

came up who looked vaguely familiar. After all these years teaching, this happens a lot. She told me she that she had been a Con Law student of mine at Seton Hall, had clerked for a federal judge, then practiced at a big firm in New Jersey, and, finally, went “in house” at a pharmaceutical company. Then, she decided that her personal and professional happiness required her to address her gender identity. She took steps to express that identity in her

personal and professional life. Kevin revealed herself as Christine. She now heads a public interest firm dealing with sexual identity. If Christine has children, I am sure she is proud to tell them the story of her personal and professional life that led her to happiness

Thank you. Congratulations for continuing the excellence of the Law Review, started long before me. I hope that it continues forever. Best of luck for the future happiness of all of you, personally and professionally. ■

Joseph D. Kearney

The Wisconsin Supreme Court: Can We Help?

This past summer, Dean Joseph D. Kearney delivered the keynote address at the Western District of Wisconsin Bar Association’s annual meeting.



Let me begin by thanking Matt Duchemin for the invitation and introduction. It is always good to see a former student become a leader in the legal profession.

In the interests of time, I want to get right into my topic, with only the briefest prefatory

comment. I spoke to this group early in my deanship (a long time ago, that would be). On that occasion I thought that I should apologize—that is, that one speaking to a federal court bar association about the state supreme court should justify this. Not so today. For has not the U.S. District Court for the Western District of Wisconsin recently become where one expects to go even for legal *decisions* about our state supreme court? That wry comment aside, be assured that I am not here to critique the pending litigation.

I am here to talk about the Wisconsin Supreme Court. It needs our help. I do not mean that the court is not functioning. Most fundamentally, it grants petitions for review, and it issues opinions. To be sure, it does these things better, or more persuasively, in some instances than others. But such an eternal truth

might be noted also of speeches (keynote addresses, even). Besides, for the proposition that the court is functioning reasonably well, let me note that every one of the seven justices this year has had a Marquette law student as an intern in his or her chambers. We are immensely grateful for this frequent contribution by each of the justices to legal education. In short, much at the Wisconsin Supreme Court, without occasioning headlines, is proceeding in an appropriate course.

Yet it is not to go out on a limb to say that the court needs help. No one can reasonably maintain that today’s court enjoys the basic collegiality that not only is a happy incident to, but is an important enabling component of, a law-declaring appellate court. And the effects of this go beyond particular cases.

Let me pause to note that perhaps a dearth of collegiality has existed for some time. I have noticed the justices’ practice in dissent of routinely referring to an opinion of the court as that of “the majority.” I think it essentially disrespectful for a dissent routinely to refer to an opinion speaking for four (or even six) justices as that of the “majority.” It is an opinion of *the court*. The constant characterization in a concurrence or dissent of the court’s opinion as a mere “majority” opinion is to imply mere policy preferences or a force of will by the court, as opposed to a declaration of the law. In some brief research a year ago, I was surprised to discover that this rhetoric seems to be something of

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a longstanding practice at the court. My own respectful but strong suggestion is that members of the court should drop the practice. That would be self-help.

Before I turn to ways that we might help, permit me another observation, equally applicable to the Wisconsin Court of Appeals. There are times it can be unexpectedly difficult to tell whether something *is* an opinion of the court. I am referring to instances where apparently someone was assigned to write for the court and ended up not only not commanding four votes but also confronted with a separate writing that *did* get four votes. The solution is clear: We now have an opinion of the court—just not the one expected in the initial assignment. In these circumstances, the work of the court should be presented as such—which means in part, by general American tradition (and logic), it should come first. And yet on occasion—including at least one this term—it is not so. The opinion by the assigned justice (now at best a concurrence) comes first—referred to as the “lead” opinion—while the *court’s* opinion—labeled a “concurrence”—follows. With good will and good communication, this is an easily eliminated phenomenon.

