MARQUETTE LAWYER

SUMMER 2026

JUDGE DIANE SYKES

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Collecting Exemplars, or Building One's Roster

Among the more unusual-sounding suggestions that Tom Shriner and I make in the courses that we teach together is that the students should "collect judges." Judges are readily at hand on the pages of the textbooks, such as in our Federal Courts course, yet we mean much more than studying the words of their opinions. Indeed, we intend the encouragement more generally than that one phrasing may suggest: The point is that we may learn so much by examining, critically if also sympathetically, the human examples and models, both of judges and lawyers, available to us and then "adding their experiences to our roster" (for another articulation). Tom himself has practiced law in Milwaukee for more than 50 years and, as a part-time faculty member, has taught a course with me every semester for the past 20 years, and my own "collection" or the Law School's "roster" has been the stronger for our collaboration.

Against this backdrop, it was striking to me this past fall when on Seventh Circuit Day (as we at Marquette University Law School came to call September 25, 2025), at a session for the bar featuring several judges, both my faculty colleague Chad M. Oldfather and one of the participating judges, the Hon. Frank H. Easterbrook, invoked the late Judge Henry Friendly. Professor Oldfather, as moderator, mentioned one of Judge Friendly's statements concerning judges, and Judge Easterbrook maintained that no one could read too much Henry Friendly. Judge Easterbrook particularly encouraged engaging with Friendly's 1967 book, *Benchmarks*.

The point resonated with me. In Federal Courts, we note, among his other contributions, one of Friendly's articles, "In Praise of *Erie*—and of the New Federal Common Law," which appeared in the 1963 *New York University Law Review* (and, as revised, in *Benchmarks*). One can get almost an entire course out of this sentence by Friendly: "The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed or the basic scheme of the Constitution demands—seem so beautifully simple, and so simply beautiful, that we must wonder why a century and a half was needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made."

But let me not get too far afield. It is the "collecting" point that is my interest here. For many years, Marquette Law School's roster has included Judge Diane S. Sykes, L'84, whose illustrious career we celebrated on Seventh Circuit Day and whom we feature here (pp. 8–22). Like Judge Easterbrook, Judges Michael B. Brennan and Michael Y. Scudder were also with us on Seventh Circuit Day, as all of them had been on a number of previous occasions. And we were glad that day to welcome to the Law School, scarcely for the first time, Rebecca Taibleson, the then-nominated and since-confirmed successor to Judge Sykes on the Seventh Circuit (the latter having assumed senior status less than a week after September 25, because how could one top Seventh Circuit Day?).

Dean Kearney and Professor Shriner before a class session of Advanced Civil Procedure in 2022.

This brings me, more directly now, to this issue of the *Marquette Lawyer*. We have collected seven faculty who offer a one-page essay each on how they have brought Judge Sykes's writings into their courses (pp. 23–29). Other colleagues, such as Professors Christine Kexel Chabot (pp. 34–36) and Kali N. Murray (pp. 52–54), are also here for you to meet: the former describes her research on Founding-era precedents with respect to presidential authority, while the latter relates her scholarship concerning trademark practices in the larger context of American history. John D. Johnson also provides glimpses into his work as a key member of the Law School's Lubar Center for Public Policy Research and Civic Education (pp. 44–51).

More could be said about the voices we collect here. Some are those of other colleagues (e.g., Assistant Dean Anna Fodor with a behind-the-scenes glimpse of Seventh Circuit Day, pp. 32–33) or visiting academics (e.g., Professor Rebecca Tushnet, whose Nies Lecture on Intellectual Property is available on pp. 37–43). Others, more unusually, are famous litigants (Tinker to Obergefell to House may be scanned on pp. 4–5). And almost every day in Eckstein Hall, one finds practicing lawyers spending time with us, such as the ones from "outstate" Wisconsin mentioned on p. 6. When I mentioned to a colleague the "collecting people" theme of this column, she said, "The way Louie Andrew did." I was especially glad to make that association, and perhaps the remembrance of Louie toward the back of the issue (pp. 57–58) will help communicate the connection.

We invite you to read on and encounter this issue's collection of thoughtful and interesting individuals. ■

Joseph D. Kearney
Dean and Professor of Law

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Hon. Diane Sykes in Milwaukee's U.S. Courthouse.

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Well-known Cases, but What About the People Themselves?

Landmark legal decisions are often known by one name, that of a leading party. *Miranda. Brown. Dobbs.* But the people themselves often receive little attention, says Derek Mosley, director of Marquette Law School's Lubar Center for Public Policy Research and Civic Education. So during the past two years, Mosley has branched out in the Lubar Center's "Get to Know" series, hosting three "Face of the Case" programs in Eckstein Hall, providing a human aspect of major changes. Here is a brief recap of each program.

Grant House, February 5, 2026

One day in 2020, Grant House was sitting beside a swimming pool with some other athletes on the Arizona State University (ASU) swim teams. House heard another swimmer say into her phone that she knew the perfect person for what the caller was looking for. What was that all about?

The caller was the teammate's mother, a lawyer with a Seattle firm involved in legal action challenging National Collegiate Athletic Association (NCAA) rules limiting ways college athletes could get paid. She was looking for athletes who might be representative plaintiffs in a class action suit. Grant House—a national-class swimmer and an academic standout at ASU—was the perfect person, as the teammate put it.

House had not been involved in advocacy around the issue but agreed with the cause. Other students, such as musicians, make money doing what they love to do, he said, but athletes were restricted, and only in recent years were they able to receive money even for use of their names, images, and likenesses. House said he had turned down things such as sponsorship opportunities so that he could maintain his college eligibility.

He agreed to join the lawsuit, which became widely known as *House v. NCAA*. He took part in a daylong deposition at one point, watched a court proceeding in San Francisco, was interviewed by reporters, and fielded some strong (and sometimes negative) reactions to the issue. He had little involvement in the legal proceedings, but with a federal judge's approval in June 2025 of a $2.6 billion settlement of the class action, Grant House became part of college sports history.

During the 2026 Get to Know (Face of the Case) session at Marquette Law School, House talked about his personal background, his current training with a goal of making the 2028 Olympic team, and some of the stresses of being involved in the case. After the case made news nationwide, he received a large volume of reactions, including some from people who thought he was involved in ruining college sports.

Audience members, many of them students in Marquette Law School's sports law program, had many questions. An audience member asked about the message of the case. "It's all about educating and uplifting one another," House said. So many doors were closed to athletes. He hoped the case would help athletes "to continually uplift one another and build forward."

Another audience member asked how Marquette can compete in college sports against universities that have more money and "can buy the best athletes." House responded that some schools with a lot of money are doing poorly now, while some with more modest resources are doing well. Success, he said, doesn't have to come from money alone, but from the culture, character, or integrity of programs. He said universities are going to need to be innovative and forward-thinking, and the voices of athletes will need to be heard.

He expressed appreciation for the chance to talk about his background and perspective, something he hasn't done often. His final words during the program: "Go Marquette!"

Mary Beth Tinker, April 24, 2025

In the 1960s, Mary Beth Tinker was a schoolgirl whose family included her five siblings. Her father, who had been a Methodist minister in a small Iowa town, lost his position after he got involved in fighting a ban on Black people's use of the local swimming pool. The family then moved to Des Moines. The Tinkers became involved in social causes,

including a protest following the death of four Black girls in 1963 when Ku Klux Klan members planted dynamite in a church in Birmingham, Alabama. The protest involved wearing black armbands. Mary Beth, then 12, took part.

A year later, the United States escalated its military involvement in Vietnam. A group called Iowans for Peace was launched, with members of the Tinker family becoming involved. Participants decided to wear black armbands to mourn people killed in Vietnam.

The plan was to wear the armbands on December 16, 1965. Mary Beth wanted to take part, but the principal of her school banned the armbands. "You could wear a black armband if you were sad about the football games," Mary Beth said, "but not the war." She said, "I was the shyest kid you could ever imagine. I was a scared little kid. I was nervous." She was sent to the principal's office and told to take off the armband. She did. "I got suspended anyway," she said. So did four other students.

A challenge to the suspensions made its way to the Supreme Court of the United States, with the Tinker name first on the Court's opinion. On February 24, 1969, in *Tinker v. Des Moines Independent School District*, a 7 to 2 decision, the Court upheld the right of the students to wear the armbands. In a phrase that became well-known, the majority held that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." That right has limits, particularly related to potential or real disruption. But what became known as the *Tinker* principle remains relevant to this day.

"I didn't know how important the case was at all," Tinker said, until she was in college, studying to be a nurse. Her case—and name—were in one of her textbooks. "It kind of hit me: 'Well, I guess this is a little more important than I thought.'"

Tinker, who lives in the Washington, D.C., area, went on to a career in nursing, counseling young people, and being involved in social causes. "This *Tinker* case is about controversy," she told the Marquette Law School audience. "We have to speak up for our conscience." There is a risk to speaking up, she said. "But it's so worth it to live a life speaking up for what you believe in."

James Obergefell, September 18, 2024

James Obergefell was raised in Sandusky, Ohio, the youngest of six children in a blue-collar family. He became a schoolteacher in Cincinnati. He knew he was gay, but "I was deep in the closet." In 1992, he went to a bar with a friend, who introduced him to a man there named John Arthur. Later, Obergefell was invited to a New Year's Eve party at Arthur's house. "And I never left," Obergefell said.

They decided they wanted to get married, Obergefell said. They didn't want a symbolic wedding—they wanted "marriage and everything that came with it." At that time, there was nowhere in the United States where gay marriage was legal. But, he said, "Our family and friends considered us married; we considered ourselves married."

In 2011, after they had been together for 19 years, Arthur was diagnosed with ALS. His physical condition declined quickly. On June 26, 2013, the U.S. Supreme Court struck down the federal Defense of Marriage Act. Obergefell said he and Arthur immediately decided to get married. That wasn't permitted in Ohio then. A friend suggested they go to Maryland, where it was allowed for one person to appear in applying for a marriage license. Obergefell got the license. Arthur was severely disabled by then, Obergefell said, so, with family and friends picking up the $14,000 cost, they chartered a medical jet, flew to Baltimore, and got married on the ground without ever leaving the plane. Then they flew home.

A Cincinnati reporter wrote about the wedding. That led to Obergefell's meeting with a lawyer, who brought him an example of a death certificate. "It broke our hearts," Obergefell said, that he wouldn't be listed as a spouse when Arthur died. He and Arthur filed a lawsuit arguing that getting married in Maryland meant Ohio had to recognize their marriage.

Arthur died three months after they got married. Both names were on the death certificate, pursuant to a federal court injunction shortly before Arthur's death, but lawyers for Ohio argued that Obergefell's name as "surviving spouse" should be taken off. The resulting court case made its way to the Supreme Court, where it was combined with other cases arguing that same-sex marriage should be legal across the country as a constitutional right.

Obergefell was present when *Obergefell v. Hodges* was announced by Justice Anthony M. Kennedy on June 26, 2015. When it became clear that the plaintiffs had won, "I burst into tears, and I could hear people around that courtroom sobbing," Obergefell said. "For the first time in my life as an out gay man, I felt like an equal American."

After the decision, Obergefell said, he became involved in advocacy not only for gay rights, but for rights of others more generally. And for those present at Marquette Law School's Face of the Case program, Obergefell emphasized his realization that what he learned as a child is true: "A small group of people really can change the world." ■

Law School Programs Highlight "Outstate" Career Opportunities

Ryan Graff, L'06, has a thriving legal practice, including interesting and big cases, opportunities for professional growth, and interaction with very capable lawyers. And there are appealing opportunities beyond work. This is how he finds life in Manitowoc, Wisconsin, on the shore of Lake Michigan, 80 miles north of Milwaukee. "I don't think you lose anything by being in a small community," he told about 20 Marquette law students at a gathering in Eckstein Hall on February 26, 2026.

Graff and a half dozen other lawyers with practices in rural areas or small to medium-sized cities were taking part in the Law School's "Beyond Milwaukee" lunch program, part of a larger campaign by several legal organizations, including the State Bar of Wisconsin and Marquette Law School, to encourage law school graduates to choose careers in smaller communities in Wisconsin.

It's not an easy sell. As is true more broadly, the pull of big urban areas such as Milwaukee and Madison is strong in the legal profession. Trends have not been running favorably when it comes to the availability of lawyers around Wisconsin. In particular, shortages of prosecutors and public defenders have made pursuit of criminal cases difficult and slow in some areas. "We need criminal defense attorneys up north like we need air," said another participant in the program, Jessica Phelps, L'14, who practices in Wausau. "It's dire."

Many places offer good opportunities. "The farther north you go, the happier they will be to have you show up," Phelps told the students. Steven Krueger, L'07, practices in Green Bay. He said that while some people in urban centers have comical ideas about what legal practice and life in general are like in less populous centers, he deals with sophisticated law firms, complicated legal issues, big businesses, and demand for his services. Plus, he said, "the earning potential is something people are often surprised by."

And then there's the lifestyle—panelists spoke of no-hassle commutes to work, lots of recreation opportunities, and access to more cultural offerings than many people realize. Seeking to dispel "a myth," Scott Swid, L'96, said there are excellent cultural programs across the state. Swid practices in Mosinee, Wisconsin, south of Wausau.

> **"The farther north you go, the happier they will be to have you show up."**
>
> **— Jessica Phelps, L'14, practicing in Wausau, Wis.**

Erin Binns, the Law School's assistant dean for career planning, noted "a wealth of legal opportunities—quality opportunities—beyond the immediate Milwaukee area."

The Beyond Milwaukee event was part of an effort to promote "outstate" legal positions, Binns said, using the common Wisconsin term for areas at least outside the Milwaukee and Madison areas. This summer will be the third year of the State Bar of Wisconsin's Rural Clerkship Program, which places students after their first or second year of law school in private law offices and state public defender locations outstate. The positions are paid, and the students have substantial involvement in legal work.

Another part of the effort was a program titled "Let's Get Criminal" on February 16, 2026, in Eckstein Hall, in which eight representatives of district attorney's offices and the state public defender's locations across Wisconsin described their work, how to prepare for jobs such as theirs, and potential career trajectories. The program was supported by the Law School's Nathan Fishbach Student Development Fund.

Binns said the Law School also hosted a recent luncheon for students, facilitated by the state bar, which included a virtual panel discussion with lawyers describing their practices in rural areas around Wisconsin. "We encourage students, and we're working with employers to promote outstate legal careers," Binns said.

Wisconsin Supreme Court Chief Justice Jill J. Karofsky pointed to the statewide needs in a "Get to Know" program at the Law School, hosted by Derek Mosley, director of the Lubar Center for Public Policy Research and Civic Education, on March 4, 2026. "We have a crisis here, for all you law students," Karofsky said. She said lawyer shortages had slowed criminal proceedings in some areas. "We're going to have to do everything we can to try to move the needle a little bit."

The Law School's efforts aim to help do that. ■

Families, Educators, Leaders—and Money

Two Lubar Center programs emphasize that all are needed for reading reform to succeed.

Maya Smart encourages parents and caregivers to take effective steps, beginning with very young children, to develop literacy abilities.

"All hands on deck"—that's what it will take to succeed in making a lot more children capable readers. This was the message from Maya Payne Smart to an audience in the Lubar Center of Marquette Law School's Eckstein Hall. "Parents, families, communities, we have to do our part," along with educators themselves.

The Law School's Lubar Center for Public Policy Research and Civic Education, partnering with the Marquette University School of Education, is playing a part in that effort as a convener to promote public awareness of and engagement with the problem of too few children learning to read well. Two programs during the 2025–2026 school year continued the longstanding commitment to making education issues one of the focal areas of the Lubar Center's public policy initiative.

Smart is the author of the 2022 book, *Reading for Our Lives: A Literacy Action Plan from Birth to Six*. She is an affiliated faculty member of the Marquette University College of Education and the chair of the newly formed Milwaukee Reading Commission. She came to Milwaukee in 2021 when her husband, Shaka Smart, became the Marquette men's basketball coach.

In a program on November 12, 2025, Smart said that when their daughter was young and Smart was checking out early childhood programs, she paid close attention to what she saw. Did the place look safe, clean, and inviting? Now, Smart said, she urges parents not only to look but to listen. Are the people running the center talking with the children, including babies? Are they doing things that build a child's intellect? Even more important, are parents engaging in these things at home? These are valuable steps in child development.

"We need to have parents who recognize they are not only providing food and a roof over the heads of their children," Smart said. "They are really their first teachers and their first educational advocates." She also encouraged enhanced teacher training. "None of this works if the child arrives in a classroom with a teacher who doesn't know how to teach them," Smart said.

Building the skills of teachers was also the theme of a Lubar Center program on December 2, 2025, in which four Wisconsin education leaders described work on implementing a 2023 state law seeking reform in literacy education.

Barb Novak, head of the Wisconsin Department of Public Instruction's Office of Literacy, said, "My heart wants every single kid to be a competent reader. . . . My brain knows that that happens through building systems." That process has started, but she said that broad success is going to be expensive, requiring more than the $50 million that the state has appropriated to this point.

Gabriela Bell Jiménez, academic superintendent for literacy for Milwaukee Public Schools (MPS), is at the center of work to improve reading proficiency among Milwaukee children, which, as a whole, is among the weakest in the nation. She compared what it will take to succeed to what it takes to make an ice sculpture from a large block of ice, saying you have to melt the block bit by bit, carefully and patiently. "Change is difficult, but we are making progress," she said. A recent update of the MPS reading curriculum, she said, was an expensive but important step.

Rep. Robert Wittke (R-Caledonia), a member of the Wisconsin Legislature since 2019 and a former president of the board of education of the Racine Unified School District, said he would have preferred a much larger appropriation—$150 million or $200 million—to support the 2023 reading law. He emphasized professional development for teachers as a priority. "We took a step in the right direction with $50 million," he said, even as more will be needed.

Carrie Streiff-Stuessy heads a community organization, Forward Scholars, that places trained volunteer tutors in 10 Milwaukee schools. It has seen good results, albeit with a relatively small number of students. Overall, "I do really see that there are changes happening," she said. But it "can't happen fast enough without the resources."

Engagement, commitment, and resources were themes at both Lubar Center programs. Marquette's commitment includes continuing to put literacy issues in the spotlight. ■

Judge Diane Sykes in her chambers in Milwaukee before moving to senior status in 2025.

A Career Built on "a Strong Public Service Ethos"

As a circuit judge, state Supreme Court justice, and federal appeals court judge, Diane Sykes has adhered to the principles she learned at home and in law school.

BY ALAN J. BORSUK

Diane Sykes says she owes everything she has accomplished to her parents.

Her father, Gerald Schwerm, was a civil engineer with a master's degree in public administration. He was named village manager of the Milwaukee suburb of Brown Deer in 1966 and played a central role in developing the village. He later became transportation and public works director of Milwaukee County, where he was instrumental in the development of Mitchell International Airport, among other projects. Sykes says her father grew up in Whitefish Bay, just outside Milwaukee, in a family of German-Polish ancestry, and after earning his engineering degree at Marquette University in 1955, became a highly capable public administrator and community builder, with a quiet but effective approach to leadership. "When he spoke, you knew it was important." Sykes says she learned from her father the value of public service. "He made an impression on me about government service and how to do it well."

Her mother, Joyce Hanrahan Schwerm, was "a people person" with "an Irish personality," Sykes says. She became a school guidance counselor after the youngest of her five children was in school. She was a behind-the-scenes advisor to her husband. Sykes says her mother was the one who would say things such as, "Jerry, this [Brown Deer] won't be a real community until you build a library." Or "until it has recreation spots like a public pond."

The two of them were models of family connectedness and stability and positive values.

Pick out aspects of the foregoing if you want insight into Diane Sykes. When she speaks, you know it's important. She has been committed to public service her entire career. Her personality has some elements of reserve, but she has had warm and positive relationships with a wide range of colleagues for many years, including people with decidedly different political and legal philosophies from her own. And she values stability and connectedness.

Those qualities led Sykes, who graduated from Marquette Law School in 1984, to a judicial career of upward steps—becoming a Milwaukee County circuit judge at a relatively early age, then five years as a justice of the Wisconsin Supreme Court, followed by the past 21-plus years as a judge on the United States Court of Appeals for the Seventh Circuit. The path almost included nomination to the U.S. Supreme Court.

Now 68, Sykes is lightening her load. In fall 2025, she completed her tenure as chief judge of the Seventh Circuit and moved to senior status on the court, with

plans for continuing yet with a reduced caseload. For the first time in her life (except for college), Sykes has moved away from the Milwaukee area. She is living near Washington, D.C.—and, more to the point, near her two sons and their families. She is spending a lot more time with her grandchildren. She says she is "recalibrating my life around my kids and my grandkids." But, in addition to her partial workload on the Seventh Circuit, she is considering other possibilities, such as teaching. "We'll see," she says. "We'll see."

From the newsroom to the law school

Her career, Sykes says, "has been a great series of opportunities and people taking chances on me." Not surprisingly, it's also involved times when Sykes helped those opportunities arise.

Consider her brief career in journalism. After graduating from Brown Deer High School, she enrolled at Northwestern University's Medill School of Journalism. One day during her junior year, she presented herself at the front counter of the *Milwaukee Journal* newsroom. She said she wanted to apply for a summer internship as a reporter and was hoping she could job-shadow a reporter for a day. An assistant metropolitan editor arranged for her to spend time with the newspaper's young city hall reporter at that time, Charlie Sykes.

Two results:

She ended up working for a year as a reporter at the paper after graduating from Northwestern. She did well and could have had a good career at the *Journal*. (Author's note: I know—I was another one of the assistant metropolitan editors at the time and worked with her.)

And she married Charlie Sykes. They had two children and divorced in 1999. He had a career as a longtime prominent conservative radio talk show host in Milwaukee and, in more recent years, a national television political commentator and podcaster.

There were no lawyers in Diane Sykes's family background, but she had seen the law at work in her father's jobs and was interested in pursuing her interest in public service by becoming a lawyer. She left the newspaper and enrolled at Marquette Law School.

"It was a great fit for me," she says. She had a general picture of what it was like to be a lawyer, particularly in court settings. But law school taught her "the rules" of the work. The Marquette approach was "very doctrinal," with "a strong public service ethos," both aspects that she appreciated.

She recalls particularly the torts class she took from one of the legendary professors at the Law School, James D. Ghiardi, L'42. "That was a formative experience because he was incredibly demanding and really taught us to read cases and distill what they said," she says. "It was rigorous, demanding, somewhat intimidating, but it also instilled in all of us the absolute imperative of being prepared."

She also cites other then-professors, Christine Wiseman, L'73, and Carolyn Edwards, as great teachers and role models. Sykes says both were trailblazers for women who wanted legal careers. "They were influential for me in terms of showing what was possible for women."

Sykes thought she might become a prosecutor or seek a job in government. While she was a law student, she worked at the Milwaukee firm of Friebert & Finerty, which had extensive involvement with government and in court on behalf of businesses and individuals. That gave her "a real education in litigation," she says. "It was a really fun place to work."

Looking for a summer internship, Sykes contacted her fourth-grade teacher. Why? Because she knew the teacher's husband was a lawyer at the law firm now known as Von Briesen & Roper, which she knew did a lot of work involving government units and school systems. She spent a successful summer with the firm.

Upon graduating in 1984, she was offered a clerkship for Terence Evans, L'67, who was then a

Judge Diane Sykes addresses the Marquette Law School graduating class of 2012 at the Milwaukee Theatre.

federal district judge in Milwaukee. Evans became a mentor with a large influence on Sykes. For one thing, he was known for his constructive ways of dealing with people during court proceedings. For another, he wrote clear judicial opinions that made complex matters understandable, even to non-lawyers. Sykes has worked to emulate that.

After a year clerking for Evans, she joined the Milwaukee firm of Whyte & Hirschboeck (now part of Husch Blackwell), where she worked for seven years. But she had an ambition to become a judge—and she credits Evans with encouraging her in pursuing that goal.

A "beyond unusual" campaign for judge

In 1992, at a time when crack cocaine was a big factor in fueling a national increase in crime, three new courts were created for Milwaukee County. Sykes decided to run for one of the seats. She was young compared to most candidates for judge and had two young sons. She also had a legal background only in civil matters and had not worked in the district attorney's office, which was a frequent precursor to winning a judicial election. "My candidacy was beyond unusual," she says. But she gained support. "Campaigns then and now are all about crime," she says, and she ran on law-and-order themes. She won.

Being a Milwaukee County Circuit Court judge was "a rewarding experience for me," Sykes says. Dockets were exploding, both because of the crack epidemic and for reasons involving civil litigation, Sykes says. "I had to learn on the job very quickly." But there were excellent judges who helped her. She points to Janine Geske, L'75, and Michael P. Sullivan as important influences. Geske went on to serve on the Wisconsin Supreme Court and as distinguished professor of law at Marquette University, while Sullivan served later as the Milwaukee County Circuit Court's chief judge.

In 1999, Justice Donald Steinmetz announced he was retiring from the Wisconsin Supreme Court, creating a vacancy that would be filled through an appointment by then-Governor Tommy G. Thompson. Sykes says some people regarded the seat unofficially as "the Marquette Milwaukee seat" on the court. Sykes was one of several people considered for the appointment and the only one with Marquette and Milwaukee credentials. The opening occurred around the time she and Charlie Sykes were going through a divorce, but he was an influential voice in conservative circles, and he used his voice to support her. "It was not an ideal time" for Diane Sykes personally, but she says, "This was my opportunity." She got the nod from Thompson.

