“THE POTENTIAL FOR UNINTENDED CONSEQUENCES . . . IS HUGE.”

Chad Oldfather, professor of law at Marquette University, talks about his ongoing work analyzing the Wisconsin Supreme Court’s decisions on separation of powers.

State constitutions attract less attention than they deserve, in the view of Chad M. Oldfather, professor of law at Marquette University. So he has expanded his teaching and research—which already included federal constitutional law and judging and the judicial process—to include the Wisconsin constitution and its interpretation by the state’s highest court. The Marquette Lawyer caught up with Professor Oldfather about this recent work.

Tell us a bit about your latest project, a newly published article in the Marquette Law Review, called “Some Observations on Separation of Powers and the Wisconsin Constitution.”

There’s a bit of an origin story here, so let me start with that. State constitutional law has been understudied, not just in Wisconsin, but everywhere. There’ve been some law professors doing very good work in the field for quite a while, but most of the attention in the academy has gone to federal constitutional law. In fact, most law schools haven’t had a class on state con law. This in turn has meant, as Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit has pointed out, that the profession as a whole hasn’t paid enough attention to state constitutions.

So, the project itself?

Sure. The title, “Some Observations on Separation of Powers and the Wisconsin Constitution,” is, for better or worse, an accurate one. Most law review articles explore a specific topic. There’s a thesis, there are arguments developed in support of that thesis, and so on. This one meanders, even lingering in places because they seem interesting. You could think of it as kind of a travelogue, an account of visiting a place and offering up observations, questions, and commentary on what I saw. There are many more incomplete thoughts than in a typical article.

How’d that come to be?

It’s mostly a product of two factors. One is that I may have an inside track with the Marquette Law Review. So I didn’t feel constrained to meet all the conventional expectations about what a law review article should look like.

Another is how I approached the project overall. Typically when I start a new project, I have a fairly specific question in mind. Often that will be about something that puzzles me. A relatively recent one was “Why is there never talk of giving precedential effect to the methodological choices U.S. Supreme Court justices make in interpreting the Constitution?” Another was “Why is it that appellate courts always review questions of law de novo?” Things like that.

For this one, I decided that I would try to read everything the Wisconsin Supreme Court has ever written about separation of powers under the state constitution. And that I would do it with the same mindset as the bear who went over the mountain—to see what I could see. My hope was to add value by virtue of the perspective I enjoy as a full-time student of the law. I’m not an advocate for a particular client or cause, I don’t have to answer a question presented in a specific factual context, and I’m not constrained by a budget or short deadlines.

How did it go?

Well, attacking a project like this one turns out to be a very tall order in a couple of ways. One is the sheer amount of material involved. I started out by running a Westlaw search in
the Wisconsin Supreme Court database for the phrase “separation of powers,” which turned up a lot of opinions. And then when I started reading them, it became apparent that what I’d done wasn’t enough. At some level, every exercise of the power of judicial review is about separation of powers. Some more than others, of course. But it ends up being enough opinions that if you print them out and start stacking them up on your dining room table, not everyone is going to be happy about it. And that’s after excluding the ones that are only incidentally about separation of powers.

And so, anyway, as I sat there at my dining room table, reading through all these opinions, I kept track of what I was seeing and did my best to identify trends and inconsistencies and so forth. A lot ended up on the cutting room floor, though no doubt some of it will prove to be useful in future work.

Any examples of what got left out that come readily to mind?

Sure. One obvious thing is that today’s opinions are much, much longer. Things started to pick up not long after the court of appeals was created in 1978. But the trend toward greater length has continued. The opinions are considerably longer. That is, of course, hardly to say that they’re better.

One of the things you included in this initial article relates to interpretation of the state constitution.

Yes—and the story turns out to be more complex than most of the court’s opinions let on. The court in the state’s early decades was very pluralistic in its methodologies. It didn’t regard the task of interpreting the state constitution as following a single path, or as an endeavor in which only one approach is legitimate. As much as anything, the justices acted like common-law judges.

And it’s not that the court lacked examples of alternatives. Thomas Cooley’s Constitutional Limitations, first published in 1868, was unquestionably the leading treatise on state constitutional law. Cooley’s aim was to describe prevailing practices, and he outlines an approach that looks like a rough version of originalism. The Wisconsin justices cited Cooley for some things, but they didn’t follow his general approach. These days the court often invokes a framework that’s somewhat akin to Cooley’s approach, but it didn’t adopt that until the mid-1970s, and its emergence then appears to have been almost by happenstance.

But that’s not all. The court has an entirely different approach when it’s dealing with separation-of-powers questions—and still another when interpreting provisions in the state constitution’s Declaration of Rights. All of which is at least broadly consistent with the pluralism of the earlier years.

