FALL 2022 SYMPOSIUM TRANSCRIPT

MAJOR QUESTIONS ABOUT AGENCY AUTHORITY: A PRACTICAL DISCUSSION ON THE IMPACT OF LIMITING ADMINISTRATIVE AUTHORITY

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The *Administrative Law Review*'s Fall 2022 Symposium[1] humanized administrative law while tackling substantive administrative law issues. With the human impact of administrative law as the touchpoint, the panels explored the practical implications of deregulation, nondelegation, and major questions. Resultant discussion transcribed[2] below allowed for a thoughtful conversation, but one that was at the same time accessible to those who do not routinely practice in the space. We thank Professors Gillian Metzger, William Buzbee, Aram Gavoor, Kimberly Wehle, Jonas Monast, and Administrative Law Judge Doug Rawald for their contributions.

1. For a brief overview of this Symposium see the Fall 2022 Symposium Synopsis, *Major Questions About Agency Authority: A Practical Discussion on the Impact of Limiting Administrative Authority*, 74 ADMIN L. REV. 651 (2022), which includes biographical notes for each of the panelists who contributed to these discussions on November 11, 2022.

2. This transcript is not a certified transcript. It has been edited for length, clarity, and context. In certain instances, participants provided additional material to explain and contextualize their statements. Citation: 8 ADMIN. L. REV. ACCORD 131 (2023).

I. PANEL I: AN AFFRONT TO THE ADMINISTRATIVE STATE

ANDREW POPPER: Okay. I'll go first and turn it over to Jake. First of all, I want to welcome this distinguished group of speakers, panelists, [sic] strong, almost lifelong supporter of the [*Administrative Law Review* (ALR)] with its [Washington College of Law (WCL)] and [American Bar Association (ABA)] connection, Dan Cohen. My research interests go one way, but my negotiation interests only go in another. And that's with Dan. But for Dan's open-mindedness and cooperation, I'm not sure we would have been able to do what we've done. One-hundred issues, at least, of this publication produced by the Washington College of Law, *Administrative Law Review*, through and with the partnership of the American Bar Association. It's an astonishing relationship, and great decades lie ahead, literally, because our arrangements now are in ten-year sequence.

So I want to thank Dan and the ABA in particular and welcome you on behalf of my colleagues on the faculty of the Washington College of Law. Almost 200 people teaching in the law school, all of whom, whether they know it or not, teach administrative law. They just think they teach other things. And all of whom, in teaching administrative law, whether they know it or not, are talking about the great issues of our time. There's no other field that is this expansive, that covers so much from securities and the environment and the whole of the financial markets and on and on and on.

We are it. The process we teach, the substance that we teach about these different fields. That's the issues of our time. Oh wait, elections . . . . And elections too. Impeachment. . . . So what we do, and what the students on the *Administrative Law Review* have done year after year, with these incredible investments they make in time, which are all too often invisible to the people who get our journal on their desk quarterly without missing a deadline ever.

What they do is remarkable. They take contorted and sometimes impossible to understand public policy questions. They seek out the best scholarship in the field. They turn it into what looks like law review articles and magically, there it is on your desk or on your computer. So in addition to welcoming you, and on behalf of my faculty, my faculty thanks all the students over all the years and who have now many become lawyers in government for what you do.

Your program today on the [major questions doctrine (MQD)] leaves me little to say. How is it that you could have a doctrine called the major questions doctrine when everything we do involves major questions? And is it really the case that the major questions doctrine is just a slip, a joke, sleight of hand, because we're talking about it anyway. When haven't we been talking about major questions? Is it really about giving oneself permission to deviate from precedent because ideologically it doesn't move in the right direction and so you're going to shift. You're going to put in the clutch and say, oh, this is a major

question. Is that what happened in the Affordable Care Act case,[3] is that what happened in [*Department of Commerce v. New York*] *DOC v. NYC*[4] when the Chief Justice established that this doctrine somehow existed, but it really meant doing logically, necessarily, and responsibly what's right.

Where is it now? I think like all of you, I read Justice Gorsuch's dissent in *Buffington*,[5] and I thought, I'm not sure what he's talking about other than I recognized *Marbury v. Madison*[6] and the necessity of judicial review. But is that becoming a major question, too? But in any case, you are in the hands of true scholars in this field.

As a faculty member in this law school, we are in your debt. I wish you a fabulous program. You can't go wrong. You really can't. Everything is open to you and through you. And so welcome. And I wish you the best with this program. And then finally, Meghan, thank you for putting on this incredible event. And it's now my great pleasure to turn this over to Jake who is the current editor in chief [(EIC)], who rules with an iron fist and a very, very thick velvet glove. It's remarkable to watch. And in that, he follows the tradition of every EIC I have known for twenty-five years. So Jake, thank you for all your hard work. The floor is yours.

JACOB WOHL: Thank you, Professor. I mimic everything that Professor Popper just said. Panelists, we are incredibly lucky to have you. Attendees, you are in for an excellent discussion, both in our first panel and in our second panel. I will keep it very brief. We welcome you. We know you have a lot going on. We are very happy that you came and decided to be a part of this and to listen to this incredibly insightful discussion on the Major questions doctrine. Meghan, thank you so much for putting this together. I know that it was very challenging. And so, we are incredibly appreciative. And I will turn it over to you, Meghan, and I hope everyone enjoys this excellent discussion.

MEGHAN HART: Thank you, Jake. And thank you, Professor Popper. So, I will very shortly introduce you all to our moderator. Before I do that, I want to talk very quickly about kind of what prompted me to want to have a symposium about this topic. I think coming into the *Administrative Law Review* as a junior staffer, I got to hear from Professor Popper and some of the members of the ABA section talk about how administrative law is everything and it's everywhere and you cannot escape it.

And at the time I kind of thought, okay, how? And through my time on

3. *See* King v. Burwell, 576 U.S. 473 (2015).

4. Dept. of Com. v. New York, 139 S. Ct. 2551 (2019).

5. Buffington v. McDonough, 7 F.4th 1361 (Fed. Cir. 2021), *cert. denied*, 143 S. Ct. 14 (2022) (Gorsuch, J. dissenting).

6. Marbury v. Madison, 5 U.S. 137 (1803).

the *Administrative Law Review* and learning more about the topic, I have absolutely seen that to be true. So I hope through this discussion and our discussion in Panel 2, we get to bring administrative law a little bit closer to home and bring all of our attendees closer to the understanding of just how administrative law is absolutely everywhere.

So with that said, I will turn it over to Professor Cohen, who is the Assistant General Counsel for Regulation of the Department of Transportation. He is also the Vice Chair of the ABA section of Administrative Law and Regulatory Practice. He's also personally my administrative law professor. So Professor Cohen, over to you.

DANIEL COHEN: Thank you very much, Meghan. My great pleasure to be here. And thank you, Andy, for your kind words on really what has been a great collegial, collaborative partnership between the section and the Washington College of Law at American University [(AU)] in producing the ALR for these many, many years that AU has been doing so under the agreement with the ABA. We['ve] had a wonderful time working together on those contract negotiations. They've never really been negotiations. They've just been great conversations.

And so it's really my great pleasure to be here not only as Meghan said as the Vice Chair of the of the section of administrative law, but also as an adjunct professor at the American University Washington College of Law. So let me set the stage with all of that aside, all that to do, let's get into the substance here.

So just setting the stage a little bit to what we're going to be talking about today, administrative law is everywhere. But going back really through the middle of the 20th century, most regulation was sort of economic. And for the most part, the most consequential of that regulation originated in what we now think of as the independent regulatory agency – the Securities and Exchange Commission (SEC) dealing with after the market crash, communications regulations, competition regulation. The [Administrative Procedure Act (APA)][7] gets enacted in 1946 and really not a lot changes until really starting in the mid-1960s and through the 1970s, we saw the growth of what we now think of as sort of the modern administrative state, right? With the establishment in the Executive Branch, with agencies like [Environmental Protection Agency (EPA)] and [Occupation Safety and Health Administration (OSHA)] and Federal Highways, much closer to my heart, the Transportation Department, and the enactment of laws like the

7. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 561– 70a, 701–06.

Clean Air Act[8] and the Endangered Species Act[9] and the Motor Vehicle Safety Act[10] that were meant to address the policy issues, right? Dealing with the environment and the workplace and public safety.

And then starting in the 1980s, you start to get a little pushback against these agencies. I mean, first some statutes get enacted. The Paperwork Reduction Act [(PRA)],[11] the Regulatory Flexibility Act.[12] [The] PRA establishes OIRA, the Office of Information and Regulatory Affairs. And at the same time, President Reagan issues an Executive Order[13] that establishes centralized review of regulations in [Office of Information and Regulatory Affairs (OIRA)] and included benefit cost analysis of rulemakings.

On the other hand, you have the Supreme Court in the eighties establishing *Chevron*[14] deference, which likely at the origin kind of thought there was sort of a check on agency action, but is now by many people come to be seen as sort of the basis for administrative action run amuck. In the nineties President Clinton issued Executive Order 12866[15] that really cemented centralized regulatory review and benefit cost analysis, a key decisional tool for regulation. It's still in place today, largely unchanged.

Also, Congress passed several what they termed regulatory reform bills. . . . Amendments to the Paperwork Reduction Act.[16] And the Regulatory Flexibility Act[17] was made judicially reviewable.[18] The Unfunded Mandates Reform Act,[19] the Small Business Regulatory Enforcement Fairness Act.[20] All of which were meant to get at kind of checking administrative action and making sure that the decisionmaking was good and well-informed.

In the 2000s, the courts started kind of really getting more into the game here, kind of cracking down on what was perceived as skirting of the APA's

8. Clean Air Act, 42 U.S.C. §§ 7401–71q.

9. Endangered Species Act, 16 U.S.C. §§ 1531–44.

10. National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30101–83.

11. Paperwork Reduction Act, 44 U.S.C. §§ 3501–21.

12. Regulatory Flexibility Act, 5 U.S.C. §§ 601–12.

13. Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1982).

14. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

15. Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

16. Paperwork Reduction Act, 44 U.S.C. §§ 3501–21.

17. Regulatory Flexibility Act, 5 U.S.C. §§ 601–12.

18. *See* Small Business Regulatory Enforcement Fairness Act of 1996, sec. 242, § 611, 110 Stat. 865–65.

19. Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48.

20. Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 28 U.S.C.).

rulemaking requirements through the issuance of guidance that was perceived as binding. And on really *Chevron*, right? On what was perceived as an expansion of agency authority through rulemaking.

So now we have the Supreme Court, kind of fast forwarding a little bit. The Supreme Court now is apparently, maybe they've abandoned *Chevron*, maybe they're applying this clear statement doctrine, the major questions doctrine. And there's even some discussion of potentially reinvigorating the 1930s era nondelegation doctrine.

So, this panel is going to engage in a discussion about regulation and the functioning of the administrative state. The question being whether Congress and the courts, including the Supreme Court, are chipping away at agency authority. Or are they restoring the proper balance of constitutional power between the three branches of government? And to engage in that discussion, we have three renowned scholars of administrative law.

Gillian Metzger is the Harlan Fiske Stone Professor of Constitutional Law at Columbia Law School. William Buzbee is the Edward and Carole Walter Professor at Georgetown Law School. And Aram Gavoor is the Associate Dean for Academic Affairs and Professorial Lecturer in Law at [George Washington (GW)] Law School. So with that, I will turn to Professor Metzger to start our discussion.

GILLIAN METZGER: Thank you very much. I'm really happy to be part of this panel. So as Dan suggested, we're seeing many challenges to the administrative state these days. But increasingly recently, they've been coming from the courts, especially the Supreme Court. And I would also add in the Fifth Circuit. What I'm going to do is focus on outlining some of these challenges that are focused on constitutional issues. Others are going to take the lead in talking about statutory interpretation doctrines and how the courts are reading statutes these days.

In general, the Roberts Court has made some significant efforts to assert constitutional limits on the administrative state, with two different but often reinforcing moves. So the first is that it has called into question the constitutionality of longstanding administrative arrangements. And in addition, members of the Court have sought to overturn equally longstanding doctrine upholding those arrangements. So this includes practices of, as Dan just mentioned, broad delegation, also independent agencies, deference to agency interpretations, appointment mechanisms and administrative adjudication. So that's one move. Another more specific move is that it has invalidated restrictions on presidential power in particular. Often in the process, pushing the unitary executive theory that argues that the Constitution vests the President with power to fire executive officials at will or control all Executive Branch decisionmaking.

A prime example of both of these moves concerns cases that address the President's removal power. And in a series of cases going back to 2010, the Roberts Court has invalidated several provisions that prohibited removing particular administrative officials without cause. Most recently, it's done so in terms of invalidating removal restrictions on single member heads of agencies such as the CFPB and the FHFA. Sorry, the Consumer Financial Protection Bureau and the Federal Housing Finance Administration.

The Court maintained that grantings of single-headed officials removal protection was an innovation, and so it portrayed what it was doing as just reinforcing established understandings. That said, the arguments that the Court adopted and its significant narrowing of precedent that had upheld removal restrictions of exactly the same kind that were being challenged here, raised real legal questions about the continued constitutionality of independent agencies writ large. So the Federal Reserve, the SEC, the [Federal Trade Commission (FTC)], even multi-headed ones. And the effect of invalidating these removal restrictions is to give the President additional power over the officials in question at CFPB, for example, and then also, as a result over their agencies.

In making these moves, the Court often justifies them these days in terms of originalism or originalist understanding. At root, however, these decisions really do not seem originalist. In fact, originalist arguments are very hard to make in defense of many of the moves the Court is making. The history, if anything, seems to support many of the restrictions and certainly doesn't support the arguments that the Court has adopted. Instead, what really seems to be driving them is more ideology and normative concerns and what they really reflect in part is a distrust of administrative government.

So in particular, you see the Court portraying these decisions as necessary to protect individual liberty, with individual liberty defined almost solely in terms of freedom from government impositions and requirements. The Court also frequently invokes political accountability with greater presidential control, for example, viewed as necessary to ensure that the unaccountable bureaucracy is at least directed by an elected official.

So not surprisingly, both of these values then surface in the removal context. The Court portrays full presidential removal authority as needed to guard against out-of-control bureaucracy that's sort of intent on trampling the rights of regulated parties. Two other contexts where the Court has questioned the constitutionality of just fairly basic administrative arrangements concerning appointment and adjudication. In *Lucia v. SEC*,[21] for example, in 2017, the Court held that administrative law judges (ALJs)

21. Lucia v. SEC, 138 S. Ct. 2044 (2018).

overseeing administrative adjudications for the SCC were inferior officers. It actually based that decision on a prior decision that it had issued about some form of tax judge called *Freytag*.[22] In another case, *United States v. Arthrex*,[23] the Court held that administrative patent judges (APJs) that sit in panels to hear challenges to patent were not inferior officers but were principal officers because their decisions were not subject to review by another principal officer like the director of the Patent Office.

Just to clarify, the difference between being a principal officer and being an inferior officer is a pretty big deal in that the principal officers have to be appointed by the President with Senate consent, whereas inferior officers can be either appointed by the President or by the head of a department or by a court of law. The issue when you're talking about inferior officers is, for example, in the case of the SEC that it had actually been the chief ALJ that had been appointing other ALJs and it had not been done by the Commission. But it's easier to rectify that than it would be to deal with a problem of appointing a principal officer who's a judge.

Interestingly, in both of these cases, one of the things the Court did is after finding these constitutional violations, it then pulled back dramatically when it came to remedy. And we're seeing this in a number of these separation of powers cases where the Court is pushing in new directions and holding things unconstitutional, but is then taking a very narrow and restrictive approach in terms of what it's actually invalidating.