"I used to be able to defend judicial elections," Sykes says now. That was when you could focus on broad judicial philosophy . . . .

The appointment meant she had to run in the statewide election in 2000. In that race, she got 65 percent of the vote while Louis Butler, then a Milwaukee municipal court judge, got 34 percent.

Seeing increased reasons not to elect judges

The 1992 race for Milwaukee County circuit judge and the 2000 Wisconsin Supreme Court election were the only times Sykes ran for office in a contested race, and she won both.

In 2000, Sykes wrote an article for the magazine of the Wisconsin Policy Research Institute in which she cautioned that judicial election campaigning was moving in troubling directions.

In her view, things have gotten much worse since then. She thinks the acrimonious and clearly partisan state Supreme Court race between then-Justice Butler (he was appointed to the Wisconsin Supreme Court by Gov. James Doyle as Sykes's successor in 2004) and Judge Michael Gableman in 2008 hit new lows for appropriate judicial campaigning. (Gableman won.) And things have gone downhill since then.

"I used to be able to defend judicial elections," Sykes says now. That was when you could focus on broad judicial philosophy and have "highly generalized discussions" on topics such as law and order and the role of courts. Campaigns were reasonably inexpensive, and candidates refrained from saying how they would vote on specific issues that were likely to come before them.

"Those kinds of campaigns have long since become impossible," she says. Two recent races for seats on the Wisconsin Supreme Court, in 2023 and 2025, were the most expensive judicial races in American history, with extensive direct involvement from both the Democratic and Republican parties. The liberal candidates who won each of those races

were clear on their positions on issues such as abortion.

"I cannot continue to defend judicial elections as they currently are run," Sykes says. That goes for the expense of races, the special-interest money involved, and the campaign rhetoric, which she labels extremely political and non-judicial "in a way that I find to be corrosive." She says the results are undermining "the proper ethos of judging," including neutrality, impartiality, due process, and fairness.

Among the regrettable byproducts of the intense partisanship surrounding our judicial campaigns, as Sykes sees it, is a kind of "whiplash" in which important recent decisions are reversed by changed court majorities. It is all "extremely disheartening," she says, and judges and justices are increasingly being viewed as politicians in robes.

What does the phrase "politicians in robes" conjure up to Sykes? It's used to criticize judges whose decisions you don't like, she says. "A politician in a robe is the opposite of what the judiciary should be because it connotes someone who makes decisions not based on the law but on policy preferences or the politics of the moment, and those are improper considerations." She regrets that "the current environment for judicial elections does not support the advancement of candidates who are committed to setting those [political] interests aside."

Recent polling by the Marquette Law School Poll has shown that large majorities of voters in Wisconsin are in favor of Supreme Court candidates giving their positions on issues likely to come before them if they win. Sykes acknowledged this and called it a result of the increased polarization and partisan intensity of national politics.

Is there hope for things to get better? "I doubt it," she says. "It's very hard to reform judicial elections in any kind of systemic or institutional way because of the primacy of First Amendment interests." Electing judges carries with it First Amendment values, she says. "Election speech—including election funding, which is a form of promoting and facilitating election speech—is at the core of the First Amendment, as it should be," she says. The choice to elect judges subordinates judicial independence and prioritizes ballot-box political accountability.

Even though Sykes had a conservative judicial philosophy, Senators Kohl and Feingold said they would go along with the nomination . . . . "I was considered noncontroversial," Sykes says.

From the state Supreme Court to the federal appellate bench

Sykes says she loved her time on the Wisconsin Supreme Court: "We were doing good work together."

She had liked being a circuit court judge, even with a heavy workload, limited resources, and the need to make a lot of decisions quickly. Trial judges have a lot of discretion in how to handle some aspects of their cases, and Sykes says she learned from people who managed courts well.

But she took to being in an appellate court setting. The work is different from the work of the trial court and requires different skills. The Wisconsin Supreme Court can pick the cases it takes up, each one carries important weight, and the work calls for "clarification, elaboration, or development" of state law in ways that have broad and lasting impact, she says.

Her time on the state high court was relatively brief. In 2003, Judge John L. Coffey, L'48, a former Milwaukee County judge who had served on the U.S. Court of Appeals for the Seventh Circuit since 1982, announced he was going to move to senior status. That opened a seat on the court, which by custom would go to someone from Wisconsin. President George W. Bush, who would make the nomination, was a Republican, and Wisconsin's two senators, Herb Kohl and Russ Feingold, were Democrats. A bipartisan panel screened candidates for the appellate seat and recommended Sykes and three other individuals. Bush chose Sykes. Even though Sykes had a conservative judicial philosophy, Senators Kohl and Feingold said they would go along with the nomination, a result partly of the good relationships Sykes had with judicial colleagues and others. "I was considered noncontroversial," Sykes says.

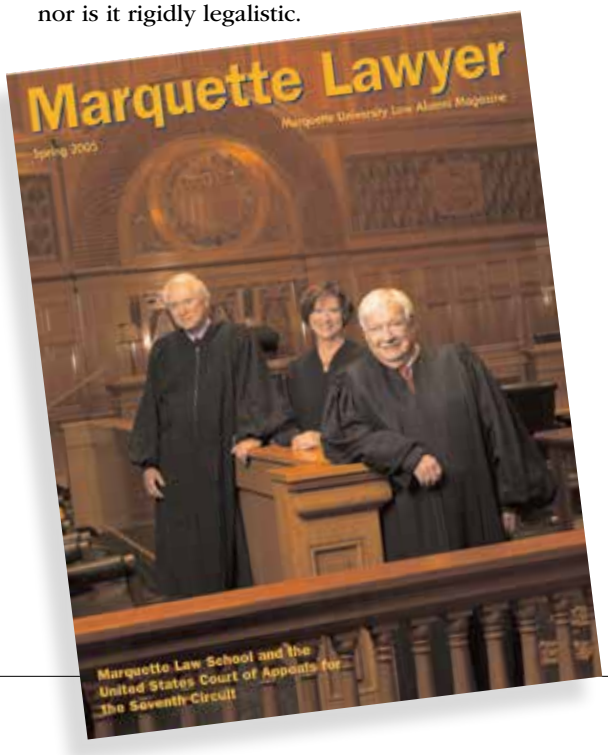
The nomination was approved on a 70 to 27 vote by the U.S. Senate. Sykes was sworn in on July 4, 2004, in the chambers of her mentor, Terence Evans, who himself had moved up from the federal district court to the Seventh Circuit in 1995. Sykes says it

was “a tremendous joy and privilege” to join Evans on the Seventh Circuit 20 years after clerking for him when she was fresh out of law school.

Building a national reputation in conservative legal circles

Sykes always has been on the conservative side of the jurisprudential spectrum, from before she ran for circuit judge in 1992 on law-and-order themes. And, she says, her time on the Wisconsin Supreme Court and the period when she moved to the Seventh Circuit coincided with the era in which conservative legal thinking was “coming into its own.” Sykes says conservative judges were no longer just “the loyal opposition,” as they had been during the tenures of Chief Justices Earl Warren and Warren Burger. “Originalism” and “textualism” had gained momentum, especially after John Roberts became chief justice in 2005. The views of Justice Antonin Scalia were increasingly influential, captured in part by a phrase he popularized: the rule of law as a law of rules. Justice Scalia promoted textualism in statutory interpretation and originalism in constitutional interpretation, and both approaches have taken hold.

Sykes, too, adheres to these interpretive principles. She gives “an unequivocal yes” when asked if she is a textualist, and she generally would agree she is an originalist. She says textualism is now the dominant means of interpreting statutes, focusing on the language of statutory law and how it was understood when it was adopted. She emphasizes that textualism does not ignore context, nor is it rigidly legalistic.



She views originalism as “a starting point” in constitutional interpretation, but it is not the entire process. “We are adjudicators, and we have to adjudicate real cases.” Like textualism in statutory interpretation, constitutional originalism focuses on the original public meaning of the Constitution. As Sykes sees it, originalism will not answer all constitutional questions. “There was so much less law” in the Founding era, and most constitutional provisions are phrased in highly general language that does not yield clear answers in actual cases. “We do, in the end, have to decide our cases,” she says, and appellate judges need to clarify the law for lower courts, the bar, and the public. Originalism is the anchor in constitutional adjudication, she notes, but precedent and implementing doctrine also have roles to play.

Thriving as a “collegial” Seventh Circuit judge

Sykes has thrived as a Seventh Circuit judge. While a state Supreme Court focuses almost only on important, consequential cases with contestable and novel legal questions, a federal appellate court hears quite a few cases that are more routine, including a lot of pro se cases. But there are also weighty and complex cases that carry a wide and lasting impact.

As Sykes stands one day last fall in the courtroom of the Seventh Circuit’s headquarters, a midcentury skyscraper in the heart of Chicago’s loop, she looks up at the painted portraits hanging on three of the walls, each one of a current or recent member of the court. She points to each of them, speaking warmly about what kind of people they were and their impact as judges—and on her. Her colleagues are no less admiring of Sykes.

At a reception honoring Sykes in Marquette Law School’s Eckstein Hall on September 25, 2025, Judge Frank H. Easterbrook—the longest-serving member of the Seventh Circuit (he was appointed in 1985)—praised Sykes. The work of appellate judges is collegial, and Sykes has all the qualities that a good collegial leader needs, Easterbrook said. She listens, she can be persuaded, and she can disagree without being disagreeable. And U.S. Supreme Court justices have found her work praiseworthy, he said. As chief judge, Sykes had oversight over all the federal courts in the Seventh Circuit, including

Judge Diane Sykes, flanked by Judge Terence Evans (left) and Judge John Coffey, fellow Marquette lawyers, in 2005.

district courts in Wisconsin, Illinois, and Indiana. That includes more than 100 judicial officers in the Seventh Circuit and more than 1,000 employees. He said the Seventh Circuit was working well, and that was an accomplishment for Sykes.

"The public has paid exactly the right amount of attention to her service: None," Easterbrook said. But in the judicial system, people know how well she did the job. He also allowed, "She's a textualist, which makes her my kind of judge."

Being considered for the Supreme Court of the United States

In 2016, following the death of Justice Scalia, partisan gridlock in the U.S. Senate prevented action on President Barack Obama's nomination of Judge Merrick Garland to the Supreme Court. Donald Trump, then a candidate for president, took the unusual step of announcing names of people he would consider for the Court if he won the election. Sykes's name was on the list.

When Trump was elected, that prospect became real for her. An elaborate process unfolded in which Sykes was interviewed by advisors to the transition team, including Vice President-Elect Mike Pence; Don McGahn, Trump's incoming White House counsel; and Leonard Leo, a leader of the Federalist Society who was influential in screening candidates for justice. It was a rapid and intensive vetting of her judicial career, including a close review of almost everything she had written as a judge, going back to her days on the Wisconsin Supreme Court and the Milwaukee County Circuit Court.

Sykes was the only woman among a small set of finalists, and she was the oldest of the finalists, having just turned 59. Age has been increasingly an important factor for presidents in federal judicial nominations in recent decades.

In the end, Trump nominated Neil Gorsuch, who continues to serve on the Court.

Sykes has no regrets. "I was extremely gratified to be included in that very elite group," she says.

The qualities of a good judge

What are the qualities of a good judge? "All of the foundational attributes are well known, well established, and often repeated," Sykes says. And she subscribes firmly to them, even as she sees partisanship and polarization creating forces working against the classic definition.

She lists attributes that she has aimed for: Impartiality. Careful attention to the need for every

Judge Diane Sykes outside the U.S. Courthouse in Milwaukee in 2025.

litigant to have his day in court. Listening with an open mind to both sides of a case and giving fair consideration to both sides. She mentions a famous quote from Socrates: Judges should hear courteously, answer wisely, consider soberly, and decide impartially.

She cites an additional maxim: Judges need to be able to put their passions aside in reaching their judgments. "That entails a certain humility and the ability to recognize the significance of the decisions we make—and what we don't know. It involves the cast of mind and temperament to put the time into learning what we don't know—about the facts and the law—before making a decision." She says good judges need "a solid foundation of knowledge of legal history, and history in general, as well as knowledge of the human condition and the path of the law over time and how the rule of law is best preserved."

Appellate judging also requires a sense of perspective about where the law has come from and where it is now. It's important to know "not just the rules, but the reasons for the rules and the history behind their development," Sykes says. And appellate judges in particular need strong communication skills, including the ability to explain the law and to persuade others in writing, on the bench, and around the conference table where judges determine the outcome of a case.

It is inevitable, both as a general matter and especially in this period in American life, that Diane Sykes's work on the bench would be praised by some and criticized by others. But 42 years after she graduated from Marquette Law School, she has earned high grades for adhering to the "public service ethos" she learned at home and as a student and for dealing with people in a wide range of situations in principled and even gracious ways.

"I have tried to maintain the longstanding norms of judging," Sykes says. ■

In Her Own Words

Excerpts from speeches by Judge Diane Sykes illustrate her legal philosophy and approach to judging.

Diane S. Sykes, L'84, recently completed her service as chief judge of the U.S. Court of Appeals for the Seventh Circuit and moved to senior status. During her career as a circuit judge in Milwaukee County, a Wisconsin Supreme Court justice, and a judge of the Seventh Circuit, she has given numerous lectures and talks, both in Wisconsin and across the nation. Here are condensed and edited excerpts from five of her speeches, including two given last year at Marquette Law School. They shed light on Sykes's legal approach, her respect for the judicial system, and her great interest in the law and the history of the United States.

Minimalism and Its Limits

This an edited text of a speech Judge Sykes gave as the B. Kenneth Simon Lecture in Constitutional Thought at the Cato Institute in Washington, D.C., on September 17, 2014, shortly before the beginning of the Supreme Court's 10th term during the tenure of Chief Justice John G. Roberts, Jr. The full version can be found at 2015 Cato Sup. Rev. 17 (2015).

From the beginning of his time as chief justice in 2005, John Roberts has been explicit about wanting to foster greater consensus on the Supreme Court. It's often suggested that the Court's legitimacy would be enhanced by fewer 5–4 rulings along the usual conservative/liberal fault line. In his confirmation-hearing testimony and more fully in his first major public address, the chief justice articulated his view that although differences among the justices should not be "artificially suppressed," a greater degree of consensus in the Court's decisions would bring "clear [jurisprudential] benefits." He famously set for himself this guiding principle: "If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more. The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground."

For the first time since the 1940s, almost two-thirds of the Court's merits opinions during the 2013–2014 term were unanimous on the bottom line, if not necessarily in their reasoning. This is generally thought to be a striking and welcome development. In some key respects it is, although it's important to note that a significant part of the Court's docket each term consists of technical statutory or procedural issues that do not engage the philosophical differences among the justices. Still, the uptick in bottom-line agreement is remarkable, especially in cases raising difficult constitutional questions.

I should probably begin with a definition. Modern judicial minimalism as a distinctive theory of decision-making is usually credited to Professor Cass Sunstein of Harvard Law School, who coined the term and is the leading academic proponent of this approach to judging. Sunstein proposes that judges should generally "avoid broad rules and abstract theories, and attempt to focus their attention only on what is necessary to resolve particular disputes." He advocates the practice of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided." Minimalist judging of the Sunstein variant proceeds along two dimensions. First, judicial opinions should be narrow rather than wide, deciding the case at hand while avoiding pronouncing rules for resolving future cases. Second, judicial opinions should be shallow rather than deep, avoiding large theoretical controversies and issues of basic principle.

On the surface, the theory sounds as if it's limited to process values, but it's not. Substantively, minimalism starts from a presumption of deference to the political branches. It self-consciously avoids invalidating acts of the legislative and executive branches either by upholding them on the merits or by using various techniques for avoiding constitutional questions. Minimalism also advocates a strong version of *stare decisis*; consistent adherence to precedent promotes stability and predictability, thereby preserving the Court's institutional interests. On a more philosophical level, modern minimalism promotes itself as a hedge against judicial supremacy. It calls on judges to go slowly and in small steps.

Of course, the Founding generation didn't need a theory of judicial minimalism. The common-law tradition, as it was understood and practiced at the time, was itself essentially minimalist, and important minimalist features are embedded in our constitutional design. The common law as applied in the courts of the new American states was based on English customary law, and in the Blackstonian tradition it was found, not made.

The philosophical terrain was also different than it is now. The Framers inherited a strong natural-rights tradition, but they also understood

that because natural-rights principles are quite general—today we would say "underdetermined"—the judges of the new federal judiciary, like their counterparts in the states, would be called upon to exercise a substantial element of judgment in individual cases. As a constraint on that authority, Article III limits the judicial power to cases or controversies that are explicitly judicial in nature. The Framers rejected a more active political role for judicial review by deciding against a Council of Revision. Beyond the constraining effect of the case-or-controversy limitation, the Framing generation generally understood that federal judges would follow long-established norms of judicial practice. They would be bound down by rules and precedents, to paraphrase *The Federalist No. 78*. This was thought to be a sufficient check against decisions based on will rather than judgment.

That was the "old" form of judicial minimalism; it was swept away by the legal realism of the 20th century. The "new" judicial minimalism is a response to the realist idea that, inescapably, appellate judges engage in discretionary lawmaking when they decide cases, including (and especially) cases of constitutional interpretation. If judges make constitutional law, then we need some theory or method to guide them.

It may help to place this minimalism in recent historical perspective.

The "living constitution" school of thought held sway in the decades that spanned the Warren Court and the early years of the Burger Court. This evolutionary approach authorized judges to interpret the core principles of the Bill of Rights and the Fourteenth Amendment in a way that reflects contemporary values and allowed them to adapt the Constitution's broad language to address modern conditions and problems. In practice this theory produced the "rights revolution" of the 1950s and '60s, which was aggressively interventionist in implementing social, political, and legal reform by judicial decree.

The conservative counterrevolution began in earnest in the 1980s and initially focused on restoring the practice of "restraint," understood as judicial deference to the policy choices and value judgments of the political branches. In the early years, the primary concern was to stand athwart the jurisprudence of the Warren Court, yelling "Stop!" (Apologies to William F. Buckley, Jr.) But the emphasis on restraint did not address how the Constitution *ought* to be interpreted and applied. That would come later, as originalism was recovered, developed, and refined.

The animating principles of originalism arise from the legal justification for judicial review—the duty to decide cases according to law, including the law of the Constitution. Briefly stated, the basic theory is this: Because our Constitution is written, unlike the British Constitution, and because it is supreme law adopted by the people as the original sovereign that brought the American government into being, constitutional interpretation ought to be grounded in the public meaning of the text as understood at the time of ratification.

Modern judicial minimalism is flexible about when judges should proceed minimally. It explicitly acknowledges that not every case calls for a minimalist ruling. As Sunstein puts it, "there are times and places in which minimalism is rightly abandoned." There's a nonexclusive, multifactor test for determining when it's best to issue a minimalist decision and when it's best to go maximalist—but you probably guessed that already.

It should be clear from this discussion that although minimalism is an approach to judging, it's *not* a theory of constitutional interpretation. Unlike originalism, it's not a method for determining the meaning, scope, and application of the Constitution. Instead, it's a theory of deference. Judges should defer to the political branches of government and to the decisions of prior courts—except when they shouldn't. It's also a theory of avoidance. Judges should not make broad pronouncements on foundational matters of constitutional principle—except when they should. Got that?

As you've probably gathered, minimalism can be criticized for offering "no genuine guidance to judges."

For my part, I tend to side with the critics. A unifying theory of minimalism is both unworkable and unwise. The Article III constraints on judicial power already enforce a degree of minimalism, and all judges respect and reason from precedent. We have well-established doctrines to ensure that judges do not unnecessarily decide constitutional questions, and the norm of analogical reasoning has a natural constraining effect. In other words, minimalism is inherent in standard judicial method. We do not need a heavy theoretical thumb on the scales. What's important is how the traditional sources of law and legal interpretation—text, structure, history, canons of interpretation, precedent, and other well-established tools of the judicial craft—are prioritized, weighted, and applied.

A noteworthy feature of the Roberts Court at age 10 is its preference for using minimalist techniques to avoid or soften or at least postpone confrontation with the political branches in structurally or politically sensitive cases.

At a time of deep political polarization, the modesty and consensus values claimed by judicial minimalism seem especially attractive. Restraint is indeed a judicial virtue. Judicial mistakes on constitutional questions are extraordinarily difficult to fix. Arrogating too much power to the judiciary distorts our politics and undermines our ability to democratically shape and alter our basic legal, social, and economic institutions. But strong avoidance and deference doctrines are not the answer. They may serve prudential or political concerns, but they are not necessary to enforce the separation of powers and

A "Bold," "Confident," and Entertaining Moment at the Dedication of Eckstein Hall

Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson (left) and Marquette University President, Rev. Robert A. Wild, S.J., (right), respectively applaud and laugh as Justice Antonin Scalia smilingly greets Judge Diane S. Sykes, upon her introducing him as the keynote speaker at the dedication of Ray and Kay Eckstein Hall on September 8, 2010. Occasioning the particular good humor were these closing lines of Judge Sykes's introduction:

> "When Dean Kearney unveiled the plans for this beautiful building two years ago, he famously declared that Eckstein Hall will be 'noble, bold, harmonious, dramatic, confident, slightly willful, and, in a word, great.' It certainly is. And with the possible exception of 'harmonious'—Justice Scalia has been known to say that one of his charms is that he likes to tell people what they don't want to hear—the dean's description of this distinguished and splendid building might likewise be applied to our distinguished and splendid visitor. So, ladies and gentlemen, please join me in welcoming the noble, bold, dramatic, confident, slightly willful, and, in a word, great Justice Antonin Scalia."

indeed may undermine that critical feature in our constitutional design. The Court's legitimacy arises from the source of its authority—which is, of course, the Constitution—and is best preserved by adhering to decision methods that neither expand, nor contract, but *legitimize* the power of judicial review. The Court's primary duty, in short, is not to minimize its role or avoid friction with the political branches, but to try as best it can to get the Constitution right.

Lincoln and the Human Dimension of Law Practice

This is an edited text of remarks by Chief Judge Sykes at the Marquette Law Review banquet on March 28, 2025.

One hundred and eighty-eight years ago this month, another newcomer to the profession was—like you—standing at the threshold of a career in the law. He started inauspiciously, but Providence had other ideas in mind. In March 1837, Abraham Lincoln entered his name in the Roll of Attorneys at the Illinois Supreme Court.

Lincoln has always been my favorite president. The historical consensus that he was our greatest president seems right to me; his political life has a lot to teach us. But he was also the president with the most experience in the courtroom, and I think we can also learn from his approach to the practice of law.

I'd like to share a story about a small case Lincoln tried during his more than two decades as a lawyer riding circuit in the state courts of central Illinois. It's a totally obscure and insignificant case. I stumbled on it by happenstance when I was serving on the Wisconsin Supreme Court and preparing a speech about Lincoln that I was scheduled to give at several events around the state. My interest was to focus on Lincoln the lawyer, not Lincoln the president. I discovered this case in a wonderful book called *Herndon's Informants*, a modern compendium of letters, interviews, and testimonials collected by William Herndon, Lincoln's last law partner, after the president was assassinated.

Lincoln's law practice, spanning more than two decades, encompassed a wide assortment of clients and cases. Very little of this work was glamorous or exciting. But he was especially good in front of a jury, and his law practice was infused with practical wisdom and a moral dimension that is instructive for us today. The humble case of *Case v. Snow Brothers*—Herndon's testimonial no. 605—captures these qualities in a particularly vivid way.

Continued on page 18

Let me set the stage with another testimonial recorded by William Herndon himself. It memorializes an interview with a Springfield resident who had witnessed a discussion between Lincoln and a prospective client seeking to engage his services in a lawsuit against a local widow. Herndon wrote:

> A citizen of Springfield who visited our office on business . . . relates the following:
>
> Mr. Lincoln was Seated at his table listening very attentively to a man who was talking earnestly in a low tone. After the would be Client had stated the facts of his case, Mr. Lincoln replied; Yes, there is no reasonable doubt but that I can gain your case for you; I can set a Whole neighborhood at loggerheads; I can distress a widowed Mother and her six fatherless children, and thereby get for you six hundred Dollars which you seem to have a legal claim to; but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things that are legally right are not morally right. I shall not take your case—but I will give you a little advice for which I will charge you nothing. You seem to be a sprightly, energetic man, I would advise you to try your hand at making six hundred dollars in some other way.

