“UNLESS COUNSEL IS PROVIDED”
Insights into the Strengths and Stresses of Wisconsin’s Public Defender System

ALSO INSIDE
Tom Merrill’s “Major Questions” on West Virginia v. EPA and the Future of Chevron
Oldfather on Separation of Powers in Wisconsin
Silbey on the Digital Age’s Challenge to Intellectual Property
Eve Runyon—Insights from a Pro Bono Pro
Letting Time Hang Heavy on Our Hands

Several years ago, I noticed a guest column, in the New York Times or the like, by the author of a successful new book. The headliner promised an essay describing how the author had “procrastinated her way” to writing a best-seller. I took it that the column would describe the diversions, side conversations, interruptions, detours taken, apparent self-indulgences embraced, and numerous other seemingly inapt or collateral things that, looking back, the writer now regarded as important parts of her journey to success.

Admittedly, some of my account is conjectural, as in fact I did not read the article. Perhaps I meant to do so but procrastinated. More likely, I regarded myself as too busy with work to pause to read the column itself.

In any event, the matter is on my mind as we have resumed this year some of the more discretionary or, in a sense, ancillary events at the Law School. During the COVID disruptions, there were fewer outside-the-classroom exchanges—from unplanned conversations after class to distinguished lectures—at the Marquette University Law School. Engaging in these things may be not so much to procrastinate the Law School. During the COVID year some of the more discretionary columns itself.

with work to pause to read the column, perhaps I regarded myself as too busy to do so but procrastinated. More likely, I regarded myself as too busy with work to pause to read the column itself.

At the same time, there is no doubt that we might all learn a good deal from reading this latest issue of the Marquette Lawyer. The topics covered are varied and examined in some depth. The exploration of the challenging work of public defenders in Wisconsin (pp. 4–23), which may be regarded as a case study, offers both glimpses into the larger system. As a reader, you will draw your own conclusions, if any, but I cannot say that I emerge with reinforced great admiration for the work of public defenders.

The 2022 Neis-Lecture on Intellectual Property (pp. 24–33), by Professor Jessica Silbey of Boston University, is a thoughtful take, based on empirical work, of what might be encompassed, in the modern, digital age, within Congress’s constitutional power “to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” To say that Professor Silbey offers, as progress, something different from the traditional take of intellectual property legal doctrine scarcely requires a spoiler alert. There are matters beyond these. The separate pieces (spanning pp. 54–47) of Marquette University’s Professor Chad M. Oldfather and Columbia University’s Professor Thomas W. Merrill engage with the law of different sovereigns (Wisconsin and the United States, respectively) but share a broadly similar substantive focus (on separation of powers) and, one may say, a carefully provocative bent. And the excerpts (pp. 48–54) of our annual Posner Pro Bono Exchange, between the Law School’s Mike Gousha and Eve Runyon, president and CEO of the Pro Bono Institute in Washington, D.C., are informative and inspiring.

Would it be an indulgence to read these things? Perhaps. Would it aid or abet—or, if you prefer, would it help—you in procrastinating? I cannot say, as I do not know what reading this magazine might take you away from (just as I do not know where it might eventually land you). Would you learn things about the law and society? Unquestionably yes. Whatever your motivation, I respectfully invite you to let time hang heavy on your hands, if you will, and to spend some of it, with us, in these pages.

Joseph D. Kearney
Dean and Professor of Law
In the Bible story of Gideon, told in the book of Judges, the Jews are threatened by a much larger force of Midianites. God instructs Gideon, a military leader and judge, to take 300 soldiers and give them each a trumpet (in Hebrew, a shofar) and a torch. They approach the Midianite camp in the night, light the torches, and blow the trumpets. Fearing that the attackers are a larger and more fearsome force than in fact is the case, the Midianites flee.

And so Gideon’s trumpet became a symbol of small, even under-resourced efforts to take on the numerous and powerful in the cause of justice.

In January 1962, the Supreme Court of the United States received a handwritten petition from a long-time petty criminal named Clarence Earl Gideon. He had asked for but been denied a lawyer while being tried for breaking and entering a pool room in Panama City, Fla. He was given a sentence of five years, the fifth time he was being sent to prison.

Gideon wanted the Court to rule that he had been entitled to a lawyer. That would require overturning a 1942 decision, Betts v. Brady, holding that defendants were entitled to a lawyer only in a small number of more serious instances.

The odds are always against the Court’s agreeing to consider any petition—to say nothing of one from an indigent person, without a lawyer, seeking to overturn a precedent. But the U.S. Supreme Court took the case.

In March 1963, it issued a unanimous opinion in Gideon v. Wainwright, ruling under the Sixth and Fourteenth Amendments to the U.S. Constitution that people who can’t afford lawyers are entitled to legal representation in criminal matters. Justice Hugo L. Black wrote for the Court that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”

Nearly six decades later, Gideon’s trumpet—as it was called in the title of a 1964 book by Anthony Lewis—continues to sound across America. There are big challenges to how the instrument is played. Public defenders assume key roles in the range of criminal law cases involving people who do not have the resources to hire an attorney. But the public defender system is stressed—underfunded, understaffed, close to overwhelmed by the tide of cases, facing larger societal forces, and sometimes confronting political headwinds.

It depends on lawyers who remain dedicated, even idealistic, about the work, who believe that Gideon’s trumpet is an essential instrument in a harmonious society, one in which notes consonant with criminal justice are sounded. This article profiles five of the lawyers in Wisconsin’s public defender orchestra; numerous other examples could be adduced, even just from the ranks of Marquette lawyers.

**“UNLESS COUNSEL IS PROVIDED”**

Life on the job with five Wisconsin public defenders shows the rewards and value of the work, amid stresses and complexities that have grown.

By Alan J. Borsuk and Tom Kertscher
"UNLESS COUNSEL IS PROVIDED"

Kelli Thompson listens during a meeting with members of the public defender's office in Shawano, Wis.

Kelli Thompson: A boss who works in trenches

On a day not long ago, someone calling the state public defender’s office that serves two less-populated counties in Wisconsin found the phone answered by an attorney who was, in fact, an expert. The attorney was so well trained and experienced that she is the head of the entire public defender operation in Wisconsin—with 578 staff attorneys, a total of 615 staff, 40 offices around the state, and an annual budget of $113.5 million.

“I probably did a terrible job, and they’ll probably never ask me again,” jokes Kelli S. Thompson, 396. “I mean, it’s Kelli Thompson. It’s like a non-issue at work. She’s always just Kelli,” one person says.

A $113.04-per-earner administrator, much of Thompson’s day is spent in meetings. But she shoehorned in later in the afternoon might be more revealing about the condition of her agency.

The meetings are about keeping all the balls in the air. On this day, the trial division director in the public defender’s office, who doubles as its top recruiter, spends 20 minutes via Zoom updating Thompson about staffing. Application for attorney positions “are way, way down, and they have been down a long time,” the director reports. Thompson notes later that when she took over the agency in 2011, “we’d have hundreds of applicants for one position.”

For 45 minutes, the appellate division director briefs Thompson in-person on friend-of-the-court briefs that the office is filing, including one in a Markey’s Victim (Vicem) case before the Wisconsin Supreme Court. There follow 15-minute in-person meetings with the agency’s administrative services director and the information technology director, giving updates on automating the downloading and management of bodycam videos of police officers and on improving the Wi-Fi in the Milwaukee County Courthouse.

Another 15 minutes on Zoom follow, with the Milwaukee-based deputy trial division director. In addition to supervising trial attorneys, that director is handling, by Zoom, the intake calendar in the Ashland County Public Defender’s office in Ashland, 180 miles northwest of Madison, meaning six hours of driving roundtrip. And taking cases means any number of other commitments, including hours of phone calls for Thompson over the Memorial Day weekend.

Thompson is firm about balancing her administrative duties with the work she finds most important: having a connection with clients, I think, makes me better at my job,” she says. “If times were normal, I probably wouldn’t be handling a lot of cases at all. I’d be doing work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems. …”

"If times were normal, I probably wouldn’t be handling a lot of prison cases; I’d work on a couple homicide cases. But we have a shortage of staff, we have so many clients who are so desperate, we have a shortage of private bar attorneys, we have clogged court systems …"
Luis Gutierrez in the public defender’s office in Waukesha.

The best thing you can do for yourself is to do the best you can.

Gutierrez grew up in Miami Springs, Fla., near Miami International Airport, the son of political exiles from Cuba. Now he is an assistant public defender mainly handling misdemeanor criminal cases in Waukesha County Circuit Court, about 20 miles west of downtown Milwaukee.

On this Wednesday, he has several clients scheduled to appear in courtroom SC-G20. Gutierrez is 30 years old; the presiding judge has 22 years on the bench. What’s it like to be an early-career public defender? Sit in on some of Gutierrez’s cases on this day and you get a look at the nitty-gritty of the legal process and the role a defense attorney plays.

Gutierrez’s first client is charged with third-offense operating a vehicle while intoxicated. Gutierrez tells him that the court has been informed that he recently tested positive for marijuana. Staying clean was a condition of bail for him. The man also relates that he just tested positive for COVID-19. Gutierrez says he’ll probably represent the man in a pending misdemeanor battery case also. “He’s a good guy. He’s had a rough couple of months,” Gutierrez says.

Legal strategy is the focus of the next call-back. Should the client proceed to trial on misdemeanor domestic violence charges involving his girlfriend? Gutierrez says he’s the charging attorney the court won’t testify, but the prosecutor has given no indication that he’ll offer a plea deal. The client is agented, and Gutierrez needs to show compassion but also to center on the trial "so we’re not just being a hard cop." He tells the judge, “I sense you’re an intense gentleman, the judge replies. “I’m satisfied you’re a person of good character.”

The prosecutor recommends a fine, and the judge agrees, setting it at $100. No jail time is a relief, but, with fees and court costs, the total tab for the man, who works in the gig economy, is $443. The judge gives him 60 days to pay.

Outside of court, Gutierrez reflects on the hearing. “This was entirely a family dispute between two brothers, and cops got involved, and this is what leads us to where we are today.”

His court appearances complete, Gutierrez checks his phone and finds he has missed calls from eight clients. It’s 11:40 a.m. He goes into a conference room next to the courtroom and starts calling them back. It’s time to play the roles not only of defense attorney but also, to a necessary extent, to do the job of friend and counselor.

Gutierrez talks to one woman who lives far from the county and has been charged with three misdemeanors: theft of less than $50 of items from a grocery store, along with possession of a controlled substance and drug paraphernalia. The woman doesn’t drive. No, Gutierrez tells her, she can’t make a payment to get out of her arrest warrant, and, no, she can’t appear by Zoom. Yes, she could get locked up if she has even a minor run-in with police.

“I don’t want to go to jail,” she says. A friend can drive her to Waukesha for a court date, she agrees.

Next, Gutierrez talks with a man dealing with a second offense for operating a vehicle while intoxicated. Gutierrez tells him that the court has been informed that he recently tested positive for marijuana. Staying clean was a condition of bail for him. The man also relates that he just tested positive for COVID-19. Gutierrez says he’ll probably represent the man in a pending misdemeanor battery case also. “He’s a good guy. He’s had a rough couple of months,” Gutierrez says.

Public Defender Pay

The starting pay for an assistant state public defender in Wisconsin is $54,912 per year. The national median entry-level salary for public defenders is $58,700, according to the NALP/PSJD 2022 Public Service Attorney Salary Survey Report.

The table below shows the average pay for an assistant public defender in Wisconsin during the past five years. Of course, the average depends on who is in the pool, and it is likely that much of the increase from 2017 to 2021 derives from departures of junior attorneys, with lower-than-average salaries. Of the immediately preceding table concerning turnover.

## Caseloads Double for Public Defenders in Wisconsin

The number of open cases for public defenders in Wisconsin more than doubled in five years. The table shows the number of open felony, misdemeanor, juvenile, family, and commitment cases per authorized attorney position.

<table>
<thead>
<tr>
<th>Date</th>
<th># open cases</th>
<th>Per attorney position</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 1, 2017</td>
<td>28,808</td>
<td>77</td>
</tr>
<tr>
<td>July 1, 2018</td>
<td>30,327</td>
<td>81</td>
</tr>
<tr>
<td>July 1, 2019</td>
<td>32,906</td>
<td>88</td>
</tr>
<tr>
<td>July 1, 2020</td>
<td>40,130</td>
<td>107</td>
</tr>
<tr>
<td>July 1, 2021</td>
<td>51,068</td>
<td>138</td>
</tr>
<tr>
<td>July 1, 2022</td>
<td>62,081</td>
<td>165</td>
</tr>
</tbody>
</table>

## Turnover Doubled

Turnover among attorneys in the Wisconsin State Public Defender’s Office essentially doubled after the start of the COVID pandemic. About 10 percent of the attorneys left during the fiscal year ending June 30, 2020; the rate exceeded 20 percent during the year ending June 30, 2022. (“FTEs” in the table refers to “full-time equivalents.”)

<table>
<thead>
<tr>
<th>FY</th>
<th>Departing FTEs</th>
<th>#FTEs</th>
<th>Turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td>41.0</td>
<td>374.2</td>
<td>10.96%</td>
</tr>
<tr>
<td>2019</td>
<td>42.3</td>
<td>374.2</td>
<td>11.44%</td>
</tr>
<tr>
<td>2020</td>
<td>36.8</td>
<td>374.2</td>
<td>9.83%</td>
</tr>
<tr>
<td>2021</td>
<td>67.0</td>
<td>374.2</td>
<td>17.90%</td>
</tr>
<tr>
<td>2022</td>
<td>77.0</td>
<td>377.7</td>
<td>20.39%</td>
</tr>
</tbody>
</table>

## Public Defender Pay

The starting pay for an assistant state public defender in Wisconsin is $54,912 per year. The national median entry-level salary for public defenders is $58,700, according to the NALP/PSJD 2022 Public Service Attorney Salary Survey Report.