So, in *Arthrex*, which was the administrative patent judge case, instead of about [sic] invalidating the removal protections for the APJs, which is what the lower court had done, the Court invalidated another unchallenged provision and thereby made the judges' decisions potentially subject to review by the director of the [Patent and Trademark Office (PTO)]. That move, which is justified in terms of – it's been justified generally more narrow remedial approach and severability doctrine, meant that really not very much had to change because the decisions don't actually have to be reviewed by the PTO director. They have to be potentially subject to review.

The *Lucia* case had a more immediate disruptive impact in that it held that there had to be – it led to an alteration in how ALJs and other administrative judges are appointed, making clear they need to be appointed by the head of department, also leading some differences in how they were selected in response. It also meant that some cases had to be re-heard. But again, it wasn't as dramatic or disruptive as it could have been. And in particular because the Court refused to go along with the Trump Administration's efforts that it used

22. Freytag v. Comm'r, 501 U.S. 868 (1991).

23. United States v. Arthrex Inc., 141 S. Ct. 1970 (2021).

the case as a vehicle for considering whether or not removal protections for ALJs are constitutional. ALJs have had ever since the APA protection against removal. And in addition, efforts to remove them have to go before a body that itself has removal protection. And when you're talking about administrative law judges that are functioning as these were in *Lucia* at an independent agency, the independent agency also has removal protection.

And so, one of the challenges against ALJs has been that they have this kind of multiple layers of for-cause removal protection that the Court in the 2010 decision had indicated would be unconstitutional.[24] But in that decision had actually put aside the question of whether or not multiple layers of removal protection for administrative judges particularly would be problematic.

So, these decisions didn't have as much of an impact as they could have had, but they still did have a significant impact. And I think it's worth underscoring what this move of the Court has meant for agencies. So, one thing is, they have required some efforts by agencies to change how they operate. They have to alter or review a range of administrative arrangements to make sure that they're constitutional. They have to change how judges are appointed, and so forth. When an arrangement is held unconstitutional, again in *Lucia* there were some decisions that had to be reconsidered. More importantly, I think, these decisions have really opened the door to a lot of constitutional challenges. So, agencies are now acting against a background of significant uncertainty, trying to anticipate what arrangements might next be subject to challenge and alter them ahead of time. And dealing with these challenges consumes resources and causes delay. It can hold up an agency moving forward with its program.

Alternatively, and I think this is something that is particularly happening in the major questions area, agencies sometimes are just going to avoid taking certain actions altogether so as not to provide a litigation opportunity that might result in new, judicially imposed restrictions. So, there's an *in terram* effect of these decisions that I think can be quite significant. And then third, when there are challenges in courts, another development that we've seen is that the lower courts have been quite willing to use nationwide injunctions, and as a result that means frequently that as soon as it is challenged, a nationwide injunction might be issued, and agency action is then forestalled at a fairly early stage. That prevents both development across different courts of arguments and assessments of the constitutionality. But it also means that the program gets stopped very early on, and that has impacts to programmatic implementation.

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24. *See* Free Enter. Fund v. Public Co. Acct. Oversight Board (PCAOB), 561 U.S. 477 (2010).

In fact, the Supreme Court just heard argument this week on a case that has, I think, the real potential to make this inhibiting impact worse. The case is *SEC v. Cochran*.[25] And the issue is whether or not those who are subject to administrative action that they want to bring a constitutional challenge to, have to first exhaust their administrative remedies, go through administrative proceedings, before they go into court to raise the challenge. Again, that has the advantage of letting the agency proceed. And maybe the agency can avoid having the constitutional issue before you go to the Court. However, the Supreme Court seems, I think, from the argument, poised to allow challenges immediately to [sic] court, which will be even more disruptive.

There are also two other pending cases that really deserve note, and they demonstrate this phenomenon of the proliferation of novel constitutional challenges in lower courts. One is *Jarkesy v. SEC*[26] and the other is *Community Financial Services Association [(CFSA)] v. CFPB*.[27] They are both what I would call "Fifth Circuit specials." The Fifth Circuit has become a font of constitutional attacks on administrative action, federal administrative action, especially administrative actions of Democratic administrations. And its decisions are really full of over-the-top anti-administrative rhetoric. So, it seems to be, at least in part, an ideological driven agenda. If you look at *Jarkesy*, there the Fifth Circuit held that SEC administrative adjudication was unconstitutional on three separate grounds.

First, it held that the SEC had unconstitutionally broad power to choose between taking an administrative enforcement action or going to court to enforce. So that's one of these delegation challenges that we're seeing. Second, taking up the claim that the Supreme Court didn't reach in *Lucia*, the Fifth Circuit held that ALJs are unconstitutionally protected by the two levels of removal power. And then third, it held that the securities fraud claim that the SEC was bringing, in that case triggered the Seventh Amendment,[28] and the SEC's administrative enforcement action had violated the defendant's Seventh Amendment jury trial rights.

I think there's is not much to these arguments except for the second is one that has been teed up and the Court will need to resolve about the two levels, multiple levels of removal protection. But the Seventh Amendment claim in particular is directly at odds with current and still binding Supreme Court precedent and would pose a huge problem for administrative adjudication

25. SEC v. Cochran, 21-1239 (U.S. argued Nov. 7, 2022).

26. Jarkesy v. SEC, 34 F. 4th 446 (5th Cir. 2022).

27. Cmty. Fin. Servs. Ass'n v. CFPB, 51 F. 4th 616 (5th Cir. 2022) *cert. granted*, CFPB v. Cmty. Fin. Servs. Ass'n, WL 2227658 (U.S. Feb. 27, 2023) (No. 22-448).

28. U.S. CONST. amend. VII.

across the Executive Branch. That kind of disruption is actually true, I think, about any one of these bases. It's also worth noting that usually a court stops at one reason to invalidate and doesn't go on to all three.

This case in particular, for example, the independent protections for ALJ again, as I mentioned, those go back to the APA in 1946, and were key concern or motivation behind the APA. So enjoining them would be very significant. The last I've seen on this, I think around the third week in October, the Fifth Circuit denied rehearing en banc. So I presume the government will probably take it up to the Court.

In *CFSA v. CFPB*, and then I'm sorry, I'm going a little long, but I'll stop after this. In this case the Fifth Circuit ruled that the funding scheme for the CFPB, under which it can obtain a statutorily set percentage of the Federal Reserve's earnings each year, violated the appropriations clause and separation of powers by ceding Congress's control over appropriations to the agency. And as a result, the Fifth Circuit invalidated the rule that was in issue, the payday lending rule.

The appropriations clause has never been used to invalidate a congressional statute this way, for good reason, actually. There's really nothing in the appropriations clause that requires annual appropriations. There's nothing that requires separate legislation even. It just requires that no money be drawn from Treasury without Congress authorizing it. Congress authorized it here by allowing the CFPB to fund itself in this way. So, this is not only a novel claim, but it's also extremely destabilizing. And the reasoning of this opinion would not be just limited to the CFPB. It would have a huge impact across the Executive Branch. There are numerous agencies that are given either lump sum appropriations or that are statutorily authorized by Congress to self-fund through fees. Most financial regulators, the Fed[eral Reserve], for example, the SEC, the [Federal Communications Commission (FCC)]. There are many programs, lots of very important longstanding programs like Social Security that are funded by permanent appropriations. So, the potential of this reasoning is really extraordinary to disrupt the modern administrative state. And at a minimum, the CFPB's payday lending rules was vacated, something they have been working on for a while. And at least until there's further review that hopefully sets aside the Fifth Circuit's decision, the CFPB is really seriously inhibited in its ability to act. Because whenever it takes some action, it's going to confront challenges from those it's regulating that its entire funding for its actions for everything it does is unconstitutional. So, let me let me stop there and hand it over.

DANIEL COHEN: Thank you, Gillian. Professor Buzbee.

WILLIAM BUZBEE: And here we go. . . . So first, thank you everyone. Thanks to the *Administrative Law Review*, Meghan Hart, American

University, and fellow panelists, and Daniel serving in his moderator role. What I want to focus on is another element of the Supreme Court's new anti-regulatory jurisprudence. And kind of consistent with the title of this conference, [much of my] focus a little bit on an element of the major questions doctrine jurisprudence. But it's also evident other actions. In part just given what's been set up, I'll talk a little more than I planned about basics of these cases so it's clear. But here's my focus.

So, my [own working] title [for these remarks] is Anti-Regulatory Cost Skewing and Anti-Democratic Imbalance on the Supreme Court.[29] What I'm interested in is how the Roberts Court and especially the new six-justice conservative supermajority in several of these major recent cases, [especially in the new] major questions doctrine [cases] . . . assesses or makes exaggerated and often wholly unproven huge impact claims. And that then leads to a skewing of [the Court's] statutory interpretation and . . . disrespect for congressional choices about agency tasks, [as well as downplaying or ignoring] . . . the expertise and [empirically-driven] conclusions of agencies. And I'll highlight . . . these flaws in this anti-regulatory cost skewing, and I'll give examples in cases.

So, what I see in these cases is first, [that] these cases tend to be quite inattentive to what the statute actually says. So that's always a problem with statutory interpretation. They tend to be wholly disregarding how Congress allocated power to agencies to assess and act on risks. [The underlying regulatory statute do not just involve] . . . a choice to use agencies, but . . . empower agencies to use certain [specified] strategies and criteria to assess and then act.

Quite notably, these cases also wholly disregard what stakeholders and agencies have actually established before the agency and in the record. Further, they tend to be one sided. They focus on the concerns of those opposing regulation and downplay or show inattention to statutes' overarching protective goals. And as a result, in the end, these cases have a kind of conclusory move that you see again and again. [The Court engaged in this kind of] anti-regulatory cost skewing, and then they impute to Congress a resistance to the very statutory aims and protective or at least balanced criteria spelled out in the statute.

And notably, when [the justices joining these antiregulatory opinions] make this final move of imputing to Congress resistance to the protective

29. I develop some of these points in the forthcoming article, William W. Buzbee, *The New Antiregulatory Arsenal, Antidemocratic Can(n)ons, and the Waters Wars,* CASE WESTERN L. REV. (forthcoming 2023) (linked to April 2022 Case Western Law School conference on "The Clean Water Act at 50").

goals of the statute, they don't anywhere cite textual support or legislative history. This [imputation to Congress is made up, an imputing to Congress what] the justices opposing regulation view as common sense.

[The Court's approach was quite different in] the Major Question Doctrine precedents leading up to the modern, [full embrace in 2022's *West Virginia v. EPA*]. [Here, I am alluding to] the last three major [questions progenitors prior to the Trump years, namely] *Brown & Williamson*,[30] *Gonzales v. Oregon*,[31] and *Utility Air Regulatory Group*[32] or "*UARG*" as we all call it. Those cases were really far more attentive to statutory design and especially to power allocations made in the statutes. I don't agree with all of the cases' [conclusions, and] *Brown & Williamson* especially has some methodological problems, but the cases were not wholly in unfamiliar modes. They were fairly rigorous cases, [even if they] took some wrong turns.

This new form of anti-regulatory cost skewing is quite different. So let me start off since this is the *Administrative Law Review* and just state a few very familiar longstanding assumptions that all of us who teach administrative law emphasize, and all of you who studied administrative law and do it would think are kind of baseline norms. And as I show you, all of these now are being skirted.

So first, very basic. Congress sets the nation's policy priorities. Short of a constitutional infirmity, courts have no business tilting outcomes and creating resistance norms due to a judge's policy preferences. So [*Tennessee Valley Authority(TVA)*] *v. Hill*,[33] famous language by Chief Justice Berger. Dozens of Scalia majority opinions and scholarships say this at least, whether he did this as another matter. But the bottom line and long established is that judges should not be pushing for their own policy preferences, that this is a problem.

Second, agencies and stakeholders in regulatory settings must carefully follow statutory criteria for action. They have to use the procedures Congress set forth and create a record. They need to look at all sides of the statutorily set criteria for action. Everyone then must argue based on the contemporaneous rationale and the record that's made. This is crazy stuff.

So, third, agencies must engage in balanced analysis of their actions' effects, including benefits and costs, responsive to criticisms, but always stay focusing on statutory criteria and with a record basis. And again, probably the most important precedent here is Justice Scalia's opinion in *Michigan v. EPA*,[34] which created essentially a baseline presumptive norm of attention to

30. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
31. Gonzales v. Oregon, 546 U.S. 243 (2006).
32. Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).
33. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).
34. Mich. v. EPA, 576 U.S. 743 (2015).

both sides of the statutory ledger. That is, costs and benefits.

Fourth. Again, basic established. Neither agencies nor stakeholders can sit out the process or vary concerns and criticisms, then later trumpet them and judicial challenges. This is just *Overton Park*,[35] *State Farm*,[36] *Vermont Yankee*,[37] could go on with dozens of cases.

Okay fifth. Agencies must engage with statutory criteria, their own regulatory histories, salient disputed issues, and show good reasons for their policy action or especially policy change.[38] *State Farm*, *Overton Park*, *Vermont Yankee*, and *Encino Motorcars*.[39] Nothing shocking here.

And then lastly, judicial methodology on any of these issues have long mirrored these baseline norms for courts. That is, this is both about what agencies should do, but also kind of frames what courts can do and look at and reviewing what agencies do. Basically, all of these baseline norms are undercut if not wholly skirted in the major questions cases.

So let me just focus on what I call anti-regulatory cost skewing, and I'll make a kind of quick trot through these cases and then stop with my – would be about 10 minutes, and later on I can go into it more.

So, first major case. *Alabama Association* [*of Realtors*] *v. Health and Human Services*.[40] This is the case of [Centers for Disease Control and Prevention (CDC)] and the imposition of an eviction moratorium. The Court took this case on its so-called rocket or shadow docket, without full briefing and certainly no large-scale opportunity for participation by others. Could CDC do this? And so, the Court said no, CDC could not do so. They very briefly noted infection spread risks. You can find one reference to it. And they noted that the statute was basically, maybe I would view it as strongly supporting CDC, the Court kind of maybe said it's a close call.

The court also found [it] irrelevant that Congress twice ratified CDC's action. Actually, they said keep it in force. So, you had expressed congressional enactments time limited that affirmed this, but the Court said no.

Why? The [Court focused on, and found problematic, the] sheer scope of CDC's claimed authority. But then what [the Court majority] looked at

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35. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

36. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

37. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978).

38. I develop this point and review underlying law in William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 Boston U.L. Rev. 1357 (2018). I also develop it in an article analyzing agency "statutory abnegation." William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 Duke L.J. 1509 (2019).

39. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)

40. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (per curiam).

was really quite remarkable. They didn't look at all at the protection side of the ledger that is prioritized in the Public Health Services Act.[41]

So, [instead, the majority] did this general reference to vast economic and political significance. But as Professor Popper said in the opening, any action that is national, especially a worldwide pandemic, will have huge effects. So, there's kind of a problem if the test is saying just any huge effects automatically skew against agency power. But I think that's what we're seeing.

What does the Court focus on? It then says, okay, financial burden on landlords, deprivation of rental payments, the loss of the property right to exclude, intrusion on landlord tenant law, a particular domain of state law. It says it alters federal state balances. They referred to great government power over private property.

Ok now let's say *Michigan v. EPA*. Where is the other side of the ledger? How about this interest in combating spread of COVID? There was one sentence. But then it disregards it wholly. How did the costs and benefits compare? Nothing. How were costs and benefits spelled out in the Public Health Survey—PHSA? Not addressed. Did the agency address such concerns? Had the agency overlooked something? There's not even discussion whether the agency had done its work.

How about net hardship to landlords? Because Congress had enacted massive rental assistance. This was never stated or reviewed. So, what you have is a litany of burdens, a brushing off of the protections rationales, and the claim that you needed clear authorization. So, no power.

Then equally or more important, [let's look at] [*National Federation of Independent Business* (*NFIB*)] *v. OSHA*[42] or Labor.[43] This is OSHA's vax or mask regulation [imposed on large workplaces]. And this [case], this textual footing was even stronger. The OSHA Act[44] created this possibility of emergency temporary standards for grave danger to employees. This appeared to be pretty clearly satisfied. But again, the Court identified the scope of the action and did not look at the benefits for the action in some ways that were really quite notable. So, they focused on the cost borne by those opposed to regulation. What did they focus on? The unvaxxed employees' possible removal. They said employers might lose employees. They talked about the possibility of fines. They talked about that

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41. Public Health Services Act, 42 U.S.C. ch. 6A.

