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REMARKS UPON THE OCCASION OF THE REGENT UNIVERSITY LAW REVIEW'S 25TH ANNIVERSARY

*Daniel Kelly**

INTRODUCTION

Thank you for inviting me to address you on this splendid occasion. My first thought upon receiving the invitation was that twenty-five years is quite a long time for the Regent University Law Review to have been in existence. This thought was immediately interrupted by a second, which was that inasmuch as the Law Review's birth coincided with my graduation from this, my beloved alma mater, twenty-five years is not really long at all.

I suspect my first thought describes reality, while the second reflects my tendency to collapse time whenever it touches on the subject of my age. I still have not entirely conceded that I am not a young man entering into the early stages of his career. Now, I think this is evidence of my youthful zeal for life. My wife, however, sometimes says she is raising six children. I don't know why she says that; we only have five.

I have the fondest memories of this place, and my time here—not that I really recognize it anymore by looking at it. I do not mean to sound like the stereotypical uncle upon seeing his nieces and nephews after an extended absence, but my how you have grown! I do, however, recognize the important parts: the feel, the essence, the purpose, the Spirit, the fellowship.

When one is grateful for many things, there are many thanks due, and I intend to give them. So, I hope you will be kind enough to grant me a few moments to recognize those who are so richly deserving of honor on this occasion.

* The Honorable Daniel Kelly sits on the Wisconsin Supreme Court, appointed by Governor Scott Walker in 2016. Justice Kelly served as the first editor-in-chief of the *Regent University Law Review*. These remarks were given at Regent University School of Law on October 1, 2016, for the occasion of the Regent Law Review Twenty-Fifth Anniversary Celebration. A video recording may be found at: REGENT UNIVERSITY, <http://www.regent.edu/admin/media/fms/vod/bcovePlayerURL.cfm?address=9002034> (last visited March 4, 2017).

It is a poor student who does not return to thank his pedagogical masters. And because even twenty-five years after my last, formal classroom instruction I do not want to be a poor student, I shall start with the faculty. Thank you to all who made this the welcoming, challenging, stretching, instructive place it was when I arrived. And thank you to the current faculty who have unfailingly carried forward this institution's traditions, objectives, and purpose.

In light of the reason we have gathered here today, I would like to put a finer point on the focus of my gratitude. Thanks to you, Professor Doug Cook, for serving as our faculty advisor. We could not have asked for a more encouraging and sagacious counselor, reference point, and space-provider. With respect to that last part, I occupied part of Professor Cook's offices until the Law Review had a place to call its own. And when that place arrived, it came in the form of an attic, without air-conditioning or heat. But it was ours, and we could not have been happier if it had been a luxury suite—like what you have now.

I am also grateful that Professor Cook supplied the muscle when it came time to convince the University administration that it really would be okay to have the Regent crest appear on the cover of the Law Review. They were fiercely protective of the University's reputation, integrity, and dignity, and rightly so. They just were not quite sure that a law review would be an endeavor serious enough to justify use of the institution's emblems. I told them that was one of the signal reasons for having a faculty advisor. If anything went amiss and we fled upon graduation, they would still have Professor Cook on whom they could visit whatever retribution might be necessary to redeem the emblems. Apparently, that was sufficient security, and we obtained the crest.

Thank you also to all the Law Review boards, including the current one, who followed ours. One never knows, when one starts something, what that thing will turn out to be. This puts me in mind of a cautionary note Frodo Baggins gave to Samwise Gamgee as they started on their epic journey. Frodo said: "Remember what Bilbo used to say: 'It's a dangerous business, Frodo, going out your door. You step onto the road, and if you don't keep your feet, there's no knowing where you might be swept off to.'"¹

Thank you, to all the Law Review editorial boards, for keeping your feet, and not only still being here, but being here impressively. I have sometimes wondered whether it is better to be part of creating something that becomes notable over the years, or to join something notable and make it even more so. I do not know the answer to that question, but inasmuch as you and the intervening years have made the

¹ THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RING (New Line Cinema 2001).

Law Review a notable thing, perhaps we can get together later and compare notes. I am sure you would have much to tell me.

Thank you to the founding board, who did all of the anonymous but critical spadework and laid the solid foundation for this publication: Tim Barkley, Brian Dinning, Cynthia Noland, Ann Poindexter, Dave Toberty, Tracy Banks, and Bill Wood.

And now I want to share a thought about each of my fellow first editors, just so you have a sense of what manner of people first put their hand to this publication's tiller.

