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REGENT UNIVERSITY LAW REVIEW: KEEPING THE REPUBLIC!

*Barbara S. Weller**

This year, 2016, marks the twenty-fifth anniversary of the Regent University Law Review, first published in the spring of 1991, with articles on public school chaplains and school prayer,¹ school choice,² and integrating the biblical command of love in modern law.³ Over the next few years, its contributors continued to focus on topics related to living out the Christian faith, such as an examination of the relevance of Hebrew law,⁴ biblical foundations in the common law,⁵ demonstrations at abortion clinics,⁶ and the free exercise of religion generally,⁷ as well as more secular and practical topics such as employee handbooks⁸ and the Second Amendment.⁹

* Barbara Weller served as Editor-in-Chief of the Regent University Law Review during the 1994–1995 school year, with the distinction of being the first woman to serve in that role. She now works as the Executive Director of the Center for Life Defense at the National Center for Life and Liberty.

¹ Herbert W. Titus, *Public School Chaplains: Constitutional Solution to the School Prayer Controversy*, 1 REGENT U. L. REV. 19 (1991).

² Timothy T. Blank, Note, *The Milwaukee Parental Choice Program, Its Policies, and Its Legal Implications*, 1 REGENT U. L. REV. 107 (1991).

³ James R. Chamberlain, Rex Downie, Jr., Karl E. Osterhout & John J. Porter, Commentary, *The Love Command as Modern Law*, 1 REGENT U. L. REV. 59 (1991).

⁴ Julian H. Wright, Jr., *Pardon in the Hebrew Bible and Modern Law*, 3 REGENT U. L. REV. 1 (1993).

⁵ See, e.g., Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, 4 REGENT U. L. REV. 1 (1994).

⁶ Barbara Specht Weller, Comment, *Bursting the Bubble Zone in Texas: An Analysis of Ex Parte Tucci*, 4 REGENT U. L. REV. 143 (1994).

⁷ See, e.g., Michael P. Farris & Jordan W. Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995).

⁸ Stephen Carey Sullivan, Note, *Unilateral Modification of Employee Handbooks: A Contractual Analysis*, 5 REGENT U. L. REV. 261 (1995).

⁹ Michael I. Garcia, Comment, *The "Assault Weapons" Ban, the Second Amendment, and the Security of a Free State*, 6 REGENT U. L. REV. 261 (1995).

Much has happened, both at Regent University School of Law and in American law and culture since that time of small, but properly focused, beginnings. Over the past two and a half decades, the law review has addressed many of the nation's most important legal topics from a biblical and conservative perspective. This publication has been blessed by the high caliber of its contributors, including Justice Clarence Thomas,¹⁰ former Attorney General John Ashcroft,¹¹ former Attorney General Edwin Meese III,¹² federal judges,¹³ and many other notable legal minds. Regent University Law Review articles were cited in over 100 treatises and other secondary sources, and, in 2015 alone, over 100 other law reviews and journals.¹⁴

I had the privilege of serving as editor-in-chief during the 1994–1995 school year, when the law review had relocated to the second floor of the brand new (and gorgeous) Robertson Hall building. From my new law review office window, I had an unobstructed view of the entire campus at that time. Years later, when I returned for a visit, I noticed that the tree under the window had grown a lot and obstructed that view—at least when it was in full leaf. Just like that tree, however, both Regent University School of Law and its law review have grown a lot over the years. In fact, it is no longer even possible to see the entire, expanded Regent campus from that window.

I had three goals in mind upon entering law school in 1992 at age fifty—the oldest Regent law student ever at that time. I wanted to be editor-in-chief of the law review; I wanted to keep my scholarship (not an easy feat); and I wanted to graduate in the top 10% of my class. Those were lofty goals considering that, at the time, I thought all torts were either cream-filled or jelly-filled! Every final exam brought panic attacks and a strong desire to quit. But I kept trusting God and working as hard as I could. In the end, two of my three goals were met—although I fell just a few points shy of graduating at the top 10% mark.

While studying for the Florida bar exam, I took a temporary job with a bar review company to try to gain a competitive edge. During those months, I was surprised to realize that students from America's traditional top law schools knew a lot less about the law than I did. Since

¹⁰ Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317 (2000).

¹¹ John D. Ashcroft, *Justice Clarence Thomas: Reviving Restraint and Personal Responsibility*, 12 REGENT U. L. REV. 313 (2000).

¹² Edwin Meese III, *The Jurisprudence of Clarence Thomas*, 12 REGENT U. L. REV. 349 (2000).

¹³ E.g., Henry Coke Morgan, Jr., *Predictive Coding: A Trial Court Judge's Perspective*, 26 REGENT U. L. REV. 71 (2013); Diane S. Sykes, *Religious Liberties: The Role of Religion in Public Debate*, 20 REGENT U. L. REV. 301 (2008).

¹⁴ This list was compiled by the Regent University Law Library. It is on file with the Regent University Law Review.

passing the bar exam (on the first try!), I have had the great privilege of working with Christian legal organizations to defend God's people in many different situations. I know that my story is similar to many other stories Regent Law School graduates could tell. I thank God every day for the privilege of serving Him and for the unique legal preparation He provided at Regent.