42. *See* Nat'l Fed'n of Indep. Bus. (NFIB) v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam).

43. The Secretary of Labor, acting through OSHA, enacted a vaccine mandate for much of the Nation's work force. *See id.* at 662.

44. The Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

vaccination of one opposed to vaccination cannot be undone. It talked about states' and employers' compliance costs.

One sentence was addressed to the other side. It says, okay, the statute might save 6,500 lives and hundreds of thousands of hospitalizations. They did not say anything about workers forced to risk their own lives due to colleagues who are neither vaxxed nor masked. They said nothing about the involuntary and grave nature of risks. They said nothing about the societal risk of spread exacerbation if workplaces became a place where infection would fester. They didn't talk about the statute's priority, and they didn't talk about the record. None of this was accompanied by record citations. So it didn't matter. They said the agency claim of power was unprecedentedly large.

West Virginia v. EPA.[45] This is one I'm sure we'll turn [to]. And then the second panel will also talk about. This was the big summer express embrace of the major questions doctrine. It's not really clear what the case is about. There was no regulatory action in effect. But as it ultimately was teed up and decided, the Court seemed to be reviewing the Obama Administration's Clean Power Plan,[46] a regulation that never came into effect that had been surpassed in achievement without coming into effect, and that the Biden Administration had said it was not returning to. But nonetheless, the Court took the case.

And once again, you have this imbalanced cost skewing. And here quite notably, something I hope we'll talk about more perhaps in the Q&A is, a lot of this case turned on the language of the Clean Air Act, which was the best system of emission reduction adequately demonstrated. And for you administrative law gurus and statutory interpretation experts, this is a benchmarking form of regulation. It required EPA to set limits based on what it observes in the world.

But like any "best" form of regulation, it's going to be a moving target. It's going to be targeting the best. Despite a plausible or a colorable textual basis, the Court said not enough clarity and again focused on the highly consequential, huge claim of power that they found. And then it just proceeded to talk about claimed huge effects that were not established in the record and in fact had been shown to be mythical.

So, they just cite nothing for this. The D.C. Circuit in the Clean Power Plan argument dug deeply on this, and the challengers had nothing.[47]

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45. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

46. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661 (Oct. 23, 2015).

47. Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021).

Actually, that's not true. I think they pointed to a number on a single table as a place where they thought there was a factual error and claim of greater risk than EPA assessed.

And so, the Supreme Court talked about threats to the grid, a highly consequential power, substantially restructuring the energy market. There was not a record basis for this. And in fact, no one could find it. The Court used against EPA some non-regulatory setting political rationales, which is an issue. And then the Court said EPA was setting the cap wherever the agency saw fit. Again, failing to see that this was something where the agency had to empirically justify it. And so it was, again, conclusory and not established.

So, I'll just list things we can do and then I'll stop because I think I'm just like eleven minutes now, am I right Daniel?

So what do you do about this? So one, is there still is a role for statutes, okay? At least some. And so, my view here is if you look at all of the recent Court cases, there still is power to holistic, functional, integrative statutory work that makes sense of how statutes work. *West Virginia v. EPA* was embarrassingly bad statutory interpretation. And so that's one thing. Second is, agencies and stakeholders should do more to make their arguments and build up a record and contest the record basis. Focus less on language and more on facts. I think this is something that people can do much more with. I think it's going to be the only way to move forward. If I were an agency, I would be creating many on-the-record proceedings on important disputed facts. Require people to focus and prove what they may be claiming in summary sorts of ways.

I think the major questions doctrine, none of the cases overrule each other. Earlier cases really emphasized congressional choice, that's still a logic. Agencies have to be careful with political talk and Presidents do too. And then lastly, I think that *Michigan v. EPA*, hard look review cases, policy change cases, actually are a counterweight to the major questions doctrine line of cases, which is, look at what agencies and do and what others did.

So I'll stop there and thank everyone and look forward to our discussion.

DANIEL COHEN: Thank you. In fact, that last point, I really would like to dig into more in the Q&A as well. But with that we'll turn to Professor Gavoor.

ARAM GAVOOR: Thank[] . . . you so much to the *Administrative Law Review*, American University Washington College of Law, Meghan Hart and others for inviting me to speak at this symposium. It's just a real pleasure to join you this morning with Professor Metzger, Professor Buzbee and Professor Cohen.

[I have] been modifying my remarks on the fly, with about three or four windows, while Professor Metzger and Professor Buzbee [have] been speaking just so I can give as little overlap as possible as sort of the closer of the group. My focus is going to be on the big picture, *West Virginia v. EPA*, my reactions to

it, and I think some of my normative predictions, as well as Trump Administration behavior in the context of regulatory reform as part of that administration's agenda, it's residual value and where things are headed.

[T]his panel, titled "An Affront to the Administrative State" covers I think an exceptionally important, possibly the dominant topic in administrative law today. Undoubtedly, we are observing a significant body of change that's going in one direction where the Court is engaging in more searching analysis, more searching review, providing a more formalistic, formal separation of powers, body of jurisprudence. And I think focusing little bit more on individual liberties of regulated parties.

So, there are changes taking place. The question that I want to engage in, at least thematically. Is this something more of a variety where the Supreme Court is engaging in a wholesale clearcut of the administrative state, leveling the forest? Or is it something where the Supreme Court is pruning the bonsai tree of administrative law that's grown and flourished for just about a century, over seventy-five years since the APA.

My thesis, perhaps a little provocative to some, is that we're experiencing a variation of a pruning. And I'm applying this from a pragmatic perspective. From a numbers perspective I just don't see a majority of the Supreme Court first granting cert[iorari] on [many] significant and provocative cases, with the exception of a couple of the key ones. *West Virginia v. EPA* is a good counterpoint to that. But also, I am not seeing, even with a conservative super majority, six justices, some of the strongest and most restrictive views of the administrative state, finding their way into the majority opinion. I think Justice Barrett, Justice Kavanaugh, the Chief Justice, and even occasionally Justice Alito in the context of nondelegation, provide a degree of balancing power.

And also, the Chief Justice, when he's in the majority, he gets to decide who [authors] the opinions. I think you're seeing some of this up in front. But the concerns that my colleague discussants raised I think are very real. Today being Veterans Day, which I want to acknowledge. Just earlier this week, November the 7th, Justice Gorsuch completely excoriated the *Chevron* deference altogether here in a sixteen-page dissent based on the denial of certiorari in *Buffington v. McDonough*, a Veterans Administration[48] case where that agency interpreted its authorizing statute to limit the retroactive benefits paid to an Air Force veteran petitioner.

48. This is a U.S. Department of Veteran Affairs case. The Veterans Administration, known as the "VA," was established in 1930; it was renamed the Department of Veteran Affairs in 1989 when it was elevated to a cabinet level agency. *See History Overview*, U.S. DEP'T OF VETERANS AFFS., https://department.va.gov/history/history-overview/ (Apr. 3, 2023). The VA label stuck after the name change. *Id.*

But note. [This is] a dissent to [a] denial of certiorari. The Supreme Court hasn't really considered *Chevron* deference, at least by my count, in about five years. And that might be in part because the Court or members of it are cognizant of its limitations. But at the same time, you see in other cases, like *Kisor v. Wilkie*,[49] another Veterans Administration[50] case, what appears to be almost like a Chevronization of the *Auer*[51] doctrine, at least, well, *Seminole Rock*[52] from the forties, *Auer* in 1997.

And in that opinion Justice Kagan was able to [convince] Justice Kavanaugh to join and essentially enshrine *Chevron* principles in the context of *Auer* review. For the students who are here, that would be the level of deference that is afforded to agencies when they are interpreting their own genuinely ambiguous regulations that they promulgate in furtherance of their authorizing statutes.

So, I think the rule of four applies.[53] I think there's a degree of moderating influence among the conservatives on the Court. And looking, for example, to *West Virginia v. EPA*, in which the Court really formally applied the major questions doctrine, holding that Congress did not grant the Environmental Protection Agency—section 111(d) of the Clean Air Act—the authority to devise emission caps based on the generation-shifting approach that the agency took in the Clean Power Plan during the Obama Administration.

There's been plenty of focus on what the Court did do. But I think it's important to observe what the Court didn't do in that case. First, I think there was a lot of fear. And if you look at the amicus briefs, arguments [were] made aplenty that the Court could latch on to, to just do away with *Chevron* deference in that case. [This] didn't happen, [*Chevron*] wasn't cited.

There [were] plenty of arguments for the Court to apply what Cass Sunstein construes as a more robust version of major questions of the nondelegative variety,[54] where instead of the Court saying as it did, that the agency didn't have the power under the statute to act, the Court could have said that the agency didn't have the power under the Constitution to act.

So keep in mind, Congress still has the authority to regulate, although

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49. Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

50. *See supra* note 48.

51. Auer v. Robbins, 519 U.S. 452 (1997).

52. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

53. The "rule of four" refers to the Supreme Court's practice permitting four of the nine justices to grant a writ of certiorari. *See e.g.*, Rogers v. Mo. Pac. Ry. Co., 352 U.S. 521, 529 (1957) (Frankfurter, J. dissenting).

54. *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475 (2021).

I will be the first to acknowledge that the likelihood of Congress regulating at a great many of the questions that I think would be beneficial to the Republic is sort of stuck in torpor.

I will also share . . . that the greater concerns of major questions doctrine, I think, certainly makes sense to observe because it's a very mushy standard. The Court did not really lay out the distinction or taxonomy of what is a major question or what isn't a major question, besides the very broad statement that if you have an old statute that provides certain authorities and the agency wants to novely [sic] apply it or innovate on a basis of major economic or social significance, that can be a major question.

So that is something that is very important to [which one should] pay attention . . . . But I think again, from a pragmatic perspective, this opinion might best be viewed at least by me and some others as the Chief Justice perhaps quietly undoing *City of Arlington v. FCC*[55] from 2013. That was a *Chevron* deference case in which the question presented for the Court was something along the lines of . . . : What level, what is the approach that the Court should take when it is reviewing an agency's power to act? Justice Scalia carried the majority, arguing that that's a *Chevron* question, and step one, the traditional 1984 approach to *Chevron*, not step zero. And I think he made pretty good points that it's very difficult to discern the difference between what is jurisdictional and what is not jurisdictional in his classic, humorous to read acerbic tone. Law students like reading that case.

But I will also observe, note the dissent. The Chief Justice joined by Justice Kennedy, [and] Justice Alito view[ed the] threshold of *Chevron* applicability to be more of a step zero question. So perhaps what we're seeing with the Chief Justice writing the majority opinion in *West Virginia v. EPA* in applying what strikes me as a sub-constitutional canon of construction, or canon of avoidance approach, sort of a red flag or trip wire, however you want to describe it. A tool to essentially provide a pathway of, yes, this could be eligible for *Chevron* deference or perhaps not.

Why do I keep mentioning *Chevron* when the Court really hasn't cited it in five years? So that's a really good point. Well, the circuit courts still cite *Chevron* deference. It's very much alive and well [in the lower courts]. I think litigators who are before circuit courts, although it is now possible to waive *Chevron* deference, really need to be making that argument. And then those very same litigators, when they're in front of the Supreme Court of the United States, better not make that argument, at least in the first 95% of their brief. Probably don't want to waive it at the very end. But maybe it's a footnote. Maybe it's in the last page of the brief, because the Court certainly,

55. City of Arlington v. FCC, 569 U.S. 290 (2013).

I think, is hostile to the concept of a *Chevron* deference, though it appears to me it sort of accepts that there needs to be some level of deference at play.

So pragmatically speaking, *West Virginia v. EPA* [did not change] administrative law doctrine all that much. If you view the opinion in *West Virginia v. EPA* as more of a threshold question as to whether agency deference should apply for a novel expansion of agency authority. Maybe if you can control for the doctrinal shift, just look at the fact that it's a conservative supermajority that voted to grant certiorari, which was surprising to some observers.

And that does have a significant signaling effect, right? There's only about eighty cases that the Court takes each year. The fact that it granted cert[iorari] was something . . . lamented in the dissent. But also, what's very critical here is that I think EPA's authority was bound to be reduced in this case regardless. And the question was, what is the mechanism by which the Court utilized to do so? Well, it has now erected a trip wire that can be crossed, although you can't really see where the trip wire is. That's why I'm using this this reference. If an agency looks to innovate too substantially and read too broadly its long dated authorizing statute.

So, I think the real effect of *West Virginia v. EPA*, though not changing doctrine, is to change agency behavior. And that's really where the real change of it is going to come, besides the fact that the Court now has a tool or a button it can press if it doesn't like what's happening with an agency that wants to engage in a more searching review of agency behavior. And that would be, the incentive structure for agencies has now shifted, I think, following *West Virginia v. EPA*.

I think if agencies can resist political pressures for presidential priorities to do big, substantial headline-grabbing things—which by the way, is very hard to resist in all administrative agencies and all presidential administrations they're always looking to do big things. But if they can resist that, the incentive structure is for agencies to engage in more incremental social change through more carefully worded, less broad interpretations of their authorizing statutes that are less likely to trigger a major questions challenge, and less likely to succeed in a major questions challenge, but also less likely to rise to the level where the Supreme Court is granting a writ of certiorari. So essentially, it's to emphasize perhaps minor questions and to engage in more minor question regulation.

Second, I really do think that the chilling effect is going to be real, although there's some counterpoints to that, right? I don't think the Department of Education perhaps got that memo. And my bet is that the general counsel's office within the Department of Education and a number of attorneys within the administration, career folks, were cautioning the

expansion of student loan debt forgiveness capability within the authorities that were provided to the Department of Education.

I also think that that the Supreme Court will now have a very broad ability to engage in statutory interpretation as it sees fit by virtue of the fact that the Chief [Justice] did not engage, at least to my reading, [in] as deep of an analysis in the statutory portion of the opinion as he has in other opinions.

So now shifting off to Trump Administration behavior. The Trump Administration was squarely anti-regulatory. Nothing was more clear about that than Executive Order 13771,[56] which was the two-for-one executive order. So putting that aside, which was pretty clear for what the administration was looking to do, I want to talk a little bit about, in the context of congressional torpor and an increase in searching review by the Judiciary, what tools does the Executive Branch have to maximize its ability to engage in the work that it needs to engage in—exercising Take Care Clause authority and a number of the different powers that Congress has conferred on the Executive Branch through the agencies—while also being careful to perhaps limit the risk of judicial review.

[Consider] Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents,[57] Executive Order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil, Administrative Enforcement and Adjudication.[58] By the way, "day one" of the Biden Administration and Executive Order 13992,[59] Executive Orders 13771, the two-for-one, Executive Order 13891, the guidance documents executive order, and 13892, which was the adjudicatory enforcement executive order, were revoked. So those are off the table. And then the last would be Executive Order 13924, Regulatory Relief to Support Economic Recovery.[60] And its section six, Fairness in Administrative Enforcement and Adjudication, which was also revoked in Executive Order 14018[61] on February the 24th of 2021.

Taken as a whole, these are executive orders that . . . many viewed as attacks on the administrative state. But if you were to rigorously look at them, they say things that are [good]. So Executive Order [(EO)] 13891, which was the guidance documents EO, required agencies to post their guidance documents online so that the regulated public could access

56. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan 30, 2017).

57. Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 15, 2019).

58. Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 15, 2019).

59. Exec. Order No. 13992, 86 Fed. Reg. 7059 (Jan. 20, 2021).

60. Exec. Order No. 13924, 85 Fed. Reg. 31353 (May 19, 2020).

61. Exec. Order No. 14018, 85 Fed. Reg. 11855 (Feb. 24, 2021).

them. That doesn't strike me as so bad. I'm sure there's many members of the regulated public that would like to see what the sources of the authority that they are subjected to.