Matt Szymanski, our Articles Editor, had the remarkable ability to swallow a course whole the night before an exam, and then crush it the next day. This was quite fortunate for us, because it left him considerably more time to work on the Law Review.

Tim Barkley, our Managing Editor, could conjure anything we needed out of thin air. It may have had something to do with his ability to tower over anyone and fix them with an oddly compelling stare when he did not receive the response he sought.

Never before in all my life have I met a more genuine and quintessential southern gentleman than James Davis, our Issue Planning Editor. He defined graciousness, generosity, and true friendship. When things got frazzled, James could bring peace with nothing but a smile, an arm around the shoulder, and steel truth in a velvet glove.

Tony Brewer, our Research Editor, was the wise voice in our midst. For those who are my age, do you remember what it was like to be a law student? Inexperienced, untested, a little full of yourself? Maybe I am getting a little too biographical. Tony's wisdom was needed.

I am a bit of a Star Trek fan. One of the recurring themes in this franchise was the encounter with a life form so advanced that it had outgrown the need for corporeality.² Tim Blank, our Executive Editor, was a little like that. He embodied pure intellect. You could tell when he entered a room without even looking. The force of his mind just made you *sense* it.

We were a motley crew. But we had as our singular purpose the launching of this publication. And notwithstanding that, it still happened! God's grace is a most welcome thing.

My fellow editors and I started the Law Review all those years ago because we believed it would be an important vehicle for our national conversation about the nature and source of law; how to create and preserve structures within which the law may be prudently developed

² Melanie Johnson-Moxley, *Rethinking the Matter: Organisms Are Still Organisms*, in *THE ULTIMATE STAR TREK AND PHILOSOPHY: THE SEARCH FOR SOCRATES* 213, 213 (Kevin S. Decker & Jason T. Eberl eds., 2016).

and applied; what quantum and type of authority may be delegated to those operating within those structures; and how to do all of this wisely, against the backdrop of Lord Acton's insight that "power corrupts, and absolute power corrupts absolutely."³ The Law Review is engaged in an important endeavor, and I would like to explain why I believe that through a bit of reverse-engineering.

Accordingly, I will start with a few thoughts on what I believe to be the proper function of the courts. With that as a foundation, I will work backwards through the law-making process to identify the entry point and influence of law reviews in general, and the Regent Law Review in particular. Finally, I will have a few thoughts about the subject matter of this symposium.

I. ROLE OF THE JUDICIARY

We will start with the topic about which all law reviews write (whether knowingly or not): "the rule of law," the enforcement of which is the sole purpose of the judiciary.⁴

"The rule of law" is a phrase so dry it nearly demands unkind comparisons to a desert.⁵ But if it ever fails, you will soon cry out for its return as desperately as the parched Saharan traveler begs for a taste of water.

The rule of law is the fount of societal stability.⁶ It is the promise of method and structure in the relationship between a population and its governors.⁷ It is the bane of arbitrariness and the guarantee that reason may inform how we choose to order our affairs.⁸ It is the ballast that keeps our lives from being upended by the stormy and unpredictable

³ RALPH KEYES, *THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN* 171 (2006).

⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

⁵ The following section, *infra* text accompanying notes 5–28, is adapted from a previous essay written by the author in which a deeper discussion of this topic can be found. Daniel Kelly, *Rawls and Civil Society*, in JOHN RAWLS AND CHRISTIAN SOCIAL ENGAGEMENT: JUSTICE AS UNFAIRNESS 123, 137–38 (Anthony B. Bradley & Greg Forster eds., Lexington Books 2015). Used with permission.

⁶ Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1857 (2013).

⁷ *Id.*

⁸ *Id.* at 1857–58.

passions of officeholders and bureaucrats.⁹ It is the bringer of order, without which no liberty is possible.¹⁰

The rule of law is ancient, and yet a mere babe. For several millennia it has struggled for purchase on this world, sometimes successfully, most often not. It enjoyed a fitful relationship with ancient tribes in the Middle East.¹¹ It rose in Athens,¹² died in Rome,¹³ found new life in England and died there too,¹⁴ only to sprout again in the United States¹⁵ and in other scattered places around the globe.¹⁶ It is a precious commodity, and yet where it exists it seems so ordinary that we barely give it thought. It will not stay where it is not loved, and it will abandon us the instant our attention falters.