One of the accomplishments of the Regent University School of Law, in addition to both spiritual and academic excellence, has been the development of the same tight networking for Christian attorneys that is exemplified in other prestigious law schools. I have never contacted a fellow Regent alum and not had the call returned. Nor do I ever refuse a call from any Regent grad. That is a great advantage as more and more Regent alums are on the rise in their respective fields of politics, law, and government, as well as other professions.

In particular, over the past twenty-five years, many alumni from the Regent University Law Review staff have made outstanding contributions in their fields. It is always risky to give special recognition for outstanding achievement. Someone is always missed and there are so many outstanding former Regent University Law Review staff members changing America and the law for good. However, special recognition must be given to the very first editor-in-chief, Daniel Kelly, who was recently appointed to the Wisconsin Supreme Court by Governor Scott Walker.¹⁵

America has seen a tremendous shift in law and culture over the past twenty-five years—and not all of those changes have been good. In fact, some of them are downright alarming. Regent University School of

¹⁵ Molly Beck, *Scott Walker Picks Waukesha Lawyer Daniel Kelly for Seat on Supreme Court*, WIS. STATE JOURNAL (July 23, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/scott-walker-picks-waukesha-lawyer-daniel-kelly-for-seat-on/article_17eb913d-91d2-5c8a-8921-45409b8b65c8.html. Other notable law review alumni include, but are definitely not limited to:

- Dale Schowengerdt (Senior Editor, 2002–2003), Solicitor General for the State of Montana, who argued on behalf of the State of Montana before the United States Supreme Court this year in *Betterman v. Montana*, 136 S. Ct. 1609 (2016), and prevailed 8-0.
- Dr. Shawn D. Akers (Internal Articles Editor, 1999–2000), Dean of Liberty University Helms School of Government, Professor of Government, and Assistant Adjunct Professor of Law at Liberty University School of Law.
- Kristen K. Waggoner (Internal Editor, 1996–1997), senior counsel and senior vice president of U.S. legal advocacy at Alliance Defending Freedom, who formerly clerked for the Honorable Justice Richard B. Sanders of the Washington Supreme Court and who received the Regent Alumnus of the Year award at Regent Law's 2016 Commencement Ceremony.
- The Honorable Jim Cox (Issue Planning Editor, 1995–1996), Member of the Pennsylvania House of Representatives.
- The Honorable Joseph A. Migliozi (Managing Editor, 1993–1994), Norfolk Circuit Court Judge for the 4th Judicial District in Virginia.

Law and the Regent University Law Review, however, have continued to be fiercely engaged in the battle for good in our changing legal culture. I am always proud to acknowledge my connection.

If John Adams, my favorite American Founder, were alive today, I think he would want to offer a word of encouragement to the Regent University Law Review during this twenty-fifth anniversary year of publication. Adams, a lawyer himself, and our nation's second president, understood that America was established as a uniquely Judeo-Christian nation, and that it would not long survive if that religious foundation was ever removed.¹⁶ He shared those beliefs with the vast majority of America's Founders,¹⁷ but I particularly appreciate his strong expression of this truth:

[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.¹⁸

President Adams, who participated in drafting both the Declaration of Independence and the Constitution, also issued a strong admonition to those countrymen (and women) who would follow him. It is an admonition that the Regent University Law Review staff has been uniquely qualified to heed, given Regent's focus on Judeo-Christian legal education.¹⁹ John Adams gave us, his Posterity, this stern warning: "Posterity! You will never know, how much it cost the present Generation, to preserve your Freedom! I hope you will make good a Use of it! If you do not, I shall repent in Heaven, that I ever took half the Pains to preserve it!"²⁰

¹⁶ Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 228, 228–29 (Charles Francis Adams ed., 1854) [hereinafter Letter from John Adams].

¹⁷ The vast majority of delegates who attended the Constitutional Convention were professing Christians. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 43 (1987). Only Benjamin Franklin and James Wilson of Pennsylvania were known to be deists, *id.* at 42, while Hugh Williamson of North Carolina and James McClung of Virginia may also have been non-Trinitarian, *id.* at 42–43. Dr. John Eidsmoe concludes that, at most, 5.5% of those attending the Constitutional Convention were deists. *Id.* at 43.

¹⁸ Letter from John Adams, *supra* note 16, at 228, 229.

¹⁹ *Regent's Vision - A Leading Global Christian University*, REGENT UNIVERSITY, http://www.regent.edu/about_us/overview/mission_statement.cfm (last visited Aug. 30, 2016).

²⁰ *John Adams to Abigail Adams, 26 April 1777*, NATIONAL ARCHIVES: FOUNDERS ONLINE (last modified Oct. 5, 2016), <http://founders.archives.gov/documents/Adams/04-02-02-0169>.

