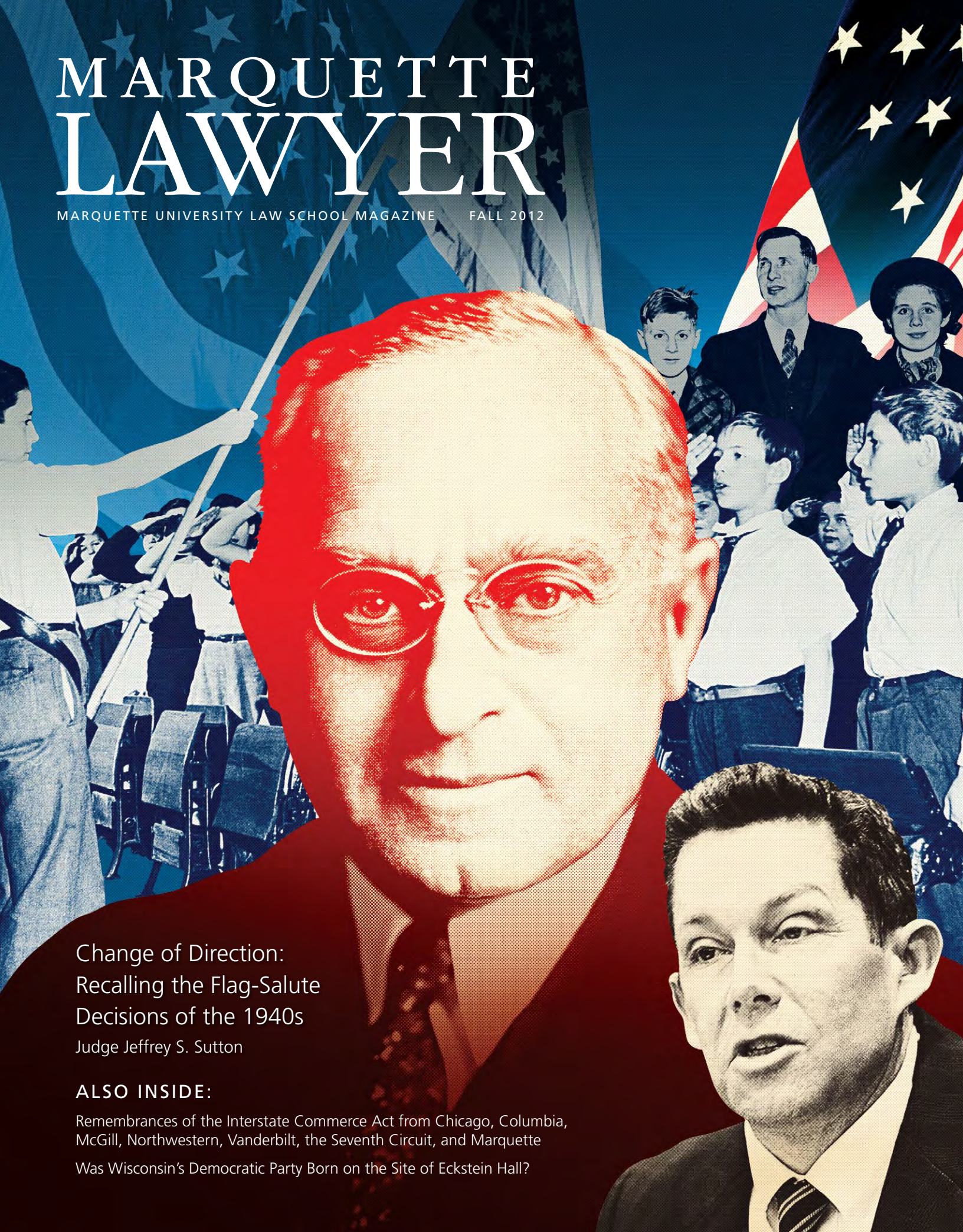


MARQUETTE LAWYER

MARQUETTE UNIVERSITY LAW SCHOOL MAGAZINE FALL 2012



Change of Direction:
Recalling the Flag-Salute
Decisions of the 1940s

Judge Jeffrey S. Sutton

ALSO INSIDE:

Remembrances of the Interstate Commerce Act from Chicago, Columbia, McGill, Northwestern, Vanderbilt, the Seventh Circuit, and Marquette

Was Wisconsin's Democratic Party Born on the Site of Eckstein Hall?

The Lawyer as Public Citizen

In recent years, Marquette Law School has assumed a prominent role in Wisconsin for convening the community for attention to public policy matters. Aspects of this are widely known (a few also being recounted on pp. 4-9 of this magazine), to the point that within the past year the *Milwaukee Journal Sentinel* has dubbed Marquette Law School “Milwaukee’s public square.”

This initiative bears on our legal education. It is true that these public policy efforts depend substantially on Annual Fund donations by alumni and friends (as opposed to students’ tuition) and are primarily in the nature of public service. At the same time, our public policy programs enable the aspiring lawyer to learn things that will help him or her in the professional world. For in addition to—and even in the process of—representing and counseling clients (the overwhelming focus of legal education), a lawyer is almost inherently a public citizen.



The significance may be clearest outside the practice. Many organizations have been able to contribute to society because of the leadership of engaged attorneys. In Milwaukee alone, Catholic Charities (Jim Brennan, L’76, and Mike Gonring, L’82), the Jewish Community Foundation (Bert Bilsky, L’79), and the Islamic Society of Milwaukee (Othman Atta, L’94) all immediately come to mind as public service organizations that have relied in recent years on the leadership of Marquette lawyers.

My claim of the benefit of our public policy initiative to our students’ formation as Marquette lawyers is nonetheless more direct. To illustrate, is there more honorable work in the legal profession than that of the criminal defense lawyer or the plaintiff’s personal injury lawyer? This is not my own background or experience, but I would maintain that the answer is “no.” And can we doubt that for these purposes knowledge of procedure and substantive law can be supplemented, to a client’s advantage, by an appreciation of larger policy and cultural challenges and trends?

My doubts are few. Criminal law, for example, is scarcely the domain of courtroom lawyers and judges alone. The Milwaukee chief of police, the district attorney of Milwaukee County, the attorney general of Wisconsin, even the Congressman from Wisconsin’s first district (now standing for vice-president of the United States) and the editor of the city’s daily newspaper—all of whom have found themselves engaged at the Marquette Law School in recent years—have an effect on the policies whereby an individual defendant may find himself treated or sentenced in the court system. So the lawyer who has followed, for example, the recent discussion at the Law School about “evidence-based decision-making” in the criminal justice system may indeed bring something to his client’s representation that a less worldly lawyer does not.

As for the plaintiff’s personal injury lawyer, it is scarcely possible, for example, that such a lawyer would not benefit from reflecting on Judge Jeffrey Sutton’s careful assessment of how and why a court reversed itself within just a few years on the viability of a plaintiff’s claim. Judge Sutton spun out that analysis in a standing-room-only Hallows Lecture in Eckstein Hall; it is found in written form as this magazine’s cover story. The general point is not news: As long ago as the nineteenth century, we knew from Holmes that the common law (historically, the particular interest of personal injury lawyers) reflected not simply logic but also “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”

To be sure, the point should not be stretched beyond its breaking point. Our public policy initiative does not yield academic (or typically even CLE) credit. Yet some sense that a lawyer’s education can be adequately cabined at the 90 credits required to earn a J.D. is misplaced. The point extends well beyond public policy: some of us have even been known to use literature and poetry to a client’s advantage. But that would be another column.

Joseph D. Kearney
Dean and Professor of Law

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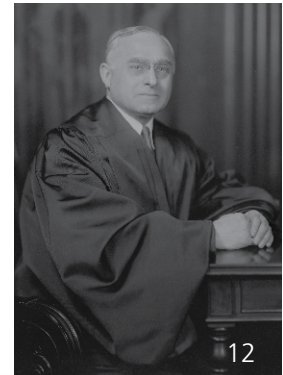
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Editor: Alan J. Borsuk

Design: Douglas Frohmader,
Andy Haas Schneider

Production: Jane Eddy Casper,
Christine Wilczynski-Vogel

Archival research: Greg Smith

Cover illustration: Sean McCabe

Please send address
changes to:
Marquette University
Law School
Office of Alumni Relations
Eckstein Hall
P.O. Box 1881
Milwaukee, WI 53201-1881

Phone: (414) 288-7090
Fax: (414) 288-6403
law.marquette.edu

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Eckstein Hall: Crossroads for Timely Talk on Crucial Topics

A public square where people address major issues, urgent needs, provocative ideas—no, it's not the classic role of a law school. That makes Marquette University Law School a groundbreaker as the school develops its distinctive public policy program. Recent months have offered compelling examples of the role that the Law School is playing. Here are highlights of some of the programs in Eckstein Hall.

“Milwaukee’s Future in the Chicago Megacity,” July 17, 2012

If you view Chicago and Milwaukee from, say, 30,000 feet, you don't see a state line, but, instead, nearly continuous development that runs from Milwaukee through Chicago and on into northwestern Indiana. And on an economic plane, you see compelling reasons why the two large cities should recognize, respect, and benefit from each other.

“The time has come to look beyond borders,” Milwaukee historian John Gurda said in the opening talk of a provocative and timely conference, “Milwaukee’s Future in the Chicago Megacity,” cosponsored by Marquette University Law School’s Lubar Fund for Public Policy Research and the *Milwaukee Journal Sentinel*. Encouraging people to look from that high-altitude vantage, Gurda said that it is time for Chicago and Milwaukee to act like siblings and present a united regional front aimed at stronger economies and better lives for people throughout the region.

His remarks were echoed throughout a day in which business, political, and academic leaders offered perspectives on what could be gained by more cooperation, as well as on roadblocks to accomplishing that.

When an audience member hit on one of those roadblocks—the Illinois objections to rerouting waterways in Chicago to help prevent Asian carp from reaching Lake Michigan—Kelly O’Brien, senior vice president for economic development of the Chicagoland Chamber of Commerce, said that it was best not to take on the most contentious subjects at

the start but to look to matters where agreement is easier to reach.

Discussion focused on three such possibilities: the development of water-related industries, in line with efforts in Milwaukee of the past several years; promoting use of Milwaukee’s Mitchell International Airport as a third airport for Chicago; and the need for better and more-coordinated education efforts to develop the workforce to meet the needs of employers. Rail issues were mentioned often, but it was clear that issues such as high-speed rail are going to continue to be controversial.

From Milwaukee Mayor Tom Barrett and Cook County Board President Toni Preckwinkle through more than a dozen other speakers, there were calls and pledges to work together.

Jeff Joerres, chairman, CEO, and president of ManpowerGroup, based in Milwaukee, said that a recent report by the Paris-based Organisation for Economic Cooperation and Development, which criticized the lack of cooperation, did the region a favor because it was a wake-up call. “Now we need to figure out how to get to making regional cooperation and improvement a reality,” he said.

“While the Law School urges no particular policy,” said Mike Gousha, distinguished fellow in law and public policy, “we believe that this conference helped generate discussion about matters important to the future of the region.” Gousha organized the conference together with Marty Kaiser, editor of the *Milwaukee Journal Sentinel*; David D. Haynes, editorial page editor for the newspaper; and Dean Joseph D. Kearney. ■

“Restoring Faith in Government: Encouraging Civil Public Discourse,” June 8, 2012

At a time when highly charged, highly partisan advocacy has dominated much of political life, the annual conference of the Law School’s Restorative Justice Initiative focused on the need for people of differing views to work together in addressing big issues.

In his keynote address, news commentator and author John Avlon called for those who want to see more civility and cooperation in government to assert themselves. “You have to play offense from the center,” said Avlon, a columnist for *Newsweek* and *The Daily Beast* and a frequent commentator on CNN. “Part of the problem with moderates is that they’re moderate.”

Avlon suggested that there is more that unites Americans than divides them, but some political figures act as though the opposite were true. “Principled compromise is the basis for a functioning democracy,” he said.

The conference ended with four Marquette students who have been involved with the University’s Les Aspin Center for Government discussing their hopes for careers in public service.

Conference organizers included Janine P. Geske, distinguished professor of law, and Mike Gousha, distinguished fellow in law and public policy. ■



John Avlon

“The Challenge and the Opportunity: How Wisconsin Can Meet More Ambitious Goals for Students,” May 22, 2012

What does it mean to call a student “proficient”? Wisconsin will make major changes in how it answers that question beginning in the 2012–

2013 school year, requiring better performance on standardized tests for a student to earn that label. The results could be rather shocking to many people as the percentage of proficient students drops sharply—or they could be seen as a call for fresh approaches to getting more students to meet higher expectations.

At a conference cosponsored by the Law School and Marquette’s College of Education, the latter reaction was encouraged by David P. Driscoll, chair of the National Assessment Governing Board, which runs the National Assessment of

Education Progress (NAEP) testing program, often called “the nation’s report card.” Driscoll was commissioner of education in Massachusetts during years when

performance by the state’s students rose to the point that Massachusetts now leads the nation in reading and math. The heart of Driscoll’s message was that setting high standards and seriously pursuing them pays off.

Responding to Driscoll, Tony Evers, state superintendent of public instruction, agreed that Wisconsin should adopt the higher definition of proficiency because students need to reach higher levels of proficiency in today’s world.

Alan J. Borsuk, senior fellow in law and public policy, led the Law School’s work on the conference. ■



A Candidate Debate, Just Before the Recall Election, May 31, 2012

An intense, face-to-face hour of the candidates in Wisconsin's recall election for governor making their strongest pitches—this was the debate that many people were waiting to see. And it happened here, in Eckstein Hall's Appellate Courtroom, even as it was broadcast live for a statewide—in fact, nationwide—audience. Republican Gov. Scott Walker and his Democratic challenger, Milwaukee Mayor Tom Barrett, squared off, with Mike Gousha, the Law School's distinguished fellow in law and public policy, moderating.

In the last forum (and one of only two) before the election—which Walker would go on to win—Walker described himself as a politician willing to make hard decisions and defend the working people of Wisconsin. Barrett described himself as a defender of the middle class and someone who practices the Wisconsin values which Walker has not followed.

The head-to-head exchanges, with Gousha keeping things focused on the forefront issues, made the session a powerful moment as the historic election neared. ■



Mike Gousha, Mayor Tom Barrett, and Gov. Scott Walker

Insights from Gaddis on a Key Twentieth-Century Figure, May 10, 2012



John Lewis Gaddis

The first half of the twentieth century was terrible, including two world wars. The second half was much better. Who developed the ideas behind that difference, Yale Professor John Lewis Gaddis asked in an “On the Issues with Mike Gousha” session at Eckstein Hall, subsequently broadcast on Milwaukee Public Television. “I don’t mean to say that George Kennan did all of that,” Gaddis said, answering the question. “But if I were to pick one central idea that was key to making the second half of the twentieth century more peaceful than the

first half, I think it was the idea of containment . . . , the idea that you could deal with the Soviet Union without having a new world war with them on the one hand and without appeasing them on the other hand. And that really was George Kennan’s idea. So I would say if we back off and look at big ideas and big consequences, this man is extraordinarily influential.”

Kennan, a Milwaukee native, was the subject of Gaddis’ biography, *George F. Kennan: An American Life*, which

was awarded a Pulitzer Prize in April. Gaddis came to Milwaukee at the invitation of the Law School, which teamed with the Marquette University Department of History to sponsor the event.

Gaddis painted a picture of Kennan as a brilliant but complex person with great, almost prophetic insights into global issues, but who was almost never happy with himself or how things were going in the world. He was “one of the greatest American writers of the twentieth century,” Gaddis said (Kennan won two Pulitzer Prizes), but he was “incapable of self-congratulation.”

The key moment in Kennan’s career came in 1946 when, in the aftermath of World War II, he was deputy head of the American mission in Moscow. Frustrated that he wasn’t being heard by his superiors, Kennan sent a 5,500-word telegram to Washington, outlining what he thought American strategy should be in dealing with the Soviet Union. “The Long Telegram” became one of the most influential and famous documents in American diplomatic history. “He broke all the rules” in terms of using a telegram for such a long message, Gaddis observed, but what Kennan said in it “became the central idea of the grand strategy of the United States in the Cold War era.” ■



Judge Thomas Curran: Fairness, Faith, and Family

Thomas J. Curran was “a man of great balance built on his Catholic faith and his personal convictions,” his son, William T. Curran, said in the eulogy he delivered at St. Patrick Church in Mauston.

That balance carried him far. Thomas Curran, L’48, was named by President Ronald Reagan as a federal judge in the Eastern District of Wisconsin in 1983. In nearly a quarter century on the bench, Curran gained an impressive reputation. Curran, 88, died in July.

“He was self-effacing, considerate, kind, and humorous, in short, the quintessential gentleman, all this while being a first-rate legal scholar,” U.S. District Judge Rudolph Randa told the *Milwaukee Journal Sentinel*.

William Curran, L’75, described his father as a person with “rock-hard self-discipline” that was not obvious “because he balanced it or masked it with wit or kindness. Even when fighting a difficult challenge, he never wanted to draw attention or sympathy.” The younger Curran practices

with his sister, Catherine Curran Orton, L’81, and her husband, John R. Orton, L’81, among others, in the Mauston firm in which Judge Curran and his brothers once practiced.

The son said, “He was so quick at perceiving the emotions and problems of others. For example, the day my law school class went before the Supreme Court to be admitted to the bar, one of my classmates was alone. His dad had been in my dad’s class of 1948. My dad warmly encouraged my classmate to join us in the celebration and meal. To this day, that lawyer still reminds me how much that meant to him.”

Thomas Curran served as president of the State Bar of Wisconsin. He presided over cases that attracted major attention. Beyond work, his life focused on his wife, the late Colette Curran, their six children, and his involvement with the church, but he always made time for Marquette Law School. When Judge Curran received the Law Alumni Association’s Lifetime Achievement in 2007, Dean Joseph D. Kearney summarized some of Judge Curran’s accomplishments and noted, “How grateful also I have been since becoming dean for the counsel combined with good humor that you have provided to me.” ■

“He was self-effacing, considerate, kind, and humorous, in short, the quintessential gentleman, all this while being a first-rate legal scholar.”

—U.S. DISTRICT JUDGE RUDOLPH RANDA

Danz Honored for Positive Impact on the Law School



Carol Dufek remembers Stephanie Danz’s joining Marquette Law School in 2005. “The minute she started work, you knew that Stephanie was going to change the Law School in a positive way,” Dufek, the school’s events coordinator, wrote in nominating Danz for

an Excellence in University Service Award.

Danz began as administrative assistant to the associate dean for academic affairs. Later, she also took on the job of the Law School’s assistant registrar. The large number of people who come into contact

with her agree that Dufek’s first impression has become reality—the Law School is a better place because of Danz.

“Stephanie is concerned: about our students, about our colleagues, and about the Law School,” wrote Bonnie M. Thomson, associate dean for administration and registrar, and Matt Parlow, associate dean for academic affairs, in their own nomination of Danz for the excellence award. “She will always go out of her way to help a student or faculty member in need, and she never believes that any task is too insignificant or unimportant if it will assist a member of the Law School community.”

Danz was one of four Marquette employees receiving service awards at a luncheon in May. ■

Update on the Marquette Law School Poll: Already the Wisconsin Standard



Mike Gousha and Charles Franklin



The Marquette Law School Poll was envisioned as “an academic enterprise that establishes the Law School as a serious player in campaign analysis” in Wisconsin during 2012, Dean Joseph D. Kearney wrote when the project was unveiled last year.

“And a serious player the law school has become,” a *Milwaukee Magazine* story said this past August. Citing not only the poll but candidate appearances and other events and analysis at the Law School, the magazine said, “During this spring’s recall face-off, Marquette University Law School’s polls, punditry, and primetime disputation were everywhere voters looked.”

As an historic year in Wisconsin politics continues to unfold, the Law School has become a valuable source of information, with poll results reported prominently and nationwide. The accuracy of results, compared to election outcomes, and the evenhandedness of programs led by Mike Gousha, distinguished fellow in law and public policy, have made it clear that the Law School is playing its envisioned role when it comes to understanding and analysis.

As planned, the Marquette Law School Poll—the most comprehensive political polling effort in Wisconsin history—has released new rounds of results at least monthly, building a rich and deep trove of information on the views of Wisconsinites, not only in terms of specific elections but on broader issues and trends. Charles Franklin, visiting professor of law and public

policy and director of the poll, has provided insightful analysis at every turn.