Janus-faced,¹⁷ the rule of law looks both backward and forward. The forward-looking face of Janus acknowledges that its role is to adopt the rules governing the prospective actions you take while pursuing results of your own choosing.¹⁸ It provides a sure foundation on which you may order your affairs.¹⁹ It demands that the law be sufficiently specific that you know what it requires, durable enough that you can plan your affairs into the future for a reasonable amount of time, and publicized broadly enough that you can learn its content and adjust your plans

⁹ *Id.* at 1857.

¹⁰ *Id.* at 1857–58.

¹¹ See PERCY HANDCOCK, THE CODE OF HAMMURABI (Percy Handcock trans., Macmillan Co. 1920) (providing context for and a translation of the ancient Code of Laws promulgated by the Babylonian King Hammurabi); Muhamad Mughaby, *Some Impediments to the Rule of Law in the Middle East and Beyond*, 26 FORDHAM INT'L L.J. 771, 772–73, 775 & n.15 (explaining that the conflict between national and internal sovereignty in Middle Eastern nations posed a threat to the rule of law).

¹² EDWIN CARAWAN, RHETORIC AND THE LAW OF DRACO 1–2 (1998); Bradley Aron Cooper, *In Defense of Community: Athenian Legal Rhetoric and Its Modern Legacy in American Foreign Policy*, 18 TEX. WESLEYAN L. REV. 221, 225–26 (2011).

¹³ EDWARD GIBBON, 1 THE DECLINE AND FALL OF THE ROMAN EMPIRE 68–73 (Alfred A. Knopf, Inc. 1993) (1776) (describing the ascension of Augustus and the development of tyranny in the Roman Empire); Peter Heather, *The Fall of Rome*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/ancient/romans/fallofrome_article_01.shtml.

¹⁴ Compare J.C. HOLT, MAGNA CARTA (Cambridge Univ. Press 1965) (1215) (establishing the principle that the king is subject to the law), with THE DECLARATION OF INDEPENDENCE (U.S. 1776) (listing abuses of power and violations of law committed by King George III).

¹⁵ *Id.* at 240.

¹⁶ See generally *id.* (discussing the rule of law in the European Union, United States, Latin America, North Africa, Asia, and in Islamic and socialist nations).

¹⁷ In Roman mythology, the god named Janus bore two faces, one looking into the past and one looking into the future. OVID'S FASTI 9 (James G. Frazer trans., 1959); Donald L. Wasson, *Janus*, ANCIENT HISTORY ENCYCLOPEDIA (Feb. 6, 2015), <http://www.ancient.eu/Janus>.

¹⁸ Kozel, *supra* note 6, at 1857.

¹⁹ *Id.* at 1857–58.

accordingly.²⁰ By giving us an understanding of the prospective consequences of our actions, we can confidently navigate reality's complicated topography en route to our destination.

The other face of Janus, the one that looks to the past, is concerned with judging events that have already happened, and doing so according to the laws that existed at the time the events occurred.²¹ It is a covenant, a solemn understanding that the authority to act against an individual must find its warrant in rules enacted and publicized prior to the actions under consideration.²² In its infancy, the United States understood the centrality of the rule of law to a just and orderly society.²³

In fact, we constructed our federal government so that it would express this principle in every element. We gave it three distinct branches, each with a discrete function corresponding roughly to the temporal framework within which it works.²⁴ We assigned them specific responsibilities that, if honored, would secure our liberties while preventing the government from second-guessing the wisdom of our individual decisions.²⁵ So it is, in our system, peculiarly the legislature's province to address the future. It determines what the laws shall be that will govern tomorrow's actions.²⁶ The executive concentrates on the

²⁰ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 371 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (stating that every government is "bound to govern by establish[ed] standing laws, promulgated and known to the People, and not by Extemporary Decrees").

²¹ Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, THE FEDERALIST SOC'Y (Dec. 16, 2014), <http://www.fed-soc.org/publications/detail/overcriminalization-administrative-regulation-prosecutorial-discretion-and-the-rule-of-law>.

²² *Id.*

²³ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."); THOMAS PAINE, COMMON SENSE 98 (Isaac Kramnick ed., 1982) (1776) ("[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other.").

²⁴ See generally THE FEDERALIST NO. 47 (James Madison) (discussing the structure and distribution of power in the new American government); THE FEDERALIST NO. 51 (James Madison) (discussing checks and balances among the three coordinate branches).