<table>
<thead>
<tr>
<th>FY</th>
<th>Annual</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>$80,494</td>
</tr>
<tr>
<td>2018</td>
<td>$71,510</td>
</tr>
<tr>
<td>2019</td>
<td>$74,339</td>
</tr>
<tr>
<td>2020</td>
<td>$73,986</td>
</tr>
<tr>
<td>2021</td>
<td>$82,514</td>
</tr>
</tbody>
</table>

Source: Wisconsin State Public Defender’s Office
WORKLOAD AND STAFF SHORTAGES ARE BIGGEST CONCERNS IN FOLLOWING PUBLIC DEFENSE SYSTEM PRINCIPLES

What are the goals and duties of public defenders and the systems that have developed in the states, since the U.S. Supreme Court's landmark 1963 ruling in Gideon v. Wainwright, in order to ensure legal representation for all defendants in criminal cases who cannot afford to hire an attorney? And how does Wisconsin measure up?

A good summary of the goals and duties comes from a 2002 report from the American Bar Association on public defender systems. It included what was titled "Ten Principles of a Public Defense Delivery System." Here (to the left) are the principles, verbatim:

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment as soon as feasible after a client’s arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and effectiveness according to nationally and locally adopted standards.

Wisconsin's adherence to the principles is generally regarded as adequate to the task. A big sore spot is the workload of public defenders. The average number of cases for each public defender in the state has risen in recent years, as has the total number of cases being handled through the public defender system. There are also increasing impacts from changes in the work itself. This includes time-consuming obligations in many cases to review video recordings from body cameras, dashboard cameras, and surveillance cameras—modern phenomena, especially in their prevalence.

Rick Jones: Seeing clients as potential butterflies

For one thing in Rick Jones’s childhood, there was Perry Mason on television. Jones says he would watch the show where Mason—handsome, intense, and dressed in great suits—would find ways in each episode to show his client was not guilty, and smart legal work would prove it. “Yeah, I want to do that,” Jones recalls thinking.

For another—one more real-life—thing, there was Jones’s uncle, a police officer in Racine, Wis., where Jones grew up. The uncle was a role model for Jones and many other Black people in Racine, who knew he was accused of involvement in an incident in which money was stolen. The accusation was false, and the uncle was exonerated, but it ruined the uncle’s life. Jones says he decided then that he would do whatever he could to make sure that this didn’t happen to others.

Then there was Jones’s mother, a single parent who raised Jones and his sister. His mother had serious health problems, and the family was in welfare. But she gave her children love and guidance. She told them, “School is your way out.”

Jones says, “We believed her, and she was right.” The three of them remain close, talking on the phone, if not in person, almost every day.

And add in that Jones was tall, athletic, and a good basketball player. After graduating from high school in Racine, he was given an academic scholarship to the University of Wisconsin–Eau Claire. After three semesters, he transferred to Beloit College, where he thought he would get more playing time. What he says he also got were professors and coaches who challenged him academically and socially, urging him to focus on what his best role in life could be. Beloit College was “one of the greatest places on my journey,” Jones says.

That led him to Marquette Law School. He says it took some time for him to “get comfortable” in law school, but he came to regard it as a great experience: “I loved my professors at Marquette,” he says. He graduated in 1989. He worked for Marquette (University of Wisconsin and, in 1999, joined Wisconsin’s public defender’s office. He left in 2004.

In 2013, he returned to work as a public defender. In his life, he says, God is his first love, his family is second, and then comes basketball and being a public defender and everything else. He continues to run a basketball mentoring program for boys and girls—mostly high school juniors—in Madison.

Based in Madison, Jones specializes in cases involving people who have served sentences for sexually violent crimes and who, under Wisconsin law, can be committed through civil proceedings to continued confinement indefinitely. He takes those cases and other major cases such as homicides all around Wisconsin, in large part because he offended. “Sex offenders can change, and the numbers back me up,” Jones says.

In any case, he says of his clients, “I don’t judge. I just fight. Everyone is entitled to justice.”
or wherever his schedule takes him. During a day in the office, he says, he spends much of his time reading whatever he thinks is relevant to a case. He calls himself “obsessive” about knowing the details of a client’s story and the relevant law. These days, the work also involves viewing sometimes hours-long surveillance video records. And then there are court appearances, status conferences, motion hearings, trials. And “a decent amount of client time.”

“...I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I’m justified in doing what I’m supposed to do as an attorney, or having to choose between being ethical and holding back because I don’t feel as though I’ve been rewarded enough for doing my job.”

Jade Hall

says. Pay and workload are factors that make it harder to draw people to jobs such as his. “I don’t remember a time when we had such a struggle getting lawyers,” he says.

Now 59, he remains committed to the work and passionate about it. He says, “I’m still fiery.”

Jade Hall: Aiming to do the “most good” as a lawyer

Before she arrives at the Milwaukee County Courthouse early in the workday, Jade (pronounced juh-DAY) Hall, L’19, has already put in an hour of work at home, writing a motion for an upcoming case. The courthouse is where she wants to be a public defender. “I realized this is where I could do the most good,” she says. “I’m not going to get paid the greatest, no; but I also knew that [in private practice] I would be more focused on the money than I would be on the client. And that’s me—there are some people who may not feel that way. But for me, I did not want to have to worry about whether or not someone has paid me in order for me to file a certain motion, or in order for me to feel like I’m justified in doing what I’m supposed to do as an attorney, or having to choose between being ethical and holding back because I don’t feel as though I’ve been rewarded enough for doing it.”

How big a workload is Hall handling at this point? She points to a list of clients 146 rows long. Some of the clients have more than one case, so the total is actually higher. Reading just your down one column, the list becomes numbing: Felony, felony, felony, felony, misdemeanor, misdemeanor, misdemeanor, misdemeanor, traffic, felony, felony, felony. “I actually thought it was more,” Hall says, surprised the total wasn’t closer to 200. Her caseload neared 300 when the court system virtually ground to a halt during pandemic shutdowns. She’s confident that, if given a name, she more likely could remember the key facts of that client’s case, since she typically has a client’s case for a year or more.

But can you effectively represent so many people? “You can,” Hall insists, “but you also can’t expect to be only 9 to 5.” That means taking files home for work in the evening, or early morning, in addition to days that can feel as if you’re simply chasing from one courtroom to another.

Before the pandemic, Hall would log as many as 13,000 steps a day making court appearances in the courthouse as well as in two adjacent buildings. These days, with judges still holding many procedures via Zoom, she might take 5,000 steps.

Following the hearing for the young woman in the robbery case, other cases are lined up. After a short hearing in which a judge refuses to lower the $500 bail for one of Hall’s clients who’s in jail, “it’s time to dash back to another courtroom. Bunning is part of Hall’s job, but so is waiting; this time it’s 25 minutes before the judge is ready to hear an operating-while-intoxicated fourth-offense case. The judge decides to ease restrictions for Hall’s 44-year-old client, which means fewer trips to downtown Milwaukee to meet with the agency that is monitoring his bail conditions. Wearing a cast on his right arm and a medical boot on his right foot, he’s grateful.

Hall goes back to her office in the nearby Milwaukee State Office Building to change into her “non-court shoes” to walk to lunch, then it’s back into heels before returning to the courthouse. There’s disappointment following a 30-minute hearing in which she fails to persuade a judge to throw out the charges against her client, a man who was parking his car with no license plate, near one of Hall’s childhood neighborhoods. He was approached by two bicycle officers who said they were looking for the woman who’d stolen a $500 bicycle. She had confessed, and the attendant gave the police the note she had written. Hall succeeded in doing what she wanted; the judge refused to lower the $500 bail.

But can you actually represent so many people? “You can,” Hall insists, “but you also can’t expect to be only 9 to 5.”

Jade Hall visits a Milwaukee neighborhood where she grew up.
Thomas Reed in the downtown Milwaukee offices for state public defenders.

**Thomas Reed**

In some ways, across Wisconsin, the overall picture of appointment attorneys in criminal cases to represent defendants who qualify as a legal representative has improved in recent years. At the same time, delays are the most pressing general issue facing the public defender system.

According to the Wisconsin State Public Defender’s Office, the average time it takes to assign a defense attorney to a case following the filing of charges is 13 days in 2019. It was 11 days in 2020, and, in the first five months of 2022, it was 7 days. State law calls for a legal hearing—where a defendant is entitled to be represented by an attorney—to be held within 10 days.

Within the time period of these years, the percentage of cases in which an attorney was appointed to 10 days has varied from 81 percent to 86 percent. That means that at least in one of six cases across Wisconsin, the defendant does not have an attorney within the time set by law. And with about 140,000 cases annually coming into the public defender system, this means that thousands of defendants are not receiving representation promptly. And in some cases, representation is not being secured for periods of weeks or even more.

Up to a point, judges will generally go along with delays in assigning an attorney to a defendant, if representatives of the State Public Defender’s Office say they haven’t been able to find an attorney. Too many cases, too few attorneys, is the simple explanation.

State Public Defender Kelli Thompson says that the problem of finding attorneys to take cases has intensified statewide and affects both rural and urban areas. In some rural areas, almost no private attorneys are willing to take “public defender cases,” while in places such as Milwaukee, the number of private attorneys who will take such cases has declined by more than a third in recent years.

“No place in Wisconsin is untouched by this,” Thompson says. In September 2022, the public defender’s office submitted a state budget request for 2023–2025 that includes a case of approximately 30 percent for the lowest-paid (starting) staff attorneys, an additional 65 percent support positions, and an increase in pay for private bar attorneys who take cases from $70 an hour to $125 per hour for in-court work and $100 per hour for out-of-court work.

A legal challenge based on delays in naming attorneys also has been resolved. On August 23, 2022, a lawsuit was filed in Brown County Circuit Court on behalf of eight people who, the suit says, had experienced delays in receiving legal representation in criminal cases pending against them. The suit names Governor Tony Evers, State Public Defender Kelli Thompson, and the members of the Wisconsin Public Defender Board as defendants.

Characterizing the situation as a “constitutional crisis,” the complaint alleges that “Wisconsin consistently takes longer than 14 days to provide counsel” to indigent criminal defendants. “[T]here are at least hundreds—if not thousands—of people enduring criminal offenses in Wisconsin for the assistance of an attorney,” the complaint alleges. “For many of these defendants, it will be months before they receive counsel.”

Voluminous records attached to the complaint list instances of delays from across Wisconsin.

The complaint asks the court to certify a class of current and future indigent defendants who have not received or do not receive appointed counsel within 14 days after their initial appearances. The requested relief includes an order requiring the defendants to immediately appoint counsel for the class members or, “if timely appointment of counsel is not feasible,” to enter an order “dismissing the class members’ criminal cases with prejudice.” The lawsuit appears intended in part to increase public or political attention to the issue.

The Wisconsin Supreme Court recently passed up one opportunity to rule in a case of delay. In 2018, Nia Lee, 45, unable to pay $25,000 bail, spent his first 101 days in jail in Marathon County without a lawyer, after being charged with felony drug possession and identity theft. Once appointed, her lawyer filed a motion to dismiss, arguing that the delay had violated Lee’s Sixth Amendment rights. The state appeals court ordered that the charges be dismissed without prejudice, but the state petitioned for review of the ruling in the Wisconsin Supreme Court. After initially agreeing to hear the case, the court changed its mind in May 2022, dismissing the case from its docket by a 5-2 vote.

### Delays in Appointing Public Advocates

This chart shows that delays in appointing attorneys have declined overall since 2019. An average of 13 days from 2019 to 2021 to 7 days in the first five months of 2022. The percentage of cases where an attorney is appointed within 10 days has varied during these years, from a low of 81 percent to a high of 90 percent.

#### Location

<table>
<thead>
<tr>
<th>Location</th>
<th>2019</th>
<th>2020</th>
<th>2021</th>
<th>2022</th>
<th>2023</th>
<th>2024</th>
<th>2025</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milwaukee</td>
<td>17</td>
<td>15</td>
<td>17</td>
<td>15</td>
<td>16</td>
<td>15</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Ashland</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>Eau Claire</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Grant</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Kenosha</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Marathon</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Shawano</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Vaucluse</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Wisconsin State Public Defender’s Office</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
<td>100 %</td>
</tr>
</tbody>
</table>

Source: Wisconsin State Public Defender’s Office

---

Robert Reed was, and surely always will be a student of people and society. That shaped what he studied when he was an undergraduate at Northwestern University in Evanston, Ill. It shaped the areas of law that he was drawn to as a student at Cornell University’s law school in Ithaca, N.Y.

And he has shaped his career in a big way. “It was an intellectual path that led me here,” he says. “Here” is the public defenders’ offices in the Wisconsin state government office building in downtown Milwaukee. Reed began working as a public defender in Milwaukee in 1982 and has headed the office, with about 50 attorneys and 100 employees, since 2000.

Reed is many things. He is a bureaucrat whose long days are filled with meetings upon meetings and a steady stream of big and little problems that he is responsible for solving. He is a leader, one of the central figures dealing with the big challenges of keeping the court system in Wisconsin functioning and (Reed hopes) serving people better.

He is an intellectual and idealist—cerebral, almost straight-lined, but motivated by ambitious visions for how the justice system can be more fair and serve more people stabilize their lives and stay on the right side of the law, making communities as a whole safer.