Consider a few facts about how good a measure of public opinion the poll results have been to date:

- The Republican presidential primary in April: The poll results tracked the rise and then decline of former Sen. Rick Santorum’s standing in the polls. A week ahead of the election, the poll results showed former Gov. Mitt Romney in the lead. The margin proved to be close to the final result.
- The Democratic primary in May for the recall election for governor: The poll accurately captured the lead Milwaukee Mayor Tom Barrett had over former Dane County Executive Kathleen Falk and two other candidates.
- The recall election for governor in June: The poll showed that Republican Gov. Scott Walker was ahead of Barrett in the weeks leading to the election. In the final pre-election poll, Walker led Barrett by seven percentage points. In the event, Walker defeated Barrett by seven percentage points.
- The Republican Senate primary in August: Just ahead of the election, the poll showed the four-candidate race was tightening, with former Gov. Tommy Thompson holding a narrowing lead over Madison businessman Eric Hovde. The final result: Thompson won with 34 percent, Hovde got 31 percent, former Rep. Mark Neumann 23 percent, and state Assembly Speaker Jeff Fitzgerald 12 percent.

While no other poll has been a similarly accurate predictor (and the dean’s prediction last year was also accurate that the poll results would initially receive a few misplaced political attacks), there is no gloating. Indeed, both Dean Kearney and Professor Franklin have publicly noted that there is always an element of—or role for—a bit of luck.

In any event, polling is always undertaken with the understanding that there is a margin of error, and results aim only to portray how things stand at a point in time, not necessarily how they will be on an election day.

But polling done well provides valuable insight into what people are thinking. It gives a voice to the public at large. And, even with major political events still to come in November, the Law School is confident it is providing that kind of insight and voice because it is providing polling done well. ■

Julie Darnieder Named Milwaukee Bar Association's "Lawyer of the Year"



Julie Darnieder

Laura Gramling Perez remembers the first time she was introduced to Julie Darnieder, L'78, some 11 years ago at a meeting. "Julie told the group that, after many years in private practice handling workers' compensation cases, she was looking for new volunteer opportunities," Perez recalled.

Out of the meeting—and much other work—emerged the Marquette Volunteer Legal Clinic (MVLC). Darnieder became—and remains—chair of the steering committee and an adjunct professor of law. Without Darnieder, Perez said, "the clinic would look nothing like it does today."

The remarks by Perez, an administrative court commissioner for Milwaukee County, were made at the recent Milwaukee Bar Association annual luncheon, where Darnieder was honored as the MBA's Lawyer of the Year.

Perez told the luncheon audience, "With a great debt to Julie's determination, creativity, excellent relationship with Marquette Law School, and elbow grease, the MVLC now operates every day of the week in four different locations, with scores of attorney and student volunteers."

"Julie's role in developing Marquette lawyers is well known," said Matt Parlow, the Law School's associate dean for academic affairs. "The MBA Lawyer of the Year Award reflects an even broader recognition in the profession of the societal value of the MVLC work which she leads." ■

Summer Program in Germany Gives Law Students Valuable Perspective

The learning experience for Marquette Law School students frequently extends beyond the walls of Eckstein Hall into the Milwaukee community, where the students work in clerkships, internships, and pro bono programs. In recent years, dozens of students have had an experience that has gone much farther, particularly to Giessen, Germany, the centerpiece of the Law School's overseas summer program.

In Giessen, the month-long program in international and comparative law is cosponsored by Marquette Law School, the University of Wisconsin Law School, and Giessen's Justus Liebig University Law School, but it attracts students from across the world. "This has become a true international program," said Professor Alan Madry, director of international programs at Marquette Law School.

Thomas Murphy, 2L, one of 13 Marquette students who took part in 2012, said, "It was amazing how students from around the world were able to share their experiences and form friendships." Murphy added, "The experience not only confirmed some assumptions I had about the American legal system but also provided me with perspectives on the role of law in society that I hadn't considered."

Madry, who taught in Giessen in 2012, recounted, "I had students in my class from India, Japan, Korea, Russia, Kazakhstan, Spain, Africa, the Dominican Republic, and South America, in addition to our American and German students. The classes, consequently, were fantastic." Madry said that students also get first-hand experience with legal and policy issues shaping Europe.

Madry said he had seen how students who took part in the Giessen program increased "a sense of the possibilities for their own lives." ■

Marquette University Law School
mourns the passing of

Phyllis Ann Ghiardi

1921–2012

beloved wife of
Professor Emeritus James D. Ghiardi

Recently Published Faculty Scholarship

Paul M. Anderson, *Sports Betting: Law and Policy* (2012) (with Ian Blackshaw et al.); “Gambling in Sports,” in *Handbook on International Sports Law*; “Legal Responsibilities” and “Legal Rights and Business Responsibilities,” in *Successful Sports Officiating* (2011); “Sonic Bust: Trying to Retain Major League Franchises in Challenging Times,” 21 *J. Legal Aspects of Sport* 117 (2011).

Alison Barnes, *Elder Law: Cases and Materials* (5th ed. 2011).

Irene Calboli, “Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union (Ten Years Later),” 16 *Marq. Intellectual Prop. L. Rev.* 257 (2012); “Balancing Individualism and Collectiveness in Trademark Merchandising,” in *Individualism and Collectiveness in Intellectual Property Law* (2011).

Patricia A. Cervenka, “Library Without Walls—A Year Later,” 21 *Trends in Law Library Management and Technology* 31 (2011); “Wisconsin Supreme Court and Legislative History,” 30 *Legal Reference Services Q.* 141 (2011).

Jay E. Grenig, *Electronic Discovery and Records Management* (2011–2012 ed.); *Wisconsin Practice: Elder Law* (2011–2012 ed.); *California Code Forms: Corporations* (3d ed. 2011); *How to Cost Your Labor Contract* (2d ed. 2011) (with Michael H. Granof and Moira J. Kelly); *International Commercial Arbitration* (2011 ed.); *Wisconsin Pleading and Practice*, Vols. 6A and 7 (5th ed. 2011).

J. Gordon Hylton, “Before the Redskins Were the Redskins: The Use of Native American Team Names in the Formative Era of American Sports,” 86 *N.D. L. Rev.* 879 (2010).

Joseph D. Kearney, “Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine,” 105 *Northwestern U. L. Rev.* 1417 (2011) (with Thomas W. Merrill).

Judith G. McMullen, “Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce,” 19 *Duke J. Gender L. & Pol’y* 41 (2011).

Matthew J. Mitten, *Sports Law in the United States* (2011); “Athlete Eligibility Requirements and Legal Issues,” in *Handbook on International Sports Law* (2011) (with Timothy Davis); “A Review of Post-PGA Tour, Inc. v.

Martin Legal Developments Regarding Participation Rights of Disabled Athletes,” 4 *J. Intercollegiate Sport* 101 (2011); “A Roundtable Discussion for the Digital Age: *Brady v. NFL*,” 29 *Ent. & Sports Lawyer* 1 (2011) (with Roger Ian Abrams et al.); “From *Dallas Cap* to *American Needle* and Beyond: Antitrust Law’s Limited Capacity to Stitch Consumer Harm from Professional Sports Club Trademark Monopolies,” 86 *Tulane L. Rev.* 901 (2012).

Michael M. O’Hear, “Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA,” 24 *Fed. Sent. Rep.* 223 (2012); “Solving the Good-Time Puzzle: Why Following the Rules Should Get You Out of Prison Early,” 2012 *Wis. L. Rev.* 195; “Beyond Rehabilitation: A New Theory of Indeterminate Sentencing,” 48 *Am. Crim. L. Rev.* 1247 (2011); “Drug Courts as Communicative Punishment,” in *Retributivism Has a Past: Has It a Future?* (2011); “Mandatory Minimums: Don’t Give Up on the Court,” 2011 *Cardozo L. Rev. de novo* 67.

Selected Additional Faculty Activities

Susan M. Bay presented a paper at the Annual Conference of the Association for the Study of Law, Culture, and the Humanities.

Rebecca K. Blemlberg presented a paper at the Central States Legal Writing Conference.

Bruce E. Boyden presented papers at the University of Arkansas School of Law, the University of St. Thomas School of Law, and the ACM Conference on Computer and Communications Security.

Irene Calboli presented papers at the Chinese University in Hong Kong, Law Society of Singapore Intellectual Property Section, Loyola University New Orleans, University of Houston Law Center, University of Wisconsin Law School, and the Marquette Law School International Intellectual Property Scholars Roundtable.

Patricia A. Cervenka served as a speaker at the Wisconsin Library Association Annual Conference and served on panels at the triennial Law School Facilities Conference sponsored by the American Bar Association Section of Legal Education and Admissions to the Bar.

Chad M. Oldfather, “Judging, Expertise, and the Rule of Law,” 89 Wash. U. L. Rev. 847 (2012); “Till Death Do Us Part: Chief Justices and the United States Supreme Court,” 95 Marq. L. Rev. 709 (2012) (with Todd C. Peppers); “The Prospect of Open Deliberations in the Wisconsin Supreme Court,” 95 *Judicature* 94 (2011).

David Ray Papke, “Skepticism Bordering on Distrust: Family Law in the Hollywood Cinema,” 50 *Fam. Ct. Rev.* 13 (2012); “Lincoln as Lawyer,” 107 *Indiana Mag. Hist.* 269 (2011).

Andrea K. Schneider, *Dispute Resolution: Beyond the Adversarial Model* (2011) (with Carrie Menkel-Meadow et al.); *Examples and Explanations: Dispute Resolution* (2011) (with Michael Moffitt); “Likeability v. Competence: Why Political Candidates Face It but Lawyers Do Not,” 17 *Duke J. Gender L. & Pol’y* 363 (2011) (with Catherine H. Tinsley et al.).

Paul M. Secunda, “The Wisconsin Public-Sector Labor Dispute of 2011,” 27 *ABA J. Lab. & Emp. L.* 293 (2012); “Constitutional Contracts Clause Challenges in Public Pension Litigation,” 28 *Hofstra Lab. & Emp. L.J.* 263 (2011); “The Forgotten Employee Benefits Crisis: Multiemployer Benefit Plans on the Brink,” 21 *Cornell J. L. & Pub. Pol’y* 77 (2011); “Lessons from Other Countries: Comparative Pension Law,” 33 *Comp. Lab. L. & Pol’y J.* 1 (2011); “Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law,” 48 *San Diego L. Rev.* 907 (2011); “Promoting Employee Voice in the New American Economy,” 94 *Marq. L. Rev.* 757 (2011).

Michael P. Waxman, “Wisconsin’s Antitrust Law: Outsourcing the Legal Standard,” 94 *Marq. L. Rev.* 1173 (2011).



Melissa L. Greipp presented papers to the Central States Region Legal Writing Conference and the New England Consortium of Legal Writing Teachers.

Jay E. Grenig served as a speaker at the American Arbitration Association Conference on Labor Arbitration.

J. Gordon Hylton presented papers at the Fordham University School of Law, Mid-Atlantic People of Color Legal Scholarship Conference, and University of Wisconsin–Milwaukee. He also became chair of the Section on Law and Sports of the Association of American Law Schools and was reappointed to the Diversity Subcommittee of the American Bar Association’s Committee of Legal Education and Admission to the Bar.

Matthew J. Mitten presented papers to the Sports Lawyers Association and the Chicago Chapter of the Association for Conflict Resolution, presented a CLE program for Chicago judges, and served as a panelist for the Dallas Bar Association Entertainment and Sports Law Section and the Harvard Sports Law Symposium.

Kali N. Murray presented papers at the Drake University School of Law, Michigan State University School of Law, and University of Wisconsin Law School.

Julie A. Norton presented a paper to the Law Librarians Association of Wisconsin and the University of Wisconsin–Milwaukee School of Information Studies.

Chad M. Oldfather presented papers at the University of Baltimore School of Law and the University of Wisconsin Law School and served as a roundtable participant at the University of San Diego Institute for Law and Philosophy.

Matthew J. Parlow presented a paper at the Georgia State University College of Law.

Andrea K. Schneider presented papers at the Charleston School of Law, Annual Spring Conference of the American Bar Association Section of Dispute Resolution, and Career Development Institute for Psychiatry.

Paul M. Secunda presented papers at McMaster University, University of Iowa Law School, University of Western Ontario, University of Wisconsin Law School, and Washington University School of Law; served as a speaker for the Milwaukee Bar Association’s Labor & Employment Section; and was a debate participant at the Loyola University Chicago Law School Law and Religion Program.

Michael P. Waxman served as contributing editor for two volumes of *ALR International*.



School children in Connecticut say the Pledge of Allegiance in 1942, including extending their right arm from their heart outward and up toward the flag, as was the practice at that time. *Courtesy of the Library of Congress.*

BARNETTE, FRANKFURTER, AND JUDICIAL REVIEW

Hon. Jeffrey S. Sutton*

West Virginia Board of Education v. Barnette, as every first-year law student learns, is the flag-salute case. It is a tale of two cases, not one. For the story must take account of the Supreme Court's astonishing about-face: The Court rejected a challenge to compelled flag salutes in 1940 (in *Minersville School District v. Gobitis*) before embracing the identical claim in *Barnette*, only three years later.

But first this is a story about people, about two American families, the Gobitas and Barnett families. When people lend their names to landmark cases, the credit is fleeting, save for the lingering acclaim that goes with attaching the family name to the constitutional principle for which the case stands. Not only did time soon forget the sufferings of the Gobitas and Barnett families, but the Court added the indignity of misspelling their names, forever linking the principle against compelled speech to families (or at least names) that do not exist.

Although it would be difficult to conclude that *both* cases were wrongly decided, I must start by acknowledging that both were wrongly captioned.



* The author is a judge of the U.S. Court of Appeals for the Sixth Circuit, an adjunct professor of law at The Ohio State University, and lecturer in law at Harvard University. This article is an edited version of Marquette University Law School's 2012 E. Harold Hallows Lecture; a longer version will be published in the fall issue of the *Marquette Law Review*. The author wishes to acknowledge his debt on a number of historical points to Shawn Francis Peters, whose book, *Judging Jehovah's Witnesses*, he warmly commends.

As for the two families, let's begin with the Gobitas clan—spelled with an *a*, not with a second *i*. Walter Gobitas held a common job and practiced an uncommon religion. He owned a local grocery store in a Pennsylvania town known as Minersville, a community indeed filled with its share of miners, and raised six children with his wife, Ruth.

The Minersville school board required all teachers and children to pledge allegiance to the American flag at the beginning of each school day. The pledge was not a new idea. It started in 1892 as a patriotic way to celebrate the 400th anniversary of Columbus's discovery of America. Congress declared the day a national holiday (hence Columbus Day) and authorized the first pledge, with these familiar words: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." Congress would not add the words "under God" until 1954.

The pledge, as initially conceived, was both verbal and physical. As the students recited the words, the exercise required them to extend their right hand from their heart outward and up toward the flag.

By the 1930s, this ceremony posed a problem for Jehovah's Witnesses, an evangelical Christian faith started in Pennsylvania in the 1800s. In 1935, the leader of the Witnesses, Joseph Rutherford, gave a speech at the Witnesses' national convention, encouraging Witnesses not to participate in flag-salute ceremonies. As he saw it, the Bible is "the Word of God" and "is the supreme authority." Pledging fealty to anything but God—whether the object be a country, a leader, or a secular symbol—violated the commandments.

Consistent with Rutherford's teachings, the Gobitas parents instructed their children not to participate in the flag-salute ceremony required by the Minersville school board. The school board reacted by expelling Lillian Gobitas (age 12) and her brother, William (10). The father sued the school board, its members, and the superintendent in federal district court. The district court and the Third Circuit granted the Gobitas family relief, invoking the free-exercise guarantee of the First Amendment (together with the Fourteenth), and permitted the children to return to school.



Walter Gobitas (center) is photographed with his son, William (left), and daughter, Lillian (right), after the children testified in a federal court in Philadelphia that their religious principles did not permit them to salute the American flag. They were expelled from their school in Minersville, Pa., an action upheld in 1940 by an 8 to 1 vote of the Supreme Court.

Photo by © Bettmann/CORBIS



Justice Felix Frankfurter

The Supreme Court was another matter. All nine Justices voted to reject the claim after oral argument, with just Chief Justice Charles Evans Hughes and Justice Felix Frankfurter explaining their thinking in any detail at the Justices' conference. Frankfurter circulated an opinion for the Court; just three days

before its release, Justice Harlan Fiske Stone circulated a dissent. No one else joined the Stone dissent. By an 8–1 vote, the Court thus upheld compelled flag salutes.

The *Gobitis* decision caused problems for the Gobitas family—and worse problems for other Jehovah's Witnesses across the country. As Shawn Francis Peters details in his excellent book, *Judging Jehovah's Witnesses*, many Minersville residents led a boycott of the Gobitas grocery store. Thanks to the willingness of the state police to guard the store, no violence or destruction of the store resulted. After several months, business for the most part returned to normal.

The same was not true for Jehovah's Witnesses in other communities. As school boards across the country enacted mandatory flag-salute requirements, Witnesses were put to the choice of sending their children to the local public schools and compromising their religious beliefs, or sending them to private schools.

Making matters more difficult for Witnesses was the first peacetime draft in American history, launched in September 1940 and ramped up after the attack on Pearl Harbor in December 1941. Male Witnesses sought exemptions from conscription on the ground that proselytizing was a central tenet of the faith and a full-time job, leaving no time for war efforts. While the draft exempted conscientious objectors, it exempted them only from combat, not from other war-related services, which Witnesses claimed to have no time to perform. The Witnesses' response to conscription did not sit well with draft boards across the country. Over the course of World War II, the government imprisoned 10,000 men who resisted conscription. Forty percent of them were Witnesses.

The Witnesses' resistance to the flag salute and to the wartime draft, combined with the Supreme Court's

stamp of constitutionality on compelled flag salutes in *Gobitis*, unleashed a wave of persecution with few rivals in American history. *Gobitis* was decided on June 3, 1940. In the first three weeks after the decision, there were hundreds of attacks against Witnesses across the country. Between May and October 1940, the American Civil Liberties Union (ACLU) reported to the Justice Department that vigilantes had attacked 1,488 Witnesses in 335 communities, covering all but four states in the country.

Local law enforcement often did little to deter the attacks. When a reporter asked one sheriff why, he answered, "They're traitors—the Supreme Court says so. Ain't you heard?"

From the outset, *Gobitis* was not a popular decision in the press or the legal academy. Some 170 newspapers editorialized against it, and few favored it. *The New Republic* and the ACLU criticized the decision fiercely—a noteworthy development because Frankfurter, the author of *Gobitis*, had helped to found both organizations. How, they thought, could one of their own, one of the great civil libertarians of the day, the defender of Sacco and Vanzetti, write such a decision?

The ACLU director, Roger Baldwin, wrote a letter to Joseph Rutherford, the Witnesses' leader, promising to help limit or overrule the decision, noting his "shock"



Chief Justice Charles Evans Hughes



Justice Robert H. Jackson

that the Court had swept "aside the traditional right of religious conscience in favor of a compulsory conformity to a patriotic ritual." "The language" of the decision, he added, "reflects something of the intolerant temper of the moment."

The New Republic was tougher. It observed that the "country is now in the grip of war hysteria," creating the risk "of adopting Hitler's philosophy in the effort

to oppose Hitler's legions." As Peters recounts, the magazine even compared the decision to one by a German court punishing Witnesses who refused to honor the Nazi salute, saying it was "sure that the majority members of our Court who concurred in the Frankfurter decision would be embarrassed to know that their attitude was in substance the same as that of the German tribunal." Ouch.

That brings us to the second family, the Barnett family—whose name ends with a *t*, not with an *e*.



Inspired by the *Gobitis* decision and perhaps by the bombing of Pearl Harbor one month earlier, the West Virginia Board of Education in January 1942 required all teachers and students in all West Virginia public schools to participate in flag-salute ceremonies. "[R]efusal to salute the Flag," the state board said, would "be regarded as an Act of insubordination, and shall be dealt with accordingly."

The "accordingly" was expulsion, with readmission permitted only after the student agreed to salute the flag. In the interim, the student would be treated as "unlawfully absent" and a delinquent, permitting the state to prosecute the parents for truancy and to send the children to reformatories for juvenile delinquents. The only way out of this bind was for the affected families to send their children to private schools, a remedy that most could not afford.

Marie and Gathie Barnett, age 9 and 11, attended Slip Hill Grade School, an elementary school outside Charleston, West Virginia. The school was not big. Just 20 to 25 students attended it. Nor was it wealthy. It could afford only a picture of a flag, not the real thing. In the spring of 1942, the principal of the school stopped Marie and Gathie and asked whether they would recite the pledge and salute the flag that day. In saying "no," they explained that "pledging allegiance to a flag was an act of worship, and we could not worship anyone or anything but our God Jehovah." The principal sent them home.