With that small window on Lincoln's approach to the practice of law, now listen to the story of *Case v. Snow Brothers*, as recorded in the testimonial of a local pastor who served several churches in the Eighth Judicial Circuit in central Illinois, where Lincoln's law practice was concentrated. Lincoln's client was the plaintiff, Mr. Case, an old man who had sold several yokes of oxen and a plow to two teenagers, only to have them later renege on the payment. Their counsel asserted that because they were minors, the debt was void under the Illinois Minor Act. Here via Herndon is the story, in the words of the pastor who watched the trial:

> In the spring term of the Tazewell County Court in 1847, which at that time was held in the village of Tremont, I was detained as a witness an entire week. Lincoln was employed in several suits, and among them was one of Case *vs.* Snow Bros. The Snow Bros., as appeared in evidence (who were both minors), had purchased from an old Mr. Case what was then called a "prairie team," consisting of two or three yoke of oxen and prairie plow, giving therefore their joint note for some two hundred dollars; but when pay-day came refused to pay, pleading the minor act. The note was placed in Lincoln's hands for collection. The suit was called and a jury impanelled. The Snow Bros. did not deny the note, but pleaded through their counsel that they were minors, and that Mr. Case knew they were at the time of the contract and conveyance. All this was admitted by Mr. Lincoln, with his peculiar phrase, "Yes, gentlemen, I reckon that's so." The minor act was read and its validity admitted in the same manner. The counsel of the defendants were permitted without question to state all these things to the jury, and to show by the statute that these minors could not be held responsible for their contract. By this time you may well suppose that I began to be uneasy. "What!" thought I, "this good old man, who confided in these boys, to be wronged in this way, and even his counsel, Mr. Lincoln, to submit in silence!" I looked at the court, Judge Treat, but could read nothing in his calm and dignified demeanor. Just then, Mr. Lincoln slowly got up, and in his strange, half-erect attitude and clear, quiet accent began: "*Gentlemen of the Jury*, are you willing to allow these boys to begin life with this shame and disgrace attached to their character? If you are, I am not. The best judge of human character that ever wrote has left these immortal words for all of us to ponder:
>
> 'Good name in man or woman,
> dear my lord,
> Is the immediate jewel of their
> souls:
> Who steals my purse steals trash;
> 'tis something, nothing:
> 'Twas mine, 'tis his, and has been
> slave to thousands:
> But he that filches from me my
> good name
> Robs me of that which not
> enriches him
> And makes me poor indeed.'"
>
> Then rising to his full height, and looking upon the defendants with the compassion of a brother, his long right arm extended toward the opposing counsel, he continued: "Gentlemen of the jury, these poor innocent boys would never have attempted this low villainy had it not been for the advice of these lawyers." Then for a few minutes he showed how even the noble science of law may be prostituted. With a scathing rebuke to those who thus belittle their profession, he concluded: "And now, gentlemen, you have it in *your* power to set these boys right before the world." He plead for the young men only; I think he did not mention his client's name. The jury, without leaving their seats, decided that the defendants must pay the debt; and the latter, after hearing Lincoln, were as willing to pay it as the jury were determined they should. I think the entire argument lasted not above five minutes.

What's your first reaction to this story? I won't call on anyone; let's just have a show of hands. Was this a compelling closing argument? Yes, obviously. Was it an *improper* closing argument—inviting the jury to nullify the law? Maybe so, when judged from our perspective as 21st-century law students and lawyers accustomed to the prevailing doctrine that the court is the sole judge of the law and that explicit appeals to jury nullification are forbidden. But Lincoln's argument was comfortably within the legal norms of his time, which generally

accepted that the jury's power extended to the facts *and* the law. With that in mind, was this a just verdict? An unjust verdict?

My own view is that it was just—and that Lincoln's argument in *Case v. Snow Brothers*, together with his advice to that prospective client whose case against the widow he declined to take, has something to teach us about the ethics of everyday law practice. I don't mean ethics in the sense of the rules contained in the code of professional conduct. The choice to plead the Minor Act on behalf of the Snow brothers was obviously fully ethical in that formal sense. Had this case arisen today and were the statute still on the books, no doubt it would have been resolved in favor of the defendants on summary judgment; the court would have little choice but to void the debt.

But the defense attorneys had another option available to them: they could have counseled their young clients to keep their promise to old Mr. Case and settled the debt in a way that would make it possible for the teenagers to fulfill their obligation notwithstanding their youth. To paraphrase Lincoln's advice to that would-be client, they could have explained to the Snow brothers that just because you *have* a legal advantage doesn't make it right for you to *take* that legal advantage, especially when more important principles are at stake. The statute that allows the court to void contracts made by minors exists to shield them from predatory adults, not to permit them to take advantage of others. Mr. Case had charged a fair price for his prairie team. (I checked; it was in line with the going rate at the time.) The Minor Act was surely an available legal defense, but invoking it would come at a cost to the character of those young men as they stood on the threshold of adulthood establishing their reputations for honesty. Their lawyers could have counseled them to do the right thing and keep their word. As it was, Abraham Lincoln's eloquent five-minute closing argument achieved the same thing.

This single, small case from Lincoln's life as a prairie lawyer reminds us of the human dimension of the practice of law. After Lincoln's death, White House secretaries discovered a document on which he had recorded some notes for a law lecture apparently intended for an audience of new lawyers. It's dated July 1, 1850, but historians do not know if that's accurate or whether he ever delivered the lecture. The notes contain many words of wisdom for new lawyers; I'll close with just one short passage that reflects his emphasis on the capacity of lawyers to be forces for good within their communities. He advised the young lawyers, "Persuade your neighbors to compromise whenever you can. . . . As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Compromise in the law is not always the best course and is sometimes impossible. But the larger point remains and speaks an enduring truth. Our law is the just instrument by which we secure and order our freedom and live peacefully together. Lincoln's challenge to all of us is this: In our daily work in this noble profession, we should try whenever possible to deploy the law in a way that promotes human flourishing and serves the common good.

I'm confident that your time here at Marquette Law School did and will continue to set you on a solid legal and ethical foundation from which to meet this challenge. Congratulations on all your successes on the law review and in law school. I wish you all the best as you continue and conclude your legal education and enter the legal profession.

Citizens United in the Montana Supreme Court

This is an edited text of a talk Judge Sykes gave on a number of occasions, starting in November 2012.

When I came to the Seventh Circuit in 2004, I had been a state court judge for 12 years—seven years on the trial-court bench in Milwaukee and five years on the Wisconsin Supreme Court. So I brought with me to the federal bench a deep appreciation for the distinct and autonomous role of the state courts, especially the state supreme courts.

Sometimes, however, the two court systems come into conflict; occasional disagreement is inevitable. But the federal courts have well-established doctrines that promote respect for the prerogatives of the separate judiciaries, along with procedural rules that keep us from stepping on each other's toes.

Of course, the United States Supreme Court sits atop the judicial hierarchy, and when it decides an issue of federal law, the justices of the state supreme courts are bound by the Supremacy Clause to follow the Court's decision, whether they agree with it or not. That was settled a long time ago in the venerable case of *Martin v. Hunter's Lessee* (1816).

So it's noteworthy when a modern state supreme court thumbs its nose at an unequivocal decision of the U.S. Supreme Court on a question of federal constitutional law. The doctrine of hierarchical precedent is so firmly established and well understood that a state supreme court's open resistance to the authority of the U.S. Supreme Court on a question of federal law is practically unthinkable.

Think again. About 10 months ago, on December 30, 2011, the Montana Supreme Court issued an extraordinary decision in a case called *Western Tradition Partnership v. Attorney General*. The case raised a First Amendment challenge to a state law that prohibited corporations from independently spending money on political speech in state elections. The decision was extraordinary because, of course, the United States Supreme Court had resolved this very question just the year before in the famous *Citizens United v. FEC* case, striking down a nearly identical federal law. Yet the Montana court upheld the state law. The court purported to apply *Citizens United*, but the two decisions are irreconcilable.

Reaction from legal commentators was swift and incredulous. Even those who viscerally disagreed with *Citizens United* understood that the Montana Supreme Court had seriously overreached. The Supreme Court quickly stayed the Montana decision, and in June 2011, at the very end of its term, granted certiorari and summarily reversed the Montana Supreme Court. "There can be no serious doubt," the Court held, that "*Citizens United* applies to the Montana state law" and all of Montana's arguments "were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."

That a state supreme court would so flagrantly disregard the Supreme Court's hierarchical authority is highly unusual in the modern era. The Court's authority to review and decide state-court cases raising questions of federal law was conclusively established early in our nation's history. As Justice Joseph Story explained in his famous opinion for the Court in *Hunter's Lessee*:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.

Justice William Johnson concurred. He agreed with Justice Story's emphasis on national uniformity, but he added that the Court's role as the final decisionmaker is also grounded in its status as a *federal* institution with democratic legitimacy:

> And another claim I may assert, in *the name of the American people*; in this court, every state in the union is represented; we are constituted by the voice of the union, and when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of the state tribunals.

In other words, the Supreme Court has a superior claim to interpretive authority by virtue of its status as a national institution—appointed by the nationally elected president and confirmed by the nationally representative Senate and pursuant to the Supremacy Clause.

Thoughts on the Book, *Cosmic Constitutional Theory*, by Judge J. Harvie Wilkinson III

This an edited text of remarks by Judge Sykes to the Indianapolis Lawyers Chapter of the Federalist Society on December 12, 2012.

One of the important and recurring themes in our perennial debate about constitutional adjudication is the role of judicial restraint. But the issue only rarely breaks through into the public consciousness. The role of judicial restraint was a prominent theme in some of the early analysis of the Supreme Court's divided decision in the health care case earlier this year, *National Federation of Independent Business v. Sebelius*.

A new book, *Cosmic Constitutional Theory*, by Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit, arrives at a pivotal time in our law and politics. Because it comes from one of our nation's most highly regarded appellate judges, it deserves our most serious reflection.

Before the Supreme Court issued the health care decision in June, my colleague Judge Richard Posner published a very interesting article in the *California Law Review*, titled "The Rise and Fall of Judicial Self-Restraint." He focused on a particular kind of restraint: the judicial policy, premised on respect for the political branches of government, that legislative and executive actions should be upheld against constitutional challenges unless their invalidity is clear beyond doubt. Judge Posner pronounced this kind of judicial restraint dead, at least as a philosophical commitment of today's Supreme Court, although he suggests that it might continue to function as a "trace element" in the justices' behavior.

Judge Wilkinson doesn't go quite that far. For him, judicial restraint is not dead, but it is seriously endangered. His thesis is that the rise of constitutional theory in the post-New Deal era is displacing the time-honored practice of judicial deference to the political branches of government, providing intellectual cover for judicial adventurism and threatening to choke off democratic self-governance. He makes a thoughtful case for restoring restraint as a defining judicial virtue.

Please forgive my generalizations as we proceed here. Judge Wilkinson first takes aim at the theory known as "living constitutionalism," practiced most prominently by the Warren Court and particularly by Justice William Brennan (and perhaps contrasted most starkly by the jurisprudence of Justice Antonin Scalia, who likes to say that he interprets the "dead Constitution"). The basic idea behind this school of thought is that the Constitution evolves to reflect contemporary understandings of the core principles contained in the majestic provisions of the Bill of Rights and the Fourteenth Amendment.

This evolutionary approach authorizes judges to implement contemporary values and adapt the Constitution's broad language to modern conditions and problems. In practice, this theory produced the rights revolution of the Warren Court (continuing under the Burger Court) and was aggressively interventionist in implementing liberal social, political, and legal reform by

judicial decree. As Judge Wilkinson explains, the results were in some cases a virtue and in others a vice, but in all cases the theory empowered judges to deploy the Constitution as a malleable instrument of social and legal change according to their own lights and at the expense of the democratic process. It produced a conservative counterrevolution.

Originalism and pragmatism are the two main theories of constitutional interpretation currently in use by judges. Let's take originalism first. Judge Wilkinson briefly discusses the foundational contributions of Chief Justice John Marshall and to a lesser extent Justice Hugo Black but quickly moves to Judge Robert Bork's exposition of the textualist/originalist theory of constitutional interpretation and explains how it gained acceptance in the legal academy—even among prominent liberal scholars—and then eventually took root at the Supreme Court. Much of this discussion presents originalism in a positive light.

For the uninitiated, the animating principles of originalism arise from the legal justification for judicial review: the judicial duty to decide cases according to law, including the law of the Constitution. On this view, constitutional adjudication begins with an inquiry into the meaning and scope of the provision in question based on its text and the historical evidence of its original meaning.

As Judge Wilkinson explains, "[p]erhaps more than any other theory, originalism focuses on judicial constraints" because it "recogniz[es] that ultimate legal authority stems from sources external to the judge." But he ultimately concludes that originalist theory has failed to deliver on its initial promise, largely because judges are amateur historians and the textual and historical indicators of original meaning are all too often inconclusive. He concedes that "[t]here is nothing intrinsically wrong with gaps between theory and practice." "Indeed," he writes, "they are unavoidable." What matters is "whether the gap between theory and practice leads to salutary outcomes or detrimental ones." With originalism, he concludes, "the results are anything but salutary."

Finally, Judge Wilkinson turns to Judge Posner's pragmatic approach to judging, which he describes as an antitheoretical response to the various unifying theories of constitutional interpretation that have arisen in the post-New Deal era. To vastly oversimplify, Judge Posner's legal pragmatism is a flexible approach to judging that focuses on the consequences of judicial decisions—for the parties and for the broader economic, social, and political systems. The object is to achieve good outcomes.

Not surprisingly, Judge Wilkinson faults pragmatism for its explicit judge-empowering premises. Whereas originalism tethers judges to constitutional text, structure, and history—"traditional legal materials whose democratic imprimatur cannot be questioned if properly discerned and relevantly applied"—with pragmatism, he writes, there is "no tether at all."

In his last chapter, Judge Wilkinson argues for an escape from all this theory and a return to judicial restraint to guard against the perils of judicial supremacy and its interference with democratic choice. I detect a nod to originalism here; there's a sense in his summation that he thinks originalist theory might have a role to play if only it could be trusted to channel restraint. Judge Wilkinson is a traditionalist and a moderate conservative who highly values the institutions of civil society; he sees judicial restraint as a mediating influence between the extremes of the progressive and libertarian visions of the Constitution now contending on the legal battlefield. He closes with an eloquent plea for judicial humility:

> [T]heory-driven judges and scholars have forgotten that wisdom lies simply in knowing the limits of one's knowledge, that good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere, and that the language, structure, and history of law serve best as mediums of restraint rather than excuses for intrusion.

I share Judge Wilkinson's view that the responsibility of judicial review is so consequential that it's best to take the long view of our nation's history and proceed with a clear-eyed understanding of the constitutional limits on the judicial role and the prudential limits of judicial competence.

Where I part company with Judge Wilkinson is in his claim that all modern theories of constitutional law are inconsistent with a proper understanding of the judicial role and ought to be resisted in favor of judicial restraint, understood as a general policy of deference to the political branches. Deference is warranted when deference is due, and a default position of judicial nonintervention doesn't answer the question of when, precisely, it is right to defer. Or to be more specific, it answers the question in a way that invites judges to unduly defer—to relinquish their own constitutional role as a check on unconstitutional exercises of authority by the other branches of government even in the face of ascertainable constitutional limits on that authority. And that is contrary to the essence of judicial duty.

The duty of judicial review requires some method of constitutional interpretation. Precedent will answer many questions but not all, and sometimes precedents are wrong. The Supreme Court regularly decides cases for which there is no controlling precedent; that goes with the territory. At the court of appeals, we decide quite a few cases in this category.

As faithful judicial interpreters, our inquiry into the law of the Constitution ought to be grounded in the principles the Framers and ratifiers fixed in its text and structure. Implementing doctrine

has an important role to play, but Judge Wilkinson is entirely right that by anchoring constitutional adjudication in the text, structure, and history of the Constitution, originalism best legitimizes judicial review.

Learning the Rules, the Language—and the Pursuit of the Common Good

This is an edited text of remarks by Chief Judge Sykes at the orientation for first-year Marquette law students on August 22, 2025.

I am a proud Marquette lawyer—Class of 1984—and I'm delighted to join you today as you begin your legal education at this wonderful law school. Forty-four years ago, I sat where you now sit. Back then, of course, we were next door in Sensenbrenner Hall. You have the good fortune to study and learn in Eckstein Hall, the Law School's strikingly beautiful new home—courtesy of generous gifts from alumni and the extraordinary efforts and vision of Dean Kearney and his talented team here at the Law School.

This spectacular building opened 15 years ago, and since then it has become a vibrant forum for a wide variety of important public events—lectures and debates and discussions that bring together members of our legal community and leaders in the spheres of government, business, social services, and even the arts. Just last month, I was here with an audience of lawyers, judges, and opera lovers for the Florentine Opera's sold-out performance of the comic opera about the unlikely friendship between Justice Scalia and Justice Ginsburg. Though these public events here at the Law School are not at the core of your legal education, I encourage you to take advantage of them and the other academic enrichment opportunities offered here in Eckstein Hall.

Of course, what will matter most in your three-year course of law study is not this impressive building or the community leaders who will visit during your tenure, but the content and character of the legal education offered here. You will find it to be first-rate, holistic, and multidimensional—as you might expect from a law school at a Jesuit university with an abiding commitment to "Care for the Whole Person" and a mission of promoting Excellence, Faith, Leadership, and Service.

The foundation of your law school education will involve learning the language and content of the rules found in the varied sources of our law: federal and state constitutions, statutes, regulations, court rules of procedure, and the common-law domains—primarily torts, contracts, property. These rules govern the relationship between the individual, the body politic, and the government; between the federal and state governments; and between private parties (both individuals and organizational associations, such as corporations). Many of these terms will be new, and some will be mysterious, but the *language* of the law matters enormously. In a democratic system grounded in the rule of law, the rules that bind us are *written*, not just declared. To become a lawyer, you must first and foremost learn the language and content of our basic legal rules.

But learning how to read and understand a legal text is the starting point; it's not the whole of your legal education. Your professors will also introduce you to the multitude of substantive legal doctrines that pervade our law. These doctrines are developed in court cases—judicial opinions that establish the interpretive rules, standards, tests, elements, and forms of legal claims. Reading judicial opinions is not like reading statutes or regulations. When you study the judge-made doctrines in our case law, you will learn how to reason by analogy, how to notice and explain factual and legal distinctions, and how to apply abstract standards and tests in concrete and particularized factual settings.

But that's not all: you will also spend time learning how to examine the "why" questions. Your professors won't just teach you the language and content of the legal rules. They will encourage you to think about the *reasons* for each rule. What's its history and purpose? To be sure, this second-tier inquiry is not itself *the law*. In our system, the legitimacy of the law depends on its promulgation *in writing* by a constitutionally appropriate authority. A misalignment between the *language* of the law and the lawmaker's *purpose* is a conundrum that we've been debating for 250 years. You will need to learn how to understand and engage in that debate.

And finally, your professors will challenge you to think about the "ought" questions. Is the existing legal rule the best one? Has it stood the test of time, or is it antiquated and ripe for reconsideration? This last set of questions sometimes entails a utilitarian or practical inquiry: Is the existing legal rule the most efficient or the least costly? On the other hand, sometimes this inquiry calls for ethical or moral reasoning. What do we owe each other? How should we structure our government, secure our liberty and individual rights, and order our relationships in society? How can we best achieve the common good and promote human flourishing?

The study of law has all these dimensions. And there is one more: learning your responsibilities as a member of this learned profession and internalizing the ethics of lawyering. These include the multifaceted and sometime conflicting duties of being an advisor, an advocate, and an officer of the court.

Over the next three years, you'll be challenged to think about and learn all these dimensions of the practice of law. I'm confident that your time here at Marquette will set you on a solid legal and ethical foundation from which to meet these challenges. Congratulations, and welcome to Marquette Law School. ■

Sykes in the Classroom

The hundreds of opinions written by the Hon. Diane S. Sykes in her career on the U.S. Court of Appeals for the Seventh Circuit and the Wisconsin Supreme Court make up a wealth of material about the law. On this and the following pages, seven members of the Marquette Law School faculty discuss how various of Sykes's writings have been a source for study and discussions with their students.

PROFESSOR ALEX LEMANN

Torts

My first-year torts class reaches something of a climax when we read *Palsgraf v. Long Island Railroad Co.*, the landmark 1928 New York Court of Appeals decision. *Palsgraf* is one of those old chestnuts that are simply irresistible to law professors. It combines engrossing facts, beautiful writing, and philosophical richness. I would probably assign it even if it didn't have canonical status and thus represent part of the esoteric *lingua franca* by which first-year law students are inducted into the cult of lawyers.

But *Palsgraf* can feel, after almost a century of life, somewhat remote. For students in Wisconsin in 2026, who often find the case to be the single most confusing thing they read all semester, a reasonable objection might be "what's the point?"

The good news for me as a teacher of tort law is that Wisconsin has its own *Palsgraf*, a 2003 state Supreme Court opinion called *Alvarado v. Sersch*, which I assign every year immediately after the perhaps somewhat hoary original. Like *Palsgraf*, *Alvarado* deals with the question of how far negligence liability ought to extend in situations where the connection between breach and injury feels attenuated.

In *Alvarado*, the plaintiff was cleaning a student apartment in Madison, at the end of an 11-hour shift during the hectic mid-August turnover period, when she found what she thought was a candle that had been overlooked by the property manager during his inspection of the apartment. The candle turned out to be a firework, and when Alvarado lit the fuse to preserve the pilot light of a stove she intended to clean, it exploded, blowing off most of her right hand.

Both the majority opinion, by Justice Ann Walsh Bradley, and Justice Diane Sykes's dissent in *Alvarado* engage with *Palsgraf* and the role it ought to play in 21st-century Wisconsin tort law. Part of the benefit of assigning the case is simply to show students that Wisconsin—most unusually—follows Judge William Andrews's dissent in *Palsgraf*, meaning that limitations on negligence liability in Wisconsin are based on an assessment of public policy rather than subtle philosophical elucidations of the concepts of duty and breach, as Judge Benjamin Cardozo set forth for the *Palsgraf* majority.

The good news for me as a teacher of tort law is that Wisconsin has its own *Palsgraf*, a 2003 state Supreme Court opinion called *Alvarado v. Sersch* . . . .

But another benefit of *Alvarado* as pedagogy is having students closely examine the point of departure between majority and dissent and push themselves to be precise in understanding the arguments that might have proved decisive. From this perspective, Justice Sykes's opinion is a gem, all that a dissent should be: it is shorter than the majority, it eschews scoring easy rhetorical points for the sake of rhetoric alone, and it raises valid concerns about the real-world impact of the majority's position. I feel confident that, like *Palsgraf*, Wisconsin law students will still be reading Justice Sykes's *Alvarado* dissent a century after it was written. ■

Illustrations on pages 23–29 by John Jay Cabuay

PROFESSOR LISA A. MAZZIE

Legal Writing

The crux of statutory interpretation in Wisconsin law, Justice Sykes explains in *Kalal*, is to stay within the statute itself.

Every fall semester, my first-year class in Legal Analysis, Writing & Research 1 is filled with eager students, excited to learn the law.

Law students and lawyers know that legal writing is a skills class. I don't teach doctrine for its own sake, as does, say, a torts professor who teaches about negligence, its elements, and its nuances. I work with students as they learn how to *work* with doctrine, doing so through an issue grounded in any area of law, whether tort, contract, criminal, constitutional, or property law. Or something else entirely. The overall framework for my instruction is legal reasoning: rule-based, analogical, and policy-based. And that is the order in which I introduce them.

We begin the semester with a rule-based reasoning problem. Typically, this involves a Wisconsin statute. Sometimes, we use a newly enacted statute, where there is no case law at all. More often, we use a statute (or set of statutes) in isolation, leaving aside for the moment any case law that exists. (I introduce the case law soon enough, when we discuss analogical reasoning.)

If students are going to learn how to interpret statutes for rule-based reasoning, our first stop is, of course, then-Justice Sykes's 2004 opinion in *State ex rel. Kalal v. Circuit Court for Dane County*, the most cited-case in the Wisconsin Supreme Court's history, with more than 1,500 citations to date, including in some 400 opinions of the Supreme Court itself. For our purposes, the facts are less important than the rules—the methodology—that we draw from the case to apply to the statute we are analyzing.

We begin, naturally, at the beginning: with the language of the statute itself. If "the meaning of the statute is plain," we stop there. The crux of statutory interpretation in Wisconsin law, Justice Sykes explains in *Kalal*, is to stay within the statute itself. That is, the interpretation of the statute proceeds according to the intrinsic evidence, which can include its "scope, context, and purpose" when those things can be ascertained from the text. "It is the enacted law, not the unenacted intent, that is binding on the public." Absent ambiguity in the statute, the inquiry does not consult extrinsic evidence, such as legislative history.

Justice Sykes's opinion presents *Kalal* as a "clarification" of Wisconsin's statutory interpretation methodology, although some might say the opinion transformed it. Previous case law had suggested that an extrinsic source such as legislative history was useful in interpreting a statute in the first instance. So, even in the absence of an ambiguous statute, courts sometimes went to extrinsic sources to effectuate the legislature's intent. Now, though, from *Kalal*, there are clear steps to unpacking the meaning of a statute (at least in the sense that anything's really "clear" in interpretation).

One difficulty in this methodology, for me, is trying to explain canons of construction in the first month of law school, when students are still wrapping their heads around so many other new ideas and words. Because under *Kalal* we use *intrinsic* evidence in the course of interpreting the meaning of the statutory text, canons of construction are important guideposts. Lawyers are quite familiar with these canons, and many are baked right into the case law. Yet students in the first month of their legal education often do innately and unintentionally apply such canons, even if they have a hard time grasping precisely what they are.

In any event, the *Kalal* methodology guides us as we examine, for example, whether a Zamboni (an ice resurfacer) is a "motor vehicle" for purposes of Wis. Stats. §§ 340.01(35) & 346.63(1) or whether it is better classified as "road machinery" under Wis. Stat. § 340.01(52). Or whether walking is a recreational activity under § 895.52(1)(g). Or what "reckless or wanton conduct" means under § 895.476, the statute that provides immunity from certain civil liability for harm caused by exposing someone to COVID-19.

