Welcome to a hard look, the Administrative Law review podcast from the Washington College of Law.

We'll discuss how administrative law impacts your daily life from regulatory actions by agencies and the litigation over them to the balance of power among branches of the government. This is a hard look.

Bennett: Hello, and welcome to another episode of A Hard Look, an administrative law podcast brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association. My name is Bennett Nuss, the Senior Technology Editor of the *Administrative Law Review* and supporting me in the booth is the indomitable Anthony Aviza *ALR*'s Technology Editor.

Bennett: Before we begin, please note that the positions, views, and ideas advanced by speakers on this podcast are representative of themselves alone. Their positions cannot be fairly attributed to the *Administrative Law Review*, Washington College of Law, the American Bar Association or any other organization to which the speakers may be affiliated.

Bennett: As you may or may not know, administrative law stands on the precipice of a massive change in the field of judicial review of agency action. The long entrenched *Chevron* Doctrine, which has been the standardized method of reviewing agency action since 1984 has come under considerable scrutiny as of late.

Bennett: In fact, the highest court has repeatedly departed from *Chevron* as their primary method of analysis within the last few years in some of the more controversial cases during that time.

Bennett: In fact, the Supreme Court has accepted cert uri in the current term to potentially eliminate or revise *Chevron* Doctrine in a case called *Loper Bright Enterprises v. Raymondo*. The Supreme Court is actually late to the party on this count.Delaware led the nation in rebuffing Chevron in 1999 in the seminal case, *Public Water Supply Company v. Dipasquale.*

Bennett: Since the turn of the millennium, 10 other states have also legislatively or judicially ended their reliance on *Chevron* like deference. Even as *Chevron* has been in decline, a potential successor to the throne, so to speak has revealed itself in the form of Major Questions Doctrine, a comparatively novel approach to judicial review of administrative action that may become the new recognized standard for agency review next year.

Bennett: However, this approach has drawn some harsh criticism from legal scholars and judges alike proclaiming it as an imprecise and far too limiting on the potential of the executive branch to effectively govern, to help us navigate the current conflict of doctrines and to perhaps make

some sense of what a post-*Chevron* universe might look like, I'm pleased to announce our guest for this episode, Professor Daniel Cohen.

Bennett: Professor Cohen is an adjunct professor at the American University, Washington College of Law where he teaches administrative law and federal regulatory practice. He's been in the admin law field for more than 30 years, having written law review articles and spoken on federal regulatory procedure at conferences for us, practitioners, government officials and academics from numerous other countries.

Bennett: Professor Cohen, thanks for coming on the podcast.

Professor Cohen: Thank you very much. Glad to be here.

Bennett: All right, if we're going to get into a discussion of Major Questions Doctrine, we need to take a look at what is potentially going to replace, being the *Chevron* Doctrine. For those in our audience who may be wholly unfamiliar with it, what is *Chevron* Doctrine?

Professor Cohen: The idea of *Chevron* deference comes from a case called *Chevron v. Natural Resources Defense Council*. It was decided in 1984. And in that case, the Court came up with a two step test that it would apply when the Court was reviewing administrative actions by a federal agency. The two step test is basically in step one, has the Court directly spoken to the precise question at issue. And if the Court can figure out using traditional tools of statutory construction what Congress's intent was on the precise question at issue, the Court will say, well, then the agency has to do what the law requires. So, if Congress's words or intent are clear, that's the end of the matter–the Court and the agency must follow the law and do what the law requires.

Professor Cohen: But, if the Court in step two determines that Congress has not directly addressed the precise question at issue–soif the statute is silent or ambiguous–the question becomes whether the agency's interpretation is reasonable among the reasonable interpretations that could be potentially determined of that statute, even if the Court doesn't think it's necessarily the best interpretation So, if the Court says, well, yeah, the agency's interpretation is reasonable, the Court will defer to the agency's interpretation.

Professor Cohen: And, that was the case for, for a very long time until a number of years later, the Court decided another case called *United States v. Mead*. And in that case, the Court said was, well, agency actions qualify for *Chevron* Deference when it appears that Congress delegated authority to the agency to take an action with the force of law and the agency action in interpreting the statute, claiming deference was promulgated in the exercise of that authority. So, the delegation can be shown in a variety of ways as by the agency exercising its power to engage

in either adjudication or noticing, comment, rulemaking that issues a legislative rule (a rule that has the force and effect of law) or some other step that the Court can look to, to determine comparable a congressional intent in providing the agency act with the force of law.

Professor Cohen: If the agency isn't acting in a matter that has the force of law, which in that particular case, *United States v. Mead*, the agency action was undertaken by the Customs Service–they had issued a letter ruling about the applicability of tariffs to day planners. And in that case, it did not have the force and effect of law. And the Court said, well, *Chevron* Deference wouldn't apply, they don't have to apply the two step *Chevron* test.

Professor Cohen: But in those kinds of circumstances, the Court will look to whether the agency is acting in a manner and under an authority where the Court might think the agency's action is persuasive; that the agency's views might matter because it's a matter in which they have some expertise even if they aren't acting with the force of law. So in that case, the Court would look to a much earlier case, a case decided in the 1940's–*Skidmore v. Swift*–to determine whether the agency's action was entitled to respect because it was persuasive.