Another would be the mitigation of what could be viewed as secret law and internal agency guidance documents against which the public is being held accountable. In Executive Order 13892, which is the adjudications executive order, essentially promoted agencies from enforcing rules that they had not made publicly available prior to that enforcement action. Looking to me to be something like paying heed to Justice Jackson's dissent in *Chenery II*,[62] laying out the concerns of administrative mischief in the context of holding the regulated public accountable and rendering retroactive the unlawful conduct that at the time of its commission by the regulated public was not expressly unlawful.

And then third, it also encouraged agencies to offer opinion letters to members and entities of the regulated public, sort of like [Internal Revenue Service (IRS)] no action letters to facilitate knowledge and also compliance with the law.

So given that we're a little bit short on time, the reason why I'm talking about the Trump Administration behavior, controlling for Executive Order 13771, which is just clearly anti-regulatory, is that these are what strike me as earnest attempts, if you look at the text, to engage in let's say that bonsai tree pruning of the administrative state [that is similar to the Supreme Court's behavior in *West Virginia*]. [C]onsequently[, these executive order restraints] would reduce the risk of judicial review and the depth of judicial review for administrative behavior that is of the sort that the Supreme Court is particularly focused on based on its recent bodies of opinions.

Thanks so much. And I think it's now time to shift to the interactive part of our program.

DANIEL COHEN: Yes, thank you very much. This is [sic] really three great presentations that really is so much to dig in on. First, let me encourage those in the audience who would like to participate in asking questions to please do so through the Q&A function that you have available in Zoom. I can moderate that and ask questions that you want to pose to the panelists. And while you're doing that, while you're typing in those questions, let me ask a couple of questions just to kind of start the conversation.

Arguably the Court's rationale for the major questions doctrine is to sort of rebalance the separation of powers, right? That's their stated goal, to kind of have Congress be the source of the agency's authority and be clear about it.

So, what is it Congress would have to say? What do you think the Court's

62. SEC v. Chenery Corp., 332 U.S. 194 (1947).

looking for? And kind of the flip of that is, there are certainly places in law now where agencies have what would very clearly be authority to take a really big deal, action with regard to the economy or of political significance. So, I'm thinking of things like, let's say the Interior Department and the Commerce Department can determine species are endangered or threatened. And that could have a huge economic impact on a whole variety of parties who want to take action because they have to redo whatever they were going to build or dredge or whatever it may be, because they need to consult with those departments before they can get permits to take those actions. But that's very clearly stated in the Endangered Species Act that those agencies could take those actions. So, what do you think about that? How does the Court deal with those sorts of circumstances? Professor Buzbee.

WILLIAM BUZBEE: Well, I guess first, one aspect of it maybe most useful for this venue is, what can agencies do in light of the way the Court acts? And I think part of the major questions is just like an anti-novelty. That is, anything that seems new becomes suspect. And so, I think even if the statute—I mean, you actually look at the provision in the vax and mask statute, or the best system of emission reduction adequately demonstrated, those words in that structure actually were pretty good to justify. And so, it doesn't seem that language alone is enough. I think the Court is quite resistant to anything that is new and especially new is new and seems burdensome and disruptive.

And so, at a minimum, my sense is, if you go back and look at the Clean Power Plan for example, agencies should be as much as possible, right, plodding, boring things that they say, this requires us to do in an empirical assessment of what is done because of this. And instead of kind of high flowing language about how wonderful aggressive regulation is, really just language, facts, language, facts. And so maybe that will help some. Because I think these statutes, and many others, the problem really isn't the language. I think it's like a fig leaf. I just don't think the Court is actually talking about a language infirmity. So, I'll stop there.

DANIEL COHEN: Thank you. Professor Metzger.

GILLIAN METZGER: I agree in terms of, if you look at the pandemic, in particular statutes as well as in *West Virginia*, the language is there giving the authority. I think the move that I see the Court saying is along the lines of, we need clear authorization for the action the agency is taking when it is big and dramatic.

So, I think where I might differ a little bit, Bill, is that if you did have that specific authorization of an action, that might be okay. And we'll leave aside for a second whether or not that should be required. I think it's clear that the Court knows that it's going to be incredibly hard for

Congress to authorize specific actions. That's why Congress delegates broadly. We know this. This is not new, anything novel. And so, they know that it has this anti-regulatory effect in practice without having to come out and say so in terms of pushing back on delegated authority.

There are some moves that Congress does conceivably have available. One is appropriations, right? One of the things that underlies and is sort of the I think a real tension with these cases is, we know Congress can't function very well writing big, new, substantive, detailed statues. And that wouldn't really make sense because quite honestly, Congress doesn't know the answers to the regulatory problems ten years out. But what Congress does do on an annual basis is pass appropriations. And also, it can do authorizations statutes. Some people are suggesting trying to use the Congressional Review Act.[63] So there are ways in which you can try to get Congress more able to respond to specific agency actions. And maybe what the Court needs to do is to be doing things like looking at what Congress is doing with appropriations. Congress, for example, in the big nondelegation case that the Court – there was a big challenge to the Sex Offender [Registration and] Notification Act.[64] And it sparked this dissent, well concurrence but essentially dissent, by Justice Gorsuch that was joined by the Chief [Justice] and Justice Thomas.[65] And Justice Alito also indicated some sympathy. And Justice Kavanaugh too for some delegation pullback.

In that case the argument against delegation emphasized, in their view, the lack of specification of the statutory text. They never looked at what Congress was doing with appropriations. And if you look at the appropriations history of that measure, it was clear that Congress was providing funding precisely to do what the agency did in enacted legislation. So, if you were actually concerned about getting Congress's feedback, you would be looking far more broadly at what it is Congress is doing. You would be looking at oversight. You would be looking at all the ways Congress — and they're not. So, I tend to think it's a bit of a fig leaf about what they're doing.

The other thing I just want to highlight, I think I agree in some ways that the Court is not—it's not at all clear to me there is a majority of the Court for slashing and burning the administrative state. They've pulled back from that. As I said, they have very limited remedies in some ways. And it's interesting that [Justice] Gorsuch's opinion was so (inaudible). That said, I do think the *in terram* effects on agencies are pretty significant.

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63. Congressional Review Act, 5 U.S.C. §§ 801–08.

64. Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. §§ 20901–32.

65. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., Roberts, C.J. & Thomas, J., dissenting)

And I think that's what they're going for. They can have the same effect in many ways that they want to push back on regulation by creating a lot of uncertainty about what's going to be struck down as a major question. So, if you focus on that pragmatically, I think there may be more impediments as a result of these cases then that suggests.

And the other thing I just want to say, I think we have to be careful about thinking that this is just Presidents and trying to push agendas. There was a pandemic. And agencies took bold, innovative action in response to a pandemic. That is what we would want them to do. And the Court, one of the most striking things in those decisions on the shadow docket from the pandemic is that, as you pointed out, just the complete lack of consideration and concern for what it was agencies were up against and what we might [see] them to do.

And this is not agency as sort of loosely giving political speech. This is facing a major crisis and trying to act on it. And the Supreme Court responding essentially with, no we don't like it when you do it for workers, because that's not what you're supposed to do in our view. But, actually sustaining it when it was in terms of health care workers, because the Supreme Court thought in all of its wisdom that's what [Department of Health and Human Services (HHS)] is supposed to do. That's not a way to run an administrative state, in my view.

DANIEL COHEN: Thank you Professor Gavoor and then Professor Buzbee. Or Professor Buzbee, do you have a quick rejoinder?

ARAM GAVOOR: I'm happy to defer to you, Bill.

WILLIAM BUZBEE: I just had very quick point, just consistent with Gillian's point about what Congress can do through appropriations and just point out there's an example of that in the Inflation Reduction Act,[66] which those who, this is mostly a climate related act that uses taxes and conditional federal spending to attack climate change. And it was passed through reconciliation because of partisan gridlock and avoiding filibuster proof majorities.

But there is one provision which does exactly what Gillian is saying as a way to act here. And for those who study this, what they did is, Congress is concerned with rollback in the Court, right? And especially of power to address climate change. So, one provision, 45Y(e)—it's a terrible number but that's what it is, 45Y(e)—within section 13701.[67] They said greenhouse gas shall have the same meaning given, under section 211 blah blah blah of

66. Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

67. *See* 26 U.S.C. § 45Y(e)(2) ("The term 'greenhouse gas' has the same meaning given such term under section 211(o)(1)(G) of the Clean Air Act (42 U.S.C. 7545(o)(1)(G)), as in effect on the date of the enactment of this section.").

the Clean Air Act, as in effect on the date of the enactment of this section.

It's a very clever provision. It says shall have the meaning as an effect on. So, at this in time when enacted, you had *Massachusetts v. EPA*,[68] *UARG*, *AEP*,[69] and regulations asserting power under the statute. And what it did is, this is Congress expressly embracing the state of the law at this point in time, which would create major resistance to the Court trying to roll it back, because here the Court has enacted into law that kind of locking into place the law as it stood. So, I just mentioned that as an example.

ARAM GAVOOR: So also, and I appreciate that, that makes a lot of sense. And I do agree with I think a lot of what Gillian and Bill are sharing. But I will also note that this past Congress has been relatively productive, right? And during COVID Congress actually has been quite productive, both in substantive regulation using its plenary authority, but also in the context of spending bills.

So, let's look at, Gillian mentioned and rightfully so, *Alabama Association of Realtors*, which is the CDC eviction moratorium. Congress did indeed act in a traditional statute, the Coronavirus Aid Relief and Economic Security Act,[70] to do just what the agency was implementing, which was to engage in a federal eviction moratorium. And then tying it into a spending bill, the consolidated Appropriations Act of 2021,[71] Congress extended that authority, right? So, Congress can, under certain circumstances—and indeed has during the pandemic period—actually exercised the political will, both in a traditional statute and as well as an appropriation statute—pardon my binary distinction between the two, being somewhat reductive—to engage in that level of regulation.

Where did CDC go wrong? And I really want stress this. CDC had the yeoman's effort, lots of challenges, very difficult time and circumstances. So, I'm giving them credit for all of that. But they did make a number of serious unforced errors. I think what was most damaging to the continuity of the federal eviction moratorium, which was then at the agency's power, sort of in a Category Two or Category Three approach for *Youngstown*[72] concurrence, was that at the same time, it was making the argument that a federal eviction moratorium was necessary to mitigate the spread of COVID. That very same agency was messaging, you can take off your masks if you

68. Massachusetts v. EPA, 549 U.S. 497 (2007).

69. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

70. Coronavirus Aid Relief and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

71. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 620.

72. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

have a vaccine. COVID is essentially over for you if you have a vaccine. For the goal of trying to increase vaccination rate, it also substantially damaged, I think in the eyes of the Court [and the public], the legitimacy for a pretty substantial abrogation of private rights.

So, I would be the first to say Congress does have a very difficult time—and I don't think as a body, even with let's say one party rule, that it is capable of acting in a nimble enough fashion to regulate all the subject matter that the Supreme Court would otherwise push back upon in judicial review under major questions doctrine. But it can act.

DANIEL COHEN: So, there's a question in the Q&A which is directed at Professor Metzger in particular. You said . . . the Court's major questions doctrine is more about an ideology, and not rooted in textualism. What do you think about the response that the doctrine is rooted in structuralist interpretation, particularly the separation of powers and principle of nondelegation? It seems that at a bare minimum this has some textual base, just not a specific, quote, "major question" textual hook.

GILLIAN METZGER: Well, so a couple of things. One question is whether or not the efforts to revive nondelegation actually have a textual base, I mean to the extent there is a restriction on delegation in the Constitution. The question really isn't that. It's over what satisfies it. Is it enough to have some broad, amorphous, intelligible principle, or do you need more specific authorization and clarity? And whether or not it's constitutionally legitimate for Congress to delegate policymaking to agencies. So often it's put it in terms of that, is there, you know there's a textual hook, it says you've got the three vesting clauses. Yes, but most of the action is about what do we infer from that in terms of what are the actual restrictions on what Congress can do.

And I tend to think that the case for saying that it has to be very specifically authorized has not been made, and among other things, is just so fundamentally at odds with the system of regulation that we have in our government, that it would take an extraordinarily high level of proof and justification to justify the kind of disruption from well-established precedent that would entail.

So, leaving that aside . . . is there actually textual basis in particular cases for [the] major question['s doctrine]. I think if you've got a statute that – and take . . . *Alabama Associations*. I mean there, there were the two different sentences and there were some statutory text you could talk about. But in *NFIB*, the text really is a broad delegation of authority. And I don't think there's a plausible statutory interpretation on-its-face line to draw to restrict the authority of the agency. The Court tried. It emphasized that it was supposed to be workplace rules. But its reasoning just didn't make sense. So if you've got a text-based reason to question

what the agency is doing, by all means, then that's when courts should enforce statutory limits on agencies. I think that's an important function that they serve. I think that the major question doctrine is coming into play when precisely there isn't often statutory text and instead is applying of kind of across-the-board presumption, regardless of the rest of the statute against binding authority. And so that's why I think it's more ideologically driven. As Bill was saying before, it all goes one way.

DANIEL COHEN: Yes, let me . . . ask one of the other questions in the Q&A, which sort of suggests that maybe the better approach is for the agency to sort of chunk it. Several of you have kind of suggested that different ways or another, really kind of break it up, don't do it all in one bite, kind of take little nibbles at the question which ultimately at the end of the day maybe gets you to the major thing at the end. But the agency has done it through little tastes here or there. But if that's true, if those aren't major questions because they're minor questions, which I guess which would be the opposite, it sort of leaves the question of, well, what happens in that case? Do we still have *Chevron*? Not that long ago, we couldn't go ten, thirty seconds without getting together and talking about *Chevron*. It took almost fifty minutes for this conversation to even mention it, right? So, does *Chevron* still exist? Is that what applies in the minor questions that are left? And does the Supreme Court even care? I mean, [in] *West Virginia*, the majority [and] the concurrence didn't even mention *Chevron*. The dissent kind of does it in passing. But kind of *Brown & Williamson*, *King v. Burwell*, kind of the antecedents under major question doctrine were very clearly *Chevron* cases.

ARAM GAVOOR: If I could jump in just really quickly. I think *Buffington* is what happens when you have a minor question, right? *Buffington* was not a major question. It obviously seriously hurt the statutory rights of a veteran, at least in the eyes of Justice Gorsuch. So that's the consequence. You're not going to get the rule of four satisfied.[73]

Second, I would also add that perhaps, with the moderating effect of the Chief Justice having the power of the pen, perhaps major question is really what nondelegation is turning into. I think you need to see a little bit more evidence of that, but I think the two are somewhat related.

DANIEL COHEN: Professor Buzbee let me get your—

WILLIAM BUZBEE: Yeah so, I guess first, I think *Chevron*—so first, lower courts and lawyers are in a conundrum. What do you do below, right? But I do think that looking at the world as a Venn diagram, as I often do, a lot of the basic rationales and nature of deference is not dependent on any particulars of *Chevron*, but has long been there for well

73. *See* explanation *supra* note 53.

over a century of kind of talking about who did Congress ask to act, through what means, factual grounds, and the application of expertise.

And so general deference principles, I think, do remain relevant. But if you actually look at Justice Kavanaugh's writings when on the D.C. Circuit and a few statements of others, and we don't know about Justice Barrett, I think the more agencies are not claiming big power based on words, but based on kind of empirical, reasonable grounding for actions taken within the domain Congress gave them power. I think there's a chance there still would be some deference. I think it's just less words. Another way to look at it, I think *Kisor* basically states, I think we're going to a unitary mode of deference, which is kind of *Kisor*, *Auer*, *Skidmore*,[74] *Mead*,[75] and the basic underpinnings of *Chevron* without this on–off switch sort of aspect that *Chevron* has sometimes had.

