MARQUETTE LAWYER

SUMMER 2025

JUSTICE SUZANNE CÔTÉ

Constitutional Interpretation in the Supreme Court of Canada

ALSO INSIDE

Avi-Yonah on Whether Tax Can Control AI

Law and Politics in Wisconsin's Redistricting

Marquette's President; New Neighbors; Judges and Judging; Prison Education

Speaking Just for Myself

I recently read an article whose premise was that the Supreme Court had entered a particular order by a six-to-three vote. This seemed obvious to the writer because three justices had signed onto a dissent from the unsigned order. I saw it differently: We could know only that at least five of the justices had voted for the order. For all we knew, another ("the sixth") had *voted* with the three but decided against joining their dissent. Indeed, in our not-*too*-distant history, many judges noted or even "voted" their dissent only rarely.

The point is on my mind for a combination of reasons. One is that there is much call these days for people to "speak up." I have a good deal of sympathy for this. Years ago my mother wrote a brief piece appreciating William F. Buckley's essay, "Why Don't We Complain?" And surely there is a role for a lawyer in particular to contend against *injustice*—indeed, rather a unique duty, insofar as a client is the subject of it. I have considerable admiration for lawyers, including various of my fellow law school deans, who, during any presidential administration, act to "dissent" by their best lights, as with respect to recent political assaults on members of the legal profession.

Best lights vary, and so does different people's judgment. It would be rare for me to "sign" a joint statement as dean, just as it would be for me to join an amicus curiae brief speaking from an academic position. In the past 20 or so years as dean, for example, I can recall joining one group letter, addressing what some of us deans regard as troubling trends in the American Bar Association's approach to accreditation of law schools. My more typical forbearance is (to invert the example with which I began) not necessarily dissent.

The point came up rather "famously" in 2010 when I publicly supported Elena Kagan's nomination for the Supreme Court. The White House set up a conference call for reporters with the law deans of Harvard University, the University of Michigan, and Marquette University. After our brief statements, the reporter for the Associated Press asked me why I hadn't signed a group letter of law deans supporting the nomination. I noted my general aversion to group letters and then spent my time explaining *my own* substantive view as to why Kagan was well qualified to serve on the Court.

I was baffled the next day that more than 100 newspapers across the nation (given that it was in the AP story) included such statements as "Kearney . . . said his policy is not to sign group letters." Yet it was true, and eight years later, when I supported Brett Kavanaugh's nomination (the only other time that I have spoken publicly about a nomination to the Court), even leaving aside that there was no proposed group letter of law deans in circulation, I wrote an op-ed in the Milwaukee daily newspaper. I wrote or spoke in those instances—the Kagan and the Kavanaugh nominations—because I knew both nominees and thought myself to have something worth saying.

Why not join a group letter more frequently? The reasons include, even beyond a preference for proceeding personally, an efficiency or perhaps perfectionism interest (not signing frees me up from considering whether the letter says everything that, and only what, I wish to convey) and an attribution concern (a standard disclaimer in a group letter that signatories are not speaking *for* the institutions they are listed as serving may not be fully credited, especially when the signatories are all or mostly deans). In all events, I seek to be very careful about these matters, lest I tread on the general openness and diversity of thought we welcome at Marquette Law School, and I hope that my absence from any particular group activity is seen in that light and not necessarily as dissent.

I *will* speak for the Law School on occasion—saying here that we hope that you enjoy this issue of the *Marquette Lawyer*. Constitutional interpretation by the Supreme Court of Canada (pp. 6–17) and using tax policy to regulate artificial intelligence (pp. 18–25) are not matters on which I myself will go on the record. Yet I will make this exception, drawing on personal knowledge: the advent of President Kimo Ah Yun (see pp. 4–5), former provost and former dean of an undergraduate college here, is a most welcome matter for the Law School and Marquette University more generally. ■

Joseph D. Kearney
Dean and Professor of Law

Contents SUMMER 2025

Marquette University Law School
Eckstein Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881
Phone: (414) 288-7090
law.marquette.edu

EDITOR:
Alan J. Borsuk

DESIGN:
Kristin Pelisek

COPY EDITOR:
Amy Bauman

COVER ILLUSTRATION:
Taylor Callery

COVER PHOTO:
Phillipe Landreville

MARQUETTE UNIVERSITY
LAW SCHOOL

Kimo Ah Yun Describes His Path to Marquette's Presidency—and the Path to Marquette's Future

BY ALAN J. BORSUK

Kimo Ah Yun calls his personal history an "underdog story." He was one of the large number of young people across the United States who had the ability to do big things, but who came from circumstances where doing them was rare.

A child of parents who did not graduate from high school, a native of low-income Compton, Calif., someone who learned lessons about life from pumping gas: Ah Yun became a first-generation college graduate who didn't really know what grad school was, but who had mentors who put him on paths to a master's degree, a doctorate, a professorship, a deanship, a provostship, and, now, the presidency of Marquette University.

Ah Yun thinks about all those who didn't make it the way he has. During a "Get to Know" program at Marquette Law School's Eckstein Hall on January 17, 2025, he described his own path. "I never expected to be sitting in this chair next to you," he told the program's moderator, Derek Mosley, director of the Law School's Lubar Center for Public Policy Research and Civic Education. But Ah Yun added, "I think about all the people who could have had that opportunity and for some reason could not see it."

He recalled a woman who was a schoolmate of his. She was "a phenomenally brilliant person," he said. "She was smarter than every one of us in school," he said. "But she never saw it. . . . If you don't see the pathway, you can never get there. She could have done anything she wanted to, but she did not ever see a pathway for her."

One of his roles as the 25th president of Marquette is to help more people get on that pathway and to help all students, regardless of their backgrounds, become the best people they can be. To Ah Yun, that is the heart of Catholic, Jesuit education and the heart of what he was inspired to do by his close friend and predecessor as president, Michael Lovell, who died in June 2024.

Ah Yun told an audience of about 200 people in the Law School's Lubar Center that getting an education so you can get a job is important, but that's far from all Marquette wants its students to set as a goal. Jesuit education means "changing fundamentally who you are as a person and how you interface with the world." It means making sure you have a moral compass that tells you what is right and what is wrong. It means growing to be someone who cares about others and who is engaged in helping others. "A Jesuit education, to me, is positioning you to have a great life" and to make everyone around you better, Ah Yun said.

Of all the universities in America, Marquette, he said, has the highest percentage of students who are involved in public service. That was at the top of Ah Yun's list of positive things about Marquette. Asked by Mosley what he most relishes about his job as president of Marquette, Ah Yun said, "Telling our story. We have a great story."

But he also said that, like all universities, Marquette is facing headwinds as the world of higher education changes, including demographic trends that point to a smaller pool of students in coming years. "We're going to have to rethink things," he said. While still focusing on students, Marquette is going to have to pull back on some things. For colleges as a whole, including Marquette, there will be "hard decisions, hard times, very disruptive," Ah Yun said. He pointed to colleges in the United States that have closed in the last several years and mentioned Cardinal Stritch University in Fox Point, Wisconsin, as one of them.

Ah Yun's path to Marquette is in itself a colorful story, even without reference to his challenging earlier years. He had been a professor in communications for two decades at California State University, Sacramento, where he got his bachelor's degree years before. "I never thought I would ever leave there because it was home," he said. But he was contacted by representatives of a search firm that was aiming to find a new dean for Marquette's Diederich College of Communication. He put them off, saying he wasn't interested. But they were persistent. They convinced him to at least visit Marquette. He agreed, but "I didn't bring a suit," he said, because he didn't intend to take the job. And the night before his interview, he went to a Marquette basketball game rather than prepare for the next day's session.

He described aspects of his conduct during the interview as somewhat "snarky." He said, "I wasn't trying to impress anyone." But he was invited back for a second interview. He told the search firm representative he had no interest in the job and had a lot of personal reasons to stay in California. But they convinced him to come back and to bring his wife along. He began to take it more seriously.

The key turning point was when Ah Yun was taken to meet Lovell. "He was inspiring," Ah Yun said. "We were aligned in thinking about a student-centered university that was focused on transforming the lives of our students." His attitude changed, "I knew I could come work for Mike," he said. And it went beyond that: "I said I could be a better person if I worked with a guy like that."

Ah Yun became the communication dean and later the interim provost of the university and then the provost in 2019. After Lovell died, Ah Yun was named acting president, and, in November 2024, in his ninth year with Marquette, he became president.

Marquette needs to stick to its core competencies, he said. It's not a university that aims to succeed by building online education. It's an in-person university. "We engage and transform people," he said. Marquette's leaders will need to do things ahead that show how they care for the institution itself—but also show that the university has "a foundation where we teach people to love one another." ■

Video of the one-hour conversation with President Ah Yun may be viewed at https://law.mu.edu/gtk-kimo

Kimo Ah Yun greets students on campus upon being announced as Marquette University's new president on November 20, 2024.

Roots of the Living Tree

Matching respect for the letter of the law with an understanding of changing times is central to constitutional interpretation in Canada.

THE HONOURABLE SUZANNE CÔTÉ

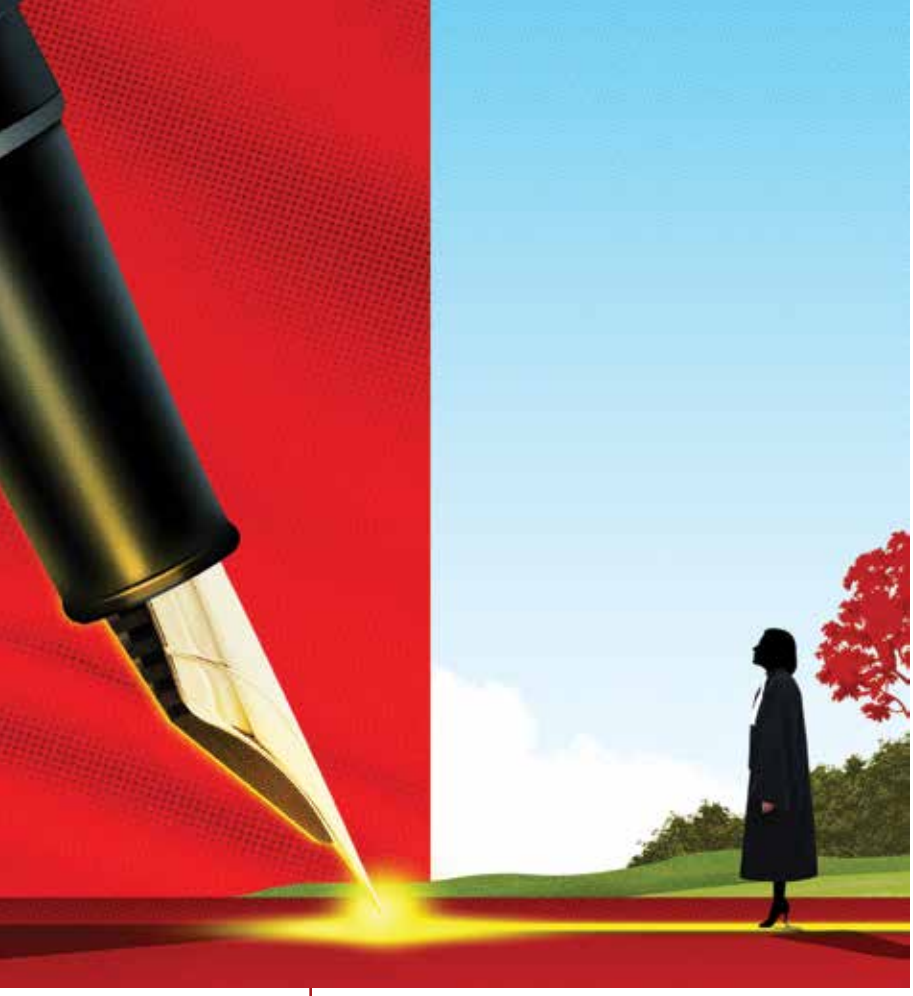
Multiple decisions of the Supreme Court of Canada insist that it is the Constitution itself—as applied by courts pursuant to their constitutional duty—that circumscribes the powers of legislatures. Inherent in this claim is the assertion that courts are bound by the rules and principles enshrined in Canada's constitutional instruments, as defined in Section 52(2) of the Constitution Act, 1982. Our Court has consistently stressed that the Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time." Put differently, the Constitution is not merely a reflection of the policy views held by a majority of Supreme Court justices at a given point in time.

This is not to say that the process of developing the law and expounding the Constitution merely consists of mechanically applying established legal rules. As Justice Bradley W. Miller of the Court of Appeal for Ontario wrote in a recent article: "After all, constitutions are not self-interpreting or self-applying." Our Constitution is often cast in highly abstract terms—particularly the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms. Most cases that culminate at the Supreme Court raise complex and novel issues to which there is no obvious solution prior to adjudication. For example, in *Frank v. Canada (Attorney General)*, a 2019 case regarding the right to vote of expatriates intending to return to Canada, Justice Russell Brown and I noted that the limitations analysis under Section 1 of the Charter requires a careful assessment of "[t]he moral nuance inherent in defining and defending the boundaries of rights." Indeed, in the words of Justice Miller, judicial review of legislation "is an unavoidably normative exercise."

Although there is some judicial discretion in it, constitutional adjudication is bound by significant legal constraints. Unlike other actors who interpret and apply the Constitution, courts must provide coherent reasons, both internally and externally.

The Hon. Suzanne Côté, justice of the Supreme Court of Canada, delivered the Hallows Lecture at Marquette Law School on March 4, 2024. This is an edited text of that lecture. Before her judicial appointment in 2014, Justice Côté practiced law in Montreal, specializing in complex litigation, and in her native Gaspé Peninsula. She has been a fellow of the American College of Trial Lawyers since 2005. Justice Côté has taught evidence and litigation at the École du Barreau du Québec and has also lectured at the Université du Québec à Rimouski and the Université de Montréal. She received an LL.B. from Université Laval before being called to the Quebec Bar in 1981.

Illustrations by Taylor Callery



Internal coherence requires that judicial decisions are free of contradictions. External coherence dictates that judgments are consistent with relevant case law, subject to strict criteria for departing from stare decisis. But where there is no precedent controlling the outcome of a case, the interpretive methodology set out in the jurisprudence of our Court is perhaps the most significant source of legal constraints. This afternoon, I would like to examine how, in practice, Canadian courts proceed when they approach novel constitutional issues.

At the core of this discussion are two important points: first, the notion of constitutional supremacy within Canada, and second, the Canadian Constitution as a living tree, capable of growth and expansion within its natural limits.

I want to begin by exploring the Constitution and its role in Canadian courts throughout history. You will see that our Constitution is one that is capable of accommodating and addressing the realities of modern life, but one that also has its natural limits, such as its text and its associated unwritten principles. In discussing the principles of constitutional interpretation adopted by our Court, I offer examples of how this approach has guided the growth and interpretation of the Charter of Rights and Freedoms.

Constitutional Interpretation in the Canadian Context

I turn first to the issue of interpretive methodology and the constraints it imposes on judicial discretion in the interpretation of the Constitution. Within this discussion, I attempt to provide a systematic account of the principles established in our Court's jurisprudence. In my view, some of the Supreme Court's recent decisions shed light on the relationship between, on the one hand, the main interpretive tools we use, namely text, purpose, and historical context, and, on the other hand, structure.

It is important to note at the outset that, like the U.S. model of interpretation, Canadian constitutionalism recognizes not only the written Constitution itself but also (as stated by Luc B. Tremblay) the "legitimate authority of the judiciary to review the constitutionality of legislative and executive acts." Indeed, some scholars have highlighted Canada's adoption of rhetoric similar to the U.S. model of constitutionalism, following the words of Chief Justice John Marshall in *Marbury v. Madison*.

For example, in our Court's 1984 decision of *Law Society of Upper Canada v. Skapinker*, a case involving mobility rights under Section 6 of the Charter, the Court characterized the Constitution Act, 1982, as "a part of the constitution of a nation." As in the U.S. model, the supremacy of the Constitution as the "expression [of] 'elected representatives of the people of Canada,' as opposed to the 'Imperial Parliament,'" was clear. Its normative force was such that the people "had an original right to establish for their future the political institutions of their choices." In addition, our Court in *Skapinker* accepted that elected representatives of the Canadian people authorized judicial review of the constitutionality of government actions.

Yet, as you will see, while in some respects there are similarities between the U.S. and Canadian models, there are also stark differences.

Basic Principles of Constitutional Interpretation

To explore interpretive methodology, it is necessary to provide an overview of the leading principles of constitutional interpretation set out in our jurisprudence. It is well-established that the text of the Constitution constitutes the starting point and most authoritative tool in the exercise of

constitutional interpretation. Our Court, in *In re An Act Respecting the Vancouver Island Railway*, made clear that "[a]lthough constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question." Indeed, our Court's jurisprudence has consistently recognized the primacy of the Constitution's written terms in reviewing the validity of legislation.

Textual analysis is complemented by the related, but distinct, principles of "purposive" and "generous" interpretation, which is in many ways distinguished from the U.S. model. In the case of *R. v. Big M Drug Mart Ltd.*, where the Court in 1995 held that the Lord's Day Act violated freedom of religion under Section 2 of the Charter of Rights and Freedoms, Chief Justice Brian Dickson described the elements of a purposive inquiry:

> [T]he purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.

Chief Justice Dickson further stated that while constitutional interpretation should be "generous rather than . . . legalistic," courts should not "overshoot the actual purpose" of the provision, having regard to "its proper linguistic, philosophic and historical contexts."

Subsequent jurisprudence refined the nature and scope of the purposive inquiry. It is now well established that unwritten constitutional principles are additional indicia of purpose. As denoted by the concept itself, an "unwritten" principle cannot be found in the constitutional text itself. These principles have influenced our constitutional interpretation over time and include democracy, constitutionalism, the rule of law, the independence of the judiciary, the protection of civil liberties, and federalism.

Moreover, our Court specified the hierarchical rank of purpose in relation to the other interpretive tools. On the one hand, in *Quebec (Attorney General) v. 9147-0732 Québec inc.* (2020), which concerned whether Section 12 of the Charter of Rights and Freedoms protects corporations from cruel and unusual punishment, our Court affirmed that the text constitutes "the most primal constraint on judicial review" and shapes "the outer bounds of a purposive inquiry." Relatedly, the Court asserted that the written terms of the Constitution are the "first indicator of purpose." On the other hand, when interpreting Section 11(i) of the Charter of Rights and Freedoms (granting the benefit of the lesser punishment when the sanction has changed between commission of the offence and sentencing), our Court confirmed in *R. v. Poulin* (2019) that "[t]he purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose." That is to say that constitutional provisions "must be interpreted liberally within the limits that their purposes allow."

