we thank the staff and editors of the previous seventy-four volumes of *The University of Chicago Law Review*, without whom Bigelow’s expansive vision would be but a footnote in The Law School’s storied history.

*The Editors*