Beginning with rule-based reasoning and statutory interpretation under *Kalal* is a most useful entry to legal analysis—concrete rules are always helpful—and it's an interesting way for students to compare their initial rule-based conclusions to their later conclusions, after case law is added. ■

PROFESSOR CHAD M. OLDFATHER

Criminal Law

The core question in *Kalal* concerns the meaning of the word *refuses*—in particular, whether a failure to act qualifies as a refusal.

A little more than a decade ago, I switched from teaching Criminal Law with a traditional casebook, featuring opinions from across the United States, to doing so using almost entirely Wisconsin materials. One of the benefits of the change is that it allows students to start to familiarize themselves with the criminal code many of them will spend their lives working with. They begin to learn how to work with the statutes, including how to interpret their occasionally unclear provisions. So the 2004 case of *State ex rel. Kalal v. Circuit Court for Dane County*—more often referred to simply as *Kalal*—would have appeared in the materials I prepared no matter what the statute it interpreted: For more than two decades, it has served as the authoritative source on statutory interpretive methodology in Wisconsin. And it would have appeared early in the semester, among the other foundational concepts.

But, as it happens, the substance of *Kalal* involves questions that are appropriate to a criminal law class also in a general sense—in fact, foundational, beginning-of-the-semester concepts. The case concerns an effort to invoke Wis. Stat. § 968.02, which creates a mechanism to bypass a district attorney's exercise of prosecutorial discretion in cases where "a district attorney refuses or is unavailable to issue a complaint." In the case, the Dane County district attorney had not pursued a former employee's claim that her employer stole money meant for her 401(k) retirement account. The district attorney's office had not expressly said that it was not going to proceed.

The core question in *Kalal* concerns the meaning of the word *refuses*—in particular, whether a failure to act qualifies as a refusal. But a substantial part of its value in the classroom stems from consideration of why the district attorney chose not to prosecute the case in the first place. What is prosecutorial discretion? Why does it exist? What sorts of considerations properly go into its exercise? What might have been behind the district attorney's decision not to prosecute in *Kalal*?

The operation of the bypass statute generates another set of questions. Why did the case end up before a judge from another county? Why does the law provide for the possibility of a special prosecutor? Functionally, what might be the result of allowing district attorneys to prevent bypass by simply delaying their decisions about whether to prosecute?

The cumulative effect is to facilitate an initial survey of the procedural and atmospheric dimensions of criminal law, and at just the right time in the semester.

And, finally, there's that for which *Kalal* is famous: its interpretive method, involving modified textualism. We read the case a couple weeks into the semester, just as the excitement of the early days of law school is turning into a sense of being overwhelmed by the new ideas, the new vocabulary—the sense that it's all a little hard to pin down, that every answer is some version of "it depends." Here, at last, is a recipe, an actual formula to follow! Or so it seems. I find that I have to dampen the enthusiasm a bit, to emphasize that even within *Kalal*'s framework there are judgments to be made, and to make clear that not every effort to figure out what a statute means requires resorting to the full machinery of that framework.

Even so, as I said to my first-year students in Criminal Law in the fall of 2024, "*Kalal* is everywhere." I had statutory interpretation in mind when I said that—the idea that the framework is operating in the background, so to speak, every time one reads a Wisconsin statute. I wasn't thinking about the fact that it's the most-cited case in the history of the Wisconsin Supreme Court or that prosecutorial discretion also factors into every criminal case. *Kalal* is everywhere in those senses, too. The case more than merits the "*Kalal* is everywhere" buttons that a student was inspired to distribute among the class the following week. ■

PROFESSOR KAREN SANDRIK

Contracts

In Contracts, a required first-year course each fall, we use one opinion by Judge Diane Sykes. And this past year, a second of the judge's opinions shaped my final exam.

The case we study together is *Karma International, LLC v. Indianapolis Motor Speedway, LLC*, a 2019 Seventh Circuit decision. The opening line draws us in: "The Indianapolis 500 race has been a fixture of American life since 1911, interrupted only by world war." Judge Sykes wrote the opinion addressing mutual breach claims between an event-planning company (a licensee of *Maxim*, the men's magazine) and the Indianapolis Motor Speedway over a disappointing party at the race's historic 100th running.

We use the case to learn the requirement that contract damages cannot rest on speculation. The court of appeals affirmed summary judgment against Karma on its claim because its damages theory was "entirely speculative," emphasizing that "a factfinder may not award damages on the mere basis of conjecture or speculation." The facts make the principle memorable: although 1,787 guests attended Karma's event, the company had sold only 92 full-price tickets. Most importantly, it could not provide concrete evidence how greater promotional efforts by the speedway would have caused more tickets to be sold or yielded more revenue. Students can grasp quickly why the law demands more than hopeful arithmetic.

The case also illustrates something I value in Judge Sykes's work: her ability to show that older doctrines still have modern bite. Students read *Chicago Coliseum Club v. Dempsey*, an Illinois appellate decision from 1932, and can reasonably question whether the court was right to conclude that the promoter's evidence on lost profits from a prizefight between Jack Dempsey and Harry Wills (which never happened) was too speculative. The doctrine can seem like a relic. *Karma International* demonstrates otherwise. The reasonable-certainty requirement remains very much alive, and Judge Sykes applies it with rigor to a modern set of facts.

My exam this past year drew from *Quality Oil, Inc. v. Kelley Partners, Inc.*, a 2011 contract-interpretation case from the Seventh Circuit. Judge Sykes's opinion rejected a literal reading of a handwritten provision in a loan-and-supply contract. The provision stated that the agreement would terminate after 225,000 gallons of motor oil and 225,000 filters were purchased, or 60 months, whichever came first. The buyer argued that this relieved it of all liability after 60 months, regardless of how much product it had actually purchased.

Judge Sykes acknowledged that the handwritten language was not facially ambiguous but explained that the plain-meaning presumption is rebuttable. The opinion draws on Judge Richard Posner's earlier opinion for the Seventh Circuit, in *Beanstalk Group, Inc. v. AM General Corp.* (2002), which we also study in the course.

Judge Sykes's opinion rejected a literal reading of a handwritten provision in a loan-and-supply contract.

Two principles do the work. The first is the whole-contract rule—the precept that phrases in a contract cannot be read exclusive of other contractual provisions and that determining the parties' intentions must involve reading the contract in its entirety. The second is the anti-absurdity principle, traced to Judge Benjamin Cardozo: "If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided." Applying both principles, Judge Sykes concluded that the buyer's interpretation was "commercially absurd" because it would allow the buyer to retain a $150,000 loan, let 60 months elapse without purchasing anything, and walk away free.

At a recent Marquette Law School event honoring Judge Sykes, her fellow Marquette lawyer and former clerk, Anne-Louise Mittal, L'15, observed that what stood out to her most was Judge Sykes's ability "to cut through even the most complicated case to identify the governing legal principle or principles at the heart of the case." That is precisely what these two opinions do. *Karma International* homes in on the principle that speculation is not proof. *Quality Oil* quickly arrives at the principle that text serves commercial purpose, not the other way around. Judge Sykes no doubt is a textualist, but *Quality Oil* shows she is not a blinkered one.

As we celebrate Judge Sykes upon her taking senior status on the Seventh Circuit and after serving as the court's chief judge, my contribution to marking the occasion is simply to make this point: her opinions continue to teach. ■

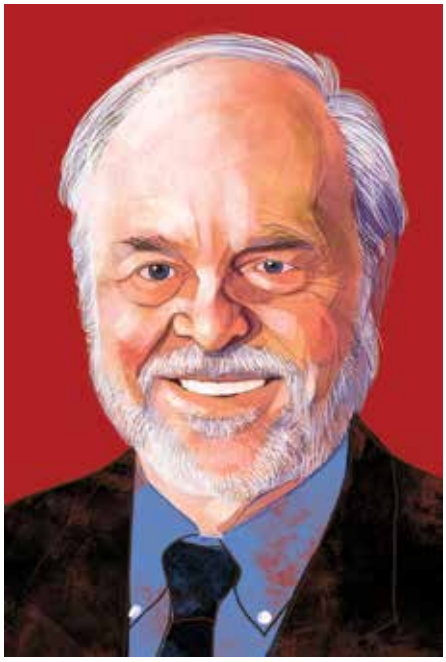
PROFESSOR DAVID R. PAPKE

Property

I switch over late in the semester in first-year Property from traditional common-law doctrine to modern zoning law. The students for the most part welcome the switch, but some find the abundant map amendments, conditional permits, special uses, and assorted variances as problematic additions to existing zoning ordinances. Fortunately for instructor and students alike, Justice Diane Sykes's thoughtful opinion for the Wisconsin Supreme Court in *State ex rel. Ziervogel v. Board of Adjustment* (2004) not only sorts out the state standards for variances but also provides a valuable metaphor for understanding how variances might best be conceived.

The case itself involved a request for a variance from Richard Ziervogel and Maureen McGinnity, of Washington County. Ziervogel and McGinnity owned a property that fronted Big Cedar Lake and included a 1,600-square-foot summer home, located 26 feet from the high-water line for the lake. In hopes of converting the summer home to a year-round house, Ziervogel and McGinnity sought to add 10 feet to the top of their summer home, a vertical addition that would ultimately include an office and two bedrooms. In order to do so, they requested a variance because the local zoning ordinance prohibited the expansion of any structure within 50 feet of the lake. The local zoning board had denied the request, and the case, as it came through the courts, concerned the standard properly to be applied in considering a variance.

Justice Sykes's opinion begins by reiterating the distinction between "use" and "area" variances, noting that while an area variance might change the shape and size of a structure, this type of variance was unlikely to be much of a threat to the character of a neighborhood. To Justice Sykes's consternation, the reigning case law failed to appreciate this or to distinguish between the two types of variances when setting standards for petitioners' requests for variances. For both a use variance and an area variance, a petitioner was required to show "no reasonable use" of the property was possible without a variance. This standard would obviously have prevented the petitioners in *State ex rel. Ziervogel* from obtaining a variance. After all, they already owned and presumably enjoyed their summer home on Big Cedar Lake.



After making her way through the confusing and frequently changed Wisconsin case law, Justice Sykes articulated a more appropriate standard. Henceforth, she stated, petitioners for an area variance need only show that compliance with a zoning ordinance would be "unnecessarily burdensome." A court might determine if petitioners met this standard by considering the purpose of the zoning ordinance at hand and also the public interests that were at stake. Justice Sykes's opinion then remanded the case for further proceedings involving the correct standard.

. . . Justice Diane Sykes's thoughtful opinion for the Wisconsin Supreme Court . . . not only sorts out the state standards for variances but also provides a valuable metaphor . . . .

Ziervogel and McGinnity were no doubt pleased by Justice Sykes's reasoning and her restatement of the variance standard, and, in addition, Wisconsinites benefited from greater clarity and thoughtfulness regarding how to perceive area variances in general. Interestingly enough, Justice Sykes achieved this larger purpose not through anything as pedestrian as a denotative rule but rather through a connotative metaphor.

Elaborating on a suggestion from a venerable practice guide by E.C. Yokley, Justice Sykes advised that a variance could be conceived of as an "escape valve." The latter is a safety mechanism that releases excessive pressure from a container or a piece of machinery. Customarily spring-loaded, an actual escape valve opens automatically when internal pressure exceeds external pressure. An escape valve guards against equipment damage and, horrors, might even prevent the container or piece of machinery from exploding.

When the metaphor is invoked in zoning law, the variance as an "escape valve" provides the system with a way to avoid unduly rigid controls on property owners. The variance releases the pressure they might feel from well-intentioned but seemingly inflexible zoning ordinances. First-year Property students troubled by the way variances confuse and complicate zoning ordinances may take to heart Justice Sykes's reminder that variances are actually valuable devices for making zoning work more prudently. ■

PROFESSOR BRUCE E. BOYDEN

Copyrights and Civil Procedure

We have used opinions by Judge Diane Sykes in two of my classes. In both instances, I looked for an opinion that presented a complicated doctrinal issue in clear terms that students could understand and debate.

In Copyrights, for many years, I supplemented the casebook with *Kelley v. Chicago Park District*, a Seventh Circuit decision from 2011. *Kelley* deals with a basic yet challenging question: what, exactly, is a copyrightable work? Protected works must meet at least two requirements: they have to be authored, and they have to be written or recorded somehow—in the words of the statute, "fixed in a tangible medium of expression."

Not many cases deal with either issue, and what cases there are tend to arise in the context of new technologies, such as computers or remote-controlled cameras. Students struggle, for example, to determine if a temporary copy made in a computer's volatile memory counts as "fixed."

Kelley involves a flower garden. In 1984, Chapman Kelley created a "living art" installation of flowers and native plants in Grant Park, called "Wildflower Works." Later, when Chicago constructed Millennium Park, Wildflower Works was mostly destroyed. Kelley sued under the Visual Artists Rights Act (VARA), a federal statute, which provides protection against destruction for certain pieces of art, including sculptures.

The Chicago Park District failed to challenge the conclusion that Wildflower Works was a "sculpture" under VARA, an action (or inaction) that Judge Sykes called "astonishing." (A useful teaching moment for students: don't overlook the statutory text!) This left the court with a conundrum: Is a wildflower garden "fixed" within the meaning of the copyright statute? And if so, by whom?

Judge Sykes concluded that Wildflower Works failed in both respects. A garden is "naturally in a state of perpetual change." And the nature of that change also undermined the human authorship requirement for copyright. "[G]ardens are planted and cultivated, not authored," Judge Sykes wrote. "Most of what we see and experience in a garden . . . originates in nature, not in the mind of the gardener." *Kelley* has been an important precedent as courts grapple with the copyrightability of AI generations, which are similarly determined largely by nonhuman forces.

In Civil Procedure, I supplement the casebook with *McCauley v. City of Chicago* (2011). *McCauley* deals with another vague doctrine: what constitutes a "plausible" claim that will survive a motion to dismiss? The U.S. Supreme Court announced the plausibility requirement in *Bell Atlantic v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), but neither of those involved a typical claim, and in both cases the plaintiff lost. This leaves students wondering: what makes a claim "plausible"? The Supreme Court's unhelpful answer is that it depends on "judicial experience and common sense."

By the time Judge Sykes wrote the majority opinion in *McCauley*, the Seventh Circuit had already decided two prior plausibility appeals, *Swanson v. Citibank, N.A.* (2010) and *Brooks v. Ross* (2009). The district court's dismissal in *Swanson* was reversed, but not in *Brooks*. Judge Sykes used these two prior data points to map out a spectrum of fact patterns, from less complex to more complicated. Where a case falls on that spectrum determines how hard a plaintiff has to work to plead their claim.

Judge Sykes then explained how Gloria Swanson, who alleged that her house was given a low-ball appraisal by Citibank due to her race, had a straightforward claim, whereas that of Victor Brooks, who alleged a wide-ranging conspiracy among unrelated parties to retaliate against him for a parole board vote, was "complex." The civil rights complaint in *McCauley*, which alleged that various city and state officials intentionally underenforced domestic violence orders on the basis of sex, was also "complex."

"What does Judge Sykes mean by 'complex'?" I ask students. After all, Swanson's claim involved math, anathema to many lawyers, whereas Brooks's claim did not. In our discussion, using the spectrum mapped out by Judge Sykes, the students come to see that a "complex," plausibility-challenged claim is one that has a lot of improbable leaps, as in Brooks's complaint. On the other hand, Swanson's racial discrimination claim, sadly, is the sort of thing that happens every day. An opinion such as Judge Sykes's in *McCauley*, particularizing "judicial experience and common sense," helps students understand when a motion to dismiss may succeed. ■

DEAN JOSEPH D. KEARNEY

Advanced Civil Procedure

Some cases break ground or set precedent, while others are less well-known but useful for their representativeness of a doctrine or concept.

In Advanced Civil Procedure, an upper-level elective offered each spring, we have occasion to read all or parts of five opinions by the Hon. Diane Sykes. One we consider for its role in establishing the law, whereas the others we take up more for their exemplifying it. The distinction is familiar in the law: Some cases break ground or set precedent, while others are less well-known but useful for their representativeness of a doctrine or concept. Both sorts can be valuable in teaching and learning. In the Advanced Civil Procedure instances, perhaps it is not surprising that it is one of *Justice* Sykes's decisions (i.e., from her time on the Wisconsin Supreme Court) that falls into the precedent-setting category.

Let's start there. *Yahnke v. Carson* (2000) came toward the end of Justice Sykes's first year of her half-decade tenure on the state Supreme Court. In a matter of summary judgment process (and substance) and with Justice Sykes writing for a majority, the court adopted what it termed "the so-called 'sham affidavit' rule." The legal precept announced by the court may be less provocative than that phrasing, but it is still significant: "we hold that for purposes of evaluating motions for summary judgment pursuant to Wis. Stat. § 802.08, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of material fact for trial, unless the contradiction is adequately explained." Just about every federal court of appeals had previously come out the same way interpreting the materially identical federal law (Fed. R. Civ. P. 56) on which Wisconsin modeled § 802.08. Yet the interpretation barely made it into Wisconsin law, as *Yahnke* was decided by a four-to-three vote, with Justice William Bablitch dissenting for himself, Chief Justice Shirley Abrahamson, and Justice Ann Walsh Bradley. In class, we find the *Yahnke* case valuable both for its specific rule and as an example of Wisconsin's embrace of a number of summary judgment concepts found in the federal system.

The Seventh Circuit cases in Advanced Civil Procedure relevant here are less prominent but interesting all the same. Two of them are personal-jurisdiction cases. *Northern Grain Marketing, LLC v. Greving* (2014) involved a successful objection by a Wisconsin farmer to being sued in federal court in Illinois on a contract dispute with the plaintiff, Northern Grain. Greving lived very close to Illinois (just over the border, in Walworth County, Wis.) and had some connections with the state—but not the "minimum contacts with Illinois that would permit the district court, consistent with the due process clause of the Fourteenth Amendment, to exercise personal jurisdiction over him." As Judge Sykes explained, "although it may seem convenient as a practical matter for Greving to defend this suit in Rockford, the Constitution doesn't permit the Illinois courts—and, thus, [under Fed. R. Civ. P. 4(k)(1)(A)] federal district courts in Illinois—to exercise jurisdiction over him." Judge Sykes's opinion for the Seventh Circuit in *Felland v. Clifton* (2012) contributes to the law of personal jurisdiction in a different way: It has occasion to discuss how a court's federal "minimum contacts" due process analysis can contribute to its consideration whether the requirements of a Wisconsin long-arm statute (there, § 801.05(3)) are satisfied.

Finally (though early in the course), to demonstrate to the students an important way that the federal court system can connect with state supreme courts, we include brief excerpts from three Seventh Circuit opinions where a close question of state law was presented. In two of these cases, the federal court of appeals *certified* a question of state law to a state supreme court. Judge Sykes wrote these two opinions, seeking answers from the Illinois Supreme Court and the Minnesota Supreme Court. In the third instance, a diversity case where the Seventh Circuit had to sort out state law in a classic "*Erie* guess" or prediction situation (in fact, Wisconsin law), it didn't even discuss the possibility of certifying to the Wisconsin Supreme Court. For the contrast of interest here, Judge Sykes was not part of the panel in this third case. Had she been, I imagine, the court might well have proceeded differently, certifying the question. Judge Sykes might have been more apt to recall Justice Sykes, we may say. ■

Seventh Circuit Day: A Great Idea, Carried Out Well

BY ALAN J. BORSUK

As Mariana Calvo Argus, a second-year law student, put it, "It felt like this *event*." Argus was describing "Seventh Circuit Day," as it came to be known—a daylong set of events on September 25, 2025, at Marquette Law School's Eckstein Hall, when judges of the U.S. Court of Appeals for the Seventh Circuit held oral arguments and took part in several programs for students and the public.

A key goal of the day was to give law students opportunities to observe the appellate court in action and to hear from the judges. The engagement of the Marquette Law School community was extensive. In particular, the six cases argued before three judges in the Law School's Lubar Center were divided into three hourlong sessions, of two arguments each, such that about 300 students were able to attend and observe one of the sessions.

In the estimation of many students and faculty members, the day was both educational and motivating. Afterward, Kaya Dreger, a first-year student, said that the court's visit furthered her interest in career paths involving advocacy in court. Observing arguments before three federal judges underscored for Dreger how cases involve "real, tangible people" and how provisions of the U.S. Constitution come alive in real cases.

The cases that were heard

The Seventh Circuit panel hearing arguments consisted of Chief Judge Diane S. Sykes, Judge Frank H. Easterbrook, and Judge Michael B. Brennan. Judge Michael Y. Scudder joined the panel for the afternoon programs.

The six cases argued to the court touched on substantial issues. Some examples: In *Public Interest Legal Foundation, Inc. v. Wolfe*, No. 24-3258, the central issue—whether the district court was correct in refusing to compel the State of Wisconsin to provide voter lists to an interested nonprofit entity—presented both statutory and constitutional questions under federal law. *Ruderman v. Kenosha County*, No. 24-2939, concerned whether the federal Trafficking Victims Protection Act applied to civilly detained immigrants, awaiting removal (deportation) or a removal hearing, who were required to perform cleaning duties at the detention facility. And in *United States v. Watson*, No. 24-2432, appellant's arguments included that the government's collection of the defendant's DNA violated the Fourth Amendment and that a federal criminal statute violated his Second Amendment rights.

Calvo Argus, the second-year student, said, "Just getting to see it live" was valuable. She described it as "a unique experience—and a very beneficial one." Dreger, the first-year student, said that some of her classmates were taken aback by how assertive some of the judges were in questioning lawyers during the oral arguments. Frequently, the judges interjected into the lawyers' arguments with questions or criticisms, as is common in appellate courts. But Dreger thought this added to the sense of importance of the proceedings, as well as her feeling of being motivated by the experience.

Chad Oldfather, professor of law, said, "My impression was that the students found it to be a valuable experience, and it was certainly one that they were discussing well after the arguments were over. And the lessons they learned that morning, as well as ones they've learned in the months and years leading up to it, were reinforced by the judges' afternoon Q&A session with the students. There's always value in having judges underscore the lessons that we try to impart in the classroom."

Advice on effective appellate advocacy

The afternoon Q&A session was a panel discussion, moderated by Professor Anne Berleman Kearney and attended primarily by upper-level law students taking Appellate Writing and Advocacy.

Seventh Circuit Judge Frank Easterbrook (second from right) makes a point at a continuing legal education session in Eckstein Hall on September 25, 2025; other participants included Professor Chad Oldfather (standing) and Judges Michael Brennan, Diane Sykes, and Michael Scudder.

Judge Sykes started the discussion by emphasizing the centrality of briefs in the appellate process; she characterized the written word as forming 95 percent of persuasive advocacy on appeal. Oral argument then amplifies, tests, and probes the strengths and weaknesses of the parties' arguments. Her advice included: Tell the facts in story form. Make the factual narrative efficient, readable, and quickly understandable—like a good magazine article. Keep in mind that judges are generalists who need to ramp up quickly on the facts and procedural history.

Judge Easterbrook said that in organizing a brief, lawyers should think about the best set of arguments supporting why a client should win on appeal. That might be different from the arguments in the trial court. Explain why a client has a good legal theory. The judges generally agreed that many briefs are too wordy and too lengthy. Make your point directly, Easterbrook said, and don't fall into acting on how easy writing on computers makes it to add more words. As for oral argument, he emphasized how much an advocate can learn by *listening* to the questions the judges ask and then engaging with the judges' evident interests.

The judges emphasized to the law students the value of limiting the number of issues presented on appeal, in order to be able to develop the arguments adequately and to concentrate the court's attention. The "fifth issue" has pretty well never won an appeal, Judge Brennan observed. He also advised lawyers to prepare for oral arguments through a moot court process. It will force a lawyer to focus on challenging questions in advance of possibly hearing them in open court.

Dialogue in an appellate courtroom and beyond

Following the Q&A session with students and turning to practicing lawyers, Professor Oldfather moderated a program in the Law School's Lubar Center for some 200 practicing lawyers. It was an opportunity for relatively informal dialogue with the appellate judges—and *dialogue* was a central term that the judges used in describing their work. Judge Brennan said that *dialogue* describes not only the oral argument process but the duties of the judges more broadly. The judges are involved in dialogue with other judges, dialogue with courts across the country and at different levels of the judicial system, dialogue with legislative branches and other parts of the government, dialogue with the legal academy, and dialogue with thought leaders outside the court system. In considering a specific case, appellate judges are aware of the ways others are listening to and communicating with them and vice versa.

Judge Easterbrook, with extensive experience as a law professor, said a lot of people think that what judges do is similar to the work of legal scholars. "That's not what judges do," he said. "Judges solve a party's problem. They don't provide abstract principles and discussion." He said, "Legal issues grow out of the real world, not from legal debates." And when as a judge you have a problem in front of you, he said, "you bring your own jurisprudence to it," but you don't just decide what seems right.

Judge Scudder, whose visit to the Law School earlier in the year to deliver the Hallows Lecture had helped inspire Professor Oldfather's approach to the session, said he wants to know the background and context of a case that is before him. That sometimes includes looking into the legislative history of a statute ("it's not a sin" to do that, he said) and reading news coverage from the time a law was passed to try to gain more understanding of what legislators were thinking.