DANIEL COHEN: One other question I guess I will ask that if there's nothing left in the Q&A, another question for Professor Metzger, going back to the ALJs. We love to talk about ALJs obviously. So, the case that was argued earlier this week isn't the real meat of it, right? It's sort of the procedural aspect of it. Can you have this sort of pre-agency determination constitutional challenge brought first? But the real meat is, are the ALJs— can you make an argument that that double for-cause protection is somehow unconstitutional? You know, that does seem to be squarely in *Free Enterprise Fund*, right? It seems to be the same kind of set up there, right? But let me ask about the Executive Branch agencies with ALJs. If you have a secretary who is a principal officer and the President can decide, it's Friday I don't want Secretary Whosiewhats to be head of Department *X* anymore. Does the for-cause protection for ALJs have the same problem?

GILLIAN METZGER: Well, a lot of it turns on whether or not you're talking about actual, as you are, ALJs. But those who come under the APA's protection. Because the way that efforts to remove ALJs is statutorily regulated goes before the Merit Systems Protection Board. And that board has had for-cause protection. So oddly enough, even there you would have multiple layers of protection.

So, I think you're absolute [sic] right. I mean it's squarely presented. It's the [sic] one of those arguments, for example in *Jarkesy*, that I think needs resolving. It was one that was foreseen by Justice Breyer in particular in *Lucia*. And so, I think that the argument for why you could have for-cause removal protection for ALJs is probably going to be true whether they're in independent agencies or whether they're in executive agencies, even if the obvious layers of removal protection are clear when it comes to independent agencies.

74. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

75. United States v. Mead Corp., 533 U.S. 218 (2001).

And that is we're talking about adjudication and we're talking about concerns about due process protections, those whose rights are being adjudicated in and for the fairness of the proceedings. Even *Meyers*,[76] the famous Taft opus expanding on presidential power, made a point of noting that there might be an adjudication, some differences in how we would view the President's removal power.

And I think that is a concern that really isn't just limited to independent agencies. That could also be true in executive agencies if they're going to proceed by administrative adjudication. You'd want to have those kinds of fairness norms able to be protected.

DANIEL COHEN: Great. Thank you. And that puts us at exactly 11:30. So we are right on time. And Meghan is back to corral us.

MEGHAN HART: Yes. Thank you so much everybody for that awesome discussion . . . . Panel II . . . will focus a lot more on kind of, the administrative state is in some sort of limbo, whether you want to call it trimming or a total dismantlement. And what does that mean for kind of real people and what other cases have we seen been impacted by these decisions? So, thank you so much to all of our panelists in this panel. I really appreciate your time . . . .

WILLIAM BUZBEE: Thank you, everyone.

DANIEL COHEN: Thank you everybody.

II. PANEL II: THE IMPLICATIONS OF LIMITING AGENCY AUTHORITY

MEGHAN HART: [F]or our second panel, we have the fabulous Professor Beske from WCL moderating, and I will turn it over to her to introduce our panelists. But hoping this discussion kind of conceptualizes and really illustrates some of the issues and challenges that we were talking about in Panel I. So, Professor Beske, take it away.

ELIZABETH BESKE: Hey folks. So, we are the boots on the ground second panel. And informed by the wonderful discussion that we had with Professors Metzger, Buzbee and Gavoor, as moderated by Professor Cohen, we are going to sort of translate all of those legal concepts and show what in fact that looks like, out there on the ground at the agencies and with major regulatory initiatives. So, we've got a wonderful panel of three . . . . We have Judge Doug Rawald, who is an administrative law judge with the U.S. Department of Transportation and has been for over six years. The majority of his docket includes civil penalty cases brought by operating administrations within the department. Prior to that, he

76. Meyers v. United States, 272 U.S. 52 (1926)

served a year as a Social Security ALJ. Before assuming the bench, he worked in several different trial attorney positions, including for the Department of Energy. He spent a year in Iraq working on a State Department project to train judges. We're delighted to have him here.

We also have Professor Jonas Monast, who is the C. Boyden Gray, distinguished fellow at the [University of North Carolina (UNC)] School of Law, where he directs the Center for Climate Energy and Environment and Economics, CE3. His work focuses on climate policy, rate making, aligning energy and environmental policy goals. Prior to joining the Carolina faculty, he directed the Climate and Energy Program at Duke University's Nicholas Institute for Environmental Policy Solutions and taught courses at Duke University School of Law, and we are delighted to have him as well. I will introduce our third panelist, Professor Wehle, when she joins, but we're very excited to have her here as well. But without further ado, Judge, I'd like to begin with you.

So, you are on the front lines handling the work of a busy agency. It would be useful to, in understanding what this deregulation project is doing, to sort of understand your job as it existed in 2016 and your job as it works now, and where you think the Court's multifaceted strategy to deregulate is going to leave you.

DOUGLAS RAWALD: And let me just offer a quick disclaimer before I start, that my comments are my own, they're not the Federal Government's or the Department of Transportation's or even the Office of Hearings' that I work with. They're just my own opinions, and I'm here to talk to folks today in that capacity. So just so you understand, as a framework, administrative law judges are often called ALJs. We were created by the Administrative Procedure Act to be independent adjudicators housed within particular federal agencies and hearing cases that involve those agencies.[77] So, part of what was important in the Administrative Procedure Act that established [ALJ's], is that we have decisional independence, which is guaranteed by the fact that we are not subject to a performance review. So, we have no one evaluating how we do our job, in the way that many other federal government employees do, and we have protections from our ability to be removed. Which is important, because that helps us to be able to decide cases we think in a manner that is right, rather than with fear of what would happen to our employment status based upon our decisionmaking.

So, most times people kind of put ALJs in two different buckets. There are those who hear benefit type cases and those that hear regulatory type cases that involve actions that are being enforced typically. That's very general, but I

77. 5 U.S.C. § 3105 (appointment of administrative law judges).

think it's kind of a handy way for folks to look at it. When you talk about benefits ALJs, they always think about folks that work in the Social Security Administration, that are dealing with Americans who are trying to get benefits in some way, and have been denied those benefits and want to then convince the ALJ they should have that. Whereas you have the second type of group, which is what I am now with the Department of Transportation, where we hear cases brought by the government against individuals who have broken a safety law of some sort, and the government wishes to collect a fine or otherwise acts in some sort of action against those individuals.

And so, just to give you a scope of kind of the administrative law judges in the federal government, there are roughly 1,500 or so Social Security Administrative Judges, which is by far the largest of all groups out there. At the Department of Transportation, we have two. So, they're just very different numbers of ALJs depending on where you work and what you do. There are probably roughly 150 ALJs that kind of fall in this bucket of looking at regulatory actions and enforcement actions and adjudicating those in the government. And those are different than another group that you may hear often in administrative parlance, administrative judges without the word "law" in the middle, who don't have those statutory protections we have, and therefore have a different status. And there are thousands of those folks who are in the federal government, different agencies, that are just [treated] differently. They are subject to performance review. They are not given the statutory protections that we have. And so, their status is somewhat different.

For me personally, I started as an ALJ with the Social Security Administration, hearing roughly 400 cases in that year, and then when I came to the Department of Transportation, my docket was totally different, in that now I hear roughly a docket of about forty cases per year . . . and [those] cases are [very] different. My cases often involve unrepresented respondents. So, folks who don't have the capacity to hire a lawyer but don't have, but the government doesn't give them the ability to be appointed a lawyer, that's not part of the process we have in place for administrative adjudications. And so, I work a lot with folks who don't understand the law or the regulations that they're involved in and help them understand what's going on around them, help them understand the procedure, and then work with the parties. We go through the adjudication and ultimately decide the case.

My authority from my agency allows me to issue what's called an initial decision, which is a decision that comes from the ALJ, but it's not a final agency action—which is important in the administrative parlance, right. So everything I do is only an initial recommendation, essentially to the agency head, and the agency had can then take that on as their agency action or not. And the way that the regulations that I work on, or work within, within the

procedures that I do, is that my decision will become the final agency decision unless appealed. And so, all parties appear before me have the right to appeal the decision that I issue to the agency itself, and then the agency head will then decide the appeal, and then of course that becomes a final agency action when the agency head either: there's no appeal so it becomes a way out, or on appeal they decide what happens, and that's the final agency action, which then the parties can then appeal to a federal circuit court based upon either DC or the court of where the respondent is located. So that's kind of the way the life cycle of the cases that I hear for my [agency]. Most of the cases I hear are ones that range in dollar value from thousands, small thousands to 50,000. Anything larger than that tends to go to federal court with the Department of Justice, though we do have some large dollar figure cases in hazmat material, which are given to us more because of our subject matter expertise than because of any sort of actual dollar figure amount, because they believe that administrative law judges in the department have the expertise to deal with these particular issues.

Most recently, and I think what you guys talked about in this first panel was that you had the *Lucia* case that really changed the way that administrative law judges do their job. From the time that I was hired in 2015 as an ALJ with Social Security, to the time that I'm working now today, in that when I was first hired as a social security administrative law judge, I was hired by a bureaucrat who signed a piece of paper saying hey Doug Rawald, you're now an administrative law judge. I became an ALJ by taking an exam that was administered by the Office of Personnel Management for the Federal Government and getting a certain score.

And that score then allowed me to be hired by an agency, the Social Security Administration. And then, once again, I was hired by a political bureaucrat or a career bureaucrat actually signing off on paperwork. And then when I went to the Department of Transportation, I was hired by the chief administrative law judge, and then a personnel officer signed my paperwork saying, "yes, you're now an administrative law judge with the Department of Transportation." What was significant about the *Lucia* decision was that it made all those decisions or signatures by those bureaucrats, to be invalid, because we are now officers. So, we have to be hired or appointed by someone who has the authority from the President to do that, and those are the heads of the agencies. And so, what we saw across the federal administrative law judge group, were that the head of agencies then took action to sign off on the appointment of the various ALJs that hired them, and that was the way that we then resulted from the *Lucia* decision. It didn't end up changing the hiring or the actual status of most of the ALJs that had been hired, in that most ALJs I think were simply allowed to be

reappointed by their current agency head and then go on with their job. But it did change what we are and as a result of that, the Trump Administration then decided to hire ALJs in a different way.

And so, there's no longer an ALJ exam. Now ALJs are hired directly by their agency, and the agency head once again signs off on their hiring. So, there is some difference now in how ALJs become ALJs, because of *Lucia* and the actions of the administration in power at the time. So where are we now? We're looking at the *Jarkesy* case, which is really interesting because it's going to change, or at least according to the Fifth Circuit, it has changed the protections we have from removal, which is more important to me as an ALJ, because the protections from removal are what keep me from worrying about whether I'll be fired for what I do. And so, if I take this in a very practical level, I, on occasion, and I would say more often than not, I don't give the government exactly what they ask for. And I do, on occasion, find in favor entirely for the respondent. And so, to give you the kind of idea from my cases, the government has to prove that the respondent did something wrong, and then they have to prove the fine they want to have.

And I will say in many of my cases, I often, even if I do find the respondent to be liable, I don't find them to be liable for the amount of money the government may be seeking. So, I often don't give the government what they want. So, the question is, if I was worried about being fired by my agency for not doing what they asked, would I then feel so free to do what I think is right? And while I'm a person of integrity, [and] I believe that I would. [I am] hard pressed to say that a person who's worried about their family or their home or unable to pay bills, might always not do what's right, just if they're worried of being fired. And so, those removal protections are what make us able to feel comfortable making the decisions and make the American public, who appear before us, confident that we're making decisions that are not going to be with a home team advantage, that aren't going to be in favor of the government simply because we're government employees too.

I think that people appearing before me should have the ability to feel comfortable knowing that I'm going to do what I think is right based on the evidence before me, and not based upon my status as a government employee. I think it's something I talk about a lot especially with the pro se respondents who don't quite grasp what my status is, versus the government, appearing before me, to make sure they understand who we are and how we are different and how we are independent. So, if *Jarkesy* were to become the law of the land for example, and there were to be a lessening of removal protections, that may affect the ALJ's ability to make those decisions. I guess as we move forward and thinking about kind of a worst-case scenario, a world without ALJs as I would say, a worst case for me, I mean maybe not for most

folks, I would have no job at that point. There would be a real change in how cases are heard. As you can imagine, there are a lot of cases that go to ALJs that would have to go somewhere else, and the most egregious of those would be the hundreds of thousands, to millions, of cases that go before Social Security Administration law judges on an annual basis. And those will flood the courts in a different way because those people will still have a right to have their case heard, and so where will those be heard? And so, you would have once again the possibility of additional federal court judges being appointed, but that would be a long-term project, given the way that the pace of appointments go. And also, those cases would then really put additional weight on the system. I mean you would have a massive slowdown of case adjudication of these very important cases, at least to the people who they involve, because of those decisions.

And on top of that, the dollar figures involved in many of our cases, while important to the respondents, may be of less importance to the government agencies writ large when you think about $5,000 versus the multi-trillion dollar budget of the federal government. And so, those cases won't necessarily be moved to the top of the heap to move forward, and they may take a lot longer simply because of the fact they are not of a dollar figure value worthy of pushing faster. And so, the public themselves may actually be awfully injured, in my opinion, based upon a loss of ALJs being involved in the process that we have currently here. So [with that], I'll turn it back to you Professor Beske.

ELIZABETH BESKE: I just have two quick follow-up questions before we go to your co-panelists. First, you mentioned that there are AJs, administrative judges who don't enjoy that removal protection that the ALJs do. Do they do a substantively different kind of work in our system?

DOUGLAS RAWALD: Well, that's interesting, because I think it varies by agency. So, the statute that we have for ALJs dictates what our authorities are, and most administrative agencies have whole cloth adopted the statutory language into their regulations that involve ALJs. AJs find themselves, I think typically, in more informal hearings, and they may find themselves in situations where they are offering opinions that are of different value as far as being automatically adopted by the agency or being sought to appeal. But to be honest, Professor Beske, the gamut of different regulations that are involved are vast. So, there could be very different ways in which these AJs are operating. But I think what's most noticeable, what's most concerning, I think for them probably, is the fact that they do get performance appraisals, they could be fired, they are not enjoying the independence that we have as ALJs.

ELIZABETH BESKE: Got it, and then just one quick follow up on the *Lucia* decision. You said that now the mechanism by which . . . ALJs are

appointed has changed. Did the decision have the effect of upending any prior decisions that had been issued during that period in which you weren't appointed, or your colleagues weren't appointed, by the head of the agency?

DOUGLAS RAWALD: Well, it's a really interesting question. My SEC colleagues will probably talk about that a lot, because I think it's very disruptive to them, because *Lucia* was an SEC case, the Supreme Court holding was limited to SEC ALJs and how they were appointed. I think all the other agencies then acted proactively to kind of adopt that because the Supreme Court, in Justice Kagan's opinion, she didn't write saying all ALJs need to do that. She said this is what the SEC ALJs have to experience. So, it has been very disruptive of their docket. And I'm not an SEC ALJ and I can't speak with authority about in what way, but I do know from anecdotal discussions with my colleagues over there, that it has in fact impacted the way their cases are brought, and some of their cases that have been in the past. Yes, they were all subject to some sort of a re-review process that one [sic]. From my case load, nothing in my past case load was affected, and nothing in my going forward case load. I did have one case that I was in the midst of adjudicating, where someone raised the issue that when I started the case I had been appointed by someone else, and I simply recused myself to the other ALJ in my office, to allow her to take it on, at the point we already had that, just to make sure that everything was clear and clean for folks to then look at. But that's how we adopted it in my particular experience.