Professor Cohen: And then if it was outside of those two categories, then nothing would apply. The Court would have to make its own decision. So, what came out of *United States v. Mead* was a third step of the two step *Chevron* test, which people come to refer to as step zero. Before you start applying *Chevron*, the question is whether *Chevron is the* right context in which to assess the agency action. So, *Chevron* has basically become this three step process.

> Step zero: Does it apply?
> Step one: Is the statute clear or ambiguous? If it is clear, the agency has to do what the statute says. If it's ambiguous, the agency's interpretation among the reasonable interpretations possible of that statute–and if so, the Court will defer to the agency's interpretation.

Bennett: Mhm. So, the United States had been a formed country for over 200 years before *Chevron* had ever hit the books, nd you mentioned this slightly with your brief discussion of *Skidmore*–but, before the Court adopted the *Chevron* doctrine, how exactly did the Supreme Court review agency actions and how is it different to how we look at them today?

Professor Cohen: Yeah, it's a really interesting question because *Chevron* has become this really important case. A westlaw search done by Professor Jeffrey Lubbers, here at American University that he did back in 2020, shows that *Chevron* had been cited by the Supreme Court in 240 cases and by the Courts of Appeals in almost 7200 cases. So, you know, that's a lot of use of the *Chevron* doctrine by courts in making it their determinations.

Professor Cohen: What's interesting, though, is *Chevron* was a unanimous decision and there seemed to be little recognition by the justices at the time that they were issuing this any big deal opinion itself seems to suggest that the courts were just explaining what had been done by courts for years prior to *Chevron*. Because before *Chevron*, of course, there was *Skidmore* and the courts would look at the statute and the legislative history materials to see what the legislature intended and assess whether agency interpretation was reasonable. So, that's essentially a combination of steps one and step two. And so there's a good, there's a good argument that *Chevron* really codified, somewhat in a more formulaic way, what had already been happening for years prior. On the other hand, *Chevron* can be seen as a landmark decision. I mean, it was instructing courts to be deferential to agencies that if the Court goes through step one and finds that the statute is ambiguous and that the agency's interpretation is reasonable in step two, you know the Court defers and leaves it up to the agency to decide. So, that seems to be a pretty big deal, I guess.

Professor Cohen: Now, the truth is, over the years since *Chevron* and certainly in the past 25 or so years, 20 to 25 years, you know that Doctrine has been ignored when it was sort of inconvenient, circumvented, and chipped away at by the courts when they don't like the results. So, it's hard to say really how, whether it really was a big deal or it's kind of fallen into some lack of relevance.

Bennett: So, paradoxically, compared to your kind of assessment of *Chevron* as lacking relevance, it's been fairly seriously criticized as being too deferential to agency programs and interpretation of statute based on the fact that a reasonableness determination is all that's needed when reviewing agency interpretation of a statute. In your experience, does this critique have merit? Is it overblown? Or is it really just something in between?

Professor Cohen: Probably something in between. I mean, for example, step one has become the key step, right? Typically, once the Court finds a lack of clarity, deference is likely. And the truth is, I believe the Supreme Court has only overturned agency interpretations at step two once. On the other hand, you know, the Circuit Courts do determine agency interpretations to be unreasonable at step two. I can tell you, I personally have lost the case at step two representing an agency position.So, you know, it happens.

Professor Cohen: And, a number of years ago, Professor Walker and, and Professor Barnett did an empirical study of this question and based on about 1600 agency interpretations at the Circuit Courts between 2003 and 2013 when the Court cited the *Chevron*, they found that the Circuit Courts over overall upheld the agency interpretation 71% of the time. I mean, that seems like a pretty good winning percentage for the agency, but that also means that they didn't uphold the agency interpretation 30% of the time.

Professor Cohen: So, you know, the question becomes, whether that winning percentage, that 71% winning percentage, could be explained on grounds other than *Chevron* tipping the scales. It could just be that agencies typically come up with pretty reasonable interpretations. I mean it doesn't have to be Chevron, right?

Bennett: Right. And so putting on my devil's advocate hat for a second, someone who is more skeptical of *Chevron* might look at your analysis in the alternative and say that under *Chevron* courts have granted agencies, their interpretation of statutes 70% of the time, which indicates that courts have been very friendly to agencies under *Chevron* and it enables executive overreach in all but the most extreme 30% of cases. What would you say in response to this hypothetical skeptic?

Professor Cohen: Well, I mean, since the Court and *Chevron* didn't really think it was doing anything particularly special, right? They just thought they were giving a bit of formality to what courts had been doing to that point. I think you might first have to look to see if that winning percentage was any different pre-*Chevron*.

Professor Cohen: I don't think anyone has done that research, but I would venture to guess that the winning percentage may even have been higher pre-*Chevron*. That is, I mean, I'll go a little bit out on a limb here and offer that, that skepticism about *Chevron* certainly over the past 25 years or so may have led to more losses for the government in court–in courts where the belief is that *Chevron* had in fact hit the scales, right. That the courts have become more skeptical as Chevron had become more of a flash point, it may be more likely that agencies lose. So, bottom line though, I think that the winning percentage is more a factor really of federal agencies applying their expertise and doing a really good job of building a record to support their reasonableness, rather than *Chevron* putting weight on the agency side of the scale.

