ADMINISTRATIVE LAW REVIEW SPRING 2025 SYMPOSIUM: THE FUTURE OF ADMINISTRATIVE LAW

APRIL 18, 2025

The Administrative Law Review*'s Spring 2025 Symposium examined the rapid pace of recent developments in administrative law and sought to provide a roadmap for where we go next. Panel discussions featured conversations on topics including the demise of* Chevron*, the intersection of Article I and administrative law, and the evolution of OIRA through the 21st century. The event culminated in keynote addresses, transcribed below,*[1] *from Professor Cass Sunstein and Dean Richard Revesz, two of the most preeminent and respected thinkers in the realm of administrative law. We also thank visiting panelists Trent McCotter, Alan Morrison, Michelle Kallen, Aram A. Gavoor, Victoria Nourse, Devon Ombres, Eli Nachmany, Susan E. Dudley, and Howard Shelanski for their contributions to this year's symposium.*

1. This transcript is not a certified transcript. It has been edited for length, clarity, and context. Citation: 10 ADMIN. L. REV. ACCORD 177 (2025).

KEYNOTE ADDRESS I: PROFESSOR CASS SUNSTEIN

CASS SUNSTEIN: Friends, countrymen, new friends, colleagues. I got on a plane today having been arisen by my dogs, my Labrador retrievers, at six in the morning in Concord, Massachusetts. And so, I want to tell you something about Concord, Massachusetts, which is where administrative law began. The Paperwork Reduction Act actually started in Concord, Massachusetts, and it started on April 19, 1775, in Concord, Massachusetts, which [was] almost exactly 250 years ago. Today, on that day, Paul Revere went through the towns that led to Concord, Massachusetts saying, "The British are coming, the British are coming." Have you heard about that? And the reason that Paul Revere said that is not that he was playing a joke; it's that in Concord, Massachusetts, munitions were held for defensive purposes in case of British incursion. And in the event that things got military between the [British] and the colonies, as Paul Revere said that it was clear that the British were coming in an unfriendly way, that colonists might die, buildings might be burned, and houses would be invaded.

One of the houses that was invaded was the house in which I live in Concord, Massachusetts. The British soldiers came up the hill on which my house stands, and they were told—falsely, by the British spy—who was more loyal to the neighbor than to the British Crown. The neighbor said, there aren't munitions here, but in my attic, there [are] munitions. In any case, the British started to burn down buildings and the locals assembled at North Bridge on April 19, 1775. The locals were farmers. Two of them were named Isaac Davis and John Buttrick. They deserve to be known by you all because they had some military experience. They were kind of the only ones who had a little military experience, and they were there with the farmers over the bridge—and [with] the greatest fighting force in the world. The redcoats were approaching to burn down the building and the farmers assembled to say, 'you're not going to get there.'

Isaac Davis, who was in the front, was from the nearby town of Acton. And when Davis arrived, people said, 'Where do you wanna go?' He said, 'I wanna go to the front.' And they said, 'Really? The British are coming.' And Davis said, "I'm not afraid to die and I haven't a man who's afraid to die."[2] The British shot a warning shot into the Concord River, which is right where I live. And the American colonists—they weren't the *American* colonists—the colonists thought, 'This is to scare us, but this isn't a fight. This isn't about anybody dying and so we're just going to stand our ground, and then the British will disperse, and know this isn't the time, and this isn't the place.'

2. *Isaac Davis*, AM. BATTLEFIELD TRUST, https://www.battlefields.org/learn/biographies/isaac-davis (last visited Sept. 4, 2025).

But to their shock, the British aimed to kill. And Davis of "I'm not afraid to die" died on the spot. And so did a 17-year-old, who is commemorated by the name of the street right near me.[3] And John Buttrick—the only other one standing with military experience—said, "Fire for God's sake, fellow soldiers, Fire!"[4] He used the Lord's name, and he called the farmers fellow soldiers, and the farmers shot immediately. It was electric.

There's a little book I own from 1827. It's, it's all paper. It's not like a real book, but it has an account by people who were actually there at the time, from 1827, and they shot, and their aim was true, and to the amazement of everyone they routed the British soldiers. That's the shot heard round the world. You've heard that phrase. That's the shot. And the British fled into Boston. And that started the War for Independence and what made it possible was the Americans fought back and they won. And so, optimism went throughout the land: this is doable. There's a history there, which is a commitment to something like self-government, republican self-government, small 'r,' and a belief in individual dignity.