It is an undeniable truth of America's Founding that our national union was uniquely based on the Bible.²¹ It is also undeniable that many in America, including those on the Highest Court in our land, seem to have forgotten that truth, which previously bound Americans together. One example of the overthrow of this truth during the twenty-five years the Regent University Law Review has been in existence was the United States Supreme Court's reaffirmation of its pro-abortion/pro-choice standard in 1992 in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²²

There is a particular passage from the *Casey* decision that has since become known in legal and philosophical circles as "the mystery passage," in which the Court seems to have completely changed the nation's original Divine orientation of liberty by stating that the constitutional right to "liberty" is so expansive that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²³ In this "mystery passage," the Court declared that every individual has the right to determine the boundaries of his own liberty and, thereby, to define his own religious and moral standards in whatever way he chooses.²⁴ The government then seemingly becomes obligated to legally recognize whatever notions of liberty any individual might concoct.²⁵

Judge Robert Bork later commented on this "mystery passage" from *Casey* in the context of a discussion on euthanasia, noting:

One would think that grown men and women, purporting to practice an intellectual profession, would themselves choose to die with dignity, right in the courtroom, before writing sentences like those. They mean nothing and were intended to mean nothing. They were intended, through grandiose rhetoric, to appeal to a free-floating spirit of radical autonomy.²⁶

Judge Bork continued to argue that this "mystery passage" and similar decisions by the United States Supreme Court have placed America in a position where her original covenant of union is dissolving

²¹ See D. JAMES KENNEDY & JERRY NEWCOMBE, WHAT IF THE BIBLE HAD NEVER BEEN WRITTEN? 78 (1998) (asserting that even some secularists have noted the role the Bible played in the United States Constitution).

²² 505 U.S. 833, 845–46 (1992).

²³ *Id.* at 851.

²⁴ *Id.*

²⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("Today, however, the Court takes the extraordinary step of ordering every State to license and recognize same-sex marriage . . . [F]or those who believe in a government of laws, not of men, the majority's approach is deeply disheartening.").

²⁶ ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 111 (1996).

and civil society as we have known it may find it difficult to continue.²⁷ Judge Bork observes:

Judicial radical individualism weakens or destroys the authority of what sociologists call “intermediate institutions”—families, schools, business organizations, private associations, mayors, city councils, governors, state legislatures—that stand between the individual and the national government and its bureaucracies. All of this has happened within the lifetimes of many Americans. We are worse off because of it, and none of it was commanded or contemplated by the Constitution.²⁸

Judge Bork correctly describes the current direction of American law. Nevertheless, the Founders’ generation was profoundly influenced by Judeo-Christian values.²⁹ That truth continues to be recognized and defended at Regent University School of Law. The Regent University Law Review is well situated to continue to speak that truth clearly to the legal world in the future, just as it has done for the past twenty-five years.

In Eric Metaxas’ new book, *If You Can Keep It*, he clearly spells out the undeniable nexus between virtue, faith, and freedom.³⁰ He points out that self-government, as a political concept, did not exist before America existed, and that self-government depends, first of all, on citizens properly governing themselves.³¹ He argues that the only basis on which self-government is able to exist is in the context of that uniting principle recognized at America’s Founding, which is that self-government—the basis for freedom—requires virtue; virtue requires faith; faith requires freedom; and freedom requires virtue.³² Round and round it goes. Metaxas calls this The Golden Triangle,³³ endlessly connecting virtue,

²⁷ *Id.* at 112–115.

²⁸ *Id.* at 105.

²⁹ See, e.g., *Washington’s Farewell Address 1796*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/washing.asp (last visited Oct. 12, 2016) (“[L]et us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”); Thomas Jefferson, *Notes on the State of Virginia*, AVALON PROJECT, http://avalon.law.yale.edu/18th_century/jeffvir.asp (last visited Oct. 12, 2016) (“And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?”).

³⁰ ERIC METAXAS, *IF YOU CAN KEEP IT: THE FORGOTTEN PROMISES OF AMERICAN LIBERTY* 54 (2016).

³¹ *Id.* at 36.

³² *Id.* at 36–37, 54.

³³ *Id.* at 54.

faith, and freedom, and warns that “[i]f you take God and faith and morality out of the equation, everything inevitably falls apart.”³⁴

Metaxas demonstrates that recognizing this Golden Triangle is the only appropriate response to the challenge issued by Dr. Benjamin Franklin to Mrs. Powell in the summer of 1787, when he emerged from Independence Hall following the drafting of the new American Constitution:

[W]hen Benjamin Franklin emerged from the building that day, he was accosted by a certain Mrs. Powell of Philadelphia. . . . Mrs. Powell put her question to Franklin directly: “Well, doctor,” she asked him, “what have we got? A republic or a monarchy?” Franklin . . . shot back: “A republic, madam—if you can keep it.”³⁵

That is the ongoing challenge for America today. Can we keep it? Truly, the success, contributions, and accomplishments of the Regent University Law Review and its staff have been a light pointing in the right direction for the past twenty-five years. This publication has been a tremendous asset in the fight to “keep” our American Republic. John Adams should be smiling down from Heaven on the efforts of this portion of his Posterity! We pray that God will enable the Regent University Law Review and its future staff to continue to work diligently toward that goal over the next 25, 50 and even 100 years and beyond.

³⁴ *Id.* at 48.

³⁵ *Id.* at 8–9, 37.