But all that is for the court to do on its own (or not). What about us? Can we help? I suggest that we can—and that we recently have been shown the way. Let me commend to your attention the recommendation of the board of governors of the state bar that we—the people of Wisconsin—should amend Article VII of the Wisconsin Constitution so that justices of the Wisconsin Supreme Court may be elected to a single, 16-year term. The term would not be renewable: that is, beyond the current justices on the court (who would be eligible, along with everyone else meeting the qualification requirements, to stand in a future election for a 16-year term), no one would ever again stand for

reelection to the Wisconsin Supreme Court. I think this to be nothing short of a visionary proposal. I hope that I can give you a bit of a sense of why this is.

Before I unpack the merits, two things. First, I speak primarily as a lawyer in this state. I make no official recommendation for Marquette University Law School. Second, I had nothing to do with the proposal. To the contrary, upon first hearing of the effort by the state bar to come up with a reform proposal, I smiled to myself. I was not derisive, but I thought this to be a bit of a fool’s errand for the lawyers involved. Too many reformers focus on unworkable solutions. Sometimes that involves restricting election spending, despite the First Amendment as interpreted. Other times it means eliminating judicial elections in Wisconsin. Such longstanding public policy is never going to be reversed in this state, and no time or capital should be spent on that front. But I did not give the lawyers involved enough credit. They avoided all this.

It is appropriate to mention who these lawyers are. It was a small working group, or task force, commissioned by the state bar president and chaired by Joseph Troy, former Outagamie County Circuit Court judge and currently a practicing lawyer. The other members, also practicing lawyers, were Christine Bremer Muggli of Wausau, Cathy Rottier of Madison, and Tom Shriner of Milwaukee. By intention (as I understand it), two of the members appointed were generally considered more conservative and the other two more liberal, and their practices collectively cover a wide range.

Let’s be clear first as to what the bar’s proposal is. It is, again, that the Wisconsin Constitution be amended so that supreme court justices would serve 16-year terms with no possibility of reelection. That is it. Everything else stays the same. Justices are elected, ▶▶

and, in the event of a vacancy, the governor appoints someone to serve until an election can be held in the usual way: that is, in the spring, in a nonpartisan election, when no other such election is scheduled (so only one justice may be elected in any given year), all as we now know it.

So what recommends the proposal? A great deal, as suggested in the task force's report, which is thorough but short enough to be read—and compelling enough to have been endorsed by the board of governors, a year and a half or so ago, by a 37–4 vote. To begin, the proposal is elegant—even brilliant—in its simplicity. It makes a change appropriate to important ends—and no more change than that.

Let's get to those substantive ends. Most fundamentally, the proposal ensures that justices will not become political candidates for reelection. Once elected, justices will be free to focus fully on the law and the court's vital role under the Wisconsin Constitution. They will not need to seek support for reelection from individuals and groups with identifiable political perspectives and economic interests. As one task force member has stated, "You can just spend your time being a judge." Imagine that, I would append to that statement.

I myself think that there will especially be benefit to the appearance of justice in criminal cases. One of the great ironies about judicial elections these days is that the opposing forces are much motivated by tort law—and so, of course, the critiques are whether a candidate will be tough on . . . tortfeasors? No, of course not: rather, on *crime*. In addition to the distasteful form, these critiques help create the sense that a justice facing reelection may reasonably be, in reviewing criminal cases, as concerned about electoral fortunes as with the law. So there will be value in adopting the proposal even if none of these cases come out differently. For (and this is true more generally than criminal cases) the proposal would eliminate the perception that any of the justices' decisions are at all affected by an interest in reelection. That perception exists; I say with neither embarrassment nor pride that



I have it myself on occasion. The assertion could never be made again.

There is other important benefit. The proposal should tamp down substantially the negative advertising that has come to dominate any number of Wisconsin Supreme Court races. The advertising that accompanies many races demeans not just the incumbent justice or opponent but also the office. The reason for the decrease under the proposal is elementary. Elections will involve candidates, none of

whom has ever served on the court or, at most, a candidate who has served only a short time following an appointment to fill a vacancy. Either way, the campaigns are much less likely to generate negative attack ads that distort a justice's record on the court.