So, tales of Concord at the time say with astonishment that in decades before, people were subjects, and then they became citizens. That people used to doff their cap to the people who were kind of bigger socially and looked down, couldn't look [them] in the eye [if] someone was bigger socially. But that all changed. And John Adams said with amazement, servility turned round. That's my first story.

The second is from 1958. If there's a competition for the greatest administrative law case in our nation's history, I nominate *Kent v. Dulles*.[5] It's disappeared a little bit from the canon, but it might be the greatest administrative law case of them all. I taught it in China about fifteen years ago. I taught it as kind of an introduction to the field and it was a little like the shot in Concord. It was like electricity in that room in Beijing that there could be such a case.

Rockwell Kent was kind of socialist, wasn't really communist—but maybe communist adjacent—and he was denied a passport on the ground that he was a communist. The relevant statute basically says the Secretary of State, under regulations issued by the President, can grant or deny passports on whatever grounds seem best. Rockwell Kent was denied a passport and challenged the denial on First Amendment grounds, on right to travel Fifth

3. *Minuteman National Historical Park*, AM. BATTLEFIELD TRUST, https://www.battlefields.org/learn/articles/minute-man-national-historical-park (last visited Sept. 4, 2025).

4. Steve Crosby, *"I Haven't A Man Who Is Afraid To Go": The Acton Minutemen on April 19, 1775*, DISCOVER CONCORD, https://www.discoverconcordma.com/articles/87-i-havent-a-man-who-is-afraid-to-go.

5. 357 U.S. 116 (1958).

Amendment grounds, and on nondelegation grounds, claiming that the grant of authority to the Secretary was completely open-ended. What the Supreme Court did with this case—and this is 1958, kind of right in the midst of the Cold War, during the McCarthy era—was an act of extraordinary courage. The Court said, look, we have a grant of broad discretion to the Secretary of State and the President here, but we also have background rights including the right to freedom of speech and the right to travel, and we are going to construe the broad statute in line with preexisting practice.

And preexisting practice was really limited. There was no exclusion of persons from passports because of their political view. That wasn't in our culture. Our tradition had a narrower restriction, and that's what we're going to insist that the administrative state follow unless and until Congress unambiguously indicates otherwise. And there's a lot going on in *Kent v. Dulles*. One thing that's on the surface is the avoidance canon, which says statutes will be construed so as to avoid serious constitutional questions—and note that this is the avoidance canon on steroids. It's not, 'we're going to take genuinely ambiguous statutes and avoid constitutional invalidation.' That's kind of a little cautious principle. It's that if there's any room for a doubt, we will construe statutes so as to steer clear of the territory of constitutional question. That's much broader, and so understood, it's a nondelegation canon. It says that if Congress wants to call a serious constitutional question, it can, but the Executive and the administrative state can't do that on its own. It needs clear congressional authorization. If you read *Kent v. Dulles* today, in light of the background of the last five years, the following sentence might explode almost as if it's in the sky: it's a major question doctrine case.

One thing the court was signaling is if the administrative state wants to do something transformative and big and new, it had better point to clear congressional permission. It can't have thunderbolts. As the Executive, thunderbolts have to come from the national lawmaker, and that's there in the opinion too.

Have you noticed—now we're in 2025; a little bit on 1775, now on 1958, now on 2025—the federal government is asserting a lot of authority, have you noticed, over our universities. I could have just had a period after "a lot of authority," but a lot of authority over the nation's universities. Does it have that authority? If not, what authority exactly does it have?

My first goal here is to suggest the relevance of *Kent v. Dulles* and the administrative law doctrines that spawned the current disputes between universities and the bureaucracy. I point to that because it's natural to focus on the big bold issues, academic freedom and freedom of speech, which means that doctrines that might turn out to matter a lot, and that are central to the *Administrative Law Review*, might be ignored. And that would be regrettable.