Led by Hayden Covington, the same lawyer who had worked on the *Gobitis* case, the Bernetts sought an injunction in federal court against enforcement of the law. Notwithstanding the 8–1 *Gobitis* decision, a three-judge court unanimously granted the injunction in favor of the parents. And notwithstanding the *Gobitis* decision, the West Virginia Board of Education did not ask for a stay pending its appeal to the U.S. Supreme Court. Marie and Gathie Barnett returned to school.

Later that school year, the Supreme Court returned to its senses. On June 14, 1943—Flag Day, as it happened—the Court held that compelled flag salutes could not be reconciled with the free-speech requirements of the First Amendment.

The 6–3 majority opinion was authored by one of the Court's new appointees, Robert H. Jackson. Jackson was the last individual appointed to the Supreme Court who had not graduated from law school. He attended Albany Law School for a year and never attended college. In spite of all this (or, horror of horrors, perhaps because of it), his *Barnette* opinion is a gem. It explains how

“If there is any fixed star in our constitutional constellation,
it is that no official, high or petty, can prescribe what
shall be orthodox in politics, nationalism, religion,
or other matters of opinion or force citizens to confess
by word or act their faith therein.”

— Justice Robert H. Jackson for the Court in *Barnette*

compelled speech cannot be reconciled with “free” speech. And it contains one of the most memorable lines in American constitutional history: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Justice Frankfurter was not happy. Instead of making a tactical retreat, he doubled down on his position in *Gobitis*. His method was a form of confession and avoidance. He confessed to agreeing with the underlying policy of the Court’s opinion—that it is not the government’s job to coerce faith in the country. But he avoided the conclusion that might flow from that premise by reminding the majority of the progressive critique of conservative jurists over the preceding 30-plus years—that they had no business importing their preferred policies into the Constitution. The first five sentences of his opinion capture the point, invoking the familiarity of members of his own faith (Judaism) with religious persecution:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

So ends the *Barnette* story, which prompts seven loosely connected observations.

First, lost in every discussion of *Barnette* and *Gobitis* is a reality that only a lower-court judge would catch. In all three cases, the lower courts were ultimately

vindicated, whether it was the (initially reversed) district court and the court of appeals in *Gobitis* or the (affirmed) three-judge court in *Barnette*. The Constitution requires one Supreme Court and permits Congress in its discretion to create “inferior” federal courts, as the Constitution painfully puts it. One lesson from the *Barnette* story, I should like to think, is that “inferior” courts are not necessarily populated by inferior judges.

Second, the Jehovah’s Witnesses played a remarkable role in developing First Amendment law—in *Barnette* and elsewhere. The lead lawyer for the Witnesses, Hayden Covington, who worked on the *Gobitis* brief and argued *Barnette*, appeared in 24 Supreme Court cases between 1938 and 1955 on behalf of Witnesses. The Witnesses’ objection to the flag salute, their zeal in spreading their faith, their willingness to proceed in the most hostile environments, and their omnipresent distribution of pamphlets laid the groundwork for much of what we now take for granted as first premises of First Amendment law. Consider these other landmark Witness decisions from the Supreme Court:

- *Lovell v. City of Griffin*, a 1938 decision invalidating, as a violation of the free-speech and free-press guarantees of the First Amendment, a city ordinance that banned the distribution of printed literature without a permit;
- *Cantwell v. Connecticut*, a 1940 decision incorporating the free-exercise clause against the states and invalidating a state requirement that individuals obtain a permit before soliciting religious contributions;
- *Chaplinsky v. New Hampshire*, a 1942 decision establishing the fighting-words doctrine and affirming the conviction of a Witness who called a city marshal “a damned Fascist”;
- *Murdock v. Pennsylvania*, a 1943 decision invalidating a municipal ordinance that required a permit (at a cost of \$7 per week) to distribute or sell literature door-to-door; and
- *Prince v. Massachusetts*, a 1944 decision upholding against a free-exercise challenge a state law that prohibited children from selling pamphlets door-to-door.

In this era, it would have been difficult to be a Witness and *not* be a First Amendment scholar. Without the Jehovah's Witnesses, it is likely that First Amendment law would not be the same, and it is a certainty that it would have taken a different path.

Third, the speed with which the Court changed its mind between *Gobitis* and *Barnette* is startling and unprecedented. What is most striking about *Barnette*, and to my knowledge without any counterpart in American constitutional history, is the shift in the number of votes over just three years. What starts as an 8–1 ruling against the First Amendment claim becomes a 6–3 ruling in favor of it. That is a shift of five votes in just three years, almost two lost votes per year.

From the vantage point of 2012, it is easy to second-guess the *Gobitis* majority—indeed, to wonder what it was thinking. How could the Court conclude that, in the midst of an epic struggle against fascism, it was a good idea to expel from school 12-year-old (and younger) children, whose only offense was to stand respectfully and silently as the pledge was recited? The only thing more head-snapping would be a law compelling salutes to the First Amendment before civics class.

A few initial explanations are in order. At the time, *any* First Amendment claim against a state was a relative novelty, as the free-speech clause had been incorporated against the states through the Fourteenth Amendment only in 1925—and the free-exercise clause had been incorporated just *14 days* before *Gobitis*. At the time, Justice Frankfurter also was perceived as a leading, if not *the* leading, progressive thinker on constitutional law, and his vote in *Gobitis* was consistent with his years of advocacy *against* using the Constitution as a means of trumping the winners of the policy debates of the day. So, in 1940, with Chief Justice Hughes, the Court's leading conservative, and Justice Frankfurter, the leading liberal, aligned against the claim, the *Gobitis* family faced what appeared to be a long and steep climb.

The war also may explain things. Remember that *Gobitis* was handed down just months after the fall of France in World War II, perhaps unduly sensitizing the

Court to the patriotism that likely would be called upon soon to sustain America's entry into the war. Indeed, within the Court, Frankfurter's opinion was called the "Fall of France" opinion. In a letter to Justice Stone on May 27, 1940, Frankfurter suggested that the war had affected his position. Wartime circumstances, Frankfurter wrote, required the Court to make the delicate "adjustment between legislatively allowable pursuit of national security and the right to stand on individual idiosyncrasies."

Oddly enough, just as the war may explain the thinking of the *Gobitis* majority, it may do the same for the *Barnette* majority. How, Jackson thought, could the country use the fight against fascism as a basis for compelling unwilling children to pledge allegiance to the flag? It is sometimes said that the law sleeps during war. Perhaps the law slept through *Gobitis* but woke up in time for *Barnette*.

The criticism of *Gobitis* and the impact of the decision on Witness persecutions also help to explain the rapid switch in votes. The *Gobitis*–*Barnette* story demonstrates that flawed judicial restraint is occasionally just as dangerous as flawed judicial intervention.

Consider the two possibilities. If forced to generalize, I would suggest that, in most close constitutional cases, the Court should err on the side of deference to the elected branches—on the side of judicial restraint. More often than not, the Court poses a greater risk to the country by invalidating laws than by letting the political processes oversee them. The American people are more likely to accept the resolution of difficult social and economic issues when they have a say in the matter. While democracy is flexible, judicial review is not. While democracy is designed to adjust to new circumstances, judicial review generally is not. And while all legislative and judicial decisions will have unintended (and unknown) consequences, the elected branches are far better equipped to respond to them than life-tenured judges. In close cases, it thus makes sense for courts to err on the side of democracy—to allow the elected branches of government to monitor, adjust to, and ultimately solve, as best they can, difficult social and economic problems.

Yet *Gobitis* illustrates the risk of generalization. One can fairly make the case that *Gobitis* took a bad situation (needless persecution of Jehovah's Witnesses) and





Courtesy of the Library of Congress.

The United States Supreme Court, 1943. From left, seated: Stanley F. Reed, Owen J. Roberts, Harlan F. Stone (Chief Justice), Hugo L. Black, and Felix Frankfurter. Standing: Robert H. Jackson, William O. Douglas, Frank Murphy, and Wiley B. Rutledge.

through inaction made it worse (by prompting increased violence against Witnesses). As Covington, the Barnetts' lawyer, argued with only some hyperbole (and as Peters recounts), *Gobitis* had facilitated a "civil war against the Jehovah's Witnesses." Judges, like doctors, should first be mindful that they do no harm—that they do not make a bad situation worse. The Court did not heed this lesson in *Gobitis*, which is surely one of the reasons the Court overruled it so quickly. Every now and then, there can be real harm in inaction, something that *Plessy v. Ferguson* demonstrated before *Gobitis* and that *Korematsu v. United States* reaffirmed after it.

Fourth, a discerning reader might wonder why Chief Justice Stone assigned the *Barnette* opinion to Justice Jackson. Stone had written the solo dissent in *Gobitis*. Jackson was a newcomer to the Court. And of course Stone by then was the Chief Justice, the first among equals on the Court—and the first among non-equals when it comes to opinion assignments. I do not know the answer, but I have my suspicions.

Justice Jackson was the weakest link in the majority. As time would show, Jackson's inclinations about judicial review were closer to Frankfurter's than to Stone's. No less importantly, the majority faced a doctrinal dispute

that continues to this day. Was *Barnette* (and cases like it) about religious liberties or about free speech? To Stone and the others, *Barnette* was a case about the free exercise of religion. Yet to Jackson, *Barnette* was a case about compelled speech. He could not understand why *anyone* should be required to salute the flag, whether over faith-based objections or something else. If the *Barnette* principle applied to spiritual *and* secular objections to the pledge, it must be a free-speech case. To this day, the Supreme Court struggles with whether to review general laws that restrict speech and faith—such as the pledge requirement—under the free-exercise clause or the free-speech clause.

Fifth, the turnaround from *Gobitis* to *Barnette* occurred after President Franklin D. Roosevelt remade the Court with Democratic appointees. By 1943, only two members of the Court had not been appointed by FDR, and both were relatively congenial to his policies. Chief Justice Stone may not have been appointed to the Court by FDR, but FDR elevated him to the Chief Justiceship. And Justice Owen Roberts had voted several times to uphold New Deal programs, casting (as some have characterized it) the fabled switch-in-time vote that preserved nine.

“In close cases, it thus makes sense for courts to err on the side of democracy—to allow the elected branches of government to monitor, adjust to, and ultimately solve, as best they can, difficult social and economic problems.”

With this cast of seemingly like-minded Justices, one might have expected a unified Supreme Court. It did not turn out that way. They remained unified, it is true, in permitting virtually unlimited exercises of the commerce power by Congress, and in agreeing that the Court should not second-guess state and federal economic regulations. But when it came to civil liberties, unanimity disappeared.

A little history helps to explain why. Odd though it may sound to modern ears, the first promoters of frequent and aggressive judicial review were conservatives. In the first four decades of the twentieth century, a conservative-dominated Supreme Court invoked liberty of contract and the limited and enumerated basis of congressional power to invalidate roughly 290 state and local laws and 50 federal laws.

Progressives responded to these decisions with increasing skepticism over the utility and legitimacy of judicial review. The leading judicial progressives of the day—Oliver Wendell Holmes, Jr., Learned Hand, Louis D. Brandeis, Frankfurter—all decried what they perceived as an activist Court.

Once FDR had remade the Court with New Dealers, such as Hugo L. Black and William O. Douglas, and progressives, such as Frankfurter, the question arose as to which way the new Court would go. Should the Justices stand by the Holmesian view of judicial restraint? Or should they treat judicial review differently depending on the type of constitutional guarantee at issue?

With footnote four of *United States v. Carolene Products Co.* in 1938 and other decisions, then-Justice Stone, who would become the author of the lone dissent in *Gobitis*, proposed a way to retain a progressive critique of conservative judicial activism but permit some liberal judicial activism—by distinguishing between economic rights on the one hand and civil liberties on the other. In addition to Stone, many of

the FDR appointees—not just Black and Douglas, but Frank Murphy and Wiley B. Rutledge also—embraced this approach.

Frankfurter was an exception, and so usually was Justice Jackson. Noah Feldman put the point in his book, *Scorpions*, this way: “As the other liberals on the Court shifted ground, Frankfurter—to his astonishment—found himself transformed into a conservative. Frankfurter’s critics, then and later, have tried to explain how it could be that the country’s best-known liberal became its leading judicial conservative. But the source of the change was not Frankfurter, whose constitutional philosophy remained remarkably consistent throughout his career. It was the rest of liberalism that abandoned him and moved on once judicial restraint was no longer a useful tool to advance liberal objectives.” *Gobitis* is the seed, and *Barnette* the first fruit, of that division.

To this day, a struggle lingers over what a progressive or liberal jurisprudence should look like. Judicial conservatives, you might say, face a similar dilemma. Many of today’s conservative Justices came of age and defined themselves in opposition to what they perceived as an unrestrained Warren Court. Now that they possess a majority, they must decide what their theory of judicial review is and what it should be. On top of all this, as Chief Judge Frank H. Easterbrook reminds us, even a Court filled with nine like-minded individuals, indeed nine clones, eventually will splinter, whether along lines currently known or yet to be imagined. The Stone Court is Exhibit A in proving the point, as exemplified by the *Gobitis-Barnette* transformation.

Sixth, what of the possibility that Frankfurter was right in *Gobitis*? The defense requires advocacy skills I do not possess. But a few points complicate the picture.

To start, there was a chance that democracy would have solved the problem. The Justice Department, it is true, was not helpful in responding to the widespread

vigilantism prompted by *Gobitis*. But Congress responded. Between *Gobitis* and *Barnette*, Congress passed a law establishing that standing silently at attention during the flag salute is all that local governments could ask of their citizens. The law was designed to preempt contrary local laws, and it was a law the Witnesses were willing to live with. In *Barnette*, the Court had a chance to rely on this law, but it did not.

In civil-liberties debates, moreover, it sometimes is worth asking this question: Would you rather live in a country in which a majority of a nine-member Supreme Court protects the rights of dissenters or a country in which a majority of its citizens do so? What, for example, is more important to the protection of racial and religious minorities in this country: Court decisions such as *Brown* or legislation such as the 1964 Civil Rights Act? There is something to Frankfurter's insight that civil liberties are best protected when they become part of our political culture and part of what we Americans do for each other, not what the Supreme Court does for us. Every time the Court protects the people from their own mistakes, it risks cheapening self-government and undermining the polity's capacity to steel itself against the next misbegotten policy urge of the moment.

No one can fairly doubt that the laws at issue in *Gobitis* and *Barnette* went against Frankfurter's policy preferences. Before joining the Court, he had devoted his career to protecting civil liberties. Yet, as he appreciated, no judicial philosophy is worth its salt if it does not hurt from time to time, if it does not force the judge to rule against preferred causes here and

there. Frankfurter may have been wrong in *Gobitis*, but he was right to bury his policy preferences. We do not have a judiciary filled with blue-robed judges and red-robed judges, and Frankfurter was surely correct to resist any suggestion to the contrary and indeed to devote a professional lifetime to proving the point.

Consistency is a virtue, not a vice, when it comes to judicial philosophy. Having spent his formative years as a lawyer and a professor writing about and criticizing conservative Justices for imposing their economic and political views on the country, Frankfurter was not about to sanction the same conduct by a Court suddenly dominated by liberals. He was rightly skeptical of the idea that constitutional rights could be neatly divided into economic and liberty rights, and indeed there is some support for this point in the modern era. Is it really true, for example, that the Supreme Court's 2005 *Kelo v. City of New London* decision—permitting the use of eminent domain over a middle-class family's home for the purpose of economic development by a large corporation—is a case about property rights as opposed to liberty rights? One may fairly disagree with Frankfurter's application of this philosophy in *Gobitis*, but it is hard to criticize his principled consistency on the appropriate role of judicial review in American government.



“Every time the Court protects the people from their own mistakes, it risks cheapening self-government and undermining the polity’s capacity to steel itself against the next misbegotten policy urge of the moment.”

“As one Justice of the Supreme Court aptly put the point:
 ‘Wisdom too often never comes, and so one
 ought not to reject it merely because it comes late.’”

Frankfurter’s career calls to mind the story, likely apocryphal, of the young lawyer who worked for an elected state court official. The lawyer asked his boss how he handled matters that involved patrons who had helped support him along the way, whether with financial contributions, promotions, introductions, or other forms of support. The answer was straightforward:

“I must follow the law where it takes me, whether it takes me in the direction of my political friends or not.” It came with one caveat: “Of course, if it is a 50-50 call, I will side with my friends.” That sounded reasonable enough, the young lawyer thought at the time. But after looking back on several years of service with the elected official, the young lawyer noticed a lot of 50-50 calls.

Say what you will about Justice Frankfurter, whether about his *Gobitis* and *Barnette* opinions or about his tenure on the Court, but he did not rationalize himself into making a lot of 50-50 calls.

No political party or interest group kept a halter on Frankfurter once he joined the Court.

Seventh, Frankfurter nonetheless erred in *Gobitis* and should have admitted as much in *Barnette*. Not even James Bradley Thayer and Holmes, the two people most responsible for influencing Frankfurter’s thinking, thought that judicial review had no role to play. They thought instead that the same restrained theory of judicial review applies to *all* provisions of the Constitution—all rights, all structure. And Frankfurter never took the position that there was no role for judicial enforcement of civil liberties. He embraced the Holmes and Brandeis dissent in *Abrams v. United States*, where the Court in 1919 upheld criminal convictions for distributing antiwar

literature. He applauded the Court’s 1925 decision in *Pierce v. Society of Sisters*, which struck down a ban on private schooling. And he later joined—and wrote—many such decisions as a Justice.

Judges are not known for admitting their mistakes, and perhaps that is a tradition that should change. In any given year, I sit on roughly 10 to 20 cases that reverse decisions of district court judges. Is it not possible that appellate judges and justices have similar rates of error? It of course helps that they sit in groups of three or nine, which diminishes the risk of error. But that reality does not eliminate the risk.

As one Justice of the United States Supreme Court aptly put the point: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” The appellate courts might be well served to follow that advice. The source of this advice was Frankfurter himself.

But even if Frankfurter did not learn the right lesson from *Gobitis* by the time of *Barnette*, it is unfair to say that he remained rigidly opposed to judicial review thereafter. He of course played a significant role in the unanimous decision of *Brown v. Board of Education*. So while wisdom may indeed have come late for Frankfurter, it did come. One wonders what would have become of Frankfurter’s legacy if it had come earlier—if he had been the first member of the Court to realize the misstep in *Gobitis*, if he had written the *Barnette* majority, if he had used the opinion to explain how and why judicial restraint need not mean judicial abdication, and if he had begun *that* opinion by talking about the law’s and wisdom’s delays.

Let me finish by mentioning a modest connection between *Barnette* and *Marquette*. Almost thirty years after *Barnette*, an important religious-liberties case





Dean Joseph D. Kearney thanks Judge Sutton at the conclusion of the 2012 Hallows Lecture in Eckstein Hall's Appellate Courtroom.

arose in Wisconsin: *Wisconsin v. Yoder*. Amish families in Green County, about 100 miles southwest of Milwaukee, challenged a Wisconsin law requiring all children to attend school through the age of 16. The Amish faith required children to stop attending school after the eighth grade. The U.S. Supreme Court held that the state law violated the free-exercise rights of the families and struck it down. The decision under review came from the Wisconsin Supreme Court. It is quite good. The Wisconsin Supreme Court's opinion begins: "No liberty guaranteed by our constitution is more

important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment." It then invokes *Barnette*, noting that, just as an exemption for Jehovah's Witnesses had no great impact on other citizens or the policy underlying the flag-salute law, so the same would be true with an exemption for Amish children and parents from the compulsory-education law. The author of the Wisconsin Supreme Court decision, quite fittingly, was one of Marquette's own professors, Chief Justice E. Harold Hallows, whom we remember with this lecture. ■



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125 YEARS

SINCE THE INTERSTATE COMMERCE ACT: A Symposium in the Form of a Final Convocation

The Interstate Commerce Act is regarded as among the most important statutes ever adopted by Congress. Enacted in 1887 to address the “railroad problem,” the Act did not merely create the Interstate Commerce Commission (ICC). It also heralded the general advent of independent agencies and, more broadly yet, the federal administrative state. It imposed a model of regulation—involving entry-and-exit controls, rate regulation, and cross-subsidized services—that would be replicated over the decades for purposes of regulating transportation, communications, and energy industries. Although the ICC itself was abolished a century later (in the mid-1990s), the Interstate Commerce Act had a major influence on the law and industry, and its effects continue to be felt (e.g., in debates concerning regulation of broadband).

