

COMMEMORATING SEVENTY FIVE YEARS OF THE UNIVERSITY OF CINCINNATI LAW REVIEW

Louis D. Bilonis & Michael E. Solimine***

January of 1927 bode well for the University of Cincinnati College of Law and its community.

The College's alumni were prospering. Class of 1880 graduate and former dean William Howard Taft was presiding over the sixth Supreme Court term of his tenure as Chief Justice.¹ Seated immediately to Taft's left in the Old Senate Chamber where the Court still convened was Associate Justice Willis Van Devanter—Class of 1881.² In the Senate wing of the Capitol, Vice President Charles H. Dawes—Class of 1886 and the Nobel Peace Prize recipient in 1925—was presiding.³ Over in the House Chambers, Nicholas Longworth—Class of 1894—was wielding the gavel as Speaker.⁴

All that Washington talent notwithstanding, some might have maintained that the most illustrious alumnus was employed in the Bronx. Miller Huggins—Class of 1902 and future Hall-of-Famer—was readying to enter his tenth season as manager of the New York Yankees. His “Murderers Row” club would win 110 games that year and sweep the Pittsburgh Pirates in four games to take the World Series.

Back in Cincinnati, energy must have been in the air. Students and faculty at the College of Law were enjoying a fine new building at the corner of Calhoun and Clifton, dedicated just fourteen months before to exceptional fanfare. There was a new dean too, named Merton L. Ferson, and he and the faculty were beginning to introduce changes that would define the College for generations to come: a greater emphasis on full-time faculty dedicated to teaching and scholarship; a broadened curriculum, which even then featured a strong clinical component; heightened demands on students.⁵

* Dean and Nippert Professor of Law, University of Cincinnati College of Law.

** Donald P. Klekamp Professor of Law, University of Cincinnati College of Law.

1. William Howard Taft was Chief Justice from 1921 to 1930.

2. Justice Van Devanter was appointed to the Court by Taft in 1911 when the latter was President of the United States (1909 to 1913). Justice Van Devanter served on the Court from 1910 to 1937.

3. Charles G. Dawes was Vice President from 1925 to 1929.

4. Other notable alumni who served as Speakers of the House in early 20th Century include Joseph Gurney Cannon—from 1903 through 1911—who was immediately succeeded by James Beauchamp “Champ” Clark from 1911-1919.

5. Indeed, Ferson was an advocate of a four-year course of study. See Roscoe L. Barrow,

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And a law review—the first to be published by an Ohio law school.

Volume I, Number 1, of the *University of Cincinnati Law Review* bears a January 1927 publication date and opens with words still timely today. “Each new invention introduced to us by the scientist adds to the complexity of our existence,” Professor (and future dean) Frank Rowley of the University of Cincinnati College of Law observed, “and brings with it an ever-increasing number of legal problems.”⁶ In the ensuing seventy-four volumes, the pages of the *Law Review* have been graced by commentary on many legal problems, whether generated by inventions or not. From the first article and issue, the *Law Review* has published the highest quality articles from law professors, law students, other academics and scholars, prominent judges, and other well-known members of the legal community.

A casual examination of the contents of these volumes amply documents the point. A full discussion of the contributions of the *Law Review* to scholarly discussion would take many pages. Here, we merely note, in a highly selective and unscientific way, the articles throughout the years by prominent academics from other law schools,⁷ highly respected Justices and judges,⁸ academics from other disciplines,⁹ thoughtful alumni,¹⁰ and symposia on important topics.¹¹

Historical Note on the University of Cincinnati College of Law, in *THE LAW IN SOUTHWESTERN OHIO* 301 (Cincinnati Bar Assoc. 1972).

6. Frank S. Rowley, *Problems in the Law of Radio Communication*, 1 U. CIN. L. REV. 1, 1 (1927).

7. E.g., Roscoe Pound, *The Future of the Common Law*, 7 U. CIN. L. REV. 343 (1933); Louis L. Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Philip B. Kurland, *Judicial Review Revisited: “Original Intent” and “The Common Will”*, 55 U. CIN. L. REV. 733 (1986); Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CIN. L. REV. 245 (2000); Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1 (2001); Patrick Woolley, *The Sources of Federal Preclusion Law After Semtek*, 72 U. CIN. L. REV. 527 (2003).