Bennett: Turning our eye a bit more to policy–some commenters and legal critics think that the growth of administrative power and breadth over the past 50 or so years has to be coinciding with the Court's deferential grant in *Chevron*. Is this link accurate, misattributed, or maybe just missing the point?

Professor Cohen: In my view, the growth of administrative power and breadth over the past 50 or so years is, I think more a factor of congressional action than judicial deference. What I mean by that is, you know, in that time period, Congress has assigned agencies more jobs to do through

Professor Cohen: And as I said, you know, just a moment ago, over the past 25 or so years, the courts–especially the Supreme Court–have been chipping away at the circumstances in which they will defer under *Chevron*. Plus in my experience, you know agencies don’t just sit around

planning for deference. It's not like there's a meeting that occurs when the agency is preparing the rulemaking where they say, ok, how do we get *Chevron* deference here?

Professor Cohen: I think rather, they look at the statute, they gather the data, they do the analysis and they, they try to make the best decision they can with the authority and the information they have and in truth, that's often hard to argue with. So, I just think that the agencies do what they do and they do it because it's often just the reasonable or right thing.

Bennett: So, originalist justices on the Court have often indicated in their opinions and public facing comments that Chevron deference is inherently unconstitutional in some manner. For example, Justice Kavanaugh commented in 2014 that quote, *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope as well as denouncing the doctrine as quote "an a textual invention of the courts" that serves as a "judicially orchestrated shift of power from Congress to the executive branch." It's a serious charge. But, would you agree with then Judge Kavanaugh, that *Chevron* fundamentally changed how we view the relationship between the branches or are these effects of *Chevron* on the balance of power overblown or misunderstood?

Professor Cohne: It's an interesting theoretical question, but as a practical matter, there is a need for Congress to delegate a certain amount of authority to the Executive Branch to carry out the laws congress passes, right. Congress can't possibly address and statute every detail or contemplate every scenario–that is just impossible. And, the Executive Branch needs a certain amount of interpretive discretion to implement the laws right to do what is legitimately and unquestionably within the Executive Branch's purview.

Professor Cohen: You know, there are questions about the separation of powers that have arisen over time as Congress has arguably ceded authority to the executive branch by drafting broad statutes, and the Executive Branches use those grants of authority to address situations not necessarily contemplated in the original enactment, but that perhaps require some response. But you know, *Chevron* didn't cause this to be the case, right?

Professor Cohen: *Chevron* may be kind of the flashpoint for the argument but that happened outside of *Chevron*. And—and again, it's not like agencies are sitting around plotting how they can argue *Chevron*, they are just trying to do the best job that they can, given what they've been assigned by the law to accomplish.

Professor Cohen: Also, I think that there is a separation of powers problem between Congress and the President. If that's true, I'm not sure that an extremely aggressive judicial branch is the obvious solution to that problem. I mean, the judiciary has little to no expertise on the substantive questions at issue in the enactment and implementation of a statute, and judges don't

really have a basis to come up with a better or a or a more definitive interpretation of ambiguous statutory text.

Bennett: So, in simpler language and potentially getting into a chicken and egg question, would you argue that *Chevron* isn't actually the cause of the growth of the executive, but rather represented judicial recognition of the fact that the executive was growing and required some kind of codified judicial review, even if such review is deferential?

Professor Cohen: You know, I think that's what the Court thought they were doing in 1984.

Bennett: Alright. And so moving away from *Chevron* and towards Major Questions Doctrine. Since *Chevron*'s passage in 1984, a number of judicial opinions and scholarly works have slowly introduced the concept of Major Questions Doctrine to American jurisprudence. And, so that our audience can follow along, what is Major Questions Doctrine?

Professor Cohen: The Major Questions Doctrine has something of a long history here that goes back starting in 2000 with a case called *FDA v. Brown & Williamson*. This is a case having to do with the FDA regulating tobacco products. And, in that case, Justice O'Connor, writing the opinion, said that when courts apply *Chevron*, right—so it was in the context of *Chevron*—when courts apply *Chevron*, they have to be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude as regulating tobacco would be to an administrative agency. And–and Justice O'Connor said: well, if that's gonna be the case, the Court is confident that Congress would not delegate that vast amount of power to an agency in a cryptic fashion. So the–the case basically says that there has to be, when there is a–a matter of economic and political magnitude, there has to be a clear grant of authority to the agency to take that action. Again, this comes up in the context of *Chevron* where the Court was trying to decide whether the agency's position—the agency's interpretation of the statute was reasonable. So–so that was 2000 and then it, you know, nobody hears about major questions, and then the word major question wasn't actually applied to it. It was just a statement of large economic and political magnitude in–involved in the agency action.