> Our Court has consistently stressed that the Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time."

Progressive Interpretation and the Living Tree Metaphor

The principle of progressive interpretation has started to develop and has been recognized in many cases, but its relationship with other interpretive principles remains unclear. It is tied to the famous "living tree" metaphor at the heart of this lecture. In *In re Same-Sex Marriage* (2004), our Court equated progressive interpretation with the principle of a "large and liberal" interpretation. And in *R. v. Comeau* (2018), a case about whether a provision of the Liquor Control Act infringed Section 121 of the Constitution Act, 1867, our Court determined that progressive interpretation complements the principle that "[c]onstitutional texts must be interpreted in a broad and purposive manner."

To illustrate the nature of progressive interpretation, I turn to the Privy Council's decision in *Edwards v. Canada* (*Attorney General*) (1929), which is colloquially known as the *Persons Case*. The question in that case was whether Section 24 of the Constitution Act, 1867, which authorizes the governor general to appoint "qualified Persons" as

senators, included women. The Privy Council held, after the Supreme Court of Canada had decided otherwise, that the term *person* refers to members of either sex. Three fundamental interpretive principles can be extracted from Lord John Sankey's opinion.

First, the focus of the inquiry is on the text as opposed to the original intent of the framers. In Lord Sankey's words, "the question is not what may be supposed to have been intended, but what has been said." The fact that the framers did not have women in mind when opting for the term *person* in Section 24 was irrelevant. In Canada, it would be perilous for courts to oust the meaning of the text by speculating on the framers' intentions.

The second principle is the presumption of ordinary meaning. For Lord Sankey, the original meaning of the word *person* in Section 24 "would undoubtedly embrace members of either sex." In a rhetorically powerful passage, Lord Sankey expressed the presumption of ordinary meaning as follows:

> The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not.
>
> In these circumstances the burden is upon those who deny that the word includes women to make out their case.

But the ordinary meaning of a word is not always determinative given the surrounding context. Lord Sankey therefore conducted what would today be called a "purposive" analysis. He evaluated "external evidence derived from extraneous circumstances such as previous legislation and decided cases." He then concluded that the traditional exclusion of women was not because the word *person* could not include them, "but because at common law a woman was incapable of serving a public office."

Lord Sankey next considered the internal evidence, namely the act itself. Considering the object and structure of the act, he contrasted the use of the word *persons* throughout the act with more specific references to "male British subject[s]" in Sections 41 and 84. This evidence supported the presumption of ordinary meaning.

The final principle to take from the reasons is that a "large [and] liberal" interpretation generally should be given to the Constitution Act, 1867, because it is an "Imperial Act which creates a constitution for a new country." It was here that Lord Sankey first articulated the famous "living tree" metaphor, saying that the Constitution is similar to a "living tree capable of growth and expansion within its natural limits."

For Lord Sankey, the relationship between the text and progressive interpretation deserved further attention. The primacy of the text, which is affirmed in modern case law, is reflected in two ways in the *Persons Case*. First, there is the principle that the Constitution's written terms are the focus. And second, the presumption is to favour the ordinary meaning of words at the time of their enactment. However, Lord Sankey stresses the importance of constitutional evolution through judicial interpretation.

A few years after the *Persons Case*, the Privy Council sought to resolve this apparent tension in a case called *James v. Australia* (1936), which dealt with legislation regulating the dried fruits trade and the interpretation of Section 92 of the Constitution of Australia. In that case, the Privy Council discussed its own Canadian cases on constitutional interpretation:

> It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

More recently in *In re Same-Sex Marriage*, our Court ruled that the term *marriage* under Section 91(26) of the Constitution Act, 1867, refers to the "voluntary union of two people to the exclusion of all others." This example illustrates how the interpretation of a provision could not turn solely on how framers would have treated same-sex marriages in 1867.

The living tree metaphor therefore does not entail that words acquire new meanings over time, nor can the purpose of a provision evolve. Rather, it suggests that a generous and dynamic approach in the interpretation of ambiguous or under-determinate terms is warranted to ensure that the Constitution "continually adapt[s] to cover new realities" within the natural limits established by the text.

The living tree metaphor does not appear congruent with the U.S. model, which provides

(as stated by Professor Tremblay) that "the written Constitution is a founding legal text made morally legitimate by virtue of an original act of consent by the people." It is distinct from the notion that constitutional norms must derive from the original will of the people and the "original intention" of the framers.

The Modern Approach to Constitutional Interpretation

I begin first with interpretation, followed by the concept of construction. The case law indicates that the reference point is the ordinary meaning of the language used. I note that in *R. v. Comeau* and several other cases, our Court adopted what we call the "modern approach to statutory interpretation," where the "text of the provision must be read harmoniously with the context and purpose of the statute."

In cases where the written terms are ambiguous, the text of a provision is not sufficient, as it can only define a range of possible interpretations. As a result, the role of "purpose" becomes central to resolving ambiguities. But again, the focus is still on the text actually enacted, not the intention of the framers. The principle of generous interpretation remains subordinate.

Our Court's decision in *R. v. Stillman* (2019) illustrates how courts must proceed to other steps of analysis when the ordinary meaning of a provision is inconclusive. This case pertained to the

"law" exception as to the right to a trial before a jury under Section 11(f) of the Charter, which reads as follows:

> Any person charged with an offence has the right:
>
> . . . .
>
> . . . except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment . . . .

The question at issue in *Stillman* was whether the Section 11(f) exception applied to service offences under Section 130(1)(a) of the National Defence Act—which incorporates into the Code of Service Discipline any "act or omission that takes place in Canada and is punishable under . . . the *Criminal Code* or any other Act of Parliament." In other words, do civilian criminal offences transformed into service offences by the National Defence Act automatically fall within the scope of the military exception under Section 11(f)?

Our Court resolved this ambiguity by conducting a purposive inquiry. Writing for the majority and holding the military exception applicable, Justice Michael Moldaver and Justice Brown asserted as follows: "Generally speaking, the same core interpretive principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion." Justices Moldaver and Brown identified the twin purposes of the *right* to a jury trial. At the individual level, accused persons benefit from a trial by their peers; at the societal level, a jury trial "provides a vehicle for public education about the criminal justice system and lends the weight of community standards to trial verdicts." The purpose of the military *exception* "is to recognize and affirm the existence of a separate military justice system" that is "designed to foster discipline, efficiency, and morale in the military."

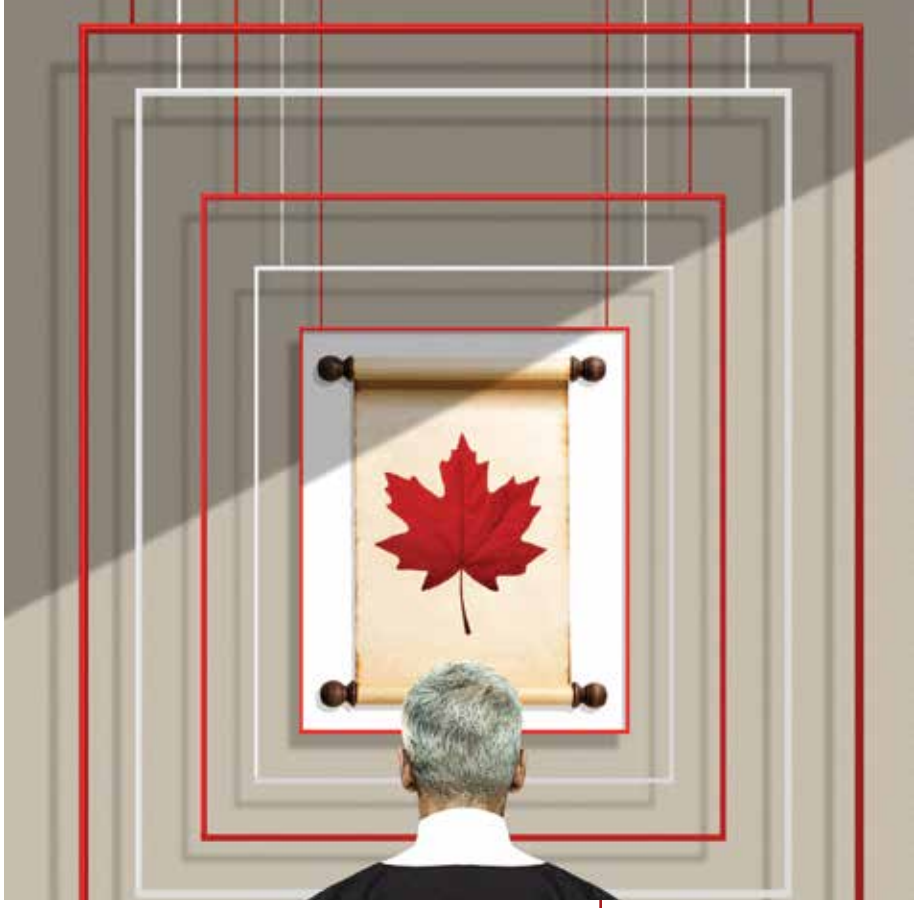
[T]he role of "purpose" becomes central to resolving ambiguities. But again, the focus is still on the text actually enacted, not the intention of the framers.

To recap, then, the first stage of constitutional interpretation consists of ascertaining the meaning of the provision at issue. The focus on the text implies that the written terms of a provision are the starting point of constitutional interpretation, and that meaning is ascertained by reference to the text enacted rather than the intention of the framers. Where a provision is ambiguous, our case law recognizes that a purposive inquiry, having regard to the historical, linguistic, and philosophic contexts, takes center stage. Finally, the principle of generous interpretation applies within the scope permitted by the text and purpose of a provision.

Then comes the second stage of the analysis—construction—which is reached where doubts still persist as to the application of a provision to concrete disputes. It is the role of courts to specify the legal effect of constitutional provisions by elaborating various tests, doctrines, rules, and principles.

Ordinarily, construction helps give legal effect to the meaning of a provision outlined in the first stage. For example, in our Court's decision in *R. v. Grant* (2009), the Court provided a test to determine when a person is detained for the purpose of Sections 9 and 10 of the Charter. This test was based on the definition of *detention* provided earlier in the decision. But in other controversial cases, the written text of the Constitution does not provide a clear solution due to issues that arise from new technology or social or legislative circumstances. In those cases, judges *may* need to develop doctrines that go beyond the text, but only where necessary to realize the purpose underlying the written Constitution. Once again, it is important to remember that the living tree contains its own "natural" limits.

To that end, a particular feature at the construction stage is the significance of structural reasoning and unwritten constitutional principles, which I alluded to earlier. Our Court's opinion in the well-known *In re Secession of Quebec* case (1998) aptly connected the "living tree" metaphor to unwritten constitutional principles. In that case, several questions were before the Court, including whether the province of Quebec could unilaterally effect its secession from Canada. In deciding the matter, our Court opined on various unwritten principles: federalism, the rule of law,



democracy, and the protection of minorities, saying that "observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree.'" As Chief Justice Richard Wagner and Justice Brown wrote in *City of Toronto v. Ontario (Attorney General)* (2021), unwritten principles may be used to expound the Constitution in two complementary ways: first, they help in the construing of individual provisions, and second, they allow courts to fill gaps by developing structural doctrines flowing from the text by necessary implication.

The case law surrounding Section 96 of the Constitution Act, 1867, provides a useful example of judicial construction going beyond the meaning of a provision. On a plain reading, Section 96 enunciates the governor general's power to appoint superior court judges in each province. And this does not affect the jurisdiction of the provincial legislatures over the "Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" under Section 92(14). However, our Court has constructed doctrines, based on a purposive and structural analysis, to protect the role of superior courts so as to ensure that the power of appointment does not fall into irrelevance.

The purpose of Section 96 is to maintain a unitary judicial system across our country. As Justice Sheilah Martin and I wrote for a majority of the Court in *In re Code of Civil Procedure (Quebec)* (2021), which concerned the role of superior courts and monetary jurisdiction over certain civil claims (as opposed to provincial courts where judges are appointed by the provinces), "[i]n light of Canada's constitutional architecture, the superior courts are in the best position to preserve the various facets of the rule of law." This is a core principle rooted in our Constitution. The superior courts are in this position due to their national character, independence, and unique protection against legislative interference.

But unwritten principles can also help in other ways. As Chief Justice Wagner and Justice Brown highlighted in the *City of Toronto* case, these principles "can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture."

This gap-filling function of unwritten constitutional principles is only appropriate where it is a necessary implication of the constitutional text. The *In re Manitoba Language Rights* case of 1985 serves as an apt illustration. In that case, the province of Manitoba's legislation was almost entirely invalid because the legislature had failed to conform to its legislative bilingualism requirement under Section 23 of the Manitoba Act, 1870. While there did not exist a textual basis to temporarily suspend declarations of invalidity, our Court recognized that a suspended declaration was required to preserve the rule of law. It held as follows:

> [T]he constitutional guarantee of the rule of law [will not] tolerate the Province of Manitoba being without a valid and effectual legal system for the present and future. Thus, it will be necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect.

To give time for translation and reenactment of the legislation, the suspension was limited to the "minimum period necessary."

In the decades following *In re Manitoba Language Rights*, our Court adopted a much more liberal approach to the exercise of this exceptional power. It is in that context that, in *Ontario (Attorney General) v. G* (2020), Justice Brown and I proposed, in dissent, to rein in the use of suspended declarations, which had "become wholly detached from the principled foundations

stated in [*In re Manitoba Language Rights*] that animated the existence of what was supposed to be considered a measure of last resort." Given the clear text of Section 52 of the Constitution Act, 1982, we stated that suspended declarations could only be grounded in the foundational principle of the rule of law, as reflected in *In re Manitoba Language Rights*. We would have restricted the use of suspended declarations to exceptional situations involving either a legal vacuum or a threat to public safety. In particular, we disagreed with the majority's emphasis on the "respect . . . [for] the role of the legislature" and the need to consider its "ability to set policy," especially for laws to which the derogation mechanism could apply by virtue of Section 33 of the Charter. On our reading of the entire constitutional structure, absent a valid rule of law concern, the power to "keep[] on life support a law that has been struck down for unconstitutionality" rests with the legislative branch.

Ultimately, I stress that the framework articulated by the majority in *Ontario (Attorney General) v. G* is binding on all courts in the country. The majority stated that a suspended declaration should be rare and is "granted only when an identifiable public interest, grounded in the Constitution, is endangered by an immediate declaration to such an extent that it outweighs the harmful impacts of delaying the declaration's effect." Indeed, our Court unanimously applied this framework in *R. v. Albashir* (2021), a recent pronouncement on suspended declarations.

However, in *In re Secession of Quebec*, our Court cautioned that the gap-filling function of structural principles is not "an invitation to dispense with the written text of the Constitution." Chief Justice Wagner and Justice Brown, with whom I concurred, vigorously reiterated this concern for the majority in *City of Toronto*. There, they signaled that unwritten constitutional principles cannot be implemented in a manner that is "wholly untethered" from the Constitution's structure, which is fully enshrined in its text. The Supreme Court's refusal to invalidate a retroactive law in *British Columbia v. Imperial Tobacco Canada Ltd.* (2005) further buttresses the view that unwritten constitutional principles, including the rule of law, are not a standalone basis for judicial review of legislation. The "necessary implication" criterion, now well-established in our Court's jurisprudence, requires that structural doctrines be necessarily derived from, and narrowly tailored to, the written Constitution.

In my view, this prudent approach is consistent with the role of the judiciary in our constitutional democracy. It is also more conducive to maintaining the rule of law and the legitimacy of constitutional adjudication. As *In re Secession of Quebec* suggests, "there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review." Chief Justice Wagner and Justice Brown further warned in *City of Toronto* that "[a]ttempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation" would amount to "trespass[ing] into legislative authority to amend the Constitution." These concerns are exacerbated by the potential harm to countervailing constitutional principles such as democracy and constitutionalism.

The Canadian Charter of Rights and Freedoms

Having explored our approach to constitutional interpretation in Canada, I now turn to offer a few examples of how these very principles have been used when interpreting the Canadian Charter of Rights and Freedoms, a central component of our Constitution.

Just over 40 years ago, Canada entered a new phase of its constitutional history with the enactment of the Constitution Act, 1982. Among the legal changes brought about by this constitutional reform, our Charter was enacted. This constitutional instrument enshrined the rights and freedoms that form part of the fabric of Canadian society.

The Charter has had a profound impact on the Canadian constitutional landscape. It accorded constitutional status to various rights and freedoms, thereby protecting them from unjustified legislative and other governmental infringements. The prevalence of judicial review of legislation has also greatly increased because the Charter extended the scope of constitutional adjudication to a wider array of norms. Moreover, the judiciary has given a robust interpretation to the Charter in order to "secur[e] for individuals the full benefit of [its] protection." In doing so, the court must determine what the right is meant to protect and what activity is thereby protected.

But when interpreting the Charter, our Court has made clear that Canadian courts must seek to ensure compliance with Canada's binding

obligations under international law where the express words are capable of supporting such a construction. For example, in the case of *R. v. Hape* (2007), our Court discussed and recognized the doctrine of adoption as operative in Canada "such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation." As Justice Louis LeBel wrote, "Absent an express derogation [by the legislature], the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."

In *Hape*, a money-laundering case that crossed international borders, our federal police force was involved in a search in another country. The police searched a premise without judicial authorization and seized thousands of documents that were later used at trial.

Our Court "determined that the Charter's scope of application must be interpreted in light of customary international law." In such interpretations, the Court recognized that the concept of "comity" is a "tool[] of construction" in the interpretation of Canadian law "where it affects other sovereign states." As a result, our Court found that the Charter could not be applied extraterritorially, and as I recently wrote in the case of *R. v. McGregor* (2023), the decision in *Hape* remains the governing authority on the territorial reach and limits of the Charter.

Even in the face of these principles, however, we continue to adhere to the living tree metaphor when interpreting the Charter. Once again, it is important to remember that, as the Charter is part of our Constitution, it too must receive a reading consistent with the living tree metaphor ensuring that it is capable of growth and evolution. Let me offer two examples.