He is a believer in following the rules of the system. But rules, he says, are only as good as how much people adhere to the spirit of them. You can have great legal rules, but courts and the system as a whole need to have justice

continued on page 18.
in their hearts. “Justice is not a possession; it is a thing that you do,” he says, adding, “You need to do it every day.” What does it mean for him to do it every day? Consider a log he kept of a recent workday:

He is at work by 7:15 a.m., a few minutes earlier than usual. This day, there is a 7:45 a.m. meeting of a committee, chaired by Milwaukee County Circuit Court Chief Judge Mary Triggiano, of leaders of law enforcement agencies, the county jail, the House of Correction, children’s court, and others. The group meets regularly to assess the functioning of the justice system as a whole system and to coordinate responses to problems. The discussion covers how many people are being held in the several incarceration facilities serving Milwaukee County and staffing issues at those facilities. Also on the agenda: How to move ahead with using $16 million in federal pandemic-response money to reduce backlogs and delays in the whole system. But Reed is also thinking about one of his more troubling current duties: appearing before various judges to tell them that the public defender’s office hasn’t come up with an attorney to represent defendants who are in jail and awaiting proceedings before the judges. The goal of speedily trials and prompt assignment of defense lawyers yields to the fact that the full-time public defender staff is stretched thin and that the number of private attorneys willing to take public defender cases has declined.

At 9:45, there is a conference call with leaders of the state public defender’s office. Like the early morning meeting, a central subject is how to use pandemic funds to help with backlogged cases. Staffing needs also are discussed.

At 11:15, Reed meets with Wisconsin State Capitol Police representatives about security procedures in the office building where the public defenders have their offices. At 12:25 p.m., it’s a monthly meeting with key players involved in setting bail for incarcerated people awaiting trial. Crowding in the jail and other facilities and heavy caseloads mean increased pressure to release people from jail. In general, people are entitled to be released on bail if they are not considered to be a threat to others. But deciding who to release and on what terms is important—as well as politically sensitive, indeed sometimes even explosive. Reed has been a leading advocate of using “risk assessment” protocols to assess individuals. Like other aspects of the system, these protocols have strong advocates and strong critics.

Reed personally handles the defense of a small number of people, generally involving defendants who have serious mental problems or who are difficult to deal with. At 2 p.m., he has a phone call with a client at a state prison who has refused to cooperate with attorneys and wants to represent himself (generally a constitutional right but not usually exercised). Judges have found the person incapable of that and have asked Reed to try to convince the defendant to accept an attorney’s representation.

At 2:30, it’s a conversation with a former judge who is now in private practice and is willing to represent some people in criminal proceedings. A two-hour meeting of the Milwaukee Mental Health Task Force starts at 3 p.m. This is a consortium of agency leaders and advocates involved in mental health services. Many of the people represented by public defenders have mental health needs, and the issue is important to Reed. He is on the steering committee of the task force.

And throughout the day, there is a stream of conversations and calls with staff members, clients, family members of clients, and others about most anything—from minor procedural issues to big decisions about handling particular cases to complaints of all kinds and personal crises for both employees and defendants. In general, if there’s a problem in the Milwaukee County Circuit Court, it ends up before Reed, either directly or through his assistant or leaders of the several teams of public defenders in the office. Reed says a central part of his job is “managing relationships”—relationships involving staff members, clients, other parts of government, and the community as a whole: “I call it the foreign policy around the public defender’s office,” he says. At 5:45 p.m., more than 30 hours after the workday starts, Reed leaves the office. It’s a full, fast-paced day—and he has worked like this for 40 years. Reed says “the most compelling and interesting work” for him is advocating for what he calls a “rational criminal justice system and improvements in the performance of the system as a whole.” That puts him in the thick of so many issues such as bail reform and treatment courts that aim to help people with problems such as drug addiction.

continued on page 18
Efforts to encourage lawyers to join in the work is his service as an adjunct professor at Marquette Law School, where he oversees the public defender clinic that gives students work experience in the field. But, in line with other trends related to staffing, student interest in the clinic has declined in recent years. Reed and others involved in the program hope to be able to reverse that trend.

Reed remains eager to promote the value and satisfactions of work as a public defender. He talks up the reasons to consider taking these jobs. And he does what he can to maintain the morale of those who already do the work, including everything from efforts to reduce work-related stress to encouraging birthday parties for staff members. He is concerned that, with limited resources, doing the work get “a half a loaf” when it comes to what they really need. But dedication and commitment still run strong. Reed says there is an old saying that “nothing great is accomplished without high spirits.”

“Justice, justice shalt thou pursue”

When Howard B. Eisenberg was dean of Marquette Law School from 1995 until his death in 2002, a poster hung in his office with the Biblical verse, “Justice, justice shalt thou pursue.” It comes from the book of Deuteronomy.

Eisenberg was dedicated to the work of public defenders in Wisconsin and nationwide. He was a public defender, he led public defenders, and he was one of the key figures in creating the public defender system Wisconsin uses to this day. He was, in many ways, a public defender all his life.

What does it mean to live by the words that Eisenberg kept so nearby? Who is the word justice repeated? Among interpretations by Biblical scholars, two stand out: The system in which work is accomplished without high spirits.

“UNLESS COUNSEL IS PROVIDED”

It’s been almost half a century since James M. Brennan first got involved with the work of public defenders in Wisconsin. In 1973, he was a student at Marquette Law School and took part in the school’s now-longstanding public defender’s clinic. The program allows interested students, as part of their upper-level curriculum, to work alongside attorneys representing people involved in criminal proceedings who are unable to afford a lawyer.

Brennan never lost his interest in serving low-income people, both with their legal problems and with other needs, and he has an unusually long-term perspective on the development of public defender services in Wisconsin across the decades. Most recently, since 2013, he has been a member of the legislatively created board that oversees the Wisconsin State Public Defender’s Office, serving as chair of the board since early 2021.

How would he describe public defender services across Wisconsin now? “The state of the system is spooky,” he says.

Brennan names three problems. First, in rural areas, there is difficulty finding attorneys who will take cases. This can leave defendants waiting in jail for weeks while defense is not even being formed. Second, an important leg on the system stands—involved in the private bar in representing some clients statewide—has weakened. The pay for private attorneys was increased in 2020 from $90 to $100, the lowest in the nation—$70 to $80, hour; this has helped to some degree but not solved the problem. And third, the impact of the COVID pandemic, says public defender programs, has really thrown the whole system into a lurch and has caused a backlog.

“One of course, we could use more staff,” Brennan adds. The caseload for the public defender has grown in recent years—something that concerns Brennan. “Quality and caseloads interact very closely,” he says. But in the broad picture, public defender work has improved over the decades, and the system serves many people well, Brennan says. Furthermore, legislative support for public defenders has been more stable than it once was, although issues including salaried and the number of positions remain.

Brennan says that when he had his initial involvement with the system, the statewide public defender office dealt only with appellate cases, and attorneys serving at the local level were appointed on a county-by-county basis by judges. The quality of the appointment process was uneven. By 1977, Brennan recalls, the statewide office had been created. Since then, appointments have been handled through an administrative process and not by judges. The effectiveness, quality, and stability of the work improved in following years.

Brennan never practiced as a public defender, but his work always involved service to people in need. He was a lawyer for the Legal Aid Society of Milwaukee for 31 years, most of the time as chief staff attorney. That meant his practice involved civil litigation, not criminal matters. In 2007, he became a former Children’s Ministries director of Catholic Charities of the Archdiocese of Milwaukee, followed by several years as the organization’s executive director. He is also a past president of the State Bar of Wisconsin.

In 2012, he retired from full-time work. He and his wife live in Ashland County in far northern Wisconsin. Among his current interests, he has qualified as a “master naturalist” at Copper Falls State Park.

Despite the current stresses on the system, Brennan remains enthusiastic about his career as a defender and the people doing it. “Most of our attorneys are extraordinarily committed and absolutely loyal to their clients,” he says. They are doing “the noble work of being a lawyer, the good work of being a lawyer, which is representing the marginalized and the indigent.”

James Brennan, chair of the Wisconsin Public Defender Board, says public defenders are committed to their work and loyal to their clients, but the stresses on the overall system mean quality in the broad picture is “spooky.”
Howard B. Eisenberg held academic positions at several law schools and was dean of Marquette Law School from 1995 until his death in 2002 at age 55. Earlier in his career, he was a public defender and a leader in improving and expanding the role of public defenders in Wisconsin and nationwide. The work of public defenders always remained close to his heart. Following his death, a special issue of the Marquette Law Review later that year included remembrances or tributes to Eisenberg from many who worked with him or were close to him.

The full memorial issue is available online (86 Marq. L. Rev. 203–400) and covers Eisenberg's entire career. Here, in light of the focus of the cover story of this Marquette Lawyer, we print below lightly edited contributions to the issue by three of Eisenberg's colleagues during his time as the state public defender; the first entry includes me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that Jim hired me when he could attract lawyers of Howard's caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the attorney general's office.

I am not sure if my memory is correct, but my recollection is that Howard and I had done nothing but exchange handshakes at that point. I do remember that in those first three days Howard wrote a brief, argued a case before the Wisconsin Supreme Court, and made a trip to the Wisconsin state prison. My biggest accomplishment in those three days was to find the law library. At that point, I believed my career as an assistant state public defender was waning.

Within a few days, Howard was named acting state public defender, while the court selected Jim's successor. That afternoon, Howard came into my office, and we had our first real conversation. It is possible to be businesslike and casual at the same time. Howard mastered it. He simply sat down and told me that my job was safe and that he was eager to work with me. He then assigned almost all of Jim's caseload to me, along with my first case to be argued before the supreme court, in the October 1972 session. From that moment, I knew that I would be challenged in ways that I had never conceived. A few weeks later, the court appointed Howard to be the state public defender.

It wasn't Howard's assurance of job security that struck me. Rather, it was his confidence that I was up to the task and his genuine desire to include me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that I was probably the luckiest young lawyer in Wisconsin. I was working one-on-one with a person whom I and everybody else knew to be a brilliant, passionate lawyer who was dedicated to providing the best possible legal representation for every indigent client he represented. And he was prolific, writing brief after brief, many involving complex legal issues, at a speed that boggled my imagination. Howard could read a trial transcript, review the exhibits, and prepare a brief in an afternoon. He would visit a prison, see a half-dozen or more clients in the morning, find time to write a dozen clients (typing the letters himself), and be home for dinner by 6:00 p.m. At first, I could not believe the pace—then I found myself drawn into it. Our work never seemed to end, but the satisfaction from it never diminished. Howard loved his job, which was infectious.

We often rode to the prisons together, either to Waupun or Green Bay, to see clients. During those long trips, we often talked about why we had become public defenders. Fundamental to Howard was making sure that each client got no less than all the process due and guaranteed by the Fourteenth Amendment. Guilt or innocence, while less than all the process due and guaranteed by the Fourteenth Amendment, is important, was not our focus. Was the case done right? If not, was the client's case prejudiced? Was the error serious enough to warrant a new trial? What could we do to make the justice system work better? Indeed, if the system fails the poorest, then how can it function effectively at all?

And so we worked. The supreme court appointed us to more and more cases, and by February 1973, Howard hired a second assistant. At about the same time, both the United States Supreme Court and the Wisconsin Supreme Court determined that due process protections attached to probation/parole revocation proceedings. Howard believed that our task as appellate defenders included responsibility for providing representation in those actions, and, by 1974, our caseload was skyrocketing, which led to expansion of the state public defender's office. Howard convinced the Wisconsin Supreme Court to increase our budget to allow hiring five more assistants and opening a branch office in Milwaukee in 1975. For the next two years, I supervised the Milwaukee office, working with two other assistants.

Our experience as appellate defenders led Howard to the conclusion that the lack of statewide resources and of a uniform method of appointing counsel created a wide disparity in the quality of appointed-counsel services throughout the state. Feeling that even well-intentioned judges failed to provide counsel to all who might be eligible, Howard believed that the power to appoint lawyers for indigent defendants should not be in the hands of the courts but, rather, with an independent public defender, whose responsibility should include devising standards by which eligibility would be determined and matching a client's needs with an experienced lawyer, whether public defender or appointed private counsel. It was Howard's caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the attorney general's office.
A vision that was the culmination of the many conversations we had on so many trips to the prisons from 1972 to 1975. Quite candidly, I told Howard that his utopian vision would never become reality. Why would the court system give up its power to appoint counsel? The public defender’s constituency had no stake in the lobbying power to persuade the legislature to follow that course. As only Howard could do, he acknowledged my concerns, drafted the legislation, shepherded it through the legislature, and obtained Governor Patrick J. Lucey’s signature to it. By 1977, the blueprint for a revolution in indigent defense services in Wisconsin was in place. Howard’s passion for justice, his ability to bridge the economic issues associated with such an all-encompassing law, and his commitment to the poor were the sole reasons that Wisconsin became the first state to have a completely independent public defender system dedicated to providing the best possible representation. No other person could have persuaded the court, the legislature, and the governor to adopt such a system.

After the legislation passed, Howard asked me to assume responsibility for setting up the trial division. From 1977 through 1978, we opened more than 50 offices throughout Wisconsin, took over existing probationally funded public defender programs, and established a system with more than 100 lawyers, which handled more than 50,000 cases annually. Looking back at the role I played in developing a better way of providing legal services to those in need, I can tell you that it was a case of incredible energy, an acute sense of justice, and devotion to family, and for his unwavering ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did.

Setting an Example with Self-Sacrifice and Wit

By Jack E. Schairer

Howard Eisenberg was an amazing man. I will remember Howard most warmly for his extraordinary energy, remarkable spirit, and devotion to family. As he did with me, Howard nurtured all who shared his path, both by example and by our conversations. He wanted us to share that path and to love the challenge as much as he did. He demanded nothing less than one’s best effort and a commitment to justice. He challenged by assigning difficult tasks. He never criticized; rather, he taught. He always carried a caseload. And so many are much better for all he did. I know that I am a better person and a better lawyer for sharing his path in those years.

Howard Believed Lawyers Have a Higher Calling . . .

By Jack E. Schairer

E veryone has at least one “Howard story.” It is significant in itself that this is so. Among those mentioned was one that displayed Howard’s very keen sense of humor. For his unwavering and tireless commitment to helping those who are among society’s most helpless and hopeless—indigent criminal defendants.

Howard’s exuberance for the sometimes Sisyphanean aspects of public defender work could be both inspiring and intimidating. Howard was a self-described appellate junkie. His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more and doing it better. And usually you did. Working with Howard invariably caused you to become not only a better professional, a better lawyer, but also a better person.

