

Washington County

Ozaukee County

# MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE FALL 2014

## THE RED & THE BLUE

Political Polarization Through  
the Prism of Metropolitan Milwaukee

by Craig Gilbert

Reactions from Boston to New Haven  
to Milwaukee to Palo Alto

### ALSO INSIDE:

Judge Kathleen O'Malley on Patent Litigation

What Local Control of Schools Means Today

Waukesha County

Milwaukee County

## Lovell, Lubar, and the Law School More Generally

In our first meeting on campus, Marquette University's new president, Michael R. Lovell, told me how impressed he had been, in his years at the University of Wisconsin–Milwaukee (UWM), by the engagement of Marquette Law School with the community. The feeling is mutual. To have a president who has already demonstrated his deep commitment to civic and community engagement here is inspiring.

In fact, that work had already brought Dr. Lovell to Ray and Kay Eckstein Hall on several occasions during his time at UWM. I recall our greeting one another in January 2011, when The Water Council, which he had joined while dean of the engineering school at UWM, had one of its meetings in the brand-new Eckstein Hall. Dr. Lovell was here again last year, this time as UWM's chancellor and a guest "On the Issues with Mike Gousha," to discuss the Milwaukee Succeeds initiative, the broad-based effort of civic leaders to improve the educational outcomes of Milwaukee children. The only wonder, perhaps, is that we did not bump into one another during our various respective visits to the downtown office of Sheldon B. Lubar, a great benefactor of both UWM (the Lubar School of Business) and Marquette University Law School (the Lubar Fund for Public Policy Research), among other civic institutions.

Work focused on the community is of great importance to the Law School. Craig Gilbert's cover

story in this magazine reflects this. Gilbert, the nationally respected Washington D.C. bureau chief of the *Milwaukee Journal Sentinel*, spent most of the last academic year as the Law School's Lubar Fellow for Public Policy Research. His essay here, like the longer series in the newspaper this past May, details the deep political polarization that is an important characteristic of metropolitan Milwaukee today. While Gilbert's work is intensely factual, we also include reactions from a number of thoughtful academics and public intellectuals, from Marquette and elsewhere. The result is an important contribution for anyone trying to understand, let alone help chart a course forward for, this region.

Gilbert's work relies not only on election returns but also on the Marquette Law School Poll, the extraordinary initiative led by Charles Franklin, professor of law and public policy, and originally (in 2011) urged upon me as dean by Mike Gousha, distinguished fellow in law and public policy, and Mike McChrystal, professor of law and chair of strategic planning for the Law School. Like almost all of our public policy work, the poll is not funded by tuition dollars. If you are among the hundreds of donors to the Law School's Annual Fund, it is *you* who have supported the poll, as this dean's discretionary fund is the exclusive source of funds supporting all political polling (and much public policy polling) that we do.

We also use these dean's discretionary funds for purposes more directly focused on the education of Marquette lawyers. Indeed, much of the rest of the magazine reflects this. From our Washington D.C. Initiative (page 5) to the Nies Lecture (pages 26–33) to the expanded work of our Office of Public Service (page 7), we try to carry the Marquette University mission of Excellence, Faith, Leadership, and Service into the larger world, both in metropolitan Milwaukee and elsewhere in the country and the world. The support of donors underwrites much of this work.

This "we" carrying forward the Marquette mission includes the president, dean, and benefactors large and small; it encompasses the faculty here and even academics at other institutions, whether UWM, Stanford, or Yale; but it is, especially, our students and their predecessors—i.e., Marquette lawyers today. On behalf of all of us, I invite you to read this *Marquette Lawyer*, our semiannual magazine, and come to know us better.

Joseph D. Kearney  
*Dean and Professor of Law*

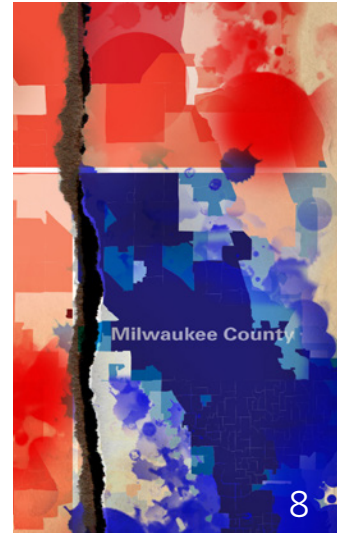


Michael R. Lovell, Sheldon B. Lubar, and Joseph D. Kearney



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## Mitten Named President-elect of Sports Lawyers Association

From behind the scenes at the Olympics to the front page of national publications seeking sports law expertise, you're likely to find Professor Matthew Mitten wherever the field of law intersects the field of play.

Now comes another honor: Mitten has been named president-elect of the Sports Lawyers Association and will serve a two-year term as president beginning in May 2015.

With more than 1,700 members, the Sports Lawyers Association (SLA) is the leading organization of professionals dedicated to the practice and teaching of sports law in the United States.

"Serving as SLA president will enable me to follow in the footsteps of so many great leaders of the world's preeminent association of sports lawyers,

industry professionals, and lawyers," Mitten said. "The appointment recognizes the contributions that Marquette Law School and its National Sports Law Institute have made to the high-profile and quickly evolving field of sports law."

Mitten has been a member of the Law School faculty and director of the National Sports Law Institute since 1999. A nationally recognized sports law scholar and Olympic sports arbitrator, Mitten served on the Court of Arbitration for Sport to resolve athlete-related disputes at the 2014 Winter Olympics in Sochi, Russia.

Founded in 1989, the National Sports Law Institute is the first institute of its kind associated with an American law school and remains the leader in its field. ■



U.S. Secretary of Labor Thomas Perez

## Labor Secretary Perez Asks Graduates to Help Others

In his address at the Law School's hooding ceremony on May 17, 2014, U.S. Secretary of Labor Thomas Perez spoke of an "orchestra of opportunity" in which each graduate can find a unique role in helping others.

"You have a remarkable degree today, and you've had a remarkable education here," Perez told graduates. "I implore you to join the orchestra of opportunity because there are opportunity gaps across this country." ■



At the ceremony at The Milwaukee Theatre, 189 Law School graduates received their hoods.





Marquette Law School's Washington D.C. Initiative supported summer internships in the nation's capital for students (left to right) Evan Scott, Alexandra Suprise, Erin Block, Kelly Cavey, Christopher (Chal) Little, and Erika Olson.

## “Invaluable”: Law Students Describe Benefits of D.C. Initiative

One of the things Kelly Cavey liked about her summer internship was simply to walk the halls of the building where she worked: the U.S. Department of Justice headquarters in Washington D.C. “It never got old,” said Cavey, a part-time student at Marquette Law School who is on schedule to graduate in May 2015. “Being part of that environment is just spectacular. . . . The world becomes a lot bigger.”

Such an august atmosphere can expand your field of vision. Far more important, Cavey and five other students gained valuable real-life experience in Washington, working with attorneys in pursuits that interest them professionally. Support from Marquette Law School's Washington D.C. Initiative underwrote much of the cost of the internships for the six students.

“I'm so grateful that I had the opportunity,” Cavey said. “The Marquette grant made it possible.” She spent two months in the Department of Justice's Office of Professional Responsibility, primarily doing legal research and writing memos for supervising attorneys assigned to handle complaints against employees of the department.

The six Marquette Law students struck a common theme in describing their summers: The experience was of great benefit.

“Invaluable” was the word Alexandra Suprise, 3L, used to describe her work on the staff of the Subcommittee on Financial and Contracting Oversight of the Senate Committee on Homeland Security and Governmental Affairs. She was hired by the office of Sen. Ron Johnson of Wisconsin. Her work included helping prepare for hearings and meetings.

“My experience in D.C. was very eye-opening to a side of the law I had not yet experienced,” said

Evan Scott, 2L, who worked for the Minority Media Telecommunications Council, a nonprofit that advocates for minority and women-owned businesses. “I really was able to get in and get my hands dirty with policy law and understand how corporations deal with regulatory organizations—in my case, the Federal Communications Commission.”

As an aide for Sen. Charles Grassley of Iowa, Erika Olson, 3L, worked with staff of the Senate Judiciary Committee. She played a significant role in drafting a speech Grassley gave on the Senate floor and helped prepare questions for public hearings.

Christopher (Chal) Little, 3L, said that he gained a lot from his work with lawyers in an office within the Securities and Exchange Commission. He added, “Perhaps the most valuable experiences were broader parts of the internship.” The SEC opens many of its training sessions to all interns, he explained. “I also was able to attend open and closed commission meetings and meet many of the talented attorneys who work for the SEC.”

Erin Block has an undergraduate degree in computer science and an interest in intellectual property law. That led to work assisting attorneys at the Patent and Trademark Office on applications for patents involving technology. She also worked on turning technical language into more understandable terms for people applying pro se for patents.

Drawing on contributions to its Annual Fund, the Law School provided stipends to each of the students to help defray living costs. The school's Career Planning Center also assisted the students in the placement process—and, most generally, in gaining a bigger sense of their own possibilities. ■

## Longtime Milwaukee Public Schools Teacher Leaves \$2 Million Estate Gift

Given the fact that Bernadette Steep dedicated her life to teaching, perhaps it's no surprise that a gift from her estate will help others attain an education.

The generosity of her gift was a testament to the way she lived her life.

A Marquette alumna who spent her entire career teaching in Milwaukee Public Schools, Steep bequeathed a \$2 million estate gift to the university for endowed scholarship aid. The gift will be split between the Law School and the College of Education.

Steep, who was 92 when she died on May 4, 2014, in Gurnee, Ill., graduated with a bachelor's degree in 1944 and a master's in education degree in 1967. Steep began teaching elementary school in 1958 and retired in 1987.

Her gift includes funds that she first received from the estate of her sister, Mary Ann, who graduated from

Marquette with a bachelor's degree in 1953 and a law degree in 1990. Mary Ann, who died on December 21, 2007, worked for more than a decade and a half as a private-practice attorney. Before her legal career, she worked for Blue Cross Blue Shield for 30 years, retiring from the company as vice president of its actuarial department.

Bernadette Steep expressed her desire to continue to have an impact in education to honor the memory of her sister, as well as Marquette's community of Catholic, Jesuit priests.

"A planned gift such as this is one of the best ways benefactors can make it possible for young women and men to pursue an education that will transform their lives," said Michael K. VanDerhoef, vice president for university advancement. "This extraordinary gift will impact countless students in education and law in perpetuity." ■

## Law School Receives LSAC "Diversity Matters" First-Place Award



Marquette Law School was recognized for its diversity outreach efforts earlier this year, receiving the Law School Admission Council's (LSAC) "Diversity Matters" first-place award for exceptional programming.

The award, in its fifth year, recognizes law school programming that encourages racially and ethnically diverse students to consider law as a career. The award was announced at LSAC's annual meeting and educational conference in May.

Marquette Law School received the award based on factors such as the number of its events, the high attendance level at the events, and exceptional website promotion.

Kent D. Lollis, LSAC's executive director for diversity initiatives, said the Law School's outreach programs were "creative, inventive, and reached the largest number of students from diverse backgrounds."

"The underlying work was a community effort," said Professor Vada Waters Lindsey, associate dean for enrollment. "From the Law School's office of admissions to our office of public service to law faculty and other colleagues at Marquette University and members of the Milwaukee community, we all pull together to help ensure that we are a welcoming and diverse community." ■



## Idealism and Tenacity Fuel Growth in Law School's Pro Bono Program

Just like Marquette Law School's pro bono program, Katie Mayer, L'11, combines eagerness to help others with tenacity in doing that. You can see that three ways when it comes to Mayer, who was appointed in August to be assistant director of public service at the Law School.

First, there is her broad professional commitment to assist and promote programs helping low-income people receive legal help. "I love being able to help reach out to people in the community who don't have access to services," Mayer said. "I entered law school with the intention of using my skills as an attorney to serve others."

Second is her personal involvement in Marquette Law School's pro bono programs, starting when she was a student. Mayer took part in the Marquette Volunteer Legal Clinic (MVLC), and she continued her involvement during three years of private practice.

And third is a personal commitment to respond to a medical need in her family. Mayer, who grew up in Sussex, outside of Milwaukee, said her mother has Meniere's disease, an inner-ear affliction that causes vertigo and hearing loss. Mayer has committed herself to raising money for the American Hearing Research Foundation to support research into the disease by running half-marathons in all 50 states, plus the District of Columbia. So far, Mayer has run five, with three more planned, but she has given herself a couple more decades to fulfill her pledge.

As for the long-run success of the Law School's public service program



Angela Schultz, Marquette Law School's assistant dean for public service (left), and Katie Mayer, the new assistant director of public service, say pro bono efforts are booming.

overall, "It's booming—for real," said Angela Schultz, the Law School's assistant dean for public service, to whom Mayer reports. Schultz said that two-thirds of law students take part in pro bono efforts and almost half of the members of each class graduate wearing honor cords recognizing their membership in the Pro Bono Society as a result of the number of hours they have volunteered.

Schultz, who joined the Law School in 2011 after a decade of working in Oregon for a domestic violence intervention program and then practicing elder and disability law in the Milwaukee area, said that she has seen increasing commitment and impact in the Law School's efforts. These include student participation at the various MVLC sites, as well as other law school and community programs such as the Marquette Legal Initiative for

Nonprofit Corporations (M-LINC), the Milwaukee Justice Center, the bankruptcy court pro se help desk, and the refugee help desk at the Pan-African Community Association. Many students also take part in the Public Interest Law Society's efforts within the Law School, which support pro bono work.

Schultz said that the Marquette Volunteer Legal Clinic served its 20,000th client last year and, at locations throughout the Milwaukee area, clinics are being held generally six days a week, including Saturday sessions with the Mobile Legal Clinic, begun last year.

Schultz said that when she has attended national conferences, she has found that Marquette's pro bono efforts were well supported. With the arrival of Mayer, the forecast is for more eagerness to help—and more tenacity in making that a reality. ■

Washington County

Ozaukee County

Waukesha County

Milwaukee County



# THE RED THE BLUE

## **Political Polarization Through the Prism of Metropolitan Milwaukee**

by Craig Gilbert

The Pew Research Center recently called polarization the “defining feature of early 21st-century American politics.” It sketched out “what polarization looks like,” exploring a series of trends that have fueled the emergence of opposing camps in the U.S. electorate: everything from ideological conformity to partisan antipathy to people living in politically like-minded “silos” to activist voters on the right and left playing an outsized role in our political process.

There’s another way to see what polarization looks like: It’s to spend some time in metropolitan Milwaukee, a kind of ground zero in the American saga of red versus blue. In Milwaukee, you’ll find the country’s dividing lines in stark relief: red–blue, white–black, old–young, married–unmarried, churchgoing–secular.



## I. The Context

In metropolitan Milwaukee, you'll find two parties drawing their support from very different kinds of voters and very different kinds of communities; a place that has grown more politically segregated with almost every election since the 1970s; and a hotbed of political engagement, where turnout and partisan division have been rising hand-in-hand for decades. In short, in southeastern Wisconsin, you'll find the most polarized part of a polarized state in a polarized nation.

That's what we found in a project that I undertook recently at Marquette University Law School. Working in particular with Charles Franklin, professor of law and public policy, I spent six months examining the deep and growing political divisions in Milwaukee and Wisconsin. As the Law School's Lubar Fellow for Public Policy Research in 2013–2014, I teamed up with Franklin in an academic-journalistic joint venture.

This was the second time that the *Milwaukee Journal Sentinel* and Marquette Law School had partnered on such a long-term reporting project. We published our findings in the newspaper and, working with Mike Gousha, distinguished fellow in law

and public policy at Marquette Law School, we held a joint conference exploring the topic; this essay is a further exploration.

Certainly I did not have a hard time selecting a topic for my fellowship. Polarization is the political story of our times. It dominates our fractious and at-times paralyzed national capital and our increasingly partisan and nationalized elections. Far from being an exception, Wisconsin has been more polarized over its governor than any state in America. And metropolitan Milwaukee, more specifically, may even be the most-polarized place in swing-state America: voters are not just strangers to each other in their politics but also increasingly live in separate worlds.

Polarization takes many forms. My research focused on two in particular. One is the growing gap between voters in the two parties. Partisanship and ideology have become increasingly aligned in American politics, with the Democratic Party losing its conservative wing (anchored in the South) and the Republican Party losing its liberal wing (anchored in the Northeast). Party lines have hardened in the electorate as the contrast between the parties has sharpened. The other form of polarization is the country's partisan geography, as states, counties, and neighborhoods have become more one-sided in their politics. Journalist Bill Bishop dubbed this phenomenon "The Big Sort" in a 2008 book by that name.

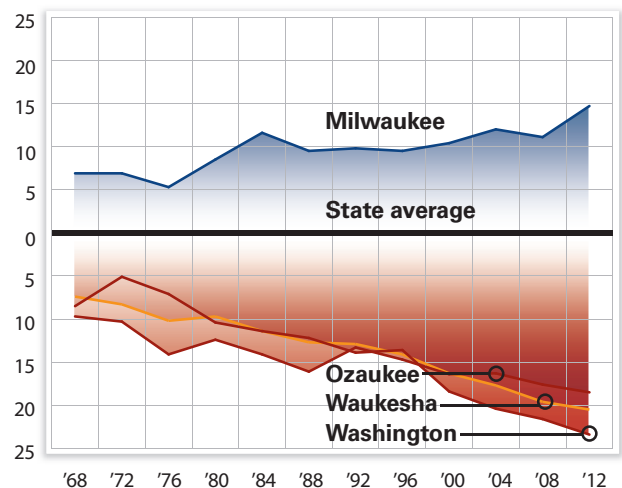
The sorting of America into like-minded enclaves is far from universal or complete, but it describes metropolitan Milwaukee to a tee. When you look at an election map of southeastern Wisconsin, you see a patch of dark blue flanked by fields of bright scarlet. For more than 40 years, the blue parts have been getting bluer, and the red parts have been getting redder; the chasm between them has been growing.

The sorting of America into like-minded enclaves is far from universal or complete, but it describes metropolitan Milwaukee to a tee.

## A growing chasm

Compared to the state as a whole, metropolitan Milwaukee's communities have been growing farther apart politically since the 1970s. The chart below is based on presidential voting and shows in percentage points the extent to which a county was more Democratic or more Republican than the statewide vote.

The four-county area's growing divide



Source: State of Wisconsin

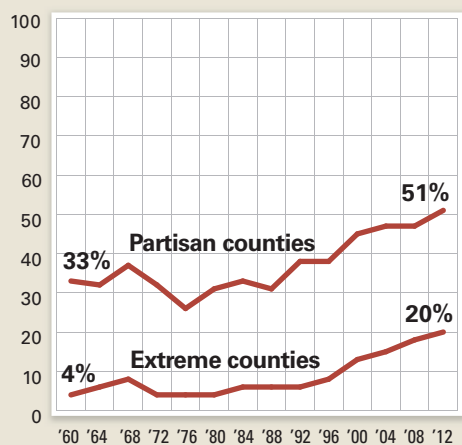
Journal Sentinel



## Across the country, voters cluster together

In the 2012 presidential race, the share of all voters who lived in a county that was 10 or more points redder or bluer than the United States as a whole (here labeled “partisan counties”) was 51 percent. The share of voters who lived in a county that was 20 or more points redder or bluer than the nation (here labeled “extreme counties”) was 20 percent.

### Percentage of U.S. voters living in one-sided counties



Journal Sentinel analysis of election data from Dave Leip's Atlas of U.S. Presidential Elections

Journal Sentinel

Only 1 in 8 voters in metropolitan Milwaukee lived in a neighborhood decided by single digits in the last presidential contest. Almost 6 in 10 lived in a neighborhood decided by 30 points or more.

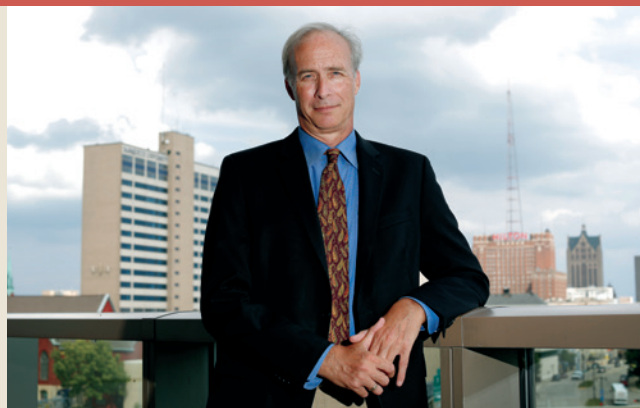
“There is no sense in trying to persuade anybody in southeast Wisconsin,” says Mark Graul, a native of the region who has run Republican campaigns for governor and president in the state. Rather, it’s just about “getting them to vote.”

The 2012 recall race for governor gives a sense of this. This recall election, less than a year and half into Governor Scott Walker’s term, was occasioned by roughly one million petition signatures in a state with fewer than five million voters. The petitions followed the state’s adoption of Act 10, which restricted the collective bargaining of most local and state government employees.