The second goal is to engage the big bold issues. And so, I'm gonna get there sooner rather than later. Okay, let's get to work, shall we? Here are some obligatory notations. Sincere, but obligatory. Viewpoint diversity is really important on campus. At some institutions, departments are in the grip of a left-wing orthodoxy. That's a betrayal of everything that higher education should be. Applause to the current Administration for drawing attention to the importance of viewpoint diversity. Discrimination against Jews ought to have no place on campus. Anti-Semitic actions are unacceptable, and in some places, they appear to have been on the rise. Applause to the Administration for calling attention to the unacceptability of that. Little parenthetical note, if I may—mildly personal—I was an undergraduate, lucky enough to have been an undergraduate at Harvard. I was a law student there. I was a visiting professor there. Since 2008, I've been on the faculty. I've been subject to, or seen, exactly zero anti-Semitic comments or acts at Harvard. None in the 1970s. None in the 1980s. Guess how many in the 1990s? It's getting repetitive. Zero. None in the 2000s, the aughts. None in the 2010s. None in the 2020s. In fact, I have not heard directly in all those years of even one anti-Semitic comment or action directed at a friend or colleague in all those decades. So, I have reason to think my experience is not uncommon, though of course it's not universal.

By contrast, in [Washington, DC], and/or in connection with government service, I have seen or been subjected to hundreds of anti-Semitic comments, some of them quite threatening, and almost all of them coming from the political right. Such was my experience [growing up] in the vicinity of Concord, Massachusetts, and as a person in various parts of the country where antisemitism was invisible, that seeing it on the part of political, I guess I don't think of anyone as an opponent, but I guess they do. My initial reaction to antisemitism is amazement: *really*? But I'm less surprised than I used to be. I have reason to think that my experience in this city, and as a government person at times, is common—and it may be nearly universal.

There's perspective there that the effort to engage universities on so-called pervasive antisemitism stems from something important, which is: racism, and antisemitism, sexism, et cetera, don't belong on campus. But there's reason to think that that is not pervasive in the institutions that are being subject to stuff. It's hard to make progress on the underlying administrative law issues without asking, 'What does the government want universities to do?' Here's a quotation: "All existing and prospective faculty shall be reviewed for plagiarism and [Harvard's] plagiarism policy [consistently] enforced. All hiring and related data shall be shared with the [federal] government and subjected to a comprehensive audit by the government during the period in which the plagiarism reforms are being implemented . . . By August 2025, the University shall commission an external party, which shall

satisfy the federal government as to its competence, to audit the student body, faculty, staff, and leadership for viewpoint diversity such that each department, field, or teaching unit must be individually viewpoint diverse."[6]

The audit shall begin this summer and shall proceed on a department-by-department, field-by-field, or unit-by-unit basis. Okay, for a physics department, what does that mean? For a biology department? For an astronomy class? For computer science? Or consider this: every department or field found to lack viewpoint diversity must be reformed by hiring a critical mass of new faculty. You need a lot of money to hire a lot of new people. Every teaching unit found to lack viewpoint diversity must be reformed by admitting a critical mass of students who will provide viewpoint diversity. What does that mean at say, Notre Dame, supposing that it is right of center or kind of Catholic? What does it mean at UCLA, supposing that it's left of center? Or consider this: by August 2025—coming up in a hurry—Harvard must reform its recruitment and admission of international students to prevent admitting students hostile to American values and institutions inscribed in the Constitution.

Suppose someone doesn't like the composition of the [U.S.] Senate. Suppose someone agrees with Professor Sanford Levinson, doesn't like the composition of the Senate.[7] Not one person, one vote, or I believe Justice John Paul Stevens, who's made the same objection.[8] Are they inadmissible? "The university must immediately shutter all diversity, equity, and inclusion programs and stop all of their policies."[9] Okay, there's a lot to say about the legality of these kinds of directives. Let's notice that the avoidance canon and the major questions doctrine are squarely relevant. Taken as a nondelegation canon, the avoidance principle means that Congress must press the constitutional issue. The Executive can't go into constitutionally sensitive territory unless Congress has authorized that. That's the holding of *Kent v. Dulles*. That's why it's a shining star. The implication is if an agency decision to withhold federal funds would raise a serious constitutional issue, statutes have to be construed so as not to allow that withholding so long as the statutes are genuinely ambiguous.