Judge Brennan said that a phrase that judges should keep in mind is "self-abnegation"—setting aside personal interests and beliefs. Judges should stick to their judicial role, he said, and when they go beyond it, "that's where problems occur." He said that, in considering cases, judges should ask if this is something they should be deciding or need to decide.

Seeing the law in action

Looking back on the day, Professor Rebecca Blemberg said, "Students very much appreciated the opportunity to witness oral argument before the Seventh Circuit judges. They were both impressed by the level of preparation put in by the judges and lawyers and heartened that the arguments unfolded more as conversations than canned remarks or sound bites." She added, "The students had the sense that they witnessed professionals making real efforts to understand positions and reasoning, a type of 'argument' often lacking in public and political discourse."

For Joe Yamat, a second-year law student, both the formal session of the court and the informal occasions to talk with some of the judges were valuable. He noted that it was particularly relevant to his Appellate Writing and Advocacy course that semester. He was impressed to see the quality of the work of the attorneys who presented oral arguments to the court and to realize how much the judges were concerned about the long-term impact of their work.

And he said he was impressed that leaders of the appeals court and the Law School agreed to bring the court to Eckstein Hall and by how well the events of the day were carried out. ■

"Behind the Scenes" of Organizing a Visit by an Appellate Court

BY ANNA FODOR

The following ran on the Marquette Law School Faculty Blog on November 13, 2025. It was one in a series of six posts capturing aspects of the Law School's Seventh Circuit Day, held earlier in the semester. Anna Fodor is assistant dean of students and adjunct professor of law.

What we hope you saw: An exciting early-semester announcement that oral arguments before the Seventh Circuit would take place in Eckstein Hall on September 25, 2025; a smooth registration process; and on the "day of," insightful lines of questioning during argument and various post-argument programs designed for students and attorneys to learn directly from the judges whose decisions fill our casebooks and support our federal filings.

But, in the nearly four months preceding, here is what was happening: emails, meetings, more meetings, drafts upon drafts, games of phone tag, some mistakes, more emails, brisk walks, smiles, notes, and, at the end of the day, a sigh of happiness and, yes, relief.

It goes without saying that putting together a day like September 25 takes work. This is true for all of our big events at the Law School, from orientation to the National Sports Law Institute's annual conference to PILSgiving to our annual lectures to the Jenkins Moot Court Competition to graduation. Staff and faculty work together to provide a seamless experience for students and guests. In some cases, it starts with a spreadsheet or a checklist from the previous year. The September

Seventh Circuit visit, without recent precedent, started with an email.

For the Seventh Circuit opportunity, the exchange began on April 30, 2025, when the court approached, via email of course, Marquette Law School to propose a sitting at Eckstein Hall for the first time in 13 years. The thread quickly proceeded to involve various parties, including a key court administrator, Associate Dean Christine Wilczynski-Vogel, Dean Joseph D. Kearney, and, certainly not least, then-Chief Judge Diane Sykes, L'84. A late September date was set, the school's calendar was cleared, and we were off to the races.

At the heart of the planning—and really, of all of our work at the Law School—was our students: their interests, availability, and capacity. I don't think it a stretch to say that the most energy was expended on constructing a day that would allow all first-year students and all interested upper-level students to take part (through observation) in the oral arguments. It was, after all, the *raison d'être* for the day in Eckstein Hall. In fact, while the dean and I sometimes have occasion to hop on a phone call to discuss a pressing matter, rarely does that call take place after 9:30 p.m. Proposing an oral argument structure to the court that would allow as many students to attend as possible, however, occasioned just this type of call on Thursday, June 26. It took place after my kid was tucked away in bed, the dishes done, and the dogs taken out for their final walk of the night. Some things are just more important than that night's rewatch of a given episode of *The West Wing*.

Our faculty were involved throughout, especially our legal writing faculty. Other key members included Professor Chad Oldfather (who recently authored the book *Judges, Judging, and Judgment* and who would lead a continuing legal education session featuring the judges), Professor and Director of Clinical Education Anne Berleman Kearney (who would lead a Q&A session with the judges designed specifically for our upper-level students), and our impressive corps of Appellate Writing and Advocacy faculty.

Faculty added sessions to their syllabus, integrated student attendance into their courses, even drafted synopses of the to-be-argued cases. They shifted class times to accommodate student attendance at the oral arguments, encouraged upper-level students to take part in whatever way made sense to them, and attended themselves, all the while aware of what a big impact one such day could have on a law student. Most lawyers (at least litigators) remember the first time they attended federal appellate arguments. To have it happen in your own law school, while you are a law student? It's special. And faculty understand that.

There were also, of course, the heretofore-untold technical and logistical elements that went into the planning. Associate Dean Wilczynski-Vogel, Assistant Director of Student Affairs Sarah DiStefano, Event Planner Chad Wheeler, Director of Media and Technology Ryan Rau, and Manager of Building Operations Ben Manske, among others, expertly handled these elements.* People contributed in ways that fall outside the corners of their job descriptions or departments, as is so often the case at Marquette Law School, where the mission is less to put square pegs in square holes (if you'll allow the adjustment to the phrase) and more to serve our students and develop the institution, as a whole, in the ways that suggest or present themselves.

For one small and perhaps extreme example, several individuals were involved in the creation of the registration form, which took on a life of its own. Anyone who has had the distinct pleasure of working with a form program such as Qualtrics, Wufoo, or Microsoft or Google Forms knows that there are different ways to build a form, including the creation of "logic" through rules that the creator identifies. But few people—I think—have had the experience of sorting through such possibilities with Dean Kearney. Suffice it to say that, with multiple constituencies, events, and concerns, we went through several drafts of the form before the final version took hold. Guess how many drafts, then add five, and you're a bit closer to the actual number.

So, what's left? Name tags or no? Promote in *Law News* or not? Handheld microphone or lavalier or gooseneck? Sure, these probably seem like trivial matters from an outsider's perspective (and even, at times, from an insider's perspective . . .). But when the goal is perfection, details matter. Was perfection achieved? Maybe not. And yet, on September 25, we hope you saw none of these details, none of the behind-the-scenes minutiae. If that's the case, then I hazard to say, we came as close to achieving perfection as possible. ■

* And I haven't even shared the various decisions and arrangements made by the involved judges, court staff, and security. Their work is tireless and impressive, though maybe not so appropriate for a blog post from the Law School to detail.

THE HALF-ORIGINALIST PRESIDENCY

CHRISTINE KEXEL CHABOT

In *Trump v. United States* (2024), the Supreme Court went to new lengths to guarantee a "vigorous" and "energetic" president. The Supreme Court's decision afforded presidents broad immunity from criminal prosecutions based on official acts taken while in office. The Court defended its ruling in largely consequentialist terms: it explained that the ruling was designed to avoid the prospect of "an Executive branch that cannibalizes itself, with each successive President free to prosecute . . . predecessors, yet unable to boldly and fearlessly carry out [current] duties for fear that [they] may be next." At the same time, the Court attempted to ground its ruling in Founding-era understandings of the presidency.

This essay explains that the Court's historical assertions rest on half-truths and a distorted view of how the Founding generation conceptualized the presidency. The distortion is most evident in the Court's determination that Article II grants the president an "unrestricted power of removal" which can never be regulated by Congress or considered as evidence of presidential wrongdoing. The unfettered removal power recognized by the

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Professor Christine Kexel Chabot joined the Marquette Law School faculty in 2023. This excerpt draws from her essay published last year: Trump v. United States *and the Half-Originalist Presidency*, 58 Mich. J. L. Reform 653 (2025). In addition to other attention, Professor Chabot's essay was noted by the *New York Times* as President Donald Trump's second term began and challenges to his agenda began to arrive last year to the Supreme Court.

Court conflicts with not only longstanding precedent but also the Founding generation's understanding of the presidency. This essay offers the first account of the historical mismatch between the *Trump* Court's ruling on removal and Founding-era conceptions of the presidency.

Much of what the Court decided with respect to immunity is unclear, as its opinion made presumptive immunity for most of the president's official acts turn on a balancing test. Unlike the bulk of the president's official acts, the Court excepted removal from balancing and categorized it as a "core" executive power committed to the president's "conclusive and preclusive" authority. The majority opinion silently departed from contrary precedent on removal. It ignored a balancing test that the Court had earlier applied to removal and treated removal as a power that can never be regulated by Congress or the courts. As a result, the Court suggested not only a sea change in governing law on removal, but it did so without substantial briefing on the historical evidence that would typically inform a judicial decision to set aside longstanding precedent in this area.

The Court's decision treated removal power the same as the pardon and veto powers without recognizing important differences between them. Removal is an implicit, Article II power, whereas the pardon and veto powers are granted by the express text of the Constitution. The pardon and veto powers allow presidents to check other branches in ways that could be undermined by congressional regulation. Removal of executive officers does not operate as a check on other branches. Although the majority asserted that an implicit Article II removal power should nevertheless enjoy the same core status as at least the pardon power, this approach overlooked the fact that an indefeasible removal power would depend heavily on pragmatic enrichment and the historical record. The problem is that the *Trump* Court's assertions of an indefeasible removal power conflict with a substantial body of Founding-era history.

Originalist debates over presidential removal power have typically focused on the unitary executive theory of Article II. Longstanding precedent has allowed statutory removal restrictions so long as they do not interfere with the president's power to remove "close military or diplomatic advisers" or subordinates who violate the law. Unitary scholars have argued that original understandings of Article II extend the president's removal power to all subordinate officers and empower the president to remove these officials based on disagreement over lawful policy choices. To justify their position, unitary scholars have focused on the president's need to control policies within the limits of substantive laws, as well as the way that statutory tenure protections interfere with presidential control of a subset of lawful policy decisions. Unitary arguments have not directly addressed whether the president may also use removal at will to promote private ends in violation of substantive laws. Nor have they addressed the *Trump* Court's further idea that courts cannot even consider evidence of improperly motivated removals in order to demonstrate wrongdoing.

The weight of recent scholarship presents a formidable historical challenge to unitary scholars' claims of an indefeasible presidential removal power. And by pushing removal in this absolute direction, the *Trump* Court's decision exacerbates these tensions with the historical record. The decision also runs up against longstanding concerns about the president's abuse of the removal power.

The unfettered removal power recognized by the Court conflicts with not only longstanding precedent but also the Founding generation's understanding of the presidency.

The Court's decision in *Trump v. United States* appears to recognize an unlimited unitary executive theory which places the entirety of the president's removal power above the law. By suggesting that it has excepted the whole of the president's removal power from the reach of criminal laws, the Court has raised questions about whether Article II empowers the president to remove officers using unlawful means, such as murder. It also raises questions about whether the president may remove or threaten to remove officers in order to promote unlawful ends, such as punishment for refusing to help the president break the law. While the Court may have had in mind other difficult cases in which removal effectuates aggressive and contested interpretations of the law, its absolute approach also excuses presidents who abuse the removal power in furtherance of clearly unlawful or private ends. Under the Court's approach, an official exercise of removal power can never violate the law. This approach elevates removal power above other executive powers, such as the protective power. It is unclear why the balancing approach applicable to official acts like the protective power should not also apply to removal.

None of the precedents cited by Chief Justice Roberts in *Trump v. United States* support a presidential power to remove subordinates in order to promote unlawful ends. The Court's assumed interest in protecting choices presidents make in the "public interest" does not seem present in removals calculated to bring about unlawful action. While members of the Court have sometimes suggested that overruling

Trump v. United States is the latest in a series of Roberts Court decisions that have forgotten much of our nation's history on executive removal power.

Humphrey's Executor v. United States (1935) is a foregone conclusion and will not lead to great change, these arguments fail to account for important aspects of decisional independence in certain agencies or the consequences of extending unitary executive theory to the type of criminal wrongdoing alleged in *Trump v. United States*. In the discussion below, this essay will show that the *Trump* Court's approach conflicts with Founding-era understandings reflected in the Constitution's text, framing history, and early historical practice. The Court's approach suggests an erosion of significant limitations that were central to the Founding generation's understanding of the presidency.

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A presidential removal power appears nowhere in the express language of the Constitution. While many have argued that this power is nevertheless implied by Article II's Vesting Clause, the historical record weighs strongly against arguments that Congress cannot regulate the president's removal power. Exercises of the presidential removal power to promote unlawful, private ends are especially difficult to square with Article II's language vesting "the executive power in a President of the United States." As Professor Julian Davis Mortenson's historical research has made clear, the "signal characteristic of executive power . . . was that it was substantively an empty vessel. The only thing [the Vesting Clause] authorized the President to do was to carry out legal instructions created pursuant to some other authority." From a Founding-era perspective, as Mortenson has explained, power to "execute" the law was merely the "power to execute plans, instructions, and above all else the laws." The power to execute was not understood to include the ability to suspend or violate the law. Removing an officer who refuses to help the president violate the law would therefore seem to fall outside the scope of law execution. Unlawful action is ultra vires and outside the scope of the public law execution power conferred by the Vesting Clause.

The Take Care Clause, in Article II, section 3, further requires the president to "take care that the Laws be faithfully executed." Professors Andrew Kent, Ethan Leib, and Jed Shugerman have marshaled considerable preratification evidence of the duties imposed by Article II's Take Care Clause and requirement that the President take an oath to "faithfully execute the Office of President." According to their research, this constitutional language shows "how important it was to constitutional designers that the President stay within his authorizations and not act ultra vires." They also note that these requirements "may . . . restrict the President's power to dismiss officials for primarily self-protective purposes against the public interest."

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Trump v. United States is the latest in a series of Roberts Court decisions that have forgotten much of our nation's history on executive removal power. The Court has forgotten what happened at the Founding. It has forgotten that the express language of Article II never included a presidential removal power, and it has forgotten that the First Congress debated the very existence of an Article II presidential removal power for months before adopting ambiguous laws that at best declined to regulate the president's removal power in three instances. It has forgotten that other Founding-era laws incorporated a panoply of legal restrictions on the power to remove officers charged with executing the law. It has forgotten that the constitutional balance struck by the political branches on removal was never checked by the Supreme Court until Chief Justice Taft's 1926 decision in *Myers v. United States*. It has forgotten that an earlier Court approved for-cause removal restrictions in *Humphrey's Executor*, and it has forgotten that only one justice dissented from the balancing test that the Court applied to for-cause removal restrictions in *Morrison v. Olson* (1988).

Recent scholarship has reminded us of a different past: a history that contradicts originalist arguments for an indefeasible presidential removal power. The Court seems bent on avoiding, rather than confronting, this inconvenient historical evidence. Despite lengthy amici briefs on originalist arguments for and against an indefeasible presidential removal power in *SEC v. Jarkesy* (2024), the Court eschewed the benefits of this additional historical briefing and declined to decide the removal issue in that case. The Court instead injected the removal issue into *Trump v. United States*, a case in which the parties and amici never presented substantial historical briefing on removal. The removal power recognized by the *Trump* Court seems to exceed the president's fundamental power to execute the law as well as the president's fundamental duty of faithful execution. The Court's decision demonstrated no awareness of one of the Founding generation's most important lessons: that the president was never meant to be a king. For the first time ever, the Court has opened the door to a presidential removal power that knows no legal boundaries. It has placed the president above the law. ■

History and Tradition in First Amendment Intellectual Property Cases: A Critique

BY REBECCA TUSHNET

To define the contours of certain constitutional rights, the Supreme Court has recently turned to explicit appeals to "history and tradition." For just two leading examples, consider *New York State Rifle & Pistol Association, Inc. v. Bruen* in 2022, involving the Second Amendment, and *Dobbs v. Jackson Women's Health Organization* the same year, concerning the right to bodily autonomy and overturning the 1973 decision in *Roe v. Wade*. The *concept* is not altogether new: Judges, including some on the Supreme Court, have been willing to use history and tradition as a rule of decision in First Amendment cases as well. In fact, we already have several examples of this practice in cases upholding intellectual property (IP) rights despite their effects on others' freedom to speak. What can we learn from these IP/First Amendment cases?

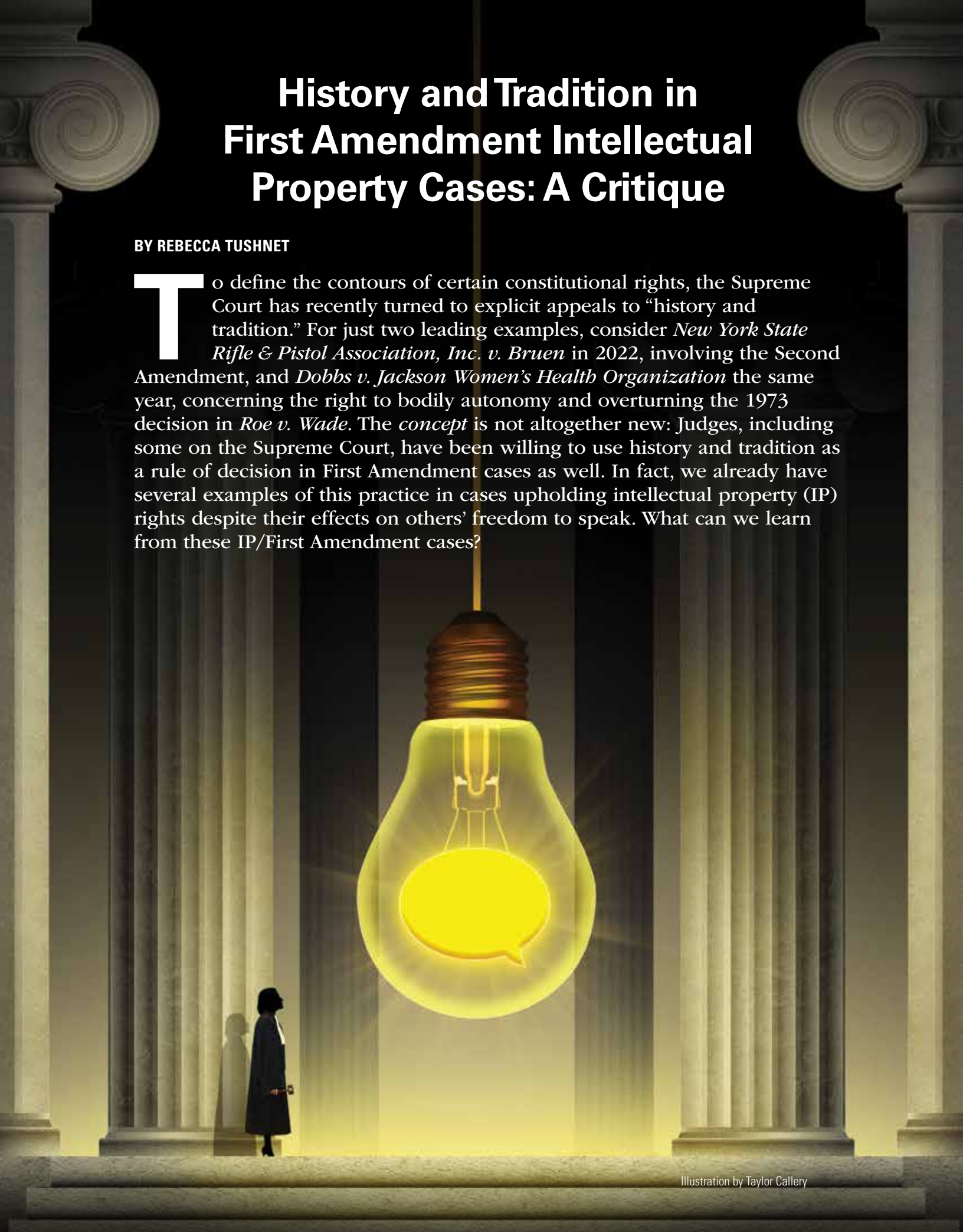

Illustration by Taylor Callery

This essay will approach this question as follows. First, it will briefly review the rise of history and tradition as an alternative mode to the approach of "strict scrutiny" in defining the scope of constitutional rights. It will then discuss the IP/First Amendment cases and their use of history to approve new expansions of IP rights, notwithstanding the resulting effects on the freedom of others to speak—including in their reporting, copying, and parodying. It concludes with some reflections about what should come next.

The key point will be that the considerations present in other modes of free-speech reasoning—in particular, the need to tailor regulation to harm—remain necessary even when consulting "history and tradition."

STRICT SCRUTINY AND THE SEEMINGLY NEW CHALLENGE OF HISTORY AND TRADITION

The strict scrutiny test, as Richard Fallon recounted in 2007, "evolved simultaneously in a number of doctrinal areas" by the 1960s and quickly came to "dominat[e] numerous fields of constitutional law," including First Amendment challenges to government regulation of speech based on content. Strict scrutiny as a standard requires the government to show that its actions are "narrowly tailored" to further a "compelling government interest" and that they are the "least restrictive means" to advance that interest, as set forth in *Reed v. Town of Gilbert* (2015) and numerous other cases.

Not so long ago, the Roberts Court seemed destined to use strict scrutiny liberally to strike down many government regulations of speech. For example, in *United States v. Stevens* (2010), the Court held that legislatures can't identify new categories of low-value and thus unprotected expression; only historically recognized exceptions count. *Stevens* and similar cases seemed to represent a firm rejection of most new speech regulations.

But the composition of the federal courts has changed, another approach has become visible, and the Supreme Court is clearly open to throwing out decades of precedent. For example, in the Second Amendment and bodily-autonomy context, the Court has appealed to "history and tradition" to distinguish constitutional from unconstitutional regulations. Could it do the same for First Amendment law?

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IP/FIRST AMENDMENT DOCTRINE'S SURPRISING HISTORY AND TRADITION

In fact, even before the rise of "history and tradition" as an explicit methodology, the Supreme Court evaluated two IP rights for consistency with the First Amendment and approved them on historical grounds, without applying any particular level of "scrutiny." These are the rights of publicity and copyright.

Right of Publicity

The right of publicity focuses on a person's interest in controlling commercial exploitation of one's name, image, or other indicia of identity. *Zacchini v Scripps-Howard* (1977) involved a circus performer who was shot out of a cannon for audience delight. A TV news station recorded the entire performance and broadcast it as part of a story about the event. The performer sued for violation of his right of publicity, and the Court found that his claim was not barred by the First Amendment, even though the incident was newsworthy. The Supreme Court consistently characterized the conflict in *Zacchini* as one between the television station's First Amendment rights and the performer's interest in his "entire act"—the latter being equivalent to a well-recognized common-law copyright claim. Common-law copyright protected creative works before they were published, and for performances it protected them against unauthorized fixation, including unauthorized recording.

Lower courts then immediately disregarded the Court's analogy and started approving almost anything called "right of publicity," including lawsuits based on people "reminding" audiences of a celebrity, despite the effects on speech. So now you can be sued for putting a digital version of Manuel Noriega in a video combat game (even though the plaintiff failed), making a bobblehead doll showing Arnold Schwarzenegger as the "Governator" (plaintiff secured a settlement), using a blonde robot in a wig to imagine "Wheel of Fortune" in the future (plaintiff Vanna White succeeded), or using, in the background of a videogame, the name of a company that also happens to be the name of the company's owner (the court refused to dismiss the plaintiff's claim). The California Supreme Court approved liability for an artist who drew pictures of the Three Stooges and sold them, reasoning that he was making art for profit. Two federal courts of appeals have held that creating a digital version of a football player in a football video game violated his publicity rights.

Arguably, the very lack of attention to the Court's use of history and tradition in *Zacchini* led subsequent courts to ignore the potential limits on its holding. Some courts eventually began asking about the fit between the right of publicity's scope and its justifications, at least when celebrities sued over parodies, but such inquiry was too long delayed.

Most of us might not care much about freedom to evoke celebrities in ads, but we should care that the right of publicity now also covers art. Moreover, even for ads, there is no clear doctrinal barrier to Donald Trump asserting a claim against truthful, nonmisleading advertising that compares other Bibles for sale with Trump-branded Bibles, or offers to resell genuine Trump-branded meme coins, even though such ads would have to use his name to make themselves intelligible. We could certainly make up new limits on the right of publicity, but not all lower courts are willing to do so, and, even when such limits are found, they make the doctrine more complicated and thus more likely to chill truthful, nonmisleading speech both in and outside of ads.

Copyright

More recently than *Zacchini*, the Supreme Court used history and tradition to reject two First Amendment challenges to new copyright legislation. Rather than analyzing whether the changes were speech regulations subject to intermediate or strict scrutiny, the Court reasoned that both extending the copyright term and creating federal copyrights where none had previously existed were things that Congress had done before, so no additional First Amendment analysis was required. These instances are worth recounting.

Congress extended the term of existing copyrights in 1998. The resulting constitutional challenge reached the Supreme Court, and the challenger, Eric Eldred, argued that new copyright restrictions on previously permissible speech required some level of First Amendment analysis. In 2003, in *Eldred v. Ashcroft*, the Court disagreed. It emphasized that the Constitution's copyright clause provided a robust foundation for congressional action and that the near-contemporaneous adoption of the Bill of Rights and the first federal copyright act showed their compatibility. Further, it reasoned that copyright includes its own internal safeguards for free speech interests: the fair use defense and the denial of copyright in ideas or facts. Thus, the Court held in *Eldred*, no further First Amendment analysis was required when Congress added 20 years to the term of existing copyrights, delaying many important works from their scheduled entry into the public domain where they could be freely used by historians, artists, and anyone else.