It is not unusual for attorneys of Howard’s caliber who work in defender agencies to stay for a few years and then move on in pursuit of greater prestige or treasure. Howard did move on to be executive director at the National Legal Aid and Defender Association, director of clinical education at Southern Illinois University School of Law, dean of the University of Arkansas at Little Rock Law School, and, of course, dean of Marquette University Law School. But in a very real and tangible way, Howard never stopped being a public defender. While each of these jobs no doubt brought enormous challenges and demands, Howard always maintained a caseload representing indigent criminal defendants, pro bono. By the time Howard returned to Wisconsin in 1995, his state public defender statute had been changed, eliminating the agency’s authority to litigate prison conditions issues. But Howard continued to fill the void with his pro bono work representing individual inmates who asked for his help and by playing a key role in a class-action suit challenging, as cruel and unusual punishment, conditions at Wisconsin’s “supermax” prison in Boscobel. After Howard’s passing, a speech he had given on several occasions titled “What’s a Nice Jewish Boy Like Me Doing in a Place Like This?” that addressed his thoughts on spirituality and the legal profession received press attention. In it, Howard took the legal profession to task for its general state of insensitivity and took lawyers to task for trying to win cases by being personally offensive, snide, unreasonable, and unpleasant to deal with. Howard believed lawyers have a higher calling to pursue ultimate good for society. His view of cura personalis meant that the Golden Rule is operative even in law offices. He urged students and lawyers, as a start, simply to be nice, to treat people, all people, better. It can’t hurt, he said. Often the case, the product of someone’s looking back over his career with perhaps some regret and urging others to learn from his experience and take a better path. Howard was always this way.

Howard somewhat incongruously for a public defender, particularly in the early 1970s, seemed as though the whole world of the legal profession had been wearing a jacket and tie. His demeanor in the office was generally formal, but he also had a humoros side. One of his secretaries who still works at his old Madison appellate office office said she remembers that Howard dictated prodigious amounts of legal work and would often end each document on the tape by signing off with a fictitious name. In one instance the secretary typed exactly what Howard dictated. He signed it and, much to the secretary’s horror, put it in the mail for filing, unknowingly, as “State Public Defender, Howard B. Eisenberg.”
Questions of INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES in the Digital Age

By Jessica Silbey

First, I want to start with my sincerest thanks to everyone at Marquette University Law School for inviting me here to give this lecture. I was supposed to be here two years ago, in March 2020, but the pandemic hit the nation, and you recall life then. It was a scary time with a lot of uncertainty and disappointments. And then came the isolation the pandemic created for so many people, which was also hard to endure. But as that isolation lifts, and we get back to normal, events like this—where we can be together face-to-face talking about cutting-edge legal issues—become even more special. For this reason especially, I am so very happy to be here to share my thoughts on a topic I have been thinking about for a long time.

Part of my excitement, too, is because of how much I admire the scholarly work of your intellectual property faculty, including Professors Kali Murray and Bruce Boyden, whose research has influenced my own. I am proud to be their colleague from afar.

My talk today will focus on the changing nature of intellectual property in the digital age. In a lecture named after the distinguished jurist Helen Wilson Nies, whose decades of service to the profession and intellectual property law are noteworthy, I hope to honor that reputation by describing new trends in the field and proposing a path forward.

My talk includes drawing on my forthcoming book, Against Progress: Intellectual Property and...
v. Maryland (1919). What “progress” meant in 1798 can and may be different from what it might mean today.

Second, the history of the “progress clause” is notably thin. Those who have devoted significant time to its history conclude that the language is largely inconclusive.

Third, the legal history of intellectual property regulation since 1789 demonstrates themes and patterns related to sociopolitical and cultural shifts that respond to changes in technology and production, assist the growth of certain industries, and attend to certain powerful stakeholders. In other words, the “progress” promoted by IP laws may be situational and historically contingent.

And so this project asks about what “progress” means for our current time in order to identify a trend that I believe is worth thinking more about, given the growing centrality of IP in our digital age.

**Twentieth-Century Progress**

During the 20th century, we assumed that IP’s goal of “promoting progress” meant simply “more”: more patented inventions and more copyrighted works. Although federal trademark law is authorized under the commerce clause and is primarily in function, without regard to the nature of the mark. Trademark protection includes trade packaging and trade dress—the look and feel of the object (such as the shape of the thermostat or a grill). Trademarks can include single colors, like robin-egg blue for a Tiffany box. They can include scents (like M&Ms’ lion’s roar) and smells (like that of Play-Doh). The trademark statute was originally passed in 1870 as part of the Interstate Commerce Act, which laws were then interpreted generously by courts. In the decades following World War II, the growth in the United States of manufacturing and scientific discovery, advertising, and entertainment industries. The 20th-century expansion of IP appears as an exuberant race to maximize the benefits of a consumerist society, amplifying values such as choice, individuality, abundance, and opportunity. By the 1980s, with the arrival of the personal computer revolution, it is fair to say that IP law was doing exactly what people thought it should: promoting progress as capital growth and dreams of wealth and comfort for businesses, certainly, and for many individuals as well. The internet and the digital revolution disrupted that trajectory. The transformation of civil society in the digital age, it turns out, is an existential threat to IP laws, which aim to control making, innovating, and distribution except by authorized manufacturers. IP law’s exclusive rights of control over making and using are an exception to everyday freedom in the digital age. The internet and the creativity
The internet may be an existential threat to IP, but essential to education, research, and business, we institutions that are sustained by them. of patented technologies, copyrighted works, also were considered threats to IP’s protections platforms, e-commerce platforms selling new and record-and-play devices, peer-to-peer file sharing and, later, streaming services, handheld digital and innovating—such as movie rental companies devices were allowed to survive, and with them their copying technology would make books, music, and movies disappear because they could so easily be pirated.

All of this, in and in narrow court decisions, these devices were allowed to survive, and with them came new business models, new technologies, new copying machines, and new inventions for making and innovating—such as movie rental companies and, later, streaming services, handheld digital record-and-play devices, peer-to-peer file sharing platforms, e-commerce platforms selling new and used goods, and 3D printers and maker spaces. These also were considered threats to IP’s protections of patented technologies, copyrighted works, and trademarked goods and to the incumbent institutions that are sustained by them. Yet as with the copy machine, which became essential to education, research, and business, we cannot live without the internet. It is here to stay. The internet may be an existential threat to IP, but it is not the end. Clicking, copying, and sending a photo online or Twitter—which may be copyright infringement. It won’t stop us from repairing our cell phone, computer, or car, which could be patent infringement. And it won’t stop us from commenting on theories of IP or making fun of, famous markets, names, trademark infringement though it might be. All of this behavior, which is inevitable in the digital age—which some would call a kind of progress but which also makes us all into pirates—challenges the rules of IP law and causes legal chaos. And that causes me to wonder if IP, as historically understood and justified, is set to change dramatically in our 21st century. It causes me to wonder if IP is for today is changing.

In addition to the internet’s ubiquity now, there are several reasons, it seems to me, that the stage is set for this change. First, since the mid-1990s, the United States Supreme Court has decided intellectual property cases at a rate that is more than double that in previous decades. The highest national court is a tone setter, selecting content and focussing the debate among legal elites that reverberates to national media and the public. The Supreme Court is a narrator of national values, interpreting federal and state law in light of the U.S. Constitution and its general, democratic, and procedural values. When it interprets and applies IP laws as frequently as it does today, it is shaping those IP laws in terms of national values and practices. And, thus, it reshapes what IP is and how it works.

Second, intellectual property law was previously a domain of technicians, a legal specialty that was isolated in practice and in law schools. Now, intellectual property law is a central part of legal education, with law schools building intellectual property and technology law centers to highlight the importance of the field in contemporary legal practice. It is such a prevalent legal field that it is not only in law schools but also in business schools, graduate science and humanities programs, and undergraduate schools. Then the organization called the People for the Ethical Treatment of Animals (PETA) sued him, arguing that the monkey and not the man was the author of the photo.

Every time I speak about this case, the audience erupts in laughter. And, of course, there is something humorous about a monkey taking photos and being a copyright author. But it wasn’t a joke. This lawsuit demanded substantial time and effort from several federal courts, and a lot of money was spent on both sides. The hard-fought goal—which at first seems like it shouldn’t be so hard—was to convince a federal court of appeals (and eventually also the Copyright Office) that only humans can be authors. But why is that so obvious? PETA brought this suit to assert the dignity of the animal in the way authorship provides: as an expression of will in the world. PETA asserted not that monkeys are human, but that they should have some basic rights like humans. Even outside the animal rights context, this is not absurd. Nothing under U.S. law prevents children from being copyright authors. Corporations, too, can assert their authors. Capacity and a human body are not necessary prerequisites. Can artificially intelligent machines be authors? Not yet. But that is being actively debated. As I describe these debates in my forthcoming book, they are about much more than whether PETA will secure copyright royalties for Naruto and her endangered community. The case debated what it means to be treated equally and with dignity, not only under copyright law, but generally, and especially today, when the planet’s natural resources are growing scarce, and when empathy, cooperation, and mutuality are necessary to survive.

Privacy: The Cases of the Defrauded Actress, the Wedding Engagement, and the Boston Break-Up

The next case is about privacy—bodily privacy, as it happens. The case concerns Cindy Lee Garcia, who auditioned for and performed a small part in a film she was told was called Drown Warriors. Her performance was five seconds, and she had only a few lines. She was paid and went home. Months later, the filmmaker posted the film on YouTube, but Garcia’s voice had been dubbed over with hateful anti-Muslim slurs. On YouTube, the film had the title Innocence of Muslims, and it was no longer an action film but a despicable screed against Islam. The film was viewed millions of times and went all over the world. Cindy Garcia received death threats and had to hire personal security. When PETA asked YouTube to take the film offline, YouTube refused because she wasn’t the copyright owner. Garcia was so angry that she sued YouTube (Google) for violation of copyright, arguing that the whole film and therefore the film’s owner. Moreover, film authorship most often excludes all the other people who contributed to the film, including actors, set designers, and lighting experts, among many others. The only way to get the video offline was to allege copyright ownership, which Garcia could not. This case went on appeal twice because the issues were so dramatic and the equities so concerning. The filmmaker was outside the jurisdiction of the United States. YouTube (Google) stood by its policy that only copyright authors as owners had control. Google prevailed.

This case is not really about copyright, though. It’s about García’s bodily autonomy, her privacy as a person invaded by the misrepresentation and fraud perpetrated by the filmmaker. It’s also about the
exacerbation of that privacy invasion by platforms, such as Facebook, Twitter, Google, Facebook, Amazon, whose policies prioritize efficiency and growth over other values. IP policies are often at odds. IP aims to disburse knowledge and useful inventions. Privacy aims for seclusion and control over identity, one’s things and effects, one’s life choices. Some copyright cases, such as those in which the estates of famous authors (e.g., James Joyce and Willa Cather) sue to prevent the publication of private letters and unfinished manuscripts, might seem properly within the scope of both copyright and privacy. These are cases about papers, effects, and privacy, all of which are left undiscussed in this essay. But we know that privacy in the United States extends to our papers and other things, and to our private spaces (e.g., our homes, cars)—that is the Fourth Amendment’s promise. So using copyright to prevent the publication of these kinds of literary works may make sense, and the authors’ estates often prevail, much to the consternation of literary historians and scholars. But they are nonetheless uncomfortable copyright cases because copyright is supposed to promote the progress of science, not to protect the privacy of public figures whose heirs wish to hide their writings as long as the copyright lasts (which is a long time).

But what about cases, like Hill v. Public Advocate, a 2014 federal court case in Colorado, in which the claim of privacy is over a public photograph? In this case, a photographer makes a photo of a couple’s engagement, two here men, and posts it to her website with their permission. Then an anti-marriage-equality group scraps the photo from her website and repurposes it for one of its campaign literature criticizing same-sex marriage. How should this case come out? Using someone else’s photograph to make a photo of a couple’s engagement is usually permitted under copyright fair use as a form of free speech under the First Amendment. But when the couple and the photographer sued, alleging copyright infringement (but really an invasion of their privacy, their right to control the representation of themselves to the public, and their defense of marriage equality), courts were listening. This is a case about misappropriating someone’s identity, which in an example of one of the rights cases that typically a copyright concern under U.S. law. Now for something a little different: the use of trademark infringement to prevent soybeans to sell as food. Like many farmers, he planted the seed to sell the majority of the soybeans as food, yes, but also to use some of the resulting soybeans as seeds for the risky late-season crop. Planting the patented seeds, which he had purchased, produced soybeans for sale and other soybeans to plant as seeds—seeds that contained the patented invention. The very act of forming was a form of patent infringement, making a copy of the invention, which Monsanto permitted, and selling soybeans, but not again to replant as seed. The late-season soybean crop was always risky, and investing in more seed would increase the expense. Saving seed from the first crop was something that farmers had been doing, well, for forever. What Monsanto’s lawsuit accomplished was to interrupt that timeless practice with a claim of 21st-century patent supremacy.

Bowman’s claim against Monsanto went like this: “I’ve paid for the seed and its invention once already. You got the benefit of the bargain, as all patentees do. No one else can sell Monsanto seed. But that is not what I’m doing. I’m just using the seed I have already purchased.” In response, Monsanto said that by growing soybean to plant as seed and not merely as soybeans for food, the En Ginseng was making unlawful copies of Monsanto’s patented invention and using them beyond the limited authorization. Bowman had replaced Monsanto’s seed with his own and therefore cut into Monsanto’s rightful monopoly. The only way out of this debate is to realize it’s a patent case in disguise: the En Ginseng is an argument about the rightful reach of the patent monopoly and about when, frankly, enough sales are enough. On the one side a giant agri-business whose soybeans are seeds and have been bought its seed for years. Buying the seed came with a license to use the patent. Bowman is an example of one of the rights cases that concern distributive justice and its relationship to human flourishing. And thus, I argue, it forms a pattern of legal action that indicates a turning tide in the purpose of intellectual property in contemporary culture.
We had hoped the information age would spread democracy and minimize demagogy. Instead, it has undermined the modernist story of progress with its narrow, numerical, market-based metrics, exposing competing claims to the common good and to justice.