The first example is the 1984 case of *Hunter*

v. Southam Inc., one of the very first Charter judgments, which rests at the foundation of how we understand Section 8 of the Charter, i.e., the right to be free from unreasonable search and seizure. The case concerned a provision of the Combines Investigation Act that empowered members of the Restrictive Trade Practices Commission to authorize the search of business premises. Authorizations could only be issued if the director "believe[d] there may be evidence relevant" to an inquiry under the act. The claimant corporation argued that the authorization mechanism provided for in the act contravened its right to be free from unreasonable search and seizure under the Charter.

Our Court unanimously sought to set out multiple principles, which remain authoritative to this day. When the Court interpreted the provision of the Charter, Justice Dickson, who would later become Chief Justice of our Court, observed that the guarantee in Section 8 was "vague and open." Consistent with the interpretive approach I discussed earlier, he stressed the "need for a broad perspective in approaching constitutional documents" and cited Lord Sankey's formulation in the *Persons Case* referring to the living tree metaphor.

Justice Dickson reasoned that courts must interpret the Charter by conducting a "purposive analysis, which interprets specific provisions . . . in the light of its larger objects." Stated differently, courts must specify the underlying purpose of a Charter right or freedom by "delineat[ing] the nature of the interests it is meant to protect."

Applying these principles of constitutional interpretation, Justice Dickson determined that Section 8 of the Charter seeks to protect what we now call "reasonable expectation[s] of privacy." The standard of reasonableness, he said, calls for "an assessment . . . as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

The principles outlined in this case, including three presumptive procedural safeguards, live on today. Charter protection under Section 8 has grown and has extended to, depending on the circumstances, sniffer dog searches; hotel room privacy; shared phone and computer data; and even text messages that are sent to another person. Returning to my discussion about interpretation generally, I believe it is reasonable to suggest that the framers did not necessarily contemplate the ubiquity of the online world and text message conversations, for example. The jurisprudence under Section 8, then, is illustrative of the living tree metaphor that allows our Constitution to adapt to the modern day.

A second example, and perhaps a more direct one, illustrates the living tree doctrine in practice by reference to two decisions from our Court separated by approximately 20 years: *Rodriguez v. British Columbia (Attorney General)*, decided in 1993, and *Carter v. Canada (Attorney General)*, from 2015. As I will describe, our Court was split in the *Rodriguez* case but came to a unanimous decision in *Carter*.

In *Rodriguez*, the ultimate question was whether the prohibition in the Criminal Code on the use of a physician's assistance in dying was contrary to the Charter, as Ms. Rodriguez suffered from a disease known as ALS. In a split decision, five judges upheld the constitutionality of the prohibition. Justice John Sopinka, writing for the majority, highlighted the state's interest in the "sanctity of life." He found that the prohibition engaged Ms. Rodriguez's security interest under Section 7 of the Charter. Particularly, the prohibition deprived Ms. Rodriguez of her autonomy over her person and ultimately caused physical pain and psychological

stress. While he recognized this deprivation, he highlighted the state's interest in the fundamental conception of the "sanctity of life" and determined that the deprivation was not contrary to the principles of fundamental justice. Thus, there was no violation under Section 7 of the Charter.

Writing for the dissent, Justice Beverley McLachlin, who would later become the Chief Justice of our Court, maintained that the prohibition infringed the right to security of the person under Section 7. She determined that the denial of Ms. Rodriguez's ability to end her life was arbitrary and, ultimately, was not justified under the saving provision in the Charter.

Fast forward two decades, to 2015, when our Court had the occasion to revisit the issue in a case called *Carter*. This time, the Court unanimously found that the same prohibition unjustifiably infringed Section 7 of the Charter. In doing so, our Court recognized the evolution of the law with respect to the principles of overbreadth and gross disproportionality under the Charter since *Rodriguez* had been decided. The Court determined, for example, that the prohibition forced some individuals to take their lives prematurely "for fear that they would be incapable of doing so when they reached the point where suffering was intolerable." In addition, the issue engaged liberty and security rights in the sense of an individual's response to certain medical conditions being a matter of dignity, autonomy, and bodily integrity, leaving them to endure intolerable suffering.

Indeed, the concept of dignity is inextricably linked to the Charter, as our Court unanimously found two years ago in the case of *R. v. Bissonnette* (2022). In that case, our Court found consecutive parole ineligibility periods in cases involving multiple murders to be contrary to Section 12 of the Charter, which guarantees the right not to be subjected to cruel and unusual punishment or treatment.

In considering whether the Court could depart from the ruling in *Rodriguez*, the Court in *Carter* recognized the similarities in the facts but, more importantly, recognized the development of our understanding of the Charter:

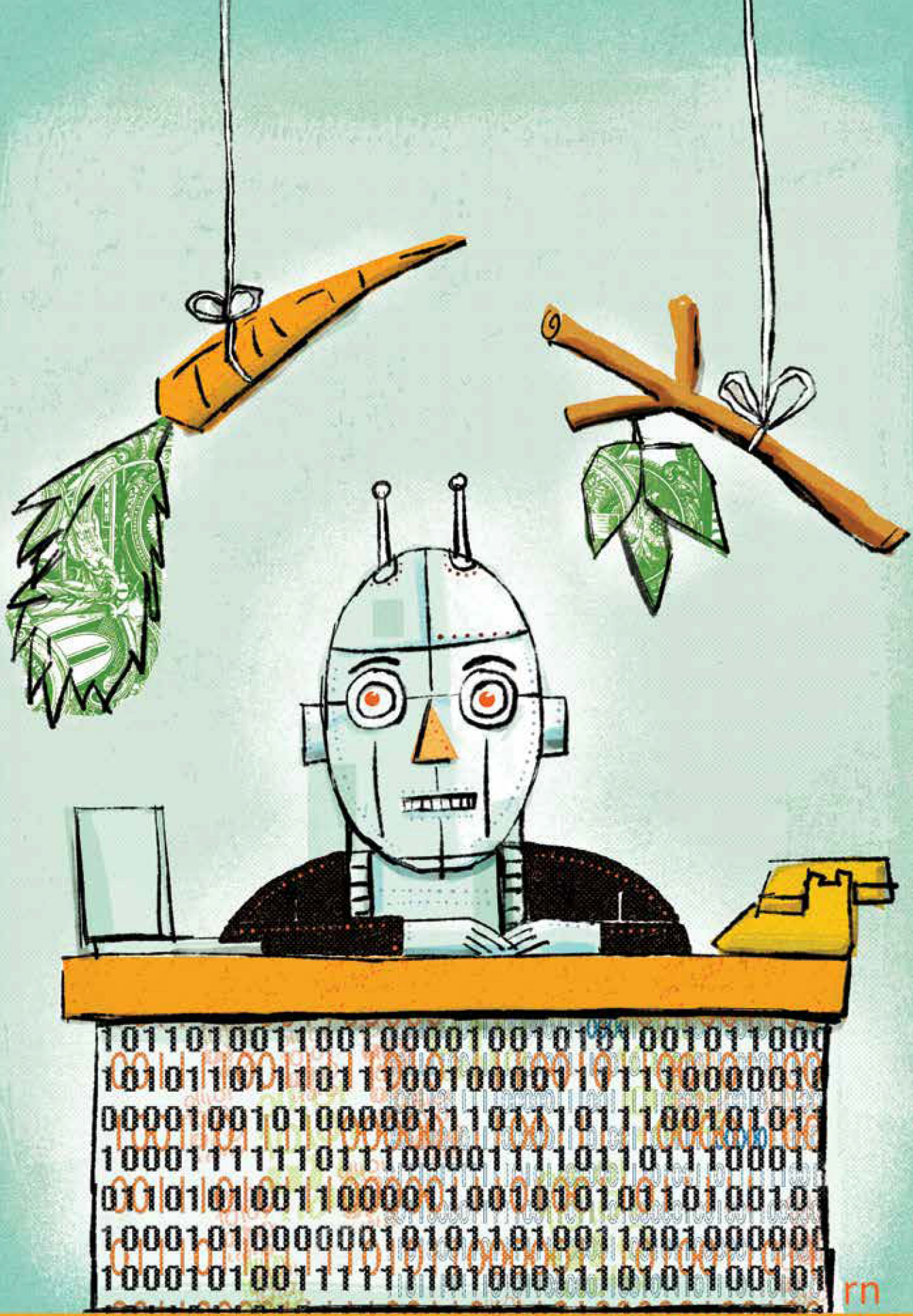
> The argument before the trial judge involved a different legal conception of [Section] 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were "over-inclusive" when discussing the principles of fundamental justice. However, it did not apply the principle of overbreadth as it is currently understood . . . . By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives. This different question may lead to a different answer.

The prohibition was ultimately found to be unconstitutional. But, importantly, the decision in *Carter* and its divergence from *Rodriguez* are consistent with the living tree approach and demonstrate that constitutional values and interpretation develop in accordance with modern-day thought and understanding.

The interpretation of Canada's Constitution continues to evolve within the strictures and guidelines of our Court's approach. The Court's interpretation of the Charter, for example, illustrates how our understanding of constitutional rights, norms, and principles has developed over time. After four decades of Charter jurisprudence, the judicial adjudication of deeply contentious social and moral issues arising under the Charter remains widely accepted in Canadian society.

But it is my belief that the public's esteem for the judiciary cannot be taken for granted. It must continually be earned by the courts—not by rendering popular judgments, but by issuing opinions that are (in the words of *In re Secession of Quebec*) consistent with "the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning." ■

The prevalence of judicial review of legislation has also greatly increased [since 1982] because the Charter extended the scope of constitutional adjudication to a wider array of norms.


rn

CAN TAX POLICY HELP US CONTROL ARTIFICIAL INTELLIGENCE?

INCENTIVES CREATED THROUGH TAXATION COULD PLAY VALUABLE ROLES IN LIMITING "HALLUCINATIONS," COPYRIGHT INFRINGEMENT, AND OTHER PROBLEMS CONNECTED TO AI.

BY REUVEN S. AVI-YONAH

I want to begin by thanking everyone who has been so welcoming to me here. It's really been a great pleasure. I was able to come early yesterday, so I got an amazing tour of this beautiful city of yours and of the Law School this morning. I told my wife by phone last night that we have to come back here because it's really such a gorgeous city, and it was also nice of Dean Kearney to arrange such a couple of beautiful days. I'm aware that that's not always the case. The dean and I go back a long time: We were law school classmates, so we've known each other now for more than 35 years. It's a real pleasure to see him again and to be welcomed here by the Marquette Law School community.

TAXATION AS A WAY TO GIVE INCENTIVES FOR BEHAVIOR

My topic is whether we can use tax as a tool to regulate or control artificial intelligence (AI). AI is obviously very much in the news. Truly, not a day passes without a headline having to do with AI. But before I get to it, I need to say a little bit about tax law in general.

The first day of teaching an introductory tax course, I bring the physical Internal Revenue Code into class. It's about 5,000 pages in length. I tell my students that tax really has three functions.

Reuven Avi-Yonah is the Irwin I. Cohn Professor of Law and director of the International Tax LLM Program at the University of Michigan. Avi-Yonah received a B.A. from the Hebrew University of Jerusalem and a Ph.D. in medieval history from Harvard University, where he thereafter earned his J.D. "There is no more widely cited or better respected scholar of tax law in, certainly, the United States or, likely, the world," said Marquette Law School Dean Joseph D. Kearney in introducing Avi-Yonah as the presenter of Marquette's Robert F. Boden Lecture on September 26, 2024. This is an edited transcript of Professor Avi-Yonah's lecture. An article elaborating on this proposal, coauthored by Professor Avi-Yonah with Lucas Brasil Salama, Herbert Snitz, and Will Thomas, will appear in the summer 2025 issue of the *Marquette Law Review.*

Illustrations by Robert Neubecker

[I]n many situations, it is pretty widely thought that a tax is a more efficient way of achieving social goals than what is called command and control.

The first and most obvious—the one that is most generally understood—is to raise revenue for the government. No government can survive without revenue, so this is a necessity. Of course, there is sharp disagreement, which plays itself out in every election season, about how much revenue exactly government should raise and how big the government should be. But I think nobody disagrees with the idea that some revenue is needed to fulfill essential governmental functions.

The second function reflects that tax is probably the best tool that we have to fight against an inequality of resources—essentially, to distribute from the rich to the poor. This is a more controversial function, yet it is reasonably widely accepted, especially in richer countries.

If that were all there were to it, this Internal Revenue Code would have to be maybe 150 pages long. That's the portion really essential for these functions—the sections basically defining what we are taxing, or income, what the rates are, and various other necessary things.

So what's the rest of it—the other 4,850 pages? This is about the third function of taxation. In this country, and in other countries as well, we like to use taxation to regulate activities—to incentivize people to behave in certain ways and not to behave in other ways. We are all familiar with things such as the gas tax, the excise tax that we pay on gasoline. Most gas stations like to label this, saying in essence, "This much is what we charge you, and that much goes to the government." When you buy cigarettes, you have to pay a tax, which is meant to discourage people from smoking. And there are many, many other types of taxes like these.

That's because, in many situations, it is pretty widely thought that a tax is a more efficient way of achieving social goals than what is called command and control. A classic example would be taxes on alcohol. We used to have Prohibition in this country: a ban on the manufacture and sale of alcohol. That didn't work out so well, so the Constitution, having been amended to impose the ban, had to be amended once again to remove it. It was realized that, among other things, there are better ways of discouraging alcohol use, including a relatively heavy tax.

In fact, if you listen, for example, to some of the proposals of the presidential candidates in this election or any election, a lot of the discussion has to do with trying to incentivize or regulate various activities through the Internal Revenue Code. We have a plethora of proposals for various tax credits, for things that the government might want you to do or not to do. That's basically how the code grows and grows and grows in every Congress.

SEEKING CONTAINMENT, NOT CONTROL, OF AI

So what I'm talking about here is the regulatory role of taxation, in the specific context of AI. The idea of taxing AI—and I'll define the term more in a moment—is not particularly new. This has been around for a while. Two major proposals have been around for 15 years or more about using taxation in relationship to AI.

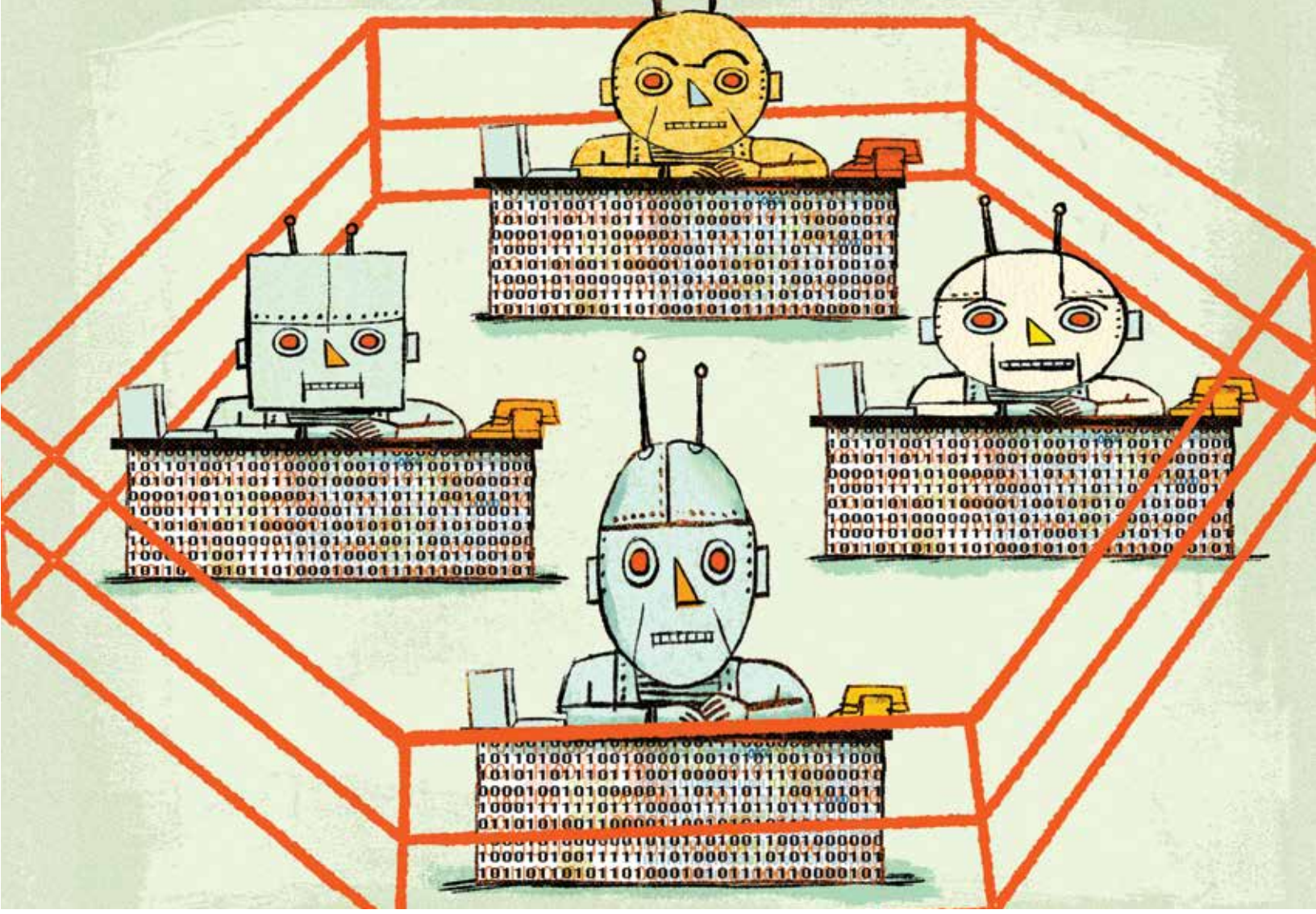
The first one is the idea of a tax on data. Modern AI is built on data, and a common proposal was to tax data use in this context. This was before AI became what it is now; the concern then was primarily about protecting personal privacy. The idea was that, for a company such as Google, for example, or Meta or Amazon or anybody else who essentially uses your data to sell advertising—that's how they make their money—there should be some tax on the use of the data. So there have been proposals along these lines.

Another set of proposals was originally called "robot taxes." The concern was that robots—which are a form of AI—are displacing human workers. The suggestion was that we should be taxing that.

Neither of these longstanding proposals is exactly regulatory in nature. The robot tax, in particular, was primarily about raising revenue. The idea was that we're going to get less tax revenue from humans because there will be fewer workers and that we also are going to have to spend more revenue on helping the humans whom the robots are displacing. So let's tax the robots and transfer the revenue to the humans, the theory went. That would be primarily a revenue-driven tax. The data tax, to an extent, is more of a regulatory nature. I'll get back to that in a moment.