²⁵ *Id.*

²⁶ *Id.*

present; he decides what shall be done today to properly carry the existing laws into effect.²⁷

The judiciary, however, takes for itself matters of the past. It compares what has already happened against the laws as they existed at the time the acts occurred, and then—to the extent possible—it adjusts the parties' circumstances to match what they would have been had they followed the rules.²⁸ The court only interprets and gives effect to the laws.²⁹ It does not question the wisdom or desirability of those laws or the results they produce.³⁰ In honoring this limitation, the judiciary thereby protects the most critical aspect of the rule of law.

Someone once said, "Judges are like umpires. [They] don't make the rules; they apply them."³¹ That's a useful description of how judges are supposed to act. It is because of the judiciary's backward-looking function that a judge may legitimately be nothing more than an umpire. Changing the decisional standard after the act has already occurred is, by definition, antithetical to the rule of law.³² So, for example, it is unjust to change the strike zone after delivery of the pitch because it prevents the pitcher from knowing where to throw the ball. And if you make a "penalty" a "tax," you've changed the rules of the game after the pitch is already on its way.³³

Conceptually, the Court does its work in a museum of sorts. Its mind ranges over things already done, actions that are matters of historical fact before they ever come to the Court's attention. The laws it applies must be artifacts it finds there; it must bring nothing into the museum. This commitment ensures that our behavior will be judged only according to the rules of which we had reason to know when we acted.

But when the Court replaces the decisional standards it finds in the museum, it banishes the rule of law. It is then impossible to know whether today's legal choices will be sanctionable once they become tomorrow's history. That is why a jurist's first commitment must be to never change what he finds in the museum.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See generally THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the role of the judiciary).

³⁰ *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963).

³¹ *Roberts: "My Job Is to Call Balls and Strikes and Not to Pitch or Bat,"* CNN.COM (Sept. 12, 2005), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

³² Cass, *supra* note 21.

³³ See *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655–56 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (explaining the inherent inconsistency in labelling the Affordable Care Act's minimum coverage provision a "penalty" for jurisdictional purposes and a "tax" for constitutional purposes).

If we do not carry new rules of decision into the museum, we will not have anything to fear from the courts. As Alexander Hamilton explained:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, *from the nature of its functions*, will always be the least dangerous to the political rights of the Constitution; because it will be least in a *capacity* to annoy or injure them. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment . . .³⁴

It is the *nature of the court's function* that makes it the least dangerous.³⁵ The corollary to this must be that if the court goes beyond the judicial function, if it invades the functions delegated to one of the other branches, it *will* become dangerous. And indeed that is true. Hamilton also said:

[T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains *truly distinct* from both the legislature and the Executive. For I agree, that "*there is no liberty*, if the power of judging be not separated from the legislative and executive powers." . . . [L]iberty can have nothing to fear from the judiciary alone, but would have *every thing* to fear from its union with either of the other departments . . .³⁶

II. IMPORTANCE OF THE LAW REVIEW

All of this puts a premium on adopting laws that are just and true. For if the judiciary may not declaim on the wisdom of a law, then wisdom must be found in the law itself, or not at all. If the judiciary may not refashion laws to reach results more congenial to the minds of the jurists, then we had best hope that prudence was one of the ingredients in the law's formulation.

The law, the judiciary's primary tool, is the distillation of an exceedingly complex process. I do not mean by this the mechanical procedure by which a bill becomes a law. Instead, I refer to the process by which the beliefs, preferences, habits, eccentricities, traditions, hopes, fears, and aspirations of more than 300 million unique individuals are expressed, tested, refined, coordinated, dismissed, or accommodated before an idea even becomes a bill.

³⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (emphasis added).

³⁵ *Id.*

³⁶ *Id.* (emphasis added) (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 202 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748)).

It has been said that politics is downstream of culture.³⁷ If that is true, then it must also be true that law is downstream of politics. Put another way, culture begets politics; politics beget laws; laws control the work of the courts. This process takes place in three stages, and law reviews may play a role in each one.

The first is the pre-political. This is where we have our most basic conversations. These are akin to what we conceive the Wild West to have been: open, unbounded, available to all. It is in this place of maximum freedom, sometimes called the marketplace of ideas, that we explore who we are as individuals and members of the human race, the need for community, the importance of not living in the Wild West, the source of law, the nature of government and the source of its authority, and the objects and subjects on which government may legitimately operate.