In these circumstances, Marquette University Law School’s Dean Joseph D. Kearney and Northwestern University School of Law’s Professor James B. Speta recently published in the *Marquette Law Review* a symposium marking the Interstate Commerce Act’s 125th anniversary. Their essays appear here as well (without footnotes), together with those of the other five participants, all longtime leading public-law scholars:

- Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit
- Paul Stephen Dempsey of McGill University
- James W. Ely, Jr., of Vanderbilt University
- Thomas W. Merrill of Columbia University
- Randal C. Picker of the University of Chicago.

Dean Kearney’s essay, in the nature of a foreword (as well as a reminiscence), provides further context. ►►

Illustrations by Stephanie Dalton Cowan
Illustration composites created from a series of historical documents and images gathered from various collections from within the Library of Congress, National Archives, and the Wisconsin Historical Society Archives.

THE LAST ASSEMBLY OF INTERSTATE COMMERCE ACT LAWYERS

Joseph D. Kearney

Dean and Professor of Law, Marquette University

I.

Upon graduating from law school in 1989 and completing a one-year clerkship, I began my career as a lawyer at Sidley & Austin in Chicago, a firm whose clients over the decades have included railroads, electric utilities, and telecommunications carriers. One of my first assignments involved a challenge to the emerging technology of “Caller ID.” The Pennsylvania Public Utility Commission had cast doubt on the legality of the technology as proposed to be deployed by the local telephone company. As counsel for a long-distance carrier, American Telephone & Telegraph Co. (AT&T), we were less concerned about the particular ruling than by its implications for our own interstate service. I prepared a substantial brief on the matter, but among its legal arguments I can recall today only the one that, like the man upon the stair, was not there. For upon reading my draft, David W. Carpenter, an extraordinary lawyer and AT&T’s primary outside counsel at the time, said something to this effect: “It omits the best argument.” And what was that? “The filed rate doctrine,” came the answer.

So began my introduction to a legal world that even then seemed as much of the railroads as of telephones. AT&T was required to file tariffs with the Federal Communications Commission (FCC), setting forth its rates and (necessarily) its services. Here is a succinct statement of this regime, frequently summarized as the filed rate doctrine: “Deviation from these tariffs is strictly prohibited under any circumstances, unless the regulatory commission concludes that the carrier’s rates fail to meet the statutory requirement of being just, reasonable, and not unreasonably discriminatory.” The model had been imported into the Communications Act of 1934 from the Interstate Commerce Act, whose great purpose upon its enactment in 1887 was to ensure that interstate railroads charged nondiscriminatory rates.

Carpenter had done some impressive things with the filed rate doctrine. In particular, in a series of cases involving electric

utility companies, he (together with Rex E. Lee and others) had persuaded the Supreme Court that various state attempts to allocate or disallow certain costs were preempted by filings in the Federal Energy Regulatory Commission (because state regulators could not tread on federally filed tariffs). Indeed, at the same time as the Caller ID matter, we seemed to be on the cusp of another victory in the Supreme Court based on the filed rate doctrine.

In a sense, none of this was novel. The filed rate doctrine had been the law since 1895. It had proved powerful enough to oust the antitrust laws. And the same year as I learned of its existence, the Supreme Court rejected even the Interstate Commerce Commission’s attempt to soften the effect of the doctrine. The agency had ruled that it was an unreasonable practice for a motor carrier to enforce a filed rate where the parties had explicitly negotiated a lower rate—that is, where there was a contract rate of the sort that typifies most business transactions. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* (1990), the Court struck down this policy because, by allowing deviations from tariffs, it offended the nondiscrimination regime at the heart of the system and the Act itself.

The effect of *Maislin* was that trustees in bankruptcy of motor carriers—there were many because of the deregulation and thus competition that the Motor Carrier Act of 1980 had engendered—proceeded against shippers who had entered into apparent contracts for lower rates and knew not of filed tariffs. To many, the filed rate doctrine seemed out of place in the world of the 1990s. The inequity of such shippers’ fate after *Maislin* attracted even popular attention, with CBS’s



60 Minutes running a story entitled “You’re Kidding.” Justice John Paul Stevens and Chief Justice William H. Rehnquist were among the critics in the legal world, the former writing for them both in a *Maislin* dissent that “[t]he ‘filed rate doctrine’ was developed in the nineteenth century as part of a program to regulate the ruthless exercise of monopoly power by the Nation’s railroads” and that the Court “fail[ed] to appreciate the significance of the ‘sea change’ in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market.”

Even most of those forming the majority in *Maislin* seemed almost relieved a few years later, in *Reiter v. Cooper*, when shippers—now proceeding *within* the Interstate Commerce Act paradigm by asserting the traditional defense that the filed rates were unreasonable—cobbed together a different argument that might protect at least some of them against the invocation of the filed rate doctrine by trustees in bankruptcy of failed motor carriers.

The telecommunications legal world in which I was moving, during these years as a young lawyer, also struggled with the filed rate doctrine. The FCC wished to do without it. Indeed, the agency for years excused all long-distance carriers besides our client, AT&T, from the statutory obligation to file their rates: the agency claimed that its authority to “modify” the tariffing obligation gave it sufficient authority. In *MCI v. AT&T* (1994), Carpenter led a team of us who persuaded the Supreme Court to set the record straight, with Justice Antonin Scalia writing for the Court and quoting one of the greatest cases decided under the Interstate Commerce Act (the 1907 decision in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*):

The tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act.

In the context of the Interstate Commerce Act, which served as its model, this Court has repeatedly stressed that rate filing was Congress’s chosen means of preventing unreasonableness and discrimination in charges: “There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.”

Justice Stevens was left in dissent to make the same point as in *Maislin* had been true of trucking—that “[t]he communications industry has an unusually dynamic character”—and to decry “a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions.”

II.

My purpose in remembering a few aspects of my early career is less to recall the filed rate doctrine and more to evoke the spirit of the age, as is captured in the struggle over the doctrine. There seemed little doubt even then that we were nearing the end of an era. Events would soon confirm it. In 1995, I left Sidley & Austin for another clerkship; by the time I returned the next year, the legal landscape had changed unmistakably.

Most prominent was the new Telecommunications Act of 1996. The Act contained numerous provisions, including the termination of the Modification of Final Judgment—the Bell System consent decree that had formed one of the twin pillars of telecommunications regulation for more than a decade (the other pillar being the Communications Act of 1934) and that had provided ▶▶

“One would imagine that, 25 years hence, the sesquicentennial will be marked. . . . Yet it will lack a substantial group of folks who can make some plausible claim to have grown up in the law, in some important sense, under the Interstate Commerce Act.”

perhaps the bulk of my practice as a lawyer. Congress also gave the FCC the authority that it had so long sought and even claimed (unsuccessfully in the *MCI v. AT&T* case): specifically, it provided that the FCC could forbear from enforcing any regulation not necessary to accomplish the Communications Act's purposes—including the tariffing requirement.

Less relevant to my practice and to the larger economy, but more symbolically notable, during this year Congress also eliminated the Interstate Commerce Commission. A new entity had to be created, the Surface Transportation Board (STB), but not with the same independent-agency status—or with the same building on Constitution Avenue. And the authority afforded the STB over rail carriers was slight.

To be sure, some vestiges of the past remained. I had the satisfaction (in *AT&T v. Central Office Telephone, Inc.* in 1998) of seeing a case in which I had been unsuccessfully involved in my first run at the law firm be overturned by the Supreme Court on the basis of the filed rate doctrine, more or less at the same time that even some well familiar with the doctrine were suggesting that the Court could no longer be counted on to have the stomach for it.

I made my own departure from this fading realm in becoming a law professor. In recalling my time as an Interstate Commerce Act lawyer (of a sort) and the era of which I was part, I am not here trying to tie together all these changes in any sort of synthetic way. Tom Merrill and I already sought to do this, in *The Great Transformation of Regulated Industries Law*, the article that bridged my transition from full-time practice to academe.

Instead, my motivation frankly is sentimental, although it is not nostalgic. By this, I mean that I do not consider myself (at least in this context) to be “of an older fashion,” in the sense that “much that I love has been destroyed or sent into exile,” to borrow a phrase from Chesterton. I hold no brief for filed tariffs over contracts in a competitive world. Yet, for the sentiment, the developing world of regulated industries law today rather resembles the larger culture, in that it has become fragmented. One could handle rather well, I should think, a negotiation of a content contract for a local exchange company, in the world defined largely by the Telecommunications Act of 1996, without any sense of

the Hepburn Act, or the Mann–Elkins Act, or any number of other amendments to the Interstate Commerce Act. But less than a quarter century ago, as my own experience shows, a lawyer could not competently confront the new technology of Caller ID without some knowledge of the Interstate Commerce Act.

So for those of us who grew up at least partly in the old world, there is some pleasure in remembering. We hope that there is some value in the remembrance for others.

We expect that there is. The remembrance is not at the scale or scope of the law review symposia celebrating the 50th and 75th anniversaries of the Act—or even the rather more ambivalent observation of the 100th anniversary. Yet we have gathered an impressive collection of scholars. The following essays range from a recollection of the beginning, in the essay by James W. Ely, Jr., of Vanderbilt University, to the interplay between the Interstate Commerce Act and the antitrust law enacted only three years later (the Sherman Act), as explored by the University of Chicago's Randal C. Picker. Thomas W. Merrill, of Columbia University, discusses the unusual phenomenon of administered contracts in the Interstate Commerce Act's regulatory scheme, suggesting that the form of regulation was more impressive than the fact. McGill University's Paul Stephen Dempsey focuses on the Interstate Commerce Commission as an agency, taking us broadly from its creation to its demise. Judge Richard D. Cudahy of the Seventh Circuit points us to the future, sketching the possible relevance of the Interstate Commerce Act's paradigm for modern debates over regulation. James B. Speta, of Northwestern University, with whom it was my privilege to convene this group, concludes with an assessment of the Act's pertinence in an area with almost as much importance to the twenty-first century as railroads possessed in the nineteenth: namely, telecommunications.

There no doubt will be other remembrances of the Interstate Commerce Act in times to come. One would imagine that, 25 years hence, the sesquicentennial will be marked. Any such observance will have the benefit of greater critical distance. Yet it will lack a substantial group of folks who can make some plausible claim to have grown up in the law, in some important sense, under the Interstate Commerce Act.

In all events, we invite you to read these essays and to join us in remembering it. ▶▶

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THE TROUBLED BEGINNING OF THE INTERSTATE COMMERCE ACT

James W. Ely, Jr.

Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University

From the time of their origin, railroads had been subject to regulation by the states. By the 1880s, however, there was broad agreement that piecemeal and inconsistent state controls were inadequate to deal with perceived difficulties and abuses arising from the interstate operations of railroads. Yet there was little agreement about the nature of the “railway problem,” and still less any consensus as to how best to address the issue. Translating the amorphous public wish for rail regulation into concrete legislation was not an easy task. After years of inconclusive debate, Congress passed the Interstate Commerce Act in 1887. Despite this important step, the early years reveal an Act that made little difference. Congress itself waited nearly two decades to strengthen the powers granted to the Interstate Commerce Commission (“Commission” or “ICC”).

An untidy compromise between quite different House and Senate bills, the Interstate Commerce Act was an amalgam of diverse and vague provisions. It created the ICC, the first important federal administrative agency, to oversee the Act. The five-member ICC had the authority to conduct hearings and issue orders to stop practices in violation of the statute. The Act declared that charges for interstate rail transportation should be “reasonable and just,” but did not define this term or give the ICC the power to set rates. In addition, the Act banned rebates or preferential treatment for any shipper, and outlawed the pooling of traffic or earnings among carriers. The Act left unresolved a basic question: Was it intended to encourage competition among the carriers, or to stabilize the industry through cartelization? As with any novel measure, the effectiveness of the Act was open to question. Congress seemed primarily concerned to placate the public clamor to curb alleged railroad abuses, and was happy to leave unsettled policy issues to the ICC and the courts. “The entry of the national government into the realm of railroad regulation,” historian Morton Keller aptly explained, “was a leap in the dark.”

The early years of the ICC present a tale of frustration. The sheer size and complexity of the rail industry presented daunting challenges to the fledgling agency with its small staff. Moreover, the states retained jurisdiction over intrastate transportation, and state regulation had the potential to undermine ICC policy. The skepticism of the federal courts about administrative regulation of the economy also greatly contributed to the feeble nature of ICC supervision. Both the Supreme Court and the lower federal courts consistently placed a narrow construction on the Commission’s authority. Two developments are particularly revealing.

First, the ICC had difficulty making its orders effective. Lacking the power to compel obedience to its orders, the agency was required to seek judicial enforcement of its mandates when railroad companies ignored adverse directives. This step, of course, created opportunities for delay when carriers disobeyed the ICC. More troublesome, however, was that federal courts from the outset refused to defer to agency findings of fact. Instead, the federal courts decided that factual matters should be reviewed *de novo*, and permitted the introduction of further evidence by either party. The findings by the ICC were treated as a sort of preliminary report. In *ICC v. Alabama Midland Railway* (1897), the Supreme Court affirmed this practice, ruling that the lower courts should give effect “to the findings of fact in the report of the Commission as *prima facie* evidence of the matters therein stated.” It added that the courts “are not restricted to the evidence adduced before the Commission, [but] additional evidence may be put in by either party, and . . . the duty of the court is to decide, as a court of equity, upon the entire body of evidence.”

Second, the ICC had difficulty establishing just and reasonable rates. The regulation of railroad rates was



one of the most vexing, contested, and misunderstood issues facing lawmakers in the late nineteenth century. As common carriers, railroads had long been under an obligation to charge reasonable and nondiscriminatory prices. But the common law also allowed the carriers considerable latitude in setting rates. In the 1870s some states enacted so-called Granger laws, which empowered state commissions to prescribe maximum charges. Congress, however, stopped short of giving the ICC such authority. Under the 1887 Act, the agency could review rates and set aside those deemed unreasonable, but it could not fix rates. In time, however, the ICC asserted that the power to impose rates should be implied from the power to bar unreasonable rates.

In *ICC v. Cincinnati, New Orleans and Texas Pacific Railway* (1897), the Supreme Court, in an opinion by Justice David Brewer, rejected this contention. It determined that, subject to the requirement that charges be reasonable and not discriminatory, the Interstate Commerce Act left the carriers free to adjust their rates to meet business conditions. In reaching this conclusion, the Court stressed the heavy investment in railroads and that rail transportation was carried on under diverse conditions in different parts of the country. Pointing out that administrative regulation of railroads was not new, the Court compared the language of the Act with that of state regulatory measures. A number of state laws clearly granted railroad commissions the power to fix rates, but such authority was not expressly given by Congress to the ICC. The authority to prescribe rates, the Court insisted, was “a power of supreme delicacy and importance,” and could not be implied from “doubtful or uncertain” language. The Court disapproved of what it saw as an agency grab for power. The justices observed that “it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it.” The Court

left open, however, the possibility that Congress might confer ratemaking power on the ICC. Until that happened with the Hepburn Act of 1906, the ICC was compelled to abandon its efforts to set rates for the carriers.

By the early twentieth century, the ICC was largely toothless and spent much of its energy gathering statistics about the rail industry. In 1903 the ICC explained: “At present this Commission can investigate and report. It has no power to determine what rate is reasonable, and such orders as it can make have no binding effect.” Nonetheless, the ICC served a vital political purpose. It satisfied the popular clamor for governmental control of railroads, even if the supervision was largely nominal.

Although the Interstate Commerce Act was important as the prototype for subsequent regulatory measures by Congress, the early history of the Act is a study in unresolved problems. Clearly the federal courts were dubious about an administrative body that was an uncertain fit in the constitutional system as traditionally understood. The modern norm of a deferential attitude toward administrative bodies was not the prevailing judicial view in the late nineteenth century. Indeed, implicit in the Supreme Court decisions narrowly construing the authority of the ICC was the premise that Congress, not the Commission, was the proper policymaking body. The Supreme Court of the 1890s was disposed toward private economic ordering, but the responsibility for the feeble power of the ICC rests ultimately with Congress, not the Court. It is far from clear that Congress was very serious about regulating the carriers. Revealingly, Congress appeared untroubled about Court rulings adverse to the ICC, and made no move to strengthen the agency for years. In fact, the ICC remained passive for a decade after the 1897 decisions.

“The regulation of railroad rates was one of the most vexing, contested, and misunderstood issues facing lawmakers in the late nineteenth century.”



THE INTERSTATE COMMERCE ACT AND THE SHERMAN ACT: PLAYING RAILROAD TYCOON

Randal C. Picker

Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School, and Senior Fellow, The Computation Institute of The University of Chicago and Argonne National Laboratory

I start my antitrust class each year with the Supreme Court's classic 1897 decision in *United States v. Trans-Missouri Freight Association*. It is hard to imagine a better place to start. The case sits at the intersection of the two great late-nineteenth-century business law statutes: the Interstate Commerce Act (ICA) passed in 1887 and the Sherman Act passed in 1890. And how often do you get to open a class with the question, "How would you run a railroad cartel?"

In the era leading up to the ICA and the Sherman Act, railroad pools and traffic associations were commonplace. No federal law sat as a barrier to a private agreement to establish the rules of competition among the members of the pool or association. Cartels today are forced to sneak around, and, one suspects, this means that the understanding of the cartel is rarely committed to paper by thoughtful lawyers. But the pools and associations of the second half of the nineteenth century were discussed openly and reported in newspapers as the ordinary affairs of business. Consider the report in the *New York Times*, on July 10, 1878, of the most recent gathering at Saratoga, New York, of the Vanderbilt family and business interests. The prospects for a pool organized around the New York Central Railroad were an active part of the discussions: "Some of the railroaders believe that a general pool will ruin the business, and about as many others say that a pool, if well adhered to, would bring things up wonderfully. Few believe, however, even if a general pooling arrangement should be made by the trunk lines, that it would be generally adhered to."

This was the central problem of these arrangements. There is an incentive to cheat within cartels, and even though the agreements could be set out in great detail and often were, the agreements themselves weren't enforceable in court. It is one thing to stop short of condemning these agreements and something else to bring the force

of the legal system to bear in enforcing them.

And yet the railroads continued to try. At the time that the ICA was passed, according to the agency that it established, there were 11 substantial traffic associations in place, covering the entire competitive railroad traffic in the United States. The post-Civil War period had seen an explosion in track miles from roughly 30,000 miles in 1860 to about 70,000 miles in 1873. The structure of competition quite literally embedded in the ground had shifted, and the railroads were struggling to create an institutional structure that matched it.

On March 15, 1889, the railroads that would comprise the Trans-Missouri Freight Association set out their agreement. Section 5 of the ICA had barred one institutional arrangement, the railroad pool. The pool was an effort to enforce cartel arrangements by requiring the sharing of revenues or profits. How much traffic a railroad received didn't really matter under a pool. What mattered was money, and if profits were split, competitive discipline would follow. The ICA took pools off of the table but was understood to have left room for other types of contractual arrangements, such as agreements on rates. Controlling those rates was the chief topic of the association agreement for the Trans-Missouri group.

The Trans-Missouri agreement was to go in effect on April 1, 1889, but with the passage of the Sherman Act on July 2, 1890, circumstances changed dramatically. By the standards of modern statutes, the Sherman Act was a little nothing, barely a page-and-a-half in the Statutes at Large. (The ICA itself ran nearly nine pages.) But within two years, the federal government challenged the very existence of the freight association as a violation of Section 1 of the Sherman Act.



Of course, a central concern of the Interstate Commerce Act was rates. All charges were to be “reasonable and just,” and if that wasn’t sufficiently clear, the Act turned around and “prohibited and declared to be unlawful” “every unjust and unreasonable charge.” The Act barred unjust discrimination in rates and undue or unreasonable preferences and, in case it wasn’t already covered, specifically condemned short-haul/long-haul discrimination. The Sherman Act itself didn’t address rates directly at all, and antitrust’s own version of an anti-discrimination regime wouldn’t show up until 1914 in the Clayton Act (and then even more so in 1936 in the Robinson–Patman Act). All that Section 1 of the Sherman Act forbade was contracts in restraint of trade, and it said nothing about the reasonableness or unreasonableness of those restraints.

But what exactly was the mechanism by which the ICA’s not-too-hot, not-too-cold pricing regime was to emerge? In an industry populated by small firms, we expect atomistic competition to result in prices equal to average costs. Faced with monopoly, we can expect high prices and deadweight losses, but the railroads sat in that uncomfortable middle ground. The railroads

Sherman Act. Alternatively, assuming that the Sherman Act did indeed apply to them, the railroads wanted to contend that their restraints were acceptable under the Sherman Act given that they were necessary to produce the reasonable charges required under the ICA. Certainly, suggested the association, the Sherman Act didn’t forbid all contracts in restraint of trade but just those that unreasonably restrained trade.