Continued on page 40

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The Court reprised its historical reasoning in 2012 in *Golan v. Holder*, which involved a challenge to a different provision of copyright law: one restoring copyright to foreign works, such as those of J.R.R. Tolkien and Igor Stravinsky, that had failed to gain protection in the United States because of noncompliance with U.S. rules requiring certain "formalities." The Court reasoned that the first Congress had allowed existing works to claim a new federal copyright, even though those works hadn't been created under a federal regime. So long as Congress acted within the "traditional contours" of copyright, *Golan* said, its acts required no further scrutiny.

But what are those traditional contours, since we know after *Eldred* and *Golan* that those contours *don't* include that a work's term of protection is the term specified when it was created or that a work in the public domain stays in the public domain?

Copyright has changed a lot since the time of the Founding. First, it covers far more kinds of works: copyright originally covered only maps, books, and charts, even though visual art, music, and sculpture were well known to the Founders. Second, copyright as the Founders knew it also only covered *copying*, as the name suggests, but Congress has extended copyright to allow copyright owners to control many more acts, including public performance and creation of derivative works such as sequels and translations.

Perhaps if Congress got rid of fair use or threw out the idea/expression distinction, this would violate the First Amendment—yet Congress *has* passed laws that cut sharply back on fair use in the digital context. If the only guideline is "traditional contours" and there is a history of shrinking freedom to use copyrighted works, then it's difficult to tell when the traditional contours have been exceeded.

TRADEMARK TODAY

Recently, the Court has become even more open to using history and tradition as the guide to constitutionality in trademark cases. As in the copyright sphere, it has used history and tradition to *approve* new restrictions on speech, rather than to strike down new regulations (as has been its tendency in Second Amendment cases).

Jack Daniel's Properties, Inc. v. VIP Products Inc., a 2023 decision, is instructive. The case involved a parody dog toy that made fun of Jack Daniel's: it was a plastic bottle, with a label "Bad Spaniels," that squeaked when squeezed. The federal trademark statute lacks a general, copyright-like "fair use" provision. Courts instead have created special tests for situations where greater scope for unauthorized use of a trademark seems justified—such as comparative advertising, resale of used goods, and artistic references.

In *Jack Daniel's*, the Court mostly dodged the question of how to harmonize freedom of speech with trademark law. Ruling for Jack Daniel's, it held that, when the defendant is using as a trademark a similar term to identify the source of its own goods (here, "Bad Spaniels" dog toys), trademark law's ordinary multifactor test for consumer confusion "does enough work to account for the interest in free expression." The Court reasoned that the basic point of trademark law for centuries has been to protect consumers from deception about the source of goods or services. Thus, source-identifying uses that cause deception must not be part of the speech historically protected by the First Amendment.

But, as I have written elsewhere with Mark Lemley,

> There is no Trademark Clause and no Founding Era federal trademark statute; indeed, the Court invalidated Congress's first attempt to pass a trademark statute, nearly a century later, because it could not be justified under the IP clause. Nor would what current courts call "likelihood of confusion" be recognizable to post-Reconstruction courts, or even mid-twentieth century courts, both of which protected trademark owners in far more limited circumstances. Until recently, trademark law applied only in cases of "passing off," where the defendant's goods would substitute for purchases of the plaintiff's goods.

No one, no matter how drunk, would buy a Bad Spaniels dog toy in place of a bottle of Jack Daniel's, or vice versa. Furthermore, modern courts can be willing to find confusion if 15 percent of consumers, or even fewer, think that a speaker must have had permission from the trademark owner to make jokes about the trademark. Justice Sotomayor's concurrence in *Jack Daniel's* warned against finding confusion too easily, a welcome caution. But this only comes into play in the later stages of an infringement case, while the speech-deterrent effect of trademark threats lies primarily in the ease with which an infringement claim may be asserted.

Then, in *Vidal v. Elster* (2024), the Court considered the trademark statute's blanket prohibition, known as Section 2(c), on registering a trademark that includes a living person's name without that person's consent. Trademark registration confers substantial procedural and substantive benefits compared to simply using a mark in the marketplace, and the Court had previously held that the government could not withhold registration on viewpoint-based grounds. Following those precedents, which treated a registration refusal like a penalty on speech, the U.S. Court of Appeals for the Federal Circuit had held that Section 2(c) was insufficiently tailored to the relevant interests in preventing confusion. However, the Supreme Court unanimously agreed that Section 2(c) was constitutional even when it barred registration of a completely nonconfusing mark, such as TRUMP TOO SMALL.

Elster said that "trademark rights have always coexisted with the First Amendment, despite the fact that trademark protection necessarily requires content-based distinctions." Justice Thomas's opinion for the Court stated that "a tradition of restricting the trademarking of names has coexisted with the First Amendment, and the names clause fits within

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that tradition. Though the particulars of the doctrine have shifted over time, the consistent through line is that a person generally had a claim only to his own name."

However, the *registration* system is not the same thing as allowing a private right of action for name confusion. Justice Thomas didn't even seem to notice that he was generalizing from individual private infringement suits to a government-run registration system that bars certain registrations even in the absence of private opposition.

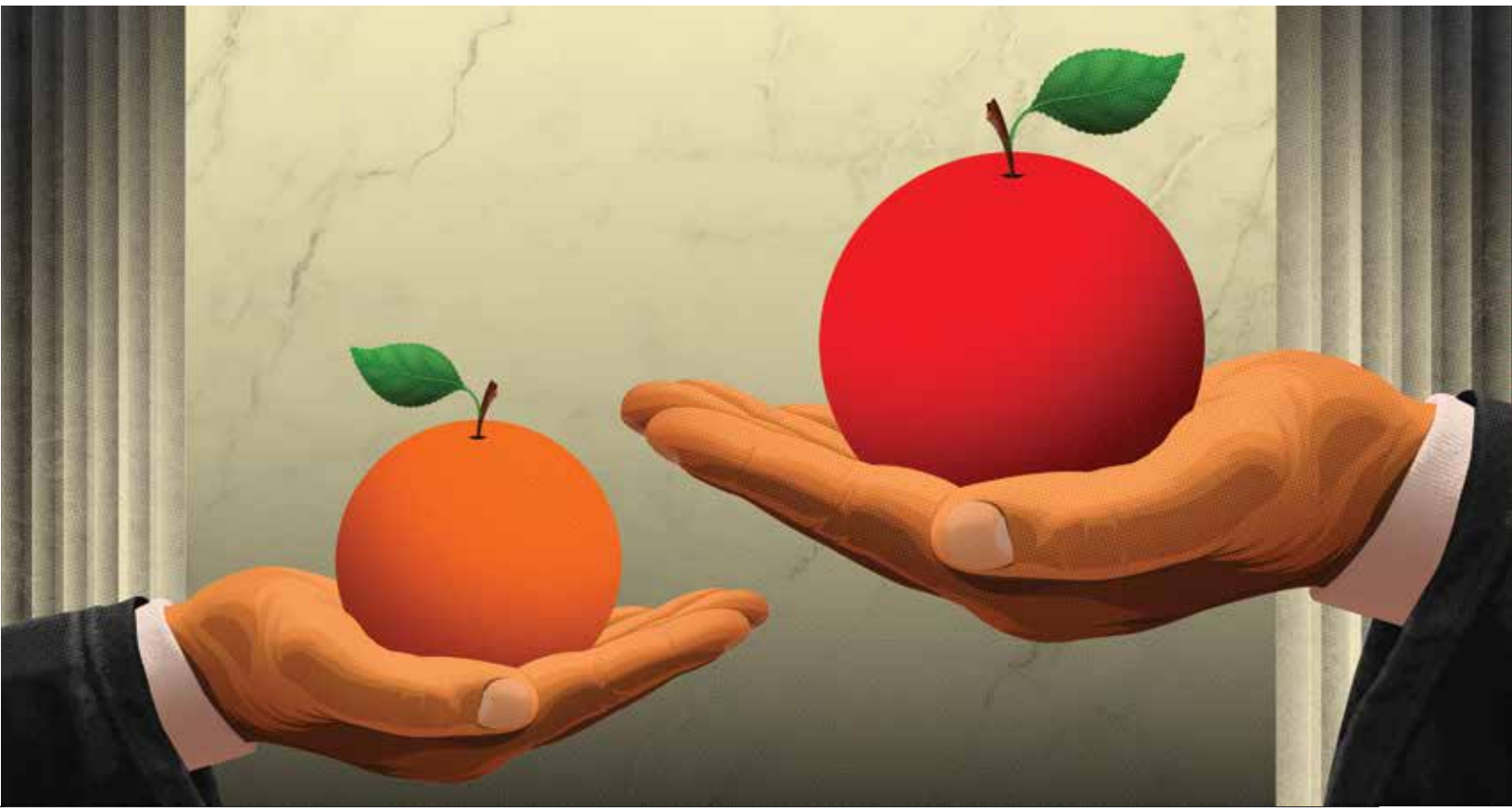
Moreover, the common-law history has an obvious link with Section 2(a), which provides for a ban on registering marks that create a false suggestion of a connection with a person. Section 2(c) goes further—its only independent utility is when it applies to a mark that wouldn't falsely suggest a connection because it is critical. To take a hypothetical but plausible example, barring registration of DEMOCRATS AGAINST ELON MUSK and similar terms doesn't seem like it's going to facilitate source identification.

In order to justify the expansion of trademark concerns to cover nonconfusing uses, the Court's opinion in *Elster* added that it's not just fraud that can be banned, but also misappropriation—"piggyback[ing]" off of another's name. Its historical foundation for *that* extension, though, comes from 1978, when Congress passed a law giving special rights to the U.S. Olympic Committee—hardly a Founding-era precedent.

This is an expansion of the "reputation" rationale far beyond the deception-based historical foundations of trademark. Reputations can be harmed not just by confusion, but by truthful information. Reputations can also be harmed by nonfactual vibes. (That's why advertisers spend so much money trying to make you think their products are cooler than the competition.)

Justice Barrett's concurrence in *Elster* was attentive to this gap: "[T]he Court's evidence, consisting of loosely related cases from the late-19th and early-20th centuries, does not establish a historical analogue for the names clause." The ability to cherry-pick a few cases out of the historical record allows for a lot of manipulation, especially in a common-law nation where there is no such thing as an unbroken, consistent line of cases. Justice Barrett further criticized relying on late-19th and early-20th century evidence at all. This approach has both a timing problem (why is that period important when it was neither the Founding nor immediately around Reconstruction?) and a conceptual problem: "[T]he Court never explains why hunting for historical forebears on the restriction-by-restriction basis is the right way to analyze the constitutional question." The latter is arguably worse: what judges do once they've found their history is even more important, as they try to determine whether the history is sufficiently like the present legislation.

The Founding era had comparatively few laws and more reliance on judicially recognized causes of action than we do now. Even when judges articulated general principles, they



were applying them to particular facts, so limiting principles that weren't relevant to the case at bar were often omitted.

Perhaps more importantly, an analogy between the historical case law and the statute would have to come from identifying the rule emerging from the case law and comparing it to the statute. And any grouping of cases to give a "rule" has to have an underlying theory of what unites these cases: a classic level-of-generality problem. 'Historical cases were about protecting rights when names were used as source-identifiers' is one theory, but so is 'historical cases were about protecting rights when names were used *deceptively*,' and the latter creates a different baseline.

The approach of history and tradition leaves key questions unanswered. Even after we identify the appropriate period of historical scrutiny (which turns out to be harder than it seems, since everyone is tempted to reach wherever in history helpful precedents can be found), the job is not over. For things like the bars on registering certain trademarks, we need to decide if the analysis should be at the level of the purpose of the specific restriction at issue, such as protecting personhood interests, or at the level of the trademark system as a whole. And we should be clear about whether—assuming that denying *registration* to the mark TRUMP TOO SMALL is legitimate because of Elster's putative free-riding on Trump's reputation—it is also constitutional to *punish* the sale of merchandise that bears the message TRUMP TOO SMALL.

WHAT COMES NEXT?

The defenders of the history and tradition approach primarily argue that it is a more neutral way of evaluating laws, compared to the policy analysis putatively required by tiers of scrutiny. Their record in the First Amendment context so far should not give us confidence.

Free Speech Coalition v. Paxton

In 2025, the Supreme Court upheld a Texas law that required age verification by commercial internet sites whose content was a third or more obscene as to minors. The opinion in *Free Speech Coalition v. Paxton*, written by Justice Thomas, used a hybrid approach. In order to find a legitimate state interest in identity-verification legislation, the Court relied on a history of legal regulation of minors' access to such (obscene-for-minors) speech.

Then, in what may well have been a concession to keep a solid majority, Justice Thomas's opinion proceeded to apply intermediate scrutiny to the regulation whose *purpose* had been already thus approved. But its scrutiny was basically indistinguishable from rational-basis scrutiny. And, as the dispute between the majority and dissent made clear, in strict or intermediate scrutiny it is not so much the legitimate-state-interest question as the *remaining* inquiries—fit and tailoring—where most of the tools of judicial scrutiny are really deployed.

As the dissent showed (Justice Kagan for herself and two others), the costs to the speaker of implementing ID verification, as well as the porousness of the ID-verification law, made the law different from past measures in ways that deserved much more consideration than the majority gave them. Website age verification is unlike brick-and-mortar age verification because it can potentially be saved for government review or exposed to hackers (something that just happened with the identity verification for a women-only app, Tea), and it is very expensive, as opposed to the very low marginal cost of checking IDs in a store staffed by humans.

Unreassuringly, the majority opinion also signaled at least some openness to the kinds of unconstrained analogies that the Court previously deployed in the IP cases. For example, a footnote explicitly refused to decide what would happen if Texas decided that a broader range of nonexplicit content were "obscene as to minors"— doubtless looking forward to controversies about drag shows, speech that acknowledges the existence of transgender people, or similar topics. Likewise, the Court did not decide what would happen if Texas decided that access to the whole internet, not just sites with more than one-third sexually explicit content obscene as to minors, should be subject to the same ID-verification requirements (a footnote allowed that a broader law might be unconstitutional as applied but that there was no relevant argument before the Court). Such expansions are different in degree, not in kind, from the rules the Court just approved. And it is difference in degree that "history and tradition" has the least capability to assess.

What History and Tradition Can't Tell Us

The history and tradition technique doesn't supply its own analytic framework, and to say that a 'sufficiently close analogy' to history is required is not all that helpful. The results can be seen in the sharply different trajectory of history and tradition in First Amendment IP cases compared to Second Amendment cases. That contrast should give us pause in further embracing history and tradition as a guide to the First Amendment more generally.

It turns out that anti-gun-regulation (or "pro-Second-Amendment") judges can dismiss inconvenient past examples of gun regulation as misunderstandings, as in *Bruen's* rejecting various historical gun regulations as "outliers," rather than precedents supporting modern gun controls. But in IP cases like *Elster*, as we have seen, the same judges can seize on outlier precedents, or simply use the general justifications for IP rights expressed in past cases, and treat them in isolation from considerations that formerly limited those rights, thus acting as (it is fair in context to say) "anti-First-Amendment" judges.

The expansion of relevant evidence beyond text to any practice (or nonpractice) of legal regulation aids in the project of judicial discretion: With such a vast corpus, who could deny that there must be some errors and misunderstandings in there? At the same time, judges can dismiss inconvenient

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past limits on IP rights as matters of legislative grace, and can always find at least some expansive descriptions of the private interest at issue, which then justifies further expanding the scope of the IP right, the First Amendment notwithstanding.

Even if a course of history and tradition identifies valid regulatory goals, interpretation and judgment are still required to see whether a particular regulation is a legitimate way of accomplishing a valid goal. Although strict scrutiny and intermediate scrutiny have problems of their own, the concerns they implement will not go away.

In the First Amendment, the animating concerns include worry about suppression by the government of views it doesn't like, whether by viewpoint-based laws or laws that in practice discriminate against particular viewpoints; related worry about government's ability to identify when speech actually causes harm rather than just causing upset; and problems of overbreadth and underbreadth, where poor targeting by a regulation may entail unwarranted discrimination against certain kinds of speakers even though other speech causes the same harm but remains unregulated.

Thus, one useful question is whether a speech restriction matches well to the putative harm it addresses. If its harm-prevention claim relies on an extended causal chain that could be interrupted by other factors, or is unpersuasive as a justification for the law at issue because of the amount of harmful speech it leaves untouched or the amount of harmless speech it suppresses, then we should identify a constitutional problem.

That is, considerations of *fit*—usually considered as part of the second and third prongs of strict or intermediate scrutiny—cannot and should not disappear even if the "compelling government interest" and "substantial government interest" standards are replaced by a test that requires the government interest asserted to be recognized by U.S. history and tradition. Indeed, tailoring concerns are likely the *only* way to evaluate whether newly enacted laws are consistent with a history and tradition of allowing some speech regulations and not others.

Zacchini, the 1977 right of publicity case, could even offer us a potential model if we took the historical analogy seriously as a *limit* on what lawmakers can enact, as in the Second Amendment context. After all, there were reasons why common-law copyright in unfixed performances didn't prevent most reporting about what people said.

Law should not be fundamentally unprincipled or unpredictable, even when some uncertainty is inevitable. Addressing the role of history and tradition in First Amendment doctrine is therefore vital to the project of maintaining the rule of law even in a time of rapid constitutional change. ■

Numbers, Facts, and Insights

Lubar Center researcher John Johnson combines a soft-spoken style with a deep commitment to understanding Milwaukee and Wisconsin.

Low key and *high impact*. That is a good beginning description of John D. Johnson, research fellow for Marquette Law School's Lubar Center for Public Policy Research and Civic Education.

The soft-spoken, almost-always casually dressed 33-year-old Johnson came out of nowhere—well, rural Illinois—to join the Law School's public policy initiative in 2016. He has become widely recognized in the region as the go-to person for knowledge about key trends that are shaping life in Milwaukee and Wisconsin. Johnson is an excellent researcher and number cruncher who comes up with fresh insights time and again and who is eager to share what he finds with the public.

Population trends in Milwaukee? Insight into how large investors are buying up low-cost property in Milwaukee and often making a lot of money in doing so? Straight-shooting and nonpartisan analysis of political redistricting in Wisconsin? The decline in births in Milwaukee? Innovative analysis of voting trends across the state? Detailed results of the Marquette Law School Poll? A look at the most common domesticated animal in every county in the country? Johnson is on top of each of those and a lot more, while still leaving time for the camping, hiking, bike riding, and other outdoor explorations that he loves.

Johnson's groundbreaking work is quoted often in the media. He has collaborated with colleagues in building databases that are available to the public on subjects such as property ownership in Milwaukee. He and Mike Gousha, Marquette Law School's senior advisor in law and public policy, work together on several major pieces each year, appearing in the *Milwaukee Journal Sentinel*, on trends shaping the Milwaukee area. And Johnson plays important roles in analyzing the results of the Marquette Law School Poll and posting the analyses in ways that make specific information accessible to the public.

The *Marquette Lawyer* asked Johnson to offer thoughts and observations about his work in his own words.

More available data, more need to understand things

More information, in the sense of raw data, is available now than ever before, but relatively few people are employed with the technical skills and time required to make sense of it. To give just one example: The City of Milwaukee has an annual budget in excess of $2 billion. Its legislative reference bureau, which provides research support and fiscal analysis for the Common Council (which allocates this money), employs 10 research staff—a number unchanged from 25 years ago. My job at the Law School's Lubar Center for Public Policy Research and Civic Education is to explain quantitative data about important public policy concerns in a fair and accessible way. My role exists halfway between journalism and traditional academia.

The questions I seek to answer come from the former. Major news organizations are generally based on the East Coast, and the number of working journalists nationwide has declined sharply. Even when a national outlet writes an accurate and thoughtful article about Milwaukee or Wisconsin, it must explain why the story matters to the rest of the country. I am unconstrained by that framing. Milwaukee, let alone Wisconsin, is large enough to justify its own specific coverage. The state, after all, has more residents than entire countries such as Norway or the Republic of Ireland. If something matters to the 570,000 people living in Milwaukee, the 1.5 million in the metro area, or the 5.9 million in the state, that alone is justification enough for me.

Even so, Wisconsin's experience is rarely singular. A close analysis of the situation here often yields useful insights for the rest of the country. In fact, much of the country bears more of

John D. Johnson, Lubar Center research fellow, has become a go-to person for knowledge about key trends shaping Milwaukee and Wisconsin.

a resemblance to us than to the coastal metropolises. Prominent media and cultural institutions are increasingly concentrated (or merely remain) in the handful of American "superstar" metros, to borrow economist Enrico Moretti's term, that have won 21st-century economic competition.

One consequence is that our political vocabulary reflects the circumstances of those metros, and not the often-quite-different circumstances of cities that are not hubs of technology and finance. This is why, I believe, we hear so often about "gentrification" and less frequently about persistent, entrenched poverty—the condition that describes so much of Milwaukee. It is why we hear about high rents, skyrocketing property values, and restrictive land-use policies, but not the difficulties of building new housing in cities with many empty lots yet insufficient property values to justify conventional construction even when land is free.

Insights into political redistricting

Redistricting is a technically complex subject with enormous political consequences, so the Lubar Center readily identified it as a topic well-suited to our mission before the 2020 cycle even began. We had no way of knowing just how long the process would take. Not one or even two but three sets of Wisconsin legislative maps were, at least briefly, the law of the land. As of early 2026, litigation aiming to toss the congressional maps is still pending in state court.

My study and coverage of redistricting had two main goals: (1) to explain how the political geography of the state interacts with traditional redistricting criteria to shape the universe of probable maps and (2) to provide independent, transparent statistics quantifying the empirical attributes of every proposed map.

The first goal required explaining how two separate issues contributed to the Republican stranglehold on the state legislature under the maps drawn in 2011. It is true that the maps were a classic partisan gerrymander drawn by Republicans to preserve their legislative majorities won in the 2010 Tea Party landslide election. The skill of this gerrymander was evident through any number of metrics. Here's one: from 2014 through 2020, across 396 Assembly races, only 7 seats changed hands between the parties.

Nonetheless, the 2011 gerrymander is not the sole reason why Republicans enjoyed such an advantage in the state legislature. In fact, they probably would have won the same number of seats in 2014 and 2016 in a randomly generated map. Patterns in where Democratic and Republican voters live currently create a sort of natural, or baked-in, advantage for the Republican Party. Democrats are a lot more likely to live in a very Democratic place than Republicans in a very Republican place, and this difference has grown over time. This asymmetrical concentration of Democrats means that a randomly drawn map of compact districts will almost inevitably "waste" Democratic votes by packing more of them into dark-blue seats than Republicans in dark-red seats.

Explaining these two facts (the gerrymander and the geography) was a balancing act, because members of each party were eager to consider one but not the other. Each fact, by itself, was only part of the truth, and any independent effort to draw genuinely nonpartisan maps would have to grapple with the way a map drawn faithfully according to neutral redistricting principles would still appear not at all "neutral" in its political implications.

Tackling the data on redistricting

Fundamentally, redistricting plans are lists of census blocks as assigned to districts. Census blocks are tiny—there are more than 200,000 in Wisconsin. By merging the U.S. Census Bureau's "block assignment files" onto spatial data and other census records, I could answer a variety of questions: How compact are these planned districts? Are they contiguous? How closely do they follow municipal and county boundaries? And, most importantly, which party would probably win an election in this district?

In principle, there is no reason why these calculations couldn't be done on a national scale, and several organizations did achieve prominence by doing exactly that during the 2020 cycle. But large amounts of the necessary data are collected locally and vary in quality and consistency. I chose to perform these calculations myself, starting from scratch with the original source datasets (some of which I assembled myself). In so doing, I helped correct serious errors in two of the national projects. Because the format of election data is so idiosyncratic, it pays to do this analysis with local expertise.

Wisconsin's state legislative redistricting saga finally ended after the new "liberal majority" on the state Supreme Court invalidated the maps used in 2022 and solicited new proposals from across the political spectrum. Surveying their options, Republican legislators decided to cut their losses and passed a map proposed by the Democratic governor in early 2024. The various proposed maps originally submitted to the court would have achieved a wide range of political ends—from heavily Republican to tilting Democratic—but many of them scored remarkably similarly on standard redistricting criteria (compactness, contiguity, maintenance of communities of interest, etc.). One lesson I took from this is that following traditional redistricting principles is no cure for gerrymandering. Sufficiently motivated partisans can accomplish their political ends even under those constraints.