Another thing that’s notable—and this is hardly unique to Wisconsin—is that the court frequently draws on the U.S. Constitution, and cases interpreting it, in its efforts to discern the meaning of the Wisconsin constitution. That, it seems to me and to an awful lot of other people who’ve thought about state constitutions, is problematic. For one thing, it’s not even clear that state constitutions are the same sort of document as the federal constitution. They might be more like statutes, they might be less like statutes, they might be something else altogether. That can have implications for interpretation. But even setting that aside, there are critical differences.

Could you elaborate on those differences?

Start with the legislative power. A state legislature has the police power. Certainly, Congress’s power is broad, but there are limits. So right off the bat, there’s this different and larger legislative power in Wisconsin.

And then the executive branch in many states, including Wisconsin, is, as some describe it, “unbundled.” There are more executive officers identified in the state constitution than just the governor (or president), and more of them selected by the people.

The judiciary, too, is different. The scope of its jurisdiction is broader, and members of the judiciary are elected. One of the big theoretical issues in federal constitutional law is what Alexander Bickel famously called the “countermajoritarian difficulty”—the fact that judicial review in the federal system entails unelected judges overturning the work of the people’s elected representatives. That’s not present here, at least not in the same way.

I haven’t worked my way through how that should cash out in terms of a differing conception of the judicial power. The fact that the justices have a popular mandate to exercise their power doesn’t tell us what the nature of that power is. But one thing that seems clear is that it’s inadvisable (I’m using a mild word) to draw any kind of easy analogies with the federal judicial power.

Taken together, all of this calls into question the idea that one can derive conclusions about how power is separated at the state level from how it’s done at the federal level.

My sense is that you have more to say about the differences.

You’re right. There’s also the fact that the two documents were drafted six decades apart, and in very different contexts. The drafters of the U.S. Constitution were coming out of a British system in which the notion of a constitution did not necessarily entail a written document. A half-century-plus can make a tremendous difference in terms of social priorities, the general sense of how government ought to work, and so on. Even the same words could have different implications.

As an academic, all of this suggests to me that there’s a lot of interesting work to be done. If I were on the court, I’d take it all as a reason to tread carefully and with a great deal of humility.

But you don’t see the court doing that?

I don’t. One of the things I do in
the article is briefly to survey some of the more prominent recent decisions concerning separation of powers. A few things seem clear from those cases. One is the truth of Justice Robert Jackson’s observation in Youngstown, or the Steel Seizure Case, that “the opinions of judges . . . often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote.” Which leads, he continued in that 1952 concurrence, to an emphasis on short-term results over a longer view of what makes sense as a matter of constitutional government.

That looks to be exactly where the Wisconsin Supreme Court is at. It’s hard to imagine these cases coming out the same way were the partisan affiliations or affinities of the branches switched. Even if that’s not the reality, it’s the perception. Part of the blame for that can be placed at the feet of the media, including some who ought to know better. But most of it belongs with the court.

How so?

I’ve already mentioned some of the reasons. But there’s more. Some of the justices recently have had big ideas about how things should be when it comes to separation of powers, which are some distance from how things are and have been. Some of those ideas, if implemented, would work fundamental changes on the structure of state government. But those ideas don’t seem to have a basis in anything directly connected to the Wisconsin constitution.

Or at least the justices propounding the ideas haven’t made the effort to make that connection. What they provide instead is general references to some of the political philosophy underlying the U.S. Constitution, or citations of separate opinions of justices on the U.S. Supreme Court, which aren’t even binding authority as statements of federal constitutional law.

So there’s this kind of castle-in-the-sky vision of what government should be, which then gets dropped, bit by bit, into a landscape or edifice that’s been built in a very different way. The potential for unintended consequences—at least assuming the justices are willing to adhere consistently to the principles they articulate—is huge. The logic of reinvigorating the nondelegation doctrine with respect to administrative agencies, for example, creates the possibility that some of the ways in which the legislature goes about its work through committees would also be problematic. That’s among the examples that I take up in the article.

More here, too?

Yes. In fact, probably the biggest thing is the tone of the opinions. There’s a boldness to some of them that’s, shall we say, unmerited. And also unhelpful. No doubt they’re good reads to people who already agree with them. But they confidently assert as established all sorts of propositions of the sort I just mentioned that are in fact highly contestable. I don’t think I’m going too far out on a limb in suggesting that judicial opinions ought to be judicious, particularly in a world that’s as fractured as ours.

More than that, the justices routinely accuse one another of activism, partisanship, and being result-oriented. As I’ve suggested, those charges almost certainly have some basis. But for the justices themselves to make those allegations, and as frequently as they do, seems unlikely to have any effect but to perpetuate the impression of dysfunction that, fairly or not (in the nature of impressions), the court has exhibited for some time now. It’s hard to advance the rule of law with some of this rhetoric.

So what’s the solution?

Group dynamics can be hard to change, especially when change comes one member at a time. So there are no easy solutions. But it will be a good start if the profession—and the academy—will begin to pay closer attention and, more than that, to convey the message that we expect something better from the justices, not just when they are on the bench but also when they campaign for it (and when others campaign for them). It’ll take time, and it won’t always be comfortable. But it would be worth the effort.