In the recall election itself, Walker prevailed by 7 percentage points—a larger margin than he had received in November 2010 against the same opponent (Milwaukee Mayor Tom Barrett). He got only 36 percent of the vote in Democratic Milwaukee County but won 73 percent of the vote in the rest of the four-county area: the “collar” Republican counties of Washington, Ozaukee, and Waukesha.

This was no fluke. In the presidential race five months later, President Barack Obama got 67 percent of the vote in Milwaukee County but just 32 percent of the vote in Washington, Ozaukee, and Waukesha. It was the biggest gap between urban and suburban counties in any top-50 metropolitan area except New Orleans. ▶▶

**Craig Gilbert** is the chief of the Washington Bureau of the *Milwaukee Journal Sentinel*. He served this past academic year as Marquette Law School’s Sheldon B. Lubar Fellow for Public Policy Research. His essay here builds upon the “Dividing Lines” series published in the newspaper. Special thanks to Enrique Rodriguez and Lou Saldivar of the *Journal Sentinel* for their work on the graphics that are part of this story.



## II. The Causes

Why are the partisan divisions in southeastern Wisconsin so extreme?

Metropolitan Milwaukee combines in one political hothouse an unusual array of polarizing attributes: deep racial segregation; an intensely engaged (and sometimes enraged) electorate; and the Balkanizing effects of serving over the past decade and a half as one of the most fought-over pieces of political turf in America.

All these factors point in the same direction. Let's examine them one by one and then consider the effects.

### Segregation

Milwaukee is the nation's most racially segregated metropolitan area by several measures, with African-Americans concentrated in the city of Milwaukee and a few inner suburbs and virtually absent everywhere else.

Because blacks are overwhelmingly Democratic, because the Republican Party remains overwhelmingly

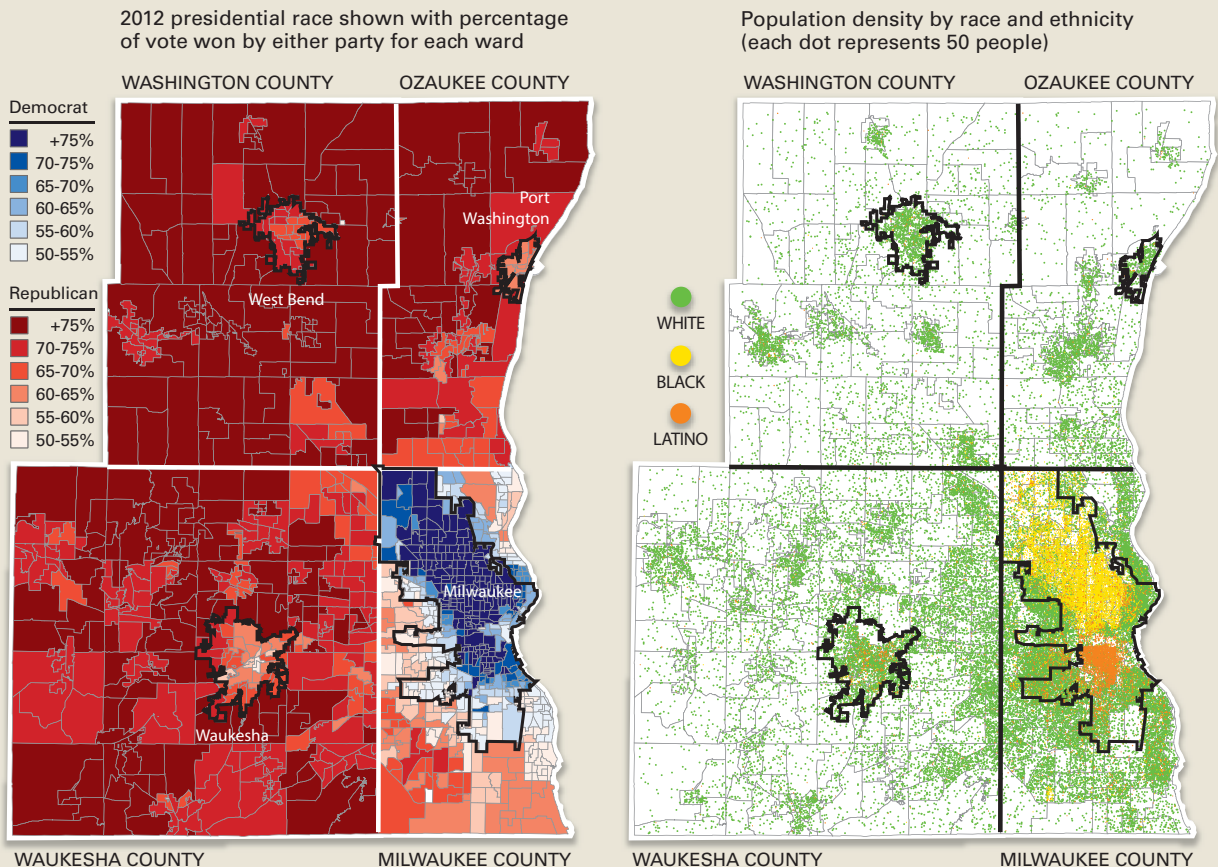
white, and because the gap has grown between how whites and nonwhites vote, racial segregation spells political segregation. The research of political scientist Katherine Levine Einstein, a Milwaukee native now at Boston University, shows that black-white segregation drives red-blue segregation in the country's major metropolitan areas.

But it's not just the partisan differences between blacks and whites at work here. It's also the political differences between whites who live close to the city and whites who live farther out. Call it the "density divide." The political distance between densely populated areas and less densely populated places has been getting bigger in America for decades. And while a big part of the phenomenon is demographic—Democratic-leaning minorities are concentrated in cities—part of it is simply attitudinal. Urban whites are more Democratic and more liberal than suburban and exurban whites.

The Pew research showed this as well. It found that liberals are much more likely to prefer living in ▶▶

### Segregation helps drive voting patterns

Race and ethnicity are big reasons for the partisan gap between Democratic Milwaukee County and the Republican WOW counties (Washington, Ozaukee, and Waukesha). Differences among white voters also contribute to the geographic divide. White neighborhoods in Milwaukee's inner suburbs are much less Republican than white neighborhoods in the outer suburbs.





## Polarization at the Local Level

by Heather K. Gerken

Having had the good fortune last year to do an “On the Issues with Mike Gousha” session on “how local should politics be?” with Craig Gilbert and Charles Franklin, I’m glad that Gilbert’s work on local politics continues apace. Gilbert’s arresting study reminds us that the problems of polarization aren’t confined to Washington. Academics are familiar with “The Big Sort,” to borrow Bill Bishop’s evocative phrase. But metropolitan Milwaukee presents such an extreme example of microlevel polarization that everyone should read this important study. Milwaukee, after all, may be a stand-in for where American politics are heading.

I’ll confess that I’m not nearly as disturbed by many of Gilbert’s findings as I suspect most people will be. As Gilbert himself notes, the ferocious politicking that we see in Milwaukee and Wisconsin has its upsides. Voters are engaged. Turnout is high. And elections have consequences; voting no longer means choosing between Tweedledum and Tweedledee. Conflict is an underappreciated good in a democracy. It fuels politics, drives debates, and pushes policy making forward.

At the same time, polarization can undermine governance. Conflict is a political good—but so is compromise. In the olden days, we used to have both. But polarization has reached such extremes at the national level that Congress cannot address the everyday concerns of everyday people. Our policy-making system, with its many interlocking gears, cannot function without the lubricants of political compromise and party defections. Policy making in Washington has thus ground to a halt.



The Gilbert study’s most important contribution is its suggestion that divisive party politics undermine governance at the *local* level as well. Polarization has gummed up southeastern Wisconsin politics and made regional cooperation more difficult.

Now that Gilbert has shown that local politics suffer from the same disease as national politics, perhaps we should start comparing solutions as well. Work being done on polarization at the national level may help us identify solutions at the local level. It’s become a commonplace to say that our presidential system cannot function with the cohesive and disciplined parties that inhabit parliamentary systems. Some think that the solution is therefore to tamp down on polarization, returning us to the parties of old so that we can return to governance of old. On this view, we should strengthen the moderates in both parties, empower the leadership, and reward bipartisanship and crossing party lines.

Others are skeptical that the forces that generated today’s divisions can be so easily pushed back. Rather than convert our parliamentary parties into presidential ones, they argue, we should make our presidential system function more like a parliamentary one. On this view, we should eliminate veto gates like the filibuster, empower the executive, and make it easier for the majority party to govern unencumbered.

Presumably solutions to what ails metropolitan Milwaukee will fit the same rubrics, with one additional complication. Local politics play out across multiple overlapping jurisdictions (e.g., municipality, county, and state), which means there are even more institutions that need to start rowing in the same direction. Still, it’s possible that local communities of interest can help forge local coalitions even when national ones are impossible. Perhaps we can leverage shared problems and neighborly values so that the nation’s cities can function even if its Capitol does not. Or maybe we should adjust local policy making to the realities of local politics, enabling cities to move forward despite their divisions. Wherever this debate leads, Gilbert’s study is an important entry—not least because of its *facts*—and merits attention beyond Wisconsin.

*Heather K. Gerken is the J. Skelly Wright Professor at Yale Law School.*

communities where the houses are smaller and closer together and schools and shops are within walking distance. By contrast, conservatives greatly tend to prefer living in communities where the houses are bigger and farther apart, even though schools and shops are several miles away. For another difference, liberals place a much higher value on living in racially and ethnically diverse communities, while conservatives favor living among people of the same faith.

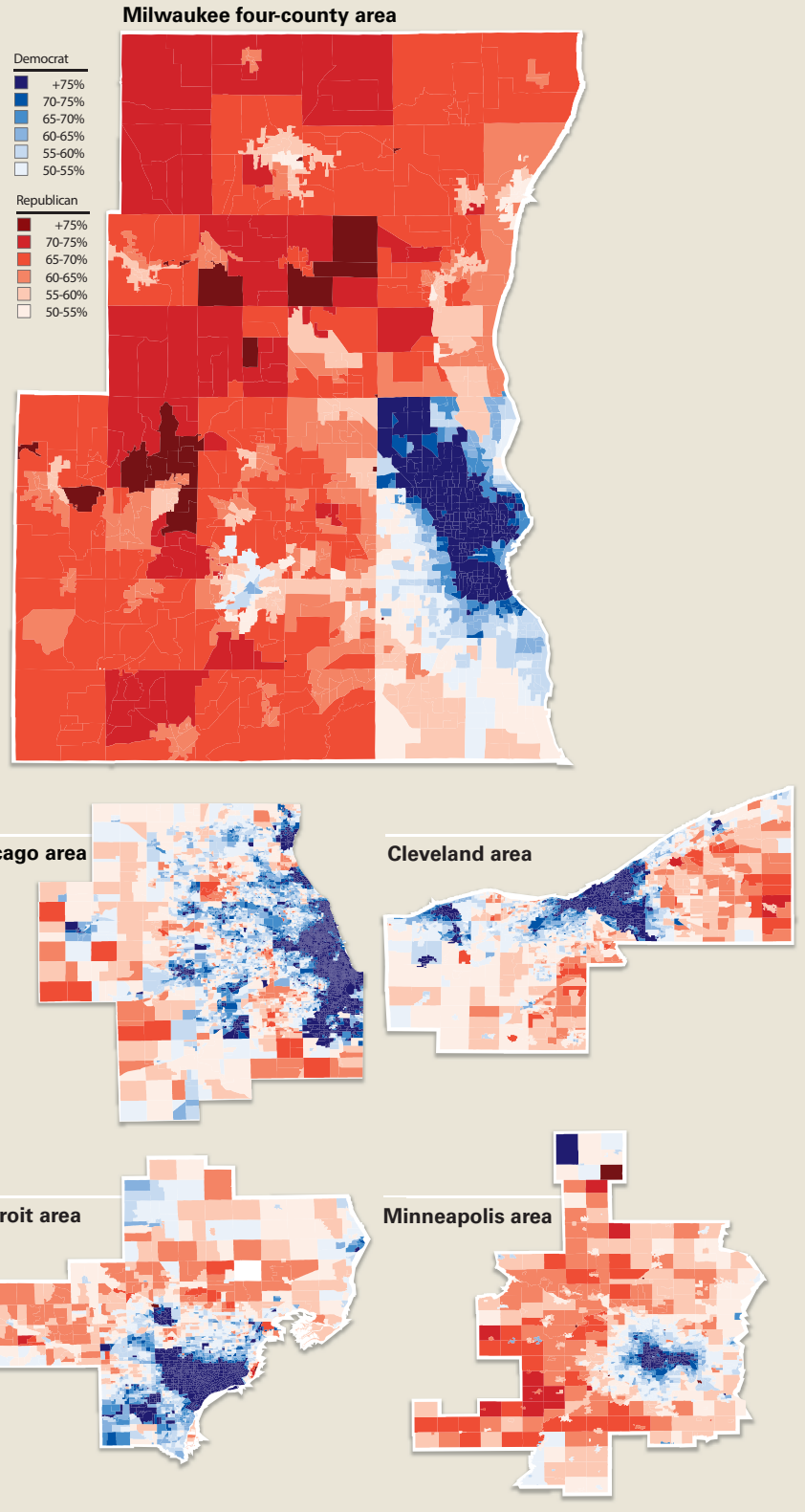
These kinds of lifestyle preferences are one ingredient in the stark red-blue geography of metropolitan Milwaukee, where almost every community has been getting systematically redder or bluer for several decades. How much self-segregating by voters is actually going on is hotly debated by scholars. But in Milwaukee, the *biggest* “sort” occurred decades ago, when white flight from the city helped populate the area’s outer suburbs with voters who were more conservative than the ones who remained behind.

And in Milwaukee, unlike many larger metropolitan areas such as Chicago and Detroit, a movement of minorities from the city has not followed that wave of white migration. Extremely low rates of minority suburbanization are one big reason that the urban-suburban partisan divisions are so pronounced in the region and one reason that metropolitan Milwaukee contains some of the most lopsidedly Republican counties of any large metropolitan area outside of the South. ▶▶

## Milwaukee stands apart

Metropolitan Milwaukee’s urban-suburban divisions are much starker than in most other Midwest metropolitan areas, separating not just individual neighborhoods and communities but whole counties. The borders between Democratic Milwaukee County and Republican Washington, Ozaukee, and Waukesha counties are easily visible just from voting patterns.

Note: Maps are based on the 2008 presidential race, the most recent one for which comparisons are available. Area maps are not presented to population scale.





## Polarization and the Infrastructure of Inequality

by Clayton M. Nall

Craig Gilbert's superbly researched and written series on polarization in the metropolitan Milwaukee area attributes the region's growing partisan segregation, in part, to its substantial economic and racial segregation. Yet from the report, one could persist in the belief that Milwaukee's economic and racial segregation emerged from citizens freely "voting with their feet": higher-income whites left for the suburbs while poor and minority residents decided to stay. In this whodunit, nothing (and no one) in particular is to blame for geographic polarization and its underlying inequalities. Racial and economic inequality appear alongside partisan polarization, but what caused all of this? In my work, I've repeatedly found that public policy bears much of the blame.

While many policies helped create a segregated metropolis, few have been as important as the extensive, federally financed freeway system built during the 1950s and 1960s. Federally funded highways were vital to the creation of Republican suburban "edge cities," such as Menomonee Falls and Brookfield. They have been a catalyst of ongoing suburbanization that, at least in Milwaukee, has disproportionately expanded the residential options of white and affluent suburbanites while doing little to improve the mobility of poor and minority Milwaukeeans.

My research has found that highways have added to the polarized political geography of American metropolitan areas. Since the early 1960s, suburban counties in which interstates were built became anywhere from 2 to 6 percentage points more Republican than comparable counties without interstates (depending on the region of the country). Metropolitan areas with denser highway networks also became more polarized, as measured by the urban-suburban gap in the Democratic vote. Highways did this, I have found, by shaping the racial and economic composition of suburbs.

Milwaukee is an archetypal example of this phenomenon at work. In a case study of the region, I found that Republican suburbs of the "WOW" (Washington-Ozaukee-Waukesha) counties owe their rapid growth to interstates. For example, Brookfield's Republican presidential vote tally tripled in the decade after the ribbon was cut on I-94. The pages of the *Milwaukee Journal* real-estate section from this era credit the "new I-94 expressway" with access to low taxes, good schools, and effective local services, all still a short drive to downtown Milwaukee. (Few of these suburban housing ads were, by the way, for multifamily housing.)

Interstate highways let the upper and middle classes move to new communities where they could reap the benefits of a "hidden welfare state" that favors suburban homeowners over other Americans. Much of the \$70 billion per year spent through the home mortgage interest deduction goes to suburban housing tracts along freeways. The American local home rule tradition, in turn, has let suburbs screen residents by socioeconomic status. Zoning ordinances that cap housing density, for example, indirectly keep out poor minorities and other Democratic-leaning groups that prefer rental housing. Low density similarly makes walking or taking transit to work untenable. Suburban communities can exclude low-socioeconomic-status citizens, while freeways permit their citizens free rein over the metropolitan area.

Political scientist Douglas Rae called the spatial divide between poor, immobile citizens in cities and affluent, mobile citizens in the periphery a "viacratic hierarchy": cities and suburbs aren't just separate (or, as the case may be, "polarized"); they're also unequal. Public policy, including generous support for the infrastructure supporting suburbanization, is a big reason why.

*Clayton M. Nall is assistant professor of political science at Stanford University.*



## Political competition and conflict

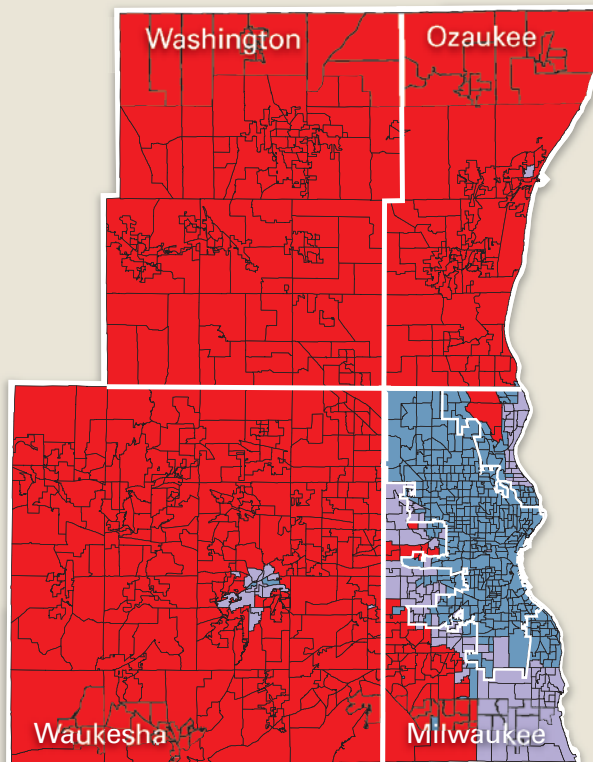
Milwaukee isn't the only big metropolitan area with racial and geographic divisions, but it combines those divisions with a distinctive political profile.

The profile has several aspects. Most of the nation's large metropolitan areas have either big powerful Democratic voting blocs or big powerful Republican voting blocs. Metropolitan Milwaukee has both. Most large metropolitan areas aren't in highly competitive states. Milwaukee exists in a perpetual political conflict zone. It is the number-one media market in a battleground state where both parties regularly spend massive amounts of time and money mobilizing their supporters.

### Competition is hard to find

Metropolitan Milwaukee is composed of very red and blue neighborhoods and not much in between. The four-county area comprises hundreds of wards, and only 12 percent of voters lived in wards decided by single digits in the 2012 presidential race. The municipalities with the narrowest vote margin were Wauwatosa, Greenfield, Whitefish Bay, West Allis, and Fox Point, all in Milwaukee County.

- Double-digit Republican wins
- Double-digit Democratic wins
- Single-digit wins by either party



Source: State of Wisconsin data on 2012 presidential race Journal Sentinel

Conflict and competition fuel polarization in several ways. Political scientists have found that election campaigns activate and reinforce voters' partisan inclinations. Campaigns are constantly reminding voters why they support one party and oppose the other. They are tirelessly proclaiming the partisan differences between the candidates. In Wisconsin, this ongoing trench warfare has produced two state parties that are extremely effective at identifying, speaking to, and turning out their troops.

The state has been a ferocious modern-day battleground in presidential elections and beyond. The Wisconsin presidential vote was decided by less than half a percentage point in both 2000 and 2004. More recently, the state went through the crucible of the labor wars and recall extravaganza of 2011–2012, an upheaval without any parallel in recent American politics.

So it's no coincidence that the state's partisan fault lines are especially deep today. The partisan gaps in how Wisconsin voters view their president and their governor are massive compared to what they used to be. They are larger than in most other states.

And the Marquette Law School Poll, led by Franklin, suggests that those partisan divisions are even bigger in metropolitan Milwaukee than in the rest of Wisconsin. In the combined counties of Washington, Ozaukee, Waukesha, and Milwaukee, in-depth polling by Marquette Law School over more than two years has shown Gov. Scott Walker with a 92 percent approval rating among Republicans and a 10 percent approval rating among Democrats. President Barack Obama has a 92 percent approval rating among Democrats and an 8 percent approval rating among Republicans.