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6. Letter from Josh Gruenbaum, Comm'r of the Fed. Acquisition Serv.; Sean R. Keveney, Acting General Counsel, U.S. Dep't of Health & Hum. Servs.; and Thomas E. Wheeler, Acting General Counsel, U.S. Dep't of Education to Dr. Alan M. Garber, President, Harvard Univ. and Penny Pritzker, Lead Member, Harvard Corp. (Apr. 11, 2025), https://www.harvard.edu/research-funding/wp-content/uploads/sites/16/2025/04/Letter-Sent-to-Harvard-2025-04-11.pdf.

7. Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 828–830 (2011).

8. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).

9. *Supra*, note 6.

Got it? There's an avenue here for judicial concern that doesn't involve constitutional artillery. It involves a familiar and central administrative law doctrine. More relevant still is the major questions doctrine, and I have to say that the major questions doctrine, I have been a kind of frenemy of the major questions doctrine. It has a kind of novelty which is jarring and its suitability for an administrative state—which is dealing with problems that change rapidly over time—is highly debatable. But to be anything other than at least a frenemy of the major questions doctrine, I submit, would be excessively negative. So, the kind of soaring Justice Gorsuch endorsement of the major questions doctrine has always deserved respect, if not agreement, because his heart is in the right place; it's in the place that the separation of powers lives. The idea behind the major questions doctrine, according to Justice Gorsuch, is that a question that involves extraordinary political or economic significance or that has a transformative or unheralded character has to be called by the elected representatives of the people and not by the kind of entity against whom Concord farmers rebelled almost 250 years ago. That [entity] is one person, whether his last name begins with 'B' or 'T.'

Principle clearly applies to school loan innovations by the Executive Branch. It clearly applies to environmental adventures, let's call them, admirable or not, by the previous administration. It clearly applies to Covid measures, which may be transformative or unheralded. What I want to urge here is that in the context we're describing, we have 'unheralded and transformative' with a vengeance. That wasn't intended as kind of a knife, but the word 'vengeance,' I think, is regrettably not a bad one. I meant it more as a cliché, but there we go. Freud. Freud might have been right on some things.

So, the basic idea is that insofar as the U.S. is using authority over institutions of higher education in a way that fits with longstanding practice, it is golden insofar as it's doing something which is extremely new and doesn't fit with preexisting practice. Then we are squarely in the domain of the major questions doctrine, whether we embrace the Gorsuch view that it's grounded in separation of powers thinking or the Barrett view that it's grounded in ordinary textualist thinking. That if someone says something, does something, very unusual and weird, you ask, 'You really mean it?' That's the Barrett view. It's textual rather than separation of powers. In either case, the major questions doctrine is an obstacle to what we are now observing. What is happening would unquestionably count as a major transformation of the role of the national government with respect to the nation's universities. And if anything, that understates matters.

Federal regulators have never asked to oversee plagiarism at universities they fund. They've never asked to abolish DEI policies. They've never asked for a third-party assessment for viewpoint diversity. And even if we think these are plausible initiatives, all we need under the major questions doctrine,

seen I think particularly through the lens of *Kent v. Dulles*, is a raised eyebrow asking: 'Where has Congress authorized that?' Now let's turn, shall we, to a bit of heavy artillery.

So, the heavy artillery is the First Amendment. Suppose the federal government wants to spend its money in support of a cause. Let's say the cause is racial neutrality. That's the cause. And, it sees the Fourteenth Amendment as embodying a principle of colorblindness. It publicly adopts an official project in which that's what it's speaking about over and over again, and it's not engaging alternative views of any kind. Is that a First Amendment problem? No, not at all. The law is clear. There aren't constitutional restrictions on government speech. That's fine. Green light. Second, the government wants to give grants to universities conditioning the grants in this way. Grant recipients must use the money to speak in favor of colorblindness. That's what the grants are for. If you're speaking in defense of race discrimination, you say race discrimination is fine, [or] you're speaking in defense of affirmative action, you're not gonna get the money. The money's only for colorblindness. Is that okay?

The Supreme Court has made clear that it really is okay. Viewpoint based funding is unexceptionable. The government can use its money to support its preferred causes. So, we're building up principles of red light. Let's start with principles of green light. Funding causes you like fine speaking in favor of causes that you like: fine. The federal government refuses to fund departments of psychology. It believes that the departments are doing terrible work and don't serve their students. That's probably okay too. Note the breadth of the principle: the government can not only refuse to fund higher education, but it can stop funding at any time for departments, et cetera, that it thinks are lousy. There's an important qualification: if it stops funding because it wants to punish an exercise of free speech, there's a constitutional problem. That would offend the First Amendment. But so far we have yet another, [but] to universities not terribly welcome, green light.