Because copying and borrowing are essential to the work being done, everyday creators and innovators often ignore intellectual property rules that restrict borrowing and sharing. These accounts describe a much more tolerant, more generous regime in which the public domain is richer and bigger. This resonates with the original purpose and structure of the Constitution's progress clause, underscoring its role in the production and dissemination of fundamental knowledge, with a much narrower scope and duration for intellectual property exclusivity.

Thus, overly aggressive assertions of IP really bother everyday creators. I know this because they describe others' claims of exclusivity as norm-breaking—violent and uncivil—suggesting a breakdown in the rules of community engagement. For example, an internet entrepreneur said to me: "the companies that I work for, we all file patents...and we are pretty cynical about it. . . . We don't think these patents are really necessarily about protecting our technology...It is rare that the person [who] actually took the photo or wrote the book itself and holds the copyright and is selling you the rights. Extremely rare. Most common, it's collectors or historical societies who have been given the material for free...who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue.

A different filmmaker describes how she is not disappointed in the system, but . . . necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it because they have physical control...and hold you hostage for inordinate amounts of money.

Thus, another harmful effect of a precarious legal system with these characteristics is that the products of work are slower to arrive and may be more costly to make, and their quality may be compromised.

Intellectual property promotes not progress but 'paralysis by analysis,' today leading to inefficient work-arounds and lower-quality products. As I've written elsewhere, "a sclerotic system . . . induces risk-aversion behaviors, which leads to inefficient market-based metrics, exposing competing claims to the common good and to justice."

Third, these new stories center on plots that are increasingly at stake in the digital age, like Marquette Law School's 2022 Nies Lecture, flanked by Marquette Law School's Professor Kali N. Murray (left) and Professor Bruce E. Boyden, which we lawyers should embrace that move.

Fourth, and finally, when IP becomes a legal framework to debate fundamental values that are increasingly at stake in the digital age, we can more easily promote "progress of science and useful arts" in the enrichment of the public domain and the shared fates of today's digital age in terms of creative and innovative practices, which we celebrate as being more possible today than ever before. Accounts of lived experiences like these, in conjunction with the proliferation of court cases previously described, challenge us to rethink IP's contours for the internet age and urge us to highlight the role of systemic law reforms that would go a long way to centering our shared fates in the digital age in terms of creative and innovative practices, which we celebrate as being more possible today than ever before.

We don't think these patents are really necessarily about protecting our technology...It is rare that the person [who] actually took the photo or wrote the book itself and holds the copyright and is selling you the rights. Extremely rare. Most common, it's collectors or historical societies who have been given the material for free...who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue.

A different filmmaker describes how she is not disappointed in the system, but . . . necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it because they have physical control...and hold you hostage for inordinate amounts of money.

Thus, another harmful effect of a precarious legal system with these characteristics is that the products of work are slower to arrive and may be more costly to make, and their quality may be compromised.

We don't think these patents are really necessarily about protecting our technology...It is rare that the person [who] actually took the photo or wrote the book itself and holds the copyright and is selling you the rights. Extremely rare. Most common, it's collectors or historical societies who have been given the material for free...who are insisting on getting paid for it to be used. I can understand paying for copying costs, and paying for processing, but oftentimes the pay goes way beyond that as a moneymaking venue.

A different filmmaker describes how she is not disappointed in the system, but . . . necessarily the rules [of copyright], although those are difficult. What's disappointing is that people control access to those images, so that even if they don't own the copyright, or they cannot legally restrict the copyright, if they own the image, they can restrict your making a copy of it because they have physical control...and hold you hostage for inordinate amounts of money.

Thus, another harmful effect of a precarious legal system with these characteristics is that the products of work are slower to arrive and may be more costly to make, and their quality may be compromised.
SEPARATION OF POWERS IN FLUX

IN BOTH WISCONSIN AND WASHINGTON

Two legal scholars offer perspectives on court decisions and trends that are bringing momentous shifts in the allocation of governmental authority at both the state and federal levels.

The legal ground is shifting in the law of the separation of powers. Decisions by both the Supreme Court of the United States and the Wisconsin Supreme Court reflect and constitute important, even controversial, changes. The following pages present two sets of intelligent and accessible insights by distinguished professors into these legal developments.

The first is a question-and-answer session with Chad M. Oldfather, professor of law at Marquette University. The topic is his developing scholarship on separation of powers under the Wisconsin constitution, with particular emphasis on the approach of the Wisconsin Supreme Court. The touchstone is his new article, “Some Observations on Separation of Powers and the Wisconsin Constitution,” 105 Marq. L. Rev. 845 (2022).

The second is a recent series of guest posts on the Volokh Conspiracy blog by Thomas W. Merrill, the Charles Evans Hughes Professor of Law at Columbia University and a friend of Marquette Law School. The five-part series engages critically with the U.S. Supreme Court’s decision this past summer in *West Virginia v. EPA*, holding unlawful an innovative approach by the federal agency to addressing the question of climate change.

The reasons for our presenting the two sets of entries include, most generally, that developments in federal law (the subject of the Merrill entries) often have a pull on state law (Oldfather’s topic). Considerably more specifically: Both Oldfather and Merrill identify and criticize recent judicial justifications for upsetting decisions made by the other branches. Oldfather’s research quite directly takes on separation-of-powers questions under the Wisconsin constitution. Merrill’s approach addresses the future of the *Chevron* doctrine involving judicial deference in the administrative-agency context and the question whether Congress may become subject to a revival of the nondelegation doctrine.

In short, this latest work of both professors, while likely to produce spirited rejoinders, certainly merits attention and consideration.
THE POTENTIAL FOR UNINTENDED CONSEQUENCES IS HUGE

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

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

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

There’s sort of an origin story here, so let me start with that. State constitutional law has been understudied, not just in Wisconsin, but everywhere. There’ve been some law professors doing very good work in the field for quite a while, but most of the attention in the academy has gone to federal constitutional law. In fact, most law schools haven’t had a class on state con law. This in turn, has meant, as Judge Jeffrey Nutson of the U.S. Court of Appeals for the Sixth Circuit has pointed out, that the profession as a whole hasn’t paid enough attention to state constitutions. I first started thinking about teaching state con law—aiding such a course—to my roster—in 2014. That ended up not happening until 2020, and by that point, my motivations included not just a general sense that the subject had been overlooked, but also a belief that trends at the U.S. Supreme Court suggested that a lot of the action would be shifting to state courts and state constitutions. And, of course, over the years, there have been a lot of significant cases under the Wisconsin constitution. It matters also that the Wisconsin Supreme Court lately has been changing—with a majority of the seven justices having taken office since 2016, but changing otherwise as well. Suffice it to say here that, as someone who presents at conferences around the country attended by not just other professors but also state appellate court judges, I’ve gotten a lot of questions about the court. So I wanted to learn more.

So, the project itself?

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

How’d that come to be?

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

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

For this one, I decided that I would try to read everything the Wisconsin Supreme Court has ever written about separation of powers under the state constitution. At the end of the project, I kept track of what I was seeing and did my best to identify trends and inconsistencies and so forth. A lot ended up on the cutting room floor, though not doubt some of it will prove to be useful in future work.

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

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

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

Yes—and the story turns out to be more complex than most of the court’s opinions let on. The court in the state’s early decades was very pluralistic in its methodologies. It didn’t regard the task of interpreting the state constitution as following a single path, or as an endeavor in which only one approach is legitimate. As much as anything, the justices acted like common-law judges. And it’s not that the court lacked examples of alternatives. Thomas Cooley’s Constitution of the Commonwealth, first published in 1868, was unquestionably the leading treatise on state constitutional law. Cooley’s aim was to describe prevailing practices, and he outlines an approach that looks like a rough version of originalism. The Wisconsin justices cited Cooley for some things, but they didn’t follow his general approach. These days the court invokes a framework that’s somewhat akin to Cooley’s approach, but it didn’t adopt that until the mid-1970s, and its emergence then appears to have been almost by happenstance.

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

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

Could you elaborate on those differences?

Start with the legislative power. A state legislature has the police power. Certainly, Congress’s power is broad, but there are limits. So right off the bat, there’s this different and larger legislative power in Wisconsin. And then the executive branch in many states, including Wisconsin, is, as some describe it, “unbowed.” There are more executive officers identified in the state constitution than just the governor (or president), and more of them selected by the people.

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

The one thing that seems clear is that it’s inadvisable (I’m using a mild word) to draw any kind of easy analogies with the federal judicial power. Taken together, all of this calls into question the idea that one can derive conclusions about how power is separated at the state level from how it’s done at the federal level.

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

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

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

But you don’t see the court doing that?

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

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

How so?

I’ve already mentioned some of the reasons. But there’s more. Some of the justices recently have had big ideas about how things should be when it comes to separation of powers, which are some distance from how things are and have been. Some of those ideas, if implemented, would work fundamental changes on the structure of state government. But those ideas don’t seem to have a basis in anything directly connected to the Wisconsin constitution. Or at least the justices propounding the ideas haven’t made the effort to make that connection. What they provide instead is general references to some of the political philosophy underlying the U.S. Constitution, or citations of separate opinions of justices on the U.S. Supreme Court, which aren’t even binding authority as statements of federal constitutional law.

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

More here, too?

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

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

So what’s the solution?

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

MAJOR QUESTIONS ABOUT WEST VIRGINIA V. EPA— AND THE NATURE OF THE CHEVRON DOCTRINE

In a series of guest posts at the Volokh Conspiracy blog, a noted scholar of administrative law critically engages with the Supreme Court’s approach to reviewing challenges to the authority of federal administrative agencies.

By Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia University

SEPARATION OF POWERS IN FLUX

The CPP was challenged in court, and in an unusual move, it was stayed by the Supreme Court in 2016 before any of the challenges produced a final judgment. In 2019, the Trump administration formally repealed the CPP, based on its legal conclusion that generation shifting was not permitted by the relevant provision of the Clean Air Act. The Trump EPA simultaneously issued a new plan for regulating emissions of CO2 from existing fossil-fueled power plants, called the Affordable Clean Energy rule (or ACE). This new, and comparatively modest, limits on emissions by existing plants, based on the use of more efficient combustion devices.

A coalition of blue states and (interestingly) electric utility companies filed a massive review proceeding in the U.S. Court of Appeals for the D.C. Circuit, challenging ACE. One day before the inauguration of President Joseph Biden, a divided panel of the D.C. Circuit struck down the Trump plan. The bulk of the court’s nearly 150-page majority opinion consisted of a laborious analysis explaining how the repealed
CPC could be squared with the language of the act. The bottom line was that since generation shifting as imposed by the CPC was legally permissible, the Trump EPA erred in concluding that it had been impermissible. The ACE plan was accordingly reversed and remanded to the EPA.

After the decision was rendered, the D.C. Circuit clarified, in response to a motion by the Biden administration, that its mandate did not mean that the CPC was reinserted. Indeed, the court’s conclusion and was long dead. The particular form of generation shifting the CPC sought to mandate was of no continuing legal consequence.

Of course, any sophisticated observer of the Washington climate scene could predict that the Biden administration would be likely to put something similar to CPC in place. Or perhaps not. There are a variety of moves the Biden administration could take to hasten the demise of coal-burning power plants. At this point, it is completely unknown what form future regulation will take. In any event, the critical legal point is that no generation-shifting plan for existing power plants was in effect when the court rendered its decision. There being no actual plan to review, the court’s ruling that such a plan violates the Clean Air Act was of no precedential value. It was an advisory opinion. The CPC had never been put in effect and was long dead. The particular form of generation shifting the CPC sought to mandate was of no continuing legal consequence.

One could perhaps argue that the D.C. Circuit’s conclusion that the CPC was legally permissible was critical to its judgment that the Trump administration erred in concluding it was impermissible, and hence its decision to reverse and remand ACE to the EPA. This, in turn, might justify a decision by the Supreme Court disapproving the D.C. Circuit’s reasons for concluding that the Trump EPA had adopted an overly narrow interpretation of the EPA’s authority, and either accepting or rejecting those reasons. But this defense against the charge of an advisory opinion is not available, as the Court did not engage with the D.C. Circuit’s analysis of the statute. Instead, it held that any form of generation shifting—at least with respect to stationary sources—was permissible. The broad statutory language of section 111(d)—addresses existing stationary sources. The section is titled “Standards of Performance for New Stationary Sources.”

A current interpretation of the statute at issue—Section 111(d)—of the Clean Air Act—does not give the EPA the authority to issue the sort of regulations at issue in this case.

The Supreme Court held in West Virginia v. EPA that the federal agency did not have authority to adopt what amounted to a cap-and-trade system for existing fossil-fuel power plants because this raised “a major question,” “of economic and political significance,” as to which Congress had not clearly delegated authority to the EPA. But a close reading of the relevant subsection, Section 111(d) of the Clean Air Act, indicates that the EPA has no authority to issue legally binding emissions standards on existing stationary sources—period. So the Court did not have to create a novel legal doctrine to limit the authority of the Biden administration to adopt something like the Clean Power Plan. It could have reached the same result simply by paying close attention to the language of the statute that purportedly granted such authority. This second of five guest blog posts on the Supreme Court’s decision makes this case (the first one suggested that the decision was an advisory opinion). We need to know a bit about the statute. When Congress adopted the model for the Clean Air Act in 1970, the central regulatory mechanism was a classic exercise in cooperative federalism. The act required the EPA, in Section 109, to promulgate National Ambient Air Quality Standards (NAAQS), setting forth permissible limits on the ambient concentration of certain key air pollutants. Once these NAAQS were established, the states were required, under Section 110, to develop state implementation plans (SIPs), setting forth a strategy for achieving the federal standards.