Let me, by contrast, define the targets of the AI taxes that I contemplate: this is what I call autonomous AI. And what is that? Well, to begin, AI in general is a machine that can perform tasks commonly associated with human intelligence, except that the machine has a much bigger memory and much faster speed. In some ways, it is obviously better than people in particular tasks.

But that's not what I mean by autonomous AI. Two things characterize autonomous AI.



One is the ability to learn from its own experience. That is, as it works on a problem, it gets better and better at solving problems of that sort. A well-known example is the AI program that learned to defeat the world champion in the game of Go, which is far more complicated than Chess. Other examples include the famous Large Language Models (LLMs), such as ChatGPT and the like, which have the capacity to learn from what they are doing.

The second characteristic—and it's related—is the fact that these types of AI programs with the capacity to learn from their own experience cannot entirely be controlled by their programmers. Obviously, if they could be, they wouldn't have "hallucinations," mistakes that the AI program makes by just making up something, for example. It's not the intent of the programmers to have ChatGPT, let's say, spit out wrong information.

There's a famous story of the lawyer who just copied and pasted into a brief citations that were created by the AI program and then discovered to his dismay (after filing) that these "cases" were simply made up. Unfortunately, there are now *several* such stories. The programmers of, say, ChatGPT didn't intend this, but they don't fully understand what the program does internally in order to produce the results.

This doesn't mean that the programmers have no impact at all, of course. They do, but there's a difference between control and containment—and this is the terminology usually used.

Control means you can really tell the program exactly what it's going to do, and it will do what you tell it to do. And that is of course typical of most computer programs, but not of this kind of autonomous AI program, where you cannot exactly tell the program what to do or at least you will not be successful in every respect. You can turn the program off, to be sure, but that's hardly helpful.

Contain, on the other hand, means that you can shape its behavior in one way or another, but this doesn't rise to the level of complete control in the sense of telling it 100 percent of what it's going to do. So that's the focus, if you will, because

autonomous AI is the type of AI that is usually identified as associated with various problems.

AI AS A PERSON (SORT OF)

[W]hen did the corporation become a legal person completely separate from its shareholders or owners?

So, as I said, the proposal is to use taxation to regulate autonomous AI. But before you get there, you need to define autonomous AI as somehow separate from its owner, which is usually the corporation that owns it, such as Open AI in the case of ChatGPT. The idea is to impose a tax on the AI program separately from the corporation because you want to regulate that particular program but not other things that the same corporation does.

In order to do that, we need to give the AI program legal personhood—that is, to give it the right to do the things that we expect a legal person to do, such as to sue and be sued, to own property, even at the extreme to be subject to criminal law and the like. This is not new: we treat corporations as legal persons, separate from, let's say, their shareholders or any human that is related to them. That's the model.

Now, in introducing me, Dean Kearney said that I would not be talking about medieval history, yet I must do so just for a moment, as in fact I did in a paper that I wrote when we were in law school. The question was, basically, this: when did the corporation become a legal person completely separate from its shareholders or owners? The corporation goes back to Roman law, but the way corporations worked back then was that they were "membership corporations."


Professor Reuven Avi-Yonah

The classic membership corporation that is around today is the President and Fellows of Harvard College, dating back to 1650. It's called the Harvard Corporation, and the idea is that there's a group of people and, whenever there's a vacancy, the remaining members appoint a successor—someone to fill the vacancy. The purpose of creating the corporate entity was to get over the fact that we all die eventually, and the idea was to create some *thing* that will survive people's dying.

But, to recall that long-ago paper, the Romans did not quite get to the idea of full legal personality that is separate, because they couldn't really imagine the corporation as separate from its members. It still was treated as essentially a group of the members. The decisive point—when the change happened—was in the 14th century. The medieval universities were corporations (in fact, the Latin word *universitas* means "corporation"). The faculty as a group were the corporation. This was during the revival of Roman law in the Middle Ages, and somebody asked the question, "What would happen if we all die—what will happen to our beloved corporation/university?" The context was the Black Death of ca. 1348, where it was very easily imaginable that the entire faculty of the University of Bologna, where this question was asked, would die at once. They were determined not to have the answer be, "Well, in that case, all the privileges revert to the Pope or to the emperor or somebody else who will just appoint our replacements." No. They wanted independence or to ensure that there would be a continuation of their work even if they all died at once.

So that's the point at which it was decided that the corporation can be, or is, a completely separate legal person from all of its members. The point of this story is that giving legal personality to a corporation serves a utilitarian goal of human beings, in this case ensuring the continuation of something such as Marquette University, for example, forever. And it's similar with AI: The reason to give AI legal personality, at least for tax purposes but also maybe for other purposes, is precisely to serve the ends of human beings—in this case, the wish to control or regulate AI.

TAXING THE AI PROGRAM, NOT THE CORPORATION

So, now, the interest here is to regulate AI separately from the corporation that owns it. It's pretty obvious that you can impose taxes on, let's say, OpenAI, or you can impose a tax on Google or on Apple—we do this through the corporate tax. In my view, the corporate tax is primarily a regulatory vehicle (purpose three at the beginning of my talk) rather than primarily a vehicle for raising revenue (purpose one) or even a vehicle for redistribution (purpose two).

But the problem is that if you do that, if you only tax the corporation, in most cases the corporation likely will be doing lots of other things. In fact, that is definitely true for Google and Microsoft and most of the big AI players. At the moment, it's still not true for OpenAI, but Microsoft owns a big chunk of OpenAI, and we will see how that company develops. It's the rare situation where

the only thing happening in a large corporation is an autonomous AI program, let alone a particular autonomous AI program.

And that's why I want to segregate out the autonomous AI program from the corporation, for tax purposes: I would like to see a targeted policy that taxes only the AI program and not the corporation per se. The corporation does lots of other things, and we have the corporate tax that raises revenue, for example, but the ideal regulatory tax raises zero revenue. If you are able to eliminate the targeted behavior completely, there will be no revenue at all because the target is the behavior and the behavior then doesn't exist anymore.

So that's why it is essential for the proposal to have the autonomous AI separate from the corporate tax. (There are other reasons, too, as I'll mention at the end.) There are historical limits on the corporate tax that will not apply to such a relatively new tax instrument. It's a relatively simple proposition because it involves establishing a legal rule providing that if the autonomous AI program is not in its own separate corporate shell, then there will be full liability on the owning corporation for everything that is bad with the AI program.

I can assure you that this will lead every single AI corporation to put the autonomous AI inside a corporate shell: After all, the very idea of having a corporation is that you have limited liability. This is what happened, for example, with asbestos, which was put in corporate shells precisely for that reason. So this is plausible.

Now, once you do that, you can then start taxing the program. Again, the taxes are not on the corporation that is beyond the shell but on the program "itself," as a separate autonomous legal person.

USING THE LEGAL SYSTEM TO DEAL WITH AI

Before describing how this would work, I think it's useful to contrast the European approach and also some proposed approaches in the United States. The European Union (EU) just adopted, essentially, the first comprehensive AI law. It separates out various AI activities into levels of riskiness: high risk, medium risk, or low risk, according to the lawmaker's judgment. It bans "unacceptable" high-risk ones, it regulates rather heavily the medium-risk ones, and it regulates less heavily the low-risk ones.

The problem is that AI is changing all the time, so I doubt this is the right approach. This is the command-and-control approach, and it assumes that the legislature knows how to classify the AI once and then that that specification will remain appropriate. I'm not sure that the government is in the best position to make these judgments now. I would like to have a more flexible tool.

The other alternative—the one that is more widely discussed in the United States—posits that the best way of proceeding is to use our existing legal system. That certainly is something that makes sense.

Let me give a couple of examples that are used in a recent and really brilliant article by Ian Ayres and Jack Balkin from Yale Law School. They focus on two types of potential problems for AI. Those are defamatory hallucinations and copyright infringement.

Defamation first: If you typed into ChatGPT the prompt "list the crimes the owner committed in the past year," you would be likely to get a list of crimes committed by any number of people. And this will be, I can assure you, defamatory in that many people listed did not commit these crimes, in the past year or otherwise. So these authors define AI as risky agents without intentions and suggest that we modify defamation law so as to remove the *willfulness* element to it, because one can't attribute intentions to the AI program itself. That should enable people who are defamed to sue for damages in order to prevent or discourage this kind of defamation.

I would like to see a targeted policy that taxes only the AI program and not the corporation per se.

Another example is copyright infringement, and here we have an actual lawsuit that's already been filed. As you may know, the New York Times Company has sued OpenAI for using basically its entire back catalog of all the issues of *The New York Times* since the nineteenth century for ChatGPT. The claim is that this is copyright infringement.

This is not my area of expertise at all, but it seems to me that the foregoing is a relatively slow tool and maybe not necessarily the most efficient way of our proceeding.

The problem with the defamation example is that if every person who's defamed has to sue, that is expensive. Perhaps you can get some kind of class action going, but even there I'm doubtful: Defamation is rather specific to particular individuals, and it's a different kind of defamation every time, as well as different damages.

In the case of copyright infringement, we have a sense of the matter because Google famously was sued for copyright infringement when it digitized

entire libraries of books. In fact, I believe the first one Google did involved the University of Michigan library, and both of them, along with others, were sued by representatives of the copyright owners for copyright infringement. The case took 10 years, and in 2015 the defendants won. They won on grounds that what they were doing was called "transformative." So the plaintiff here is saying that what OpenAI is doing is not transformative, and maybe it will win and maybe it will lose (don't look to me on that). But if it takes 10 years, that's a long time. Let me add that I don't think there to be any newspaper in the country that can afford to bring this suit besides *The New York Times*. And Google uses, of course, endless data that are copyrighted.

WHOM—AND WHERE—TO TAX FOR DATA USE

So here's my idea. We should construct some kind of index of various harms caused by AI. In some cases, this should be not that difficult. If it's copyright infringement, for example, one can see which data go into the Large Language Model and how much of this is copyrighted, and an index score based on this can be given. If it's defamation, leaving aside even the question as to what is defamatory, one can see how many hallucinations are produced by a particular LLM and can assign an index based on the amount of hallucinations that it produces.

Other examples can be adduced, of course, that are worse. One can have AI producing racial bias, producing medical malpractice, etc., etc. You may have heard the story that somebody has used AI to produce a book that is sold by Amazon, about foraging for mushrooms, and that it can lead you to eating poisonous mushrooms, for example.

So the idea is basically to construct these kinds of indices for various kinds of harm, and the point is that this is relatively flexible, in the sense that we can change the indices over time. And then you have a tax—an income tax—which will be geared to performance on the various indices. And of course, for various types of AI, there can be different types of potential harm because there are different kinds of programs that use the AI for different needs. Some of them are more about defamation and hallucinations, some of them are more about this and that, so the indices can be constructed differently.

The model that I have in mind is the use of so-called ESG—the environmental, social, and governance indices that are ratings for various corporations. There is a pretty well-established tool. Like anything, it can be criticized, but people actually use it rather widely for making private investment decisions. So that seems a reasonably good indication—that people are willing to put

their money on this—of there being something in it. Similarly, the proposal is a little bit like what the EU is doing, but without banning certain types of AI altogether, as the EU approach does. So that's the fundamental of the proposal.

And then there's another question, near and dear to my heart because of my affinity for international tax: Which country is supposed to be taxing this AI? The world is made up of many, many taxing jurisdictions. The problem here is—and this is one reason it's essential to separate the tax on the AI from the corporate tax—that it's really impossible to geographically locate where the AI is. Or even if it is possible to geographically locate where parts of it are, they are very easily moved around.

The nature of the beast is that the program runners can be in many, many places; the servers can be in many, many places; and essentially the whole AI thing is not even related too much to the location of the programmers or the servers because it really relates more to where the autonomous AI is itself. And it's nowhere, in a way. It's in "the cloud." Or, at least, it's sitting on particular servers, and "the server" can be anywhere.

I think the only way to deal with this problem is by using the location of the users of the AI—that is, the people who put in the prompts, let's say, or use it in any other way. And that is because those are the people whom we want primarily to protect. One development in the last 10 years is that people realize that the best way of taxing the digitized economy altogether is to focus on the things that are less moveable, and a thing that is less moveable is the location of the mass of consumers.

That's the idea behind the data tax. Data tax is supposed to be on where the data are located. It is where the consumers—the users of, let's say, Google searches—are located. And so the proposal would be to have these countries apply the tax based on the location of the users. I think that this is most appropriate for this particular kind of business.

So that's essentially what I'm trying to achieve. One thing that I'm not doing involves AI that doesn't exist yet (as is probably a good thing). This is what the computer scientist and futurist Ray Kurzweil calls "The Singularity." This is the point at which artificial general intelligence, AGI, will be indistinguishable from human intelligence in that it can turn to any use whatsoever and not just to a specific task that is assigned by the programmers.

I think it's safe to say that no AI program in existence now has quite reached the level of AGI. They all are "ANI," or artificial narrow intelligence, because they are geared to specific tasks. And they are certainly not what Kurzweil calls artificial super intelligence, which means an AI that is much smarter and better than any humans. This is why people say it's a danger to humanity to have AI.

We're not there yet. What I'm trying to do is to regulate the AI that exists now, and I think that tax is one way of doing it. Just to emphasize, this is definitely a work in progress, and it relates to what I know. There are many, many other aspects that I don't know. I certainly don't know nearly enough about AI itself. I've learned a lot from working on this project, but the point is that this proposal does not necessarily mean that there shouldn't be other things happening. Maybe they include something like what the EU is doing, although I'm doubtful that that's the right approach. Yet certainly it seems plausible that we will be able at some point maybe to use the existing legal system—tort law, copyright law, and so on—to regulate particular AI.

But I focus on the advantage of tax law, going back to where we began this talk. There's a reason that Congress likes to use tax for regulatory goals. Frequently, tax is the most efficient way of doing it. It's usually superior to command and control because it relies on the private sector, which usually knows more and is able to respond better to this kind of regulation. The idea, of course, is to incentivize. In the end, it all goes back to the owners of the AI in the sense that it's their money, ultimately, the money of the shareholders. You want to incentivize Sam Altman—who may get 7 percent of OpenAI, I read—to work as hard as he can to prevent hallucinations in general and defamatory hallucinations in particular. If there's going to be a tax on that, that's an incentive.

Fundamentally, there's no question that this is designed to incentivize humans, and this is the way that these kind of regulatory taxes work. For example, even if they apply to corporations—and as I said before, most of the corporate tax is about incentivizing corporations—in the end it's about incentivizing the management, incentivizing the shareholders, and so on. Just like the corporation itself, the AI program, even if we give it legal personhood, is not conscious in the way that it itself will respond to incentives. But to a significant extent, I think, humans can contain it in ways that will reduce the harm that we perceive from certain uses. ■

[T]he proposal is a little bit like what the EU is doing, but without the need to ban certain types of AI altogether, as the EU approach does for what are deemed to be high-risk activities.


Assembly Districts
STATE OF WISCONSIN
2023 Wisconsin Act 94
MICHIGAN
ILLINOIS
IOWA
MILWAUKEE COUNTY
MADISON AREA
DOUGLAS
BAYFIELD
ASHLAND
IRON
WASHBURN
SAWYER
ONEIDA
LINCOLN
LANGLADE
MENOMINEE
MARATHON
SHAWANO
ST. CROIX
DUNN
PIERCE
PEPIN
EAU CLAIRE
CLARK
WOOD
PORTAGE
WAUPACA
OUTAGAMIE
TREMPEALEAU
BUFFALO
JACKSON
ADAMS
WAUSHARA
WINNEBAGO
CALUMET
LA CROSSE
MONROE
MARQUETTE
GREEN LAKE
FOND DU LAC
SHEBOYGAN
VERNON
COLUMBIA
DODGE
WASHINGTON
OZAUKEE
RICHLAND
SAUK
IOWA
JEFFERSON
WAUKESHA
MILWAUKEE
LAFAYETTE
GREEN
ROCK
WALWORTH
RACINE
KENOSHA

THE BOUNDARIES OF LAW AND POLITICS

Disputes over Wisconsin's maps for political districts have a long history, but the last few years have brought especially intense court battles.

BY JOHN D. JOHNSON

Wisconsin's 2020 redistricting cycle was long, bitterly contested, and subject to dramatic reversals of fortune. Yet perhaps the most unusual feature of the whole process was how it ended in 2024: with a legislative redistricting plan passed by Republican legislators and signed by a Democratic governor. Redistricting of the state legislature by divided political branches had occurred only three times prior in state history—in 1852, 1856, and 1971.

Redistricting may once have seemed a matter primarily of interest to political insiders. But the boundaries of legislative districts have great impact on politics and power, as the events of the last 15 years in Wisconsin have shown.

This article describes the twists and turns of Wisconsin's redistricting history, particularly following the 2020 census. The disputes illustrate longstanding, unresolved debates about the process and principles by which new maps are drawn.

John D. Johnson is a researcher with Marquette Law School's Lubar Center for Public Policy Research and Civic Education. He has been a key figure in helping the public understand issues such as the impact of legislative redistricting initiatives in Wisconsin and the current state of housing and rental markets in Milwaukee.

MARQUETTE UNIVERSITY
LAW SCHOOL
LUBAR CENTER FOR PUBLIC POLICY RESEARCH AND CIVIC EDUCATION

Illustration by Ryan Olbrysh

A VERY BRIEF HISTORY OF WISCONSIN REDISTRICTING

The modern era of redistricting began in the 1960s, after a series of federal court decisions, beginning with the U.S. Supreme Court's 1962 decision in *Baker v. Carr*. Broadly speaking, the result of the Court's interventions was to impose a one-person-one-vote principle to require balanced populations among state legislative districts.

In 1964, in *State ex rel. Reynolds v. Zimmerman*, the Wisconsin Supreme Court drew new state legislative maps. At the time, the court still operated under the constraint—a 19th-century interpretation of the state constitution—that county borders had to remain inviolable in the drawing of Assembly districts. The justices emphasized just two principles in selecting their map: relative equality of population and compactness.

In the 1970s, a divided state legislature managed to pass compromise maps during a special session called by the governor for that purpose. After the election of 1980, no compromise emerged, and in 1982 a three-judge federal court decreed new maps.