In short, for both Wisconsin and its southeastern population hub, fierce partisan polarization may be both a cause and an effect of an intense and sustained level of electoral competition in recent decades.

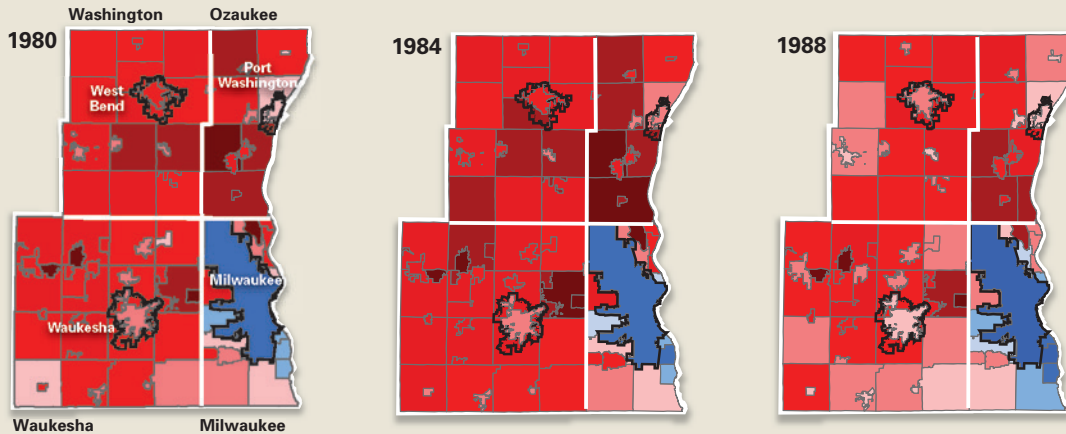
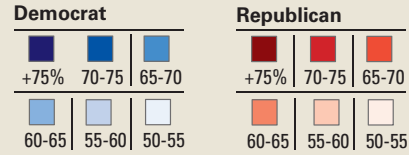
## Political engagement

Wisconsin is not just a hotbed of partisan division. It is a hotbed of political activism. Many scholars believe that these two phenomena reinforce each other. The most partisan and ideological voters are the most likely to vote, volunteer, go to rallies, and give money, Marquette Law School's polling shows. And the most engaged voters tend to be the most partisan.

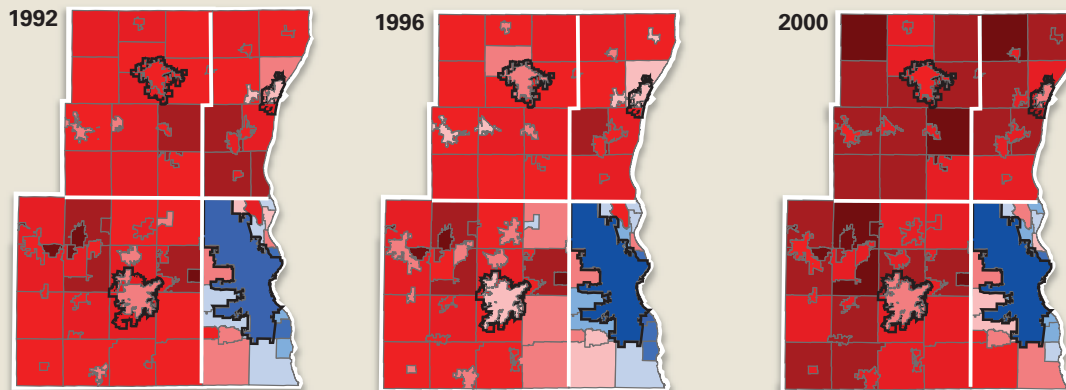
Political scientist David Campbell of the University of Notre Dame points to two seemingly incongruous situations that foster voter turnout. For one, there are ▶▶



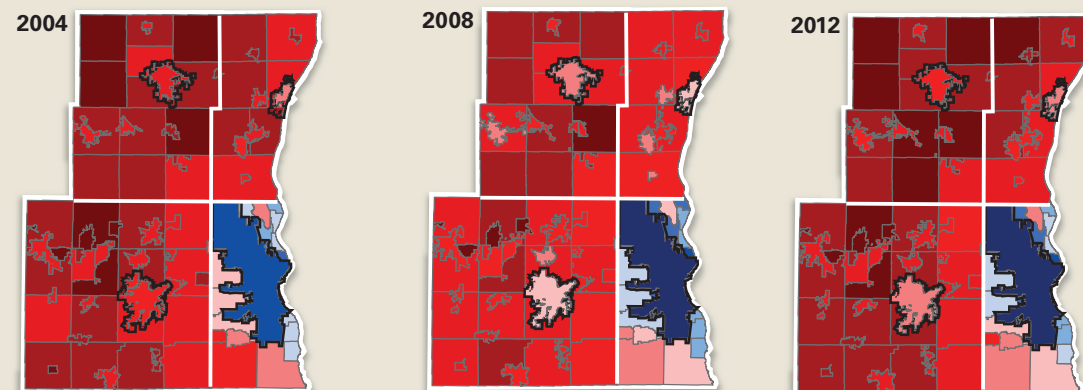
## Increasing polarization as seen in the presidential vote



In the 1980s, the red parts of metropolitan Milwaukee were not as red as they are today, and the blue parts were not as blue. Milwaukee's North Shore suburbs and Wauwatosa (just west of the city but inside the county) were still largely Republican.



By 2000, the three suburban counties had become more lopsidedly Republican, the North Shore of Milwaukee County was turning blue, and the gap between the city of Milwaukee and the outlying suburban communities was wider than ever.



In 2012, Washington, Ozaukee, and Waukesha were three of the highest-performing Republican counties in America, making metropolitan Milwaukee's urban-suburban voting gap among the biggest in the nation.

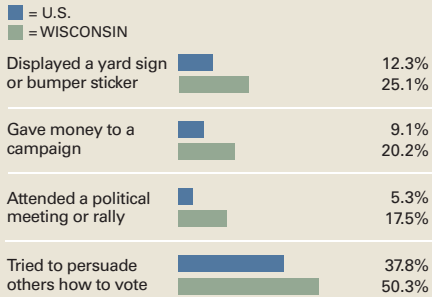
Source: State of Wisconsin voting data and election data provided by Clayton Nall of Stanford University

“highly competitive places politically, where you feel compelled to vote to advance your interests, because your vote is going to matter, and you are more likely to be contacted by a campaign,” he says. “Or you live in a place where elections aren’t competitive, but that means everybody has kind of the same view and same values.” In this second situation, these like-minded communities engender a sense of civic duty about voting.

### Local engagement rates high

Wisconsinites were much more engaged in politics than the average American in 2012, and not just when it came to voting. They were much more likely to participate in a variety of political activities, based on what registered voters in Wisconsin told the Marquette Law School Poll and how Americans answered similar questions in the American National Election Study.

Wisconsin vs. U.S. voters in politically related activities, 2012



Sources: Marquette Law School Poll in 2012; the 2012 American National Election Study. Journal Sentinel

Metropolitan Milwaukee has both kinds of places in great abundance. It is full of politically like-minded communities, where shared political values are nurtured. And it’s a seething hotbed of division and conflict, because southeastern Wisconsin is where the reddest and bluest communities in a warring battleground state converge.

“You have what you might call the perfect storm,” Campbell says. “You’ve got both the consensus and the conflict.”

In the last presidential election, Ozaukee County, bordering Milwaukee

County to the north, had the highest turnout of voting-age citizens—84 percent—of any county in the country with more than 50,000 people. Waukesha County, to Milwaukee’s immediate west, was tied for second at 83 percent. Washington County, to the northwest, was 11th (80 percent). Milwaukee itself had one of the highest turnouts of any big urban county in America (74 percent). Dane County, anchored by the ultra-blue city of Madison and less than 75 miles from downtown Milwaukee, barely trailed Ozaukee and Waukesha. (It was fifth in the entire country with 81 percent.)

Commentators wondered going into the election whether Wisconsin’s unflagging political wars and nonstop elections in 2011 and 2012 would wear out the state’s voters. Instead, these experiences produced record-breaking turnouts, especially in the state’s most partisan counties.

“You think, ‘Oh, engagement—that’s a good thing.’ But it can lead to people being more polarized,” says political scientist Alan Abramowitz of Emory University.

## III. The Consequences

How has polarization changed our politics?

Let us begin with voting patterns, which are dramatically different today from Wisconsin elections as recent as the 1980s and 1990s. More specifically, examining a quarter-century of exit poll data, Franklin and I found a systematic decline in both ticket-splitting (where people vote for candidates of different parties on the same ballot) and crossover voting (where Democrats vote for Republicans and vice versa).

Consider an instance of crossover voting from the past: In the Wisconsin U.S. Senate race of 1988, a third of self-described conservatives supported Democrat Herb Kohl on election day, even though he ran on a campaign platform of a 10-percent defense cut and a 10-point tax increase for people making \$200,000 a year. A quarter of self-described liberals supported his opponent, Republican Susan Engeleiter. One in four Republicans

voted for Kohl, and one in five Democrats voted for Engeleiter.

As for ticket-splitters, in 1988, one in four voters fell into this category, picking one party for Senate and the other party for president.

A quarter-century later, in 2012, when Democrat Tammy Baldwin defeated former Gov. Tommy Thompson to succeed Kohl in the Senate, just 1 in 17 was a ticket-splitter. In short, today, the share of voters who are “persuadable”—i.e., up for grabs—has shrunk.

### No voter fatigue

Voters here responded to the political wars of 2011–2012 by turning out in droves. In the 2012 presidential race, three of the top five turnout counties in the United States could be found in southern Wisconsin.

Top U.S. turnout counties as a percentage of voting-age citizens

1	Ozaukee (Wis.)	84.4%
2 TIE	Carver (Minn.)	82.9%
2 TIE	Douglas (Colo.)	82.9%
2 TIE	Waukesha (Wis.)	82.9%
5	Dane (Wis.)	81.2%
11	Washington (Wis.)	78.7%
34	St. Croix (Wis.)	74.7%
44	Milwaukee (Wis.)	73.7%
46	Sheboygan (Wis.)	73.3%
50	Racine (Wis.)	72.5%
	U.S. (nationwide)	58.0%

Turnout figures are for counties above 50,000 population. (Citizen voting-age population is not available for most smaller counties.)

Source: U.S. Census Bureau. Journal Sentinel U.S. Election Atlas, Elections Project

Campaigns have accordingly adjusted their priorities, putting more of their efforts into mobilizing their base and less into persuading undecided voters than they used to. “We keep jacking up the base,” says Democratic pollster Paul Maslin of Madison. “The campaigns are not even trying to appeal to the other side.” ▶▶



## Sorting Through Possible Evils of Political Separation—and Finding Not Much

by Richard M. Esenberg

As a politically active person who still hopes that some parts of life can be—if not wholly free of politics—at least ideologically demilitarized zones, political separation (*segregation* seems a misleadingly loaded word) is not something I'm inclined to encourage. But just what is the evil attendant upon Milwaukee's Big Sort?

Some might claim that political separation impedes regional cooperation. If the suburbs are filled with people who oppose certain types of urban policies (typically those that require taxing them to pay for initiatives to benefit the central city), then regional agreement on such policies will never be reached. Absent the imposition of the desired "cooperation" by the state or federal government, suburban residents will not pay for mass transit seen as primarily benefiting city residents or otherwise "share" their tax revenue. Recalcitrant exurbanites will continue to insist on large lots and more roads. And so on.

This is less an objection to political separation than it is to the difficulty of obtaining a particular policy outcome: If one doesn't desire the policy, then separation is not a problem. Those who oppose certain forms of regional cooperation cannot be outvoted and coerced into participation, so they must be convinced. If the idea is that greater investment in regional mass transit or "smart growth" planning is in everyone's best interest, then everyone (or at least a majority of those residing in each community) must be convinced that this is so. That's a tall order—not least because these claims of universal benefit are often untrue.

Lest this be seen as a death knell for the city or for urban policies favored by certain elites, let me suggest another view. Former Milwaukee Mayor John Norquist was fond of saying that no city can become or stay great through charity. He might have added that a great city cannot be built by restricting the ability of people to leave it or by imposing its policy preferences on its neighbors. It may be that the future of American cities is not as supplicants for regional largesse but as places that are attractive places to work and live in their own right. That end may be better served if cities must be responsive to markets and individual choice. It may turn out that the optimal evolution of a metropolitan area requires the liberty of those who live there more than it does the ability to impose the nostrums of planners.

A more direct objection to political separation is that it increases political polarization within representative bodies. If legislators are increasingly elected from politically homogenous districts, then they may be less willing—or able—to compromise. As a result, "nothing gets done."

But compromise is not always a good. Doing something is not always preferable to doing nothing. Whatever is least objectionable—or splits the difference between radically different approaches—is not always best. It may be more important to resolve foundational differences than to pretend they don't exist.

Nor is it clear that a legislature composed largely of representatives from competitive districts with precarious political futures will make better policy, or even get "more done," than one with members from safe but ideologically disparate districts. Perhaps being elected from a district that is a biannual battleground promotes sagacity and courage, but count me as doubtful.

Our current Congress is often portrayed as uniquely gridlocked and unable to deal with our most pressing issues. But it has been ignoring many of these issues—think of the deficit and entitlements—for the past 30 years, including periods when it was much less polarized than it is today.

Finally, one might reasonably fear that political separation will lead to increased polarization within the electorate itself. If we rarely encounter anyone who does not think like us, then we may be less able to appreciate good arguments from the other side. We may be more likely to see our political opponents as embodying some combination of "evil" and "ignorant."

I'm more sympathetic to this concern. I spend much of my professional life as an advocate for a particular ideological perspective, and yet even I think that some of my friends (and foes) wildly overstate what is at stake in our political wars. But, fortunately, not more than a handful of us really believe that politics is a sufficient reason to hate our neighbor. In any event, it's not self-evident that living next door to a "wing nut" or "moon bat" would lead to potlucks and book groups. We increasingly live in a world in which our web of associations extends beyond, and is not based upon, where we live. To the extent this is true, residential separation is not as harmful—nor its reduction as potentially beneficial—as we might imagine. While Robert Putnam's work focuses on ethnicity, it suggests that we are less likely to engage with those we see as unlike us—even when they live across the street.

The bad news is that there is not much we can or ought to do about political separation. The good news is that it may not much matter.

*Richard M. Esenberg is president and general counsel of the Wisconsin Institute for Law & Liberty and adjunct professor of law at Marquette University.*



## Why Partisanship Bothers Us

By John J. Pauly

In conjunction with Craig Gilbert's thoughtful study of political polarization in the Milwaukee metropolitan area, it is worth asking why hard and determined forms of partisanship so unnerve us.

As a student of journalism and media, I want to probe the meanings that Americans attribute to their experience of political division. Partisanship, especially these days, does not want for defenders. Indeed, the country's liberal tradition seems to invite it, emphasizing the need for robust competition between ideas in politics and for unrestrained competition in the marketplace. These commonplaces of American life, in turn, encourage partisan individuals to style themselves as sincere and authentic in their public performances. A willingness to engage in tough-minded, agonistic argument has come to be seen as a sign of moral virtue, a principled refusal to yield to untruth.

And yet . . . we do worry about intense forms of partisanship, and for good reason. We know from our personal and historic experience how easily an unwillingness to listen, withhold judgment, or compromise can undermine the common good. True believers unsettle us because their certainty makes us wonder what they would be willing to do in order to get what they want. Moreover, each generation carries in its head a parable about partisanship run amok—a story about how the Civil War nearly brought the union to ruin, how Vietnam destroyed family comity, or how a gubernatorial election put mild-mannered Wisconsinites at one another's throats.

In a *New York Times* opinion piece last fall, the Canadian writer and politician Michael Ignatieff eloquently summarized the dangers to democracy from this state of affairs. Ignatieff spoke to the importance of distinguishing adversaries from enemies. "An adversary is someone you want to defeat," he wrote. "An enemy is someone you have to destroy." Liberal democracies depend upon the goodwill of adversaries. Ignatieff argued that appeals to civility will not diminish the current spirit of enmity, and he urged the sort of structural changes that other Western democracies use to minimize gridlock, including campaign finance rules, open primaries, and impartial redistricting commissions to avoid gerrymandering.

Let me add two observations specifically about polarization.

First, polarization has created a tragic mismatch between the problems facing southeast Wisconsin and the political tools at hand to solve those problems. The conflicts over water for Waukesha, high-speed rail, public university funding, the Affordable Care Act, and school vouchers offer a preview of what lies ahead. Every significant challenge confronting us, from economic development to public health to environmental protection to inequality, requires a regional response. And yet we have poured all our political energy and imagination into branding, mobilization, and fund-raising rather than into the arts of deliberation. We think so little of governing that we now consider it normal that candidates running for public office plainly express their distaste for government. Faced with a stalemate that they themselves have created, the national parties generate preposterous bills with no chance of passage. Easier to create talking points for the next election than to do the work for which they were hired.

Second, polarization creates its own problems for journalists. I am grateful to live in a community where the legacy newspaper remains committed to public service, including in innovative ways such as the relationship between the *Milwaukee Journal Sentinel* and Marquette University Law School that made Gilbert's study possible. But how much can we expect of journalism in the absence of the structural changes that Ignatieff and others recommend? Whatever its blind spots, exclusions, and prejudices, the American daily newspaper that emerged after World War I believed in the reasonableness of the political system. What happens when the political system no longer puts much faith in its own reasonableness? And in the new digital media environment, wracked by its own forms of fractiousness, how might journalists who hope to speak on behalf of the common good find their feet?

*John J. Pauly is professor of journalism and media studies and holds the Gretchen and Cyril Colnik Chair in the Marquette University Diederich College of Communication.*





To characterize it differently, the formula for winning statewide elections has changed. “When I was running for governor, I intentionally went out in the black churches . . . , into the union halls . . . , to the Democratic festivities,” former Republican Gov. Tommy Thompson says. “I did that because I wanted to bridge the gap. That kind of politics isn’t in vogue any more. . . . [For me] it was, ‘How do I expand from 69 or 70 percent to 75 percent?’ People now say, ‘How do I get to 50 percent plus one?’”

Thompson won Milwaukee County three times and Dane County once during his one-sided reelection victories of the 1990s. The idea of that happening today is unthinkable.

Candidates today are less interested in, and much worse at, attracting votes from the other party. They are more interested in and often much better at racking up landslide margins among their own party’s voters. That has altered the way political coalitions are put together and made it harder for people in both parties to cross partisan lines to achieve consensus or compromise.

It goes hand in hand with the trend of rising partisan antipathy. Partisan polarization is not a product of growing fondness among voters for their own party but, rather, of growing dislike for the other party. In Wisconsin, major statewide politicians once routinely got favorable ratings from a significant minority of voters in the other party. Today they get almost no support from voters in the other party.

Our increasingly polarized geography affects not only campaigns but also governance. In a place such as metropolitan Milwaukee, it represents a huge barrier to regional cooperation on policies from water to housing to transportation. Milwaukee has a long history of urban-suburban conflict, but those divisions are now compounded by partisan differences, too.

The matter goes beyond Wisconsin. Nationally, one party (Democrats) has a huge urban base. The other (Republicans) has very little urban presence. This has big implications for the two parties’ agendas and ensures sharp partisan division over issues that break along urban-suburban-rural lines, from mass transit and urban infrastructure to social spending to voting rules to immigration.

The divergence in the two parties’ coalitions also helps explain why Republicans and Democrats have gotten so good at winning different kinds of elections. Consider Wisconsin’s recent election history. Why is the party that utterly dominates state government

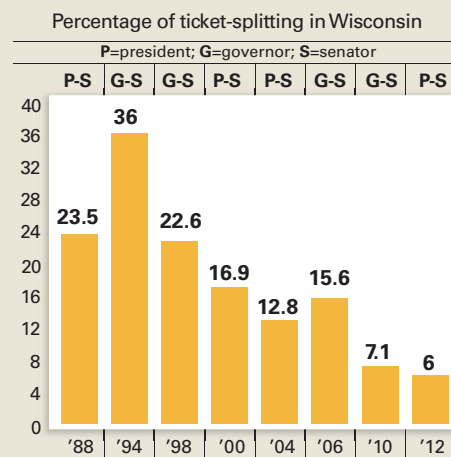
(Republicans) incapable of winning a presidential campaign in Wisconsin? Why did the party that swept top-of-the-ticket races for Senate and president in 2012 (Democrats) lose the majority of the state’s legislative and congressional races?

How could the same state in the space of two years elect the political odd couple of Tammy Baldwin and Ron Johnson to the U.S. Senate? How could the same state in the space of five months vote for Scott Walker and Barack Obama?

The answers to these questions are rooted in our polarized political landscape.

### The decline of ticket-splitting

Ticket-splitting has declined dramatically in Wisconsin since the 1980s. The share of voters who voted for different parties in major races on the same ballot (president and U.S. senator in some years, governor and U.S. senator in others) topped 20 percent before 2000 but sank to 6 percent in 2012.