The federal agency was directed to review the SIPs to make sure that they were adequate, and if a state utterly failed to promulgate an adequate SIP, the EPA could step in and promulgate a plan for the state. But the core idea was that the federal government would set the air quality standards and the states would have substantial discretionary authority to develop a regulatory plan to meet these standards, taking into account the circumstances of each state.

The Clean Air Act also gave the EPA authority to set “source controls” on sources in a number of situations, including emissions standards for hazardous air pollutants and for mobile sources such as automobiles. And, of relevance to the issue in West Virginia, Congress gave the EPA authority, in Section 111, to establish NAAQS on certain categories of new stationary sources discharging pollutants that can endanger public health and welfare. Having instructed the EPA to establish the NAAQS and having authorized the EPA to create direct emissions standards for hazardous air pollutants, was the EPA also authorized to promulgate new and modified standards for existing sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy. Many members of Congress were concerned that states with relatively clean air would use the discretion they enjoyed in establishing SIPs to set relatively lax environmental standards, or permit pollution more mobile sources, why did Congress also give the EPA authority to regulate new stationary sources? The answer is grounded in industrial policy rather than environmental policy.
the Administrative Procedure Act (APA) when agencies issue legally binding legislative rules. In order to determine whether Section 111(d), the EPA is instructed to “prescribe regulations which shall establish a program by which the agency shall, in its current incarnation in Section 111(a)(3), defines “standard of performance” to mean the “best system of emission reduction” (BSER) that “the Administrator of the EPA determines has been adequately demonstrated.” The same term—“standard of performance”—appears in both section 111(d)(1)(B), delegating authority to the EPA to “promulgate” standards for new sources, and in section 111(d), directing the states to submit plans establishing standards of performance for existing sources. But the determination by the EPA that a standard has been “adequately demonstrated” can be made ex post, when the EPA reviews the standards set by each state, as well as any comments submitted by the federal agency’s promulgating national standards for new sources. There is no language in the statute suggesting that the EPA must determine which standards of performance have been “adequately demonstrated” as part of the exercise of authority by states to establish standards of performance for existing sources, let alone for its making such standards legally binding in the federal Register. Although the EPA has no authority to issue binding regulation setting emission standards for existing sources, presumably it has the authority to issue guidance documents (“general statements of policy”) setting forth its advice to the states about how to regulate existing sources. But if the EPA followed a practice of approving state plans for failure to conform to the agency’s advice, the agency would be vulnerable to a court characterizing its advice as a binding rule that it has no statutory authority to make.

There is no mention in West Virginia v. EPA of the EPA’s delegation deficit under Section 111(d). Quite to the contrary, Chief Justice John Roberts, Jr., in setting forth the statutory and regulatory background of the case,完全没有endorse the EPA’s view of its authority under section 111(d).

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.” The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA. (Citations of regulations omitted.) This passage will be quoted with the EPA in any future controversy over its authority to issue binding national regulations on existing sources of pollution. It is highly ironic in its eagerness to adopt the “major questions” doctrine designed to limit the type of regulation that agencies can adopt without clear congressional approval, the Court rarifies a conception of the EPA’s authority over existing sources that is not supported by a careful reading of the statute. All of which suggests the desirability, to which I will return in the last entry (after the forthcoming third and fourth posts), of a court’s carefully considering the actual authority delegated to agencies, as opposed to rummaging about “major questions.”

3. WEST VIRGINIA v. EPA: WHAT WOULD HAVE BEEN THE RESULT UNDER THE CHEVRON DOCTRINE? The Supreme Court’s decision in its Chevron deference doctrine directly (as opposed to simply creating an exception to it). How, in fact, would the case have been decided under Chevron?

The Supreme Court’s June 2022 decision in West Virginia v. EPA will be remembered for its endorsement of the “major questions doctrine.” The new doctrine, as would have been obvious to all participants in the legal community, was designed to function as an exception to the Chevron doctrine, so named for Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (1984).

But then the Court, in City of Arlington v. FCC (2013), adopted a restrictive interpretation of Mead that effectively expanded the Chevron doctrine. The Court held in Arlington that it is not necessary to identify a delegation of power to act with the force of law with respect to the specific statutory provision in question; it is enough that Congress has in general terms authorized the agency to act with the force of law, although the delegation of power to act is even further, holding that Chevron applies to an agency’s interpretation of the scope of its delegated power. In West Virginia v. EPA, the correct approach would be taken, in its most recent decision in貌似 most recent word on the Chevron doctrine, it seems that a reading of the statute supports either the Obama administration’s Clean Power Plan or the Trump administration’s Affordable Clean Energy rule as a “permissible interpretation of Section 111(d) of the Clean Air Act.

Let’s start with the Obama administration’s Clean Power Plan. The Trump administration would not matter that Congress delegated authority to the EPA to act with the force of law with respect to new stationary sources of air pollution but not with respect to existing stationary sources (see the second post in this series). All that would be required in that instance is that Congress delegated authority to the EPA to act with the force of law with respect to the Clean Air Act, as of course it did with respect to new sources. And the fact that the CPP expanded the EPA authority over existing sources to an unprecedented fashion would not matter, so long as one could point to a provision in the statute that could be interpreted to support this.

As the tortured D.C. Circuit decision that became West Virginia reveals, it is possible to interpret the statutory definition of standard of performance—the “best system of emission reduction”—to authorize a standard based on requiring individual plants to participate in a cap-and-trade system. After all, a cap-and-trade approach is a “system,” and none of the other factors that the states are directed to consider with respect to existing plants (such as the “cost” of compliance and the remaining “useful life” of a plant) explicitly precludes such an approach.

Again, as the old saw goes, what is sauce for the goose is sauce for the gander. The Trump administration’s Affordable Clean Energy Plan, or the EPA’s promulgation of an “efficient” system for reducing emissions of a plant) explicitly precludes such an approach.

As the tortured D.C. Circuit decision that became West Virginia reveals, it is possible to interpret the statutory definition of standard of performance—the “best system of emission reduction”—to authorize a standard based on requiring individual plants to participate in a cap-and-trade system. After all, a cap-and-trade approach is a “system,” and none of the other factors that the states are directed to consider with respect to existing plants (such as the “cost” of compliance and the remaining “useful life” of a plant) explicitly precludes such an approach.

Again, as the old saw goes, what is sauce for the goose is sauce for the gander. The Trump administration’s Affordable Clean Energy Plan, or the EPA’s promulgation of an “efficient” system for reducing emissions of a plant) explicitly precludes such an approach.

The Trump administration requires that the reviewing court wave away any objections based on the EPA’s lack of rulemaking authority, objections based on the EPA’s lack of regulatory authority, or objections based on the implications of that interpretation for the scope of agency authority. So the question would boil down to whether the Trump administration’s interpretation of “best system of emission reduction” was itself permissible.

The EPA explained that emission standards under Section 111 had always been based on available

42 MARQUETTE LAWYER FALL 2022 MARQUETTE LAWYER 43
The fact that the Chevron doctrine, as it stands after years of judicial treatment under the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important point for consideration in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, Congress has failed to provide significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the substance of the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers and the electric power industry without any filling of wetlands, and the provision of information about abortion providers is just one example. In each case regular shifts in policy as the Executive changes hands have been abetted by the Chevron doctrine.

The major questions doctrine is, indisputably, and, as a practical matter, will encourage courts to engage in something akin to political pontifying than law. West Virginia v. EPA is clearly designed to impose new limits on federal agencies as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in City of Arlington v. FCC (2013) that federal courts must give Chevron deference to any agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act. West Virginia turns this Chevron doctrine principle on its head. At least with respect to “major questions,” an agency will be presumed to have authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

West Virginia thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with Chevron. As formulated in West Virginia, a court is supposed to ask, first, whether the agency is seeking to render a policy in a manner that presents a “major question” of “economic and political significance.” If the answer is “Yes,” the court asks, second, whether there is a “clear statement” by Congress conferring such authority. If, in the absence of a clear statement, the agency will be held to have exceeded the scope of its authority. (West Virginia does not say what happens if the answer to the first question is that the question is “moot.”)

Before considering the workability of the major questions doctrine, it is worth asking whether, as Justice Neil M. Gorsuch suggested in his concurring opinion, West Virginia is a “fence line” of the plant was the technology that could be adopted at the site of each individual source—the “fence line” of the plant was the expression adopted. Invoking the idea that the “fence line” of the plant was the technology that could be adopted at the site of each individual source, the Trump EPA used this as a platform in its attempt to undermine the doctrine.

The fact that the Chevron doctrine, as it stands after years of judicial treatment under the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important point for consideration in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, Congress has failed to provide significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the substance of the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers and the electric power industry without any filling of wetlands, and the provision of information about abortion providers is just one example. In each case regular shifts in policy as the Executive changes hands have been abetted by the Chevron doctrine.

The major questions doctrine is, indisputably, and, as a practical matter, will encourage courts to engage in something akin to political pontifying than law. West Virginia v. EPA is clearly designed to impose new limits on federal agencies as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in City of Arlington v. FCC (2013) that federal courts must give Chevron deference to any agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act. West Virginia turns this Chevron doctrine principle on its head. At least with respect to “major questions,” an agency will be presumed to have authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

West Virginia thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with Chevron. As formulated in West Virginia, a court is supposed to ask, first, whether the agency is seeking to render a policy in a manner that presents a “major question” of “economic and political significance.” If the answer is “Yes,” the court asks, second, whether there is a “clear statement” by Congress conferring such authority. If, in the absence of a clear statement, the agency will be held to have exceeded the scope of its authority. (West Virginia does not say what happens if the answer to the first question is that the question is “moot.”)

Before considering the workability of the major questions doctrine, it is worth asking whether, as Justice Neil M. Gorsuch suggested in his concurring opinion, West Virginia is a “fence line” of the plant was the technology that could be adopted at the site of each individual source—the “fence line” of the plant was the expression adopted. Invoking the idea that the “fence line” of the plant was the technology that could be adopted at the site of each individual source, the Trump EPA used this as a platform in its attempt to undermine the doctrine.

The fact that the Chevron doctrine, as it stands after years of judicial treatment under the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important point for consideration in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, Congress has failed to provide significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the substance of the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers and the electric power industry without any filling of wetlands, and the provision of information about abortion providers is just one example. In each case regular shifts in policy as the Executive changes hands have been abetted by the Chevron doctrine.

The major questions doctrine is, indisputably, and, as a practical matter, will encourage courts to engage in something akin to political pontifying than law. West Virginia v. EPA is clearly designed to impose new limits on federal agencies as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in City of Arlington v. FCC (2013) that federal courts must give Chevron deference to any agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act. West Virginia turns this Chevron doctrine principle on its head. At least with respect to “major questions,” an agency will be presumed to have authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

West Virginia thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with Chevron. As formulated in West Virginia, a court is supposed to ask, first, whether the agency is seeking to render a policy in a manner that presents a “major question” of “economic and political significance.” If the answer is “Yes,” the court asks, second, whether there is a “clear statement” by Congress conferring such authority. If, in the absence of a clear statement, the agency will be held to have exceeded the scope of its authority. (West Virginia does not say what happens if the answer to the first question is that the question is “moot.”)

Before considering the workability of the major questions doctrine, it is worth asking whether, as Justice Neil M. Gorsuch suggested in his concurring opinion, West Virginia is a “fence line” of the plant was the technology that could be adopted at the site of each individual source—the “fence line” of the plant was the expression adopted. Invoking the idea that the “fence line” of the plant was the technology that could be adopted at the site of each individual source, the Trump EPA used this as a platform in its attempt to undermine the doctrine.

The fact that the Chevron doctrine, as it stands after years of judicial treatment under the Obama or the Trump approaches to regulating carbon emissions from existing fossil-fueled power plants highlights an important point for consideration in the doctrine. In an era when Congress frequently fails to legislate on important policy questions, Congress has failed to provide significant regulatory instability as policy shifts from one presidential administration to another.

Thus, we have witnessed climate change policy oscillating between skepticism (Bush 43) to enthusiasm (Obama) and once more to enthusiasm (Biden). This makes it difficult to gain traction on the substance of the relevant actors to engage in long-range planning, which is absolutely vital in the electric power industry.

Similar shifts have occurred with respect to so-called “net neutrality” requirements for internet service providers and the electric power industry without any filling of wetlands, and the provision of information about abortion providers is just one example. In each case regular shifts in policy as the Executive changes hands have been abetted by the Chevron doctrine.

The major questions doctrine is, indisputably, and, as a practical matter, will encourage courts to engage in something akin to political pontifying than law. West Virginia v. EPA is clearly designed to impose new limits on federal agencies as they seek to rewrite the scope of their authority. The Supreme Court’s attention to the scope of agency authority is welcome. As noted in the immediately prior post (the third in this five-post guest series), the Court held in City of Arlington v. FCC (2013) that federal courts must give Chevron deference to any agency’s interpretation of the scope of its authority. This would effectively give agencies the power to determine the dimensions of their regulatory mandate unless it is clear that Congress has not conferred authority on the agency to act. West Virginia turns this Chevron doctrine principle on its head. At least with respect to “major questions,” an agency will be presumed to have authority to act unless the court finds that Congress “clearly” has conferred authority on the agency to decide the matter in question.

West Virginia thus establishes a “two-step” standard of review very different from the “two-step” standard commonly associated with Chevron. As formulated in West Virginia, a court is supposed to
and give their judges life tenure, is to answer such difficult questions.

5. WEST VIRGINIA v. EPA: GETTING TO ACTUAL DELEGATION

The Court should assimilate the “major questions” doctrine of West Virginia v. EPA and earlier precedents—including Chevron and what came even before that—to an approach that asks whether Congress has made an actual delegation. Only this will serve the relevant separation-of-powers principle.