Next case: the federal government suppose suspends federal funding *in toto* to universities with faculty members who do not pledge to support colorblindness. To obtain federal funding, universities must require faculty members to sign a pledge: 'I believe in colorblindness and will speak out in its favor.' That's a really easy case. It's unconstitutional. Federal funding is, in that case, accompanied by an unconstitutional condition. The Supreme Court has repeatedly made that clear, saying that viewpoint-based restrictions that target speech that would occur independently of the funding are unacceptable. And if the government is leveraging over its power of funding to require people to support certain causes, it's in the constitutional garbage pail. The same principle protects institutions of higher education.

Here's another one. The federal government says something like this, and what we're trying to do is elicit principles here: 'If you don't put your English department in some kind of receivership for federal checkup, you will lose federal funds.' That's not clear. If the government is disapproving of the political views of the members of the English department, it's engaged in unacceptable viewpoint discrimination. If it is targeting the fact that the English department is a really lousy department, then there's probably no First Amendment problem. So, we know exactly what we're talking about: viewpoint-discriminatory federal receivership versus viewpoint-neutral federal receivership. With all this, I think we're well equipped to handle, on constitutional grounds, most of the problems that are being observed. Insofar as the government is seeking to check viewpoints on campus, including by a requirement of viewpoint diversity, it is on weak constitutional ground. Insofar as the government is trying to stop incompetence or something like it, then we're talking about something that might raise statutory questions, but not constitutional questions.

Here's the broadest problem. The one which everyone in this room needs to figure out, and maybe I'll go off script here and say that the idea of academic freedom has been an administrative law and constitutional law thing since the 1950s, but its content hasn't been specified and its role in the face of the sorts of things we're currently observing has twenty-five question marks connected with it. So, this is to say that insofar as the speech of students or faculty is being restricted, we know how to handle it. It could be viewpoint-discriminatory and illicit. Insofar as institutions as such are being targeted, academic freedom moves to the fore as a concern, but its status and nature is unresolved. This is what's going to be tested. In 1957, the year before *Kent v. Dulles*, the Court was confronted with an academic freedom case, and here's what it said: 'It is particularly important that the exercise of government power be carefully circumscribed when the exercise of that power tends to impinge upon sensitive areas like freedom of speech and freedom of association, particularly in the academic community.'[10] The Court then identified liberties in the area of academic freedom and political expression, areas in which government should be extremely reticent to tread.

Guess how thickly defended by reference to originalism that paragraph is. Not thickly defended. Not at all. Nonetheless, the Court added the essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straitjacket upon the intellectual leaders in higher education would imperil the future of our nation. This is on the heels of the McCarthy era. No field of education

10. Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957).

is so thoroughly comprehended that new discoveries cannot be made. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students—hi teachers, hi students!—must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. Otherwise, our civilization will stagnate and die. That's in the midst of a contest with the Soviets.

Justice Frankfurter elaborated the point, arguing for the exclusion of governmental intervention in the intellectual life of a university. That's very strong talk. In 1967, a majority of the Court said the same thing, insisting our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to those concerned that freedom is therefore a special concern of the First Amendment. Go back, if you would, to the catalog with which I began, the various restrictions, and suppose, to exaggerate, the federal government put all of the nation's universities and colleges in something like a federal receivership in which those agencies specified mandatory processes to be followed by the institutions to deal with alleged violations of federal law. Such a step might well intrude on protected speech, in which case it's easy. It's also possible that such a step would intrude into academic freedom, taken as an implication of the First Amendment.

If there is a general right to academic freedom, any mandatory processes would face a serious burden of justification. Yes, simply because they intrude on academic institutions. We could imagine variations on cases that would make free speech violations clear. For example, a mandatory office for patriotism; or reckoning with racism; or promoting or forbidding consideration of diversity, equity, and inclusion. Mandatory offices of this kind would involve unconstitutional conditions, funding requirements accompanied by strings that embody viewpoint discrimination. Suppose that viewpoint discrimination isn't involved, all we're seeing is a certain governance structure; that's what's being contemplated by some of the request-slash-directives. That would pose the unresolved question whether there is in fact a general right to academic freedom, taking the form of some kind of shield against intrusions on university self-governance. Extreme cases are the most revealing. If government said that universities can't get federal money unless they agree to a governance structure that disables their operations, it would be clear there's a First Amendment violation and we can go from there.