In a 5–4 decision, the Supreme Court rejected both propositions. The Sherman Act was passed more than three years after the ICA, so it would have been easy enough for Congress to carve out the railroads from the new antitrust statute, but nothing like that had been done. And, in similar fashion, it would have been easy enough for Congress to expressly limit Section 1 of the Sherman Act to bar only unreasonable restraints of trade. Had this been done, the Court seemed to suggest, then the railroads would have been given the chance to prove that their agreement would “only keep rates up to a reasonable price.” But Section 1 barred all restraints of trade, both reasonable and unreasonable, and the agreement of the Trans-Missouri Freight Association was found to violate the Sherman Act.

“And how often do you get to
open a class with the question,
‘How would you run a railroad cartel?’”

knew—and argued to the Court in *Trans-Missouri*—that the competitive structure of railroads was perverse and needed something more than purely unbridled competition to sustain a healthy industry. Railroads were a special-use property. They couldn’t easily be turned into something else if the railroad business turned out to be oppressively competitive. The railroads sought the opportunity to prove that their rates were reasonable—as required by the ICA—and that the association agreement was the mechanism to produce reasonable rates.

In the Supreme Court, the Trans-Missouri association argued that the railroad business had to be understood as exempt from the Sherman Act—that the much more specific Interstate Commerce Act, designed for railroads, had to control over the more general terms of the

What were the railroads to do? Railroad pools had been the preferred method for enforcing railroad cartels, but those were expressly barred by the ICA. Railroads had countered with the rate associations, which seemed to sidestep the ICA but were now condemned by the Sherman Act. The answer took two forms: seek more legislation and continue their practices much as they had before, notwithstanding the decision in *Trans-Missouri*.

As to legislation, the ICC reported in its 12th annual report, dated January 11, 1899, that the railroads were seeking new legislation that they hoped would solve the problems that they had faced for the last half century. The railroads didn’t want merely an exemption from the Sherman Act or a repeal of the anti-pooling provisions of the ICA. Instead, the railroads wanted the power to enter

into rate and pooling agreements that would be enforceable in court—agreements with teeth.

In the meantime, the railroads tried to operate as they had before. The 1902 annual report of the Interstate Commerce Commission explained the realities of railroad life:

It is not the business of this Commission to enforce the antitrust act, and we express no opinion as to the legality of the means adopted by these associations. We simply call attention to the fact that the decision of the United States Supreme Court in the *Trans-Missouri* case and the *Joint Traffic Association* case has produced no practical effect upon the railway operations of the country. Such associations, in fact, exist now as they did before those decisions, and with the same general effect. In justice to all parties we ought probably to add that it is difficult to see how our interstate railways could be operated, with due regard to the interests of the shipper and the railway, without concerted action of the kind afforded through these associations.

This was the first decade or so of the Interstate Commerce Act. How would the rate provisions of the Act be implemented? The Act itself was understood not to give direct rate-setting authority to the Interstate Commerce Commission. The railroads themselves tried to set rates through the traffic associations, much as they had tried to do with the pooling arrangements that had preceded the ICA. The result in *Trans-Missouri* seemed to bar those arrangements under the Sherman Act.

The path forward from there was complex and with many fits and starts. Legislation was proposed to amend the Sherman Act to limit Section 1 to barring

unreasonable restraints of trade, but the Supreme Court itself rendered that unnecessary in 1911 in its “reinterpretation” of Section 1 in the *Standard Oil* case. On the railroad side, the 1920 Transportation Act finally gave the ICC rate-setting authority (even beyond the authority to determine maximum rates that the 1906 Hepburn Act provided). In 1948, with the passage of the Reed–Bulwinkle Act, the intersection of the ICA and the Sherman Act was finally dovetailed: The ICC was given the authority to approve carriers’ private agreements on rates, and that approval in turn conferred antitrust immunity on those arrangements.

This was in many ways the path forward seen by the Interstate Commerce Commission as early as 1899. The commission both was familiar with life for railroads as it had been before the two great business acts and then had seen how those acts had worked together for a decade culminating in the *Trans-Missouri* case in 1897 and the *Joint-Traffic Association* case in 1898. The commission noted that “many thoughtful persons” believed that “unrestricted competition was inconsistent with the purposes aimed at” by the Interstate Commerce Act, and the commission was inclined to agree with them. The commission further noted that there was “no great nation at the present time which endeavors to enforce competition between its railways, although in many cases that method has been tried and abandoned.” Competition needed to be restricted and railroads needed to be allowed to accomplish this through agreement but subject to oversight by the commission to protect the public interest. Five decades later, the early vision of the commission was fulfilled. Of course, whether that was a good result is a question for another day. ▶▶

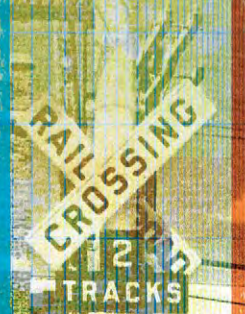
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THE INTERSTATE COMMERCE ACT, ADMINISTERED CONTRACTS, AND THE ILLUSION OF COMPREHENSIVE REGULATION

Thomas W. Merrill

Charles Evans Hughes Professor, Columbia Law School

The 125th anniversary of the Interstate Commerce Act invites reflection on what it has contributed to our understanding of public regulation. Perhaps the most important and enduring idea associated with the Act is what we may call the administered contract. At common law, transportation services, like other goods and services, were governed by ordinary contracts between customer and carrier. Building on innovations in English and state railroad legislation, the Interstate Commerce Act developed a different form of contracting. Contracts for transportation services became public acts, understood to have the openness, generality, and binding force of public law. This concept of the administered contract soon spread to other public transportation and utility services. It remains a feature today of what we loosely call public utility law. Ironically, rail transportation, where it all began, has reverted to ordinary contracting. This aspect of the history of the Interstate Commerce Act—the rise and fall of the administered contract—tells us much about why the Interstate Commerce Act, despite all its flaws, was so widely emulated. It also sheds important light on the appropriate domain of private and public law in the provision of services to customers.

Ordinary contracts are obligations based on mutual assent between identified persons. They are private undertakings in two senses. First, they see the light of day only under special circumstances, such as a litigated dispute or public recordation to perfect a security interest. Second, the obligations that such contracts create are personal to the parties and ordinarily do not extend to third parties, except in unusual circumstances such as third-party-beneficiary contracts. Ordinary contracts are enforced by courts and arbitrators, seeking to identify the parties' agreement and to enforce it by its terms. Courts and arbitrators typically do not consider questions of social welfare or regard themselves as free to rewrite contracts in order to achieve a different

outcome from the one agreed upon by the parties.

Administered contracts, like ordinary contracts, are grounded in mutual assent. A service provider offers service on stated terms and conditions; if a customer agrees, this creates an obligation binding both parties. Nevertheless, administered contracts differ from ordinary contracts on many dimensions. Unlike ordinary contracts, administered contracts are public undertakings. They are filed in "tariffs" or "schedules" with an administrative body, and these tariffs must be posted in public places or otherwise made available for public inspection. Administered contracts are public in a second sense as well: They are regarded as offers open to any member of the public. Although an offer of service may be designed to meet the needs of a single customer, once the proposal is filed as a tariff, any person is free to avail himself of the service on the same terms and conditions.

Perhaps most significantly, administered contracts are understood to be public obligations. Some of this is inherent in the preceding point: Once a service provider agrees to offer service on stated terms and conditions, and these are filed in a public tariff, the service provider is obligated to provide the service if it is requested. Indeed, failure to provide the service when requested is a violation of law. But even more strikingly, enforcement of the contract is not given to courts, at least not exclusively, but is subject to oversight and modification by a public administrative body. Such an agency typically has the power to review tariffs before they take effect for compliance with general legal requirements and to reject or modify tariffs found to be noncompliant. The agency can also bring civil enforcement actions and even initiate criminal proceedings against persons who provide services without a publicly filed tariff or who provide



services or pay rates that deviate from the publicly filed tariff.

Finally, administered contracts are public obligations in the sense that they preempt contrary state law. This feature of administered contracts is called the “filed rate doctrine.” The service provider and the customer may not mutually agree to deviate from the tariff on any dimension—that is, they are prohibited from modifying the tariff by an ordinary contract. And the customer may not bring an action in tort to recover for any loss or damage that has been disclaimed by the tariff. This feature highlights the degree to which administered contracts function as an alternative to private ordering through the common law.

The concept of the administered contract emerged from the central purpose of the Interstate Commerce Act, which was to prevent “discrimination” in the provision of

One strategy the Interstate Commerce Act took against this perceived inequity was to attack the problem directly, in the form of anti-discrimination obligations, long-haul/short-haul provisions (which forbade charging more for short-distance shipments than for otherwise identical long-distance shipments over the same route), and a general prohibition on unreasonable rates and practices. Enforcement of these substantive constraints, however, was difficult. It was expensive to file a complaint charging a carrier with a violation of these provisions, or to persuade Interstate Commerce Commission (“Commission” or “ICC”) staff to commence an investigation. Once commenced, proceedings quickly bogged down in complicated evidentiary questions about cost accounting. When courts began to recognize defenses based on “meeting competition,” success became increasingly hard to achieve.

“The concept of the administered contract emerged from the central purpose of the Interstate Commerce Act, which was to prevent ‘discrimination’ in the provision of rail service.”

rail service. The principal cause of complaint against railroads was the perception that some customers were getting better deals than others for what were perceived to be similar services. Specifically, high-volume, well-connected customers, such as the oil and steel trusts, were getting breaks that were denied to ordinary folks. The disparity in rates was endemic to the railroad industry, with its mixture of competitive and monopolistic routes. The central problem was how to allocate large fixed costs—such as roadbed, terminal expenses, and administrative overhead—to individual movements. There was no clear answer to this problem. Railroads naturally sought to allocate a higher proportion of fixed costs to shippers on monopolistic routes, like rural grain elevators, which had little ability to resist higher prices. Railroads sought to allocate a smaller proportion of fixed costs to high-volume shippers like the oil and steel trusts, which typically had access to multiple transportation alternatives and could take their business elsewhere if rates got too high.

A second strategy was the adoption of administered contracts. If railroad service could be procured only through published contracts, these contracts were available to all, and deviations were strictly prohibited, then favoritism would become much more difficult. The regime of administered contracts turned out to be much easier to implement and enforce than the substantive prohibitions against discrimination. The courts, at the urging of the Commission, soon held that any provision of service without a tariff, any failure to file and publish a tariff before providing service, or any deviation from a tariff once it became effective was a per se violation of the Interstate Commerce Act. Railroad employees, shippers, agency officials, and courts could easily understand these rules and the consequences of violating them. Administered contracts did not end differential treatment. Carriers quickly learned to file tariffs tailored to specific endpoints, goods, and volumes, and so could continue to engage in differential pricing based on different competitive circumstances. But at

“Administered contracts did not end differential treatment. . . .

But at least the plague of secret rebates, kickbacks, and preferences, which was so disturbing to the public in the late nineteenth century, was brought to an end.”

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The idea of the administered contract was wildly successful. Within the transportation sector, the idea spread from railroads to motor carriers, intercity buses, river barges, and airlines. It leaped to other industries as various as stockyards, telephony, natural gas distribution, and electricity distribution. It prevailed in a variety of federal regulatory schemes and was adopted by nearly all states as well.

Explaining why the idea of administered contracts was so successful is more difficult. Although the idea got its start in an industry characterized by a mixture of competitive and monopolistic routes, where differential pricing (i.e., “discrimination”) was rampant, it proved to be equally popular in regulation of both industries with natural monopoly characteristics (electricity, natural gas distribution, and local telephony) and industries that were inherently competitive and were regulated largely to protect some other industry from competition (motor carriers and river barges). So the administered contract was not a regulatory response to any specific industry structure.

Without doubt, administered contracts had some benefits. The device was critical in stamping out the more blatant forms of favoritism, such as secret rebates, and this may have contributed in some measure to public confidence in the fairness of a rapidly industrializing capitalist system. They made it marginally easier to initiate claims of discrimination, since all tariffs were theoretically available for inspection through the agency’s public documents room. The reality, as I have suggested, is that even with this better access to

evidence, claims of discrimination or long-haul/short-haul violations were very hard to win. Administered contracts made it possible to protest rate increases before they took effect, and to seek a stay from the Commission pending investigation. This probably provided customers somewhat more leverage than they had under a regime that allowed only reparations for rates already put into effect and later deemed unlawful. But whether this had any widespread or permanent effect on the level of prices is questionable. Overall, it is hard to pinpoint any significant tangible benefit associated with the widespread use of administered contracts relative to ordinary contracts.

This is my theory: The regime of administered contracts created the illusion of comprehensive regulation without its associated costs. Forcing regulated firms to file and adhere strictly to tariffs satisfied the public’s demand that the government “do something” about abusive practices in various critical network industries. Every firm had to publicize every service offering in advance, and had to wait patiently for a short period (e.g., 30 days) to see if any customer would protest or the agency would suspend and investigate. The public was thus led to believe that the government was on top of the industry. The reality was that all but a tiny percentage of tariff filings piled up, unread, in agency offices and later in warehouses. Meanwhile, the administered-contract regime imposed a small deadweight loss on regulated firms, but preserved their autonomy to determine what services they would offer at what prices. Administered contracts created the appearance of regulation while leaving the significant decisions unregulated, except in the most extreme cases. In so doing, they avoided the sclerosis and inefficiency

that would have accompanied any effort to nationalize these industries and run them as state bureaucracies, as happened in most other industrial democracies.

The regime of administered contracts under the Interstate Commerce Act came to an end fairly rapidly in a 20-year period from the mid-1970s to the mid-1990s. Using “letters of understanding,” railroads began soliciting business from major shippers, such as utilities that burn coal provided by continuous-cycle unit trains running from mine head to power plant. When disputes arose in which railroads attempted to argue that such letters were not binding because they were not filed as tariffs, courts were not amused. The ICC soon decided that such letters of understanding were presumptive evidence of reasonable rates and had to be reflected in tariff filings. Administered contracts were effectively subordinated to ordinary contracts. The Staggers Rail Act of 1980 expressly authorized the use of carrier–customer contracts, which quickly became the standard mode of doing business in the industry. When the ICC was formally abolished on January 1, 1996, tariff filing ended and rail service contracts were by statute returned to state courts to be treated like ordinary contracts.

What caused the demise of the administered contract in the context of the Interstate Commerce Act? President Eisenhower’s interstate highway system may have been the most important cause, with the growth of the air transportation network playing a supporting role. The convenience of the new highway system and the emergence of air travel quickly reduced intercity rail passenger transportation to a detail. The railroads happily turned over all intercity operations to Amtrak, a federally subsidized corporation, in 1970. The vast growth in the transport of goods by motor carriers, along with the development of commercial air freight, meant that most shippers of commercial goods had competitive alternatives to rail transportation, even if, as before, the shippers were served by only one rail carrier. The primary exception consisted of shippers of

bulk commodities such as coal, but these sorts of shippers were precisely the types of firms that could negotiate long-term contracts with rail carriers, and there was no reason to believe that administered contracts would provide them with better protection than ordinary contracts.

In short, the administered contract disappeared once widespread dependency on rail transportation disappeared. When the Interstate Commerce Act was adopted 125 years ago, multitudes of agricultural producers and small manufacturers were completely dependent on rail transportation to connect with the outside world, and fear of exploitation by railroads was rampant. The regime of administered contracts helped to tamp down this anxiety, at least to a degree. Once new transportation alternatives—car, motor carrier, and airplane—opened up, the sense of dependency on railroads faded away. It was only a matter of time before the ritual of tariff filing, publication, and worrying about strict compliance with tariff terms came to be seen as an unnecessary regulatory burden, adding to the cost of rail transport with little or no offsetting benefit.

If this analysis is correct, it suggests that the proper domain of administered contracts should be determined by economic dependency, even though, as noted, administered contracts were sometimes imposed without regard to such dependency. The economic concepts of monopoly or market dominance are a relevant part of the inquiry. But so is a more contextual understanding of vulnerability. Someone is economically dependent on a service when that service is a necessity of economic life and is provided by a single firm or a single dominant firm. Railroads fit this description when the Interstate Commerce Act was adopted. They do not, at least not for the vast majority of economic actors, today. It is thus fitting and proper that the idea of administered contracts, which emerged under the Interstate Commerce Act, has today disappeared from the industry in which it was born. ▶▶

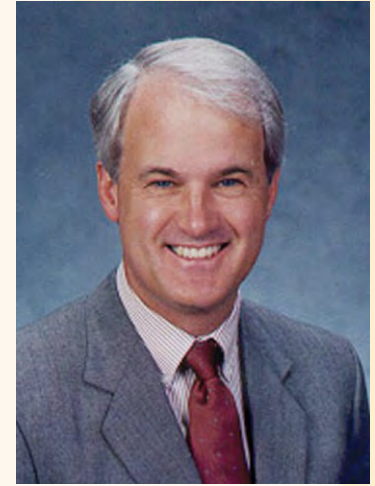
“This is my theory: The regime of administered contracts created the illusion of comprehensive regulation without its associated costs.”

THE RISE AND FALL OF THE INTERSTATE COMMERCE COMMISSION: THE TORTUOUS PATH FROM REGULATION TO DEREGULATION OF AMERICA'S INFRASTRUCTURE

Paul Stephen Dempsey

Tomlinson Professor of Global Governance in Air & Space Law and Director of The Institute of Air & Space Law, McGill University

This is an excerpt from the conclusion of Professor Dempsey's article.



The transportation industry has undergone a remarkable metamorphosis—from horses and wagons, to steamships, to railroads, to trucks and automobiles, to aircraft and spacecraft—a transformation that is far from over. The evolution of technology, of America's economy, and indeed, of economic theory and political ideology all has contributed to the relationship between government and this important infrastructure industry, one which today accounts for approximately 16 percent of the gross national product.

Few industries play as broad or vital a role in the economy as transportation. Throughout American history, a network of roads, canals, railroads, and airways has spurred growth by making possible the movement of goods from one market to another. Transportation has historically been identified as an industry “affected with a public interest.” The common carrier obligation—the principle that service be open to all upon reasonable request and on fair and nondiscriminatory terms—has been imposed upon commercial transportation providers since the Middle Ages. So regulatory oversight of the surface transportation industry has long been considered necessary and justified to protect the public's interest in having adequate transportation available on reasonable terms.

More affirmatively, perhaps, federal, state, and local governments in the United States have a long history of building, financing, subsidizing, and promoting transportation. The land grants and government subsidies helped build the railroads; the nationalization of rail passenger service helped restore the health of the freight railroads. Government carries the mail. It builds the roads, highways, transit lines, airports, and seaports. It does all this because it understands the profound

positive social and economic externalities that transportation potentially offers. Whenever possible, the provision of transportation services in the United States has been left to private firms (a/k/a common carriers). When it has not been economically feasible, as with airports, air traffic control and the airways, urban transit, small community air service, and intercity passenger rail service, the government has assumed responsibility; that is, federal, state, and local governments have subsidized or provided these services.

Across this time (or since 1887, at any rate), federal regulation of the transportation sector of the United States' economy has served various purposes: to remedy market deficiencies (such as the lack of effective competition or the existence of destructive competition), to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the states. These purposes and the manner in which regulation has been implemented to achieve them affect not only the performance of the companies and industries in this sector, but also the ability of the United States to lead the global economy.

In 1887, Congress passed the Interstate Commerce Act to protect the shipping public from the monopoly power of the rail industry, and created the Interstate Commerce Commission to carry out that regulatory charge. In 1935, the Commission's regulatory authority was extended to include the nascent interstate trucking and bus operations. Other sectors of surface transportation—pipelines, domestic water carriers, and freight forwarders—were subjected to economic regulation in 1910, 1940, and 1942, respectively. Airlines were regulated in the same fashion beginning in 1938.

Federal economic regulation of transportation developed into a comprehensive web of governmental oversight of entry and exit, rates, consolidations, and service quality. Regulation reached its high-water mark in the 1950s and 1960s.

In the late 1970s and early 1980s, Congress began to pare and refine federal transportation regulation to reflect contemporary industry conditions and evolving ideological attitudes. The result was to reduce significantly the federal presence in the interstate transportation industry. Perceived successes in transportation deregulation became the political catalyst for comprehensive deregulation across many infrastructure industry sectors.

Today, railroads have consolidated into four major lines; the bus industry has one large survivor; and several hundred airlines and trucking companies have gone bankrupt. Ironically, the only major airline to support deregulation, United Airlines, ended up in the largest bankruptcy in aviation history. Former American Airlines CEO Bob Crandall observed:

Our airlines, once world leaders, are now laggards in every category, including fleet age, service quality and international reputation.