Professor Cohen: But that doesn't come around again until 2015 when the court is deciding a challenge to Obamacare, the Affordable Care Act, a case called *King v. Burwell*. And in that case, the court upheld the Obama Administration interpretation of the Affordable Care Act, but only after deciding, essentially at *Chevron* step zero, that it was not going to give deference to the IRS's interpretation of the Affordable Care Act having to do with tax credits applicable in health exchanges. And–and the Court said: well, you know, listen, the IRS is not really the agency we look to–to handle matters of health care policy, particularly when there are questions of deep economic and political significance that are central to the statutory scheme. So in that case, the court said: this is such a big deal that the IRS is the wrong agency. And then the Chief

Justice, who was the the writer of that opinion, went through his own analysis of the statutory provisions and decided that the agency's interpretation—what–what came out of the agency's interpretation—was–was the correct interpretation of the statute. So we don't then hear about this concept of great political, economic significance or large or deep or whatever economic and political significance until 2021. When, in the–the height of the pandemic, the Center for Disease Control issued a moratorium on evictions of–of tenants from rental apartments. And they–they base that–that action on some authority in the Public Health Services Act which authorized the Surgeon General to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases. In that case—and it comes up in the context of a–of a–of a temporary restraining order, preliminary injunction kind of scenario, so it wasn't like a fully briefed case and fully argued case. But it—the Court said, you know, it strains credulity to believe that that statute gave the CDC the authority, as sweeping as it was, to prohibit evictions from–from rental apartments. That it's just not—there's nowhere that you could imagine that the Center for Disease Control would be involved in landlord-tenant matters. And that just doesn't come through in the statute, and that if there–if there were to be such a, an exercise of powers of vast economic and political significance, the Court expects that Congress would have been clear in giving the Surgeon General that authority.

A year later in a case called *NFIB*—the *National Federation of Independent Business—v. OSHA* having to do with the employer vaccine mandate. The–the Court revisited the same–the same concept again in the context of–of a, a challenge, you know, a preliminary challenge to the–to the agency action, not a–not a–not a full challenge and briefed and whatnot through the–through the process. And in that case, what the Occupational Safety and Health Administration had done is under the–the OSHA Act, their–their organic statute, they have authority to issue something called emergency temporary standards to address when employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, and the emergency standard is necessary to protect employees from such danger. In that–in that rule, the–the agency had–had imposed a mandate for vaccines on all employers with employees—with more than 100 employees. And–and, there too, the Court said once again, this–this everyday exercise of federal powers is–is–is not what's at issue here, right? This is a big deal, and it is a matter of significant encroachment into the lives and health of a vast number of employees. And that, when Congress is authorizing an agency to take such an action of such vast encroachment and such vast political and economic significance, the Court expects Congress to speak clearly in the exercise—in their ability to exercise such power.

Bennett: So looking at the through-line of each of the cases, you mentioned, there is a cited expectation for Congress to speak clearly on specific major items that they seek to delegate. Is this clarity held to some standard of good delegation or is it at the discretion of the reviewing court to determine if the degree of the action taken mirrors the delegatory language?

Professor Cohen: An interesting question to try to figure out based on the cases we have. What we do know is, you know, *King v. Burwell* is an example of the agency winning in a major question doctrine case, though it is part of a *Chevron* analysis. And–and that–and the statutory language in that case was not a model of clarity, which I think is evidenced by the somewhat grammatical gymnastics the Court undertook to find that the tax credits were available on both state and federal exchanges when the actual language seemed at first blush to go the other way. So I don't–I don't really know what a good delegation is in this context. It seems that for a number—maybe a majority—of the Justices, what they want to see is an obvious explicit and direct link between the statutory authority and the specific action taken. I mean, that is, you know, EPA can issue a national ambient air quality standard for pollutants found to endanger human health, which is a pretty big deal, right? That has major political and economic consequences because the Clean Air Act very clearly says EPA can issue a national ambient air quality standard for pollutants found to endanger human health. So maybe it needs to be that specific. It–it—I think, well, you know—maybe over time we'll find out.

Bennett: Maybe trying to resolve a little bit of the lack of clarity here, Justice Barrett has opined that Major Questions Doctrine is more of a disposition than a rigid test, stating that the doctrine is quote, "a tool for discerning, not departing from the text's most natural interpretation," end quote. Do you agree that it's more of a guiding principle, or is it actually a determinative predisposition against agency action?

Professor Cohen: It's probably too soon to know definitively. What I think is clear, at least from the cases that we–that we have to date, is that it does seem to be something of an on-off switch. That is, you know, if the Court doesn't think there is a clear statement of authority, then the agency action is unauthorized. *King v. Burwell* is the only counter we have to that. And as I said, the statute, there was itself not really a model of clarity, and to the extent its natural reading may have gone the other way, does seem to kind of be a counterfactual.

Bennett: And so turning to the practical a little bit: to your knowledge, how has the executive branch had to modify its method of rules interpretation due to the court's rapid adoption of Major Questions Doctrine over the past two decades?