Source: Analysis of Wisconsin exit polls by Journal Sentinel and Marquette Law School  
Journal Sentinel

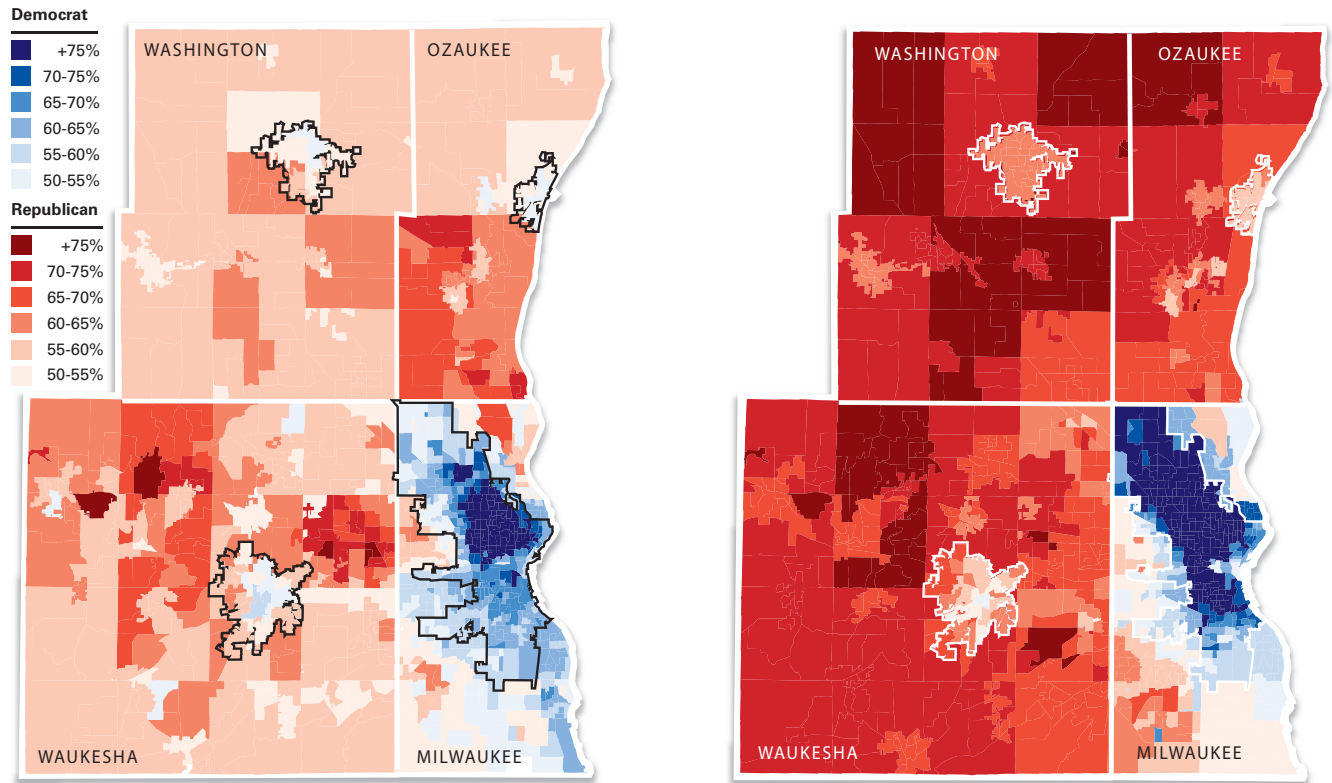
The GOP’s struggles in recent presidential elections stem in large part from its inability to compete in the nation’s most populous places. Republicans are on the wrong side of the density divide. They haven’t won a major statewide election on a presidential ballot in Wisconsin since 1984. In the last two presidential races, Obama won the state’s biggest counties (Milwaukee and Dane) by such huge margins that the GOP had no prayer of making up the difference in the state’s smaller counties.

“Unfortunately, we have become a party that can’t lose a midterm and can’t win a presidential,” says Reince Priebus, the Wisconsinite who chairs the Republican ▶▶

## Two Senate races just 20 years apart: One juxtaposition shows the growth of polarization

In 1992, Russ Feingold beat Bob Kasten amid significant crossover voting. By 2012, when Tammy Baldwin beat Tommy Thompson, crossover voting had virtually disappeared, and communities on both sides had grown more partisan. To be sure, the relative size of the blue and red swaths can be deceiving: For Milwaukee County's population in 2012 was 954,000; the combined population of Washington, Ozaukee, and Waukesha counties was 612,000. At the same time, the point is not the size of the swaths but the growing homogenization within the respective swaths.

### Senate voting maps are by ward



1992: RUSS FEINGOLD (D) vs. BOB KASTEN (R)

2012: TAMMY BALDWIN (D) vs. TOMMY THOMPSON (R)

Source: State of Wisconsin

Journal Sentinel

National Committee. Priebus says that his party won't succeed long term at the presidential level unless it does better with minority voters and has a year-round "massive presence in Hispanic, African-American, and Asian communities across the country."

But in midterm races, key pieces of the Democrats' urban coalition—blacks, Latinos, young voters—turn out at lower rates, and the intensity of the GOP's older, whiter, high-turnout base comes to the fore. Republicans have won six of the state's last eight races for governor.

This gets us to Tammy Baldwin and Ron Johnson, the most politically disparate pair of same-state senators in the country. Johnson got elected by a smaller, more-conservative midterm electorate (2010); Baldwin won on a presidential ballot that attracted a larger and less-conservative pool of voters (2012).

Our polarized geography has big consequences for congressional and legislative races, too. But in this case, it deeply disadvantages Democrats, whose

voters are so concentrated in urban areas that many of their votes are wasted in 90-percent-blue districts. The Republican vote is more efficiently distributed across more districts.

In some states, including Wisconsin, this problem has been made worse for Democrats by gerrymandering. In a sign of how tilted the state's current lines are, Barack Obama carried Wisconsin by seven points in 2012, even as Republican Mitt Romney won a majority of not just the eight congressional districts in the state but also the far-more-numerous legislative districts.

We have a political landscape that favors Democrats in presidential races and Republicans in congressional races, increasing the odds of getting divided government and exacerbating the consequences when we get it. The nation's polarized geography is also taking its toll on political competition. In the most populous and most polarized part of Wisconsin (metropolitan Milwaukee), almost no truly competitive ▶▶



## Polarization or Social Control in Metropolitan Milwaukee?

by David R. Papke

As a person who has always considered the City of Milwaukee to be home, I find Craig Gilbert's study of political polarization in the metropolitan area to be both thorough and illuminating. His research indicates that when it comes to Republican and Democratic voting patterns, the area has become more polarized than any area outside of the American South. What's more, the political polarization very strikingly correlates with race, ethnicity, education, and population density. Republican voters reside largely in middle- and upper-class suburbs in Washington, Ozaukee, and Waukesha counties, while the impoverished and working poor reside and vote in the City of Milwaukee's Democratic inner city.

When we reflect on what has come to be, it is important that we not take the polarization to be simply a naturally occurring phenomenon and thereby overlook the political agency involved—that is, the way some socioeconomic groups attempt to contain and control other socioeconomic groups. Polarization has taken place in part because local and state governments have used law and legal arrangements to push socioeconomic groups apart, to assign poorer citizens to certain areas, and to reduce the clout of these citizens at the polls.

This effort dates back to the decades following World War II when local suburbs tolerated and sometimes encouraged the use of racially restrictive covenants. Researchers have found racially restrictive covenants in 16 out of 18 suburbs in Milwaukee County. In Wauwatosa, a suburb immediately to the west of the City of Milwaukee (and whose eastern edge is within four miles of downtown Milwaukee), 51 subdivisions composing one-third of the suburb's land prohibited African Americans from renting and buying property. The covenants in Milwaukee County remained important through the 1970s, and, as a result, the African-American population moved and expanded primarily along a vector running northwest from the original inner city to the county line, always within the city limits.

In the present, the enforcement of such racially restrictive covenants is unconstitutional, but suburbs can keep out people they take to be undesirable through exclusionary zoning. Such zoning cannot explicitly invoke race, but it can make it difficult for the urban poor to locate affordable housing in the suburbs. Exclusionary zoning is not common in older, fully developed suburbs such as West Milwaukee or Shorewood, but newer "second-ring" suburbs can and do use zoning designations related to lot size, number of bedrooms, and so forth to prevent the construction of inexpensive rental housing of the sort that the poor might be able to afford. As a result, they have no choice but to remain in the inner city.

Not to be outdone, the state government in recent years has taken steps to allow more-affluent potential Republican voters to move to certain areas while in the process leaving poorer Democrats even more concentrated in other areas. One recent legal change, for example, eliminated the requirement that City of Milwaukee employees live within the municipality. This sprang middle-class employees from the city that issues their paychecks. Republican Governor Scott Walker was the greatest champion of the change. He hails from the suburbs to the west of the city and, of course, relies on the huge turnouts of white Republican suburbanites in Washington, Ozaukee, and Waukesha counties at election time.

My general point is that what at first glance looks like polarization starts to look like social control upon further reflection. For decades, white middle- and upper-class suburbanites have been sealing off their communities and consigning the poor and working poor to the inner city. To quote the Italian leftist and highly regarded political theorist Antonio Gramsci, "Bourgeois hegemony is not automatic but rather achieved through conscious political action and organization."

*David R. Papke is professor of law at Marquette University.*



legislative or congressional districts exist. Across the country, there are fewer competitive counties and fewer competitive states, all of which means a shrinking presidential playing field.

Polarization is decreasing state and local competition in two ways. One is the trend toward politically one-sided places, which results in fewer partisan battlegrounds. The other is the decline of ticket-splitting and crossover voting, which makes election outcomes in those one-sided districts and states increasingly predictable.

Individually, these trends aren't fatal to competition. Party-line voting isn't inimical to competition when the electorate in a state or district is evenly divided. And one-sided states or districts can experience competitive elections when significant numbers of voters cross over to support candidates in the other party. But when neither condition is present, when the electorate is both one-sided and very partisan in its behavior, general election outcomes are baked into the cake.

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## COMMENT

### Polarized Regions: Race, Political Segregation, and Metropolitan Policy Consequences

by Katherine Levine Einstein

Craig Gilbert's excellent reporting reveals a deepening political divide in metropolitan Milwaukee, with Democrats and Republicans increasingly residing in separate geographic enclaves. The trends that he unveils are not limited to metropolitan Milwaukee: my own data analysis of all of the nation's metropolitan areas (more than 300) finds that metropolitan political divisions have, on average, steadily increased since the late 1980s. This increasing polarization in Milwaukee and beyond has important implications for politics and public policy, many of which Gilbert highlights in his reporting. It yields the election of more politically extreme representatives, with mayors and state legislators responsive to just one side of the political spectrum. In addition, rising political segregation—where Democrats live with other Democrats, and Republicans with other Republicans—potentially creates a more extreme mass public, as individuals reside in echo chambers devoid of opposing views. Finally, greater metropolitan political polarization hampers regional cooperation across a number of important policy arenas; it is this latter consequence that is the focus of my research.

The fact that political segregation hinders coordination between municipalities is both surprising and politically important. A long strand of political science research has found that greater metropolitan cooperation is in the interests of both urban and suburban residents. For urban residents, the regional coordination of services can yield better mass transit links, allowing for easier access to jobs in booming suburban economies. It can offer affordable housing in communities with better government services and economic opportunities. And greater regional cohesion potentially can lead to tax-base sharing, providing less-affluent communities with more fiscal resources. In the Minneapolis metropolitan area, for example, the Metropolitan Council oversees a limited tax-base sharing program that redistributes local tax revenues from more- to less-affluent municipalities.

Regional cooperation is not, however, simply a boondoggle for urban residents. Suburbanites can similarly benefit from mass transit by using it to avoid traffic congestion. While *sustainability* has become a loaded term in conservative circles, regional smart-growth planning is potentially quite beneficial to residents in outlying suburban communities, protecting their property values from diminishment due to unregulated development. And greater metropolitan cooperation can benefit all residents by helping reduce the negative externalities that emerge when metropolitan municipalities compete with one another for developers.

By dividing local residents, political polarization prevents these mutually beneficial coalitions from emerging, with metropolitan jurisdictions unable to find common ground. Gilbert's reporting cites several examples from the Milwaukee metropolitan area, and my own research systematically documents the issue nationally. Using interviews with dozens of local officials, archival documents, and data analysis, I find that more-politically-polarized places exhibit more-fragmented mass transit systems: in particular, they tend to be



There was a time a few decades ago when political scientists worried out loud about Americans' disengagement from politics. Fueling these worries was a trend of declining presidential turnouts.

There was also a time when they worried that American voters were non-ideological to a fault. In a highly influential paper published 50 years ago, "The Nature of Belief Systems in Mass Publics," Philip Converse of the University of Michigan argued that very few voters have a well-formed belief system. Most voters don't have consistent positions on

issues, he found in his study of public opinion. And most don't have a coherent ideology. Political scientists found themselves asking, "If voters don't know what they think or want, how does representative democracy even work?"

Today not too many scholars or commentators or political observers worry about this. But whether the benefits of the political awareness, passion, and engagement of voters in a state such as Wisconsin outweigh the costs of their fierce and often bitter divisions is not clear. ■

disproportionately clustered in central cities, with no suburban links. Moreover, when suburban communities in polarized places do provide transit, they offer few, if any, easy transfers to the central city system. More generally, more-politically-polarized regions struggle to plan together, with planning documents reflecting less coordination across different political jurisdictions. My research on publicly subsidized housing suggests similarly fragmented policy outcomes in politically polarized places: higher levels of political segregation seem to spur a larger number of public housing authorities, controlling for other demographic characteristics. Having a large number of housing authorities in turn presents a major coordination challenge for metropolitan policy makers and advocates hoping to implement a more regional approach to publicly subsidized housing.

We know, then, that politically polarized places such as Milwaukee struggle to promulgate potentially valuable regional partnerships. What's more, the *kinds* of places that are politically segregated lend a particularly disturbing bent to the relationship between political polarization and metropolitan policy outcomes. My research finds that the most powerful predictors of political segregation are the proportion of a metropolitan area that is black and the residential segregation of blacks from whites. Specifically, my statistical analyses suggest that metropolitan areas that are more black and segregated exhibit far higher levels of political polarization. These two variables explain a whopping 70 percent of the variance in metropolitan political segregation. This relationship remains when statistically controlling for virtually all metropolitan demographic characteristics. It is thus unsurprising that Milwaukee, as the nation's most racially segregated metropolitan area, experiences such high levels of political polarization.

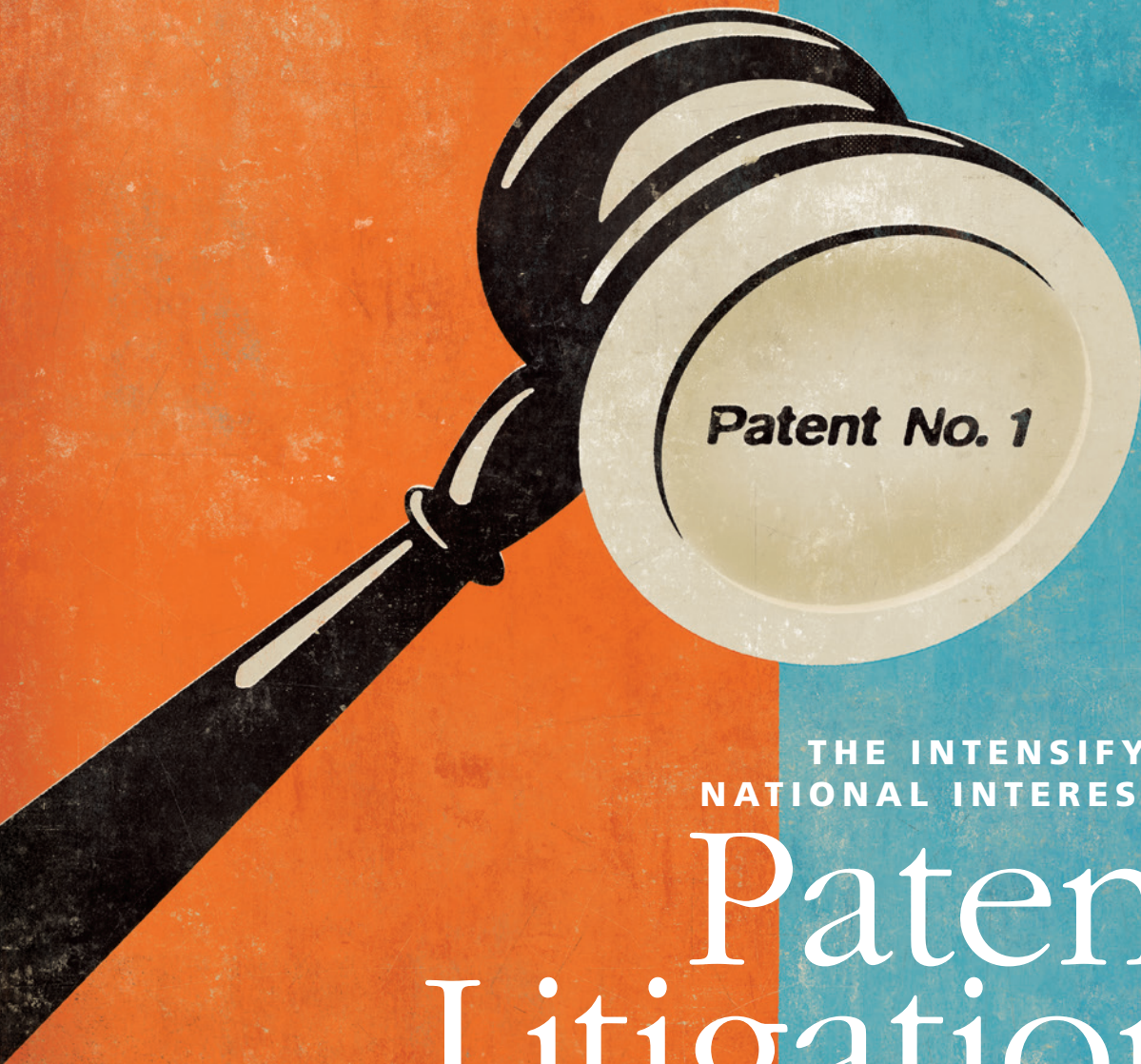
Social scientists have long known of the tight link between racial segregation and the concentration of the poor into isolated neighborhoods. This powerful connection means that racially segregated communities tend to suffer from a variety of the ills associated with concentrated poverty, including worse schools, higher crime, the spatial mismatch of employment opportunities, poor housing stock, and lower-quality public services. Putting this reality together with this essay's earlier observations yields a depressing result: if racially segregated places tend to be both politically segregated and disproportionately impoverished *and* if political segregation hinders regional cooperation, then the places most in need of metropolitan coalition-building are the least able to implement these valuable regional partnerships.

To move past these divisions, we need to think beyond voluntary regional partnerships to address policy challenges in the nation's most politically polarized metropolises. Among the more politically polarized places featured in my analysis, I find that some combination of entrepreneurial community and business leaders, unelected bureaucrats insulated from electoral pressures, and federal or state officials can, at times, circumvent local political cleavages. Nonetheless, even with these solutions available, political polarization remains a stark obstacle to potentially beneficial regional coalitions, particularly for the metropolitan areas that need them most.

*Katherine Levine Einstein is assistant professor of political science at Boston University.*







**Patent No. 1**

THE INTENSIFYING  
NATIONAL INTEREST IN

# Patent Litigation

by Hon. Kathleen M. O'Malley





## I. Opening Remarks

I am privileged to be asked to give a lecture named in honor of Judge Helen Nies. She was the first woman to serve on the Federal Circuit and the only woman, to the date of this lecture, to serve as its chief judge. Although I did not have the opportunity to meet her before she passed away in 1996, all four women currently on the court are well aware that Judge Nies blazed a trail for us. At her investiture to the Court of Customs and Patent Appeals—one of the predecessor courts to the Federal Circuit—Judge Nies said that she hoped her service on the court would inspire other women to consider undertaking the same challenge. No doubt she would be pleased to see one-third of the seats on the current court filled by women—and to see how many talented young women are now entering the intellectual property (IP) field.

In preparing to come here today, I thought I should learn something more about Helen Nies than her statistical firsts on the court. I wanted to get a sense of the person whose name you all invoke every year at this time. So I read the transcripts of her investiture to the court in 1980, her investiture as chief judge in 1990, her portrait ceremony in 1993, and her memorial service only three years later.