Both the Chevron doctrine and West Virginia v. EPA are based on ideas about the delegation of interpretive authority from Congress to administrative agencies. Chevron introduced the idea of “implicit” delegations, and the doctrine spawned by it eventually held that any ambiguity in an agency statute is an implicit delegation. West Virginia is effectively an unacknowledged cave-in. Without the majority’s mentioning Chevron, the case presents that a ‘major question’ is involved, a delegation must take the form of a clear statement; presumably, only express delegations or something close to them are involved.

Both positions are extreme. The idea that any ambiguity is a delegation transfers too much power to the administrative state. The view that only express delegations will do for major questions concentrates too much power in reviewing courts.

The better position, as I have suggested in *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State* (University Press, 2022), is that courts should condition any strong form of deference to agency interpretations on a finding that Congress has actually delegated authority to the agency to resolve the issue. This means more than finding ambiguity; courts must carefully interpret the statute and conclude that Congress left a gap for the agency to fill.

But it does not mean the delegation must be express; the delegation can be implicit but actual. For example, when Congress delegated authority to the EPA to promulgate emissions standards for new stationary sources (by the agency’s determining the “best system of emissions reduction”), this was an implicit but actual delegation to the agency to interpret the meaning of “best system” for that purpose (Section 111(b) (1)(B) of the Clean Air Act).

There are multiple reinforcing reasons for requiring courts to find an actual delegation before deferring in a strong sense to an agency’s interpretations. This was the universal assumption before Chevron. See e.g., *Social Security Bd. v. Niero* (1946) (“An agency may not finally decide the limits of its statutory power. That is a judicial function.”). It is required by the Administrative Procedure Act. See 5 U.S.C. § 706(2)(C) (authorizing courts to set aside agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

It is, as I argue in chapter 3 of *The Chevron Doctrine*, most likely what Justice John Paul Stevens had in mind in *Chevron* when he concluded that Congress had left a gap in the Clean Air Act about the meaning of “stationary source” and implicitly delegated authority to the EPA to fill that gap.

Importantly, independent judicial judgment about the existence of an actual delegation is critical in preserving the separation-of-powers principle, reaffirmed in *West Virginia*, that (in the words of that decision) “[a]gencies only those powers given to them by Congress.”

Tasking courts with determining, as a matter of independent judgment, that there has been an actual delegation to the agency requires courts to do nothing as to which they have a comparative advantage: statutory interpretation. There is no simple test for identifying the limits of agency authority, no escape from a court’s examining all relevant aspects of the statutory language, structure, purpose, and the evolution of the statute over time.

Sweeping presumptions, such as any ambiguity = delegation or any major question = no delegation, will only disserve the underlying separation-of-powers principle, which is that Congress has exclusive authority to decide the scope of agency authority.

This does not mean courts must proceed in a purely ad hoc and unguided fashion. As I discuss in the new book (chapter 11), it is possible to identify a number of rule-like principles here. Express delegations, when they exist, should be enforced according to their terms. Issues as to which some other entity exercises decisional authority should not qualify as a delegation to the agency. Agencies have no delegated authority to override incontrovertible statutory limits, as when the EPA sought to interpret “250 tons” of air pollutant to mean “100,000 tons.” See *Utility Air Regulatory Group v. EPA* (U.S. 2014).

There are also situations that should qualify as “red flags,” requiring courts to engage in a more searching examination of the scope of agency authority. One is when an agency adopts an interpretation that deviates from the settled understanding of the scope of its authority, as when the FDA decided that it had authority to regulate tobacco products after consistently disavowing such power (the FDA v. Brown & Williamson Tobacco Corp. (U.S. 2000)).

Another is when an agency adopts an interpretation that sharply expands or contracts the scope of its authority, as when the FCC decided that its authority to “modify” tariff-filing requirements permitted it to deregulate much of the long-distance telephone industry (MC I v. AT&T (U.S. 1994)).

“Red flags” brings us back to *West Virginia* and the major questions doctrine. Decisions such as *Brown & Williamson, MC I v. AT&T*, and *Utility Air* were precedents heavily relied upon by Chief Justice John G. Roberts, Jr., in support of recognizing a major questions doctrine. The crucial difference, however, is that in these previous decisions, observations about the “economic and political significance” of the agency interpretation, or the potential for “radical or fundamental change,” or its “unprecedented” nature were offered in the course of the Court’s exercise of traditional statutory interpretation to determine the scope of the agency’s authority. The provenance of the major questions idea gives rise to hope that *West Virginia* can be assimilated to the complex of norms about statutory interpretation—which is to say, to the world of conventional interpretation, as displayed in the precedents upon which *West Virginia* draws.

To be more specific, it would be desirable if the Court, in some future encounter with a question about the scope of agency authority, did not proceed as if *West Virginia* established a hard-edged clear statement rule, requiring first an abstract determination (based on multiple factors of uncertain weight) whether the question is “major” and, if so, then demanding a clear statement from Congress authorizing the agency to address the issue.

It would be better to treat *West Virginia* as requiring, in every case, that the agency possesses actual delegated authority over a question before the court will defer to its interpretation. And the circumstances that led the Supreme Court to deem the question in *West Virginia* “major” should be cited as ones that alert the reviewing court to the need for a particularly careful examination of the agency’s claim of authority.

We live in a perilous world in which the role of law is vulnerable to being crushed in a universal game of political “hardball.” The Chevron doctrine was a notable attempt to distinguish the realm of “law” from that of “policy,” and to define the role of the courts as being the enforcers of law, with agencies given primacy in the realm of policy. Over time, as I set forth at length in my book, *The Chevron Doctrine* proved to have a number of shortcomings. But the Court, in its efforts to define something better, needs to tread cautiously, lest it make the ideal of the rule of law and the courts’ role in enforcing it, more difficult to attain than ever before.
The Pro Bono Institute’s Eve Runyon tells Marquette law students they can and should make helping others a career goal.

Eve Runyon has been president and CEO of the Pro Bono Institute (PBI) since 2016. She received a bachelor’s degree from the University of Virginia and a law degree from Yale University. The institute is a Washington, D.C.-based nonprofit that supports pro bono efforts of major law firms and in-house legal departments. Runyon spoke with Mike Gousha, senior advisor in law and public policy at Marquette Law School, for the Posner Pro Bono Exchange in the Lubar Center of Eckstein Hall on April 22, 2022. The annual event honors the contributions of the Gene and Ruth Posner Foundation in support of Marquette Law School’s public service work and introduces the Pro Bono Society Induction Ceremony, where this past year 139 Marquette law students were recognized for their work. This is an excerpted and lightly edited transcript of the Posner Exchange between Gousha and Runyon.

Gousha: When did you know you wanted to be a lawyer?
Runyon: My parents met—and a normal love story—fell in love. They decided they wanted to get married and have a family. But there was a hiccup, and the hiccup was that my father is white and my mother is Black. At the time that they met, it was illegal for interracial couples to marry. The Loving case (Loving v. Virginia (U.S. 1967), which I’m sure you know, all studied in law school, was decided two months prior to their marriage. So there was a very real understanding for me growing up that the law was something that was extremely powerful and extremely important. It probably wasn’t until college that I decided I, too, wanted to be a lawyer, but there were lots of things that were relevant to me and that influenced me in coming to that decision.

Gousha: When were you in law school, how actively involved were you in the idea of pro bono, the idea of voluntarism?
Runyon: One of the reasons I chose my law school was that you were able to participate in a clinic in your first year. And I thought that that was amazing, that I would be able to practice and provide legal services at such a young stage in my development. At the time, I wasn’t doing pro bono work, but I was working very diligently in the clinic, and that was probably the most fantastic experience that I had in law school.

Gousha: What did you learn?
Runyon: The importance of service, the impact that you can have in individual lives, the impact that your experience can have on how you think about things more broadly. My clinic was a disabilities rights clinic, and we worked primarily with children who had special ed needs. We were working to solidify IEPs [individualized educational plans] and make sure that the children had appropriate accommodations in school. But we also looked at the bigger picture, and we did some policy work.

Gousha: Your first job was with Skadden, Arps, Slate, Meagher & Flom, representing major electric, gas, and pipeline companies. It may not seem on the surface that this provided a direct connection to the next part of your life.
Runyon: I was an energy lawyer. I did a lot of work involving FERC, the Federal Energy Regulatory Commission. I would be responsible for building liquefied natural gas facilities. I worked on rate cases. That had nothing to do with pro bono, but it was at a firm that fundamentally believed in pro bono. And so, while I had a bountiful practice that was focused on all things energy, I also had a very active pro bono practice. It was one of the reasons why I selected the firm, and it was one of the reasons why my experience at the firm was so positive.

Gousha: You did different things in pro bono while you were at the firm. Describe for us what those were.
Runyon: I purposely chose different types of pro bono experiences because I wanted to make sure that I was challenged and wanted to make sure that I was learning. We talk about the value of pro bono as an opportunity for professional development, and I really wanted to make use of that and to experiment with my legal practice.

My first case was a death penalty case, and I was able to work on that full-time. My firm put, ‘Your billable workside allow for a couple of months and work on this death penalty case,’ and I did that. I did a lot of family law and landlord/tenant cases—so, your traditional poverty bread-and-butter legal aid cases. In the District of Columbia at the time that I was at Skadden, we were trying to figure out how they could more effectively provide services to tenants in landlord/tenant court, and so they were creating a self-help center. I worked with the Access to Justice Commission in D.C., which was building out the self-help center. I was doing all the first drafts of the template motions that people would be able to use. I also spent time working on an employment discrimination case that was assigned to my firm by the district court.

So, lots of really very different, exciting things that were challenging, meaningful, and satisfied my desire to learn, and satisfied my desire to give back.

Gousha: The death penalty case—what was it like working on that?
Runyon: That was hard. To this day, I’m not sure how to talk about that case because we were not successful; our client was executed. It was a difficult experience, but it was one that I am extremely grateful for having worked on. I actually worked on the case when I was a summer associate at Skadden and then, when I returned to the firm, I was assigned to it as a first-year associate, and I worked very closely with the partner, who had had a number of death penalty cases and had been successful in the past. I came on right at the end stages of the representation, and what I did on the project was unbelievable. I was writing first drafts of motions and briefs that were filed before the U.S. Supreme Court and before the Virginia Supreme Court. I was the investigator on the case, and so we were gathering affidavits from people who were involved in the case years before. I was traveling around Virginia, getting people to sign affidavits, which was really sort of exciting and different for a first-year associate at a big law firm. We filed for a new trial in the state court in Virginia. It was a really fantastic experience, but it was a difficult experience as a young lawyer and as a pro bono lawyer.

Gousha: Did the outcome of the case change the way you felt about the law?
Runyon: No! I think it made me understand how important pro bono is. There were things that the client wanted us to do as his lawyers that were important for him. He understood what potentially was going to happen and what did happen, and he had a lot of regret. There were things that we were able to do to give him sort of agency, to give him peace. Even though the end result was that he was executed, we were able to sort of go with...
him on that journey in a way that brought him some comfort, and that was extremely meaningful.

Meeting markers on the path to becoming “a good lawyer”

Gousha: You had a wealth of experiences at Skadden. When did you know that something else was in store for you as your career unfolded?

Runyon: I knew even before going to Skadden that ultimately I would end up in public interest. I didn’t know whether I was going to go to a nonprofit organization or whether I’d work for government, the State Department or DOJ . . . but I knew that I wanted to end up doing public interest work. I chose the firm because I wanted the experience, I wanted the training ground, I wanted to be a good lawyer and go to a place that was going to teach me how to be a good lawyer. And I thought, ‘I’ll be here for three or four years and then I’ll move on and do what it is that I’ve always dreamed of doing.’ It ended up being seven years, and that was fine.

Gousha: It happens.

Runyon: Oh, it happens. One of the things that was great about my firm—and a number of firms have similar programs—is that in my fourth year, they loaned me to the local Legal Aid, and for seven months I was a staff attorney at Legal Aid. And I loved it. When I returned to the firm after my fourth year, I realized, ‘Okay, I really should start thinking about what I want to do next.’ And I was very practical about it . . .

Trying to close a chasm: The work of the Pro Bono Institute

Gousha: You feel like you’re making good progress on all of those fronts.

Runyon: Yes. When we started there were, I’d say, maybe five or so major law firms in the United States that had a full-time pro bono counsel. This is someone at the firm whose responsibility is to organize pro bono for the firm. And now there are hundreds. And it’s a reflection of how institutionalized pro bono has become at law firms across the U.S. and how much it is a part of the value that law firms have.

On the company side, a very similar story. When we first started Corporate Pro Bono, which is the project that I directed, focused on companies, pro bono was very individualized. The notion that a lawyer at a company—a lawyer at Microsoft or Harley Davidson or whoever is doing pro bono seemed outrageous. To the extent that it was happening, it was someone who was really passionate about it and was working at their local or area legal aid organization.

We started working with companies the same way we had been working with law firms, to help them create infrastructure so that more lawyers can get involved and make the delivery of services more efficient. Now we’re working with thousands of companies.

The Pro Bono Institute has a challenge program—to help firms create infrastructure and use their resources in a way that would bring efficiency to how legal services are being delivered or delivered on a volunteer basis. We then expanded our mission to involve legal departments of companies.
Teaming up to pursue more impact

Gousha: I thought it might be good to give the students and their families in the room and the folks who care about them to hear about an individual project. So you did something called the Collaborative Justice Project in Minnesota. Tell us about that project.

Runyon: Sure. So the work that we do at PBI can be lumped into three buckets. There are the individual services that we’re providing to law firms and to companies. A law firm will contact us and say, “We want to be more efficient in how we’re delivering pro bono services; we want to host a strategic planning session for our managing partner and our executive team, so that we can better impact the communities in which we have offices.” PBI works directly with law firms and with companies to provide individual services.

The third bucket is to strengthen the industry as a whole, where we have initiatives like our challenge, our LogicEngine and trainings and conferences that we host, designed to elevate best practices so that we collectively can be more effective and efficient in how we deliver pro bono services.