By contrast, what do we gain from the current reelection system? The possibility of change, one might say—but only in theory, as the task force has explained. In the past 98 years, only one previously elected justice has actually lost a reelection (Chief Justice Currie in 1967).

So our present system gives us expensive, degrading, polarizing reelection races, which may distort decisions and almost always end with the reelection of the incumbent justice. How much better, it seems, to extend the term of the incumbent but avoid the distorting and ugly reelection process.

The single extended term also will promote collegiality on the court. For it will eliminate the possibility that justices will publicly or privately oppose a colleague's reelection. Let no one doubt that this has been the source of much of the court's well-publicized problems in recent years.

Much more might be said in favor of this proposal, but that should give you a sense of it, and the task force's report is available. There are things that may be said against it as well, as there always will be in devising public policy, and perhaps you will account the costs and benefits of the proposal differently from the task force, the board of governors, or me. But the matter deserves your engagement, and I want to turn briefly to something rather apart from the merits.

Specifically, *can* this proposal be enacted? Some say “No.” The primary reason is that it is a nonpolitical proposal that must make it through a political process—in particular, passage by two successive Wisconsin legislatures and then approval by the voters. I appreciate the challenges, but I believe that it can be enacted.

Fundamentally, the proposal is a good idea. That still matters a great deal in this world. Part of this is that the proposal is ideologically neutral. And it maintains Wisconsin’s tradition of nonpartisan election of supreme court justices but reduces the frequency of often politically charged and costly elections. Both those outside the court, and those within, will have considerably less reason to act in ways that reduce confidence in the highest judicial tribunal of this great state.

But let me conclude by emphasizing another aspect of it. The proposal comes from the bar—people uniquely concerned with the Wisconsin

Supreme Court and judicial process more generally but who spend all their time in the real world. That gives me not just pride but hope. The hope is that many other practicing lawyers will recognize the great opportunity that four leaders of the bar and, subsequently, the state bar board of governors have presented to us. We *can* help, to answer the question with which I began.

And so we should. When I speak to graduating Marquette lawyers, I tell them that they will determine the course of the future, by their undertakings as members of the legal profession—the profession to which civil society turns to do its deals, to right its wrongs, and to protect its freedoms. This profession is old, it is honorable, and, for a time, it is ours. We in this generation of the profession find ourselves in a position to help bestow a great gift upon ourselves and our fellow Wisconsin citizens and to bequeath it to those who come after us. I hope that we will seize the opportunity. Thank you. ■

Phoebe W. Williams, L’81

Milwaukee Bar Association’s Lifetime Achievement Award

Phoebe W. Williams, L’81, associate professor emerita at Marquette Law School, received the Milwaukee Bar Association’s 2015 Lifetime Achievement Award, presented by Maxine A. White, L’85. Professor Williams delivered the following acceptance remarks.



Thank you, Chief Judge White, for that very warm and gracious introduction—and thank you to the directors and members of the Milwaukee Bar Association for recognizing the work that I have done. Receiving the MBA Lifetime Achievement Award is a very special achievement for me.

I have many people to thank for

contributing to the achievements you considered when deciding I am worthy of this award. I will mention only a few of them.

First, I must share with you how grateful I am for parents who were exemplars of the principles that hard work, serving others, and justice matter. As a child growing up in Memphis, Tennessee—which was at the time a very racially segregated society—I learned very early that sometimes laws and customs could be unjust and unfair. Nevertheless, Mom and Dad pursued their careers as educators with hope, enthusiasm, and optimism. They never mentioned to me that they received unequal pay, or were denied equal educational facilities, until I questioned them.

As an academic, I researched and wrote about the impact of the Supreme Court’s decision in *Brown* ▶▶