ELIZABETH BESKE: Got it. Okay. Thank you so much. And we have Professor Wehle here. I introduced your co-panelists, and I promised that I would wait until you arrive to introduce you. So, before I hand it over to Professor Monast, let me introduce our third panelist, Professor Kimberly Wehle, who, we are lucky, is visiting with us this year and is a tenured professor at the University of Baltimore School of Law, where she teaches civil procedure, administrative law, and federal courts. She finds more hours in the day than any of the rest of us, because in addition to a full billet of teaching, she [acts] as a legal contributor for ABC News. She regularly writes for *Politico*, *The Atlantic*, *The Bulwark*, *The Guardian*, and *The Hill*. Did I forget any? Very prolific, very terrific on her feet, we're delighted to have her. And with that, I'm going to turn then to Professor Monast. So, you have explored the Major questions doctrine at length Professor, and just yesterday, a Texas District Court invalidated the Loan Forgiveness Program of President Biden's, on the basis of the najor questions doctrine. I'd love to know how the najor questions doctrine is affecting agencies in real time. Agencies are obviously now, I think as [Judge] Rawald made clear, operating under a backdrop of considerable uncertainty. How have you seen that play out?

JONAS MONAST: That's a great question. I think we're in an era right

now where if you don't like an agency action, you are a bad lawyer if you don't claim that that falls within the major questions doctrine, because we don't know the bounds of it. So, this is a doctrine that was talked about on the last panel. Just very quickly, the najor questions doctrine applies to extraordinary cases where . . . an agency action that has major political and economic consequence, and in those extraordinary cases, Congress must be clearly in order for the agency to have authority to act. That's all we know about the major questions doctrine at this point. My guess is that it will be the circuit courts that will tell us more about the balance of the major questions doctrine. I'm not sure that the Supreme Court will. In fact, in one of the last cases decided last term in *West Virginia v. EPA*, which I'm going to spend most of my time talking about, Chief Justice Roberts who wrote the majority opinion, explicitly declined to say more about what counts as a major question, saying that that would simply be dicta and wouldn't have value.

Now of course, administrative law students know that there are a whole lot of cases where a court uses one particular case to announce a rule, which can operate as far more powerful than just dicta, but that's what the Supreme Court has left us with so far. So, a couple of big picture implications, right? If all we know is there's now a category of cases where the Supreme Court and federal courts generally will apply a different level of scrutiny, but we don't know, until the court tells us that it falls within the major questions doctrine, which agency actions fall within the major questions category and which don't, this rule looks a lot more like Justice Potter Stewart's definition of pornography than an actual administrative law rule. [W]e know it when we see it, and we have to wait until the end of the litigation process to know if a court has seen it or not. So just one implication I think broadly about the major questions doctrine as it exists today, and I should say, in addition to every case being a major question case, or at least the lawyers arguing it, agencies that are tasked with governing particular problems are in a position right now where they don't know the scope of their authority to deal with those problems. Which, very likely, if an agency wants to create a rule that it thinks will survive judicial scrutiny and of course agencies want to do that, they are I think more likely now to be less ambitious in terms of what the agency action would be.

That's one implication of [the doctrine]. Another implication of it, and this is I suspect the *Administrative Law Review* and many other law journals will be publishing articles along these lines for many years to come, is this is the Court asserting a tremendous amount of power in the division of power between the Executive Branch, the Congressional Branch, and the Judicial Branch, right. [A]gain, we have to wait until the end of the litigation process [to know the scope of an agency's authority because] the court says for these

types of cases, we're the ones [who] will decide what Congress intended, as opposed to a *Chevron*-type analysis where an agency is tasked with coming up with a reasonable interpretation of ambiguous statutory language. Now the Court is saying that there's a category where that doesn't apply.

Another, I think really important difference here between this type of statutory review and more normal non-major question statutory review, is that the starting point isn't the language of the statute. The starting point is a court [sic] subjective assessment of the politics at issue, and I think politics is really used as a stand in for controversy. So, if the Court feels like it is a politically controversial issue, and of course we've seen how issues that may not have been controversial a few years ago can become controversial issues, like wearing masks, if it seems to be a politically controversial issue, then now we're in a separate category, a higher level of judicial scrutiny for those types of cases.

I'm going to spend the rest of my time here though, talking about the particular implications of *West Virginia v. EPA*. And this is the case that dealt with the Obama Administration's effort to address greenhouse gas emissions from existing power plants, fossil fuel-fired power plants under the Clean Air Act.

And I'll get to the details of that in a moment but let me just say why I want to focus on that one. I think one of the big picture implications of the major questions doctrine is it's going to make it far harder for administrative agencies, and Congress generally, to tackle big, complex problems. And by complex problems, I mean problems that are likely to evolve where new information will become clearer in the future. And we can come up with a very long list that may fall within that category. One is dealing with climate change, mitigating climate change in a cost-effective way as technology evolves, as we understand the science, adapting to climate change, the next global pandemic, artificial intelligence, biotechnology, very complex financial systems. If a member of Congress wants to deal with those types of issues and wants to enact a law instructing agencies to deal with those issues in a particular way, the more specific that Congress has to be, the more likely the law is going to address the problem that just happened, as opposed to the problem that is likely to happen in the future. Because Congress, kind of by definition, Congress doesn't know what the next problem is going to be. And prior to *West Virginia v. EPA*, I would have said the Clean Air Act is a great example of Congress creating a statutory framework designed to evolve to deal with new information as it becomes available.

The Clean Air Act at its heart says to the EPA, address air pollutants that cause harm to public health or the environment. Gather new information on a regular basis. When that new information suggests that the existing rules for protecting public health and the environment are not sufficient to protect against the harms that we want to avoid, then the EPA is supposed to do

something different. In my mind, one of the many reasons why *West Virginia v. EPA* was decided incorrectly using the major questions doctrine, is because in 2007, the Supreme Court already determined that greenhouse gases fall within the Clean Air Act. Greenhouse gases weren't in Congress's mind in 1970 when they adopted the Clean Air Act, but the definition of a pollutant, was broad enough to include this class of pollutants, so therefore the agency has to do something about it. Now we know that even though the agency has to do something about those emissions, and the electric power sector is one of the largest sector sources of emissions, the EPA is restricted in what it can do, and really is in a position of either choosing a more costly option or an option that is less likely to actually reduce pollutants. And if Congress can't [rely on a flexible framework] like the Clean Air Act, [if it must] be far more specific . . . then that makes it far harder for Congress today to say we know that there's this area of the economy that is likely to change, and we want to create a statutory framework right now that is responsive as things change, as opposed to saying Congress must then step in and make these specific choices along the way as we gather more information.

And by the way, it may take years for litigation to play out before we know whether Congress had spoken clearly enough for the agency to take action. I'm going to stop here and then if we want to explore this more in question and answer, I'm happy to go into more detail about it.

ELIZABETH BESKE: I have two quick follow up questions for you. First, if you could wave a magic wand and insert language into the Clean Air Act that might satisfy the court and might address problems presently unknown, that might come down the pike in ten, twenty years, is there anything that would work?

JONAS MONAST: So, the major questions doctrine is rooted in trying to assess what Congress intended, right? So, this isn't saying Congress couldn't delegate to the agency the ability to do something like it did with the Clean Power Plan, which is that issue in *West Virginia v. EPA*, it just simply says Congress did not. So, you could say maybe Congress could have been more specific that it intended [the phrase,] "best system of emission reduction."[78] It could have been more specific that it intended its best system to be interpreted broadly as opposed to narrowly.

But I'm not sure that would have helped, because that section of the Clean Air Act does have limits on agency authority.[79] The agency cannot act in a boundless way. It has to take costs into account, and has to take existing technologies into account, it has to take energy requirements into

78. West Virginia v. EPA, 142 S. Ct. 2587, 2599 (2022) (quoting § 7411(a)(1)).
79. *See* § 7411(d).

account. So, one of the characteristics of previous major questions cases, was it looked like there was really no limit to what an agency could do. An agency was using a term like "protect public health" and defining it incredibly broadly. Here, Congress did create boundaries on what the agency could do with regulating greenhouse gas emissions or any other pollutants in this category. But that wasn't enough, right? So, I think the hard part now is how can Congress be specific enough that a court would say that's good enough, we understand what you meant, but be flexible enough so that the statute is designed to deal with the next problem instead of the past problem. And I don't know what those magic words are, and I think partly because I think the major questions doctrine as Professor Buzbee I think talked about earlier, it really looks like an anti-regulatory tool, as opposed to something that is applied that is really trying to get at what Congress intended.

ELIZABETH BESKE: So looking at it from the agency's perspective then, is there anything that if you were advising the EPA as to how to approach things, you mentioned agencies are going to favor very incremental actions and be quite chilled by the impact of the major questions doctrine, is there anything they can do by way of building a record, or is there some due diligence that the agencies can do that might make the likelihood of a major questions issue less likely? I mean that might answer that first question, like is this a political big deal that requires a different conversation that might sort of preempt that inquiry?

JONAS MONAST: Yes, potentially. So, among the many reasons that the Court identified to strike down the Clean Power Plan under the major questions doctrine, it said the EPA was going out of its lane. The EPA doesn't regulate energy, the EPA regulates pollution, right. So, explaining how this is within the lane of the agency or coordinating with other agencies at the same time, which by the way, the EPA did, it coordinated with [Federal Energy Regulatory Commission (FERC)] during the Clean Power Plan. I think doing more to describe the role as not a big deal, really nothing new, like this is what we've always done, it just might look different in these ways, but it looks different in these ways because of the statutory context. So, trying to put in the record the statutory interpretation record, not just the record of how the rule was developed might help.

[T]he Court [also] pointed to . . . political statements by the agency and by the White House about what they were trying to accomplish. That's a hard one, right? Because of course, the Executive Branch is going to brag about something that they're doing, but if they're bragging about it, then now we know that the court will look at that and kind of awkwardly say that the current administration's interpretation of this tells us something about

what Congress in 1970 meant for the language to do. But if it looks like an Executive Branch actor is trying to do what Congress couldn't do, then that was also evident. So, avoiding that kind of thing to the extent possible. I think also identifying the limits of authority. But that can also run counter to an agency's ability to solve the next problem, because that may create a record that prevents the agency from doing something different in the future.

ELIZABETH BESKE: That's great, and I'm sure we'll come back to it. But I want to get Professor Wehle into the conversation. Professor Wehle, you have written about *West Virginia v. EPA* in *The Atlantic*,[80] but you've also identified another front in the attack on the administrative state, where we're getting it from every angle, and in particular the idea that novel standing theories are permitting sort of a state-based attack on the output of the federal government, and sort of premised more in federalism, and I'd love to hear about that.

KIMBERLY WEHLE: Well thank you . . . delighted to be here. I agree with everything Professor Monast just explained, and I missed the morning panel because I was teaching, but having taught administrative law now for fifteen years, this is really a seismic shift. That is, if you read the Clean Air Act, it's very broad, pretty clear under straight up *Chevron*. And think what's happening is not just an assault on the administrative state, the ability of agencies to implement policy, which I think has . . . for many years [been] a question as to whether it's appropriate for regulatory work to be done through the Executive Branch versus Congress, that's the nondelegation doctrine, etc., but I think the implication is also that it's sort of gutting the discretion of Congress, right, to actually pass laws. Handing that power to this unaccountable United States Supreme Court, know it when we see it,[81] and of course it's happening in the Voting Rights Act,[82] and then the question is, and voting rights elements as well, but then the question is, where does it go? And as you indicated Professor Beske, it looks like not just in standing, but in other ways what the Court is, I think has its eye on sending stuff back to the States. And of course, the major thing already was *Dobbs*.[83] In the *Dobbs* opinion, the Supreme Court said, and I know that this isn't a *Dobbs* panel, but essentially what Justice Kavanaugh said, in his concurring

80. *See, e.g.*, Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, ATLANTIC (July 19, 2022), https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/ (commenting on the Supreme Court's *West Virginia v. EPA* decision).

81. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it . . . .").

82. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat 437 (codified as amended in scattered sections of 52 U.S.C.).

83. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

opinion, was this is for States. So there actually are four cases that I can talk about, but I'm going to focus on the two that are most I think salient. But the four would be the DACA[84] program . . . people that were brought into the country as minors or born here, President Obama essentially exercised his prosecutorial discretion under Article II,[85] to make determinations as to who is going to stay and who is going to go, did it through the procedural exception to notice-and-comment. And you know, long story short, it went through notice-and-comment. So now we have an actual notice-and-comment rule for DACA, there's still litigation going on under the procedural rule, but this case was brought by a couple, a group of republican state Attorneys General, and that is sort of one case brought by States against what the President is going to do.

And I think the question there outstanding even under the notice-and-comment rulemaking, is whether now that it's on remand, the [lower] court is going to say it's outside the scope of the authority period. Which, there's some details in DACA relating to benefits that arguably should have gone through notice-and-comment, a big deal if the courts were to say listen, Presidents cannot make distinctions on this, even as a matter of prosecutorial discretion. Which gets . . . to the second case, which is even more stunning in my mind, which is *United States v. Texas and Louisiana*.[86] This concerns a set, again, of administrative guidelines. So, for non-students of administrative law, when agencies make laws they normally do through notice-and-comment, but there's a bunch of exceptions where agencies issue guidance; and they need to do that to be nimble, to tell the regulated community what's going on. But in this instance, the Biden Administration set priorities for deciding under the immigration statute and the Immigration and Nationality Act,[87] which immigrants should be arrested and deported on grounds of national security. Again, straight up Article II enforcement action.

You know, police, prosecutors can't go after everybody, they pick and choose and there are criteria for how they pick and choose. And these guidelines had a list of criteria and basically set up a totality of the circumstances test. Donald Trump came in, sort of cracked down and kind of was like no exceptions type policy, and then Biden sort of went back to Obama. This was again September of 2021. Texas and Louisiana sued, two States sued. And just to your point on standing, so as we all know, hopefully students know that the scope of the federal courts' jurisdiction under Article

84. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021).

85. U.S. CONST. art. II.

86. United States v. Texas, 143 S. Ct. 51 (2022), *cert. granted* (No. 22-58).

87. Pub. L. No. 82-414, 66 Stat. 163 (1952).

III[88] is confined to this concept of cases and controversies. And it's really a conservative Court under Justice Scalia that's outlined kind of a test for that.

And in the context of suing the government, the idea is if you've got a political grievance, if you're just like [an average person] and we're all the same, you need to go to the ballot box. You've got to have something very specific, a specific injury, to come to court. So, what's the specific injury for these states? Well, there's three that are floating around. One is this *parens patriae* sort of sovereignty concept, which comes out of another case, *Massachusetts v. EPA*, that I can talk about in the Q&A.[89] But if the idea is well, we represent our citizens, that's really broad, that is pretty much any time a state could second guess a President. Then there's this notion of injury to us because we have a tax revenue and we've got to decide on priorities.

And that's really what Texas and Louisiana said here. They said listen, when you allow immigrants to stay longer than they're allowed to stay, it costs us in law enforcement, it costs us in public services. That's our injury. And of course, there are 11 million non-citizens in America. There's no way any administration can go and address all 11 million in every moment, but that's the challenge. And so really, and you think about the implications, it's essentially arguing that any time a state has an impact financially, they can come into federal court and get potentially an injunction against the President's exercise of core Article II authority. And that's essentially what the government responds in this particular case on standing, and I'm quoting, they argue:

> Federal policies routinely have incidental effects on [s]tates' expenditures, revenues and other activities. Yet such effects have never been viewed as judicially cognizable injuries. As a recent explosion in state suits vividly illustrates, the contrary view would allow any state to sue the federal government about virtually any policy—sharply undermining Article III's requirements and the separation [of] powers . . . .[90]

So that's a big one, and that's pending before the United States Supreme Court.[91]

The second one is a case called *Brackeen v. Haaland*,[92] also brought by Texas. This one is less of an attack on enforcement, Article II, more so straight at the heart of Article III, but also involving, excuse me, Article I, legislative power.[93] It involves the Indian Child Welfare Act,[94] which is a

88. U.S. CONST. art. III.

89. *See* Massachusetts v. EPA, 549 U.S. 497, 519 (2007).