The second stage in the process is structural. Based on what we learn in the pre-political stage, we then build the institutions that will allow us to live in society productively and peacefully.³⁸ For example, we create an economic structure where we can organize and employ our talents to create and exchange value in a way that could not be done alone. We gather in churches so that we might better serve our Creator and our fellow creations. We create philanthropic and fraternal organizations with like-minded individuals in pursuit of a myriad of objectives. It is also the stage in which we determine how to channel the coercive part of our communal life. We decide upon the basic form government is to take (whether monarchy, democracy, republic, or something else), and agree on how to allocate government powers amongst the servants populating the structure.³⁹

The final stage is the realm of prudence. Having staked out the parameters in which government may properly operate, we then decide what rules to adopt to preserve our rights and foster human flourishing.⁴⁰

I conceive of these stages as different levels in a funnel. The first stage is at the top, and it is where we may rove the most broadly in search of both metaphysical and physical truths. The next level, the structural level, is constrained by the conclusions we reached in the first. Thus, for example, if we conclude in the first stage that we will live in community, rather than pursue solitary lives, this sets certain

³⁷ James Poniewozik, *Remembrance: Andrew Breitbart, 1969-2012*, TIME (Mar. 01, 2012), <http://entertainment.time.com/2012/03/01/andrew-breitbart-1969-2012>.

³⁸ See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 189–99 (Whitmore and Fenn & C. Brown 1821) (1689) (describing the process by which people living without government come to appreciate and build it).

³⁹ See *id.* (describing the allocation of powers within the government).

⁴⁰ See *id.* (explaining that people enter into community, governed by the majority, for mutual comfort, safety, and security).

boundaries on how we may thereafter conduct ourselves. Similarly, the range of options available to us in the prudential stage is narrowed by the decisions we took in the prior stage.

As the funnel narrows, the pressure builds as ideas are compressed into structural principles. This in turn puts pressure on competing means of advancing human flourishing, until, at the very end of the distillation process, a law emerges from the bottom of the funnel. And that is the process by which the funnel cooks the ideas of millions of people down to a law that has fixed and discernable content, and that is suitable for execution by the executive branch, and application by a court of law.

Law reviews have a critical role to play in this process. Where else is it possible to have a long-form, in-depth, intelligent conversation about all of the factors that feed into the law-making and applying process? Law reviews can participate at any level of the funnel, but their value increases the higher in the funnel they engage.

They have the least value when they engage after a law has emerged from the bottom of the funnel. At that point, they may be able to marginally affect how the law is applied, but they can do nothing about its content. Their role is primarily descriptive, offering commentary on how it progressed through the process and the degree of fidelity to structural principles and anticipated effectiveness.

Law reviews have more value at the prudential level, inasmuch as there is actually an opportunity to affect the law's ultimate content.⁴¹ They can describe the boundaries governing the subjects a law may properly address. And they can illuminate the interaction between a proposed law and human nature to assist in discovering the best way of promoting human flourishing.

They have even greater value at the structural level. Here the conversation begins to reach some foundational issues. What are the objects and subjects on which government may legitimately operate? What structures are needed to allow us to maximize our value-creating potential? What is the basic form government should take, and how should we allocate its power to make it robust enough to perform its functions, but not so hegemonic that it can steal our liberties?

Law reviews, however, have the most value at the pre-political level. Here is where we seek transcending truth, and discover how it applies to matters both prosaic and profound. Do we relate to each other as man or beast? Created, or accidental? What are the irreducible institutions of society? Can we bend them into whatever shape we wish? Or does reality have certain features baked into it that, no matter how hard we try, we

⁴¹ Michael L. Closen & Robert J. Dzielak, *The History & Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 22–23 (1996).

cannot ignore without hazarding injury? What is law? What is the nature of government, and the source of its authority? Does it have only that authority delegated to it by the people who called it into existence? Or does it have inherent authority that it may exercise against the people without their consent?

These are the types of questions you may address when you enter the funnel at the very top. So the pre-political level engages us in “first principles” questions.⁴² They are first both in terms of importance, as well as in order. If we err at this level, our mistakes will infect the structural level, and errors in the structural level will propagate into the prudential level, and missteps there cannot be remedied by the judiciary.