So, this is a period in which to the—are some of us feeling amazement? To have another personal word, I didn't vote for President Trump. I wished him well. I hoped everything would go great and still, of course do. It's our country. We love our country. With respect to this domain, at least, [Donald Trump has gone] beyond what was expected. It's clear that government can fund programs it likes and refuse to fund programs that it dislikes. Yay for programs that are, you know, hooray for America; we're not gonna fund

anti-American programs, that's fine. Still, government can't impose unconstitutional conditions as, for example, by saying that in return for federal money, a university must agree to write an annual celebration of Franklin Delano Roosevelt or Ronald Reagan.

The challenging questions are arising, some of them, when federal agencies use federal funds to punish actual or alleged violations of federal law. If federal authorities seek to require certain processes, they may be on firm ground if they're not regulating protected speech, but even so, they may run up against principles of academic freedom whose existence and scope have yet to be specified. Okay, there's a lot that's unclear. My main submission, I hope, is simple and straightforward. They involve the avoidance canon and the major questions doctrine. They call for a bipartisan celebration of both those who've been fighting over the major questions doctrine. I suggest: lay down your arms, join hands with those who have been bracing [against] it. *Kent v. Dulles* points the way. It celebrates congressional supremacy. It suggests that in the current era we ought to be drawing on and making new an old project supported by those embattled farmers only almost exactly 250 years ago at this minute, which is to link the structure of governance with the protection of individual rights. Thanks.

KEYNOTE ADDRESS II: DEAN RICHARD REVESZ

RICHARD REVESZ: Thank you so much for that nice introduction. It's really great to be here. I did spend a lot of my time with you and your colleagues at the *Administrative Law Review* over the last year, and you all did the most impressive edit on a law review piece that I can remember. I mean, it was really extraordinary. And I don't actually know how you on your fingertips came to suggest so many good additional sources. For me to also cite—I was a little apprehensive because I think when I submitted the piece, it was around 30,000 words—and you know, you're told that like 30,000 words is really pushing the limit of you know, what's acceptable. But anyway, I submitted it and by the time I was done, I realized the piece was 39,000 words. And I don't think I actually added a lot of words.

I think I basically added like all of the citations and things you suggested, but I figured at least you wouldn't complain that it was too long since you had actually caused it to be so long. But it was really extraordinary work, and I'm really, really grateful to you for having done that. And it was also really user-friendly because I was in the government then. It was pretty busy, and it was actually really easy to work through all your comments and suggestions. Sometimes, I don't know, these things are presented in ways that are pretty inscrutable and that was not the case at all. So, thank you so much, and it's great to be here, and it's wonderful to see the issue. And I was also pleased by the friends and colleagues who have articles in the same issue as I do.

So, my talk today is title[d] "New Challenges of Federal Regulations: Executive Branch Responses." And it's actually not particularly directed at the work of [the Trump A]dministration. It was kind of written before that, or kind of as things were getting started. If people wanna explore some of the connections, I'm happy to do that in the Q&A. So, in the last decade, federal regulations, particularly federal environmental regulations, have faced a whole bunch of additional hurdles. First, and this is what people think about the most, the Supreme Court has become less sympathetic, and the general focus is on *Loper Bright* [*Enterprises v. Raimondo*][11] and on *West Virginia v. EPA*.[12] Cass [Sunstein] talked some length about *West Virginia* and its implications. Those cases have gotten the most attention, but there are other cases that show the hurdles that regulations will now face as a result of decisions of the Supreme Court.

I would put in that group *Ohio v. EPA*,[13] decided just a week, within a week of *Loper Bright*, and *Michigan v. EPA*,[14] which is a case that maybe you don't

11. 603 U.S. 369 (2024).
12. 597 U.S. 697 (2022).
13. 603 U.S. 279 (2024).
14. 576 U.S. 743 (2015).

focus on as much. Decided about ten years ago, [*Michigan v. EPA*] was a case where the Supreme Court held that EPA had to take costs into account in making the determination that regulating greenhouse gas[es], the hazardous air pollutant emissions of power plants, was appropriate and necessary. And in the process, Justice Scalia's opinion put various burdens on the agency and was, you know, somewhat dismissive of the agency's analysis. Now those are not the only hurdles.