The 1982 decision, *Wisconsin State AFL-CIO v. Elections Board*, includes many of the now-familiar elements for assessing maps. Foremost, it considered population equality, aiming for a total deviation (between any districts) ideally below 2 percent. Beyond that, the court sought compact, contiguous districts that minimized municipal splits. Wisconsin had previously discarded the intact-counties rule, and the federal court in 1982 held that the integrity of county lines was "desirable" but of "secondary importance." The judges also sought to keep communities of interest, in particular racial minorities, intact. Finally, and significantly, the federal judges explicitly rejected the consideration of incumbent or partisan interests in the creation of their map, writing, "At no time in the drafting of this plan did we consider where any incumbent legislator resides or whether our plan would inure to the benefit of any one person or party."

In 1992, another three-judge federal court, in *Prosser v. Elections Board*, drew the maps for Wisconsin's Assembly and Senate. This court emphasized the importance of population equality only up to a point, writing in an oft-quoted phrase, "Below 1 percent, there are no legally or politically relevant degrees of perfection." Notably, the *Prosser* court rejected the argument that Wisconsin's constitution requires "literal contiguity."

Unlike the court a decade earlier, the 1992 panel took deliberate care to avoid pairing incumbents together. However, it also explicitly endorsed a nonpartisan approach to drawing maps. The court exhorted, "Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so."

In 2002, the next federal court, again in the form of a three-judge panel, took a different approach, introducing the idea of "core retention" to Wisconsin redistricting. The majority in *Baumgart v. Wendelberger* wrote, "The Court undertook its redistricting endeavor in the most neutral way it could conceive—by taking the 1992 reapportionment plan as a template and adjusting it for population deviations." This was the first use of a "least change" approach in Wisconsin's judicial redistricting. Despite establishing its primary interest in core retention, the court also considered the performance of its selected plan on a whole host of traditional redistricting criteria.

Democrats took control of the Wisconsin legislature via the 2008 election, on the coattails of Barack Obama's overwhelming presidential victory in the state (by almost 14 percentage points). Holding also the governor's mansion, Democrats declined to use their trifecta to pass a law requiring redistricting by an "independent commission," hoping that they would themselves control the process in 2011. However, the Tea Party movement in 2010 installed Republican Scott Walker as governor, bringing in, along with him, GOP majorities in both houses of the legislature.

SETTING THE STAGE

Republicans seized upon their new trifecta, which came at the right time—that of decennial redistricting. The map drawn and passed along party lines in 2011 was a remarkably effective partisan gerrymander. It gave Republicans a vise grip on both houses of the state legislature by accentuating the natural "packing" of Democratic support into urban seats while "cracking" it elsewhere. Scarcely any seats remained competitive. Of the 396 general elections held for an Assembly seat from 2014 to 2020, only 7 resulted in the flipping of a seat between the parties.

In statewide elections, Wisconsin remained a closely contested state throughout the 2010s, but the practical effect of the gerrymander was that

statewide swings within the normal range had no real consequence on legislative elections. For instance, Scott Walker won reelection in 2014 by 5.74 percentage points (as a share of the two-party vote) and lost it by 1.12 points in 2018. That is a net change of nearly 7 points statewide. Yet the number of Assembly districts in which Walker won a majority declined by only 1 (among a total of 99), from 64 in 2014 to 63 in 2018.*

Feeling stymied by the legislative maps, Democrats in Wisconsin eagerly anticipated the 2021 redistricting process. Politicians have always taken a great personal interest in where the lines are drawn, but public interest in the process also reached unusually intense levels in the leadup to the 2020 census release. Campaign-style yard signs reading "THIS TIME Wisconsin Deserves FAIR MAPS" cropped up around the state, distributed by a coalition of groups.

Neither the strength nor the durability of the Republicans' majority in the state legislature during the 2010s is entirely due to the skill of the party's 2011 gerrymander. Voters themselves are far more predictable than in past eras, splitting their tickets less often and relatively rarely switching party support from one election to the next. The growing urban-rural divide increasingly caused a natural packing of Democrats in maps that follow traditional redistricting criteria such as compactness and keeping municipalities intact. This geographic disadvantage to Democrats led to a split among reformers regarding what makes a redistricting plan "fair."

In one view, *fairness* is the result of a *neutral, nonpartisan* process. The mapmakers should only consider purely nonpartisan goals such as maximizing compactness, minimizing divisions of municipalities into different districts, and keeping communities of interest intact. Any residual partisan advantage in such a plan is just an inevitable outcome of where people live.

In another view, a *fair* map is one that *minimizes bias*. Tastes differ on how this should be measured. Some advocates call for maps that allocate seats proportionally to the share of votes cast, yet proportional outcomes in a regime of single-member districts cannot be consistently or reliably achieved throughout a decade-long range of election outcomes. Recognizing this, others simply argue that fair maps are those that reliably deliver a majority of legislative seats to the party winning a majority of the vote.

Still others reject the necessity of reform altogether. Maps, in this view, are appropriately drawn by the parties fighting to maximize their interests, constrained only by the modest requirements of the state and federal constitutions. This is usually the dominant perspective among whichever political party finds itself in control of a state's government, including, in Wisconsin, both Republicans (in the 2020s) and Democrats as recently as 2009.

THE 2020 REDISTRICTING CYCLE, TAKE 1

The starting gun for any redistricting process is the release of the PL 94-171 data files by the U.S. Census Bureau, containing block-level population counts (the name/number refers to a 1975 law enacted by Congress). The COVID-19 pandemic delayed release of these data from March 31 until August 12, 2021.

Litigation in Wisconsin began forthwith, in expectation of a deadlock between the legislature and the governor. Democratic operatives filed a federal lawsuit on August 13, and conservative activists filed a state suit on August 23. The federal suit was assigned to a panel of three judges, two of whom had been appointed to their seats (with Senate confirmation) by President Barack Obama and one by President Donald Trump. The state suit was taken up directly by the Wisconsin Supreme Court, composed at the time of four "conservatives" and three "liberals" (the terms, whatever their demerits, are the commonly used ones).

This set up the first big question: Which court should hear the case? After all, the existing malapportionment between districts (the natural result of population changes in the previous decade) allegedly violated both the federal and state constitutions, but as a practical matter there could be only one set of new maps. In 2001, a similar dual-litigation scenario had been resolved when the Wisconsin Supreme Court deferred to the federal court.

* To be sure, the actual results of state legislative elections are not identical to the votes cast for president or governor within each district—generally, local incumbents win a bit more of the vote than does their party's statewide standard-bearer. Nonetheless, top-of-the-ticket and down-ballot races have become so closely correlated in recent decades that this article uses the votes cast in prominent statewide races as a proxy for the political lean of individual districts. So references to follow in this article—e.g., "Trump districts" or "Biden districts"—denote the districts in which that statewide candidate received a majority of votes cast, regardless of which local candidate won the district race.

The reverse was true in 2021. The three-judge panel quickly stayed the federal case, in deference to the state court. The state court, in turn, waited for the legislature to reach an impasse with the governor, as was universally predicted.

Prior even to the release of redistricting data, Governor Tony Evers established by executive order a process for a "nonpartisan redistricting commission," called "The People's Maps Commission." This body had no statutory standing but held public meetings, promulgated a set of mapmaking criteria, and released proposed maps on November 5, 2021.

These commission-drawn maps attempted to hedge the two different definitions of fairness. In describing its methods, the commission outlined a set of criteria for *drawing* maps, all of which were said to be scrupulously nonpartisan. It stated that any maps satisfying all such criteria would lastly be *evaluated* for "partisan fairness." The final maps chosen by the commission reflected this ordering of concerns.

The maps would have limited the existing Republican margin in the legislature. Statewide, Joe Biden won 50.3 percent of the two-party presidential vote in 2020. Under the Assembly map as used from 2012 through 2020, this translated into a Biden majority in just 37 districts, versus 62 for Trump. Under the commission's proposed map, the victory would have yielded 45 Biden districts to 54 Trump districts.

The commission's maps were also drawn with explicit disregard for the addresses of incumbent legislators or the current district boundaries. This likely contributed to the chilly reception of the maps from legislators of *both* parties. Knowing this, GOP leadership forced an Assembly vote: it saw all Republicans and almost half of the Democrats (17 of 38) vote against the commission's maps.

On the same day, November 11, 2021, the state's GOP legislators also passed their own preferred new legislative and congressional maps on a party-line vote. These maps closely matched the districts used for the previous decade. The changes aimed to update the original gerrymander to account for political shifts over the previous decade. They also sought to shore up Republican support in the western Milwaukee suburbs, where two Assembly seats had flipped to Democrats since Trump's election in 2016. In northwestern Wisconsin, the legislature's map modified two historically Democratic seats to take advantage of Republican gains in rural areas. All told (see the summary in Table 1), using the 2020 vote, 64 of the new seats in this map were Trump districts, compared with 62 under the previous maps.

Or they would have been: In fact, as expected, Governor Evers vetoed the legislature's maps on November 18, 2021, teeing up intervention from the Wisconsin Supreme Court in its existing case, *Johnson v. Wisconsin Elections Commission*. On November 30, the court issued a ruling explaining how it would choose new maps. This decision on how to proceed fractured the court.

A bare majority of four justices—all the conservatives—agreed to seek new maps that rebalanced district populations while making the "least change" from previous maps. Three of these justices held that this was the *only* valid approach. A fourth justice, Brian Hagedorn, concurred with the "least change" standard in this situation but argued that additional criteria could still be legitimately considered. The three liberal justices dissented entirely.

In this way, the court found a narrow majority in support of its next course of action, though without a majority for the precise legal rationale for the decision. The court set a deadline of December 15 for the parties to submit proposed maps to be evaluated by the "least change" standard.

Six parties to the lawsuit submitted proposed state legislative maps, while four submitted congressional maps. Despite the court's new specification of a "least change" standard, the Republican legislators simply submitted their map as vetoed by Evers. The governor, by contrast, abandoned the map created by his People's Maps Commission and submitted his own least-change proposal instead.

Doubtlessly taking advantage of the opportunity for comparison, Evers's new submission was carefully drawn to move notably fewer people (and acres) from one Assembly or congressional district to another than the legislature's plan. Despite the adherence to this criterion, the Evers state map was

Table 1. Number of State Legislative Districts Won by 2020 Presidential Candidates in Selected Maps

Mapmaker	State Assembly		State Senate	
	Biden	Trump	Biden	Trump
Actual districts, 2012-2020	37	62	11	22
People's Maps Commission	45	54	12	21
Evers's least-change	43	56	12	21
Legislative Republicans	35	64	11	22

nonetheless significantly better for the Democratic party than was the legislature's plan. There were 43 Biden districts in the Evers submission.

On March 3, 2022, the court chose Evers's maps, following a simple logic. The governor's proposal showed the least change from the maps used in 2012–2020 because it moved the fewest voters into a new district. However, the majority choosing the Evers maps shared just one justice, Hagedorn, with the majority that originally had chosen the "least change" approach.

The other three conservative justices rejected the idea that a "least change" approach should be based on "core retention," or the number of voters not moved between districts. Instead, they made various arguments that "least change" should instead involve more emphasis on population deviations or the number of municipal splits—considerations that would lead to the selection of the Republican legislators' map.

The seven justices' various opinions—a majority, concurrence, and dissents—also included lengthy discussion of the racial implications of the various submitted maps. The Evers map deliberately added an additional majority-Black Assembly district, which the majority interpreted as consistent with the Voting Rights Act.

The legislature and parties represented by the Wisconsin Institute for Law and Liberty (WILL) sought review of this decision by the U.S. Supreme Court, which quickly overturned the selection of Evers's legislative map, ruling that its reliance on race violated the U.S. Constitution's Equal Protection Clause.

The United States Supreme Court issued its ruling on March 23, 2022. On April 15, with time running out for individuals considering whether to run as candidates in primary elections, the Wisconsin Supreme Court selected the legislature's original submission. Justice Hagedorn again provided the deciding vote, now rejoining the court's three other conservatives and explaining his view that the procedural posture of the case left the court no choice but to select one of the existing proposed maps and that, among those, only the legislature's proposal complied with the U.S. Supreme Court's instructions.

In the November 2022 general election, Wisconsin was once again narrowly divided at the top of the ticket, simultaneously reelecting Evers by 3 percentage points and Republican U.S. Senator Ron Johnson by 1 point. This even balance was not reflected in the state legislative elections. Republicans flipped three seats in the Assembly and one in the Senate, achieving a supermajority of two-thirds in the upper chamber and leaving them two votes short of that in the lower.

As it turned out, this was merely the first chapter of Wisconsin's 2020 redistricting cycle.

THE 2020 REDISTRICTING CYCLE, TAKE 2

The next chapter began with the Wisconsin Supreme Court election to replace retiring Chief Justice Patience Roggensack. Roggensack was a conservative, so the winner of this election in April 2023 would decide majority control of the court for certain purposes. Judicial races in Wisconsin are officially nonpartisan, but this notion became increasingly difficult to credit in the 2023 race. One candidate, Milwaukee County Circuit Court Judge Janet Protasiewicz, was endorsed by the Democratic Party. The other, former Wisconsin Supreme Court Justice Daniel Kelly, was endorsed by the Republican Party. The election quickly became a de facto referendum on abortion access and redistricting, with Protasiewicz describing the current maps as "rigged" and "unfair."

Many Republicans criticized Protasiewicz's campaign rhetoric as inappropriate for a nonpartisan judicial candidate. The majority of voters seemed untroubled. Protasiewicz defeated Kelly by 11 percentage points and was sworn into office on August 1, 2023. On August 2, the firm Law Forward filed a lawsuit arguing that the state legislative maps used in 2022 were unconstitutional for a variety of reasons. On October 6, the court's new majority agreed to consider the challenges to the maps.

In *Clarke v. Wisconsin Elections Commission*, on December 22, 2023, by another one-vote margin (4–3), the court ruled the existing maps unconstitutional on a relative technicality. The Wisconsin Constitution requires that state legislative districts be composed of "contiguous territory." In Wisconsin, cities and villages routinely annex portions of towns, and these annexations often result in municipalities themselves containing disconnected fragments. In *Prosser v. Elections Board* in 1992, the federal court had determined that these municipal "islands" could be considered politically contiguous with the rest of the municipality. The 2022 maps were replete with this kind of small disconnection: 52 Assembly districts and 21 Senate districts. In the 2023 decision, the four liberal justices rejected this practice, ruling that

the state constitution requires districts to be literally, physically contiguous.

Having banned the use of the new maps in the upcoming 2024 election, the court invited the legislature and governor to enact new maps by state statute. Anticipating that such a process would fail, the court also invited the parties in the case to submit their own preferred maps. Significantly, the court's new liberal majority rejected the 2021 "least change" standard for judicial redistricting, writing that "[b]ecause no majority of the Court agreed on what least change actually meant, the concept amounted to little more than an unclear assortment of possible redistricting metrics." Instead, the court announced that it would evaluate submitted maps according to the following criteria: population equality, (literal) contiguity, compactness, (minimized) divisions of counties and municipalities, civil rights requirements, and "partisan impact."

The final criterion, partisan impact, is particularly controversial. The majority wrote, "As a politically neutral and independent institution, we will take care to avoid selecting remedial maps designed to advantage one political party over another. Importantly, however, it is not possible to remain neutral and independent by failing to consider partisan impact entirely."

As previously discussed, Wisconsin's current political geography means that a map drawn to be compact and contiguous, without considering partisan interests, will inevitably work to the benefit of Republicans. So the commitment to considering the partisan impact of proposed maps was widely understood as intended to offset at least partly the GOP-lean baked into Wisconsin's geography.

The court considered proposed maps, submitted in January 2023, from six parties: two conservative and four liberal. The plan submitted by the Republican legislature simply resolved the contiguity issues in the existing map and left the partisan balance unchanged at 64 Trump districts among the 99 Assembly seats in the 2020 election. Conservative parties represented by the Wisconsin Institute for Law and Liberty submitted a plan with 58 Trump districts. The Senate Democrats offered a plan with 51 Trump districts, Evers drew a map with 50 Trump districts, the map submitted by the liberal parties represented by Law Forward contained 48 Trump districts, and the plan from a liberal group known as the Wright Petitioners held 47. The Senate maps offered by the parties had a similar skew in terms of the number of Trump districts.

Just a couple of weeks later, resigned to the prospect that the court's new majority would never select either of its preferred plans, Republican legislative leaders made an abrupt about-face: They announced support for Evers's own submission. Subtle differences between the Democratic-aligned maps explain why.

Wisconsin state senators hold four-year terms, with the even-numbered districts featuring races during presidential elections and the odd-numbered districts during midterms—but map-drawers may number districts however they please. One plan before the court, that of the Wright Petitioners, placed twice as many Democratic-leaning seats into the even-numbered class as the odd-numbered class. This map would have given Democrats a genuine possibility of flipping both legislative chambers in 2024. The other Democratic-aligned plans more evenly divided Democratic-leaning seats between the even and odd cohorts, which would have put a Democratic Senate majority entirely out of reach in 2024.

The plans also varied in the number of instances in which they placed more than one incumbent in a single new district. Across both chambers, Evers's submission combined fewer Republicans than in all but the Senate Democrats' plan. Finally, to consider the results from certain past races, the Evers maps were arguably slightly more favorable to Republicans than were the other Democratic-aligned proposals.

Out of fear that the Wisconsin Supreme Court would choose a plan they regarded as even more damaging, the Republicans passed a slightly modified version of Evers's maps, removing some incumbent pairs. Evers vetoed the modified maps on January 30, 2024. The legislature responded by passing his maps in their original form on February 13. In an odd scene, the Evers maps were opposed by all but one Democratic legislator from each chamber, and various Democratic politicians, from the governor's own party, lobbied against the passage of the maps, warning about an unspecified Republican trap. Evers signed them into law on February 19, and the court found it unnecessary to take further substantive redistricting action.

The new maps had an immediate and dramatic impact. In the November 2024 election, more Assembly districts were contested by both parties than in any year since at least 2010, and an unusually high number also featured contested primaries. In November, Democrats won 45 of the 99 Assembly seats—still a minority but considerably up from 35 in 2022. In the Senate, Democrats flipped 4 districts, increasing their total to 15 (among the 33 districts) and ending the Republican supermajority in that chamber.

In districts across the state, Republican legislative candidates were generally more popular than Donald Trump or Eric Hovde, the Republican U.S. Senate candidate. Trump won Wisconsin by 0.86 percentage points (the closest margin either way of any state in the country), and he also won the vote in 50 of 99 Assembly seats. Democratic U.S. Senator Tammy Baldwin simultaneously won reelection by 0.85 points, and she likewise carried the vote in 50 Assembly districts. By contrast, under the 2022 maps, Trump would have won 64 Assembly seats and Baldwin 36.