While I learned, of course, about her impressive background and education, and generally about her years of service on the court, I also captured a glimpse of the person who was Judge Nies. In reading what others said about Judge Nies, and attending to her own words, I was amazed to see how much Judge Nies and I had in common:

- We both grew up and went to college and law school in the Midwest.
- We both were economics majors as undergraduates.
- We both waited tables while in school, to help put ourselves through.
- We both were devoted daughters.
- We both had children while practicing law and threw ourselves into raising them with a zeal that our children sometimes found annoying.
- We both love physical activity and staring at the water.
- We both love singing—though she, unlike me, could actually do it well and was apparently not afraid to do it in public.
- We both cherish our nonlawyer girlfriends who help give balance to our lives.
- We both love to entertain and host parties, especially if champagne is involved.
- We were both in private practice *and* government service before taking the bench.
- Neither one of us was a patent specialist when appointed to the Federal Circuit; she was a trademark specialist, and I was a district judge (and thus, by necessity, a generalist).
- We both do our best legal writing at the kitchen table.
- We both have strong bonds with our law clerks and judicial assistants, and have a deep appreciation for all that they do for us.
- And, most importantly, we both love being judges, love the law, and work extraordinarily hard not just to do the work of the court but also to try to do it well.

I hope that Judge Nies is looking down and rooting on her kindred spirit. And I hope my years on the court will someday be remembered as fondly as hers. ▶▶

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This past spring, the Hon. Kathleen M. O'Malley delivered the Law School's Nies Lecture in Intellectual Property Law. The annual lecture remembers the late Helen Wilson Nies, who served as a judge of the U.S. Court of Appeals for the Federal Circuit (and a predecessor court) from 1980 to 1996. Judge O'Malley is herself a judge of the Federal Circuit since 2010; she previously served as a United States district judge in Cleveland, Ohio. This is a lightly edited version of Judge O'Malley's Nies Lecture.



## II. The Evolution of the Federal Circuit

### AN OVERVIEW

For my Nies Lecture topic today, I am going to focus on the United States Court of Appeals for the Federal Circuit's shift from a relatively little-known court to one whose work in the IP field has become the focus of all three branches of government, an increasing number of increasingly vocal academics in the field, reporters, and—yes—even bloggers. It is not the judges on the court who are garnering or deserving of all this attention. I believe it is a change in patent litigation that has begun to shine light on the court.

There has been a change in the volume of patent litigation, in the nature of the parties engaging in it, in the law firms representing those parties, in the impact of patent litigation on the individuals and other entities involved in it, and in the importance of patents to the economy as a whole. All of these changes have caused many to take notice of the work of the Federal Circuit—some of that notice welcome, some less so.

Let me touch on each of these changes briefly and then discuss the attention the Federal Circuit and patent litigation generally are receiving from all three branches of government. I will leave it to the academics to do an empirical study on the changes in their own ranks and in their attitudes toward IP litigation. On that score, I will just note that I have seen an increase in the number of amicus filings from academics, as well as a greater variety of academic institutions represented in those filings. And, I will leave the reporters and bloggers alone, in the hope (however vain) that they might return the favor.

### THE INCREASING VOLUME OF PATENT APPEALS

The Federal Circuit was formed in 1982, the year I graduated from law school. As a consequence of this timing, I did not learn about the Federal Circuit in my civil procedure class, and Case Western, like most law schools then, did not have a class on patent law, where discussion of its potential creation might have arisen.

While clerking on the United States Court of Appeals for the Sixth Circuit,

I also had no occasion to come across or care about what the Federal Circuit was doing or saying. It was not until I started practicing law at Jones Day in Cleveland, and was assigned to work on a number of patent cases, that I learned about this unusual circuit—the only one based on subject matter rather than geography. I soon realized that I was among a rarefied few in the legal profession who knew about the Federal Circuit or the scope of its jurisdiction.

In its first year—despite the court's nationwide jurisdiction over patent actions arising in all district courts—the Federal Circuit entertained appeals from district court judgments in only 175 cases. This low number is reflective of the fact that, in each of the three years prior to 1982, there were far fewer than 1,000 patent cases filed in district courts nationwide. The patent cases that were reviewed on appeal accounted for only a small percentage of the Federal Circuit's overall docket.

By the time Judge Nies passed away in 1996, the number of patent appeals had risen to more than 350, and the number of patent actions filed in district courts had risen to about 1,800. During that year, patent appeals challenging U.S. Patent and Trademark Office (PTO) decisions numbered 89. Despite this increase, patent cases still only constituted about 30 percent of the Federal Circuit's overall docket.

Fast-forward to 2012 and 2013, where the Federal Circuit entertained appeals from district court judgments in more than 500 cases during each of those years, and district court patent filings rose to 5,189 and 6,497 respectively. At the same time, appeals arising from PTO decisions were up to 132 in each of 2012 and 2013, a 28 percent increase. Patent cases now account for 55 percent of the court's docket—an all-time high.

While federal filings in complex civil cases in regional circuits have been down in recent years, the patent litigation business is booming. Indeed, patent filings in district courts have almost doubled from 2010—when there were 3,301 patent actions filed—to 2013, when, as noted earlier, there were 6,497 such cases instituted. And, notably, the approximately 550 patent appeals we saw in 2013 arose from cases instituted in earlier years, where district court filings were far fewer than today. So long as the appeals pace keeps up with the increase in the number of filings in district courts—even partially—appeals in patent actions from the district courts will



increase. At the same time, we expect appeals from the PTO arising out of the post-grant reviews authorized under the America Invents Act to skyrocket.

But it is not just the numbers that are important. As with all things, the quality and character of patent litigation today are as meaningful as its quantity.

## THE CHANGING CHARACTER OF PATENT LITIGATION

Many patent cases filed today are actions brought by patent owners who do not actually practice the invention that is the subject of the patent and that is allegedly embodied in the product or method they attack. Some of these actions are filed by what have been variously referred to as nonpracticing entities, patent-assertion entities, or—the favorite term in congressional hearings—trolls. Trolls are generally considered entities that purchase patents for the purpose of generating capital by enforcing them. A recent Government Accountability Office study estimates that about 20 percent of patent cases are

*“Many patent cases filed today are actions brought by patent owners who do not actually practice the invention that is the subject of the patent and that is allegedly embodied in the product or method they attack.”*

prosecuted by nonpracticing entities, though many argue that this estimate is low. This monetization of the property rights reflected in patents is new and results in enforcement of patents that in years past would have remained dormant—passive rights which owners either did not have the wherewithal or the desire to enforce. And some assert that it results in enforcing—or efforts to enforce—undeserving patents, which either should not have been granted or are no longer relevant.

Those numbers do not take into account, moreover, active companies that do practice inventions reflected in some of their patents, but nevertheless bring actions based on others that they own but no longer practice because their own technology has moved on. Again, this is generally new as well. In the past, competitors tended to worry only about those competing in the exact same space, with the same technology.

Now patents are seen as ways to prevent competitors from catching up, from using the same building blocks to arrive eventually at the same place. This seems particularly true where computer-implemented software patents are involved.

This litigation is also often brought in parallel with actions before the U.S. International Trade Commission (ITC), stretching the resources of those sued and upping the ante with the threat of a possible order barring importation of what could be a company’s key product or the key component of its products. Indeed, appeals from the ITC to our court involving requests to bar products on the grounds that they infringe one or more patents held by a domestic industry—appeals once in the single digits—have averaged in excess of 20 per year for the last five years.

Let me add that patent actions often include claims against a corporation’s competitors and customers alike, further complicating the proceedings, causing sensitivity with respect to sharing of discovery, and interfering with business relationships.

## A CHANGE IN WHO IS LITIGATING PATENT CASES

The change in the nature and number of law firms litigating these matters is meaningful as well—and not just because with big law firms tend to come big legal fees. When I started practicing law, Jones Day was one of the few general-practice firms to handle patent litigation. It was then largely the province of boutique firms that did nothing but prosecute and litigate patents. Indeed, even when I took the bench in 1994, the law firms I tended to see in patent cases were not the same firms trying other complex civil cases in my court. Today, I would venture to guess that there are not more than a handful of large firms without vibrant patent litigation departments, and, of those few, most are probably actively trying to develop them. I think this to be important for a number of reasons. ▶▶

*“It is impossible to go to a patent-related conference or a conference on IP litigation generally, or even on Federal Circuit practice, without hearing complaints from in-house counsel regarding the costs and structural burdens imposed on them by costly, high-stakes, and now somewhat-constant patent litigation.”*

To begin, it reflects the fact that patent litigation has become more mainstream; it reflects the extent to which traditional large-firm clients are repeatedly drawn into patent litigation—and the high stakes now involved in those matters. It is not unheard of to see damage verdicts that exceed \$1 billion, and many approach \$100 million or more. Big firms are responding to the needs of their clients and the fear that those clients have of being hit with large damage awards or an injunction barring sales of what could be their most valuable products or, on the other side of things, with losing a legitimate patent advantage in their particular industry.

The presence of general-practice litigators in the mix is important for another reason. They are experienced in trying all manner of cases before district courts and in arguing a variety of civil cases before the regional circuit courts of appeals. As a result, they have a generalized knowledge of how the federal rules of civil procedure and evidence are designed to work, how principles regarding jurisdiction and venue are to be applied, of governing common law concepts, and of how the relationship between the trial and appellate functions is meant to work. They therefore have less tolerance for treating patent cases differently from other cases when it comes to these basic principles and are more comfortable challenging the Federal Circuit in the Supreme Court when it adopts special rules in patent cases.

### **THE TENSION BETWEEN THE BURDENS OF PATENT LITIGATION AND THE NEED FOR A STRONG PATENT SYSTEM**

At the same time that patent litigation has become a more popular tool for challenging competitors and a more popular funding source for venture capital firms, the scope of available e-discovery has exploded. Today, there are emails, backup files, metadata, and other

potential sources of information that litigants can and do seek. This means that the costs and burdens of discovery have been increasing at the same time the stakes in these cases have been getting higher. Some studies indicate that the average fees and expenses incurred in defending an infringement suit exceed \$5 million, and costs in the more-complex actions far exceed even that number.

Corporations are feeling the financial burdens, and general counsel can no longer ignore the part that patent litigation plays in a company’s legal budget. Where in-house patent counsel were once either deemed unnecessary or left to their own devices given the unique nature of their litigation world, they are now critical players in corporate hierarchy.

It is impossible to go to a patent-related conference or a conference on IP litigation generally, or even on Federal Circuit practice, without hearing complaints from in-house counsel regarding the costs and structural burdens imposed on them by costly, high-stakes, and now somewhat-constant patent litigation. This burden is complicated, moreover, by the scrutiny the Federal Trade Commission (FTC) has now decided to give to patent litigation and those involved in it. Even mutually beneficial and cost-effective resolutions of patent actions can be risky given the FTC’s skeptical view of patent settlements and their potentially anticompetitive nature.

The increase in patent litigation and the burdens imposed on businesses by it—especially litigation where abusive or coercive tactics are employed—come at the same time that the need for legitimate patent protection for true innovators has been heightened. As we have become less capable of competing in the manufacturing and energy sectors, American ingenuity has become a primary driver of our economy. It is our ability to conceive of better mousetraps, to continually be one step ahead in the technology space, and to



lead in medical research and development, that keeps us competitive in the world. Thus, while complaints about patent litigation, and its attendant costs and burdens, abound, few would debate that a robust patent system—with meaningful mechanisms to enforce patent rights—is necessary to foster innovation and to protect the often substantial investments innovators must make.

Indeed, at a recent conference I attended, I heard the founders of a large technology company explain that, while their company is now often the victim of what it perceives to be unfair infringement claims by nonpracticing entities, they recognize that the company owes its existence to the patent protection upon which it was able to rely in its early days. And, at that same conference, I heard the inventor Dean Kamen say that, although he might be characterized as a troll (because he loves innovating but not manufacturing), he knows that he could not afford to continually come up with new innovations—which are primarily in the medical device field—without confidence that he could get patents for his inventions, which enable him to recoup his costs and fund his next effort. Similarly, those conducting pharmaceutical research and development will tell you that the costs of developing, testing, and getting regulatory approval for new drugs is so prohibitive that it would not be undertaken but for the promise of patent protection, which offers at least the hope of recouping that outlay.

So we are now in a world where patent litigation has become overwhelming to many business owners at the same time that appropriate patent protection has become increasingly important to the economy. It is at the center of this vortex that the Federal Circuit finds itself.

### III. All Branches of Government Are Responding

#### OUR COURT'S EFFORTS TO ADDRESS THESE CHANGES

**T**he Federal Circuit has responded to the changing character of its docket. We are one of the few appellate courts to sit all 12 months of the year. And, in each of those months, we hear more arguments in complex cases than courts sitting far fewer days do in their average court sessions.

With a full complement of judges,\* and the benefit of six talented and dedicated senior judges, we have also accelerated the pace of judgments, giving parties and litigants quicker answers and avoiding business uncertainties. We also have increased efficiencies related to the processing of cases by fully implementing an electronic case filing system, a change lauded universally by counsel. Thus our pace has not slowed as it has in some other circuits; it has accelerated.

On the substantive law front, among other things, we have decided six patent cases en banc since I joined the court at the end of 2010:

- *TiVo Inc. v. EchoStar Corp.*, involving district court authority over contempt proceedings (2011)
- *Therasense, Inc. v. Becton, Dickinson & Co.*, concerning inequitable conduct (2011)
- *Akamai Technologies Inc. v. Limelight Networks, Inc.*, concerning indirect infringement (2012)
- *CLS Bank International v. Alice Corp. Pty. Ltd.*, about the patentability of computer-implemented software and methods (2013)
- *Robert Bosch, LLC v. Pylon Manufacturing Corp.*, presenting a question about the scope of our jurisdiction over patent appeals (2013)
- *Lighting Ballast Control LLC v. Philips Electronics N.A. Corp.*, involving the standard of review for claim construction (2014).

Even outside the en banc context, our court has made progress in clarifying difficult issues arising in patent cases. Our jurisprudence has come a long way (1) in the standards and burdens involved where a patent claim is challenged on obviousness or enablement grounds, (2) on the appropriate measures for proving damages in patent actions, (3) on whether, and when, permanent injunctions remain appropriate upon a finding that a patent is valid and infringed, (4) on the standards to be employed when a request for fees is made under Section 285 of the Patent Act, and (5) on when the plaintiff's chosen venue is inappropriate. And, these are not the only areas where we have worked hard to incrementally clarify the law in response to the increasing numbers of patent appeals we are handling and to the increasingly complex and contentious nature of those appeals. ▶▶

\*Randall R. Rader retired from the position of circuit judge on June 30, 2014—i.e., between the date of the lecture and this publication.

*“So we are now in a world where patent litigation has become overwhelming to many business owners at the same time that appropriate patent protection has become increasingly important to the economy.”*

## THE SUPREME COURT HAS BECOME INVOLVED IN PATENT APPEALS

As I noted at the beginning, however, we are not the only ones who have recognized the increasing importance of intellectual property law and of the disputes arising thereunder. The Supreme Court, too, has shown an increasing interest in the area, and in the cases that we are deciding. Recent years have seen an unprecedented willingness by the Supreme Court to wade into patent actions within the Federal Circuit’s jurisdiction. In the first decade of the circuit’s existence, the Supreme Court took 18 cases arising out of the Federal Circuit, only 5 of which were patent cases. While the number of patent cases going to the Supreme Court increased slightly in later decades, in the first 28 years of the Federal Circuit’s existence, the Supreme Court granted certiorari in 51 Federal Circuit cases, only 22 of which were patent cases. Between 2010 and today, however, the Supreme Court has taken 22 cases from Federal Circuit judgments, 17 of which are patent cases. And it took one case from state court—*Gunn v. Minton* (2013)—for the purpose of unanimously overruling Federal Circuit precedent regarding our jurisdiction over state-law patent-malpractice actions.

For a sense of how dramatic this shift is, consider that about 30 percent of the cases that went from the Federal Circuit to the Supreme Court during Judge Nies’s 16 years on the bench were patent cases. In my three-and-a-half years on the bench, more than 75 percent of the cases arising out of our court and ending up in the Supreme Court are patent cases. To give you another metric, in the first 28 years of the Federal Circuit’s existence, patent actions finding their way to the Supreme Court made up, on average, less than 1 percent of the Supreme Court’s total docket. In the last three years, patent matters constituted more than 5 percent of the high court’s caseload.

Some of the decisions from the Supreme Court in recent patent cases seem to be sending a general message regarding how the Federal Circuit operates. *eBay Inc. v. MercExchange, L.L.C.* (2006), *KSR International Co. v. Teleflex, Inc.* (2007), *MedImmune, Inc. v. Genentech, Inc.* (2007), *Global Tech Appliances, Inc. v. SEB S.A.* (2011), *Gunn v. Minton* (2013), and *Medtronic, Inc. v. Mirowski Family Ventures, LLC* (2014) are all generally seen as instances where the Supreme Court has been telling the Federal Circuit that, as an Article III court, it is bound by the same civil rules, jurisdictional standards, and common law principles that govern all Article III courts—in other words, that patent litigation must be treated like all other litigation.

But the Supreme Court has gone further, even wading into highly technical patent matters, such as the patentability of business methods, software, and even aspects of DNA mapping.

As of this lecture’s date, we are currently awaiting decisions in five cases for this term and already have a sixth on the Supreme Court’s docket for next term. These cases involve: (1) an analysis of what constitutes patentable subject matter under Section 101 of the Patent Act, (2) what standards govern claims of indirect infringement, (3) what measure should be employed to determine whether claims are indefinite and, thus, invalid, (4) what considerations should affect district court assessments of fee applications under 35 U.S.C. § 285, (5) what standard of review our court may apply to those Section 285 decisions, and, finally, (6) whether the Federal Circuit can continue to review *de novo* all aspects of claim construction decisions by district judges.

Thus, the Supreme Court has shown a heightened level of interest in what this court does in the patent arena, and in whether we are doing it correctly. Supreme Court-dictated changes in the legal standards that the Federal Circuit must apply or in the governing standard of review it is to employ may affect the Federal Circuit’s jurisprudence across a wide spectrum of cases for years to come.



## THE EXECUTIVE AND LEGISLATIVE BRANCHES TAKE NOTICE

It is not just the Supreme Court that is scrutinizing the matters coming before us or that is recognizing the issues' importance. The President of the United States has taken an interest in patent litigation, even mentioning the need for a

stronger patent system to foster innovation in his State of the Union address this past January. These comments echoed White House announcements regarding the need for policy makers to address abuses in the patent litigation system and to streamline the costs imposed on businesses by such abuses, while at the same time being cautious not to curb the innovation that a strong patent system can encourage. And the White House has created a special in-house position within the Office of Management and Budget—the Intellectual Property Enforcement Coordinator—whose function is to coordinate the efforts of government entities to combat intellectual property theft and to foster innovation.

Because of these White House calls for reform and its own independent concerns, Congress also has shown a willingness, and an apparent continuing desire, to redefine the patent laws in ways not done since passage of the Patent Act in 1952. The America Invents Act was signed into law on September 16, 2011, and the changes brought on by it are sweeping—among other things, creating new classes of actions for challenging the validity of patents before the PTO and thereby fashioning a new platform from which cases can be appealed to our court. That legislation also set up the Patent Pilot Program, through which district judges can opt to handle a greater share of patent cases, in the hopes that with greater experience in these complex cases might come greater expertise and increased efficiencies.

While the America Invents Act took seven years to pass and its changes have not been afforded the test of time, we are seeing proposals for even more patent reform—with one bill having already passed the House and others working their way through the Senate.

These new legislative initiatives are not aimed at making substantive changes to patent law. Instead, they seek to address and change the way patent litigation is conducted by the courts. Congress is currently considering numerous legislative proposals whose avowed purpose is to curb litigation abuses. Their apparent primary focus is on how trial court judges manage those patent cases that come before them—the proposals would dictate everything from pleading requirements, to the extent and timing of discovery, to stays of litigation against certain parties, to whether and when courts should award fees to a prevailing party. These proposals may even go so far as to require the Supreme Court to change certain rules of civil procedure and to direct the Administrative Office of the United States Courts to expend resources to conduct studies regarding litigation practices in patent cases.

These bills have raised questions regarding the appropriate respective roles of Congress and the courts in managing litigation—or at least they have for me. But the debates over them have focused instead on the tension I mentioned earlier between a legitimate, and somewhat frenzied, desire to curb litigation abuses by a certain class of patent litigants, on the one hand, and the need to maintain the integrity of the system for those who might legitimately need to resort to the courts to protect their intellectual property rights and the business interests they further, on the other. As those debates reflect, from a policy perspective—which is Congress's prerogative—there are no easy answers about how to balance these concerns.

## IV. Conclusion

With all of this, in just a few short years, the Federal Circuit has gone from a court familiar to a specialized group of lawyers and a fairly limited number of litigants, to one whose work has become more important to our national economy and that is now being scrutinized by all three branches of government. As I said, I do not believe that it is the makeup of the court or the work of the particular judges on the court—or even their personalities—that either deserves the credit—or the blame—for all this attention. Changes in the realities of the patent system and of patent litigation itself have put us at the eye of the storm. It is a storm we on the Federal Circuit will continue to do our part to weather successfully. ■







# Who Governs Local Schools?

**For decades, power over education policy has shifted toward Washington and state capitals, but politics and the realities of teaching are keeping life in the idea of local control.**

By Alan J. Borsuk

**A**s part of the administration of President Lyndon B. Johnson, Michael Kirst helped write the Elementary and Secondary Education Act of 1965. The law was the first broad foray by the federal government into kindergarten through twelfth-grade education in the United States.