8. E.g., Arthur T. Vanderbilt, *Improving the Administration of Justice—Two Decades of Development*, 26 U. CIN. L. REV. 155 (1957); Earl Warren, *Address*, 27 U. CIN. L. REV. 225 (1958); Roger J. Traynor, *Speech Impediments and Hurricane Flo: The Implications of a Right-of-Reply to Newspapers*, 43 U. CIN. L. REV. 247 (1974).

9. E.g., Francis R. Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. CIN. L. REV. 408 (1931); Dean Alfange, Jr., *Congressional Investigations and the Fickle Court*, 30 U. CIN. L. REV. 113 (1961); Deborah J. Merritt et al., *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929 (2000).

10. E.g., James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839 (2003).

11. E.g., *Conference: Law and Lawyers in the Modern World*, 15 U. CIN. L. REV. 123 (1941); *Symposium: The Teaching Process in Legal Education*, 37 U. CIN. L. REV. 1 (1968); *Symposium: Empirical Approaches to Judicial Behavior*, 42 U. CIN. L. REV. 589 (1973); *Symposium: Computerization of Land Title Records*, 43 U. CIN. L. REV. 465 (1974); *Symposium: Feminist Moral*, 56 U. CIN. L. REV. 459 (1987); *Symposium: Commercial Speech and the First Amendment*, 56 U. CIN. L.

The contributions of the *Law Review* would be noteworthy based on this work alone. But the *Review* has set a truly high bar for legal scholarship with the publication of the annual Robert S. Marx lectures, starting in 1966; the William Howard Taft lectures on Constitutional Law, starting in 1986; and the Corporate Law symposium, starting in 1989. Once again, a brief summary cannot do full justice to the marvelous contributions of these speakers and contributors. Some highly selective examples of the Marx lectures would be those by prominent federal Judges Henry Friendly, David Bazelon, Marvin Frankel, and Jack Weinstein, and Professors Archibald Cox, Ruth Bader Ginsburg, Stephen Carter, and Martin Redish,¹² among many others who could be mentioned. The Taft lecturers have included Justices Sandra Day O'Connor and Antonin Scalia, Senator Orrin Hatch, and Professors Akhil Amar, Pamela Karlan, and Randy Barnett, to list but a handful of distinguished examples.¹³ The Corporate Law symposium has addressed securities law, corporate governance, and bankruptcy, among other topics.¹⁴

The quality of this scholarship has been confirmed by the marketplace of ideas. Many of these publications have generated discussion and feedback in the scholarly community. As just one example, consider Justice Scalia's well-known Taft Lecture, *Originalism: The Lesser Evil*,¹⁵ which according to a later Taft lecturer has been cited and discussed nearly 500 times.¹⁶ Other surveys have documented that *all* of

REV. 1165 (1988); *Symposium on Race, Gender, and Economic Justice*, 65 U. CIN. L. REV. 765 (1997); *Symposium: Law, Ethics, and Affirmative Action in America*, 72 U. CIN. L. REV. 873 (2004).

12. See Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972); Jack B. Weinstein, *Equality, Liberty and the Public Schools*, 48 U. CIN. L. REV. 203 (1979); Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Stephen L. Carter, *The Confirmation Mess, Continued*, 62 U. CIN. L. REV. 75 (1993); Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9 (2004).

13. See Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891 (1989); Akhil Reed Amar, *Presidents Without Mandates (with Special Emphasis on Ohio)*, 67 U. CIN. L. REV. 375 (1999); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

14. *Fourteenth Annual Corporate Law Symposium: Corporate Law Firms in the Twenty-First Century*, 69 U. CIN. L. REV. 1107 (2001); *Fifteenth Annual Corporate Law Symposium: Corporate Bankruptcy in the New Millennium*, 70 U. CIN. L. REV. 1225 (2002); *The Seventeenth Annual Corporate Law Symposium: Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95 (2004).

15. Scalia, *supra* note 13.

16. Barnett, *supra* note 13, at 8.

the work published in the *Law Review* has generated considerable discussion in the scholarly community.¹⁷ Likewise, *Law Review* articles have been cited and discussed in court decisions. For example, as of this writing articles have been cited in 38 decisions of the United States Supreme Court¹⁸ and 44 decisions of the Ohio Supreme Court.¹⁹

As a leading legal historian once noted, the law is “an odd profession that presents its greatest scholarship in student-run publications.”²⁰ At its inception the *University of Cincinnati Law Review* was student-edited. That is how it has operated for most of its history, and it has always turned to students for casenotes, comments, and other scholarly contributions.²¹ The cast of student contributors and editors is long and replete with now-familiar names that constitute a “Who’s Who” of the bench, bar, business, public service, and academia.