. . . [T]he financial health of the industry, and of the individual carriers, has become ever more precarious. Most have been through the bankruptcy

process at least once, and some have passed through on multiple occasions.

. . . .

. . . I feel little need to argue that deregulation has worked poorly in the airline industry. Three decades of deregulation have demonstrated that airlines have special characteristics incompatible with a completely unregulated environment. To put things bluntly, experience has established that market forces alone cannot and will not produce a satisfactory airline industry, which clearly needs some help to solve its pricing, cost and operating problems.

The effects have been widespread. Deregulation of the power industry unleashed Enron to wreak havoc on consumers and investors. Deregulation of the telecommunications industry has led to financial instability. Deregulation of the financial industry resulted in a trillion-dollar bailout of the savings and loan industry, followed years later by the subprime mortgage crisis, which resulted in the housing industry meltdown and several trillions more in taxpayer liability in propping up the largely deregulated banking and financial industry.

The cumulative weight of these events triggered the most serious economic collapse in American history since the Great Depression, saddling our generation and ▶▶

“Across this time (or since 1887, at any rate), federal regulation of the transportation sector of the United States’ economy has served various purposes: to remedy market deficiencies . . . , to override the market to achieve broader social purposes, and to ensure uniformity in the face of regulatory efforts by the states.”



the next with unprecedented debt. Deregulation of trade has transformed the United States, the wealthiest nation on the planet, into a debtor nation, in which middle-class industrial jobs have located offshore, leaving Americans to retrain as greeters in Wal-Mart, full of goods produced abroad. The economists tell us this is beneficial for “consumer welfare,” irrespective of the fact that a consumer needs a job to buy the cheap imported goods. It is said of economists that they know the price of everything and the value of nothing. They have led this stampede toward free and unregulated markets, and working-class Americans pay the price for their myopic adventurism.

Despite the economic crisis of contemporary America, the politicians and the public remain in denial that deregulation had anything to do with the disintegration of the American economy. This is perhaps because, unlike the 1930s, the collapse of the twenty-first century did not result in the collapse of the banking industry, leaving the country penniless and unemployed. Today, instead, the banks are solvent, subprime housing has been repossessed, and the American economy has been transformed into lower-paying service-sector jobs. America remains in this trap so long as the prevailing wisdom is that market can do no wrong and government can do no good. We have not learned from the wisdom of George

Santayana: those who forget the lessons of history are doomed to repeat it. Judge Richard Cudahy has observed:

Economic activity and its political analogues are inherently cyclical, and regulatory institutions must be attuned to the cyclical nature of things. A good deal of the time, competition advances innovation and growth, but there is indeed sometimes such a thing as destructive competition. We have apparently known destructive competition, linked to predatory pricing, in the airline industry and may continue to know it. Competition in this industry has been destructive because on balance wealth has been destroyed and both tangible and intangible values have been undermined.

Competition itself has been weakened, and for that reason a return to some form of regulation is likely.

In the nineteenth century, market failure gave birth to transport regulation. The public interest in transportation was deemed paramount. Nearly a century after economic regulation was born, an inflationary economy, coupled with a perceived failure of the regulatory mechanism, gave birth to deregulation. Undoubtedly, the pendulum of American public policy will swing again. Like transportation itself, public policy in this vital infrastructure industry is in perpetual motion.

THE INTERSTATE COMMERCE ACT AS A MODEL OF REGULATION

Richard D. Cudahy

Senior Judge, U.S. Court of Appeals for the Seventh Circuit

This anniversary of the Interstate Commerce Act reminds us that this historic statute—corrective of notorious railroad abuses in the nineteenth century—is the model for “direct” regulation of business at both the state and federal level. In recent decades, this model, or “original paradigm,” of regulation has been widely supplanted by a “new paradigm,” as Kearney and Merrill termed it in *The Great Transformation of Regulated Industries Law*. The new paradigm is characterized by a narrowed application of direct regulation to bottlenecks or areas of monopoly power, as opposed to areas where competition in a relevant market is arguably adequate to maximize consumer welfare, induce efficiency, and adequately discipline the economic process without government intervention.

So the world has changed. Whereas the original paradigm was held to be applicable (as a constitutional matter) to businesses characterized as “affected with a public interest,” today the regulation of these same enterprises, which include public utilities, is usually said to depend (as an economic matter) on finding them to be capital-intensive “natural monopolies,” in which marginal cost remains below average cost over a full range of output and a sole provider is more efficient than competition. For example, state public service commissions traditionally regulated the electric power industry, but under the new paradigm, transmission and distribution are directly regulated, while generation is treated as workably competitive and spared government economic surveillance.

But the original paradigm is still useful. Direct regulation, as in the Interstate Commerce Act, generally involves principles of public interest applied by a regulatory authority (usually a commission) to commercial enterprises so as to combine the supposed efficiency of private enterprise with social needs supposedly democratically derived. This permits, the theory goes, surveillance of service as well as price, but we also know now that it is arguably less effective and

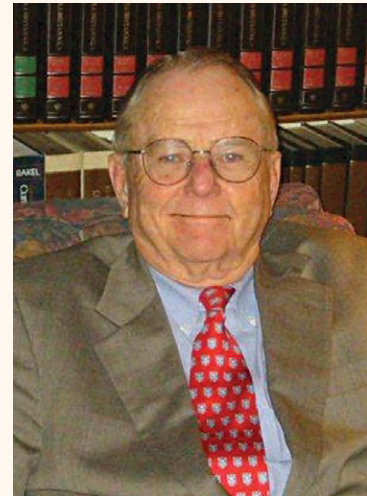
more open to improper influence than free and fair competition in a market, as prevails in the economy generally. In these circumstances, in evaluating the nature of regulatory

measures, one must attach appropriate importance to the evils sought to be corrected by regulation.

As all concede, in the case of the Act, the prime evil was discrimination in price and in other respects, highlighted by railroad rate favoritism to the Standard Oil Company, greatly enhancing its dominance. There was also acute concern about geographic discrimination disadvantaging certain agricultural areas and crops and giving rise to the undue favoring of long hauls over short. So it is not surprising that the Act not only moved sweepingly against discrimination (for its primary substantive end) but also deployed a uniform filed rate at the expense of a contract rate established in a competitive market (for its procedural means). As a further measure strongly advancing uniformity, totally destructive of competition, and also adverse to discrimination, the Act as amended authorized rate bureaus for collective rate-making.

As modified by subsequent legislation, the Act empowered the commission that it created to fix maximum railroad rates based on reasonableness and justice. This was a model for public-utility rate-setting, which usually involved establishment of a rate base reflecting invested capital and a rate structure generating revenues sufficient to cover expenses plus a return on the rate base sufficient to attract capital. The rate structure was then to distribute revenues to services generally in accordance with costs.

After the advent of the new paradigm, by contrast, there are still strictures against discrimination, but with less blunt tools than uniform rates on public file. Instead, ▶▶



the paradigm relies on competition, which (in a puzzling parallel) also involves price discrimination, although these price differences are presumably justified by cost. Perhaps the main reason for moving from the original paradigm to the market model was ideological, part of what has been called the “capitalist revolution,” which has been dominant since the 1980s, but which has been shaken by the recent financial crisis and economic downturn.

The move to the market paradigm from a regime of direct government regulation has been most unquestioned in industries, such as motor carriers and airlines, having no natural monopoly characteristics. But at least in the case of the airlines, deregulation has not been free of apparently fundamental problems. Economic regulation of the airlines by the Civil Aeronautics Act of 1938 was introduced not primarily to protect consumers but to make the industry viable and capable of being financed. The period of direct regulation, ended in 1978, has been the only one during which airlines have been profitable and apparently viable for the long term. Destructive competition—nonexistent in theory but a practical reality—is without any clear solution but seems to be leading to ever-more-massive consolidation within the industry—not a favorable omen for workable competition.

The Interstate Commerce Act, adopted in 1887, was a long time in gestation and at various times attracted some industry support, based in part on its potential for various sorts of joint ratemaking. But it was more

beginning than end. The contest that the Act signaled between the advocates of government regulation and exclusive reliance on natural forces and the market continues today.

This contest is prominent, for example, in the debate about “net neutrality” in the world of communications and the Internet. Net neutrality essentially means the historic openness of the Internet and the principles necessary to protect and promote it. The Federal Communications Commission recently approved net neutrality rules, in an effort to increase Internet service provider transparency; to prevent the blocking of access to any legal services, applications, and content; and to prohibit wired providers from “unreasonable discrimination” of content or services. Opponents of such regulation argue that Internet communication has developed historically through the action of market forces free of regulation and giving maximum scope to innovation and creativity—and that future progress is threatened by regulation. Advocates of regulation, on the other hand, not unlike their predecessors in the 1880s, see discrimination, perhaps in the form of fees for assured access and priority, as a major threat to net neutrality.

The Interstate Commerce Commission may be gone. However, the larger battle goes on as to whether regulation controls the abuses of freedom or obstructs the creative process springing from unregulated freedom—or at least as to which of these functions is dominant. ▶▶

“Perhaps the main reason for moving from the original paradigm [represented by the Interstate Commerce Act] to the market model was ideological, part of what has been called the ‘capitalist revolution,’ which has been dominant since the 1980s, but which has been shaken by the recent financial crisis and economic downturn.”

76th Congress of the United States of America

At the Second Session,

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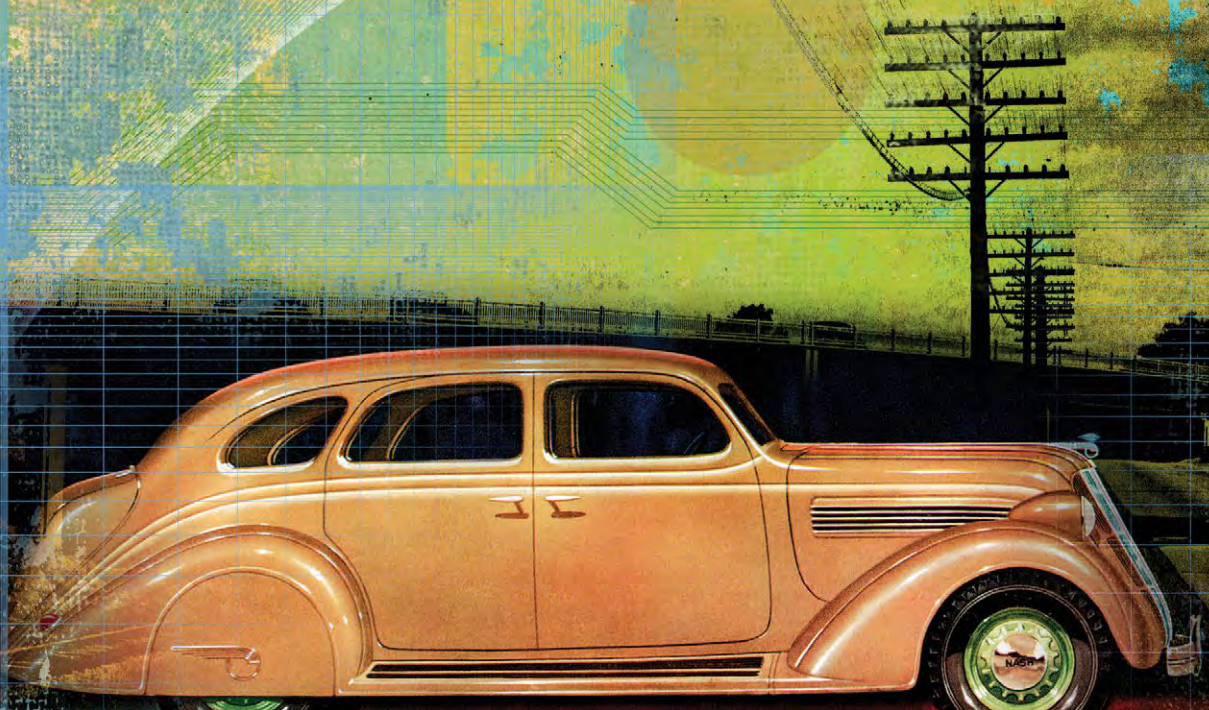
- Newfoundland Express Company
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- Northern Express Company
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- United States Express Company
- Wells Fargo & Company Express
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Concurring Carriers:

Halifax & Southwestern Railway (Express Department)

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the Commerce Commission, Canadian Railway Commission, State of New York, First and Second District, U. S. Army, Agent, R. R. Station, Wash. D. C.



SUPERVISING DISCRIMINATION: REFLECTIONS OF THE INTERSTATE COMMERCE ACT IN THE BROADBAND DEBATE

James B. Speta

Professor, Northwestern University School of Law

“The forms of action we have buried, but they still rule us from their graves.” For a telecoms lawyer asked to reflect on the 125th anniversary of the Interstate Commerce Act, F.W. Maitland’s famous line concerning common law procedure leaps to mind. The 1887 Interstate Commerce Act (ICA) continues to exert an outsize influence on the world of telecommunications—despite changes in both the ICA and telecoms. The ICA’s original commitments of just and reasonable rates, nondiscriminatory service, and supervision by an administrative agency were, as is well-known, copied from the railroad statute into numerous other federal regulatory regimes—including the Communications Act of 1934. And while the ICA’s structure steadily changed in the 1970s and 1980s, leading to the Interstate Commerce Commission’s eventual demise in 1996, the Communications Act remains the controlling statute for an enormous, and increasingly important, segment of the American economy—notwithstanding that telephones, telegraphs, and broadcasting (the objects of that Act) are no longer the important services.

In fact, the most persistent issue for the Federal Communications Commission (FCC) in recent times has been—and remains—in the realm of broadband services: specifically, the application of “nondiscrimination” rules to the Internet. Both the FCC and commentators discuss this issue as if it were, in part, simply the extension of nondiscrimination obligations codified in 1887 and 1934 and behave as if nondiscrimination notions under those statutes might illuminate the modern debate. I have done the same, and perhaps even worse by reaching back to the common law of common carriage, and there is at least some purchase to be had in all this, because, as the literature says, “non-discrimination was unquestionably the overriding goal of the Interstate Commerce Act, taking precedence even over the ‘just and reasonable’ [rate] requirement.”



But, as important as the nondiscrimination obligation was to the regulatory model

initiated by the ICA, much of the current telecoms (or broadband) debate forgets that nondiscrimination was merely one aspect of a regulatory system in which all aspects of a carrier’s services were supervised. And under that supervision, discrimination was frequently allowed—after all, the statute forbade only “unjust discrimination,” which gave the regulators considerable flexibility. Moreover, discrimination was frequently *required* in this regulatory model, in the name of universal service. This richer history should allow a better consideration of the modern, broadband problem.

I. “NONDISCRIMINATION” IN THE CURRENT TELECOMS DEBATE

One influential commentator in the debate over the proper rules for broadband regulation (Tim Wu) has made the pitch that “in coming decades . . . the main point of the telecommunications law should be as an anti-discrimination regime, and that the main challenge for regulators will be getting the anti-discrimination rules right.” He is hardly alone. And the FCC’s only significant foray into Internet regulation has been to impose nondiscrimination rules on Internet access providers, first issuing a (since-vacated) cease-and-desist order against one provider and following more recently with generally applicable rules providing that “[f]ixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.” Virtually no one calls for the other economic elements of the original regulatory paradigm, such as renewed restrictions on entry and exit, or the return of rate-regulation. And while few call for the FCC to be abolished, everyone (including

the FCC) agrees that its touch should be lighter, more ex post, more deferential to private companies. The FCC itself describes the Open Internet rules as “high level,” indicating that they will be applied case-by-case through private negotiation, private standard-setting, and, only as necessary, complaint and enforcement actions through the agency.

Those pushing for modern, Internet nondiscrimination rules frequently invoke their statutory history—from the ICA through the original Communications Act. The FCC invoked the Interstate Commerce Act when it forbade “unreasonable discrimination” by broadband carriers, although the reference came in rejecting calls for stronger nondiscrimination rules. More recently, in setting up his project for broadband anti-discrimination rules, Tim Wu argued that “[a]s an anti-discrimination regime, common-carriage is important both historically and conceptually.” Similarly, Susan Crawford has said that modern market conditions require returning to the old ways—that “[w]e need to return to the basic notion of a non-discriminatory network underlying communications. . . . [T]he old paradigm of regulation is new again—with a few changes.” The foresighted work of Ithiel de Sola Pool expressly argued for common carrier rules for new electronic networks, where monopoly conditions warranted. Even the opponents of network neutrality rules make the connection between those rules and the historic nondiscrimination regime of the Interstate Commerce Act. For example, Bruce Owen, intending no compliment, has written that “[p]roponents of net neutrality may recognize their own fears and goals . . . [in] the legislative history of the first modern attempt by the federal government to regulate directly the behavior of large firms, in this case railroads. The result was the 1887 Act to Regulate Commerce.”

II. THE SHIFTING NORMS OF NONDISCRIMINATION UNDER ICA STATUTES

A call for broadband nondiscrimination rules as an extension of the nondiscrimination requirement of the ICA and of the Communications Act misses two important pieces of the history of those regimes. As already noted, the statutory text forbade only “unjust” (or “unreasonable”) discrimination, and the regulators sometimes used that discretion to approve discriminatory rates. More importantly, the goal of universal service, especially in the Communications Act, meant that the regulators affirmatively valued discrimination—discrimination that helped maintain artificially low prices for some services while ensuring that the carrier met its total revenue needs.

The common law did not impose a strict non-discrimination duty on common carriers—so long as rates were reasonable, they did not have to be equal. The ICA was undoubtedly meant to do more. Specific provisions forbade much long- and short-haul discrimination, and the statute generally forbade unreasonable discrimination. It is sometimes said of the Interstate Commerce Act (this is the D.C. Circuit in *Sea-Land Service, Inc. v. ICC* in 1984) that “[t]he core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.”

But introducing the idea that the tariffed rate may respond to competitive conditions—that discounts can be approved (*Sea-Land* again) “on grounds of reduced costs and the need to meet intermodal competition”—



“The 1887 Interstate Commerce Act . . . continues to exert an outsize influence on the world of telecommunications—despite changes in both the ICA and telecoms.”

“The FCC and advocates for broadband nondiscrimination may take one part of a system and not others, but should acknowledge—and explain—their selectivity.”

eliminates any need for “costs” to serve as the basis of a nondiscrimination requirement. Moreover, the Interstate Commerce Commission early implemented “value-of-service pricing,” under which high-priced commodities were charged more (regardless of cost of transport). And even further deviations from nondiscrimination were permitted: “The Hoch–Smith Resolution, passed by Congress in 1925, explicitly required the ICC to give consideration to the relationship between agricultural freight rates and agricultural incomes and has been interpreted as giving clear legislative sanction to the maintenance of the value-of-service rate structure” (Friedlaender & Spady, 1980). These practices had economic and noneconomic explanations. Economically, value-of-service pricing “may have been a roughly adequate method of concentrating the fixed costs of railroad service on those customers whose demands for rail transportation were least elastic” (Richard Posner, 1971), and permitting rate concessions upon the development of intermodal competition allowed the railroad to keep the traffic at some rate (maintaining at least a marginal contribution to fixed costs). Non-economically, low prices for agricultural commodities no doubt were popular.

That did not mean that nondiscrimination was a dead letter, to be sure. Formal nondiscrimination requirements persisted. Even when the ICC and later the FCC (and the courts) approved contract rates, the law required that a carrier offer the rate to any party that could meet the exact terms of the rate. Extreme formalism came in the Communications Act context, when the FCC approved what were known as “contract tariffs”—service packages that, while tariffed, in most cases could be met by only one potential customer. Moreover, substantive nondiscrimination cases did occur, and the regulators did, from time to time, hold that tariffs for similar services were discriminatory.

The point, though, is that nondiscrimination, while an important rule, was very much applied based on the overall context, and that context was part economic and part noneconomic. Economically, railroads had high fixed costs, which needed to be recovered. Non-economically, the Interstate Commerce Act’s politics excluded recovery of those fixed costs against the most captive customers (the short-haul, agricultural customers). As competition developed, further concessions from the traditional modes of proceeding, including non-discrimination, were required. Consider the D.C. Circuit’s statement in one of the telecommunications contract tariff cases: “We have the impression that there is a certain air of unreality about this case. The FCC (one way or another) will undoubtedly permit AT&T to compete effectively against its competitors”

Little need be added about universal service, for the point is now clear. Regulators wanted universal service (and, in the case of railroads, cheap agricultural service, and, in the case of telephones, cheap local residential service). This meant cross-subsidies, some of which necessarily violated any notion of cost-based non-discrimination. In telephony, business rates were higher than residential rates, even if the business and the residence shared the same address. Long-distance rates were made uniform, even though the costs were higher on lightly used trunk routes.