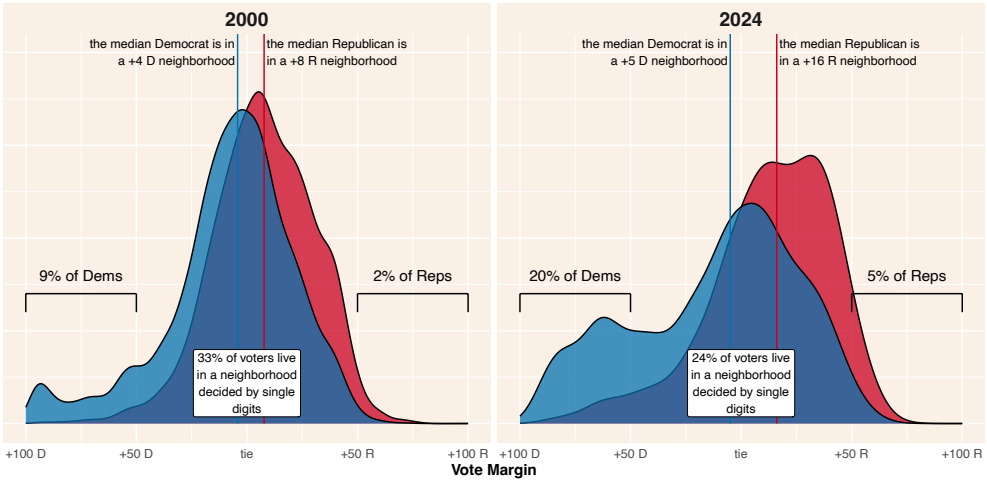
I've become increasingly convinced that the real strength behind the gerrymanders we see around the country is less the growing skill of the consultants drawing the maps and more the growing predictability of the voters themselves. In contrast to the recent past, voters today rarely split their tickets within elections and seldom switch party allegiances between elections. Gerrymandering

works only when voters are easy to predict.

Currently, voters in Wisconsin might be easier to predict than anywhere else. The change between how counties voted from 2020 to 2024 was the smallest in the state's history. Literally no other state has been as closely divided between Democrats and Republicans in three consecutive presidential elections as Wisconsin in 2016, 2020, and 2024. Despite this near-stasis in the electorate, the tiny shifts that did occur exactly matched the national outcome. Our electoral votes have gone to the national winner each of these times. All this makes Wisconsin an especially illuminating place to understand the factors that drove President Trump's victory in 2024.

The following collection of facts must be considered in unison to really understand the 2024 presidential election in Wisconsin. In contrast to the nation, turnout in the state increased. Turnout, as a share of eligible voters, was higher in Wisconsin than in any other state in 2024. Trump's share of the vote grew nearly everywhere in the state—in 68 of 72 counties—including the biggest cities and the smallest rural areas. Support for Trump grew in the most-white places and also the most-Black and most-Hispanic in terms of population. Growth in Trump support was not closely correlated with increased turnout. Both his supporters and opponents were highly motivated to vote. Still, it's easy to get carried away by a Trump popularity narrative. Trump's increase in support in Wisconsin, while geographically widespread, was small. Relative to 2020, his share of the vote grew by 0.77 percentage points—

In a narrowly divided state, shifting political geography
The partisan lean of neighborhoods where Wisconsin's Democratic and Republican voters live, 2000 and 2024



Wisconsin is becoming more politically polarized, a trend that has significant implications for redistricting. In the 2000 presidential election, a third of voters lived in neighborhoods where the percentage of support for the parties differed by single-digit margins. By the 2024 election, fewer than a quarter of voters lived in neighborhoods that were so closely divided. In addition, in 2024, 20 percent of Democratic voters and 5 percent of Republican voters lived in neighborhoods that overwhelmingly favored their party, more than twice the percentages of those living in lopsided neighborhoods in 2000 (then 9 percent of Democrats and 2 percent of Republicans). John D. Johnson created this figure using data from the State of Wisconsin.

the third-lowest increase in the country and the lowest among all swing states. Yet it was enough.

Important trends in Milwaukee home ownership

The City of Milwaukee maintains an unusually old and extensive database of property information, with annual records for each year archived since 1975 and almost 100 data points on each property. These data, combined with transaction records, have been a particularly helpful tool for me in seeking to answer many questions about Milwaukee's housing market. Naturally, the data are specific to Milwaukee, but our findings have drawn considerable interest from people in other midwestern cities, whose experiences, it turns out, have been similar.

The mortgage foreclosure crisis and the fallout from the Great Recession lasted longer and affected more households in Milwaukee than the national average. Citywide, 14 percent of all houses experienced at least one foreclosure from 2007 to 2016. In some neighborhoods, this was more than 30 percent. Using granular parcel and transaction data, I was able to trace, in exacting detail, the scope of Milwaukee's foreclosure crisis and who ultimately acquired those properties.

In broad strokes, here is what we learned in Milwaukee. As more and more Milwaukee houses hit the market at basement prices, they were often purchased by a growing number of individual investors from states such as California, Texas, and Illinois. These investors shared tips and strategies on web forums. By their own admission, many of them had no connection to Wisconsin, and some never even visited the state. Rather, they contracted with local property management firms to handle the operations side of things. Some of these investors bought only a handful of properties, while the largest would gradually acquire up to several dozen.

Large corporate single-family-housing investors such as Invitation Homes and American Homes 4 Rent entirely avoided

[V]oters in Wisconsin might be easier to predict than anywhere else.

Milwaukee and cities like it in favor of sunbelt metro areas. But the smaller investors understood something that those large companies may have missed. Milwaukee, despite its shrinking population and often-dilapidated housing stock, was still a very profitable place to be a landlord, simply because rents were remarkably high relative to home values.

As this rental market dynamic became more widely understood, a group of out-of-state companies with private equity funding (three, by my count) began buying up *hundreds* of single-family homes and duplexes across the city's north side. This buying activity began in the late 2010s, around the same time that the homeownership market slowly began to recover. Yet beginning in 2018, the city ended each year with steady net increases in the number of owner-occupiers. Many of these owner-occupier increases were happening in the same neighborhoods as where these new corporate landlords were buying houses. Obviously, this raised a new question. If large corporate landlords were increasing their portfolios at the same time as the nascent wave of new owner-occupiers, who was buying from whom?

I found the answer by matching real estate conveyance records with parcel data. This way, I could see not just the names of the grantor and grantee but also the address of each and the legal nature of the transaction. I found that, whereas during the housing crisis landlords bought houses previously owned by distressed owner-occupiers, beginning in the late 2010s corporate landlords built their holdings by buying out entire portfolios of smaller landlords. Rather than buying from owner-occupiers, the new breed of corporate landlords was competing *with* would-be owner-occupiers for the same pool of homes owned by smaller landlords looking to get out of the business.

Our research into these larger landlords—their competition with prospective homeowners and their negative implications for tenants—landed at the right time. Public concern about the phenomenon was growing, both in Milwaukee and in other cities. One useful policy response to the phenomenon was a multimillion-dollar housing acquisition fund created and managed by the local nonprofit Acts Housing but attracting funding from the public sector. The goal of the fund is to compete in the same market as the large corporate landlords. Using the fund, Acts can complete all-cash, even whole-portfolio, transactions with landlords leaving the business, as well as participate in foreclosure auctions. Acts Housing then sells the properties to new homeowners, who complete its financial counseling program, and the proceeds of the sales replenish Acts' acquisition fund's capital. Our research, I have learned, was instrumental in making the case for why this approach was needed to foster homeownership opportunities in Milwaukee.

The work didn't stop there. After matching property ownership records manually for several research projects, a colleague and I decided to expand the analysis to the whole city, automate many aspects of it, and publish the results. We created a website, mkepropertyownership.com, where a user can input the address of any residential rental property in the city and immediately view the web of discrete legal owners (usually LLCs) associated with that property. To my knowledge, this website made Milwaukee just the second U.S. city to have such a resource when we published it.

This method of linking individual parcel ownership records is called "network analysis." Combined with Milwaukee's remarkably extensive archive of parcel ownership records (again, dating back to 1975), it would be possible to calculate ownership networks in each prior year and to link them from one year to another. This analysis, which I intend to conduct in the future, will allow us to understand the degree of owner concentration which exists in each segment of the rental market *and* the ways in which that concentration has evolved over time.

Why the number of housing units stays the same as population declines

Understanding who owns Milwaukee's properties is only half the housing market puzzle. The other half is the demand side—who lives here? Studying how Milwaukee's population is changing reveals much about the current (and future) demand for housing, schools, and amenities generally.

At first glance, Milwaukee's demographic trajectory presents a mystery. The city's population has fallen in every census since 1960. Since 1990, the population has fallen by 8 percent. Why hasn't demand for housing cratered? Why is Milwaukee not like Detroit, where swaths of the city have been practically abandoned? The answer is twofold.

First, even though the total population has fallen sharply in Milwaukee, the number of occupied housing units (or "households" in census speak) has remained about the same. Since 1970, the number of two-person households has remained about the same; the number of households with three or more members has fallen by 32,000; and the number of single-member households has risen by 33,000. From 2010 to 2020, Milwaukee's population fell by about 17,600, but the city actually *added* 5,200 more households. Even as the population falls, the demand for new housing is growing because more people want to live alone.

The second reason why Milwaukee's housing market didn't crater like Detroit's is a little more complicated. (1) Milwaukee has actually experienced the Detroit scenario of outright depopulation (shrinking population *and* fewer households), but that depopulation has been limited to 57 of the city's 210 census tracts, mainly on the near north side.

The rest of the city has experienced something else. (2) Over the first two decades of the 21st century, 34 tracts experienced a *building boom*, where new

construction fueled population increases. (3) Another 33 tracts didn't build any new housing, but actually saw a small population increase because *immigrants with larger families moved in*. (4) The largest chunk of the city (86 tracts) underwent a *stable decline*.

Anyone seeking to grow Milwaukee's population must grapple with these four different trajectories.

In Milwaukee, land is cheap (approaching "free" in some neighborhoods), empty lots are numerous, and existing land-use rules are not particularly restrictive. I've identified hundreds of privately held empty lots where an owner could already build a four-unit apartment building by right. In fact, no housing is built in these places because, in about half of Milwaukee (the half containing the lion's share of empty lots), it's impossible to build and sell a conventional house (or apartment building) without losing money.

The basic problem in Milwaukee, and, indeed, pretty much everywhere in the United States, is that the hard costs of homebuilding have reached unprecedented heights. My favorite way to show this is by comparing the construction costs of common Milwaukee homes with the wages earned by ordinary workers during the year when the house was built. For example, in 1890, a typical carpenter salary in Milwaukee was $588, and a simple cottage could be had for $1,000 (1.7x salary). The quality and cost of housing increased over the following decades. By 1929, a simple bungalow cost $6,200, or 2.7x the average carpenter's salary of $2,238. In the early 1950s, carpenters earned $5,595 on average, which meant that the cost of a standard new Cape Cod home ($13,800) was 2.5x the salary. In 2025, the cheapest new house in Milwaukee cost $349,000; the average carpenter earned $62,260, meaning that house would cost 5.6x income.

These numbers are imperfect measures, but they're illustrative. It costs many more multiples of a typical salary to build a house today than it cost when our cities, towns, and villages were built. This is the fundamental problem afflicting almost everywhere in America, and liberalizing land-use rules won't solve it in most places because the cost to build is unaffordable to typical workers. We need solutions that reduce the cost of construction itself.

How to tackle a research idea

The projects I work on all feature quantitative elements. Sometimes I use more complex statistical modeling, but often only simple arithmetic is needed. The harder part is narrowing big policy topics into tractable research questions and finding data sources—sometimes novel ones—to answer them. Often, a research-ready dataset about my specific topic is not available, so I have to get creative, finding other administrative datasets that can shed some light on my own question.

My housing market research program is a good example of this. The main data sources I used were the city assessor's tax rolls and the digital records of property transactions filed with the Wisconsin Department of Revenue. Both of these data sources exist mainly to help the local and state governments levy taxes. Neither of them was designed for longitudinal property ownership analysis. If they had been, many things about their structure and quality would have been different. Nonetheless, after careful data cleaning, matching, and cross-validation, I could extract from each source the information I needed to answer my own research questions.

To a remarkable degree, the tools needed to do this work are now freely available as open-source software. I mostly use the programming language R for all my data cleaning, wrangling, modeling, and geospatial needs. (These days, I use it for writing reports and building simple websites as well.) I aim to never manually alter my source datasets, which remain saved in their original form. All changes to the data are preserved and documented in programming scripts (and their outputs). This practice does not eliminate the risk of errors, but it does mean that the source of those errors is preserved for me or someone else to find.

Insights into the demographic future

I wonder a lot about what a declining population means for Wisconsin generally and Milwaukee specifically. Wisconsin's official state demographic projections predict that the state's population peaked in 2020 and will be 3 percent smaller in 2050. As Wisconsin's population ages and shrinks, how will that affect Milwaukee?

Births to Milwaukee moms are falling, which isn't a surprise—it's true pretty much everywhere. But what is surprising is the pace. Births in 2025 were down 5 percent from 2024 and 29 percent since 2010. That drop-off is happening much faster in the city than the suburbs (or the state overall). Obviously, this has all kinds of implications for the

It costs many more multiples of a typical salary to build a house today than it cost when our cities, towns, and villages were built . . . . We need solutions that reduce the cost of construction itself.

city, beginning with day cares and schools.

Long-term insights from the Marquette Law School Poll

Part of the original purpose of my appointment here in 2016 was to support the work of Charles Franklin, who serves as professor of law and public policy and director of the Marquette Law School Poll. In the 14-plus years our poll has existed, we've seen a realignment in who identifies with which party. Back when we started, Democrats handily outnumbered Republicans in the state, but Republicans could pretty often win midterm elections and were dominant in low-turnout April elections. Now things are exactly reversed. The state now has fewer Democrats than Republicans, but those Democrats are much more likely to show up to vote. Our polling gives an amazing window into how that realignment happened.

The state now has fewer Democrats than Republicans, but those Democrats are much more likely to show up to vote.

On a different note, I think our polling from the spring of 2020, right at the beginning of the COVID-19 pandemic, might be some of the most fascinating data we collected. Looking back, it's easy to remember the pandemic as a time of vitriolic division over masks, vaccines, "social distancing," etc. But I remain struck by the remarkable unity among Wisconsinites during the initial months. In March 2020, more than 80 percent of all party groups supported mandatory social distancing measures. In that same late-March poll, we asked about 200 people to describe in their own words, "How has the coronavirus outbreak affected you and your family?" and "What should the state and local government do to deal with the coronavirus outbreak?" For many, it's impossible to discern party or ideology from their answers. That changed in the following months, but it's important to know that the divisions we remember emerged over time and were not baked in from the start.

Each county's most common domesticated animal

I grew up walking distance from my grandpa's farm. At one time or another during my childhood, we raised and butchered chickens, grew and sold flowers, and ran a U-pick strawberry farm. One of my earliest memories is of my grandpa's hog operation, just before he gave it up, unable to compete with the huge Concentrated Animal Feeding Operations (CAFOs) coming into the market. So I've always been aware of how hard farming is and how the increasing scale of the largest operators is changing the business.

Using data compiled by the U.S. Department of Agriculture, I made a map of the nation's counties, showing the most common domesticated animals, first to answer my own curiosity and, second, to help other people understand how massive animal agriculture is—even when you can't see it. To return to the hog example, in McDonough County, Illinois, where I grew up, pigs outnumber humans three to one. But these days, you could drive across the county on back roads without ever seeing one. That's because 99.4 percent of the county's hogs are raised in just nine massive CAFOs.

Finding the remotest spot in each Wisconsin county

I enjoy hiking in remote areas. I got to wondering what the remotest spots in each county were. For starters, I had to decide how to define *remotest*. I decided on "the farthest point from a road accessible to a car." If you defined it differently, you'd get a different answer, of course.

Then, I had to figure out how to calculate these points. This ended up being conceptually simple, but computationally expensive (which is to say, you need a powerful computer to do it). Here's how: Take every road in the state, buffer it by an equal amount on each side (let's say, 500 meters), and subtract those buffered roads from the area of the state. You're left with a bunch of polygons, the edges of which are 500 meters from the nearest road. Then, find the centroid of the biggest circle you can draw inside each of those polygons. The centroid of the circle with the biggest radius is your "remotest" point. The radius of the circle plus 500 meters is the distance to the nearest road.

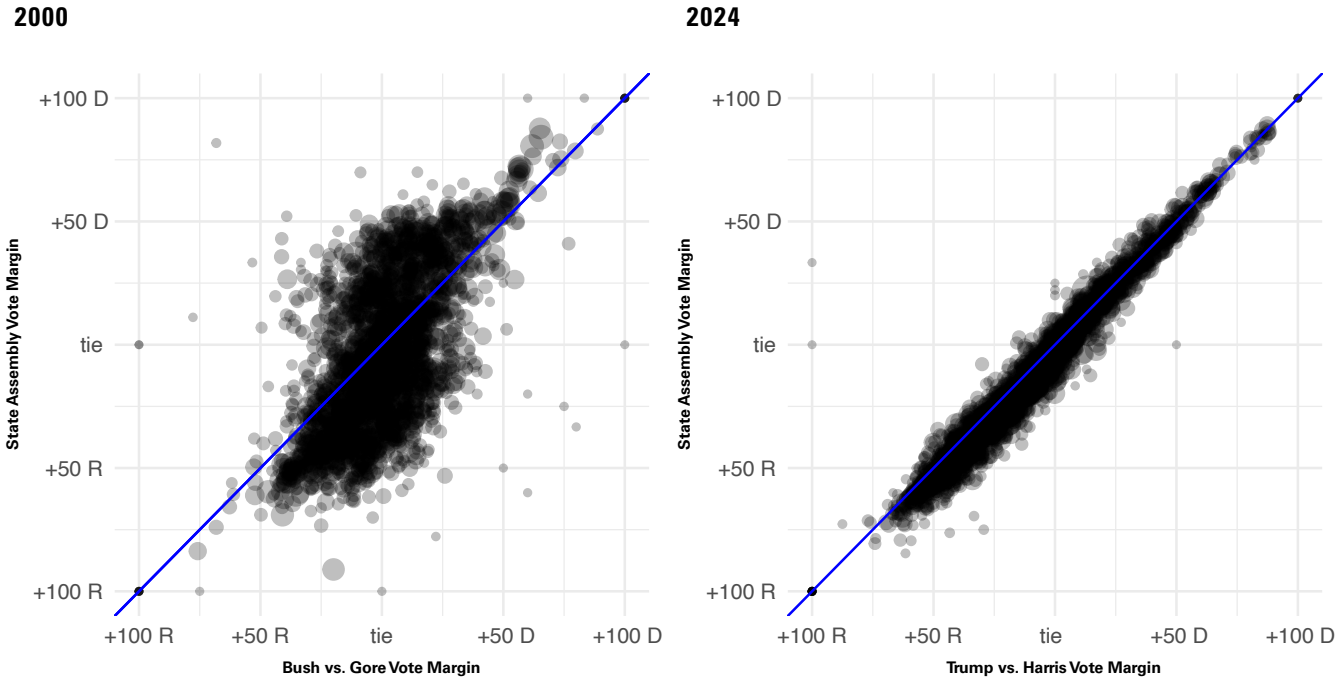
One thing I learned from this exercise is that we have a *ton* of roads. The farthest you can get from a road in mainland Wisconsin (leaving aside the Apostle Islands and Lake Winnebago) is 2.37 miles. That point is in the Bad River Band's reservation in Ashland County, near Copper Falls State Park.

Upcoming interests

I'm tracking the 2026 state legislative races in Wisconsin. This is the second election with our new maps, which give Democrats a real shot at winning a majority. However, Republican state legislators have usually been more popular than other kinds of Republicans. Will this be the year that Democrats finally win a majority of either (or both) chambers?

After this election, we'll enter a narrow window of time where

Declining ticket-splitting
The correlation between vote for president and vote for Wisconsin State Assembly



This figure reflects the increased correlation between the party vote margin for state assembly and the party vote margin for president in each Wisconsin voting tabulation district—i.e., less ticket-splitting. Each dot is sized according to the number of votes cast in the tabulation district. John D. Johnson created this figure using data from the State of Wisconsin.

I think the state government *might* consider reforms to the redistricting process before the 2030 reapportionment. I'll be tracking and evaluating any proposals that emerge, whether from elected officials or outside groups.

On the housing side of things, I want to learn more about the components of housing cost. Our big problem is that conventional construction just costs way more (as a multiple of typical wages) than it ever has before. Manufactured and modular housing is much cheaper, and, in rural Wisconsin, it's quite common to see lots of these kinds of houses. But we rarely see manufactured or modular homes in established cities or suburbs. Why not?

I'm also looking forward to solving a mystery about Milwaukee's population. The Census Bureau models annual net domestic migration at the county level, and its estimates show a net loss of 36,000 people moving from Milwaukee County to somewhere else in the United States from 2020 to 2024. This is not a trivial amount—it's equal to almost 4 percent of the population. A loss of this many people in such a short time seems consequential to me. I want to figure out several things. First, did this actually happen, or is it some artifact of pandemic complications with the data? Second, if it did happen, where did those people leave from? Looking at the past 20 years, the lion's share of the county's population loss occurred in just a few dozen census tracts covering the central city's north side. Does this hint at out-migration reflect a sudden flood of people exiting those neighborhoods?

Beginning with a love of maps

People sometimes ask how I got into research. I loved maps as a kid and would pore over old atlases. At some point we got a digital copy of *Encyclopedia Encarta* on CD-ROM, and I practically wore that thing out. My favorite subjects have always been history and geography, but I figured out pretty quickly that neither of those has a career path. Statistics rule the world today, so I decided to focus on that. Still, I try to bring a bit more of a qualitative and historically grounded approach to my work. Most of my reading is history.

When I finished graduate school in December 2015, I immediately began looking for work. My backup plan was teaching English overseas, and I was about a month away from moving to Korea when I was invited to interview with Marquette Law School. I've been here ever since. Besides my excellent colleagues, my favorite thing about working here is being in a place that encourages broad inquiry while grounding the research process in important, real-world issues. ■

The Haunting of American Trademark Law

KALI N. MURRAY

The retirement of trademarks such as "Uncle Ben" and "Aunt Jemima" during the fulcrum of the Black Lives Matter movement prompted scholars to reconsider how trademark law protected various marks that perpetuated images built on a terrifying scaffold of racist imagery. In many ways, though, this reckoning stopped without a full accounting of trademark's fraught relationship with social identities of race and caste in the United States.

Indeed, if we simply sit with the vocabulary of trademarks, we can see the ghosted remnants of trademark law's relationship with enslavement. We "brand" ourselves as enslaved people were "branded" by an iron. We "pass off" the goods of another as a person could "pass" from one race to another. We "register" a mark today as enslaved people then received a new name and had their new name "registered" on a ship register.

The "haunting" of trademark law, though, does not rise simply from the remnants of an older order glimpsed through this vocabulary. What we understand as trademark law was formed in the fulcrum of what I term the "enslavement economy," which describes the political, economic, and social order produced by the process of enslavement imposed throughout the Atlantic World. As Professor Roberto Saba notes:

> Slave labor was central to the making of the modern world. It gave Europeans the means to occupy and develop the Americas. The trade in slaves helped merchants accumulate capital that was reinvested in agriculture, industry, and infrastructure. Slave plantations produced the sugar, cotton, and coffee that propelled the industrial revolution in the North Atlantic countries.


January 22, 1820. 3w699

Ran away from the

Subscriber on the 24th inst. a negro boy named GEORGE. He is 18 or 19 years of age, 5 feet 8 or 10 inches high, of a dark mulatto color, well made, and of a good appearance. He had a green cloth short coat, a blue plains short jacket, and a fine hat somewhat worn, when went away. He is generally very neat in wearing his clothes. He was brought from Washington county, and has been my servant for the four last years. It is supposed he is in company with one or two other negroes that belong to persons in Halifax county. As he left me without any provocation, he will probably aim for Norfolk, or some other seaport town, in order to secure his final escape. Any person apprehending and securing him in gaol, or delivering him to Mr. Peter Evans, in Edgecombe county, shall be liberally rewarded. He has travelled considerably, and may endeavor to pass himself for a free fellow.

George E. Spruill.

Scotland Neck, Halifax County, Jan. 13, 1820. 4w699

Figure 1

Trademark law is an ideal place to consider the relationship of intellectual property to the political, social, and economic system of enslavement. Trademarks, which protect the commercial signs associated with the goods and services of its users, seem to be intimately connected to the economic practices of enslavement, either because a slave market would advertise its services in selling enslaved individuals using trade names or because goods like sugar or cotton produced by enslaved persons would be trademarked.

I use fugitive slave advertisements—advertisements placed in colonial and antebellum newspapers that sought the return of an enslaved person to their enslaver—to explore the relationship of trademark law and the construction of race and caste in the United States. Fugitive slave advertisements are understood to be a crucial part of the social, cultural, and economic history of enslavement. Figure 1 depicts an

example of a fugitive slave advertisement placed by George Spruill in the *Edenton Gazette* and the *North Carolina General Advertiser*, in Halifax, North Carolina, in 1820, seeking the return of George, an 18- or 19-year-old enslaved person.

This advertisement contains hallmarks of the fugitive slave advertisement: a stylized picture of an escaping individual, a description of the individual, and, indeed, a claim that the individual sought to "pass himself for a free fellow."

This essay adds to a substantial, interdisciplinary literature on fugitive slave advertisements. Uniquely, I read them as though they are a legal source, much like a legal opinion. Jonathan Bush has identified what remains a significant problem in the study of the law of enslavement, that is, its reliance on the public law embodied in criminal law, rather than through private mechanisms, such as tort and contract law. Overlooking these private law mechanisms results in a paucity of legal opinions. This paucity of legal source is intensified because the law of England did not offer sufficient analogues to the experience of Atlantic slavery, thus making it difficult to incorporate into preexisting legal doctrines.