90. Brief for Petitioners at 7, United States v. Texas, No. 22-58 (U.S. filed Sept. 10, 2022).

91. United States v. Texas, No. 22-58 (U.S. argued Nov. 29, 2022).

92. Brackeen v. Haaland, No. 21-376 (U.S. argued Nov. 9, 2022).

93. U.S. CONST. art. I.

94. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25

forty-three-year-old federal statute that essentially prioritizes adoptions of native children for native people, the family and then the tribe.

And it's in reaction to forced removal, for many decades, of native children from their homes. And it's consistent with a longstanding tradition, over 200 years of treating tribes under federal law as sovereigns. And under the Commerce Clause, Congress' power under the Commerce Clause, there's special treatment for tribal relations, it's known as the Indian Commerce Clause.[95] Plaintiff's are a white family [who] adopted a native child through the process, and now want[] to adopt the sister and claim[] that it's discriminatory to make distinctions on the basis of native affiliation. And for again, 200 years, the Supreme Court has held that actually when you're talking about tribal, it's a political thing, it's not race.

[The states are] also arguing that for the federal government to impose sort of a child welfare system that supersedes the state, violates the Tenth Amendment,[96] this kind of anti-commandeering principle. But again, the claim here for Texas to have standing, has to do with how it affects their ability to manage their own state, a really big deal. The oral argument was held this Wednesday I believe. Justice Gorsuch is a staunch supporter of native rights. He and Justice Kagan kind of lined up together in this and said no equal protection violation, and not an anti-commandeering problem. He said in another case last year . . . where the Court held for the first time that states have concurrent jurisdiction with federal government to prosecute crimes in Indian Country, he wrote: "Reservations are not glorified private campgrounds, tribes are sovereigns,"[97] is what he said. But it was actually, interestingly, it was Justice Thomas who asked about standing, and said the parents can represent themselves, why states are you in here doing this? But I think people that watched it believed that the consensus is they really probably are going to get into the merits.

So again, an idea that a state is affected by a federal policy, here a federal statute, can just go into a federal court some place and get an injunction, a nationwide injunction, [is a] huge swipe at federal autonomy and federal authority. The last case, which you of course mentioned, that comes up with respect to the major questions doctrine is *Nebraska v. Biden*,[98] which is the student loan case. There are a number of litigations that are winding through the courts.

U.S.C. §§ 1901–63).

95. U.S. CONST. art. I, § 8, cl. 3.

96. U.S. CONST. amend X.

97. Oklahoma v. Castro Huerta, 142 S. Ct. 2486, 2511 (2022).

98. Biden v. Nebraska, 143 S. Ct. 477 (2022).

The injunction that was issued I think yesterday, was by a conservative group called the Job Creators Network that represented students that weren't eligible for loans. But again, we also have another challenge brought by a bunch of republican states, Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina. Again, a standing problem, arguments raised—they're claiming among other things, lost tax revenues give them a sufficient injury to come in because, by virtue of how their loan programs are connected to federal authority etc., they can have an impact. Very modest tangential concepts of standing. And of course in *Massachusetts v. EPA*, an environmental greenhouse gases case, the Court did say their special "solicitude" for sovereigns, but you know you can distinguish that.[99] And I think if we're in a world where the Court either glosses over standing in these cases, or really kind of beefs up the authority of the states to kind of claim a tangential taxpayer or tax interest in standing, we're going to see potentially a lot of states flexing their federalism muscles to second guess Presidents and Congress, which is a really big deal. I should just say standing when it comes to individual taxpayers, the court for a long time has said taxpayer status is not enough, you need to actually show some kind of concrete injury. But given the fight post *Dobbs*, this idea of states' rights versus the federal government, I think we're not only going to see a shrinking of the administrative state, but a shrinking of congressional authority, and an aggrandizement, as we saw with *Dobbs*, of state power and all of the potential problems that come with that, given how divided we are politically right now.

ELIZABETH BESKE: Okay, wonderful. I've got some fantastic questions from the audience, the first of which is kind of general and real politic. The administrative state is undeniably under siege. Professor Metzger's foreword in the *Harvard Law Review* identifies many different facets to this, many different fronts to this war on the administrative state.[100] Arguably restrictions on removal, the effort to gut restrictions on removal of ALJs and whatnot is the unitary executive folks. And the major questions doctrine is arguably justified in the name of congressional primacy. The question then is, is there really any principled defense of any of this, or is it simply just "Federalist Society-inspired, results-driven opportunism?"

* * *

99. Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

100. See Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017)

KIMBERLY WEHLE: Well, I mean again, I agree with Professor Monast's argument, or how it was laid out with respect to the scope of congressional authority, that the Court's taking a swipe at that. So, I mean I am 100% behind separation of powers and protection of the prerogative of Congress, and there might be an argument somewhere in there about nondelegation, that Congress should be making the laws. [There is] the argument as well [that] agencies are needed because it's very complicated and there's not that expertise in Congress and we're[otherwise] going to have an unregulated world. If that were just it, we could have a debate about sort of an originalist approach to the Constitution and say listen, legislative power shall be vested in Congress means shall, and Congress better get its act together and start doing the regulation.

But that's not what's happening when it comes to congressional legislation. And I could just speak again, I do a lot of work in voting rights as well. I mean think about the Voting Rights Act, which the Supreme Court in 2013 basically said after multiple renewals of the Voting Rights Act, section 5 and section 4, in which the Justice Department basically used to do pre-clearance of any cute maneuvers and new voting laws to make sure that they weren't discriminatory, multiple renewals of that with super majorities in the U.S. Congress, and . . . thousands and thousands and thousands of pages of records, the Court struck that down and said go back to the drawing board.[101] And the John Lewis Voting Rights Act[102] can't get through Congress because of the filibuster. But even more recently, [the Court considered] section 2 of the Voting Rights Act,[103] in a case called *Brnovich*.[104] Litigants can't rely on pre-clearance, so they're using section 2 for basic voting rights cases, not just gerrymandering.

Justice Alito inserted in a Supreme Court opinion, five new factors, a five-factor legislative test, inserted into section 2 that does not exist in section 2 of the Voting Rights Act.[105] That is legislating from the bench, and I think we have to start using different terminology when we talk about a conservative court that has a conservative approach to . . . .

ELIZABETH BESKE: So the hat tip to legislative primacy then, you think is utterly disingenuous?

101. *See* Shelby County v. Holder, 570 U.S. 529 (2013).

102. John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021).

103. 52 U.S.C. § 10301

104. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

105. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat 437 (codified as amended in scattered sections of 52 U.S.C.). *See also* § 10301.

KIMBERLY WEHLE: It's just not borne out by the facts, that if you read these decisions, they're quite radical. And I'm quoting our former colleague Jamie Raskin, who is just brilliant on this, that I interviewed right before the 2020 election, done via a YouTube page,[106] it is fascinating. He made that same argument. So, you could also listen to Sheldon Whitehouse, a Senator from Rhode Island, who does a very impassioned speech on how much money has poured into the nomination process.

Millions and millions and millions and millions of dollars that have ratcheted up through, if it's the Federalist Society or sources, we're not even aware of, dark money, getting the right judges politically on the bench has been extremely important so we can all connect our logical dots, and unfortunately, [it's] not just [in] *Dobbs* [that the Court has acted radically], but prior to *Dobbs* when the Supreme Court did not enjoin SB8[107] in Texas, notwithstanding basic civil procedure, injunctive relief standards, [including] likelihood of success? Yes, because six weeks is not twenty-four weeks under *Roe*.[108] Harm to an individual? Yes, carrying a baby for ten months with forced delivery is, I have four of them, that's hard. And public interest? The bounty hunter [enforcement scheme] was brand new, non-tested . . . . They did not step in to enjoin that pending a decision in *Dobbs*, that to me showed this is a political court and it's taken me a long time to get to say that publicly, but it's a very sad state of affairs and I think it is true.

ELIZABETH BESKE: I'd like to see, Professor Monast, do you agree? Is this all politics or is there some through line that we can find in a separation of powers purity argument?

JONAS MONAST: I mean, given how quickly and how much has changed with the change of personnel on the Court, it's hard to look at what's happening right now and say that it is anything but a political experiment or a political project. I'll just say in terms of shrinking the administrative state, if that is the language we're going to use, I mean I think Justice Gorsuch has been pretty transparent in what he's trying to accomplish, with I can't remember whether it was *Alabama Realtors*[109] or the [*NFIB*] *v. OSHA*, but one of the other major questions cases decided last term, in his concurrence, he essentially said look, whether you call it nondelegation or whether you call it major questions doctrine, it leads to the same thing, which is it takes authority

106. *See* Simple Politics with Kim Wehle, #SimplePolitics with Kim Wehle - Guest Congressman Jamie Raskin, YOUTUBE (Jan. 23, 2021), https://www.youtube.com/watch?v=6uL6EiB4krw.

107. SB 8, 87th Legis. Sess. (Tex. 2021).

108. Roe v. Wade, 410 U.S. 113 (1973).

109. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (per curiam).

away from agencies to . . . interpret broad statutory language to do new things.[110] And it forces Congress to be the one to make those choices.

And again, if we can, just putting aside how Congress operates now, but just thinking about the role of the Legislative Branch, saying this is a problem, generally this is how to do it, relying on the agency experts to figure out with the specific situation, how to actually do it, right. That makes it far harder for Congress to do that. It makes it far harder [for] agencies to use existing Statutory Authority to deal with new circumstances. I think another way, I think a lens of asking whether this is political or not, is just paying attention to how the court is deploying different ways of approaching cases, right? If originalism gets you to the outcome that you like, then you're an originalist.

With the UNC and Harvard affirmative action case, Justice Brown Jackson was making a pretty strong originalism argument that the Fourteenth Amendment actually does sanction affirmative action, right?[111] My guess is we're not going to see a majority opinion that rests on originalism that says that affirmative action is okay because of the Fourteenth Amendment. So, it's going to take more than some of the justices and the conservative majority making speeches, saying that this is not political and that we're still a legitimate branch of government in order I think to convince the public that that's the case.

KIMBERLY WEHLE: Can I just follow up to that point, which is the point you make about the sort of intellectual dishonesty. The case involving the Biden Administration's guidelines for deportation, the Supreme Court allowed a stay of those guidelines to go in effect, refused an emergency petition to let Joe Biden, as President, have the deference there, which suggests they thought there was some merit to the idea that there wasn't the authority under the Immigration [and] Nationality Act [of 1965].[112]

This is the same statute that the Court held, in *Trump v. Hawaii*,[113] gave President Trump virtually unfettered power, even if it violated the Equal Protection Clause[114] and other parts of the Constitution to implement the travel ban. Now that was on a different part of the statute, right? However, the theory really was Presidents have a lot of power over immigration. So there again, same statute, breathtaking amount of deference to the Court, notwithstanding even if the Court didn't deny there could have been legitimate equal protection, constitutional violations. Too bad, the guideline or the

110. NFIB v. OSHA, 142 S. Ct. 661, 668–69 (2022).

111. U.S. CONST. amend XIV.

112. Pub. L. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

113. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

114. U.S. Const. amend XIV, § 1.

immigration authority is that broad, but then wouldn't step in to protect President Biden's prerogative, when it did not involve other potential rights.

ELIZABETH BESKE: This is of course very disillusioning, and I'd love to pivot to a couple more very specific questions that we've received from our audience. One is for the Judge. Judge Rawald, if we have thousands of other agency judges, not ALJs, but AJs, who lack ALJ independence, why is it so bad if ALJs lose that independence? Are the AJs not functioning well without it, or is there some topical difference between the kinds of work they handle?

DOUGLAS RAWALD: Well to be clear, I would never besmirch the work or the reputation of the administrative judges, they're doing their job in the federal government. I'm sure they work hard, as we all do, and under exhausting conditions. What my impression is [is] that their case load, of course, differs from mine. The statutes that provide for cases to be heard by ALJs, that provide the authority to agencies to bring cases that impact the individuals who are members of the public, when they require their cases to be heard by ALJs, require that because they believe the people writing those statutes, that the ALJs will be able to provide the independence to the making a decision in those cases that would help the people who are being regulated and enforced against, feel confident that the decision is being made by someone who is independent, in fact regardless of their employment status. Whereas the topic areas that often fall before administrative judges, do differ, as you mentioned Professor Beske. I think a prime example is security clearances are often cases that you see administrative judges here in the Department of Defense.

Those are not cases that are ALJs, those are cases that go before AJs because they may involve someone getting denied, something that may otherwise make it hard for them to be employed, which is a different question than one of reviewing other statuses or both monetary fines that come before an ALJ on a regular basis. What I would suggest is that anybody who adjudicates a case would probably like to be independent. I think we could all agree that all things being equal, someone who's being forced to make a decision that impacts two different parties, would like to be as free of any sort of outside pressures as possible, to make the best decision they can, based upon the facts in front of them, the evidence they've considered, and the law at hand and that issue, without having to worry about any extraneous concerns that might otherwise impact their ability to be neutral in that case. So, I think what's important to keep in mind, is that the loss of independence for ALJ's, the loss of removal protections, would at least, if not in actuality, at least in appearance, create some sort of thought of bias. Which, when we look back at the basic principles of jury selection, we look at the question of whether they could be both impartial in fact, and also impartial based upon an appearance of impropriety.

And those kind of things are important. So the fact that when Congress came together, bipartisan in nature, many years ago in enacting the Administrative Procedure Act, and decided to have this impartial adjudicative part of that. It reflected the fact they all agreed that it was important to have the public who are being regulated and facing enforcement actions, have confidence in those folks who are adjudicating those cases, be independent from the agency that's employing them, in coming to a decision that affects those individuals.

ELIZABETH BESKE: Great, thank you. Another question possibly for Professor Monast, do you have thoughts about whether the Court will actually overrule *Chevron*, and thus go through the *stare decisis* analysis, or tip of the hat to *stare decisis*, or are they going to do what they've done in other areas like the Establishment Clause[115] for example, and say the precedent has been abandoned or oh, remember that precedent? No, I don't. And that the space has been overtaken by the major questions doctrine instead. So, is *Chevron* going to be interred officially or will we just never talk about it again in polite company?

JONAS MONAST: That's a great question. You know there's a question today, even before the rebirth of the major questions doctrine over the last term, whether *Chevron* was still alive or not, or whether it was like the Monty Python, the knight, "I'm not dead yet?"[116] Because the Supreme Court hasn't cited it for a while. I can't remember the last time . . . we've seen a citation to *Chevron* in a majority opinion of the Supreme Court. So, it's not clear what the state of *Chevron* is. In terms of the relationship between *Chevron* and the major questions doctrine, I actually wrote an article that was published in the *Administrative Law Review*, that was kind of earlier in the major questions doctrine precedent, trying to figure out where the major question doctrine fits.[117]

And I actually disagree now with the conclusion that I drew then, which was, then it seemed like the major questions doctrine was just a version of *Chevron* analysis, that *Chevron* step one says, was the statute clear?[118] If so, do it right, then the major questions doctrine, as it was being used at the time, was kind of asking that question of is the statute clear? Now I think that it plays a fundamentally different role. Because again, the starting point with the major questions doctrine isn't the statute. The starting point for the major questions doctrine is the politics at issue. That determines a level of scrutiny for how you interpret the statute. So, I think it's very different

115. U.S. CONST. amend. I.

116. Monty Python and the Holy Grail (EMI Films 1975).

117. Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 Admin. L. Rev. 445 (2016).

118. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

and I don't think that the evolution of the major questions doctrine tells us much about the status of *Chevron* at this point.

Because if a court agrees that the statute isn't clear and it doesn't raise an issue of major political or economic consequence (although as a footnote, I challenge you to find an issue that makes its way to the Supreme Court that doesn't bring up issues of major political or economic consequence) . . . then presumably *Chevron* could still apply. But if the Supreme Court isn't citing it anyway, then I'm not sure that it matters that it hasn't been overturned.

ELIZABETH BESKE: Judge Rawald.