“Leaving civil rights to local control was ridiculous on its face, so this intervention in the 1960s was very justified,” Kirst, a Stanford professor and prominent scholar of education policy and history, said in a recent interview with *Marquette Lawyer*. But the law set off what Kirst called “vector factors” that have changed the landscape of education decision making in profound ways.

Not only was there no such thing as federal education policy in, say, the first half of the 20th century, but state education departments often had just two or three employees, Kirst said. The impact of legislatures, courts, education organizations, and other outside forces then? Pretty much zero.

In recent decades, control over what schools do has moved up the ladder of interests in a big way. Numerous outside forces, especially the federal and state government, have big impacts on what schools teach and how they are run. In the pursuit of laudable goals—racial integration, higher achievement, holding down taxes, closing achievement gaps between students from have-and have-not backgrounds, preparing tomorrow’s workforce—the latitude of local school boards and superintendents has been constrained by larger forces.

“I’ve argued that the imbalance has grown too great,” Kirst said. “To me, this has been overkill. . . . It’s been going on in an unrelenting way for decades, and there’s been very little reversing.”

It’s become a fair question to ask what “local control” means for schools, even in states such as Wisconsin that have proclaimed this as a guiding principle for many decades. After all, what’s local about a long line of edicts from Washington?

But there is still life in the longstanding notion of local control. Orders may come from on high, but the real action of education is ultimately as local as each classroom. The distinctive cultures of different schools and school districts demonstrate that there is still a traditional local aspect to school control.

There also is new life being breathed into local control. From the right and, to a lesser degree, from the left, advocates are making headway in building opposition to the Common Core State Standards, the nationwide effort to set learning goals for children, with many prominent political leaders such as Wisconsin Governor Scott Walker calling for reinvigorating local control. In addition, Congress has been deadlocked for seven years in revising federal education law, and the days of new waves of federal funding coming to states and local schools have waned. In some ways, control is more local than ever: The controversial growth of charter schools and programs of private-school vouchers has put more than 2 million children nationwide in schools that are freed even from oversight by school districts. ▶▶

Kirst is in his second round of serving as president of the California State Board of Education. “We got into state control squared and cubed,” he said of California. But Gov. Jerry Brown, a Democrat, and Kirst have taken significant steps to restore budget and policy powers of local districts. “Local school leaders,” Kirst said, “are still vital, and I think they need more discretion to teach children. . . . All of this pushing and pulling from outside can’t really educate children in the end.”

But at the level of a typical school district, all the orders from above can feel uncomfortably restrictive. Kathleen Cooke, superintendent of the Hamilton School District in suburban Milwaukee since 1993, said that she and her staff used to put together a list of all the federal and state mandates they had to follow, including those related to education and those placed on any large business or gathering place, such as environmental and safety rules. They stopped compiling the list in 2010, she said, because it was such unhappy reading.

Cooke said that her district complies with the requirements, while doing all it can to do what fits best

school food programs. How can they do this? The power of the purse, in the form of multibillion-dollar meal subsidies for lower-income students. “We believe that proper food nutrition and meal portion guidelines are best decided at a local level,” Rick Petfalski, president of the school board of the Muskego-Norway School District in suburban Milwaukee, recently told the *Milwaukee Journal Sentinel*. The district, with relatively few low-income students, withdrew from getting subsidies. But for the large number of districts with higher percentages of low-income students, turning off the federal faucet is unrealistic, and menus will follow federal rules, whether kids or others like it or not.

Three: Perhaps the least-pursued provision of the 2002 revision of the Elementary and Secondary Education Act (this revision being popularly known as No Child Left Behind) called for solving the national problem of students in low-achieving schools disproportionately having teachers with weaker qualifications than those in high-achieving schools. In July 2014, U.S. Secretary of Education Arne Duncan



*“Local school leaders are still vital, and I think they need more discretion to teach children. . . . All of this pushing and pulling from outside can’t really educate children in the end.”*

Michael Kirst, President of the California State Board of Education and Professor Emeritus at Stanford University

for their schools. She said that she’s given politicians this request: “Stop the unfunded mandate machine.”

There is no question that mandates, funded or not, have grown to levels not envisioned when Congress passed the 1965 education law. Consider this overview of the roles played in education policy by various parties.

## The Federal Government

Here are three recent steps by officials of President Barack Obama’s administration:

One: It was announced that federal officials will hold school districts responsible as a civil-rights matter for discipline policies that disproportionately affect students by race—for example, if suspensions are given at much higher rates to black male students than to others.

Two: In an effort supported by Michelle Obama to make offerings more nutritious, officials have revised rules for what can be served in federally subsidized

announced an “Excellent Educators for All” initiative aimed at getting states to address the issue.

School discipline, cafeteria food, and teacher hiring as federal matters? Those are pieces of a big picture of federal impact.

To be sure, these are only recent examples. Consider also the boom in girls’ basketball. For this, one would have to go back more than 40 years, to the passage of Title IX. Underestimated at the time it was created, it sparked a whole new world of women’s sports nationwide.

Critics often point out that the word *education* does not appear in the United States Constitution. “The last place you want to put any authority over education is at the federal level,” said Neil McCluskey, associate director of the Center for Educational Freedom at the CATO Institute, a libertarian think tank. He said that the federal government has reason to intervene in schools in cases of discrimination based on group identity when local and state authorities are not correcting the problem.





*“Broadly speaking, that leaves us at a place where the federal government creates an expectation that all students will be served.”*

Daria Hall, Director of K–12 Policy Development for the Education Trust

But beyond that, the federal government has “no authority to legislate in education” or to spend money on education programs, he said.

Others speak up for the role of the federal government. Professor Robert Lowe, an education historian with the Marquette University College of Education, said, “I look to higher levels of government to guarantee rights and guarantee resources.” Much has been done at federal initiative to help students from populations that historically have gotten lesser opportunities, Lowe said. “If you leave things at the local level, you are going to have profound inequalities.”

Daria Hall, director of K–12 Policy Development for the Education Trust, a Washington-based nonprofit that focuses on education policy, said that federal money accounts for about a dime on every public dollar spent on kindergarten through twelfth grade. The money and other powers are enough to be influential. “Broadly speaking, that leaves us at a place where the federal government creates an expectation that all students will be served,” she said.

No Child Left Behind was due to be revised and reapproved by Congress in 2007, but as the national climate around education has become more partisan and Congress more deadlocked, that has not happened, nor is it likely in the next several years. Instead, Obama and his secretary of education, Arne Duncan, have pushed federal policy onto new turf, issuing many states, including Wisconsin, “waivers” from the current accountability regime and requiring states to pursue programs, including teacher evaluation initiatives based, in part, on measures of student success. They also prodded states to join the Common Core initiative. One result has been a surge of opposition to federal involvement in education.

*“I look to higher levels of government to guarantee rights and guarantee resources. If you leave things at the local level, you are going to have profound inequalities.”*

Robert Lowe, Professor, College of Education, Marquette University

## The States

If the federal government has no constitutionally specified role in education, states do. Most state constitutions make education explicitly a state responsibility. But for decades, states generally took a hands-off role in telling local schools what to do. That began changing as the politics around education heated up and states were given the role of disbursing and monitoring the increasing flow of federal money. Nationwide, states generally provide about half of school funding. In Wisconsin, it is more than 60 percent.

From the 1960s on, “states increasingly asserted the control over local schools that was theirs by law but that they had only modestly exercised until then,” Kirst and co-author Frederick Wirt wrote in *The Political Dynamics of American Education*, a textbook published in 2009. “Indeed, despite Washington’s greatly enlarged role, perhaps the most striking change in U.S. education governance in recent decades has been the growth of centralized state control and the ascendance of governors over school policy in most states.”

Wisconsin offers three good examples: In 1993, Gov. Tommy G. Thompson and the legislature agreed on a “three-legged stool” approach to education spending. The legs were a state commitment (no longer in force) to pay two-thirds of the general cost of schools; “revenue caps” (still in force) on how much school districts can collect in state aid and property taxes; and a limit (no longer in force) on how much salaries and benefits of teachers could go up each year. “The Thompson funding mechanism really changed local control,” said Jack Linehan, a retired suburban superintendent and former executive director of an organization of southeastern Wisconsin school leaders. “That was probably a watershed event.”

The second example is the 2011 law known as Act 10, Gov. Scott Walker’s signature accomplishment. The law both asserted state power, by cutting state spending on schools and requiring public employees—including local school district teachers—to pay more for health and retirement benefits, and put new meaning into local





*“The last place you want to put any authority over education is at the federal level.”*

Neil McCluskey, Associate Director of the Center for Educational Freedom at the CATO Institute

control by nearly erasing the until-then strong role teachers unions played and increasing management’s powers.

CJ Szafir, L’11, is education policy director of the Wisconsin Institute for Law & Liberty. Szafir said that the Act 10 changes increased local control of education. He pointed to actions taken in school districts such as Oconomowoc, which committed itself to innovation in how students learn and reduced the number of teachers at its high school while having many teachers take heavier workloads (with more pay). It couldn’t have taken those steps under prior contracts, he said.

On the other hand, Marquette’s Lowe sees the way some politicians, business groups, and foundations have fought unions and pushed reforms such as charter and voucher schools as steps to dismantle public school systems and mute local voices, particularly in low-income communities.

The third example is the power the state has (through federal Spending Clause legislation) to put chronically low-performing school districts under “corrective action plans.” That has meant the state Department of Public Instruction has played a major role in determining what is done by Milwaukee Public Schools in recent years.

Tony Evers, Wisconsin superintendent of public instruction, said that while he supports local control in general, there are issues such as financial oversight of school spending where “there isn’t local control,” and that’s good. Otherwise, “there would be no way to monitor large amounts of money being spent,” he said. The power to issue teachers’ licenses is another aspect of state control. Overall, Evers said, “I think we have a good balance” of state-local power.

Both Republican Rep. Robin Vos, speaker of the Wisconsin State Assembly, and Democratic Rep. Peter Barca, minority leader in the assembly, spoke up in favor of local control in interviews for this story.

## Courts

School desegregation is probably the most potent example of the role of court actions in school policy. Judicial decisions that called for implementing integration plans profoundly changed communities and the dynamics of education in many American cities, including Milwaukee, as in many ways did the end of the era of desegregation orders. At state

levels, judicial rulings in several places that state school funding systems were unacceptable (or, in some cases, acceptable) for how they impacted low-income communities also shaped education realities, as have court proceedings about the rights of special-education students, such as the *Jamie S.* case involving Milwaukee Public Schools, described in this magazine’s fall 2013 issue.

A recent decision by a California judge that tenure and layoff practices for teachers discriminate against low-income students because they increase the likelihood of those students getting less-qualified teachers drew strong reactions nationwide, and a similar legal challenge was launched in New York. Those cases are not yet concluded.

## The Common Core

The rise of the set of expectations for student learning known as the Common Core State Standards is unique in that it arose from collaboration among state officials, with strong support from private, business-oriented organizations. When the Obama administration used leverage to prod states to join in, the Common Core was branded by opponents as the federal government’s taking away local and state power. Opposition continues to build, and it could have significant impact in limiting federal education initiatives in coming years.

At the same time, more than 80 percent of states remain involved in the Common Core effort, and it is affecting the way tens of thousands of teachers nationwide do their work.

## Businesses, Unions, and Philanthropists

The interests of teacher unions and of philanthropists and businesses that want to spur innovations such as independent charter schools often have little in common except for two things: They are each influential in important ways, and



each one often draws great fire from the other. Teacher unions have long been shaping presences in education, and the provisions of union contracts often go far in determining what schools do. Business and foundation involvement in education issues has ebbed and flowed for decades, but it has been high nationwide in recent years, with foundations such as the Bill & Melinda Gates Foundation and the Walton Family Foundation having national impact.

### So What's Left of Local Control?

Actually running schools. Hiring teachers, assigning them, and evaluating them. Selecting principals. Opening and closing schools, setting what curriculum they use, choosing textbooks and other education materials. Actually implementing all the orders from above. Those are all crucial aspects of education still in the hands of local schools and their leaders.

The Education Trust's Daria Hall said, "It's all in the implementation." Two different teachers can interpret standards and programs very differently. "It's the responsibility of districts to make sure that implementation is equitable and high quality," she said.

Kathy Christie, a vice president of the Education Commission of the States, a Denver-based organization that assists state leaders with education issues, said that local control "is still alive and kicking, but I would also contend that it is gradually being impacted by the fact that we have an increasingly mobile population. Such mobility and pressure to compete globally have contributed to concerns about consistency across state and district boundaries, and that, I think, is drawing attention to concerns about the number of decisions left to local communities. Overall, though, the 'all politics is local' adage still probably holds and generally applies to education."

But Betsy Kippers, president of the Wisconsin Education Association Council, a union organization, said that local control had slipped in Wisconsin, largely because of Act 10. "I think the history before we started losing local control is all about the voices in the local community coming together," she said. "Those voices have been severely diminished." What she called "a stranglehold" by the state on funding is "taking away a local community's ability to budget based on its values."

Michael Spector, a retired lawyer with the Milwaukee-based firm of Quarles & Brady, was involved in many education matters in Wisconsin. He said school boards and superintendents can still make significant

differences. He pointed to Shorewood, the close-in suburb where he lives, saying that its school leaders have been able to do things that serve students in distinctive and successful ways. "Part of it is how aggressive school board members want to be," Spector said.

Spector's view was backed by a study published in June 2014 by the Center for Reinventing Public Education at the University of Washington. The study, "Policy Barriers to School Improvement: What's Real and What's Imagined?" by Lawrence J. Miller and Jane S. Lee, asked principals at eight schools in four states about what they saw as policy barriers to change in their schools. It concluded that only 31 percent of the 128 barriers listed couldn't be overcome. "What we found is simultaneously troubling and encouraging: Principals have far more authority than they think," the two authors concluded.

Some education advocates question how much "local control" is really local or effective. Chester E. Finn Jr., president emeritus of the Thomas B. Fordham Institute, an influential Washington-based think tank, asked what is local about having a district the size of Los Angeles. More broadly, Finn, who favors expanding independent charter schools, said that school districts as constituted now are often roadblocks to improvement. "I've come to believe that the local school district . . . doesn't work very well any more in the 21st century and is, in its way, archaic," he said. He would be glad to "let traditional districts go the way of the passenger pigeon."

Whatever the merits of that, it isn't likely to happen on a broad scale, although some urban centers such as New Orleans, where all schools are now charter schools, provide striking examples of what Finn favors. But overall, school boards, superintendents, and local public school systems are deeply ingrained in the makeup of communities and have loyal supporters. In polls both nationwide and in Wisconsin, including the Marquette Law School Poll, people generally give mixed or poor grades to schools overall, but give their own community's schools much better grades.

Many hands are on the steering wheel of education policy, with the federal and state governments commanding powerful grips. But as much as forces try to grab that steering wheel and as much as orders come down from above (or from the backseat) on where and how to drive education, it is ultimately teachers and students who determine how far, how fast, and how well learning will go. ■



Paul T. Dacier

## Some Recollections of Marquette Law School— and Some Advice

The editor-in-chief of the *Marquette Law Review* traditionally invites a speaker for the journal's end-of-year dinner. This past year Steven Kruzal, L'14, asked Paul T. Dacier, L'83, to address the gathering. Mr. Dacier is the general counsel of EMC Corp., a Fortune 500 company based in Hopkinton, Mass. We produce here his remarks, which blend reminiscence and more-direct advice.

**I**t is a privilege and an honor to speak with you this evening. It took me 30 years to make it to Law Review! Thank you very much.

This evening I would like to tell you about some of my law school experiences and offer you some insights that I have gained through years of practicing law. To begin, I ask you to bear with me in a trip down memory lane. I would like to share with you a few memories from my law school years.

The first event that I attended at the Law School was a picnic. It was being held near Sensenbrenner Hall. As I approached the event, I ran into a woman, and she asked, "Are you a first-year law student?"

I said, "Yes."

I then asked if she was, too, and she said, "No, I am a third year." Then she said, "You are going to have *quite* the experience."

I thought, "Hmmm, that is interesting."

On my first day of law school, I was in a class with Professor Michael Waxman. I believe that it was his first time teaching at the Law School. He asked, "Is the law a profession or a business?"

I didn't know the answer to the question. I thought again, "Hmmm, that is interesting." (Incidentally, I now know what he meant, and I have come to regard the law as a profession.)

It turns out that those early moments were only the beginning of a most interesting journey. While I was at the Law School, I found myself constantly interacting with people who got me to think differently; who changed my world view; who caused me to think, "Hmmm, that is interesting."

One of my favorite subjects was the Uniform Commercial Code (UCC), taught by Professor Ralph Anzivino. I studied that subject every day and night during the semester and was more than ready for the



Paul T. Dacier

final exam. The night before the test, a classmate called in a panic. You see, he never studied until the day or night before an exam. He exclaimed, "Paul! Paul! I just finished reading Article 9 . . . I haven't even started studying Article 2 yet!" I burst out laughing and said, "Good luck," and then hung up the phone, convinced he'd never pass.

The next day, I took the UCC exam and wrote four-and-a-half blue books. My friend told me that he wrote two blue books. I received a very good grade. My friend? He passed with an 80—not such a bad grade on the old scale. You might assume that I thought again, "Hmmm, that is interesting." But, in reality, my reaction was stronger than that. It was a disappointment when I realized that my grade received may not always reflect the level of effort expended.

In my mind, I experienced a considerable indignity when I had to take the exam in Evidence from 3 to 6 p.m. on my birthday. That night at dinner with a friend, I was exhausted from taking the test. I could not talk—even though the dinner was to celebrate my birthday. This is another example of something that I learned quickly: life is seemingly not fair, or, somewhat more specifically, an important personal event can be trumped by reality.

As you can see, these law school experiences, as well as others, are emblazoned in my mind after all these years. And I am grateful for them—even the ones that bothered me to no end.

These moments, I believe, marked the beginning of my journey as a lawyer. Since then, three decades have gone by, and I have learned a lot of lessons and would like to pass some of them on to you. To that end, there are three pieces of advice that I would like to give as you enter the profession of law. The first is: *Always ask “Why?”* The second is: *Solve problems.* And the third is: *Embrace innovation.*

### **Let me begin with *Always ask “Why?”***

In law school, we are all taught the black-letter rule. In many ways, we believe that the rule says what it says. But is this really true?

In 1990, I was the only lawyer at EMC Corporation in Hopkinton, Mass. My title at the time was corporate counsel. My boss was Dick Egan, the “E” in EMC. Dick was constantly questioning my judgment. He would listen to my answers about the rule and then would ask, “Why?” or “Are you sure?” or “It does not say that.” Dick questioned me so much that I was irritated most of the time. After a while, I realized that Dick was forcing me to look at the rules skeptically. He wanted me always to consider the needs of the business and then apply the rule. This pushing by Dick caused me to change how I looked at business and legal issues. I stopped thinking that the black-letter rule was the end of the matter.

How does this apply to you? It is a given that, as lawyers, you must know the law. To effectively evaluate the situation, however, you must know the goals and objectives of the client. The challenge will always be to take the needs of the client and then apply the rule.

Also, never slow down the client or business because of the rule or related legal issues. To put it differently: Always ask yourself “Why?” Challenge your assumptions and always remember that what the client wants, the client gets, wherever possible, and you are the one to make it happen. If you say “no” too easily or discourage the taking of risk, you will lose the client. You need to enable the client to take the risk, where appropriate, on sound legal advice, and, in all events, your job is to make sure that the law is there for the client’s benefit and not to the client’s detriment. Also, you should work faster and more efficiently than everyone else. In doing so, you will be seen as a can-do lawyer who used “Ask ‘why?’” to get the task accomplished.

### **The second piece of advice is to *Solve problems.***

From the beginning of civilization, problems have always existed. That is why Hammurabi’s code and the Magna Carta were written. That is why the United States Constitution is in existence. For us today, the problems may be more discrete, but the fundamental question remains: What do you do when a problem comes your way? How do you react?

Trade secret misappropriation is a major problem in the high-tech industry. In the 1990s, when EMC was a much smaller company than today, this problem was particularly acute. One day we would go into court in Massachusetts seeking preliminary relief against a particular defendant, and it would be granted. A few days later, we would be back in court with the exact same facts with a different defendant, and the request for preliminary relief would be denied. We felt like—it is almost not too much to say—we were in a first-class business world with a third-world court system.

I then criticized the courts to Dick Egan and anyone else who would listen.

One night I was speaking about this situation at home, and my young son said, “Dad, can’t you fix this?”

My first inclination was to say, “Of course not. This problem is bigger than me.” But, the truth be told, his comment got me thinking. It is easy to criticize. Why not try to change the system and solve the problem?