If we do not address these questions at the top of the funnel, we will not be able to affect their resolution later in the process. Why is that important? We live in an age where we question whether law is anything other than the raw exercise of power by one group of people against another.⁴³ We are uncertain whether justice, as a concept, is possible.⁴⁴ We have even grown distrustful of our ability to speak freely without damaging each other. And, apropos of this Symposium’s subject,⁴⁵ we are in the midst of discovering whether it is possible to redefine the basic institutions of humanity that date back to the dawn of all things, such as marriage.⁴⁶

III. THE RECREATION OF AN INSTITUTION

If you will indulge a little equine imagery, it seems evident that as a people, we have gotten the bit in our teeth and we are on a wild romp through the unknown. Perhaps our technological acumen has convinced us that nothing is outside our reach. If we can conceive it, we can do it. Perhaps we believe we really can build a tower to the sky, and touch the very face of God.⁴⁷

⁴² See generally ARISTOTLE DICTIONARY 405–06 (Thomas P. Kiernan ed., 1962) (describing a first principle as the basis from which a thing is known).

⁴³ See Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 515–16, 518–19, 523 (2000) (describing the Marxist concept of hegemony, which views entrenched social institutions as a means for a dominant social group to subjugate the subservient group).

⁴⁴ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (2d ed. 2012) (explaining a school of legal theory that questions foundational concepts of justice, including equality and neutrality in the law).

⁴⁵ Brett Tubbs, *Regent University School of Law Celebrates 25 Years of Law Review*, REGENT U. SCH. L. NEWS BLOG (Oct. 13, 2016), <http://regentlawnews.blogspot.com/2016/10/regent-university-school-of-law.html>.

⁴⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting) (explaining that the right to privacy does not include the right to redefine marriage).

⁴⁷ See *Genesis* 11:1–9 (relating the story of the Tower of Babel).

Whatever the source of our hubris, it has convinced us we may instantiate the philosopher's crucible. The philosopher is free to experiment as he wishes, to reinvent life and reality in any way he cares to imagine. He may melt society in the crucible, form it anew, study it, criticize it, learn from it, or even advocate for its adoption. But it is just a thought experiment. If the newly imagined society does not contribute to human flourishing, he can dump the results in the ashcan, clean out the crucible, and start fresh the next morning.

But we, it turns out, are an impatient people. We have no time for study or careful consideration. We have decided to experiment with the lives of real human beings, as we melt down the institution of marriage and recreate it in a new and hitherto unknown form.⁴⁸

But what if form follows function? What if marriage serves a purpose greater than personal desire and fulfillment? What if marriage is shot through with pieces of immutable reality that we cannot ignore, no matter how much we may wish, without risking injury? What happens if marriage, as it has been known for pretty much all of time, grew up around those pieces of unchangeable reality? What if there is no room in our remade institution for some of the elements we find in the crucible, things that will not readily dissolve upon command?

It is a concern that before abandoning the wisdom of the ages, we did not first ask whether this institution is malleable enough to accommodate the new understanding of the world announced in *Obergefell v. Hodges*.⁴⁹

I cannot answer these questions, nor even address them. That is not to say I do not have thoughts on them. But it is to say that the full scope of my authority begins and ends with applying the law given me by the people of Wisconsin, and of the United States. That is because, in accepting appointment to the Wisconsin Supreme Court,⁵⁰ I became a servant. And I do mean "servant," not in the self-congratulatory sense in which we call ourselves "public servants." I mean a real servant, one who understands his position is inferior to the one who has retained him. I mean one who does as he is instructed, and does it with a will, and a glad and cheerful heart. I mean one who understands that the latitude of his actions is defined and limited by the people from whom he borrows his authority.

⁴⁸ See *Obergefell*, 135 S. Ct. at 2602, 2607 (asserting a constitutional right for same-sex couples to marry, despite acknowledging that, traditionally, marriage has been defined as a heterosexual union).

⁴⁹ *Id.*

⁵⁰ Brett Wilson Tubbs, *Regent University School of Law Alumnus Selected to Supreme Court of Wisconsin*, REGENTALUMNI.ORG (Nov. 22, 2016), <http://www.regentalumni.org/s/832/social.aspx?sid=832&gid=1&pgid=252&cid=6305&ecid=6305&ciid=17621&crid=0>.

CONCLUSION

You can address these questions. The Regent University Law Review is uniquely well-positioned to explore these issues, and provide guidance as the great people of this nation escort them through the funnel from idea to reality. Your willingness to examine these “first principles” questions is unmatched. Your foundation is firm, and your leadership sound.

May the Regent University Law Review always be blessed with editors who care about it as much as the ones it has today. May its contributions and influence over the next twenty-five years grow as quickly and surely as they have grown in its first quarter-century. May God bless you, this University, and the work of your hands.