III. LESSONS

What does this mean for the debate over broadband nondiscrimination rules? Without doubt it means that one cannot simply say that the Interstate Commerce Act and the Communications Act adopted nondiscrimination rules for essential services, and therefore such non-discrimination rules should now be adopted for broadband carriers (because broadband service is

becoming essential). And one also cannot say that nondiscrimination rules are the response to broadband monopoly, for of course the monopoly is incomplete. The business access market is likely more robustly competitive (as it was in traditional telephony in the 1990s) than the residential market. Under the traditional scheme's permission of rate discounts to respond to competition, the result would be to allow carriers to charge businesses less than residential customers. But, of course, the universal service imperative of the traditional regime would *not* in fact have permitted that result, for what were largely noneconomic (or at least distributional) grounds.

These conflicting forces have always been conflicting, but they could be resolved by a traditional regulator such as the ICC or the FCC in a system in which entry was legally and practically limited, and in which the regulator had the tools to ensure that carriers would receive adequate overall returns. Applying non-discrimination rules while attempting to maintain the essentially unregulated nature of Internet carriers is a much trickier enterprise, and it is not clear how the new system can adapt to balance these concerns. On the one hand, the FCC's recent foray attempts to meet

this concern by only stating a high-level principle of nondiscrimination and promising to adjudicate disputes. Adjudication may allow the FCC to forbid only particularly problematic practices, minimizing its intrusion into the business practices of the carriers, and to consider any legitimate business justifications offered by the carriers for specific services. On the other hand, the FCC has rejected the notion that discrimination is only a concern when it can be expressly linked with anticompetitive foreclosure (which would be an instance in which the carrier is making *more than* normal profits). As a result, the Open Internet Rules have the potential to impose important business restrictions on the carriers, while the FCC no longer comprehensively supervises them and assures the adequacy of their revenues.

In short, while the Interstate Commerce Act's nondiscrimination requirement provides something of a model for the broadband world, the rule was part of a system—a system in which nondiscrimination was never absolute and that allowed compensation for its costs. The FCC and advocates for broadband nondiscrimination may take one part of a system and not others, but should acknowledge—and explain—their selectivity. ■



Downtown Milwaukee ca. 1900 (right)
and in 1912 (immediately below).
Wisconsin Historical Society
(WHI 24987 and 4690).





WAS WISCONSIN'S DEMOCRATIC PARTY BORN ON THE SITE OF ECKSTEIN HALL?



On May 14, 2012, the U.S. District Court for the Eastern District of Wisconsin and its bankruptcy court held a special session in memory of the late Judge Dale F. Ihlenfeldt. Speakers included Marquette Law School Dean Joseph D. Kearney, who remembered for those assembled Judge Robert E. Tehan, L'29, and the world of Milwaukee in the first half of the twentieth century.

Thank you, Judge Shapiro, and May It Please the Court. I am here representing the late Dale Ihlenfeldt. I appreciate that this is an especially implausible claim: I knew him least among the speakers and will say almost nothing of him. Yet I am confident in my authority. Let me explain.

I saw Dale Ihlenfeldt one year ago at the Milwaukee Bar Association's annual memorial service. Shortly afterward, he called me: he wished to give me a biography that he had written of the late Robert Emmet Tehan, United States District Judge for the Eastern District of Wisconsin from 1949 until his death in 1975. I should want to know more about him, Judge Ihlenfeldt thought, because Judge Tehan was a Marquette.

He was right, of course: I have always regretted that Tehan seems a sort of forgotten district judge. So I went over, that very afternoon I think, to the house on Marietta Avenue (Judge Ihlenfeldt said that he would turn the Christmas tree lights on for me). There the judge greeted me more generously than suits my office, and I sat on a couch that had once been in Judge Tehan's chambers—and I listened and learned.

What I learned more than anything was that Judge Ihlenfeldt, in his 90s and, let us acknowledge, dying, wanted to perpetuate a judge's memory—not his own but Judge Tehan's. I left with a book, a biography of Judge Tehan that Judge Ihlenfeldt had written—and, I think, with an obligation. So, just to add to the mix that we have in this story here among the Presbyterians and the Catholics, and with Judge Shapiro's indulgence, permit me this mitzvah. It's at Judge Ihlenfeldt's bidding; this is a story he wanted told.



Judge Dale F. Ihlenfeldt

Milwaukee Journal-Sentinel © 2012. used with permission

RIGHT This overlaid page from the *Sanborn Fire Insurance Maps* (1909) shows (with a quarter-circle) the approximate relative location of Eckstein Hall (built 2010), at the corner of 11th and Sycamore (now Michigan), and to the east (with a rectangle) the property in the Tory Hill neighborhood on which Judge Tehan lived most of his life. *Courtesy of the Milwaukee Public Library.*



BELOW The 1950s aerial view of Milwaukee begins (in the bottom left-hand corner) along Wisconsin Avenue and looks southeast, past the Church of the Gesu (built 1893), toward the Tory Hill neighborhood, before the construction of Milwaukee's central highway interchange. The site of today's Eckstein Hall is right in the middle of the photo, on the right side of Michigan Street (which then ran south of Gesu) and west of 11th Street and the Tehan family house. *Marquette University Archives.*



If you stood today where Judge Tehan was born in 1905, you would, I believe, be in Eckstein Hall, or at least in its afternoon shadow. This was 534 N. 11th Street (as it would be renumbered in the early 1930s), before 11th Street was made to curve. Let us spend a bit of time in that neighborhood—for Judge Tehan spent pretty much his entire life there (indeed, in that house, before it was torn down for freeway construction in the 1960s). This was the improbably named Tory Hill neighborhood.

Judge Tehan recalled in 1963: “To list our neighbors is like calling the roll of the Ancient Order of Hibernians. There were the Sullivans, the Rices, the Dalys, the Kinsellas (Billie was President of Worden-Allen, and President of the Athletic Club), the Lynchs, the Sheehans, the McDonoughs, the McGoverns (Bill McGovern, who was President of the Telephone Company), the Collopy, the O’Donnells (Father O’Donnell, who

was the President of Marquette University), the McCormicks, the McDermotts, the O’Connells, the Murrays and the Hennigans.”

Recalling a song of the era, one almost expects to hear of a young Bob Tehan tripping the light fantastic with Mamie O’Rourke on the sidewalks of Milwaukee. sidewalks of New York was a better rhyme.

Truly, this was another world, several times over. The center of “all of the social and religious life,” Judge Tehan recalled, was initially not Gesu Church (as it had become by his birth in 1905) but St. Gall’s, “at the corner where the Electric Company now is,” or, that is to say, at 2nd and Michigan (or if you prefer, Sycamore, as the street was then called, west of the river). Listen



Judge Robert E. Tehan (1968)

Wisconsin Historical Society (WHI 96547)



This photograph of downtown Milwaukee, ca. 1910, looks east down Grand Avenue (today Wisconsin Avenue). Wisconsin Historical Society (WHI 54882).

to Judge Tehan recalling this world in 1951, to the Employees’ Mutual Benefit Association, at a memorial service:

In retrospect, the Milwaukee of 1910 to 1915, appears a sedate and unhurried, well-ordered way of life. Many of the departed would well remember with me that Milwaukee of the Gas Light era, with its wooden side-walks, and unpaved roads, of brewery wagons pulled by sturdy, handsome horses, of Wells-Bach mantles—the Milwaukee of the Five-cent beer, and free lunch—and then too, free sausage from the butcher for the boy who ran errands for his mother. They would remember with us winter’s snow-packed streets, and winter’s then only known transportation, the streetcar and the jingling sleighs. . . . the streetcars [with] their five-cent fare, and their two men crews and the little pot-bellied stoves round which the

passengers would converge on a day like this. . . . Then too, they would remember the titanic political struggles in those days between La Follette Progressivism and Conservatism, between the Milwaukee Socialist Party and the Non-Partisan policy. And unforgettable too, would be the impact of Europe's war upon our serene way of life in 1914, and culminating in our own participation in 1917. As a boy of 13, I passed this building many times to watch and cheer, and wave, as the Troop Trains pulled out of The Milwaukee Road station . . . , and they would remember too, the emotions of hate and suspicion that were abroad in our land, of the transformation of sauerkraut to liberty cabbage, and the Deutsche Club to the Wisconsin Club.

Judge Tehan might have been called, for an impossible term today, a "4M'er"—receiving his education not simply at Marquette Academy (or Marquette High), Marquette University, and Marquette Law School, but, before all that, at Gesu Grade School. His high school transcript—replete with Latin and Greek and the like—discloses a



The boys of the 1919 eighth-grade class, photographed in front of the Gesu School, included Robert E. Tehan, third from the left in the back row. There were separate classrooms (and entrances and playgrounds) for the school's boys and girls. *From Judge Ihlenfeldt's biography of Judge Tehan (2009).*

very smart young man (only two grades below 90 in his four years, and most closer to 99, on the numbered scale that I remember from my own days at St. Ignatius in Chicago but that one could scarcely find anywhere today). Judge Ihlenfeldt wrote this of one of the two below-90 grades: "It would be of great interest to know the story behind that grade of 70 [in the first semester of his third year] in 'Christian Doctrine', but alas, it probably died with RET."



Robert E. Tehan takes the oath of office to serve as United States District Judge in Milwaukee in 1949. *Wisconsin Historical Society (WHI-96550).*

Judge Ihlenfeldt called him "RET" throughout his biography. He was not yet Judge Tehan, and I think that Judge Ihlenfeldt could not bring himself to refer to the man (or even the boy) as simply "Tehan."

So Bob Tehan practiced law upon graduating from Marquette in 1929—and after taking the bar, there being no diploma privilege yet for Marquetters (I told you that this was another world). But his love was people—and politics. He married and had sons (he and his wife would later separate). Tehan was elected a Democrat to the Wisconsin Assembly in 1936 and to the Senate in 1942. There was almost no Democratic Party to speak of in Wisconsin in those days. From 1922 to 1932, the state assembly averaged 90 Republicans, some 7 Socialists, and a fraction more than 2 Democrats. The state senate during that time period averaged 31 Republicans, 2 Socialists, and 0.2 Democrats. As late as 1946, although the Socialists were gone from the legislature, well more than 80 percent of the representatives and senators were Republicans.

And who nurtured the Democratic Party in Wisconsin so that its fortunes would begin, however slowly, to change in the late 1940s? Foremost, Robert Tehan, from posts such as party chairman. Frank Zeidler would recall this in 1988: "When the Progressive Party began to decline as a movement after the 1940 national elections, it was an easy step for the majority of the younger leadership of the Progressive Party and for some former Socialists to become Democrats because of ties with Bob Tehan"



TOP From left to right are Julia Boegholt, Robert E. Tehan, and Alben W. Barkley, vice president of the United States (undated, likely 1949). *Wisconsin Historical Society (WHI 96553).*



LEFT This photograph was taken at the 1956 jubilee mass and dinner in honor of Edward J. Morgan, S.J. From left to right are Edward J. O'Donnell, S.J., president of Marquette University; Father Morgan; Robert E. Tehan; William P. O'Connor, Bishop of Madison; and Father Morgan's cousin, Everett P. Morgan, S.J. *Wisconsin Historical Society (WHI 96548).*

Things changed, but not altogether, when President Truman appointed Tehan U.S. District Judge in 1949. As Miles McMillin later would recall in the *Capital Times*, “Stop of an evening [at the house on 11th Street] and you might find Jim Doyle there, or Tom Fairchild, or Gaylord Nelson, or Bill Proxmire, or Pat Lucey, or John Reynolds, or Horace Wilkie, or Carl Thompson, or Henry Maier,” these all being younger men Tehan helped bring to the party. “One night in his kitchen,” McMillin remembered, it was “Jack Kennedy.”

I've told you nothing of Judge Tehan's judicial career. Nor will I, for time-related reasons only (I just started borrowing from Tom Shriner's allotment), save to say that, as you likely know, Dale Ihlenfeldt, only a few

years out of the Pacific Theatre, was Tehan's second law clerk, after Irv Charne. What initial affinity the Irish Roman Catholic Marquetter from the west side of Milwaukee might have felt for the German U.W. Presbyterian from Two Creeks, I cannot say. Perhaps Tehan was looking for a good law clerk. This would lead to Tehan's appointing Ihlenfeldt as clerk of the court and, later, to the initial bankruptcy appointment.

You will find rather little directly of Dale Ihlenfeldt in the biography that he wrote of Robert Tehan. But you will find some *impressive* research, and you will find much evidence of a man who was smart, loyal, likeable, and grateful. Two men, actually.

Thank you. ■

Honorable Diane S. Sykes

Law School Hooding Ceremony

The Honorable Diane S. Sykes, a judge of the U.S. Court of Appeals for the Seventh Circuit since 2004 and a former member of the Wisconsin Supreme Court, spoke at the Law School's Hooding Ceremony on May 19, 2012, in the Milwaukee Theatre. Judge Sykes welcomed her new fellow Marquette lawyers and, in so doing, recalled the late Dean Howard B. Eisenberg and the late Judge Terence T. Evans, L'67.

Dean Kearney, distinguished members of the faculty, family and friends of the graduates, thank you for the invitation to join you this evening to celebrate the Marquette Law School Class of 2012. As a fellow Marquette lawyer—Class of 1984—I am honored to be the first to congratulate the newest Marquette lawyers and to warmly welcome you to membership in the profession that we now share. This is a pivotal moment for you, as it was for me when I received my Marquette J.D. You've reached an impressive academic milestone by dint of your commitment and hard work—serious and sustained intellectual effort guided by gifted professors and helped by the love and support of your families. A law degree signifies high scholarly achievement; your families are immensely proud, and you should be too.

But there's more to it than that, for the study of law is not just an intellectual discipline but a process of formation—and especially so at Marquette, where the study of law is informed by the University's Catholic and Jesuit identity. This was true of Marquette Law School when I was a student, and from what I have seen at the Law School lately, it is all the more true today. The four words etched in stone in that beautiful fireplace in the magnificent Aitken Reading Room—Excellence, Faith, Leadership, and Service—are abiding aspects of a Marquette legal education. They are *foundational* virtues, infused in the program of study the Law School imparts to its students. They are also *aspirational* virtues in that Marquette lawyers are encouraged to carry them into the practice of law when they leave.

I have had the great pleasure of working with some of you as interns in my chambers and have gotten to know others in occasional guest lectures, in seminar discussions, at the moot-court competition, and at special ceremonies and other events—both in Sensenbrenner Hall and in the Law School's extraordinary new home. I hardly need to remind you (but I will anyway) that you

are the last group of students to have experienced the charms and challenges of Sensenbrenner Hall and the first to inaugurate the quite spectacular Eckstein Hall. The old building served generations of Marquette lawyers well; it is where, for example, the late Dean Robert Boden welcomed my classmates and me in 1981. But it could not support the continuity of the Law School's core teaching mission, much less accommodate its growth or its development as a forum for civil discourse on the important legal and policy issues of the day. In Eckstein Hall, the traditional mission of the Law School has room to grow; this exceptional new building makes the Law School's enhanced mission possible.

In this sense you are a transitional class of Marquette lawyers, a bridge between the best of the old Law School and the promise of the new. There is a metaphor in this. The practice of law requires both continuity and growth—a deep understanding of legal principles born of reason, tradition, and experience and tested by time, but also a mind alert to present needs and the future consequences of public and private legal decisions. I know that your time at Marquette Law School has helped you appreciate this. You have mastered the procedural and substantive law that you need to succeed as members of the profession. But you have also been encouraged to contemplate how the law is rightly deployed in the service of others, in the promotion of human dignity, and in the pursuit of the common good. I have no doubt that every one of you is capable of first-rate legal work. I am also confident that you have internalized the teaching that ours is fundamentally a service profession, and our work in the law should always be grounded in personal integrity, oriented toward a search for the truth, and aimed at the promotion of human flourishing.

Twenty-eight years ago I sat where you sit, waiting for my turn to shake hands with the Dean and receive my diploma. I would soon begin work as a law clerk to

Judge Terence Evans of the United States District Court for the Eastern District of Wisconsin. Judge Evans was himself a proud Marquette lawyer—Class of 1967—and he lived out the values I have just mentioned in a unique and memorable way. In 1995 he was elevated to the Seventh Circuit, and in 2004—twenty years after I began my clerkship—I was given the rare privilege of joining “my judge” as a colleague on the court. Terry Evans died last summer of a sudden illness. Permit me a few minutes to remember him. He had an important influence on the law and our legal community, and he always credited Marquette for what he achieved.

Terry Evans grew up in very modest circumstances. He was raised by his mother in a rented upper flat in Milwaukee’s working-class Riverwest neighborhood. He was an unremarkable student at Riverside High School but also a track star, and he enrolled at Marquette University on a track scholarship. After graduation he married his college sweetheart, Joan, and taught history at North Division High School. He was pretty much an accidental law student; he took the entrance exam on a whim because Joan’s brother was doing so. But he found his purpose at Marquette Law School and did well, attributing his success to the Law School’s supportive environment. He later said that “Marquette held my hand for that first year.” He landed a clerkship at the Wisconsin Supreme Court in the chambers of Justice Horace Wilkie. After clerking he returned to Milwaukee and did a brief stint in the District Attorney’s office before moving to private practice. During this time, he and Joan were blessed with three children. In 1974—at just thirty-four years old—he was appointed to the state trial bench in Milwaukee County. Not quite six years later, he was confirmed to the federal bench. Thus began a remarkable and influential tenure as a federal judge.

For thirty-two years—sixteen on the district court and another sixteen on the Seventh Circuit—Terry shared his wit, his wisdom, and his warmth, both on the bench and off. He will be best remembered for his work as an appellate judge, but some of us were privileged to practice before him in the district court. He was a superb trial judge. We generally think of judging as dispassionate and detached, but in Terry’s hands it was a decidedly human endeavor. He was genuinely interested in *the people* in his courtroom as well as their cases. He deeply understood Milwaukee and Wisconsin—the people, traditions, and institutions of our city and state. (This included a vast repository of knowledge about our sports franchises.) He had a pragmatic approach



to deciding cases and a disarming sense of humor that made him a favorite of everyone who came into his court. He took it as part of his job to give guidance and direction to the lawyers—especially the young lawyers—who appeared in his court, just as he had been helped by the training he received at Marquette. Many of his “teachable moments” would take the form of a funny aside, which made the medicine easier to take. Here is a famous example:

In a decision denying a routine motion for leave to amend a complaint, Judge Evans dropped the following footnote (and I will omit the name of the offending law firm to protect the innocent):

(1) The story of the creation of the world is told in the book [of] Genesis in 400 words; (2) The world’s greatest moral code, the Ten Commandments, contains only 279 words; (3) Lincoln’s immortal Gettysburg address is but 266 words in length; (4) The Declaration of Independence required only 1,321 words to establish for the world a new concept of freedom. Together,



“ [Y]ou are a transitional class of Marquette lawyers, a bridge between the best of the old Law School and the promise of the new. There is a metaphor in this.”

the four contain a mere 2,266 words. On this routine motion to amend a civil complaint, [the law firm that shall remain nameless] has filed a brief . . . that contains approximately 41,596 words spread over an agonizing 124 pages. In this case, the term . . . “brief” is obviously a misnomer.

When Terry arrived at the Seventh Circuit, he brought his talent as a storyteller and his capacity for writing clear, pragmatic opinions. He loved to sprinkle his opinions with sports trivia, music lyrics, and movie references. He would get the legal job done, too, but he did it with such straightforward reasoning and clean writing that he made the law accessible to everyone. One newspaper columnist in Milwaukee described Terry’s opinions this way:

[They were] not at all pretentious. He didn’t try to solve all the world’s ills in one fell sentence. He got to the nub of things and did it with rare intelligence and wit, . . . [and he] made them relevant to the masses.

. . . .

[He] left a very big and public mark. But he left lots of little ones, too.

Terry Evans brought a practical wisdom to his work, and his humane approach to the law is well worth emulating. He understood that he couldn’t solve all the big problems in the law and had the humility not to try. But through his commonsense brand of judging, he touched countless individual lives and made the law and our legal community better.