As a result, in the late 1990s, I started an initiative





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to establish a business court in Massachusetts. I worked on this initiative with the Massachusetts Legislature and the courts. In 2000, the Business Litigation Session was established in Suffolk County (Boston) by court order. Since then, more than 4,000 complex business cases have been filed in the Business Litigation Session. This business court has been an outstanding success. In fact, the entire civil court system in Massachusetts is working more efficiently because complex business cases are now being handled by a specialized court with a dedicated group of judges. Now there is a body of case law with consistent rulings that practitioners can rely on concerning trade secret misappropriation, covenants not to compete, and the like. Also, court rulings are issued expeditiously, and this helps businesses operate with certainty. This court has also given Massachusetts a reputation of being a more business-friendly state. Incidentally, two of the judges who presided in the Business Litigation Session during the past 10 years are now justices on the Massachusetts Supreme Judicial Court.

What can you do when a problem comes your way? Well, first and foremost, when you see a problem, don't assume that it is someone else's responsibility to fix. Your ability to solve a problem is as much about mindset as it is about capability. Even as law students, you can effect change. An example is for all of you to use the power of the pen through the *Marquette Law Review*. Over the years, the *Law Review* has published many excellent scholarly articles on the Interstate Commerce Act, the Wisconsin Constitution, the innovation undertaken by the courts with alternative dispute resolution, and the Wisconsin Consumer Act. I believe that as law students, you should use this

power to embrace critical emerging trends and solve real-time problems. For example, I suggest that articles be written that analyze the law of cybersecurity and privacy and whether the United States Constitution is scalable, taking into account the desire of terrorists who are ready to destroy our way of life. The key point is that you, as student leaders in this Law School, are taking on current real-time societal and legal problems. And, through the *Marquette Law Review*, you are giving advice on how to resolve these major issues to the benefit of all citizens.

Along the lines of being a thought leader, during the past few years I have been delighted to see the Law School achieve prominence with its political polls and in publishing an analysis about a recent judicial election contest at the Wisconsin Supreme Court. I read about the political polls and the judicial election contest in the *Wall Street Journal* and the *New York Times*. This widespread publicity is excellent for Marquette Law School and its reputation. This publicity also makes the Law School a sought-after reference source because of its impactful analysis and commentary.

### **My third piece of advice is to *Embrace innovation.***

Innovation is the lifeblood of civilization. Innovation is constantly taking place and changing our way of life. Even the law is being buffeted by innovation.

The innovation in law that I am talking about is the explosion in "self-help law" or "do-it-yourself law." People are learning the law over the Internet from a variety of generally available sources that offer easy ways to do legal tasks without the need for consulting with a lawyer. Shockingly, some lawyers (and associated business entrepreneurs) are encouraging the public to bypass the legal system as we know it through the use



of technology or otherwise. These lawyers are biting the hand that should be feeding them. They are thriving at *your* expense.

What can you do about this, since the train clearly has left the station and innovation in the law is going to continue no matter what? As a lawyer, you need to innovate, too. You need to show a value proposition to the public about why they need a lawyer. You need to show the public that they can afford you and that having a lawyer is essential to their well-being. You need to show the public that, contrary to popular belief, the law is not easy and that self-representation, in any way, shape, or form, is dangerous.

There is also a huge misconception about the number of lawyers in the legal profession today. People say that there are too many lawyers in the United States. This is not true. There is an overwhelming amount of legal work in this country, and there is not a glut of lawyers. I believe that many new or seasoned lawyers should focus on lower- and middle-income America. The people in these income categories have an enormous need for legal services. They need help with wills and powers of attorney. They need legal representation on real estate transactions, divorce and domestic relations issues, criminal matters, and the like. Furthermore, the huge number of pro se litigants illustrates that there is a tremendous need for legal representation in the courts—beyond that which is allegedly self-taught. With the right focus and price points, I believe that all lawyers can be gainfully employed.

The courts have to innovate, too. Whether rightly or wrongly, there is an overwhelming public perception that the courts are slow, complicated, rigid, and difficult to understand. People also think that it takes forever to get a judge to hear a case and rule on it. Interestingly, judges comment on the court system as well. Many state

court judges will tell you that they are overwhelmed with work and that state budget cuts are restricting their ability to render justice fairly and efficiently. On the other hand, some federal judges will tell you that the number of civil and criminal cases taken to trial has dropped dramatically over the years. In fact, one federal judge recently told me that in his district each year on average only 4.5 cases per judge are tried to a jury.

Most people do not understand that the judiciary is a coequal branch of government. They are also very quick to criticize the jury system. People need to be reminded that there is a system of advocacy in the United States, as established by our founding fathers, that seeks truth and justice.

In any event, because of these perceptions, innovators have gotten involved in the litigation process. This is why the private litigation industry has grown dramatically. Many lawyers and their clients have embraced private litigation in the form of arbitration or otherwise without the benefit of the rules of evidence and the right of appeal, because of the mistaken belief, in my opinion, that such a process is superior.

Some judges have realized that private litigation is competitive with the courts, and they have responded by adopting the “rocket docket” approach. This means that lawsuits are dealt with rapidly and efficiently. In fact, with rocket dockets, most civil suits are set for trial within one year from the date of filing.

I believe that all courts should adopt the rocket docket approach. By rapidly dispensing justice, the reputation of the courts will be enhanced among the public and with lawyers. Also, the number of civil litigants in private litigation will decrease, and the courts will be fully utilized, as always intended.

I would like to conclude my remarks with a personal story that I have never told anyone before this evening. The reason for this story is to illustrate to you that it is important to speak up and ask for help at any time during the remainder of your academic life or as you progress through the real world. You never know what can come from asking someone for help. >>

“Once in a while I think about Dean Boden’s kind gesture. It has served as an example for me, and I have paid it forward.”

It was the spring of 1980, and I was a senior at Marquette University. I was an average student with average grades. I was one of two student representatives on the university's Academic Area Budget Committee. The other members of this committee were the deans from the colleges and schools within the university. One of the members of this committee was Marquette University Law School Dean Robert F. Boden. After a committee meeting one day, I introduced myself to Dean Boden. I told him that I had just applied for admission to the Law School and asked for his help. He said, "Call me in two weeks."

As time went by, I was sure that he had forgotten all about it. As suggested, however, I called the dean and then met with him in his office. In the meeting, I started to tell Dean Boden about my qualifications for admission—that I was an Eagle Scout and. . . .

He interrupted me and said, "You are also on the Academic Area Budget Committee?"

And I said, "Yes, of course." I quickly realized the disconnect in that he was impressed with my

membership on a university committee, while I was trying to tell him how important it was that I was involved with scouting. Nevertheless, it seemed that the dean showed a *genuine* interest in me, and I remember him saying he'd see what he could do to help. After meeting Dean Boden, I wondered if I had done the right thing by asking him for help.

Sometime after my meeting with Dean Boden, and much to my relief, I was admitted to the Law School.

Once in a while I think about Dean Boden's kind gesture. It has served as an example for me, and I have paid it forward. Many, many times people have asked me for help, and I have tried to oblige them in any way that I can. The door to opportunity opened for me through an act of kindness, so why shouldn't I do the same thing? I urge you to do the same thing for anyone who asks for your help.

The education that I received at Marquette University Law School changed my life forever. Let the education you receive at this Law School change your life forever, too.

Thank you. ■

## Sports Law Banquet | James L. Perzik

### L.A. Lakers General Counsel Receives Joseph E. O'Neill Award

On April 25, 2014, at the annual Marquette Law School Sports Law Banquet, James L. Perzik received the National Sports Law Institute's Joseph E. O'Neill Award. The award, remembering a late partner at Davis & Kuelthau, is given annually to an individual who has made a significant contribution to the field of sports law while exemplifying the highest ethical standards. Mr. Perzik is the senior vice president of legal affairs and secretary of the National Basketball Association's Los Angeles Lakers and the team's former longtime general counsel. In addition to providing a glimpse into his work over the years for one of the nation's great sports franchises, his remarks in receiving the award offer, both incidentally and directly, wise counsel for Marquette law students interested in sports law.

**D**ean Kearney, Professors Mitten and Anderson, the O'Neill family, Chuck Henderson and his colleagues at Davis & Kuelthau, my good friend Professor Parlow, faculty, students, and anyone whom I may have missed:

First, I would like to thank the O'Neill family for creating the Joseph E. O'Neill Award and for its support of the award by Chuck Henderson and his firm. Second, I would like to thank those who believed that I should be the recipient of the award. It is my great honor to accept it. Again, I thank you all.

It was suggested that, given the number of students present this evening, I describe my path to becoming the general counsel of the Los Angeles Lakers. I do quite a bit of mentoring, and this is probably the question that I am asked most often.

I graduated from the school of business at the University of Southern California (USC) with a major in accounting. I received my CPA certificate and engaged in the practice of accounting. I primarily dealt in the areas of business and tax consulting. After seven years of practice, I thought that I could learn more about taxes if I went to law school.

“Most sports law opportunities do not have the capacity to teach you how to be a lawyer, and therefore the people involved generally look for experienced lawyers. And no matter what happens, if you get the experience, you will always be a lawyer.”

I carried out that decision by attending the law school at USC in the evening and continuing to work during the day. After graduation, I joined a small local Los Angeles law firm that attracted some quality clients. While at the firm, I was able to pursue my interests in business and tax. Several years after I joined the firm, we obtained a client who was engaged in the creation and operation of real estate syndications, which, at that time, were a very popular and permitted tax shelter. My client was a bright man who, in his early 20s, had obtained a Ph.D. in physical chemistry, a rather exotic science. He applied his scientific thinking to the real estate business and was quite successful. He was also a sports nut. As a result, I represented him in his acquisition of a franchise for World Team Tennis in Los Angeles, which he moved to the Forum in Inglewood, California, the home of the Los Angeles Lakers and the Los Angeles Kings. At the time, the Forum, the Lakers, and the Kings were all owned by Jack Kent Cooke.

It did not take long before my client, Dr. Jerry Buss, started meeting with Mr. Cooke for the purpose of buying the Forum, Lakers, and Kings. In May 1979, after extended negotiations, Dr. Buss agreed to purchase all of the entities plus a 13,000-acre ranch north of Los Angeles for \$67.5 million, the largest transaction in sports at the time. Following the closing of the deal, our firm

continued to represent Dr. Buss in all of his activities, including his sports activities, until we dissolved our law firm at the end of 1990.

Dr. Buss then asked me to join him as general counsel of all of his business activities.

One of the matters in which I was involved during my first year with the Lakers was to deal with the discovery of the fact that Earvin “Magic” Johnson had HIV. It was a very emotional period. But with time, it has turned out well for Magic and the thousands of people who were helped because of the publicity and treatments that followed.

In 1985, I assisted Dr. Buss in forming one of the first regional sports networks (RSNs) in the country. Fox Sports eventually acquired this RSN, and that led

to its formation of RSNs throughout the country. My daily duties included helping with the operation of the Lakers, the Kings, an indoor soccer team, tennis events, a volleyball team, an indoor roller hockey team, the world’s largest regularly scheduled boxing program, concerts, and other events held at the Forum. I am involved with all player contracts of the Lakers, all player trades, the salary cap, and other collective bargaining matters. I also represented the Lakers in the move to the Staples Center and the recent 25-year, \$5 billion agreement between the Lakers and



James L. Perzik and Professor Matthew J. Parlow





Time Warner's new Los Angeles RSN. My 34 years representing the Lakers have been a fun and challenging ride, which has been rewarded with 10 NBA championships and 16 NBA Finals appearances.

I have always loved sports; however, at no time along the way did I ever have in mind a career in sports. It just happened. Many of my peers obtained their positions in a similar manner; they just happened to be in the right place when the opportunity arose. This does not mean that you cannot get into sports if that is your goal, but it is something that you need to work at in order to place yourself in the best possible position when the opportunity does arrive.

You must first decide whether you want to be in sports or whether you want to be a lawyer who does sports law. Not everyone who graduates from law school wants to be a lawyer. Most do. When you graduate, you have the tools to be a lawyer, but you are not yet a lawyer. If you want to be a lawyer in sports, I strongly advise that you work in a law firm environment for three to five years and obtain experience. The experience will definitely benefit you. Most sports law opportunities do not have the capacity to teach you how to be a lawyer, and therefore the people involved generally look for

experienced lawyers. And no matter what happens, if you get the experience, you will always be a lawyer.

While you are practicing law, some of the ways that you can try to move above the competition for a sports law position include participating in organizations that give you the opportunity to meet and work with lawyers in the area of sports law. Two of those organizations are the Sports Lawyers Association and the Forum on Entertainment and Sports Industries of the American Bar Association. To have a better chance of succeeding, you should not merely attend the meetings. You should become active. Volunteer to be on committees, write articles for their journals, and when you are out in practice, seek opportunities to speak at their meetings and other events. Get yourself known by those in the profession who are also active in these organizations. This has worked for some people whom I know. Talk to those in the field, ask them for advice—and whether they can recommend someone else who can provide you with more advice. Keep in touch with those with whom you have spoken. I hope that you are successful with whatever approach you take.

I wish you all good luck in your careers.

And, again, I thank you for this evening. ■

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## Marquette Law Review 1933 Editorial

### “Leadership from the Bench”

The *Marquette Law Review*, established in 1916, contains not just longer-form articles and student comments but also, over the years, such other items as memorials, historical notes about the Law School, and speeches. The following “editorial,” as the *Law Review* itself termed it, was published in June 1933 and is among the more unusual entries. We offer it as a glimpse into our past.

**L**ike a voice “crying out in the wilderness” come two recent dissenting opinions<sup>1</sup> written by Louis D. Brandeis, associate justice of the United States Supreme Court. The distressing situation in this country, bringing in its wake social and economic chaos, has given the people leadership in government; and, as if to keep pace with the constructive forces being brought to bear on administrative problems, the unprecedented pronouncements by Mr. Justice Brandeis have given

the people, but more particularly the courts, standards for determining our future policy in matters of social and economic concern.

It has been said that one who sits upon the bench of the Federal Supreme Court should be primarily a statesman. Certainly the career of Mr. Chief Justice Marshall attests the wisdom of this statement. Today, more than ever before, this court is concerned chiefly with problems of policy; the merits of the particular controversy are often brushed aside in an effort to get at the underlying cross currents of public welfare. The adequate performance of such a function requires a

<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

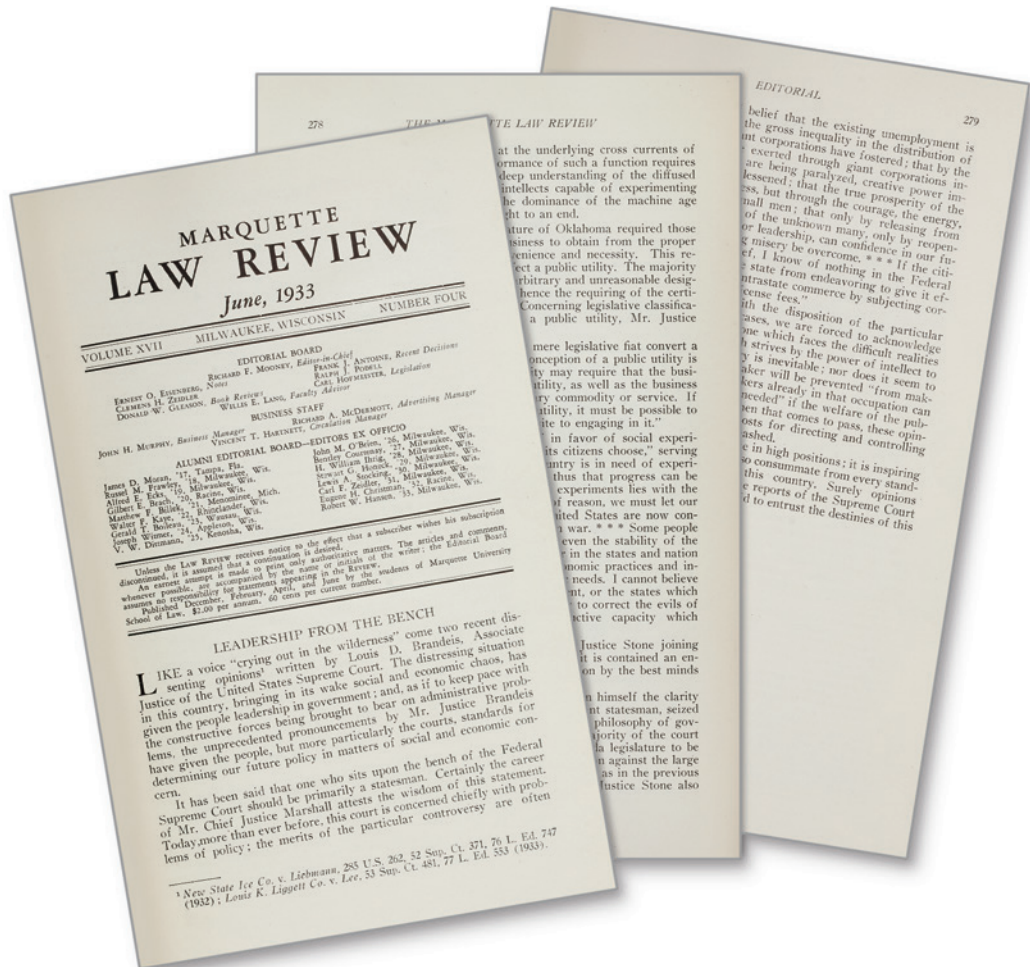
court composed of men with a deep understanding of the diffused elements of our social order and intellects capable of experimenting with new and untried methods. The dominance of the machine age over the lives of men must be brought to an end.

In the *Liebmann* case, the legislature of Oklahoma required those who desired to engage in the ice business to obtain from the proper authority a certificate of public convenience and necessity. This requirement made the ice business in effect a public utility.

The majority of the court considered this to be an arbitrary and unreasonable designation, unwarranted by the facts, and hence the requiring of the certificate to be an oppressive regulation. Concerning legislative classification of a hitherto private business as a public utility, Mr. Justice Brandeis says:

“Of course, a Legislature cannot by mere legislative fiat convert a business into a public utility. But the conception of a public utility is not static. The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water, or any other necessary commodity or service. If the business is or can be made a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.”

Mr. Justice Brandeis declares himself in favor of social experiments, with “a single courageous state, if its citizens choose,” serving as a laboratory. He considers that the country is in need of experiments, carefully considered, for it is only thus that progress can be made. The responsibility in regard to such experiments lies with the court; but “if we would guide by the light of reason, we must let our minds be bold. . . . The people of the United States are now confronted with an emergency more serious than war. . . . Some people believe that the existing



conditions threaten even the stability of the capitalistic system. . . . There must be power in the states and nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.”

Thus does Mr. Justice Brandeis, with Mr. Justice Stone joining in the opinion, conclude his mighty dissent. In it is contained an entire economic philosophy, one which invokes action by the best minds in the country.

Just one year later, this man, who combines in himself the clarity of a great jurist and the foresight of a pre-eminent statesman, seized another opportunity for further exposition of his philosophy of government. In the *Florida Chain Store* case,<sup>2</sup> the majority of the court held a regulatory tax of chain

<sup>2</sup> [This is the *Liggett* case. — ed.]

“Today, more than ever before, this court is concerned chiefly with problems of policy; the merits of the particular controversy are often brushed aside in an effort to get at the underlying cross currents of public welfare.”

stores by the Florida legislature to be unconstitutional because of an obvious discrimination against the large chains. The dissent is based upon the same grounds as in the previous case, and this time Mr. Justice Cardozo and Mr. Justice Stone also dissent. In concluding Mr. Justice Brandeis states:

“There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of the past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome. . . . If the citizens of Florida share that belief, I know of nothing in the Federal Constitution which precludes the state from endeavoring to give it effect and prevent domination in

intrastate commerce by subjecting corporate chains to discriminatory license fees.”

Whether we agree or not with the disposition of the particular controversies presented in these cases, we are forced to acknowledge that a new leadership has arisen, one which faces the difficult realities of our present condition, and which strives by the power of intellect to overcome them. Control of industry is inevitable; nor does it seem to be far in the future when a shoemaker will be prevented “from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed” if the welfare of the

public as a whole demands it. Surely when that comes to pass, these opinions will be looked upon as guide posts for directing and controlling the unknown forces that will be unleashed.

Leadership should come from those in high positions; it is inspiring to know that a man, writing opinions, so consummate from every standpoint, graces the highest tribunal in this country. Surely opinions such as his have seldom appeared in the reports of the Supreme Court or of any court. One should not be afraid to entrust the destinies of this nation to him. ■



Portrait of Justice Louis D. Brandeis.  
Collection of the Supreme Court of the United States.



# CLASS | NOTES

1970



**Andrew M. Rajec** was named Slovak-American of the Year and honored by the Slovak Embassy and the Friends of Slovakia at a gala celebration in Washington, D.C. He is president of the First Catholic Slovak Union of the United States and Canada (FCSU). Under his leadership, FCSU activities have expanded into 27 states, and the organization's assets have substantially increased. Pictured above (left to right): son, Andrew P. Rajec; Andrew M. Rajec; Peter Kmec, Slovak ambassador to the United States; wife, Ida Rajec; daughter, Idka Rajec; and son, Daniel Rajec.

1973



**Christine M. Wiseman** has been confirmed by the Illinois Senate to serve on the Illinois Board of Higher Education, the state's coordinating agency, which oversees colleges and universities.