Professor Cohen: Yeah, you know, earlier I mentioned that I–I don't think agencies sit around thinking about *Chevron*. That may be a little different with respect to the Major Questions Doctrine. So–so *Chevron* again, as we talked about earlier, is more about being reasonable. If the agency can justify what it's doing, and that would seem to make *Chevron* less of an issue, right? If–if the agency can explain itself and–and–and is doing what seems to be reasonable, you don't really have to have a whole lot of thought going into the action thinking about the Court's analysis, right? That it's not–it's not so much of a thought exercise because it's really, just, if you do what seems to be right in the first instance, based on the–the law and the facts, you–you

probably do okay. Major Questions Doctrine, at this point, is–is ill-defined. And–and again, it's–it's more of an on-off switch, I think. So, I–I think it's harder to know if–if a court will think the agency has the authority, because the agency certainly takes the action thinking it has the authority. And–and because getting a court to agree with a lack of agency authority means a challenge to a rule will win, it's almost certain that a litigant is going to raise the argument. So–so I do think agencies need to be more mindful, and actively so, in contemplating the Major Questions Doctrine than they would have been for *Chevron*.

Bennett: While it's clear that Major Questions Doctrine may be an inhibitor to agency action like you men–like you mentioned before, do you think it's enough an impediment to seriously impact the efficacy of agencies in their day-to-day operations? And if so why and how.

Professor Cohen: So, you know, in many cases, agencies have clear authority of long standing to do very impactful things. And I mentioned, you know, the–the Clean Air Act clearly authorizes EPA to–to–to set national ambient air quality standards, even though—and we'll get into this in a moment—they–they lost the–this case, *West Virginia v. EPA* about their Clean Air Act authority. But you know, and–and–and the Occupational Safety Health Administration certainly has unquestioned authority to establish rules addressing workplace hazards. The FCC can regulate access to the radio spectrum. I mean, where there–where there may be an impact is where an agency is trying to use an existing statute to address a new problem. I think with a–of a theme, at least in the–so far in the cases that have been decided by the Supreme Court, is that, you know, in–in looking at the Major Questions Doctrine that not every problem has an existing solution, right? Like it's not that just because there–there is a problem, the agency can–can fix it, and–and that's–that's probably true. So it may be that agencies need to go to Congress and ask Congress to be clear about the authority when it's not clear, and if there is a problem and Congress fails to act, right? And then—and that's on Congress.

Bennett: So, we kind of telegraphed our cards a little bit and we mentioned the case a little bit earlier, but *West Virginia v. EPA* was *the* case that brought the Major Questions Doctrine from a reference practice into a somewhat more solidified state. So, can you really quickly relate what this case was and what the court held?

Professor Cohen: Can I do this quickly is really the question, right? So, it was a really complex procedural history in this case that raised standing questions that I'm just, I won't get into here, right. But on the substance, in 2015 EPA—the Environmental Protection Agency—promulgated something they called the Clean Power Plan. There was a rulemaking that they undertook. It went through notice-and-comment, they did all of the various steps required under the Administrative Procedure Act. And this Clean Power Plan addressed carbon dioxide emissions from existing coal and natural gas fired power plants, electric generation power plants.

Professor Cohen: So, the authority that the agency cited to was Section 111 of a Cleaner Act, which among other provisions, authorizes regulation of certain pollutants from existing sources of pollutants under Section 111(d). So, Section 111(d) is sort of a generic catch-all provision that gives EPA authority to regulate sources of pollution that are not covered by other provisions of the Clean Air Act. And that provision hadn't really been used as authority for prior regulations. Again, the actual measures in the Clean Power Plan and are quite complex. But the main point was that EPA's rule will require that electric generation from coal and natural gas be shifted to generation from renewable energy sources like wind and solar for the purpose–stated purpose in the rule of reducing greenhouse gas emissions, which would be the pollutant that they were trying to resolve. The Supreme Court invalidated the Clean Power Plan, saying that there are extraordinary cases in which the history and the breadth of the authority that the agency has asserted has economic and political sig–significance, and that the assertion provides a reason to hesitate before concluding that Congress meant to confer the authority. So, under this body of law, which for the very first time in this *EPA* case—*West Virginia v. EPA*—for the very first time, the Court actually called the Major Questions Doctrine.

Professor Cohen: The Court said that given both separation of powers, principles and a practical understanding of legislative intent, the agency must point to clear congressional authorization for the authority claims. In the Court's view, EPA claimed to discover, and I'm sort of quoting somewhat from the court here, to discover an unheralded new power representing a transformative expansion of its regulatory authority in the vague language of a long extant but rarely used statute designed as a gap-filler. That discovery allowed it to adopt a regulatory program that Congress had itself declined to adopt, right?

Professor Cohen: There had been legislative proposals to do effectively the same thing that the Clean Power Plan did by rulemaking and that given those circumstances, the Court hesitated before concluding that Congress meant to give EPA that authority and therefore invalidated the rule.

Bennett: Well, *West Virginia v. EPA* received outsized attention from media and scholars at the time of its passage and brought a great amount of public scrutiny on the decision and thus the doctrine, some positive, some negative as is to be expected. Do you think that the public perception of agencies and their role in the everyday function of government has had an impact on the development of Major Questions Doctrine or no?