In 1971, three years after he finished his clerkship with Justice Wilkie, Terry stopped by to visit the justice on a trip to Madison. Justice Wilkie introduced him to his newest law clerk, for whom he had effusive praise. The justice described his new clerk as a “superstar” and “a very special law clerk indeed.” That new law clerk was Howard Eisenberg, who also has a special claim on our gratitude as Marquette lawyers. As Dean of

the Law School from 1995 until his untimely death in 2002—ten years ago next month—Howard Eisenberg provided visionary leadership and an inspiring example of what it means to put the law in the service of others and the common good. He revitalized the faculty, bringing in many of the outstanding and energetic teacher-scholars under whose direction you have learned the law. He reinvigorated the Law School’s service mission, not just by what he *said* but by what he himself *did*, in the dozens of pro bono appointments he accepted from the state supreme court and the Seventh Circuit, and in his tireless work on community and court initiatives. He strengthened the academic quality of the student body. In this, as in other things in life, success breeds success—just look at the impressive group of new Marquette lawyers sitting in this hall. And as a Jewish dean of a Catholic law school, he embraced Marquette’s Jesuit mission—even going so far as to accompany Janine Geske and a group of local lawyers and judges on a retreat in the Dominican Republic just to see what Ignatian spirituality was all about. This included daily Mass. I can tell you, because I was there, that Howard was not just along for the ride; Marquette’s Jesuit ideals were important to him, and he was passionate about perpetuating them.

Howard Eisenberg was a transformational figure in the life of this Law School. Dean Kearney and the faculty have consciously built on his uplifting work. So it is right to remember him this evening. In a very real and substantial way, he has had an impact on your legal education. I commend his example to you. In the words of Professor Geske, Dean Eisenberg “called each one of us to a higher level of service, integrity, and excellence.” Or to use Howard’s own shorthand expression, he called on us to “do well and do good.”

I extend his call to you. I know you will answer it. Congratulations and welcome to the legal profession. ■

1967

Michael J. Zimmer gave the 2012 Fairchild Lecture at the University of Wisconsin Law School, speaking on "Inequality, Individualized Risk and Insecurity." He is a professor at Loyola University Chicago School of Law, specializing in employment discrimination law, labor and employment law, and constitutional law.

1968

William A. Jennaro received the Lifetime Achievement Award from the Milwaukee Bar Association at its 154th annual meeting this past June.

1971

Caroline Lawrence Kinzer has published *Men, Music, and Mirth*, an amalgamation of several genres: personal memoir, travel adventures, commentary, and, above all, a family saga. She resides in Palm City, Fla., with her husband, William Philipbar.

1972



Timothy P. Crawford, Racine, Wis., recently received the National Academy of Elder Law Attorneys' Outstanding Member Award from the academy's Wisconsin chapter.

1974

Mike Piontek has been elected a judge on the Racine County Circuit Court.

1975

John Patterson has been named chief executive officer of United Vision Logistics, a logistics services provider headquartered in Lafayette, La.

1976

Mary Pat Jacoby was selected as a "2012 Women in the Law" honoree by the *Wisconsin Law Journal*. She is a partner in the Milwaukee office of Quarles & Brady.

1979

Frank Steeves was recently featured in *Profile* magazine. He is executive vice president, general counsel, and secretary for Emerson Electric Co., St. Louis, Mo.

1982



Michael J. Gonring received the Pro Bono Award for Lifetime Achievement from the State Bar of Wisconsin's Legal Assistance Committee. He also received the Milwaukee Bar Association's

Distinguished Service Award in June. Gonring is a partner in the Milwaukee office of Quarles & Brady.

1987

Captain Rob Blazewick, JAGC, U.S. Navy, presented lectures on Law and Strategy, Weapons of Mass Destruction, and Transnational Terrorism as part of a conference he directed this past May on homeland security. The conference was held in Ashgabat, Turkmenistan, for the leaders of several national ministries.

Christie A. Christie received her Ph.D. in Urban Education, Multicultural Studies, from the University of Wisconsin-Milwaukee this past May. Christie is a staff attorney at the Legal Aid Society of Milwaukee, guardian ad litem division, and an adjunct professor at Marquette University Law School and MATC.

1988

Wendy Selig-Prieb has been named president of Worth New York, a division of the national women's fashion company, The Worth Collection, Ltd. She has been with the company since 2005.

1990

Antoinette C. Robbins, Philadelphia, Pa., recently served as a panelist during a Women's Summit hosted by Philadelphia Councilwoman Blondell Reynolds Brown and the African-American Chamber of

Commerce of Pennsylvania, New Jersey, and Delaware. Robbins is the senior compliance officer of Delaware Investments.

1991

W. Richard Chiapete has been appointed District Attorney for Racine County, Wis., where he has served as deputy district attorney since 2005.

1992

Timothy S. Jacobson had his thriller, *The Kurchatov Penetration*, reviewed favorably in the June 2012 issue of "Wisconsin Bookwatch." *The Kurchatov Penetration* was featured on Amazon's Best Sellers-Top 100 lists for both April and May 2012.

Christine Liu McLaughlin has been named a "2012 Woman of Influence" in the Inspiration category by Milwaukee's *Business Journal*. McLaughlin is a shareholder with the Milwaukee office of Godfrey & Kahn and chairs the firm's Women's Leadership Forum and Diversity Committee.

1993

Brian Wright has been appointed District Attorney for Eau Claire County, Wis.

1996

Kelli S. Thompson has been elected 2013 chair of the State Bar of Wisconsin Board of Governors. Thompson has served in a number of leadership roles at the State Bar, including chair of the Bench Bar Committee and member of the Access to Justice Commission.

1998

Daniel Finerty has joined Lindner & Marsack, a firm specializing in labor and employment law. Finerty will assist clients with labor and employment litigation and compliance and counseling matters. >>

Marquette lawyers and the Milwaukee Justice Center

At the intersection of need and help, the Milwaukee Justice Center is being built. Marquette is involved in a big way—from Marquette lawyers to Marquette Law School students and staff and even Marquette undergrads.

The need has two key elements. First, the people: Thousands of low-income residents of Milwaukee County, whose situations bring them to the civil courts for what are, in the big picture, small matters. They generally cannot afford to hire lawyers, and more than 80 percent of those eligible for free legal services are not able to obtain them. Second, the system: Without guidance or help available to them, the people, their unfamiliarity with legal processes, and their cases impose a big load on the functioning of the courts.

An increasingly valuable part of a solution: The Milwaukee Justice Center, based in the Milwaukee County Courthouse and offering thousands of people free resources to guide them toward accomplishing what they need. People are able to get brief legal advice from volunteer attorneys. Launched in 2008, the Justice Center is a collaboration of the Milwaukee Bar Association (and its foundation), Marquette University Law School, and Milwaukee County.

And at the heart of the solution: The people who get involved. The center is “a shining example of what happens when people work together,” says executive director Dawn Caldart. As a way of applauding the many who are involved, we spotlight four with particular Marquette Law School connections.

Dawn R. Caldart

After working at Kohl’s for about a decade, Dawn Caldart, L’01, wanted new challenges. She considered a career in the health field but, while working at Children’s Hospital of Wisconsin, became interested in the intersection of health and the law. That led her to attend Marquette Law School and become actively involved in pro bono efforts. Caldart worked in private practice and for the AIDS Resource Center of Wisconsin for several years.

In 2007, she and her husband, Tom, adopted two children from Ethiopia. “They have just filled us up in ways we didn’t know that were missing,” she says. After taking a break from work, she returned to law, looking for something that also would be fulfilling. She says she has found it as executive director of the Milwaukee Justice Center.



Laura Now, Michael Hupy, Dawn Caldart

The center served about 6,600 people in 2010, about 8,000 in 2011, and is expected to go beyond 10,000 this year, Caldart says. Its service includes self-help desks staffed by volunteers, including Marquette undergrads, and clinics on Thursdays and Fridays in which attorneys, many from major law firms, offer legal advice. Marquette law students work with the attorneys and help in other roles. The large majority of people who come to the center need help with family law matters. Landlord-tenant issues and small claims matters are also common.

The Milwaukee Justice Center “really exemplifies Marquette’s mission” of helping others, Caldart says. As for her own role, she says, “Every day, I wake up, I get to do what I love, I get to help people, I get to work collaboratively to grow this project. I feel so fortunate.”

Michael F. Hupy

Michael Hupy, L'72, is one of the most widely known lawyers in Milwaukee. He has won multimillion dollar personal injury cases for clients, and his firm has eight offices in Wisconsin and Illinois. But law practice is about more than your own cases and clients, he says.

"There are a lot of people who cannot afford legal services but have to have them," Hupy says. "I believe there are times when duty calls and we must stand up to the plate to fulfill our professional obligations."

Hupy and his firm, Hupy & Abraham, have supported many charitable causes. But he relates that he was not really familiar with the Milwaukee Justice Center when Michael J. Skwierawski, a former Milwaukee County judge, and Michael J. Cohen, L'86, a partner with Meissner, Tierney, Fisher & Nichols, called on him to talk about the center. Skwierawski and Cohen have helped lead the Milwaukee Bar Association's support of the Justice Center.

Within a day, Hupy responded with a commitment to give the center \$100,000 over three years.

"What I hope to accomplish is to provide legal services to as many people who can't afford them as possible," Hupy said. "We have an obligation, a duty, a need, and more of us need to realize that we're not here to make money; we're here to help our clients and serve the public."

Laura J. Now

When Laura Now, L'10, was working as a project assistant at a law firm in Chicago, she participated in a number of community service projects supported by the firm, including organized running events and charity runs. When Now was a student at Marquette Law School, she became actively involved in the school's Pro Bono Society and continued to take part in local running events. These days, she is a lawyer at O'Neil, Cannon, Hollman, DeJong & Laing in Milwaukee, and she participates in the firm's volunteer work with the Milwaukee Justice Center.

Combine her commitment to community service and her love of running, and you have a young lawyer who asked why Milwaukee didn't have a legal fun run to support pro bono work and to build camaraderie among those in the Milwaukee legal community. To remedy this, Now got the ball rolling to create such a run to benefit the Justice Center.

The second annual run/walk was held recently at Veterans Park on Milwaukee's lakefront. More than 150 people took part in each of the first two events, and there is potential to grow.

"I've never done anything like this," Now says. "The support's been pretty cool so far."

Now says that during her own volunteer turns at the Milwaukee Justice Center, she has helped people with everything from landlord-tenant and small claims issues to family law matters. The center, she says, "certainly fills a need in Milwaukee County." And Now is filling a need for involvement and support as the center grows.

Joshua L. Gimbel



For three generations, Josh Gimbel's family has been closely connected to Marquette University Law School. The foundation created by his grandfather, Gene Posner, L'36, has provided longtime support for the school's pro bono work; Gimbel, a lawyer with Michael Best & Friedrich, is now the president of the foundation.

So it's no surprise that Gimbel, an alum of the University of Wisconsin Law School, has been an enthusiastic supporter of the public service efforts of both Marquette Law School and the Milwaukee Justice Center. The Posner Foundation has supported both, including the work of Angela F. Schultz, Marquette Law School's pro bono coordinator, one day a week at the Justice Center. Gimbel is also involved in the Milwaukee Bar Association Foundation, and has chaired its annual golf outing, which raises money for the Justice Center.

"This was just the perfect vehicle to reach the most people," Gimbel says of the Milwaukee Justice Center. He calls it "a great marriage of need, professional attorneys, and law students." He notes one particular thing he likes is that it allows law students to see lawyers giving back to the community.

"I'm one of those people who believe you put your money where your mouth is," Gimbel says. Indeed, in addition to leading the Posner Foundation's support of pro bono work, he works about a half dozen two-hour shifts a year as a volunteer at the center.

It would be possible to adduce additional examples beyond Caldart, Hupy, Now, and Gimbel, but it is not necessary. In their support of the Milwaukee Justice Center, these four individuals, some of whose connections with Marquette Law School go back more than 75 years, are emblematic of much of what is meant with the simple but elegant term, "Marquette lawyer." ■

1999

Matthew Duchemin has been elected to a two-year term on the Western District of Wisconsin Bar Association's Board of Governors. He is a partner in the Madison office of Quarles & Brady.

Joseph T. Miotke is president-elect of the Wisconsin Intellectual Property Law Association. He is a patent litigator with the Metro Milwaukee office of Dewitt Ross & Stevens.

Mary T. Wagner's third collection of essays, *Fabulous in Flats*, was recently named to the list of finalists in ForeWord Book Reviews' "Book of the Year Awards." It also took a "gold" award in the 2011 eLit Book Awards and was named "Published Book of the Year" by the Florida Writers Association last October. Wagner has been an assistant district attorney with the Sheboygan County District Attorney's office for the past 11 years.

2001

Michael P. Maxwell is a contributing author to *Inside the Minds: Strategies for Consumer Bankruptcy Trustees*, recently published by Aspatore Books, a Thomsen-Reuters company. Maxwell continues to serve as a Chapter 7 trustee in the Eastern District of Wisconsin.

Mollie Newcomb recently opened up her own firm, The Law Office of Mollie Newcomb, in Milwaukee. She focuses her practice on intellectual property law.

2002

Benjamin A. Menzel has joined the Waukesha, Wis., office of The Schroeder Group. He focuses his practice on civil litigation, commercial and business litigation, and debtor/creditor rights.

2003



Ryan E. Ruzziconi, Flint, Mich., has been named "Top General Counsel for a Privately Held Company in Michigan," as part of the 2012 *Crain's Detroit Business* magazine's

General & In-House Counsel Awards. He is vice president and general counsel for Diplomat Pharmacy, Inc.

2004

John Schulze Jr., Madison, Wis., is serving as the chairperson for the Public Service Commission's Partners in Giving campaign, which is the Dane County, state, and University of Wisconsin employee workplace campaign to raise money for hundreds of charities. Schulze currently serves as a PSC division administrator.

2006



Ray H. Littleton, Lansing, Mich., has been appointed to the State Bar of Michigan Representative Assembly for the Sixth Circuit. He is an associate at Foster Swift Collins & Smith and focuses his

practice on health care, commercial litigation, general litigation, and medical/professional malpractice defense.

2007

Andrea F. Cataldo has joined the Milwaukee office of Godfrey & Kahn. She is a member of the firm's corporate practice group.

Melissa Stone has joined Lindner & Marsack, a firm specializing in labor and employment law. Stone will focus on defending workers' compensation claims for the insurance industry and self-insured employers.

2008

Jonathon Flynn, Shorewood, Wis., recently started as a full-time faculty member at Cardinal Stritch University's College of Business, with the rank of assistant professor. He is engaged to **Sergio Magaña**, L'12. Their wedding is planned for July 2013.

Max N. Gruetzmacher has joined the Mt. Pleasant, S.C., office of Motley Rice as an associate. He focuses his practice on securities and consumer fraud litigation.

2009

Charles R. Stone was recently appointed adjunct professor of business at Peking University's Market Economy Academy in Beijing, China, teaching Organizational Behavior East and West, in Chinese. Stone is an associate at Weiss Berzowski Brady, Milwaukee.

2010

Bradley Dahmer and **Alexis Hagquist**, both graduates of the part-time program, were married in Las Vegas, Nev., on December 11, 2011.

Bryant E. Ferguson has joined the Milwaukee office of Reinhart Boerner Van Deuren as an associate in the firm's employee benefits practice.

Anique N. Ruiz has been elected to a two-year term on the State Bar of Wisconsin's Board of Governors. She will represent District 2. In addition, she has been selected as one of *Community Connection News Magazine's* 2012 "Professionals to Watch." Ruiz is an associate with the Milwaukee office of Gonzalez Saggio Harlan.

Laura D. Steele has joined the Milwaukee office of Kerkman & Dunn as an associate.

2011

Christopher Kuechler has joined Jaskolski & Jaskolski as an associate. The firm is located in Greenfield, Wis., and focuses on family law.

Edward Robert Tybor III has joined Rosensteel Law Group in Phoenix, Ariz. He focuses his practice on real estate law.

SUGGESTIONS FOR CLASS NOTES may be emailed to jonathan.leininger@marquette.edu or 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 on the Law School's website, law.marquette.edu.



Breiner & Breiner: Learning from a father's love of law and life



Ask Ted and Mary Breiner about their careers, and their responses start with their father. It's more than just showing respect for a parent. Al Breiner shaped the lives and careers of his son and daughter in profound ways.

Family. Chemistry. Patents and trademarks. The law. The outdoors. Wisconsin. Virginia. Marquette University. Fine wine.

Each played an important part in the life of Al Breiner, who died in 2002. Each has played important parts in the lives of Ted and Mary Breiner, who have continued the successful intellectual property practice in Alexandria, Va., that their father founded.

Start with chemistry. Al Breiner graduated from Marquette University in the early 1950s with bachelor's and master's degrees in that field and went to work for Johnson Wax in Racine as a chemist. Through his work, he got involved with and interested in patents.

The family, including three children born in Racine, moved to Virginia in 1959, where Al Breiner worked as a patent agent for a Washington law firm and attended Georgetown's law school at night, earning his law degree in 1963. He worked for law firms for several years before setting up his own practice, specializing in patent and trademark law.

Al took Ted to visit Marquette when it was time for Ted to choose a college. Ted says that one visit was all he needed to be sold on the university. After completing his undergraduate degree, he enrolled in Marquette Law School, graduating in 1979. Mary followed the same path several years later, graduating from the Law School in

1982. They maintain strong ties with the Law School and Milwaukee.

"I never intended to go into intellectual property law," Ted says. His father suggested it, but Ted was interested in other areas of the law. However, on a trip to Germany, Ted met a lawyer his father knew, and their conversation convinced Ted. "It was the best decision I ever made, working with my dad," Ted says. "This field is just fun."

Mary joined the firm after her graduation. "I enjoy working with claims and the wordsmithing that goes on," she says. The Breiner law firm has fluctuated between three and four lawyers, but at the present it's Ted and Mary. "Being family, we can speak our minds and we don't have to worry about office politics," Mary says.

Outside of work, Al Breiner had "a love of the land," as Mary puts it. He was an enthusiast for outdoors activities of many kinds, and his children followed suit. For Ted, who is married and has five daughters, that means "you name the sport, and I've either done it or coached it for my kids." It also means he has a great love for a boat he bought in 1995, which is kept at the neighborhood marina a block from the family's home. For Mary, the outdoor impulse includes a big interest in dogs—she has a Norwegian Elkhound—and an active role working on land her father bought two hours west of the Washington area.

In 1979, Al Breiner was in Europe, riding a train along the Rhine River, when he noticed vineyards planted on steep slopes. The land reminded him of the Blue Ridge property he owned. He became interested in trying to grow grapes and make wine there. A test vineyard was planted in 1986. Stone Mountain Vineyards was established in 1995. It now produces about 3,000 cases a year of about a dozen wines.

A third Breiner sibling, Chris, managed the law firm. He also was the Stone Mountain winemaker and ran the winery until he passed away unexpectedly in February 2012. Ted's oldest daughter, Kate, is now operating the winery.

Al Breiner was "a great lawyer, an excellent lawyer," Ted Breiner says. But he was more than that. He was a builder of family bonds and paths, as can be seen in the work and lives of Ted and Mary Breiner and the generation-to-generation continuity of the extended family. ■



TRIAL ADVOCACY 2 *Marquette Law Review* RESTORATIVE JUSTICE CONFERENCE
Professional Sports Law PUBLIC INTEREST LAW SOCIETY *On the Issues with Mike Gousha*
Marquette Volunteer Legal Clinic — Council for the Spanish Speaking CREDITOR-DEBTOR LAW
HALLOWS LECTURE 19th Annual Howard B. Eisenberg Do-Gooders' Auction ADVANCED TORTS
Hon. Helen Wilson Nies Annual Lecture DISTINGUISHED LECTURES Pro Bono Work
Marquette Law School Faculty Blog Media Law ADVANCED EVIDENCE International Law
Milwaukee's Future in the Chicago Megacity Conference POSNER PRO BONO EXCHANGE

EXCELLENCE FAITH LEADERSHIP SERVICE

Carved in stone above the fireplace in Eckstein Hall's Aitken Reading Room, these four words succinctly state Marquette University's mission, which is exemplified in Marquette Law School activities that require rather more words.

ESTATE AND GIFT TAXATION Howard and Phyllis Eisenberg Loan Repayment Assistance Program
M-LINC—Marquette Legal Initiative for Nonprofit Corporations George and Margaret Barrock Lecture
Student Organizations Marquette Volunteer Legal Clinic for Veterans ROBERT F. BODEN LECTURE
National Sports Law Institute Marquette Volunteer Legal Clinic — House of Peace Community Center
The Challenge and the Opportunity: *How Wisconsin Can Meet More Ambitious Goals for Students*
Business Associations FACULTY TEACHING AND RESEARCH *Marquette Elder's Advisor*
MARQUETTE LAW SCHOOL POLL Jurisprudence Prosecutor's and Public Defender's Clinics