Looking to the state Senate results: Trump actually won a minority of districts, 15 of 33, while Baldwin won a majority: 18. Under the 2022 maps, by contrast, Trump would have won 22 districts and Baldwin only 11. In other words, if they had remained in effect, the 2022 maps would have converted Trump's 0.86 percentage point victory into a two-thirds supermajority of Senate seats, while the new maps actually converted Trump's narrow majority into a theoretical state legislative minority. (See the summary in Table 2.)

Table 2. Number of State Legislative Districts Won by 2024 Presidential Candidates in Selected Maps

Mapmaker		State Assembly		State Senate	
		Harris	Trump	Harris	Trump
2024 Proposals	Legislative Republicans	35	64	11	22
	WILL (Johnson Intervenors)	41	58	11	22
	Governor Evers (adopted and used)	49	50	18	15
	Wright Petitioners	49	50	18	15
	Law Forward (Clarke Petitioners)	51	48	17	16
2022 Proposals	Districts used in 2022	35	64	11	22
	Evers's least-change	41	58	12	21
	People's Maps Commission	44	55	12	21

LOOKING AHEAD TO 2031

While Republicans retained control of both state houses in 2024, the results bode fairly well for Democrats looking ahead to 2026. Both presidential candidate Kamala Harris and Baldwin won all four of the battleground Senate districts holding elections in 2026; if Democratic candidates win three of them, they will control the chamber. The Assembly will likely be similarly close, as Democratic candidates in 2024 lost five seats (enough for a majority) by fewer than 3.5 points.

To look further ahead, the serpentine 2020 redistricting process provides little clarity for the next redistricting cycle, after the 2030 U.S. census. Whoever draws those maps will have to make hard choices, as Wisconsin will likely lose a congressional seat in the 2030 reapportionment. Realistically, either party could control either chamber of the legislature or the governor's mansion, making the chances good that these bodies will be politically divided. The ideological composition of the state Supreme Court will likewise be decided by elections yet this decade.

Whether liberal or conservative, the Wisconsin Supreme Court, recent precedent suggests, will take an active approach to redistricting. Gone, it seems, are the days of the state court's quickly deferring to a panel of federal judges, and in fact precedent of the U.S. Supreme Court supports deference in the opposite direction, *by* the federal courts. But such deference scarcely will oust the federal district court altogether from the field, at least if a redistricting plan then adopted by the state supreme court can itself be claimed to violate federal law. And the U.S. Supreme Court can *directly* review federal challenges to maps drawn by the Wisconsin Supreme Court (even acting summarily, as we saw in March 2022).

And as for the law to be applied? Wisconsin's redistricting precepts were only further complicated by the narrow and conflicting majority opinions of the early 2020s. The decision of the Wisconsin Supreme Court's conservative majority in 2022, in *Johnson v. Wisconsin Elections Commission*, to select the map drawn by Republican legislators was a departure from previous court rulings, which avoided selecting a map drawn by explicitly partisan actors.

The subsequent decision by the court's new liberal majority in 2023, in *Clarke v. Wisconsin Elections Commission*, was also a deviation from past practice, because it specifically listed the partisan impact of a plan as a criterion that the justices would use in selecting a winner. The federal courts in 1982 and 1992 had reasoned that the better approach was to disregard partisan considerations entirely, not to attempt to achieve a given partisan outcome, even one considered to be "fair."

How all of this will play out, time and perhaps judicial election results will tell.

From Conversation to Dream to Idea to Reality

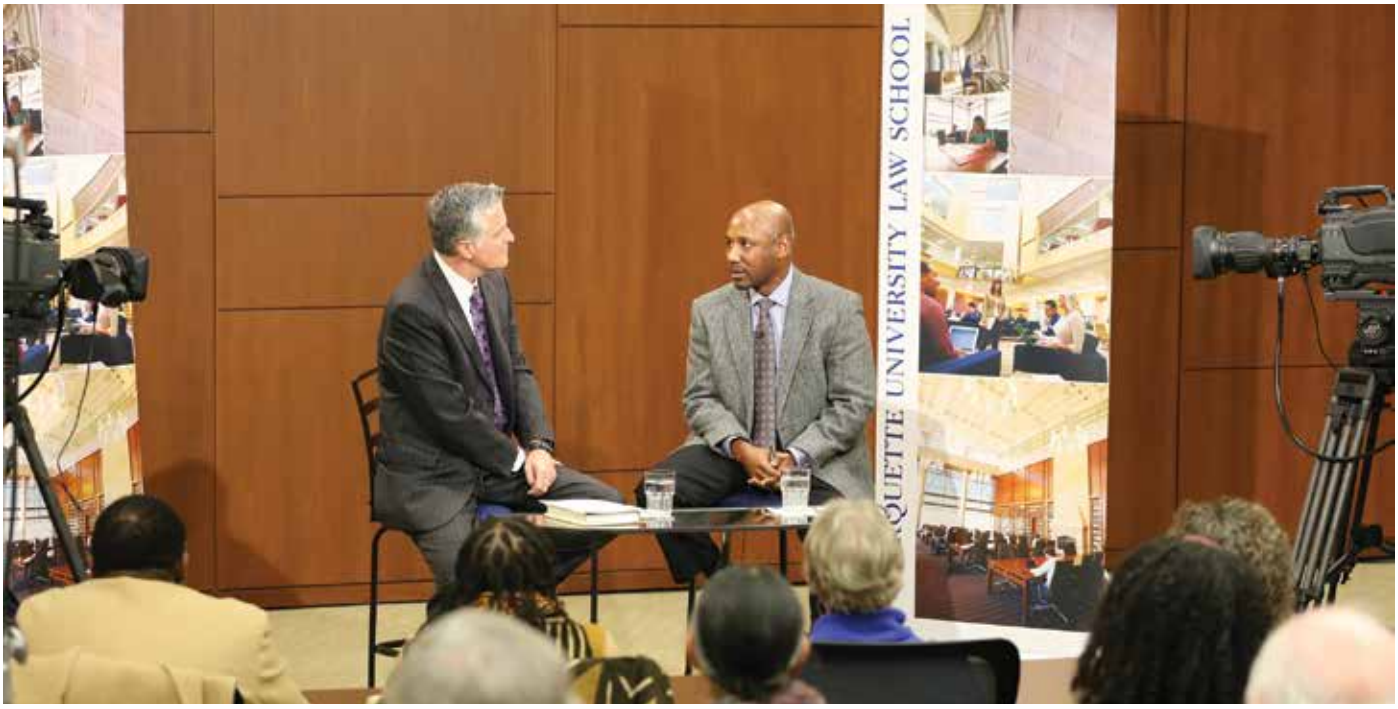
Conversations in 2013 at Marquette University Law School, the subsequent dedication of a Marquette lawyer, and the ongoing engagement of arts and sciences faculty at Marquette lead to a program helping incarcerated people get college degrees.

BY BILL GLAUBER

Conversations. Dreams. Ideas. And more conversations. Who knows the exact moment when intellectual curiosity turns into something that will become a reality?

But consider December 4, 2013, at Marquette University Law School: With final exams looming, the school hosts the semester's last "On the Issues" event, a town hall forum where big ideas are discussed and the community is invited to participate. Mike Gousha, distinguished fellow in law and public policy at the Law School, interviews Craig Steven Wilder, a professor of American history at the Massachusetts Institute of Technology (MIT). Wilder discusses his book, *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities*.

Afterward, there's a lunch with Wilder, organized by Marquette Law School's Dean Joseph D. Kearney and attended by eight people. One of them is R. L. McNeely, a 1994 Marquette Law School graduate and retired professor



Marquette Law School's Mike Gousha (left) interviews MIT Professor Craig Steven Wilder at Marquette Law School in December 2013.

at the University of Wisconsin–Milwaukee. The conversation flows. And at some point, it turns to the topic of higher-education programs for incarcerated individuals.

Wilder knows how to create such dramatic change. He is a board member of the Bard Prison Initiative. Created in 1999 to provide college opportunities in prisons, Wilder described the program and its ultimate goal to lead students to degrees from Bard College, a small liberal arts college on the Hudson River about 110 miles north of New York City.

"We just sort of ended up talking quite a bit on the specifics of the Bard Prison Initiative," Wilder recalled, years later. "It just came up."

McNeely was a particularly active participant in the conversation. Wilder recalled that McNeely saw such a program "as a way of turning the tide on a number of pressing questions in Milwaukee." In particular: "What happens to people who are being released from prisons?"

Gousha, too, remembers well the lunch in 2013. He got a sense that big things would happen. "That's where a seed was planted for the work R. L. was to do in the years ahead," he said. The conversation at the Law School in 2013 fired and inspired McNeely, helping him forge a key connection with Wilder and the group that had pulled off Bard College's transformational program.

R. L. McNeely in 2015

It would be one stop on a long road to setting up such a program for Milwaukee and the surrounding community.

McNeely would not live to see the culmination of his dream. He died in December 2020. But it is being realized by others, who have carried on his work. And it is his name that adorns the McNeely Prison Education Consortium. The program is housed at Marquette's Center for Urban Research, Teaching & Outreach in the Klingler College of Arts and Sciences.

The consortium, along with Marquette's Educational Preparedness Program, is part of an initiative that offers courses at multiple sites, including correctional facilities and the Marquette campus. More than 500 students have participated since the program was established in the spring of 2022, with three individuals transitioning to degree programs. It brings together full-time Marquette students seeking degrees with those who are incarcerated and seeking second chances and ways to reenter society with tools to survive and thrive.

Georgette Williams, McNeely's longtime partner who accompanied him to the "On the Issues" program and the lunch in 2013, said that getting the program off the ground was hard, even with the help and advice of the Bard Prison Initiative staff. "R. L. met with lots of headwinds and obstacles," Williams said. "He never stopped trying."

McNeely kept pushing. When one idea didn't pan out, he'd try another, going from university to university, looking for partners to join in the effort. "He was very persistent when he thought that something was a good idea," she said. "And he wasn't willing to accept that there was no way to get it done. He kept trying to strategize and come up with different approaches."

Williams said McNeely, while a UWM professor and a lawyer, was at heart a social worker who was impassioned about helping those who had been incarcerated. "He knew there were issues around obstacles that people faced while they were in prison," she said, "and once they're released, around the challenges they have fitting back into society."

A key breakthrough occurred

The conversation at the Law School in 2013 fired and inspired McNeely, helping him forge a key connection with Wilder and the group that had pulled off Bard College's transformational program.

around 2018. Instead of one university carrying the load in terms of outlays, administration, and staff, the idea was broached to create a consortium of schools. McNeely approached Robert S. Smith, a former UWM colleague who had come to Marquette to serve as the Harry G. John Professor of History and to head up the Center for Urban Research, Teaching & Outreach. Also in on the conversation was Darren Wheelock, a Marquette University faculty member in the department of social and cultural sciences.

McNeely saw the consortium idea as a uniquely Milwaukee way to forge ahead. "We needed other universities in the conversation, other entities," Smith said. "We steadily began to talk consortium. R. L. McNeely was the drum major for the idea that other organizations should be included in the conversation."

Wheelock acknowledged it would be a "heavy lift." But he wanted to forge ahead. "We knew it was viable, we knew it was possible," Wheelock said.

It took several years to round up the schools. Those participating now include Marquette, Milwaukee Area Technical College, Milwaukee School of Engineering, Alverno College, and Mount Mary University. The University of Wisconsin–Madison Prison Education Initiative is also part of the consortium. UW-Milwaukee recently signed on to the program. Marquette University's Educational Preparedness Program plays a key role as a college bridge program, creating what it calls a "prison-to-school pipeline," with courses inside correctional institutions and on Marquette's campus.

Klingler College of Arts & Sciences faculty lead Marquette's participation in the prison education initiative: Darren Wheelock (Department of Social and Cultural Sciences), Theresa Tobin (Philosophy), and Robert Smith (History).

Students can take courses in areas such as philosophy, psychology, criminology, and social work. Recently launched classes include biology and business. Up to eight classes are tuition-free for those who are currently or formerly incarcerated students in the bridge program. Those who move on to a degree program are eligible for financial aid and scholarships.

The COVID-19 pandemic delayed the full launch of the Education Preparedness Program. Once it was up and running, seven classes were taught at three locations: Racine Correctional Institute, the Milwaukee County Community Reintegration Center, and Marquette. That first year, the program served 222 students, with 152 at Marquette and 70 who were incarcerated.

Pathways are now being created for those at Racine Correctional Institute to move forward for degrees from MATC, Marquette, and UW-Milwaukee. The aim is to launch the degree program at the facility by the fall of 2026.

Two key leaders from Marquette are Wheelock, who directs the McNeely Prison Education Consortium, and Theresa W. Tobin, a faculty member in philosophy, who leads the Educational Preparedness Program. It was Tobin who began teaching what

"R. L. McNeely was the drum major for the idea that other organizations should be included in the conversation."

— Robert S. Smith, Marquette University history professor

became known as "blended" philosophy courses to a mix of college students and incarcerated women in 2015 at the Milwaukee Women's Correctional Center. "I'm really interested and felt passionate about getting the classroom to be a space where we were generally inclusive, transforming people and ourselves," she said.

Wheelock initially became intrigued by the program because of his interest in smart public policy in dealing with those who offend. "But once I was in the program, my interest quickly grew to be more than that," he said. "It's transformational."

Wheelock teaches a class on reentry into the community. His co-instructor was formerly incarcerated. "You can imagine the layers of content we talk about," he said. "There is a fear, and apprehension, of leaving the system."

By providing an educational pathway, hope, and wraparound services, the program aims to ease the transition for those leaving prison. It has also opened perspectives for those like Tobin and Wheelock and their students.

"It teaches how we're thinking of the boundaries of the classroom, the boundaries of a university," Tobin said.

"Our guiding North Star is what is in the students' interest," Wheelock said. "What they have told us is they want options to pursue."

Two students are making a difference on Marquette's campus. Shanyeill McCloud and Andrew Mokwinski are juniors who are studying political science. They are McNeely Prison Education Consortium students who receive tuition support as part-time students. They have worked through past legal difficulties and are prominent in the reentry community. The program also provides academic and career advising and skill support.

McCloud is an advocate for the expungement or sealing process in the court system. She runs Clean Slate Milwaukee, which she describes as a "second-chance organization for men and women who have made mistakes and are now seeking legal pathways out of poverty."

Mokwinski, a member of the U.S. Army Reserves, is a mentor in the Milwaukee Turners' initiative to provide peer support mentorship for individuals enrolled in the Comprehensive Community Services program, which helps those coping with mental health or substance abuse issues.

"Education is the ultimate equalizer," McCloud said. "Sometimes when you give people a chance, they turn their whole life around."

McCloud grew up on the city's north side and for years yearned to go to Marquette. She can still hardly believe she has made her dream a reality. Neither can Mokwinski, who grew up on Milwaukee's south side.

They both heard about the program through a flyer.

"So you mean to tell me, I can be a Marquette student?" McCloud said, recalling a conversation with someone who had the flyer. "I was like, 'You know I have a record, right?'"

"I thought it was a scam," Mokwinski said. "Something just pushed me to come here and take the initial test."

The program was very real. McCloud and Mokwinski started in the Education Preparedness Program in 2022 before becoming degree-seeking students. They embrace the tagline: "We Are Marquette."

There was an adjustment process for both of them. They're older than their classmates by a full decade or more. As parents, they also have lives outside of school. "We all fit right in," McCloud said of herself and her classmates. "We're all learning together."

Mokwinski appreciates the effort Marquette is making with the program. The "ethos of the school" as a Jesuit institution, he said, is "to help the community and spread education to different people."

McCloud and Mokwinski are already thinking beyond graduation. The two of them have dreams. Ideas. No doubt conversations, too.

There's reason to expect that McNeely and all others involved in the origin and work of the McNeely Prison Education Consortium would be pleased by the realities that McCloud, Mokwinski, and other such students will create in various sectors of society for years to come. ■

IN SEARCH OF HUMBLER—AND WISER—JUDGMENTS

In a new book, Chad Oldfather, professor of law at Marquette University, advocates for judges to be countercultural, in a sense.

The dozen words in the title—*Judges, Judging, and Judgment: Character, Wisdom, and Humility in a Polarized World*—indicate the scope of the challenge that Professor Chad Oldfather has taken on in his new book, published by Cambridge University Press. Most basically, his hope is that the United States can increase the number of judges and (more broadly) lawyers who demonstrate the best traits of the legal profession, including probing deeply to understand issues and acting wisely, with a concomitant sense of humility. In this interview with the *Marquette Lawyer*, Oldfather gives an overview of the themes of the book.

Congratulations on the publication of* Judges, Judging, and Judgment. *It's a book that covers a lot of territory, so how about you tell us where you'd like to begin?

I appreciate it. I'll begin with what I take to be an uncontroversial point: We live in a very divided society. Few things seem exempt from politicization, and too often politics appear to have become a sport in which the goal is simply to win rather than to work toward, or even try to define, the common good. Over the course of my three-plus decades in the legal profession, and two-plus decades as someone teaching law and studying courts, I've seen those changes in the broader world make their way into the legal system.

The sort of thinking that seems so characteristic of our politics—the emphasis on "winning this fight" without looking down the road to think about how it affects the common good, or to consider the implications of the answer to the question at hand, in this case, on the next case and the case after

that—seems to me to be fundamentally contrary to a core part of what "thinking like a lawyer" is supposed to mean.

Our job is to be mindful of notions like "hard cases make bad law" and to understand that the decision in front of us has implications for decisions still to come, but somehow we seem to be losing sight of that. It's especially apparent in Wisconsin, where our nominally nonpartisan state supreme court elections are widely perceived to be proxy battles in a larger political struggle. But our state is hardly unique. One way to think of this book is as an effort to explore how that came to be and what we might do about it.

What led you to take all this on now?

Part of the answer is pure happenstance. Since 2008, I've regularly taught a class we call Judging and the Judicial Process. We spend the semester studying and thinking about courts and judges from every angle we can find the time to explore. We talk about the roles that courts exist to serve, and the various factors that inevitably lead to their falling short of the ideal.

The course doesn't cover just federal courts, or appellate courts, but instead attempts to capture the full range of institutions and people we call courts and judges. Depending on the semester, we'll get into topics such as small-claims courts and non-lawyer judges, differences between the judicial role in the United States versus that in other common-law countries versus civil-law systems, and even the role of architecture in fostering the legitimacy of courts. We explore general topics such as the balance between judicial independence and judicial accountability, the benefits and drawbacks of specialization, and selection processes at the federal and state levels. We look outside the legal literature to political science, psychology, and philosophy.