Professor Cohen: It is hard to say. I mean, you know, different people have different perspectives on the activities of federal agencies and some think they go too far. Others think they don't go far enough. I think the media attention was more about the partisan divide over climate change since most of the reports in the popular press focused on the fact that that's what the rule was about and that that was an issue in what the EPA was trying to accomplish. And, the popular press sort of

mentioned the Major Questions Doctrine is sort of either a, like a boogeyman, this evil thing that Supreme Court was trying to foist on the country or as a constitutional imperative that was needed to save the country sort of depending on the news source. But, they never really explained what it was.

Professor Cohen: They just kind of quoted it. They said this is what the court said, "And there is this Major Question Doctrine that they never got into the details." So, even if the public didn't appreciate the ground shift that this case represented in the field of administrative law in favor of more mundane narratives, *West Virginia* did cause and still causes consternation in the legal world in that the standard to be applied from *West Virginia* is still somewhat uncertain in your experience.

Bennett: Has this uncertainty impacted legal practice and litigation surrounding rules? And, if so how?

Professor Cohen: Yeah, absolutely. I mean, you know, if a party is challenging a federal agency action we making or otherwise and, and we'll get into the otherwise, in, in a little bit, I think, at this point, you know, to me it's malpractice to not raise Major Questions Doctrine as an argument. Why? Because if you can convince the court that that doctrine applies, as I say, it's an on/off switch–you can win if you can convince the court to see it your way. And, and I will say, you know, at the extreme, I did see one instance in which a party raised Major Questions Doctrine in a DC Bar disciplinary proceeding. I don't think that it has been very far but it was, but it was made. So, this may settle out over time as the doctrine gets further, further flushed out. But, for now it appears front and center of both agency drafting of a rule and when, as they're preparing their documents for anything beyond run of the mill rules and rules addressing long standing programs. Unless there's something novel at issue in that particular rulemaking. It's certainly coming in in comments submitted by outside parties and rulemaking proceedings. And the challenges are almost every time when the agency rule is–is up in court So pushing our discussion into, well, not exactly the present day but close enough.

The most recent case surrounding Major Questions Doctrine was decided this last term in the student loan repayment case, *Biden v. Nebraska*. Can you quickly relate what this case was and what the court held?

Professor Cohen: So, in–in August of 2022 President Biden announced a student loan debt cancellation program based on the emergency declared in light of the COVID-19 pandemic. So the plan would have canceled a maximum of $20,000 in federal student loans for qualifying borrowers. And the plan was based on a provision of a statute called the Higher Education Relief Opportunities for Students, the Heroes Act of 2003. So, that Act was passed in the wake of the September 11 attacks. And the provision said that the Secretary may waive or modify any

statutory or regulatory provision applicable to the student financial assistance programs under the Higher Education Act. And this is kind of key here as the secretary deems necessary in connection with a war or other military operation or national emergency.

Professor Cohen: So, the Court recognized that the Heroes Act had authority to postpone loan payments during the COVID-19 emergency. But the Court said no matter how broad the meaning of waive or modify may be waive or modify is not cancellation and relying on the Major Questions Doctrine. The Court said that a program that would cost $400 billion needs to have a clear statement of authority from Congress. And the Court also said, well, you know, even if you thought that the authority might be there under waiver, the court also questioned the continued existence of an emergency.

Professor Cohen: Given that at the time in August of 2022, the President himself had said, you know, the pandemic was kind of over.

Bennett: I find comparing this case to *King v. Burwell* remarkably interesting because even though Justice Roberts found that you don't automatically grant *Chevron* deference on matters of economic and political significance, Roberts ended up deferring to the agency's interpretation of the Affordable Care Act. It seems like we have a similar instance here where Justice Roberts does not apply *Chevron* Deference in *Biden v. Nebraska* but holds in the alternative and invalidates the action. Now, granted we're looking at two separate kinds of programs. One was for Obamacare, which extended to the entire class of American citizens, whereas student loan repayments only goes towards a very select population. But is there a doctrinal difference in play here or is it just an evolution of the Court's jurisprudence?

Professor Cohen: Well, so one thing to keep in mind—and this is why I said, you know, in my earlier answer on, you know, the applicability of this doctrine as rule making or otherwise—you know, what's at issue in this case is financial assistance. And recall that *Chevron* and–and in particular, step zero of *Chevron* talked about when the agency is acting with a force and effective law based on a grant of authority, and that really kind of gets into notice-and-comment, rulemaking and–and–and those and adjudication, those kind of actions which is not typically what's at issue when–when financial assistance is in play. So sort of an interesting question because the–the court is applying Major Questions Doctrine to this financial assistance program which suggests maybe that it's not really *Chevron* at all. So that gets into, you know, *King v. Burwell*. There, the Chief Justice found essentially it's step zero. So the reasoning was sort of Major Questions Doctrine rather than need step zero. Right, that the Chief Justice said, you know, this was such a big deal that he didn't think the IRS was the right–the right agency to be deciding it. But he decided that *Chevron* didn't apply because it was a matter of such national and economic political significance. Congress would have needed to have been explicit in that case, right? And he went on to do his own statutory analysis.

Professor Cohen: In contrast, the Chief Justice doesn't even mention *Chevron* in the student loan case. Now, maybe that's doctrinal, maybe that's evolutionary, or—maybe, you know, in a more pedestrian, as I said—maybe that's because the *Nebraska* case was about financial assistance, which is a topic not typically considered in a *Chevron* context. That he didn't say so, we just don't know.