Wiseman has served since 2010 as president of Saint Xavier University in Chicago.

1974

**William C. Gleisner III** was reelected to a three-year term on the Wisconsin Judicial Council. Gleisner, who practices in Waukesha County, has served on the council since 2008.

1976

**Mark W. Schneider** has been appointed a member of the board of directors of Littler Mendelson in Minneapolis. A shareholder and co-chair of the firm's traditional labor law practice group, he focuses his nationwide

practice on representing management in all phases of labor law and labor relations.

1977

**Colonel John E. Kosobucki** was named Investigator of the Year for 2013 for the Investigations of Senior Officials Directorate, Office of the Inspector General, Department of Defense, in Alexandria, Va. He is retired from the U.S. Army.

1978

**Jack Lance** has retired after more than 31 years as general counsel to the Rockdale County Public Schools, Ga. He and his wife, Glenda, have three grown children and seven grandchildren.

1979



**Daniel T. Dennehy** has been nominated and confirmed as a member of the five-person Milwaukee County Personnel Review Board. He was then elected the board's new chairperson. Dennehy is a shareholder

with von Briesen & Roper in Milwaukee, where he focuses his practice on employment, personnel, and labor matters.



**Maureen H. Hoyle** was recently appointed president for the Council for Opportunity in Education (COE), in Washington, D.C., after serving the organization for 31 years. In January, she presented at a

Senate Health, Education, Labor, and Pensions Committee roundtable on strengthening federal access programs. Also in January, she rang the opening bell at the New York Stock Exchange on behalf of COE, for which Stefan Jekel, NYSE Euronext's New York-based team member, presented her with a medallion (above).

**Steve A. Laraway**, president and CEO of Laraway Financial Advisors, St. Cloud, Minn., recently earned the Chartered Financial Consultant designation from the American College of Financial Services.

1985



**Kathy L. Nusslock** has been chosen as the chief operating officer of Davis & Kuelthau Milwaukee. She is responsible for overall management of the firm's operations, including human

resources, facilities management, and oversight of accounting/finance, information technology, and marketing/business development.

1986

**Thomas G. Cullen**, managing attorney for Wisconsin operations for Attorneys' Title Guaranty Fund, has been promoted to vice president of Wisconsin operations. He serves as in-house legal counsel for the Wisconsin Realtors Association.

1987

**Laurie J. McLeRoy** has joined von Briesen & Roper as a shareholder in the litigation and risk management practice group in the firm's Milwaukee office.

1988

**Janet C. Protasiewicz** is judge of Branch 24 in the Milwaukee County Circuit Court, having been elected this past spring.

1990

**Noelle C. Muceno** has been named as a shareholder in Crivello Carlson's Milwaukee office, where she practices in the areas of product liability, toxic torts, and general insurance and professional liability.

## Opportunity and strategic vision underlie McEssy's

**B**ill McEssy was walking out of a bank in Fond du Lac, Wis., one day in 1969 when he ran into a guy he knew from playing recreational baseball. The guy told McEssy that he was managing a McDonald's but wanted to acquire his own franchise. He didn't have money to buy one and asked if McEssy would join him.

"It was a unique encounter," McEssy says—and it changed his life. McEssy had a successful practice in Fond du Lac that included family, real estate, bankruptcy, and criminal law. His father, also a Marquette lawyer, was a judge in Fond du Lac, ultimately serving on the bench for 34 years, and the family was well established there. "I wasn't possessed to give up law practice and go into McDonald's," McEssy recalls.

McEssy is not an impulsive person. He's loyal to his family, friends, and employees. He has an easygoing manner, and he's fun to talk to, but don't mistake the seriousness of his purposes. He's dedicated to his work and his involvement in the Catholic Church. And he thinks strategically—where should things head in the big picture, and how do we get there?

But bumping into his friend became a turning point in his life. In 1970, McEssy joined his friend in buying a McDonald's franchise in the western Illinois city of McComb. Through the 1970s, McEssy was a passive investor as the partnership grew to include five McDonald's stores in the Quad Cities region. But in 1980, McEssy sold his share to his partner, bought three McDonald's stores in the Chicago area, left his law practice, and moved to Lake Forest, Ill., to launch a business that became the successful McEssy Investments.



Step by step, he became one of the largest McDonald's owner-operators in the country, with 47 stores, generally in a triangle from north of Chicago to Milwaukee to Lake Geneva, Wis. He also became involved in several other business ventures—for one, he is the largest investor in the recent successful reopening of Lake Lawn Resort in Delavan, Wis.

As his McDonald's roster grew, so did McEssy's involvement in charitable and community efforts. He made sure that his stores supported their communities. In their personal lives, McEssy and his wife, Lois, became deeply involved in supporting the work of the Archdiocese of Chicago and especially the University of Saint Mary of the Lake/Mundelein Seminary. He has been chairman of the seminary's advisory board for nine years, and its 880-acre campus now includes the McEssy Theological Resource Center.

McEssy has earned recognition in both his professional and personal life this past year, his

## career and work

50th since graduating from Marquette Law School. This includes the McDonald's Golden Arch Award, the highest recognition given to franchise owners by the food giant, and the Francis Cardinal George "Christo Gloria" Award, given to him and his wife by the Cardinal at the seminary's "Evening of Tribute" in Chicago.

Although it has been more than three decades since he practiced law, McEssy says that his success is grounded in what he learned in law school and in legal practice. "I wouldn't have grown to the largest operator in the region without my legal background," he says. "Whatever success I've had started with getting a law degree." His role leading an operation that includes more than 2,000 employees calls on skills in negotiating contracts, setting up and overseeing corporations, hiring top-notch people for key positions, and strategic problem solving—all skills he honed as a lawyer.

McEssy got his undergraduate degree from Marquette, where he met Lois, who was also a student. They married during his first year in law school and had the first of their three children during his second year. It was a demanding period, he recalls—in addition to law school and the baby, he was working full time at the Schlitz brewery. "But looking back, thank God I did it," he said. "It was a good learning experience."

McEssy has become involved again in Marquette Law School since a meeting with Dean Joseph D. Kearney during the first year of his deanship in 2003. McEssy encouraged the plans for what would become Eckstein Hall. "I was a bit skeptical initially that this young guy was going to be able to pull this off, but I told him that he should make sure that the building was monumental. He persuaded me that he could do it, but, even so, I wasn't prepared to be as impressed as I was when I took a tour of the Law School building."

Believing in your ability to accomplish great things, and then proving it—those are things that both describe and appeal to McEssy. "I've never worked for anybody since law school," he said. But, with vision, talent, and hard work, he turned a chance encounter 45 years ago into a launching pad for big success—both for himself and for serving others. ■

### 1991



**Frank A. Gumina** was named a co-leader of Whyte Hirschboeck Dudek's health care law team. He is a shareholder in the firm's Milwaukee office and has worked with health care clients for more

than 20 years, developing strategies to meet business objectives.

### 1992

**Jason Abraham**, of Hupy & Abraham, recently assisted in obtaining a settlement, with payouts of more than \$4 million, on behalf of an Illinois biker who was severely injured in a crash with another motor vehicle. Abraham is managing partner in the firm's Milwaukee office.

### 1994



**Barbara Kahn Boxer** is managing director of Belle Capital USA, an early-stage angel fund focused on building companies, in underserved capital markets across the country, that have at


least one female founder or C-level executive or are willing to recruit top female talent to their C-suite and board. The fund is on track to raise \$25 million by 2016 and has invested in three companies since its inception in November 2012.



**Heather L. MacDougall** was sworn-in this summer as commissioner of the Occupational Safety and Health Review Commission. Nominated by President Obama and

unanimously confirmed by the U.S. Senate, she will serve a term expiring in April of 2017. She is the fifth woman to be named as a member in the Review Commission's 43-year history. ▶▶





SUGGESTIONS FOR CLASS NOTES may be emailed to [christine.wv@marquette.edu](mailto:christine.wv@marquette.edu). We are especially interested in accomplishments that do not recur annually. Personal matters such as wedding and birth or adoption announcements are welcome. We update postings of class notes weekly at [law.marquette.edu](http://law.marquette.edu).



**Sally A. Piefer** of The Schroeder Group, in Waukesha, Wis., has been elected to the board of directors of Feeding America Eastern Wisconsin (formerly America's Second Harvest of Wisconsin).

She will serve on the human resources and communications committees. The organization distributes food through a network of 1,000 hunger-relief programs.

**Richard C. Rytman** was recently appointed director of global security for Chrysler Group in Auburn Hills, Mich.

## 1995



**Todd J. Schneider** has become a partner in the firm of Froum & Garlovsky in Chicago. His practice is concentrated in the areas of estate planning, trust and estate administration,

charitable planning, and business succession planning, with a significant portion devoted to representing musicians, songwriters, entertainers, and recording artists.

## 1997



**Daniel G. Radler**, a partner in Quarles & Brady's Milwaukee office and the national chair of the firm's intellectual property practice group, has been elected to the firm's executive committee.

**Bradley C. Fulton** has assumed the role of president and managing partner of DeWitt Ross & Stevens in Madison.

## 1998

**Laurie E. Meyer** has joined the Milwaukee office of Davis & Kuelthau as a shareholder on the firm's labor and employment team. Her prior experience includes practicing labor and employment law and civil litigation at Borgelt, Powell, Peterson & Frauen.

## 1999

**Kurt D. Dykstra** is community president/senior vice president of Mercantile Bank in Holland, Mich.

**Joseph T. Miotke** is president-elect of the Wisconsin Intellectual Property Law Association. He was recently included in *Intellectual Asset Management* magazine's "IAM Patent 1000," which recognizes the world's leading patent practitioners. Miotke is in the Milwaukee office of Dewitt Ross & Stevens.

## 2000

**Eryn M. Doherty** has been promoted to vice president, labor relations, for Sony Pictures Entertainment, Culver City, Calif.



**Rebecca Cameron Valcq** was recently appointed as general counsel of Lammi Sports Management in Milwaukee. She was also recently named one of the *Milwaukee Business Journal's* "40 Under 40,"

an award recognizing Milwaukee-area individuals under the age of 40 who are making a difference in their professions and communities.

**Elizabeth Westlake** is with GE Healthcare, in Wauwatosa, Wis., working in commercial operations contracting.

## 2001

**David Saucedo** recently joined the Bonner Law Firm in Cody, Wyo. Before moving west last year, he practiced in Milwaukee in the areas of family, criminal, probate, and bankruptcy law.

## 2002



**Thomas M. Hruz** was appointed by Gov. Scott K. Walker to serve as an appellate judge on the District III Court of Appeals. He was previously a partner at Meissner Tierney Fisher & Nichols in Milwaukee.

**George S. Peek** has become a shareholder in Crivello Carlson's Milwaukee office, where he practices in the areas of commercial and business litigation as well as products liability and insurance litigation.

## 2003



**Sherry D. Coley** has been elected to a two-year term as secretary of the State Bar of Wisconsin. She is a member of the litigation practice group in the Green Bay office of Godfrey & Kahn, as well as a member of the firm's product liability and tort practice group.

## Early steps and perseverance bring long-term success for O'Brien

Barbara O'Brien is a distance runner, both literally and figuratively. On the literal side, she has maintained a demanding exercise regimen for years; she's run five marathons. On the figurative side, her professional and personal lives are models of long-term commitment, determination, and dedication.

The professional side: When O'Brien was a student at Marquette Law School in the mid-1980s, she got a job as a clerk at Borgelt, Powell, Peterson & Frauen, a firm in downtown Milwaukee specializing in defense work for insurance companies. Nearly three decades later, she is still with the firm, with a long record of success.

Her interest in insurance and in business law actually pre-dates law school. O'Brien grew up in Stevens Point, Wis., where her father practices business law. O'Brien got her undergraduate degree from the University of St. Thomas in St. Paul, Minn., and decided to get a job before enrolling in law school. She became a claims adjuster for an insurance company. She liked the work and geared her law school course selection toward a career in the field. She credits Marquette University law faculty, including Professors James Ghiardi, John Kircher, and Thomas Hammer, with teaching her skills that have served her well.

The personal side: While she was a law student, she met a classmate, Brian Smigelski. They married, and, together, they've stayed on the same paths and in the same city since, and now have two grown children. Smigelski, also L'87, specializes in business, construction, and employment litigation for DeWitt Ross & Stevens, in its Brookfield office.

"I'm happy," she says of her career choice and, more generally, of the way life has worked out. She says that the Borgelt firm has treated her well, including when her children were young and she wanted time off or a schedule that allowed her, for example, to be there when they got home from elementary school.

The work itself appeals to her. "I do a lot of paper pushing," she says, but she likes wading into the details of insurance policies and finding things that might have been overlooked. A typical day for her means "taking a lot of phone calls from clients," handling depositions, and working on mediation of cases. The number of cases going to mediation has increased over the years, she says, as the costs and risks of trials have increased. "I always tell the clients that a successful mediation is when no one is completely happy with the outcome but the clients can live with the results," she says.

Six and sometimes seven days a week, O'Brien is working out by 5:30 a.m., usually at one of the two gyms to which she belongs, or going for a run with a woman from work. "I just feel so much better," she says of her workouts. "In my next life, I'd like to come back as an exercise teacher." She also loves to ski—a pursuit that interrupted her exercise regimen this year when she tore ligaments in a knee while skiing in Jackson Hole, Wyo. Now recovered from surgery, she has returned to running.

O'Brien is the president of the Marquette Law Alumni Association Board this year. She said that she has benefited from involvement in alumni matters, especially through meeting Marquette lawyers she didn't know previously. "The school has so much to offer everybody, and it's fun to be part of it," she said. One of her priorities: getting alumni who have not visited Eckstein Hall to see the Law School's four-year-old home.

You can expect she'll pursue that goal with the persistence of someone who is in it for the long haul. ■



## PROFILE: Andy Shiffman, L'09

# As agent, friend, fan, Shiffman is there for players 24 hours a day



You're a professional basketball player, it's 4 a.m., and your elbow hurts. Who will listen to you?

Andy Shiffman will. Twenty-four/seven—that's Shiffman's job. And he loves it. His title is director of basketball operations for Priority Sports & Entertainment. Less formally, he's an agent for professional basketball players, guys in the National Basketball Association, guys who want to be, guys playing in leagues overseas.

What will he do for them?

"Anything and everything," he says. When one of his draft prospects broke his nose, Shiffman arranged doctors' appointments, a schedule of workouts, ways of meeting the client's needs for food, massages, shoes, whatever. The heart of the job, of course, lies in getting good deals for his clients, helping them have good careers. "Every day I'm talking to NBA teams" on behalf of clients, Shiffman says.

Shiffman grew up in Memphis as a big sports fan. He wasn't good enough at basketball to play it at an elite level, but that was his number-one sport. He received a bachelor's degree from Indiana University in 2006 and then headed to Marquette Law School. Why? "Sports law was hugely important for me," and that was a specialty of Marquette, home of the National Sports Law Institute.

"I absolutely loved it," he says of his time in Milwaukee. His eyes were opened to understanding both law in general and sports law particularly, and he had close relationships with faculty members and students. He loved a job he got keeping statistics for the Milwaukee Bucks.

He graduated in 2009—and things got harder. He realized that it was very difficult to get a job working for the front office of an NBA team on its basketball operations side. He broadened his options and pushed in every way he could to get into the business. One

important step: He flew to Las Vegas, where the NBA summer leagues were under way. He talked to anyone who would listen to him.

On the last day of the summer leagues, an NBA executive told him to call the coach of the University of Memphis basketball team. That led to a job in the video room there. Shiffman kept talking to anyone he could reach. He lost out on some jobs he really wanted, missed some breaks, and got some breaks. He had passed the Tennessee bar and had started working at a law firm in Memphis when he met an executive of an NBA team on the street in Memphis. The exec told him he should contact Mark Bartelstein, CEO of Priority Sports & Entertainment. Shiffman did, and he called in help from anyone he could to talk him up to Bartelstein.

It took a few months, but it worked. In March 2012, Shiffman moved to Chicago, where the agency has an office. "It shows how far networking can go," Shiffman said. "I absolutely love my job; I love Chicago."

His law degree is an asset, he said, including his involvement in the firm's work on arbitration cases. A lot of skills he developed in law school—negotiating, making an argument, navigating complex procedures—are also important in his work, not to mention when he's helping players deal with speeding tickets.

As is evident, he does more for the players with whom he works than just get involved in business dealings. He even gives them his analysis of their play, especially using the skills he picked up in basketball teams' video rooms. He says he tells them, "I'm your partner in this; I want it as bad as you do."

He wants the players to have great careers—and, for himself, he's convinced that he is already launched on one. ■



**Natalie R. Remington** is now lead counsel, United States and Canada Service, for GE Healthcare in Wauwatosa. Her duties include reviewing and advising on changes to health care–related contracts, negotiating the parameters of contracts, reviewing marketing material, assisting with policy compliance, and helping resolve client concerns.



**David J. Seno** has been elected to a partnership in the Milwaukee office of Foley & Lardner. He focuses on assisting public and private companies with mergers and

acquisitions, strategic alliances, and various commercial transactions, including cross-border transactions.

**Rebecca J. Roeker** has been appointed by Governor Scott K. Walker as chief legal counsel for the Wisconsin Department of Transportation.

## 2004

**Dawn Drellos-Thompson** is practicing business and civil rights law in Naples, Fla. She and her husband are partnering with others in the construction and management of commercial and residential property around the country.

**Kirk Pelikan** has been promoted to partner in the labor and employment practice group of Michael Best & Friedrich's Milwaukee office.

## 2007



**Angela M. Rust** has been promoted to partner at Hinshaw & Culbertson in Appleton. Her practice focuses on health care providers in the areas of regulatory compliance, transactions and

affiliations among providers, bioethics, and value-based reimbursement contracts between providers and commercial insurers, employers, and other health care purchasers.

## 2008

**Thomas E. Howard** has been reappointed to the standing committee on mental health law of the Illinois State Bar Association. He is a member of the Peoria law office of Howard & Howard.

## 2009



**Rebecca H. Mitich** is this year's recipient of the Aspire (Emerging Leader) Award from Wisconsin Commercial Real Estate Women (WCREW). The Aspire Award recognizes a woman in the

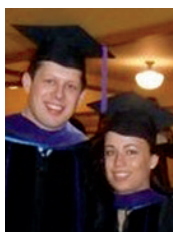
commercial real estate industry who, in five years or fewer, through her work, accomplishments, and charitable involvement, has demonstrated that she will be one of the industry's leaders in years to come. Mitich is an attorney in Whyte Hirschboeck Dudek's Milwaukee office.

**Charles R. Stone** has taken a position as an associate in the Beijing office of Reed Smith. He is also an adjunct professor in the business school of Peking University's Market Economy Academy, where he teaches "Organizational Behavior East and West" in Chinese.

## 2010

**Jason K. Roberts** recently accepted the position of legal analyst within the international department of Thomson Reuters ONESOURCE Indirect Tax in Portland, Ore., where his responsibilities include monitoring and reporting on international tax law changes and trends.

## 2011



**Jack Dávila** and **Victoria David** are engaged to be married in August 2015. He is an associate on the litigation team at The Previant Law Firm, Milwaukee, and she is an associate at the

Milwaukee office of Pledl & Cohn. The couple would like to thank Professor Jack Kircher for his creative seating arrangement in the 2008 torts class where they first met.

**Thomas I. Guz** has recently taken a position with LB&B Associates, a diversified services company located in Columbia, Md., where he is the lead negotiator and arbitrator for more than 30 collective bargaining agreements. He and his wife, Kylie, have two daughters: Lilian, age 2, and Zoey, 1.

## 2014



**Kenneth "Sam" Brooks** is an associate in the intellectual property practice group of Quarles & Brady's Milwaukee office. A patent engineer, he focuses his practice on the preparation and

prosecution of patent applications, with particular expertise in the areas of electrical, mechanical, software, and computer engineering.



**Hannah A. Rock** has joined the law firm of Hansen & Hildebrand, Milwaukee, as an associate. She will concentrate on family law, mediation, and collaborative practice.

  
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# RECALLING THE CIVIL RIGHTS ACT OF 1964

On July 2, 2014, Eckstein Hall was the venue for a program, primarily organized by the U.S. Attorney's Office for the Eastern District of Wisconsin, commemorating the 50th anniversary of the Civil Rights Act of 1964.

Participants included (left to right) James L. Santelle, U.S. attorney; Chris Abele, Milwaukee County executive; Andrew Kahrl, assistant professor of history, University of Virginia (formerly of Marquette University); Luis "Tony" Baez, executive director of Centro Hispano; Tom Barrett, mayor of Milwaukee; Jocelyn Samuels, assistant attorney general for civil rights, U.S. Department of Justice; James H. Hall, Jr., president of the Milwaukee branch of the NAACP; Edith Hudson, assistant chief, Milwaukee Police Department; Ralph Hollmon, president of the Milwaukee Urban League; and Robert J. Shields, special agent in charge, Federal Bureau of Investigation, Milwaukee office. The photo collage in the background memorializes the civil rights "March on Milwaukee" and is reproduced with permission from Clayborn Benson, Wisconsin Black Historical Society.

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