Bush's critique of "sourcing" the law of enslavement could extend to the specific development of trademark law as well. Indeed, as early as 1925, Frank Schechter identified a key problem in understanding the development of trademark law: that it is difficult "to . . . determine[] the actual point of contact between the fragmentary law of trade-marks as developed in the guilds and the modern common law and equitable doctrines of trade-mark law." Fugitive slave advertisements are also useful for a practical reason: they are now more accessible given recent efforts to successfully digitize these advertisements. In this essay, I will be relying on two databases, the North Carolina Runaway Slave Notices Project, which has fully digitized images associated with fugitive slave advertisements, and the Freedom on the Move Project, which has crowdsourced information about more than 33,000 fugitive slave advertisements (although its images are not transferable from the website).

Fugitive slave advertisements offer us one way to explore how the legal framework of both enslavement and trademark law was created, in light of the sparseness of "official" texts like legal opinions or statutes during the colonial and antebellum period. In this essay, I use fugitive slave advertisements to examine how "the haunting of trademark law" helps us comprehend two fundamental elements of the legal history of trademark law. In Part I, I explore how trademarks operate as both information forms and information systems in the construction of the social process of market exchange. In Part II, I explore how the informational content of the fugitive slave advertisement helps us to retrieve the "ghost texts" and the "haunted texts" of trademark law. In highlighting the historical methods associated with Atlantic history and diasporic studies, I explore how the fugitive slave advertisements and enslavement economy visualized the status marks that sought to bridge local, regional, and national slave markets in the colonial and antebellum United States.

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What does the haunting of American trademark law teach us? Initially, the ghost text speaks to what is very often absent in our understanding of the development of trademark

Professor Kali N. Murray joined the Marquette Law School faculty in 2007. She is codirector of the school's intellectual property program and has published widely on intellectual property, administrative law, and property. This piece excerpts the introduction and conclusion of her recent essay, *Seeing the Dead: Marks, Meaning and the Haunting of American Trademark Law*, 103 Tex. L. Rev. 1499 (2025).

law in the United States: its origins in, and relationship to, the system of enslavement that endured in the Atlantic world until Brazil abolished slavery and emancipated enslaved African communities in 1888. I foreground how an enslavement economy built on visualized marks of status sought to bridge local, regional, and national markets of enslavement. It seems to me the ghost text demonstrates how trademark law, given its ongoing relationship with other forms of commercial law, is an ideal place to consider the relationship of intellectual property and the political and economic system of enslavement. Trademarks—which protect the commercial signs associated with the goods and services of its users—are intimately connected to the economic practices of enslavement.

Likewise, the "haunting" of American trademark law by the haunted mark also widens the scope of our understanding of how trademark law developed in the United States by focusing on the ways in which trademark law was embedded in the public regulation of colonial and antebellum markets. For example, Mississippi's 1822 An Act Concerning Strays and Drovers, Horses, Cattle, and Other Stock, and Directing Stock Brands and Marks to be Recorded not only designated *who* could engage in the act of branding ("the act of status branding") but also required "any horse, cattle or other stock" to have a "brand and ear mark different from the brand and ear mark of every other person in the same county," "required ear mark and brand shall be recorded in the office of the clerk," and resolved "any dispute shall arise respecting the brand or mark." Debates over the development of trademark law have typically focused on the *private* law of trademark by tracing its histories through tort actions between competitors. However, the status brands suggest a *public* law of trademark, where trademark law functioned as a way to control the social meaning of visualized works. Further work in this area may help us to understand the consolidation of trademark law in the United States in the late 19th century.

Debates over the development of trademark law have typically focused on the *private* law of trademark by tracing its histories through tort actions between competitors.

To conclude, the ghost text and the haunted text offer us two ways to further understand the law of enslavement in the United States. First, regarding fugitive slave advertisements as legal sources offers us a way to trace the informal and formal mechanisms of a legal system dedicated to enslavement. Fugitive slave advertisements were written by enslavers (with the potential support of newspaper staff), and thus offer a way to map non-elite opinion on the status of enslaved persons within the colonial and antebellum United States. Runaway advertisements described enslaved individuals as property, reflecting common conceptions of legal statute. Indeed, considered study of runaway slave advertisements can be seen as a sustained counternarrative to the types of legal narratives seen in the published opinions of elite judges.

Second, both the ghost mark and haunted mark help us contemplate the relationship of intellectual property to broader values within a democratic society. The ghost text helps us to comprehend how the visual landscapes developed during the colonial and antebellum United States. Professor Rebecca Houze describes the visual landscapes as a way to navigate a "built environment" in which "we encounter many images and objects, which are both strange and familiar. They are part of a shared language, a visual vocabulary of the collective imagination." Runaway slave advertisements allow us to "reconstruct" the visual landscapes of colonial and antebellum United States, which permits us to trace how modern commercial relations, and its accompanying signs, shaped the markets, farms, waterways, and plantations of the modern United States (and elsewhere). Understanding how the visual landscape of the United States developed, trademark law is situated to answer broader questions of political economy—that place where political and economic structures intertwine to produce social meaning in information. For example, seeing anew the country mark and the ways in which it served as both a mark of origin and a political identity helps us to understand how the modern trademark seeks to police self-identity.

The haunted mark speaks to another dynamic within a political culture: the relationship of law to the political subordination of specific groups within a society. I have argued elsewhere that intellectual property law needs to engage and explore how it enforces social hierarchies of "race" or "gender" by "defining a status, by reinforcing a status, and by drawing boundaries between different statuses." Katrina H.B. Keefer refers to the branding of an enslaved person as simultaneously an "act of violence" that was also an "act of industry and capitalism" that allowed "slaveholders and slave traders to mark those they believed to be their property; it was a fundamental commodification of the human body." The enslaved brand was a central act of enslavement; it marked "a transition from human to commodity." The pervasive marking of the human bodies glimpsed in runaway slave advertisements defined the status of an enslaved person by providing visible indicia of a subordination. The markings reinforced that status through the sheer horror of physically defiling the face or body of that person, ultimately offering a visualized boundary between a person and non-person, a citizen and what Chief Justice Roger Taney referred to (Black Americans) in *Dred Scott v. Sandford* as mere "ordinary article[s] of merchandise." ■

MARQUETTE UNIVERSITY
LAW SCHOOL POLL

Insight from the Marquette Law School Poll Goes Beyond Election Contests

The horse races are always going to get big attention. That's a fact when it comes to results of the Marquette Law School Poll. Who is ahead in the campaigns for president or senator or governor and what the trends in support are—the poll data on these questions make news, both in Wisconsin and often nationwide. Just about no one doubts that the poll has become the best and most reliable way of gauging opinion in Wisconsin.

This is partly because the Marquette Law School Poll surveys much more than the status of campaigns. Both as to Wisconsin and with national samples, each round of polling gets at what people think on a wide array of matters. These results get less attention but offer valuable windows on public opinion, and they are part of the reasons that Nate Silver, founder of *FiveThirtyEight*, recently rated the Marquette poll as no. 2 in the entire nation, out of more than 500 that were considered.

Here are a few recent highlights.

Data centers. The Marquette poll of Wisconsin in February revealed a dramatic increase in opposition to large data centers. In October 2025, the poll found that 55% of those polled in the state regarded the costs of the energy-intensive centers as outweighing the benefits, while 44% said the benefits outweighed the costs. By February 2026, opposition had grown, with 70% seeing the costs as greater and only 29% seeing the benefits as greater. Furthermore, in October, there was virtually no difference in opinion based on partisanship. But in February, even with opinion among Republicans being little changed (43% seeing greater benefits, 55% greater costs), opposition among Democrats and independents soared. Among Democrats, 56% saw the costs as greater in October, but 85% said that in February.

Professor Charles Franklin, director of the poll, called it "one of the most sudden changes in public opinion we've seen in 14 years of the Marquette Law School Poll."

School spending. Most shifts are gradual but no less illuminating. A good example: Since 2013, the poll has asked Wisconsinites 26 times which is more important to them: reducing property taxes or increasing spending on public schools. In 2013, opinion was close to evenly divided. In following years, peaking in 2018, support grew for school spending, such that it outpolled tax reductions until 2023. But in eight polls starting that year, tax reduction drew more support. In February 2026, the results had climbed to 60% for tax reduction, 40% for public school spending.

That discovery aligns with results on a separate question, which have shown a trend toward opposing local school referendum proposals. Together, they indicate the headwinds facing advocates of increased school spending in Wisconsin.

"The point is slow but steady change in opinion over several years, in contrast to the sudden change on data centers," Franklin says. "This illustrates the value of having long-term polling with a consistent question to track opinion change."

Partisan divides beyond elections. On some issues, even ones related not to campaigns but to perceptions of what is going on, Marquette polls for years have shown the striking impact of partisanship on people's views.

Consider the overall cost of groceries: Is it up or down over the last six months? Republicans these days are much less inclined to say that grocery prices have gone up than Democrats or independents. Or consider immigration or inflation: Republicans see immigration problems as more serious than do Democrats and attach much more urgency to immigration and border control. While majorities of all partisan groups think inflation and the cost of living are of great concern, only 57% of Republicans say this, compared to 86% of Democrats.

In Marquette's national polls, perceptions of the U.S. Supreme Court also show partisan differences, with Republicans much more likely to approve of the Court's work than independents or Democrats. That is today. But in July 2021, 58% of Republicans and 60% of Democrats approved of how the Court was handling its work. The past five years have seen a remarkable shift from bipartisan approval to a deep divide.

In Wisconsin, the race for the open seat for governor will be a big story in the second half of 2026. And the presidential election of 2028 is on the horizon. Count on the Marquette Law School Poll to keep the public informed on how those races shape up. At the same time, count on the poll also to continue to offer insight into a much wider range of issues. ■

FROM THE PODIUM

RANDY DEAN

Michael Lenard's Olympic-size Commitment to Hard Work

On October 17, 2025, the National Sports Law Institute (NSLI) presented its Master of the Game Award to Michael Lenard in the Lubar Center at Marquette Law School. Lenard is vice-president of the international Court of Arbitration for Sport (CAS), based in Lausanne, Switzerland, whose jurisdiction includes resolving disputes in connection with the Olympic Games; he is a longtime member of the NSLI's board of advisors. Among the presenters of the award was Randy Dean, a Milwaukee native and former NFL quarterback, whose remarks focused on Lenard as a person.

Michael Lenard, flanked by Professors Paul Anderson (left) and Matt Mitten, in Eckstein Hall after receiving the National Sports Law Institute's Master of the Game Award.

I am honored to have been asked to make some brief remarks about Michael Lenard in connection with this Master of the Game Award. The résumé, the achievements, and the awards and recognitions are all testament to a remarkable, dedicated, highly intelligent individual, leader, athlete, teammate, and friend.

The friendship, essentially a brotherhood, among my twin brother, Rob, Michael, and me, started in elementary school, maybe even kindergarten. And even in the fall of 1972, during our senior year at Whitefish Bay High School, little did the three of us know that the arrival of alum Dennis Berkholtz, captain of the 1972 U.S. Olympic handball team, to introduce the new sport of team handball into the PE program, would lead to a seemingly quixotic journey for the three of us to the Olympics—and, for Michael, to decades of service to and leadership of the integrity of Olympic and international sport. Forty-five years later, in 2017, Michael would be the recipient of the United States Olympic Committee's Torch Award, in recognition of his outstanding service to the U.S. Olympic movement.

As Michael admits and coaches have assessed, he was not blessed with the athletic ability of some other players. This only motivated him to work harder, in the Olympic spirit of "faster, higher, stronger." Michael's assets included being smarter than all of us about the game of handball, and just generally smarter, and being that perfect teammate who made everyone around him—and ultimately the team—perform better.

Rob and I were fortunate to be selected for the 1976 Olympic handball team. Michael would have made the 1980 Games, but the United States boycotted. He earned a spot on the 1984 team, winning multiple national championships and international competitions along the way. He did this while balancing demands of practicing at a major law firm and investing his skills and talents in the U.S. Olympic organization in support of athletes.

His playing career in the past and despite national and international demands for his professional expertise, Michael has always been available to serve and support teammates and friends. He skipped the ceremony for the Torch Award because of his commitment to attend the wedding of his dear friend and colleague John Coates in Australia. He is the "go-to" person for eulogies, which, though not something anyone desires to do often, is an honor. Two and a half years ago, when my brother, Rob, passed away suddenly, Michael pivoted and coordinated the delivery of an Olympic flag to Rob's funeral.

This past week, it was a rare gift to have dinner with Michael, to catch up and reminisce about our youth together, intense backyard 2-on-2 basketball games, handball training camps, teammates, competitions, and perspectives on our journeys. It was an overdue and heartfelt reminder of how much I admire Michael and all that he has accomplished—and even more so, how fortunate, grateful, and blessed my late twin brother and I have been to have Michael as a lifelong friend and teammate.

Congratulations, Michael. ■

JOSEPH D. KEARNEY

Lasting Lessons from Louie Andrew's Life as a Learner

Louis J. Andrew, Jr., L'66, became much involved in the advancement of Marquette Law School some 30 years after graduation—and remained so for the next three decades. Today, the Law School is home to the Andrew Center for Restorative Justice, established in 2022 with the generous support of Louis and his wife, Suzanne Bouquet Andrew, Sp '66. In remarks at a gathering after a funeral Mass for Louie Andrew at the Cathedral of St. John the Evangelist in Milwaukee on November 24, 2025, Dean Joseph D. Kearney remembered this alumnus and friend.

Flying was among the many joys and passions that defined Louis J. Andrew, Jr. Pictured here as an adult, he was the youngest pilot in the country for a short time: On the morning of his 16th birthday, Louie received his pilot's license and made his first solo flight.

My connection with Louie Andrew began with Dean Howard Eisenberg, who recruited me to join the Marquette Law School faculty in 1997. That was only about a year after Howard had caused Louie to renew his own connection with his alma mater: In remembering Howard after his death in 2002, Louie would write that he (Louie) "really had not been involved with anything at the Law School" since graduating some 30 years earlier, in 1966, but that Howard inspired him and Sue. It was a great privilege for me, as a junior faculty member, that Howard introduced me to Louie and that the group of us would go to the occasional Milwaukee Brewers game together, as a beginning connection. I continue to have the master scorecard that Louie had created and of which he made a gift to me, including the magnanimous inscription, "Go White Sox."

Louie's connection with Marquette Law School in the ensuing years came to include Janine Geske and, eventually, Mike Gousha, among many others. It expanded to encompass restorative justice, the possibility of a law school building project, and just about anything else whereby the Law School might grow and develop. Louie had a remarkable habit of engaging with people, seeking to learn from them, and, often in the most indirect way possible (and always in the least showy way), of teaching them things. I learned an extraordinary amount from Louie, and I know this to be true of many others.

This past weekend, I went to my "wayback machine," as I sometimes call my old emails. With some people, I could reconstruct very large portions of our work together by going through our back-and-forth emails. I knew this not to be the case with Louie, with whom the in-person connection was central. (How he could be present so consistently at Marquette Law School—for example, as chair of the Law School Advisory Board and as a member of the steering committee during the Eckstein Hall building project—from Fond du Lac, I had and have no idea, but we may leave that aside.)

Yet, in my lookback yesterday, I was struck by one of the first emails that he sent me (this was in 1999). He included references to my wife, Anne, and how lucky the legal profession in Milwaukee was to have her; to his daughter, Sara, "now a junior in the business school" at Marquette, who was enjoying it "very much"; and to his fundraising work with Howard for the Law School. Here, though, from that email, is what was especially occupying Louie's attention on Saturday, January 23, 1999:

> Today I am spending the day plotting a route on a map through France. I was invited to go on a race in a vintage car race from London to Monte Carlo.
>
> The race starts next Saturday. I am the navigator in our car. The course is a very intricate route thru the north and east sides of France going through the mountains. I'll tell you about it when I am back. We are driving a 1927 Packard owned by my friend. No heater in the car.

I learned a good deal about Louie in that exchange, reflecting, as it did, an interest in my family, in his own family, in the advancement of Marquette Law School—and in some (if I may) unusual pastime or venture, with a friend, that would make for an interesting experience and from which he might learn something.

Learning is what Louie wrote about in an essay that he contributed to the *Marquette Law Review*,

remembering Dean Eisenberg shortly after his death, in 2002:

> I learned about the Chicago Cubs [I didn't say that everything that Louie learned was good], I learned about Judaism, I learned about dedication and giving, I learned about Phyllis and his family, I learned about what it takes to make a law school tick, I learned about warmth and humor, I learned about success without bragging, I learned about St. Ignatius, I learned about the dedication of Father Wild, I learned about university politics, I learned about wonderful students, I learned about clear, passionate writing, I learned about leadership, I learned about goodness, and I learned what pro bono really means.

Here's what I would say: Of all the many extraordinary people with whom I have had the privilege to work, I don't know that I have ever worked with anyone who embraced learning, or set himself up to learn new things, more than did Louie Andrew.

And yet, all along, it was also we who were learning from Louie. Permit me to relate one other thing that Louie said in his brief essay about Howard: "We all talk about what contribution one person can make in his lifetime to the betterment of the world. This is [someone] who really showed how this can be done." From my own experiences (and, I have an idea, many of yours), I would conclude that Louie was not just a student or learner but, in his own gently inquiring and instructive way, a teacher. Let us all look forward to applying many of his lessons in times yet to come. Thank you. ■

. . . I DON'T KNOW THAT I HAVE EVER WORKED WITH ANYONE WHO EMBRACED LEARNING, OR SET HIMSELF UP TO LEARN NEW THINGS, MORE THAN DID LOUIE ANDREW.

CLASS NOTES


Tim Jacobson


Mary T. Wagner


Nicole Jergovic

76 **Thomas L. Frenn** has been elected treasurer of the Charles Allis Art Museum in Milwaukee.

80 **David H. Kistenbroker** was executive producer for the film, *Becoming Led Zeppelin*, winner in the Best Music Documentary category selected by the 2025 Critics Choice Documentary Awards and winner of Best Documentary in the International Press Academy Satellite Awards.

84 **Brian Carroll** has begun offering mediation services through Concurrence ADR as he continues practicing with Reinhart Boerner Van Deuren, Milwaukee.

90 **Alan Kesner** has become of counsel with the real estate team at Michael Best & Friedrich, Milwaukee.

92 **Tim Jacobson**, in addition to his legal work at Fitzpatrick, Skemp & Butler, serves as board president of Sustainable Driftless, a nonprofit based in La Crosse, Wis., which premiered its latest film, *Spirit of the Driftless: Preserving Our Legacy*, at Viterbo University.

95 **Derek C. Mosley**, director of Marquette Law School's Lubar Center for Public Policy Research and Civic Education, was one of four former 40 Under 40 honorees selected for induction into the *Milwaukee Business Journal*'s 40 Under 40 Hall of Fame.

98 **Kurt D. Dykstra** has been appointed general counsel of the U.S. Office of Personnel Management in Washington, D.C.

99 **Mary T. Wagner** of Sheboygan, Wis., published *Of Bairns and Wheelie Bins*, a guide to understanding British TV detectives, which won two first-place awards in the National Federation of Press Women's annual communications contest.

00 **Lindsey Canonie Grady** has become general counsel and chief administrative officer of Milwaukee World Festival, Inc.

Nicole Jergovic, of Sarasota, Fla., received the 2025 Unity Award from the Association of Prosecuting Attorneys, recognizing her national leadership in strengthening the investigation and prosecution of animal cruelty cases nationwide. She serves as program manager for the Law Enforcement Training Center at Humane World for Animals, where she develops and delivers national training for law enforcement.

03 **Patricia Anderson Fassett**, appointed as a judge of the Superior Court of Washington for Cowlitz County in 2019 by Jay Inslee, governor of Washington, is now serving in her second four-year term.

Danny G. Thomas is founder and principal attorney of BridgePort Legal, in Los Angeles.

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

CLASS NOTES


Laura M. Lyons


Aryeh "Ari" Derman


René F. Jovel


Elizabeth Elving


Naomie Kweyu


Ethan Chmiel

04 **Rachel Monaco** has spoken on somatic skills for resilience and trauma-informed lawyering to groups at West Virginia University College of Law, the Northern District of West Virginia Drug Court Program, Marquette University's restorative justice program, and the National Crime Victim Law Institute. She also has earned overall female champion honors in a variety of competitions "Up North" in Wisconsin: the Ironbull Underdown 60K Ultramarathon, the American Birkebeiner Trail Marathon, and the Port Wing 10K.

05 **Laura M. Lyons** has joined Great American Insurance Group as a senior claims technical director.

Joshua Uller has joined Kuchler & Cotton, Waukesha, Wis., after nearly a decade of service with the Federal Defender Services of Wisconsin.

09 **Aryeh "Ari" Derman** has been named a partner at Clark Hill in the firm's Chicago office. His practice focuses on regulatory compliance in banking and finance.

Elizabeth Miles is now serving as an assistant city attorney for Milwaukee.

11 **Anthony J. Flint** has been promoted to chief legal and risk officer at Ariens Company, Brillion, Wis.

Lucas Kaster has launched a new Minnesota-based law firm, Schlesinger Kaster, focusing on employment discrimination, harassment, and retaliation.

13 **Jessica L. Kramer** was appointed by President Donald J. Trump and confirmed by the U.S. Senate to serve as the U.S. Environmental Protection Agency's Assistant Administrator for the Office of Water.

14 **René F. Jovel** has joined Versiti Blood Health, Inc., Milwaukee, as assistant general counsel. Versiti is a national blood health organization that advances patient care through donations, diagnostics, and research.

15 **Xheneta Ademi** was promoted to partner at Quarles & Brady in the firm's office in Washington, D.C. Her practice focuses on trademark and copyright protection.

Avery Mayne has been named to the *Milwaukee Business Journal*'s 2026 40 Under 40 honorees.

16 **Matthew Ackmann** has been named a shareholder at Reinhart Boerner Van Deuren, Milwaukee, where he practices in the trusts and estates group.

Robert Berry has been named to the *Milwaukee Business Journal*'s 2026 40 Under 40 honorees.

17 **Matthew Carlson** has been elected to partnership at Kutak Rock in the firm's office in Omaha, Neb., where he practices in the tax credits group.

18 **Jessica Lothman** has joined Hawkins Delafield & Wood, with a practice centered on tax-exempt financings, and was elected as vice president of the Wisconsin Chapter of Women in Public Finance.

20 **Elizabeth Elving** has been named to the boards of Next Act Theatre and The Cathedral Center, Inc., an emergency shelter for women and families in Milwaukee.

Xavier E. Prather has joined Foster Swift Collins & Smith in the firm's office in Grand Rapids, Mich., as part of the family law practice group.

21 **Emily C. Boylan** is one of this year's Belle Case La Follette Award recipients, an honor presented annually to a recent law school graduate who as a member of the Wisconsin bar serves underserved populations.

David E. Goldman has joined Winthrop & Weinstine in Minneapolis as part of the firm's employment counseling practice group.

Naomie Kweyu has joined Bell Nunnally, in Dallas, Texas, as an associate, where she focuses on construction litigation, real estate disputes, transportation and logistics matters, and fiduciary litigation.

Keyana J. Payne has joined Hoogendoorn & Talbot in Chicago, focusing on estate planning, trust and estate administration, and probate matters.

22 **Benjamin Crockett** has joined O'Neil, Cannon, Hollman, DeJong & Laing, in Port Washington, Wis., where he is part of the business and real estate, land use, and construction law groups.

23 **Ethan Chmiel** has been promoted to head of legal at Fairbanks Morse Defense, representing the company and its growing portfolio of businesses.

Kendall Means has joined Gordon Rees Scully Mansukhani as an associate in the firm's Milwaukee and Chicago offices, representing clients in investigations and litigation matters in employment and commercial contexts.

Emilie Rohde has joined Reinhart Boerner Van Deuren, Milwaukee, in the firm's corporate law practice.

24 **Patrick Doll** published an article in the *University of New Hampshire Sports Law Review* on the growing use of biometric data collection at sports facilities.

Sadie C. Hobbs has joined Reinhart Boerner Van Deuren as an associate representing clients in commercial and competition law, as well as product liability, safety, and recalls.

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.

MARQUETTE UNIVERSITY

BE THE DIFFERENCE.

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

Ray and Kay Eckstein Hall, home of Marquette University Law School, in Milwaukee, Wis. (aerial view from the south).

A Wider Perspective

Being a law student is demanding. But there's more to life than course studies, right? Marquette Law School knows this and shows it by supporting more than three dozen extracurricular organizations and more than 125 organization events each year. They offer students ways to fuel ambitions, to grow, to connect.

Marquette Law School student organizations cover interests from *A* to *Y*. (Sorry, we don't have any student organizations that begin with *Z* . . . yet.) Groups fostering career interests? We've got them. Helping individuals in society with needs from food to shelter to legal issues? We're big on that. Political advocacy? There's a spectrum of organizations. Connecting with people who have similar backgrounds, experiences, or interests? Absolutely.

We have organizations that can add depth to your academic work. We also have organizations that can connect you with others just to socialize. And there's always room for more. Just this year, we supported the launch of new organizations, including the Private Equity and Venture Capital Law Society, Beyond State Lines Law Society, and Fashion and Art Law Society.

Welcoming. Vibrant. Enriching. Even relaxing. Our student-run organizations aim to make those words ring true for any and all Marquette law students who want to join or even just sit alongside for a little while.

It's part of the Marquette mission: Excellence, Faith, Leadership, Service.