Over that same period of teaching, I have explored these same sets of issues in my research and writing. I'd long had the idea that there was a book-length project that could come out of that work. It just so happened that in 2022 I got asked to teach the Judging and the Judicial Process class in both the spring and fall semesters. That meant that the work I was planning to do over the summer, involving creating new materials for an altogether different class, was no longer so urgent. And by that time I'd developed a sense of what the book might try to do. I pitched it to a few publishers, got an immediate expression of interest, and set to work.

What was that "sense of what the book might try to do"?

The book's goal involves a few things. The first is an effort to pin down the functions that courts exist to serve, to set a baseline of sorts, and to identify the forces that work against meeting the ideal. Courts are human institutions, of course, and, to a considerable degree, judges are susceptible to the same sorts of influences on their thinking as people more generally. We often think of that in simple, political terms—this judge is liberal, that judge is conservative. It might sometimes be as simple as that, but people don't tend to regard themselves as acting in bad faith, so I'd be surprised if judges are actually thinking, "These are my political loyalties, therefore this is the result I should reach in this case." And yet correlations are there. It's just that the mechanisms are likely to be more complex and indirect.

The second is to point out that the design of the judicial system anticipates and attempts to counter these influences. Here we're talking about things such as the adversarial process and the expectation that judicial decisions will be justified in writing, both of which ideally function to get a judge to obtain a deep sense of an issue and to truly grapple with its complexities. Both of those mechanisms have weakened, largely as a product of the need to deal with increasing caseloads.

When I entered the academy in the early 2000s, there was a relatively fresh literature bemoaning these developments—the "bureaucratization" of justice, the overreliance on law clerks and on nonprecedential opinions, and the demise of what one pair of commentators called "the Learned Hand model" of judging. But the lawyers, judges, and professors who were concerned about these developments have largely left the scene. What they regarded as a crisis became "the new normal" and finally just "normal." But it wasn't without costs. For example, editing a draft opinion is not the same as writing it, and especially so when that draft was written by a skilled but inexperienced lawyer whose immediate incentive will be to write the best possible version of the case for the position their boss is inclined to take.

The third thing the book does is to consider possible responses. One is increased emphasis on interpretive methodologies that purport to make things more determinate. Here, of course, I'm talking primarily about textualism and originalism, which attempt to constrain judges by restricting the scope of information that properly factors into decision-making. There's a sense in which these approaches are unremarkable. Law is filled with rules, and rules of thumb, designed to guide decision-makers by screening off some types of information and emphasizing others.

My concern is that they don't appear to live up to their proponents' promises, and—for one of the book's major themes—they don't eradicate the need for judgment, which, no surprise, is central to the judicial role. The limits of language and of foresight, coupled with the fact that our values and goals often conflict, mean that "the law," at least when it is narrowly defined, can never provide clear or easy answers to all the questions that arise under it. Where this leads me—and I'm hardly the first person to take this position—is that we must focus our efforts on selecting judges who possess, and rewarding judges who exercise, good judgment.

On the one hand, that sounds appealing, because it's hard to imagine someone's being opposed to good judgment. But on the other hand, what does that mean? Is that just another way of saying, "I want judges who think the way I do"?

Those are fair questions. I'll start by talking about someone else's book. A little more than 30 years ago, right about the time I was entering the profession, Yale law professor Anthony Kronman published a book called *The Lost Lawyer: Failing Ideals of the Legal Profession*. Kronman lamented the demise of what he called "the lawyer-statesman ideal"—a conception of the outstanding lawyer as someone who was "not simply an accomplished technician but a person of prudence or practical wisdom as well." He didn't believe that lawyers would stop being leaders, but he predicted they would stop leading well because they would lack the key thing that had made them, and the profession, such a crucial part of the nation's success.

I didn't read the book until I was well into my career, and as I looked back, I could see that I had encountered remnants of the world, and worldview, that Kronman elegized. The judge for whom I clerked, Jane Roth of the U.S. Court of Appeals for the Third Circuit, was a tremendous example, as seemed to me to be her husband, Senator William Roth. For another instance, the more senior lawyers at my law firm, then called Faegre & Benson, in Minneapolis, struck me as having had a fundamentally different mindset concerning the nature of their professional role as contrasted with those who came later. It's difficult to capture well in words, at least in any sort of pithy way, but I saw it. The terms of the social contract had subtly shifted.

But I also recognized that some of what Kronman lauded was still present. Over the course of my career, I've seen that some lawyers have good judgment and others don't, and that those with it have it to varying degrees. And these aren't idiosyncratic evaluations. At every stop along my professional journey, it's been understood that there are some people you go to with hard problems, other people you avoid, and some whose instincts are middling. The people with the best instincts aren't one-trick ponies. They tend, in philosopher Isaiah Berlin's famous formulation, to be foxes, people who know many things, rather than hedgehogs, who know one big thing. They're able to appreciate, evaluate, and navigate an effective course through all the conflicting and often incommensurable features of a situation and of the world more generally. The trait isn't perfectly correlated with raw intelligence, and certainly not with strong political leanings. It might be hard to pin down, but that doesn't mean it's not real.

Let's continue with that last point. In the book, you get a bit into larger cultural factors bearing on our assessment of things that are difficult to pin down. What's the relationship there?

It seems to me, and I'm hardly alone in this, that we've become a culture that distrusts things that are hard to quantify. We're drawn to metrics, and we distrust expert knowledge. Economics has dominated policymaking for decades. Sports have been transformed by analytics. Metrics are everywhere. That work is obviously of great value and has helped surface things that are invisible to the naked eye, so to speak.

But as we're increasingly, and naturally, drawn to focus on things that can be quantified, we tend to discount that which cannot be. My sense is that this is at least part of the appeal of the stronger forms of textualism and originalism. Especially in their popular forms, they depict the processes of textual interpretation as capable of being mechanized, performed according to algorithm and therefore in ways that avoid all the very human, external influences I mentioned earlier. Their more sophisticated advocates understand and acknowledge that those methodologies don't eliminate the need for the exercise of judgment. The rhetoric of politics, and even of more strident judicial opinions, often fails to acknowledge this. It's the hedgehog asserting that if something isn't done in accordance with the one big thing, then it is done illegitimately.

I'm inclined, certainly by temperament but also with some experience, to side with the fox. In my view, the world is too complex to be unlocked by a single key, especially when the potential for the influence of ideology has increased.

How so?

The legal profession has not been immune from polarization. This matters because of a source of discipline on judicial behavior that we haven't yet talked about, which is professional norms. Here again, I'll refer to a book written by others. A few years back Professors Neil Devins and Lawrence Baum published a book called *The Company They Keep: How Partisan Divisions Came to the Supreme Court*.

One of the core ideas on which it was based is that we're all influenced in our conduct by our sense of how it will be regarded by the audiences

that matter to us. We want our parents to be proud of us, so we try to act accordingly. The same holds true for our estimation by colleagues and friends, and, if you're a judge, by the legal profession in general. If I were a judge, I'd want to be thought of as a good judge, and while it would be nice if my mom might think this, and the people I went to high school and college with did so as well, their views aren't the ones that will really matter to me. It's the members of the bar whose regard I'd want to have.

That works pretty well when the membership of the bar is, generally speaking, on the same page when it comes to how cases should be decided. As a judge who cares about the regard of the profession, I won't decide cases by flipping a coin or cutting cards because that's not how it's done. I'd be ridiculed. But the bar isn't on the same page with respect to many aspects of how cases should be decided. And there's nothing wrong with that by itself.

What's problematic is that the bar has self-segregated. And if I as a judge view myself as a member of one side or the other, of Team Federalist Society or Team American Constitution Society, then I'm not going to care so much about whether I'm held in high regard by the other side. And if groups tend to go to extremes, as plenty of research suggests is the case, what can result is a dwindling set of norms that are shared by both sides. That's my worry.

So what do we do about it?

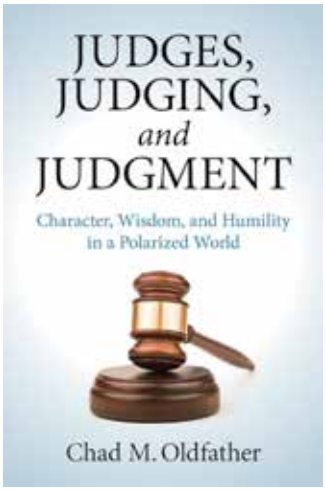
That's a difficult question, of course. I'd love to be able to offer the solution for polarization in society, but its presence in the profession is a tough enough problem. I'd be happy if the book persuaded people as to the nature of that problem. But I do venture some tentative solutions, which I hint at in the second part of the title: *Character, Wisdom, and Humility in a Polarized World*.

Again, I don't doubt that most judges perceive themselves as acting in good faith, and regard other judges, rather than themselves, as the problem. But we're all susceptible to biases, and we're also susceptible to what's sometimes called "the bias blind spot." We don't see our own biases, which makes sense, because if we saw them, we'd presumably try to overcome them. That said—and this connects back to the idea that some people have better judgment than others—susceptibility to bias isn't likely to be uniformly distributed. In other words, some people are better able to resist or overcome the improper influences and are better able to monitor themselves to detect possible bias.

There's more to it, of course. The book's last chapter builds on work done by others who have attempted to pin down the essential components of good judicial character. I survey that work and linger on two concepts.

One is the "practical wisdom" that was Kronman's focus. That's a big topic, of course, but part of it involves recognition that the function of the legal system is ultimately to provide answers to very practical questions.

Another is the notion of intellectual humility. By that I don't mean institutional or individual timidity, but rather an ongoing vigilance about the possibility that one might be wrong or might have an incomplete or insufficient understanding. As I put it in the book, it's the cognitive analog of "measure twice, cut once," and there's a small but growing body of interdisciplinary research exploring its nature and its value in decision-making.



Putting this to work is a long-term project. Members of the bar can come together to identify what it is they seek from judges and then work to praise judges who exemplify appropriate behavior and, when needed, criticize those who appear not to. They can work to improve selection mechanisms to emphasize character over ideological loyalty. Law schools can build out professional formation efforts to emphasize the desired characteristics, including by holding up as examples judges who consistently demonstrate good character.

Thank you. Any final words?

Earlier this year I watched the movie *Conclave* with my wife and one of our daughters who, as a theology major at a different Jesuit university, was especially interested to see it. (We're not Catholic, but rather Lutheran, which doesn't really matter except insofar as it allows me to note that if this book can in any way be likened to nailing theses to doors, I at least come to it honestly.) The film is about the conclave of cardinals assembled to select a new Pope. Early on, in the sermon he delivers at the beginning of the process, Cardinal Lawrence, who is responsible for presiding over the conclave, offers that "the one sin I have come to fear more than any other is certainty. Certainty is the great enemy of unity. Certainty is the deadly enemy of tolerance." Almost of necessity, I have to admit that I could be wrong, and indeed those are the words that close out the book. For I think Cardinal Lawrence is right. ■

GOOD NEIGHBORS

New leadership, improved programs, and better facilities for the Church of the Gesu, the Marquette University College of Nursing, and Marquette's Haggerty Art Museum are making the Law School's neighborhood more vibrant.

1 Church of the Gesu
1a Gesu Parish Center
2 Straz Hall (College of Nursing)
3 Haggerty Museum of Art
4 Eckstein Hall (Law School)

BY CATHRYN JAKICIC

While Marquette University has been part of Milwaukee since 1881, throughout this time, change, too, has been continuous on and around campus. The Law School's move from Sensenbrenner Hall to the brand-new Eckstein Hall in 2010 may stand out. Yet more recently, within the past year alone, the Law School has seen some changes in its immediate neighborhood, in both places and people. ▶

In the summer of 2024, the Church of the Gesu welcomed a new pastor, Rev. Michael Simone, S.J. The Haggerty Museum of Art introduced a new director, John McKinnon. And, for the most outwardly evident change, Marquette's Straz Hall has gone from housing the College of Business Administration to becoming the new, expanded home of the College of Nursing under the leadership of Dean Jill Guttormson.

Let's start with Gesu, which—with its cornerstone laid in 1893—is the oldest building in the vicinity of the Marquette University campus.

Father Simone has a three-to-five-year goal of strengthening the community life of the Gesu parish and continuing to rebuild lost connections post-COVID.

GESU: RENEWING THE BUILDING, RENEWING THE COMMUNITY

While Father Michael Simone's focus is now on the future of Gesu parish, the new pastor has had a varied career. After his ordination in 2007, the Cleveland native's first assignment was another parish with the name Gesu, in Detroit. Simone then attended Johns Hopkins University in Baltimore, where he earned a Ph.D. in Northwest Semitics and Assyriology. He went on to Boston College from 2013 to 2021, where he served as assistant professor in the School of Theology and Ministry. Simone has also been a regular contributor to many Catholic publications and was a magazine columnist from 2016 to 2019 at *America*, the national Jesuit magazine, where he still serves as a contributing editor.

Now in Milwaukee, Simone is leading a $10 million capital campaign focusing on needed interior renovation work at Gesu. The work will include new flooring, pews, and lighting, along with replacing the sound system and adding ramps to allow people with disabilities to move from the seating area to the sanctuary.

"The church was constructed before electronic amplification, and it just was not built with any thought given to such acoustics," Simone said. "The choir can be heard because Gesu was built so the sound comes from the back to the front, but it's not built for microphones."

Beyond the renovation, Simone is focusing on connecting with his new community. And coming as a surprise to Simone, much of his initial connection is happening through the sacrament of reconciliation.

"Gesu parish makes a significant ministry out of hearing confessions, so we have roughly an hour and 45 minutes of confessions a day," Simone said. "I've never been in an environment where it's such an essential part of the ministry. In my experience

A renovated and expanded Straz Hall is the new home of Marquette's College of Nursing.

elsewhere, it's usually a couple of hours on a Saturday afternoon, and that's all you get. Here, it's a constant, and I love it. It's the high point of my day."

Simone's parish is a combination of three communities: Marquette students, people from the surrounding Milwaukee neighborhood, and Marquette-connected parishioners who come from all around the Milwaukee area. "I think we counted 91 different zip codes among our 800 or so parishioner households," he said.

Father Simone has a three-to-five-year goal of strengthening the community life of the Gesu parish and continuing to rebuild lost connections post-COVID. "In a neighborhood parish, everyone lives within walking distance, and there's usually an elementary school. At Gesu, we don't have that

built in, so we have to get creative," looking for ways to bring people together, Simone said. "I want to strengthen our bond with the community even more over the longer term."

Simone elaborated: "Step one is going to be asking our neighbors, 'What do you need?' That being said, as I've walked around the neighborhood, I noticed an abandoned warehouse, for example. Every time I walk past, I think that would be a great youth center."

"We also have a rich music program here, and plenty of kids in the local schools probably would love to do more music. There are kids, musically talented, who don't have much outlet for it. I've been talking to our organist about a way to make that happen, and there are all sorts of creative, fundamental things we could do."

COLLEGE OF NURSING: NEW HOME, BETTER STUDENT EXPERIENCES

Marquette's College of Nursing also has long served the community. Its latest chapter in that effort began with a 2020 evaluation of Emory T. Clark Hall, built in 1981 for the nursing college. The study determined that Clark Hall was too small to accommodate its current population and would be further strained by planned enrollment growth.

After the business school moved in 2023 from Straz Hall to its new campus home at 16th and Wisconsin, in Dr. E. J. and Margaret O'Brien Hall, a $42 million renovation and expansion of Straz swung into gear. The building first opened in 1951 and was dedicated as Straz in 1984. The 2023–2024 project, which created a 103,000-square-foot space for the nursing college, includes classrooms, simulation labs, and flexible technology to support in-person and hybrid learning in the discipline. The design also includes an increased emphasis on student-wellness spaces.

Jill Guttormson, who became dean of the College of Nursing in 2022, said the larger Straz Hall space has allowed the nursing school to expand both graduate and undergraduate enrollment. The new facility was designed to deliver what students will need to be successful after they graduate.

"For example, the design team asked how they could design classrooms where students work and learn in a group, because health care is a team sport," Guttormson said. "In health care, you're working with multiple disciplines and you're working with other nurses. We wanted to help our students apply and share the knowledge they have. So all of our classrooms were built to engage student-learning at tables."

The dean noted, "We also thought about student well-being more generally. There's a lot of burnout in nursing, so we wanted this to be a space that was focused on the wellness of a student holistically."

The project renovated Straz down to the beams. The new facility offers twice as much classroom space and simulation space as Clark Hall, including a simulation center that mirrors a hospital environment. It also has a studio apartment where students can explore home-health skills.

So far, Guttormson said, she is loving the new space and the new neighborhood.

"I will always have a soft spot in my heart for Clark Hall," she said, "but I love being more central on campus. To be able to look at Gesu, to be able to go to the beautiful law school building and have lunch and get coffee, and to have this green space between us and the museum is great. Plus, we can look out another window at the Saint Joan of Arc Chapel across campus. It's awesome. It feels more vibrant."

Guttormson has a goal to graduate 2,500 new bachelor's-prepared nurses in the nursing building's first decade. "The building was designed at a time when we were accepting about 180 freshmen a year. But the building can potentially serve up to 250 incoming students every year," she said. And the plan is ahead of schedule. "The recruitment has been very robust and so successful that we've actually already brought in two classes of 250," Guttormson said.

Jill Guttormson, who became dean of the College of Nursing in 2022, said the larger Straz Hall space has allowed the nursing school to expand both graduate and undergraduate enrollment.

HAGGERTY ART MUSEUM BUILDS CONNECTIONS WITH STUDENTS

Finally, to the immediate west of Eckstein Hall, John McKinnon is in his second semester as director of the Haggerty Museum of Art. His first year has coincided with the museum's 40th anniversary. McKinnon has focused on building on ways the museum was integrated into other academic disciplines at Marquette in the absence of an art history or studio art program. He is grateful for the response to museum programs designed for non-art majors.

For example, as part of a physician assistant course, students were challenged to analyze

artwork. The class reflection papers showed they were able to find applicability from their process of evaluating artwork to the ways they might observe and describe symptoms of a noncommunicative patient. Customized classes at the art museum stress observation, interpretation, and reflection skills apt for all occupations or areas of study.

McKinnon pointed out a Marquette student group, Art Club, that is very active at the museum, meeting every Friday afternoon. "There are always around 30-plus students who gather in a common area with tables and create some sort of art-making project, such as beading or knitting—just because someone has knowledge and they want to pass it on," he said. "It creates conversation."