Bennett: To some extent, we may just have to wait and find out. But talking more about Justice Roberts's opinion is he writes *Biden v. Nebraska* that emergencies don't grant agencies special powers without specific congressional authorization. Considering that we've just exited what can clearly be considered a state of emergency following the height of the COVID-19 pandemic, how might the Court's hostile disposition regarding agency assumptions of implied authority interact with government efforts to combat emergencies in the hopefully not-too-near future?

Professor Cohen: Your question may be overreading–overreading the case somewhat. I mean, on the one hand, right, the Court does say just because there's a problem doesn't mean there's a solution and so that does, you know, create something of a–of a problem. But–but the Congress did provide emergency authority to the Education Department. The Court's opinion seems to be saying that–that Education just read that too much into that grant of emergency authority, but it didn't say the emergency authority itself wasn't appropriate. So, you know–so that does seem to highlight the issue with the MQD, right? The–the Major Questions Doctrine, that is. How explicit does the authorization need to be to satisfy the test? And I'm not sure we quite yet have the answer to that.

Bennett: And granted this may be a question for another podcast on what exactly emergency law is and the privileges that it has over its more mundane counterpart. But, potentially, can the Major Questions Doctrine be a dangerous impediment on authority exercised by the executive in times of crisis? Or, I guess in an alternative construction, could it be considered a necessary check on the executive from utilizing far too many powers in the name of an emergency response?

Professor Cohen: You know, potentially, but—though, this can go either way. Right? We–we certainly–we don't want the government hamstrung when–when there's an emergency existing, and–and action needs to be taken to save lives or to protect property. But, you know, we also don't want the concept of what constitutes an emergency to become so elastic that the executive branch can use it as a pretext, right? You know, maybe the initial reaction to COVID is a good example of what to do in that Congress acted very quickly to pass bipartisan legislation. You know, maybe the same after the 9/11 attacks, and that would presumably solve the problem if Congress actually passes clear law.

Bennett: So let's zoom out a little bit and get kind of the big, and one may even say, major questions. There is a great deal of debate as to what exactly constitutes a major question even among supporters of the doctrine. So, for example, Justice Scalia in *MCI Telecommunications Corporation* cited that the extent to which a regulation deviates from the plain language of a statute is what can invalidate it, which is an attitude echoed by Justice Roberts in his analysis in more recent cases. Other cases and opinions like the per curiam opinion in *Alabama Association of Realtors* indicate that the degree to which authority is asserted by the executive is the indicator of when a question is major. Additionally, cases like *Brown & Williamson Tobacco Corp.* indicate that economic and political magnitude is when a question becomes major. So what makes a question major or is it too chimerical to really grasp at the moment?

Professor Cohen: Yeah, maybe. As a general matter, I–I think there are basically two flavors of the Major Questions Doctrine, right? So first, it's a really big deal. And–and here I'm thinking *Brown & Williamson* and regulating tobacco. *King v. Burwell*. Obamacare that, you know, health care is like one-seventh of the—of the United States economy. *West Virginia v. EPA*—electric generation across the entire country. So–so there's, there's, there's one flavor. The it's a really big deal flavor.

Professor Cohen: And–and the other is: For real? Agency X is doing what? And I–and I think that is sort of the, you know, maybe the Center for Disease Control issuing an eviction moratorium. Or–or OSHA, you know, imposing a vaccine mandate. It's sort of—that doesn't seem to be the right place, you know, the–the Center for Disease Control getting into landlord tenant law that–that just seems—it just doesn't go together. So, and then the question becomes, where does the Major Questions Doctrine fit in this whole context with *Chevron*?
Right? So I–I think Major Questions Doctrine, if you look back at *Brown & Williamson* and *King v. Burwell*: I think it started as a gloss on *Chevron*, but now seems to be either its own thing because now when you hear–when you read these Major Questions Doctrine cases, they don't talk about *Chevron*. Or–or maybe it's sort of step minus-one to *Chevron*, right? You kind of figure: first, is it a big–really big deal where you would go down the Major Questions Doctrine path in the first instance? And then, if it's not a big deal, then you go into the step zero: well, would *Chevron* apply to this? And if so, then go through the *Chevron* analysis. And, you know, it's probably a little too soon to–to know, but, at least for the district and the circuit courts, it does seem more like it's kind of like a step minus-one. I mean–I mean, as a practical matter, the Supreme Court hasn't mentioned *Chevron* in so long, even when deciding questions of statutory interpretation, it seems almost irrelevant. Now, you did mention the *Loper Bright* case this term with a–with a question on the, you know, on the docket is: should Chevron be overturned? But the Supreme Court at least seems to do Major Questions Doctrine in–in one path and nothing because they're not talking about *Chevron* and the other.

Professor Cohen: But–but again, I think, you know, for–for the circuits and the district courts, it does seem like there's gotta be something there because they're presumably not gonna always be deciding major questions, right? They–presuming that's where you're gonna have minor questions decided.