DOUGLAS RAWALD: I was just going to suggest that it might be interesting to look at the trial level, how often *Chevron* is cited by a judge in a trial opinion, or in a brief submitted to a judge. I would suggest that on fair occasion that when a respondent before me is questioning the legality or the ability of the administrative authority to bring the action, because it goes beyond the authority they have to regulate something, that the agency will often cite *Chevron* as a basis for how they're going about their business. And then I may have occasion even cited *Chevron* myself or other of my colleagues may have.

So, I think while that may not be cited by the Supreme Court, it's interesting to wonder how changing that would be to those of us who do jobs on a daily basis at a trial level, and our ability to do work if we didn't have that kind of guiding light as we evaluate the government's position on what they're bringing forward as a regulatory action.

ELIZABETH BESKE: That's interesting. So, it might be like the political question doctrine, which the Supreme Court has come in and said five things about, and has lived a very robust life in the lower courts. So, *Chevron* may be alive and well, just not ever briefed or argued before the Court.

JONAS MONAST: Can I ask of Judge Rawald? So, do you anticipate that similarly major questions, like references to major questions doctrine will be before you?

DOUGLAS RAWALD: So interesting because until this discussion today, it hadn't crossed my mind. But while you were talking earlier, I was thinking that very thought, that that could happen. I have not seen it yet, but certainly could be. I mean there are, the bar of people that appear before regulatory agencies range from many *pro se* folks to very well and knowledgeable lawyers who have backings by sometimes groups that are pressing certain issues, to industry groups, so they may want to bring some these ideas and some of these thoughts in bringing up their ideas. I mean, certainly the *Jarkesy* notion of a jury question, that has come around now more often. The idea of removal or these protections for administrative judges comes up more often, so we could see that more in the future. Sure, I guess that would be working their way into briefs

from counsel in the future.

ELIZABETH BESKE: So, I've got one question. It seems triggers for the Court in invoking the major questions doctrine, include situations when an agency relies on broad general statutory language [and] re-purposes an old statute in a new way, and perhaps emphasizing the novelty of the situation, acts outside of its historic experience, regulates conduct distinct from that agency's central organic purpose, or has engaged in failed attempts to get more specific statutory authority to do something, so tried and tried and tried in Congress, never got anywhere, or intrudes on areas traditionally reserved to the states. Are there any other triggers? I mean is there a list in other words, and I sort of asked you this Professor Monast earlier, but are there things agencies can do going forward to avoid triggering the Court beyond that?

JONAS MONAST: So, whoever wrote that list, you only show up here as anonymous attendee, but that's a good list. That's drawing from [Chief Justice] Roberts' majority opinion in *West Virginia v. EPA*. But again, all we know about the major questions doctrine at this point is these are examples of when the Court has found that the major questions doctrine applies in the past. So, it doesn't tell us whether this is the whole list. It doesn't tell us, for example, how old is old enough? How new is new enough? And it also, this is again why I think that of all of the major questions cases, *West Virginia v. EPA* really is cause for concern. I guess this isn't exactly on this list that was included in the question, but another reason that the Court struck down [the Clean Power Plan] is that they interpreted the section of the statute at issue, which is section 111(d), as a mere gap filler, as a kind of a backwoods provision of the Clean Air Act.[119] But if you look at the statutory context, which by the way, [Chief] Justice Roberts [did], when he wrote the opinion upholding the Affordable Care Act[120] . . . which is the only time the Supreme Court has used the major questions doctrine to uphold an agency action as opposed to strike it down.

You know, he emphasized the importance of looking at the statutory context. The statutory context for section 111(d)[121] is, it has only been applied two or three times since 1970, but that's by Congress's design, because there are some sources and some pollutants that wouldn't otherwise be covered under other sections of the statute. So even though it's been applied rarely, I think it's absolutely a mischaracterization to say that this is a backwoods provision. It's filling an important gap. So again, getting back, trying to use what we know now about the major questions doctrine and looking forward and trying to say that there's something here that is actually

119. Clear Air Act, 42 U.S.C. § 7411.

120. Affordable Care Act (ACA), 124 Stat. 119 (2010) (codified at 42 U.S.C. §18001).

121. *See* 42 U.S.C. § 7411(d).

a doctrine and not just a tool for a court to strike down a rule that it doesn't like. I just, I don't know, because I think one, it's easy to imagine another case adding to this list of just examples of when the major questions doctrine applies. But two, it also I think, highlights how subjective the major questions doctrine is because it depends on what scope of congressional, or sorry, statutory context you pay attention to, and how important is it that it's an old statute? Again, if this is really about congressional intent, it shouldn't matter how old it was, there was just what the intent of Congress was at the time.

ELIZABETH BESKE: That brings up another question that I got directly. If the Court doesn't give more guidance on the major questions doctrine, as you say, Chief Justice Roberts left much unsaid, isn't there significant risk that certain lower federal courts are going to have an outsized role in clobbering the administrative states? So, Professor Metzger in the last panel, coined the term or used the term, Fifth Circuit special, and I immediately wrote that down. But litigants are choosing their forums, and to Professor Wehle's point, frequently and increasingly it's the states themselves that are choosing fora that are very congenial to this dismantling objective. Do you think it was [Chief Justice] Roberts' goal to kind of punt on that so that much work could be done in Texas?

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KIMBERLY WEHLE: I mean, punting on the major questions doctrine? I would just add, again, the undercurrent here is not about whether congressional intent, this is not going at the agency, it's going at the United States Congress, and that's the part that is what I find, about the major questions doctrine that is so stunning. That is, however, broad Congress made it, we don't like how you wrote this statute Congress, it's not good enough for us. So, we're going to tell you the implications of this don't work. And I should just add, and I've done some research regarding *Dobbs*, the other fallout is the massive amount of uncertainty this kind of thing creates in the marketplace, right? So, part of the reason for *Chevron* deference is the idea of Balkanization—it's good to say okay, we don't have fifty states interpreting this. We have one source, the federal agency, that's going to give us a definitive interpretation that we may be able to weigh in on through notice-and-comment. If not, we can challenge it, but at least a guidance [sic] gives us some way of projecting how to spend our money, what our [profits and losses (P&L)] is, what our projections are, where we should hire; think about *Dobbs* in this moment, you've got employees that are in Texas and employees that are [in] California. In Texas, maybe if you allow an employee to leave the state for an abortion, you could literally be sued or

criminally liable as the employer. Whereas in California, it might be required that you actually give some kinds of leeway under the State's employment laws and health care laws. What do you do as a company? How do you protect against or manage that risk? It's daunting to imagine the implications for health care, the implications for [human resources (HR)]. And the major questions doctrine, given that we don't even know in this moment when statutes after the fact, as Professor Monast says, after much litigation, are going to be held to have been not good enough for the United States Supreme Court. You know in terms of planning and the implications for business and the economy, I just think the court is stepping way, way, way out of its judicial, Article III[122] lane here.

ELIZABETH BESKE: Well, and that was a point that Professor Metzger made, and I'd love to get others' views on this, but that even if the Court does not [do] one more thing to squash the administrative state, it will, in having created the major questions doctrine, [have] absolutely chilled agency action, constrained agencies to very incremental backward-looking change, as opposed to forward looking initiatives.

KIMBERLY WEHLE: Well, I had one other thing. I did an assignment with my administrative law students over the years, where I'll take an actual notice-and-comment rulemaking that's pending, and people will weigh in on it. And actually, it's some of the most productive work I think I've done, and that is the students take it very seriously, they file their comment, they put their name on it. And the takeaway is wow, actually notice-and-comment, if you think about democracy, where regular people get to weigh in, it's actually quite a democratic process. You can't do that; you can't have access to your member of Congress if you don't have strong lobbyists in Washington. And of course, under *Chevron*[123] and arbitrary and capricious review, the agency has to take into account legitimate, good arguments, or it could be struck down as arbitrary and capricious.

So, I think there's a mythology in this idea of, oh agencies are bad, a mythology that somehow what agencies do is just a bunch of bureaucrats that are politicians. There's actually a lot more structure and ability of regular people and judicial review, than there would be of Congress, which is neither here nor there, but I think there's that point. The other point, I've done work over the years on outsourcing of agency, or I mean congressional power, just the shrinking of the administrative state does nothing to do with the outsourcing to private contractors of federal power and federal

122. U.S. CONST. art. III
123. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

authority.[124] When contractors get a contract with the Department of Energy to even write rules, sometimes that happens. Certainly, to engage in the kinds of stuff that the judge does. Booz Allen Hamilton can do administrative adjudications if it's pursuant to a contract. That is not governed by the Constitution because they're private actors, and it's not governed by the APA. So, I just want to sort of just pierce that idea, the idea coming into this, that somehow when agencies do stuff, it's bad, it's anti-democratic, it's unaccountable. It's actually quite the opposite and we're not, [sic] we don't have our eye on other ways things are substantially unaccountable, and don't get within this conversation because it's under the radar.

ELIZABETH BESKE: I think that's an excellent point. So, Professor Monast, did you want to jump in?

JONAS MONAST: So on the chilling effect question, I mean I think I've already referenced this earlier, but I think absolutely this uncertainty and the more power that the judiciary reserves for itself by being ambiguous about a major questions rule, as opposed to being specific about when it applies, that then creates uncertainty for what an agency can do, if it's facing a new problem or it thinks that a new approach to an existing problem would be more consistent with the statutory scheme. I think the example that we're likely to see with that very soon is a rule from the Securities and Exchange Commission on disclosing climate risk. Because they had proposed a draft rule before *West Virginia v. EPA* was decided, that included requirements for disclosing what's called Scope 3 Emissions, which is emissions beyond the control of the particular company that is making the disclosure.

I think there's a lot of consternation at the SEC about what the major questions doctrine means and the final rule will probably be something far less ambitious than the draft rule that was proposed. But I think it's also important to recognize this isn't going to put a screeching halt on agency action. Right now, for example, the EPA is working on the replacement rule for the Clean Power Plan, and it's doing that now in the aftermath of *West Virginia v. EPA*. So, it's going to do something different. But think the agency is trying to figure out now within the confines that it's working under, how can it still do something meaningful? And there are a few different ways that agencies can be creative in how they approach that. So how can they use existing statutory authority and go farther? And do it in the same way they've done in the past, but just achieve something more than their existing rules do.

Another thing that you have seen the EPA do is talk about kind of the full suite of regulations they're working on, as they call it, the Administrator calls

124. *See, e.g.*, Bridge C.E. Dooling & Rachel Augustine Potter, *Rulemaking by Contract* 74 Admin. L. Rev. (2022).

it the Power Sector Rules.[125] So rather than thinking about this particular rule, dealing with this pollutant from this source, and this pollutant from these sources, they're trying to take a more holistic view and signal to the regulated entities that even though there are different pollutants coming out of the smokestacks, collectively all of these rules are going to affect the same smokestacks. So, you might want to keep this in mind when you're making investment decisions going forward. So, there will be action. The EPA will still regulate greenhouse gas emissions from fossil fuel fired power plants, but the Court has taken away, I think, an ability to do so I think in a way that achieve the goals of cost effectiveness and environmental effectiveness together, and is forcing some hard choices. So, there will be a chilling effect.

ELIZABETH BESKE: That kind of neatly anticipates my final question as our time draws to a close, which is we're stuck with this Supreme Court for a long time as we know. And are these just bumps in the road and we're all going to get efficient at navigating around them? Or ten years out, is the regulatory landscape going to be unrecognizable to the law students and legally informed people in 2022?

KIMBERLY WEHLE: I mean, I can take that. I would say it already is getting that way. And I think it's not just going to be the regulatory state, it's going to be much of the Constitution. And maybe the answer, in part, is litigants and interest groups need to start lobbying State legislators and State courts under state law. If the idea, back to my initial comments, that the Court is going to encourage more State power and sort of dismantling of the federal government, including the power of the United States Congress, then I think people who care about these issues have to rethink their strategy.

And so, the message isn't just gloom and doom. It's okay, people need to accept what the trajectory is and re-calibrate and find another crack in the vessel to make an impact on the underlying policy issues that matter to so many Americans.

ELIZABETH BESKE: Great. Professor Monast.

JONAS MONAST: That's a hard one. I mean there are so many different ways to respond to what's happening. I think we saw year one of the six justice conservative majority, and really sweeping implications of that. Now we're in year two, with . . . some more huge cases that will have very broad societal impacts. So, we'll see where they are, are they going to continue to look, are these cases going to continue to look like the cases did last time, in which case I do think that starts to lead to a legitimacy problem

125. Michael Regan, Adm'r, SEC, Remarks to CERAWeek About EPA's Approach to Deliver Certainty for Power Sector and Ensure Significant Public Health Benefits, As Prepared for Delivery (Mar. 10, 2022).

broadly, not just for those of us that pay really close attention to these things.

There's a, for the law students here, there's one approach to it is lawyers, as long as there's been a profession of lawyers, the rules have changed and lawyers have figured out how to craft the best arguments that they can, based on the rules that are existing today, and also have an idea about where they may want the rules to go and craft an argument that gets there too. There's also a political response, and I think we're going to see a lot of that too. Rights I would guess, protecting rights that at least I think are important, that is likely going to come from the Legislative Branch for much of my professional life going forward I would think, rather than relying on the courts to protect what we have understood thus far in my professional life, what the source of the rights are. So, there's that. And I think Professor Wehle makes a good point too, is that so much attention is focused on the federal government, but that's only one player among many when thinking about how to make progress.

ELIZABETH BESKE: Judge, I'm going to let you have the last word, but I just want to flag that somebody said in the comments, maybe the answer is case-by-case adjudication, rather than agency action writ large. I mean maybe it is in the hands of the ALJ[s] . . . to sort of incrementally move things and I just thought I'd bounce that to you before we conclude.

DOUGLAS RAWALD: Yes, it's awfully hard to regulate by adjudication. I mean there's a lot of administrative law discussion about that as a process, the weakness of that, because as administrative law judges were not ensconced in what the administrator, the political appointee, may particularly want to do when they have the ability to of course, reverse our decision. So, it's not initially an area that we are well versed to be taking the first stab at. We're better at taking evidence in, looking at the evidence, looking at the regulation that was existing and then kind of making a decision based on those facts, without announcing any broad, sweeping judgments. I think that's an area that could be risky for an administrative law judge in doing that.

But I will say that administrative law judges writ large have been bumping along for many, many years, basically in obscurity in some ways. We would hear cases and the only people that would know about us were those that were appearing for us. I would say that most Americans' interaction with a judge would have in fact been an administrative law judge, probably in the social security context. But otherwise we are anonymous in nature until of course, the last five years, when suddenly we have appeared in certain publications and a lot of discussion regarding our position. And so, from my point of view, this is the most sustained structural attack on the administrative law judges in the history of the program. So, I presume there will continue to be such attacks and such attempts to kind of change the way we do business, and

I would suggest that something will change in some way in the next five or ten years as we continue to see these things, the attacks that go on. Whether we will respond in a way that will make sure that we are, our digital independence is guaranteed and not questioned or whether it will be in some way undermined, I can't say it's too predictive, but it does, I do think that there will continue to be a greater assault, given the fact that there's been so much going on of late.

ELIZABETH BESKE: You guys, this has been a fascinating panel. Meghan, are you going to come back? I have learned a ton from all of you. I very much appreciate your perspectives on all of it. There's Meghan. And the boots on the ground understanding of how this is all playing out is invaluable. And thank you.

MEGHAN HART: Yes . . . I first want to thank our participants for contributing such fabulous and thoughtful questions to kind of guide us through this conversation. And Professor Beske, you should have no reservations about your knowledge of administrative law and how tactfully you guided us through such a robust conversation. To all of our panelists, thank you so much for dedicating your time and thoughts and experience to educating us on all of these different topics.

I am certainly very appreciative and I'm sure our panel and our participants are appreciative as well. So I have nothing else to say except enjoy your weekend and the rest of your day and thank you so much.

ELIZABETH BESKE: Thanks to all.