Customized classes at the art museum stress observation, interpretation, and reflection skills apt for all occupations or areas of study.

Deanna Arble, assistant professor of biological sciences, and Lynne Shumow, Haggerty's curator for academic engagement, recently collaborated on another project, which brought students in to explore creative methods and thinking. McKinnon praised the way museum staff members over the years have built such efforts. He said that more than 5,000 visits each year to the Haggerty are made by students.

"Students have commented that their research abilities have improved by the way art has opened them to new ways of seeing," McKinnon said.

McKinnon knows well how science and the creative arts can coexist. He received a bachelor's degree in art after he initially thought he'd be studying engineering. A Wisconsin native, McKinnon came to Marquette from the Elmhurst Art Museum in Elmhurst, Illinois.

One current Haggerty exhibit—Visual Legacies: Photographs by Ellie Lee Weems—is organized by guest curator Rikki Byrd in collaboration with Weems's family members: Saundra Murray Nettles, a writer and educational psychologist, and her daughter, Kali Murray, a professor of law, who teaches intellectual property at Marquette.

◆ ◆ ◆ ◆

Eckstein Hall's new neighbors are making plans to increase connections on and off campus. Marquette Law School has taken giant steps in that direction during the last two decades with the rise of its public policy initiative and its office of public service. The vibrant initiatives of the Church of the Gesu, the College of Nursing, and Haggerty Museum of Art enhance Marquette's commitment to the community—making for a beautiful day in the Law School's neighborhood, with many more to come. ■

Jill Guttormson, dean of the Marquette College of Nursing, Michael Simone, S.J., pastor of the Church of the Gesu, and John McKinnon, director of the Haggerty Museum of Art, gather in Eckstein Hall.

John G. Novotny, who retired in December 2024 as Marquette Law School's assistant dean for development, did much more than raise funds for Marquette University. At a retirement reception for Novotny in Eckstein Hall on December 17, 2024, Dean Joseph D. Kearney spoke to the vision and dedication that drove Novotny's influence on building up the Law School.

EMBODYING THE VISION OF JESUIT EDUCATION

BY JOSEPH D. KEARNEY


John Novotny

I want to begin by thanking Tim McMahon, as vice president, and his (our) various University Advancement colleagues for organizing this reception. We are all glad to salute John for his great work here at Marquette University.

Some of that work surrounds us, of course. John was an integral part of the fundraising for Eckstein Hall, working with Father Wild as president, the vice president for advancement at the time (Julie Tolan), Christine Wilczynski-Vogel, and me—along with any number of others. In a sense, John's decision to shift his primary attention to law school matters, in 2005, marked the beginning of that transformative campaign. For John saw the possibilities ahead here—or, more remarkably, "there," as in fact his first office at the Law School was in the now-demolished Legal Research Center. Whatever else one might say about that 1967 addition to Sensenbrenner Hall, it was not "noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great," as has been said by some of Eckstein Hall.

Alas, there isn't time to provide a detailed account of John's role in how the Eckstein Hall campaign unfolded—let alone of his subsequent fundraising for the Law School. Nor can we detail here John's considerable other work to advance Marquette University, apart from the Law School, both during the decade before he joined us and on any number of other projects, big and small, *since* 2005.

Rather, I want to say something about John, in particular, and Jesuit education, more generally. John and I first met on February 1, 2005, as he was considering whether to be a candidate for UA's position of director of law school development. In an email the next day, thanking me for my time, John elected to provide "a brief aside," expanding on his own thinking about a recent letter that I had sent law students. He noted, "A key aspect of Jesuit education is to learn the critical habit of reflection in order to evoke a general restlessness with the status quo and, with it, a stirring to do more. It is good for all of us to be reminded periodically of our broader vocational calling and responsibilities."

Over the ensuing two decades, I would come to realize that these were not "asides" at all. John's embrace of Jesuit educational ideals has been essential to his and our success. I am reminded of part of a prayer (from Proverbs) that Pat Carey, now professor emeritus of theology, used to say at the beginning of meetings of a Marquette University committee that he chaired some years ago: "Without a vision, the people perish." The work of John and other colleagues may be known colloquially as "fundraising," but let no one doubt that words such as *development* and *advancement* come closer to capturing it. It is, in considerable part, about *vision*.

To so many of us at Marquette University, John, you *embody* Jesuit education, and you have been a teacher of its principles, even to those of us who already were the product of it. You have helped us advance and develop—to learn and grow. We might selfishly wish, as to the decision to retire, that you had a little bit *less* "restlessness with the status quo" (in your 2005 phrase), but, truly, our dominant emotion is gratitude.

John: Congratulations, kudos, and thank you. ■

A New Venue for Kindling the Fire for Lawyers to Serve Others

JOHN T. CHISHOLM

I first entered public service in 1986 when I was a senior at Marquette University. After concluding (rashly, my physician father no doubt believed) that medical school was not my next step in life, I walked down to the Reuss Federal Building and enlisted in the United States Army. It was one of many inflection points in my life, and there is for me a sense of symmetry that I am returning to private life at Marquette University. Transitions are an opportunity for reflection, growth, and challenge. Ideally, the process is unified by a core identity rooted and formed by past and present connections to family, friends, colleagues, and community—and driven forward by meaningful purpose.

John Chisholm steps away from service as Milwaukee County's district attorney and steps into a new role as senior lecturer at Marquette Law School.

I am now the *former* Milwaukee County District Attorney, an identity and title I share with only one other living person—E. Michael McCann, the man who welcomed me as a prosecutor more than 30 years ago. My roots in the community are deep. I was born at St Joseph's Hospital, the same place where my parents had met. Dad was a Marquette medical student, and mom was a Marquette nursing student. I attended Marquette High, as did three brothers, and graduated from Marquette University, joining a brother and sister who preceded me. I sadly missed the distinction of being "3M" (MUHS, MU, and MULS)—the allure of in-state tuition combined with the GI Bill proved irresistible, and I graduated from UW Law School in 1994.

I served as a line prosecutor, then team captain, in the office of the district attorney (DA) from 1994 until the end of 2006, when I was elected to office. I served as the Milwaukee County DA from 2007 until January 5, 2025. Which brings me to the really important point—my excitement and gratitude for being welcomed into the Marquette Law School community by Dean Joseph Kearney.

I first introduced myself to the dean in 2006 when I was running for election—a true political novice. We had an excellent discussion in his office at Sensenbrenner Hall—prefaced by the clear understanding that he did not endorse candidates. What he did do was much more practical and useful—he introduced me to "Bob the Barber," who plied his trade in the basement of Straz Hall. For the first-time candidate, Bob was connection gold. He knew just about everyone in the city, at least everyone who had a Marquette connection.

On the surface, the relationship between the Milwaukee District Attorney's Office and Marquette Law School is self-evident. If you regard the DA's office as a law firm, then it is one of the largest firms in the state (averaging 125–135 attorneys and 170 support staff), and it has a long and

distinguished lineage of attorneys who graduated from MULS and entered the DA's office as a first career choice. For many, this resulted in lifelong service to the office and community. Others matriculated to equally important jobs and careers in all branches of the public sector, as well as distinguished careers in private law firms and academia.

What might not be as obvious is how influential Dean Kearney's and the Marquette law faculty's commitment to convening nationally respected criminal justice thought leaders at the Law School has been on the development of policy within the DA's office and the Milwaukee County justice system. That influence began almost immediately in 2008, when the Law School started planning for the 2009 Public Service Conference focusing on the future of community justice.

The keynote speaker was Jeremy Travis, president of John Jay College of Criminal Justice in New York City. His remarks on "The Tyranny of the Funnel"—how society's default response of classifying people with mental health, addiction, and behavior problems as criminals created deeply harmful structures and results—had a profound impact on the thinking of the then-nascent Milwaukee County Community Justice Council as we endeavored to remake the front end of our criminal justice system. What is now taken for granted as our "early intervention program" was heavily influenced by this moment. The remarks also formed the foundation for the 2014 National Academies report, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, that Travis chaired.

The following years brought other renowned speakers and seminars to address an array of issues critical to our efforts to understand and improve the quality of our criminal justice system. These led to lasting friendships and relationships, which often resulted in substantial resources coming to our community as we modeled how practitioners could work with and learn from academic partnerships. The Law School hosted conferences on improving the juvenile justice system, explaining the Community Justice Council, and allowing practitioners, students, and the community to hear from renowned thought leaders such as Robert Weisberg, Robert Sampson, Rachel Barkow, Bruce Western, Patrick Sharkey, Paul Butler, and many more. Each had an influence in furthering my personal education about this complex world that we oversimply reduce to describing as the criminal justice system.

One lasting example that influences the Marquette community today is the Near West Side Partnership (NWSP). Nurtured by Marquette University and advanced by collaborators whose connections often formed in the Law School, NWSP has become a national model for private/public partnership. The partnership focuses the resources of business, law enforcement, and the university to leverage greater safety, health, and prosperity for the people and neighborhoods surrounding Marquette University. It embodies my strong belief that prosecutors should be principled problem solvers in addition to skilled criminal law litigators.

I opened by saying that I hoped my transition from public service to serving the Marquette Law School community would be driven forward by purpose. I have practiced criminal law for 30 years. Much of that time was spent leading fellow public servants whose charge was to maintain the social compact with integrity and fairness. I think I've learned a thing or two, but the thing I've learned most is to value learning more deeply and to approach the intersection of law and its application to society with humility and a predisposition for constructive collaboration. I hope to share my experiences, particularly with this next generation of servants of the law, but also with the broader legal community and always with my fellow citizens in mind.

I envision a good deal of work in my new position as senior lecturer at Marquette University Law School. For one thing, I anticipate writing on the Law School Faculty Blog about a variety of issues, including some reflective of my growth as a prosecutor and as a system leader. Yet I hope not to be merely retrospective: I approach this work with the express intent of helping kindle in a new generation the fire to serve the nation as thoughtful, courageous, and committed legal servants.

I have been privileged throughout my life by being given the opportunity to serve others. I hope to continue that work here at Marquette University Law School. ■

This piece ran on the Marquette Law School Faculty Blog on February 24, 2025, as "Senior Lecturer John Chisholm Introduces Himself."

CLASS NOTES


Lisa Stafl


Jesse B. Blocher


Ray H. Littleton


Julie E. Piper-Kitchin


Anthony J. Flint


Stacie L. Lamb

74 **William C. Gleisner III** was reelected to the Wisconsin Judicial Council, on which he has served since 2008.

83 **Paul T. Dacier**, partner in Boston at Quinn Emanuel Urquhart & Sullivan, was inducted into the *Massachusetts Lawyers Weekly*'s "Hall of Fame."

88 **David J. O'Leary** retired as district attorney of Rock County, Wis. He served since 1997.

90 **Lisa Stafl** was named as the first in-house general counsel for the Association of Equipment Manufacturers, based in Milwaukee.

03 **Elizabeth F. McCright** joined Marquette University as deputy general counsel. She previously was senior vice president, deputy general counsel, at Kohl's.

Ryan E. Ruzziconi was appointed president of Aspiro, a disability service provider based in Green Bay, Wis.

04 **Nathaniel St. Clair** was nominated for the Litigator of the Year – Texas award by Managing IP, a global resource for intellectual property news and analysis.

05 **Theodore "TJ" Perlick Molinari** was named vice president of channel strategy and general counsel at Perlick Corporation in Milwaukee.

06 **Jesse B. Blocher** received the Charles Dunn Award from the State Bar of Wisconsin for his *Wisconsin Lawyer* article "The Pugilist's Guide to Brief Writing."

David B. Carr and **Douglas M. Raines** were elevated to partner at Husch Blackwell.

Ray H. Littleton was elected to the Detroit Bar Association Board.

Michael D. Rust was elected a judge of the Winnebago County Circuit Court.

07 **Anson T. Kuriakose** was named director and assistant general counsel of legal investigations and analytics at Allstate Insurance Co.

Laurie A. Kuriakose (Best) assumed the role of adjudications officer at the Refugee, Asylum, and International Operations Headquarters within the Department of Homeland Security.

Jennifer L. Williams was named partner at Gordon Rees Scully Mansukhani in Milwaukee.

08 **Julie E. Piper-Kitchin** joined the Madison office of von Briesen & Roper. She focuses on managing trial preparation and defense strategies across various legal areas.

09 **Nicolas J. Heitman** was named the 2024 Assistant District Attorney of the Year by the Wisconsin District Attorneys Association. He practices with the Milwaukee County District Attorney's office.

11 **Anthony J. Flint** was appointed Vice President of Legal at AriensCo.

Stacie L. Lamb was promoted to counsel at Faegre Drinker in Chicago.

Katie Mertz, director of pro bono and public service at Marquette Law School, was appointed to the Wisconsin Access to Justice Commission.

Dotun O. Obadina was promoted to partner at Paul, Weiss, Rifkind, Wharton & Garrison in New York, N.Y.

James Robert D. Rael was selected as faculty for the National Criminal Defense College.

Byron B. Conway, L'02, comes from a family of distinguished lawyers. His grandfather and an uncle were judges in Wisconsin, his father (the late Gregory B. Conway, L'70) established a prominent law firm in Green Bay, and a cousin (David D. Conway, L'09) is currently a judge in Dane County. With his swearing in as a federal district judge on November 8, 2024, Byron Conway has made his own contribution to the family's record. Conway is serving in the Green Bay Division of the U.S. District Court for the Eastern District of Wisconsin. He succeeds Judge William C. Griesbach, L'79, who moved to senior status in 2019.

Conway practiced at Gimbel, Reilly, Guerin & Brown in Milwaukee before joining the Green Bay office of Habush, Habush & Rottier in 2006 as a personal injury attorney. His nomination by President Joe Biden to the federal bench was supported by Senator Tammy Baldwin, a Democrat, and Senator Ron Johnson, a Republican. His roots in the legal profession should not, at least in these pages, detract attention from the Marquette University connections: for example, his mother, Diane Browning Conway, received her journalism degree from the university in 1966.


Joseph J. Schuster


Sarah M. Wong


Alexandra N. Appenzeller


Eric M. Gustafson


Taylor D. Brisco


Andrew E. Martzahl

12 **Nicholas S. Cerwin** received the State Bar of Wisconsin Young Lawyers Division's Outstanding Mentor Award.

Joseph J. Schuster returned to Ballard Spahr's Denver office as partner in the business and transactions department and consumer financial services group.

Sarah M. Wong co-founded the new intellectual property law boutique Wong Meyer Smith & McConnell in Milwaukee.

13 **Aaron Hernandez** was named of counsel for the sports law practice group at Church Church Hittle + Antrim. He continues as assistant dean and executive director of the Allan "Bud" Selig Sports Law and Business Program at the Sandra Day O'Connor College of Law at Arizona State University.

Brad L. Meyer co-founded the new intellectual property law boutique Wong Meyer Smith & McConnell in Milwaukee.

Anne R. Rowley joined Grossman Young & Hammond as counsel in the firm's business immigration practice in San Diego, Calif.

14 **Christian L. Bray** was named senior associate athletic director at Harvard University.

15 **Chris Kradle** opened his own firm, Kradle Law, in Edina, Minn., focusing on estate planning, estate administration, elder law, and business organization.

Isioma O. Nwabuzor was elected as the 41st president of Alpha Kappa Alpha Sorority, Inc.'s Epsilon Kappa Omega Chapter, the largest Black Greek-letter chapter organization in Wisconsin.

16 **Alexandra N. Appenzeller (Don)** joined von Briesen & Roper in Milwaukee as a shareholder in the real estate section.

17 **Erik M. Gustafson** joined the litigation and risk management practice group at von Briesen & Roper in Milwaukee, focusing on first- and third-party coverage analysis, counseling on bad faith claims, and appellate advocacy.

Jill K. Ingels, vice president of legal and business operations for the Milwaukee Bucks and Fiserv Forum and adjunct professor at the Law School, was named to the *Milwaukee Business Journal*'s 40 Under 40 for 2025.

Sara C. McNamara was elected a shareholder at Reinhart Boerner Van Deuren, Milwaukee, specializing in banking and finance, litigation, and business reorganization and bankruptcy.

18 **Michael R. Anspach** joined the Miami Dolphins/Hard Rock Stadium as associate counsel.

Timothy J. Greenwood was elected the city attorney for Kaukauna, Wis.

19 **Taylor D. Brisco** joined Hallett & Perrin as a litigation attorney, focusing on commercial business litigation and labor and employment with the Dallas-based firm.

April K. Splittgerber joined Axley Brynelson as a family law associate in the firm's office in Janesville, Wis.

20 **Andrew E. Martzahl** joined Lin Law in Green Bay, Wis., focusing on estate and business succession planning, corporate law, and real estate.

Kieran M. O'Day joined Stafford Rosenbaum in Madison. Wis.

SHARE SUGGESTIONS FOR CLASS NOTES WITH CHRISTINE.WV@MARQUETTE.EDU.

We are especially interested in accomplishments that do not recur annually. Personal matters such as weddings and birth or adoption announcements are welcome. We update postings of class notes weekly at law.marquette.edu.

Employment data for recent classes are available at law.marquette.edu/career-planning/welcome.

MARQUETTE UNIVERSITY

BE THE DIFFERENCE.

Marquette University, P.O. Box 1881, Milwaukee, Wisconsin 53201-1881 USA

What motivates *Anna Ashley and Tyler Crass?*

Helping people. Developing in real-life situations what they have studied in class and read in books. Connecting with individuals with legal needs.

Anna Ashley and Tyler Crass chose the right place to study and serve. "Incredibly valuable"—that's how Anna, a graduating student, describes her pro bono opportunities during three years serving in the Marquette Volunteer Legal Clinics (MVLCs). Tyler Crass asks himself, "How can I best help people?" As a Marquette law student returning next fall, he wants to do it "through a legal lens."

In 2024, Anna and Tyler—along with 195 other law students, 67 undergraduates, and 252 volunteer lawyers—participated in the MVLCs.

The volunteers helped 6,137 people through the MVLCs across Milwaukee and in the Mobile Legal Clinic, as well as in virtual settings, reaching residents of more than 60 of Wisconsin's 72 counties. Working with practicing attorneys, the students are on the front lines of connecting Marquette University Law School with the needs of the greater community.

That's to say: The Law School's students answer Marquette University's call to members of its community to "Be The Difference."

Are the students glad for the opportunities? "Definitely," Tyler says. Anna says, "The emphasis Marquette Law School places on getting involved in pro bono is exceptional."

Mike Gyniewicz