Bennett: Yeah, and Major Questions Doctrine, instead of being a solidified legal test, seemingly almost requires a policy determination from the court as to when items become major, which is kind of where your step negative-one analysis comes into which to many inherently imbalances the branches of government towards the judiciary. Not to mention that it practically throws the political question doctrine out the window when the court applies the doctrine. So should we understand this is the court accepting its role as the final arbiter of contentious policies? Or is there a different read here?

Professor Cohen: In–in one sense, the Major Questions Doctrine strikes me as a fairly simple and straightforward legal test. That is, the agency is doing something of great political and/or economic significance. Is the statute explicitly clear and authorizing the agency to take that action? The policy question becomes, when does the action cross the significance threshold? One could argue that, at least in the more recent cases, the threshold seems to be when a majority of the Justices don't like the action taken. On the other hand, the court did use the Major Questions Doctrine to uphold Obamacare in *King v. Burwell*. So it may not be completely a one-way street. But inherent in your question is a separation of powers issue about the role of the judiciary. And—and certainly the courts should not allow unauthorized agency action, right? That–that seems obvious, and that's always been the case long before Major Questions Doctrine was–was an issue. But—but the Major Questions Doctrine may tilt the separation of powers by creating too high a bar for the specificity of authorization. And I think this will probably play out over time.

Bennett: So we have already invoked the specter of *Loper Bright* before—coming soon to an administrative law podcast near you. And that case indicates that *Chevron* deference may be heading for retirement in this coming Supreme Court term, and Major Questions Doctrine at the very least seems to be its heir apparent. What would administrative law look like in a post-*Chevron* world, assuming that the Court embraces Major Questions Doctrine as its doctrinal method for reviewing agency action?

Professor Cohen: Yeah, well. I mean, the one part of it is the–the ability for law professors to write academic articles with probably, you know, increased exponentially. So that's a–that's a good thing in and of itself, right? So, you know, as I said before, I'm not sure *Chevron* really matters at the Supreme Court anymore. So they seem perfectly happy to answer statutory interpretation questions without citing to *Chevron*. So, and it's not clear that Major Questions Doctrine is the obvious replacement. And you know, as I said, it seems to be its own sort of path,

at least the Supreme Court. So, and again, not every question is major. So the–the issue would be, if the court were to–were to overturn *Chevron*, what happens to the cases that present minor questions? And—and what happens with respect to cases where the agency has clear authority, but some litigant challenges, the validity of an action taken pursuant to that authority? Which is why major questions, you know, may well be a step minus-one, again, is that the district–in a certain court level, where the–where the minor questions will be litigated. If *Chevron* were to be abandoned without an obvious replacement, there would likely be chaos since none of those courts would know how to approach questions that they have had a framework to use for the past forty years. So, on the other hand, like I said, from a purely academic perspective, it could be a boon, and the *ALR* would certainly have symposia subjects for years to come.

Bennett: Yeah. I mean, anything to get more symposium off, right.

Professor Cohen: Yeah, and podcasts!

Bennett: We could have–we could have podcasts. Yes, we'll have my–my successors for generations will have stuff to talk about. At the end of the day, the final author of laws is Congress, and they have a great deal of deference when they draft bills. Should this intense conflict between the executive and judicial branches over the power of agencies indicate to us that we also have a higher expectation of Congress when they draft legislation? And if so, what should those expectations be?

Professor Cohen: Well, Major Questions Doctrine, i–if you take it based on the words that they're using, it does seem to require pretty sophisticated legislation by Congress or–or at least a whole lot more specificity of legislation, which–which may mean a whole lot more legislation. Whether Congress is up to that task: That's an open question. And–and given recent history of congressional difficulty doing the basics of legislating, you know, we–we may be facing a government shutdown in a–in a few days from when we are recording this podcast. You know, that–that may be a lot to ask of Congress.

Bennett: Yeah, and it really seems like we find ourselves in a bit of a stalemate. On the one hand, as you said, Major Questions Doctrine endorses a view of Congress as an intelligent and explicit delegator of powers and the executive as the executor of those laws. However, a sober assessment of our government reveals that there must, at least for now, be a pretty heavy reliance on the executive to do what is necessary for the maintenance of the country in lieu of an effective Congress. This is likely an impossible question to answer outside of a book or a massive political treatise or perhaps an *ALR* symposium, but how can we balance this version of the ideal against our reality and perhaps come to a balance that's both philosophically and practically satisfying?

Professor Cohen: Well, I agree that's an impossible question to answer, so I'm not even gonna try. But what I will say is, you know, the–the, the genius of the system that our founders set up 250 years ago is that somehow we–we always find ways to muddle through, and–and I'm sure that'll happen here as well.

Bennett: Yeah. Well, thank you so much for coming on the podcast, Professor Cohen. We really appreciate it.

Professor Cohen: My pleasure. Happy to be here.

Bennett: All right. And if you want further reading on the subject, you can find all of the major cases that we mentioned throughout the podcast as well as some informative law review articles in the description for this episode. If you enjoyed the podcast, be sure to refer it to a friend and follow us on the platform of your choice. Until then, my name is Bennett Nuss, and this has been A Hard Look brought to you by the *Administrative Law Review*, the Washington College of Law and the American Bar Association. We hope to see you next time.