Without the dedication of those students, this well-deserved anniversary would be hardly conceivable. It is fitting, however, that a different dedication on the part of those students also accounts for the small curiosity some attentive readers might have noted about this anniversary. Although we commemorate 75 volumes of publication, the *Review* actually was born nearly 80 years ago. In the 1940s, many students who would have attended the University of Cincinnati College of Law and contributed to this worthy undertaking answered a higher

17. See, e.g., James Leonard, *Seein’ the Cites: A Guided Tour of Citation Patterns in Recent American Law Review Articles*, 34 ST. LOUIS U. L.J. 181, 218 (1990) (ranking the *Law Review* as tied for 52 in most cited reviews); Fred R. Shapiro, *The Most-Cited Law Reviews*, 29 J. LEGAL STUD. 389, 392-93 (2000) (30th in rank).

18. See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 130 (1999) (citing Curtis Wright, Jr., *Uniform Rules and Hearsay*, 26 U. CIN. L. REV. 575 (1957)); *Marek v. Chesny*, 473 U.S. 1, 34 n.50 (1985) (Brennan, J., dissenting) (citing Roy D. Simon, *Rule 68 at the Crossroads: The Relationship Between Offer of Judgement and Statutory Attorney’s Fees*, 53 U. CIN. L. REV. 889 (1984)); *Norfolk & W. Ry. Co. v. Lieplet*, 444 U.S. 490, 504 (1980) (Blackmun, J., dissenting) (citing William O. Bertelsman, Note, *Procedural Protections for Federal Rights in State Courts*, 30 U. CIN. L. REV. 184 (1961)); *Chaffin v. Stynchcombe*, 412 U.S. 17, 21 n.6 (1973) (citing Kenneth L. Aplin, *Sentence Increases on Retrial after North Carolina v. Pearce*, 39 U. CIN. L. REV. 427 (1970)).

19. See, e.g., *Anderson v. Highland House Co.*, 757 N.E.2d 329, 332 (Ohio 2001) (citing William J. Reiter, Thomas M. Strasser & David J. Pohlman, *The Pollution Exclusion Under Ohio Law: Staying the Course*, 59 U. CIN. L. REV. 1165 (1991)); *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 321 (Ohio 1997) (citing Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397 (1989)); *Gladon v. Greater Cleveland Reg’l Transit Auth.*, 662 N.E.2d 287, 305 (Ohio 1996) (Douglas, J., dissenting) (citing John A. Gleason & Kenneth Van Winkle, Jr., Comment, *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity*, 55 U. CIN. L. REV. 501 (1986)); *Illinois Controls, Inc. v. Langham*, 639 N.E.2d 771, 782 (Ohio 1994) (citing Merton L. Ferson, *Undisclosed Principals*, 22 U. CIN. L. REV. 131 (1953)).

20. Morton J. Horwitz, *NEWSWEEK*, Sept. 15, 1975.

21. The first three issues of the *Law Review* were student-edited. A faculty member assumed editing responsibilities until 1949, during which time student contributors wrote notes and editorials. In 1949, the students resumed editorial duties.

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call to serve their country in wartime. To cease publication during those years could not have been an easy decision, but “[i]n view of the small number of students enrolled and the desire to maintain the high quality of the *Cincinnati Law Review*, publication of the *Review* was suspended from 1942 to 1947.”²²

It is coincidental but also fitting that the *Review*’s 75th volume will be published the year before the College’s 175th anniversary. That anniversary will be an occasion to reflect on the rich heritage of the College and the many contributions of the College’s graduates and faculty. The *Review* has earned an extremely important place in that story. The past volumes speak to the many scholarly accomplishments of the College as a whole, and of the faculty and students, in particular. We will expect no less for the next 75 volumes of the *Review*.

22. Roscoe L. Barrow, *Historical Note on the University of Cincinnati College of Law*, in THE LAW IN SOUTHWESTERN OHIO 302 (Cincinnati Bar Assoc. 1972).