The last thing that we do—this speaks to the collaborative justice project—is to support efforts to be creative and innovative in how we think about access to justice and how we bring about change, how we can be more effective, how we can address persistent problems, how we can bring about policy change.

The Collaborative Justice Project is something that we launched in Minnesota. It’s been based on something that we were seeing happen in the philanthropic community called “collective impact.” It’s this idea that if you really want to address a persistent problem and make a difference, then you need to bring together representatives from different sectors of the community and come up with one plan. Instead of having people working in isolation and work on different efforts, collectively you develop one plan and focus your resources toward that plan.

That’s exactly what we did in Minnesota. It’s a collective impact project that is focused on reentry (from incarceration) and on trying to reduce recidivism. The folks in Minnesota selected the focus of the project. The law firms, companies, and other stakeholders felt that reentry was an important topic and that they could produce meaningful change in the community by focusing on reentry.

The project involves more than just lawyers because, as wonderful as we are, we cannot solve things by ourselves. So you have lawyers from law firms and companies, but you also have the Minnesota Department of Corrections, the Bureau of Prisons, Minnesota’s U.S. Probation and Pretrial Services, Minnesota’s federal reentry court, nonprofit organizations that are on the ground day-in, day-out, that are providing services to individuals who are returning to the community from state and federal facilities, and more.

So you have this collection of people who are working together. Some of the services that we provide are focused on people while they’re incarcerated, recognizing that reentry starts well before anyone is released. This programming focuses on developing prosocial behavior and other resources that people need while they’re incarcerated. We have another effort focused on what happens after you’re released. We spend a lot of time trying to identify keys to success—employment, housing, family reunification. We have an effort that’s specifically focused on providing pro bono services addressing persistent civil legal needs that individuals are facing—not having a driver’s license, not having identification, having outrageous child support debt, trying to reunify with kids. And then we have an effort that’s focused on policy and advocacy.

There’s a theme in what I’ve done throughout my career: recognizing that providing services to individuals is unbelievably meaningful. It’s also unbelievably meaningful to take that knowledge, that understanding, and apply it to the system as a whole. So we’re also working to change some of the policies in Minnesota, so that we’re not just impacting individuals, but impacting all.

Gousha: Do you see measurable from that effort already? Are you making progress based on the activities you’re undertaking in Minnesota?

Runyon: We are. Minnesota’s federal reentry court—and there is a reentry court here in Wisconsin as well—serves individuals who are at high risk. The recidivism rate for that community is around 76 percent. For those in the program, it has dropped to around 38 percent.

Gousha: Big difference.

Runyon: Yes. We can’t take credit for all of that because we are not the only partner in Minnesota’s reentry court, but we are part of the equation.

Gousha: I’m wondering if you could do something in Wisconsin. Is that possible?

Runyon: Absolutely. Actually, we are in the process of bringing the project to Wisconsin right before the pandemic hit, and, of course, we had to pause because of that. There are a few things that made Wisconsin really attractive with regard to this project. One, there is a federal correctional facility, Oxford. Two, there is a federal reentry court here in Milwaukee. Three, there is a community that is committed to pro bono legal services. And those were the three important key players that we had to Minnesota. To be very much interested in bringing the project here. Hopefully, we can return to those conversations once things turn a bit more back to normal.

The pro bono pandemic boom

Gousha: Speaking of the pandemic, I think what’s really great about today is we’re recognizing the efforts of so many students who did this work during a pandemic. How did the pandemic affect the work that your organization does?

Runyon: I think, like everyone, it turned everything upside down. The day that everything shut down was the day before we were hosting a national conference. We had to shut that down and had to figure out how to move all of our programming to Zoom. More importantly, we had to think about how it impacted the law firms and companies that were providing pro bono services. They had to figure out how they could do that virtually, moving their clinics and moving their other programs to a virtual environment. There was a lot of change, a lot of anxiety, and a lot of long nights.

I think what we’re seeing now is collectively the legal community trying to figure out what worked well and what didn’t, and in what instances we can continue to provide services remotely and in what instances do we really need to be in person. You’re seeing law firms and companies having these conversations. The courts are having these conversations, as are other really important key players, trying to think through what we did, learn how, can we be more effective and efficient moving forward.

For example, many of the legal aid organizations realized that in domestic violence cases, the legal aid or pro bono lawyer was the only contact the individual may have, and virtual is not the best way to provide services because you’re not able to assess how dangerous that situation may be. But in other instances—for example, landlord/tenant—it’s actually great to do things virtually and not to have people travel down to the courthouse. You actually had more people participating—and so you had fewer things that were happening by default—because the parties were actually showing up.

Gousha: Did you see any change in the commitment of people to pro bono during the pandemic?

Runyon: We did. As I mentioned, we have the Law Firm Pro Bono Challenge initiative. The law firms that are signing up for it are committing 3 percent or 5 percent of their billable hours to pro bono. We have been surveying our law firms since we launched the challenge. We’ve been able to track law firms’ engagement from year to year. We had reached five million hours per year that were being devolved by our law firm challenge signatories, which is amazing. When we first launched the challenge, it was less than a million hours. We’ve seen more and more lawyers getting involved, giving back, and providing services. We saw a huge increase in the number of hours that people were devoting to pro bono that first year of the pandemic. It was really quite inspiring. And this was at a time when we had no clue what we were doing, didn’t know if we could actually do clinics remotely, didn’t know how we were going to contact our clients and let them know that we still providing services.

The legal aid organizations were hugely impacted by the pandemic. Not only was there the challenge of trying to provide services because you couldn’t actually do clinics remotely, but there’s a challenge in that you are fundamentally an under-funded organization. You

"WE’VE BEEN SEEING MORE AND MORE LAWYERS GETTING INVOLVED, GIVING BACK, AND PROVIDING SERVICES. WE SAW A HUGE INCREASE IN THE NUMBER OF HOURS THAT PEOPLE WERE DEVOTING TO PRO BONO THAT FIRST YEAR OF THE PANDEMIC. IT WAS REALLY QUITE INSPIRING." Eva Runyon

“THERE’S A TALEM: IN WHAT I’VE DONE THROUGHOUT MY CAREER, RECOGNIZING THAT PROVIDING SERVICES TO INDIVIDUALS IS UNBELIEVABLY MEANINGFUL. IT’S ALSO UNBELIEVABLY MEANINGFUL TO TAKE THAT KNOWLEDGE, THAT UNDERSTANDING, AND APPLY IT TO THE SYSTEM AS A WHOLE.”
don’t have laptops to give your staff when you’re requiring them all to go home and do work. One of the things the Legal Services Corporation did was to make sure that they received increased funding specifically so that they could give legal aid organizations the money that they needed to address the technology gap that they had. All of these challenges existed that first year of the pandemic, yet the hours in pro bono went through the roof.

“Is it our duty to give back”

Gousha: It will give you a moment or two to talk about your advice for law students as they continue on with their careers.

Runyon: So, two things. One, Ruth Bader Ginsberg was quoted at the start of the program, by Josh Gimpel, and she was an amazing justice. We had the pleasure of PBI of having her come and speak to our lawyers a number of times. She was very inspirational and shared her belief that we as a profession have an obligation to give back. Regardless of what you do as a lawyer, whether you’re a corporate lawyer, whether you’re a public interest lawyer, we have a unique skill, and it is our duty to give back to those who are underserved. The most important thing that I’ve seen in my job at PBI is that no matter what you’re interested in, no matter what community you wish to serve, no matter what you think the barriers are to pro bono, there is an opportunity that is right for you, that will be meaningful to you, and that will be life-changing for the individual that you’re serving. That’s the first bit of advice that I’d give.

The other speaks to my career path. I started off at a big corporate law firm, doing really fascinating work and energy, and ended up as a public interest lawyer. What you do in your first year of practice may not be what you’re doing in your fifth year of practice or your tenth year of practice. And that’s fantastic because this is a journey. I would encourage you to always seek to learn and to challenge yourselves and to look for new opportunities to grow, to be proactive about your career. No one’s going to care more about your career than you are, so be proactive. Pro bono is a great way for you to grow as a lawyer. I would encourage you to look for those opportunities.

Frankly, M. Gimbel received the Witteus History Award from the Milwaukee County Historical Society.

Don Manzullo has been named a “Nice Guys For Congress? How an Obscure, Country Lawyer Kept His Faith, Beat the Establishment, and Survived Twenty Years in Washington” (WestBow Press 2022).

William C. Gleisner, III, received the President’s Award from the State Bar of Wisconsin in recognition of his dedication to the work of the Wisconsin Judicial Council for the past 14 years and for his continued contributions to the bar and the legal profession.

John E. Kosobucki received the Meritorious Civilian Service Award and medal from the Department of Defense, Office of the Inspector General, in ceremonies at the Mark Center, Alexandria, Va., in July 2022. Kosobucki serves as a senior official investigator conducting noncriminal investigations of senior Department of Defense officials.

Susan A. Hansen of Milwaukee was honored and received the Lifetime Achievement Award from the Milwaukee Bar Association.

Kathy L. Nuslock received the Nathan A. Froebel Foundation’s Award from the Eastern District of Wisconsin Bar Association.

David C. Samaski published The Essence of Writing Persuasive Trial Briefs: Big Ideas for Mastering Mediation, Arbitration & Trial Briefs (2020); a practical book is available in both e-book and paperback.


Michael J. Cohen, of Meissner Tierney Fisher & Nichols, received the Distinguished Service Award from the Milwaukee Bar Association.

Annette K. Corrigan has joined Lavelle Law, in Sheboygan, Ili. She is a trustee of the College of DuPage in Glen Ellyn, Ill.

Sonja Tornov Eavys joined Fox Rothschild in Minneapolis, Minn., as a partner in the family law department.

Diane M. Donohoo received a Racine County Sheriff’s Office certificate of appreciation for her work on the cold-case homicide trial of Linda Lacorch.

Derek C. Mosley received the Robert H. Fisched Social Justice Award from the Milwaukee Jewish Federation.

Susan A. Hansen received the Lifetime Achievement Award from the Milwaukee Bar Association.

Kathy L. Nuslock received the Nathan A. Froebel Foundation’s Award from the Eastern District of Wisconsin Bar Association.

Frank C. DeQuire, Jr., has joined Quarles & Brady in Milwaukee as a partner. His practice focuses on business and corporate law and public finance.

Kurt Dysktra was named president and CEO of Independent Colleges of Indiana, based in Indianapolis.

Thomas J. Watson was named president and CEO of Wisconsin Lawyers Mutual Insurance Company in Madison, Wis. He has been with the company since 2005.

Tara R. Devine, managing partner of Salvi, Schostok & Pritchard’s office in Lake County, Ill., is president of the Lake County Bar Association.

Christopher R. Smith joined von Briesen & Roper as a shareholder in the Milwaukee office. His practice focuses on real estate development, eminent domain, and property tax.

Jeffrey R. Ruied promoted to senior vice president at Hamness Patels, a real estate private equity firm, in Milwaukee.

Malinda J. Eakre, a Reinhardt Boerner Van Deuren shareholder in Milwaukee, was elected to the board of governors for the Seventh Circuit Bar Association.

Susan M. Roth was named a court commissioner for the Milwaukee County Circuit Court.

Raphael F. Ramos was featured in the Milwaukee Journal Sentinel for his work at Legal Action of Wisconsin’s Eviction Defense Project. A national report examining innovative volunteer eviction defense programs has identified the project as a model for the country.

Stephan P. Boyett has been promoted to equity partner at DuFour Conanisakis, a firm in Irvine, Calif. His practice encompasses a range of corporate and real estate matters.

Christina A. Katt has joined Burton Weltz Buhkma Okison & Vlat, in Waukegan, Wils.

John G. Long is a partner and member of the sports, entertainment, and media practice group at Lewis Brisbois, in the firm’s Houston, Texas, office.

Peter B. Benar is associate athletic director for compliance at the University of Wisconsin-Milwaukee.

Laurie C. Frey is named director of risk management, at Madison Square Garden Entertainment Corp.

Sarah J. Knutson was named contract manager for Prime Video Sports, Amazon, in Seattle, Wash.

Raphael F. Ramos and Mercedes M. de la Rosa are tax attorneys at Arenfox Schiff in Chicago.

Brandon J. Teltser is director of compliance services at the University of Nevada, Reno.

Jake T. Armellini was named contract manager of Prime Video Sports, Amazon, in Seattle, Wash.

Gerard A. Donnel has been named associate director of compliance for University of Tennessee Athletics, in Knoxville, Tenn.

Mercedes de la Rosa is an attorney at MWH Law Group in New York City.

Zach J. Lioe is assistant athletic director, compliance, at Central Michigan University, in Mount Pleasant, Mich.

Ashley T. Madsen joined Godfry & Kahn, Milwaukee, as an associate.

Breanna M. Moe is trademark staff attorney at L&L Legal Services, South Carolina.
HELP! I NEED SOMEBODY.

If The Beatles had enrolled in law school, there is a good chance that that’s what they would have sung at some point during their first year. Finding your way in law school can be a challenge.

HELP! NOT JUST ANYBODY.

At Marquette Law School, the students, faculty, and administration strive to respond to the call. Upper-level students serve as peer mentors through a wide array of student organizations and key initiatives such as the Academic Success and Marquette Law Mentorship programs. Assistant Dean of Students Anna Fodor and staff throughout the Law School meet regularly with students, one-on-one, to offer guidance and support. The faculty is committed to being accessible beyond the classroom and to building personal relationships with our students. And Eckstein Hall, the Law School’s beautiful home, is a place where you can feel comfortable and welcome, even on those hard days’ nights.

While thrilling and inspiring, the start of your legal education can also be daunting. At Marquette Law School, our students do not go it alone. *Cura personalis* might not be part of any band’s lyrics, but it sings to us.

CURA PERSONALIS: CARE FOR THE INDIVIDUAL PERSON