Two other hurdles faced by regulations over the last decade are actually not related to jurisprudential moves by the Supreme Court but instead flow from the increasing polarization of the political parties. In particular, state attorneys general of the party opposing the president have become aggressive litigants. In the case of regulations propagated by Democratic administrations, they often file suits before sympathetic judges in single-judge divisions of judicial districts. So, they know what judge they will get, and they know they're gonna get a judge that's unsympathetic to the regulation. And these judges, who are otherwise very conservative, have often been quite liberal granting nationwide injunctions. So, you know, a case is filed in Amarillo, Texas, and a nationwide injunction comes out of Amarillo, Texas, and then the administration is left to try to sort out the consequences, which are usually not favorable to the regulation. In addition, incoming administrations have begun using a variety of tools to attempt to undo the regulatory output of predecessors of the opposite party. I mean, this is not an entirely new phenomenon. It had happened in the past, but it really became a serious thing with the Trump Administration's effort to undo Obama [Administration] regulations. It continued in, you know, a similar way with the Biden Administration's efforts to undo Trump Administration regulations. And now you see the other side of it.

So, [of] these three things, one is jurisprudential: the Supreme Court putting additional hurdles in the path of regulations. And the other two, caused by polarization, have created a challenging environment for regulations. This is actually now true for both parties, regulations of both parties.

Largely through empirical work, I will discuss how administrative agencies have responded to the challenges caused by less sympathetic courts and increased polarization. Thankfully, agencies did not just keep doing what they had done before and thereby resigning themselves to worse outcomes. Instead, the Executive Branch has responded to these challenges, particularly beginning in 2023, in ways designed to increase the resiliency of regulations. And I say increase, not guarantee. There are no guarantees here. It's just a question of changing the probabilities. So first, I will tell you about efforts to conclude priority rules earlier in the last year of the President's term than had previously been the case; thereby shielding them at least partially from hostile actions by incoming administrations. Second, I will discuss the far

more robust use of favorability as a tool to protect portions of regulations, even if other portions are struck down. And third, I'll explain the significantly enhanced efforts that agencies have undertaken to discuss the regulatory antecedents for their actions as a way to be in a better litigation position following *Loper Bright* and *West Virginia v. EPA*. So untying, perhaps the most important way that administration can protect itself from the undoing of its rules during a subsequent administration is by not waiting until too late in the President's term before finalizing the rules.

In this connection, congressional disapproval and the Congressional Review Act (CRA)[15] has gotten the most attention. As I think many of you know, under the CRA a rule finalized during the last sixty legislative days of an administration can be disapproved by a subsequent Congress under fast-track procedures that, most importantly, bypass the filibuster rule that otherwise would apply in the Senate. As a result, regulations can be disapproved by a simple majority in the Senate as opposed to the sixty votes that would otherwise be necessary. Typically, this mechanism works only if the presidency changes hands and if the incoming president's party also controls both the House and the Senate. Absent unified congressional control, the resolution of this approval will be unlikely to pass. And absent a president aligned with the congressional majorities in both chambers, the president would veto such a resolution. And given the relatively close balance of seats in Congress in recent decades, the veto is unlikely to be overridden.

But in recent history, incoming presidential administrations faced unified government when they took office, and thus, CRA disapproval is a real possibility that administrations must contend with. Indeed, the last instance of an incoming president taking office with a Congress of the opposite party was in 1989 with President George H.W. Bush. Since then, incoming presidents, their parties have controlled both chambers of Congress for the first two years. I mean, they have often lost the congressional majority in the midterm elections; the first two years are the relevant ones for CRA purposes. But while the CRA has gotten the most attention, there are many other reasons why early conclusion increases a regulation's resilience. In particular, a rule is more likely to survive judicial scrutiny if the administration that promulgated it gets to defend it in court before leaving office—or at least gets to participate in as many stages of litigation as possible.

It's also the case that even if a regulation is completed too late to protect it from CRA disapproval or defend it in court, there is value in ensuring that the effective date occurs before the end of the administration. Although I won't say much about that issue today, but if [that's] not the case, it's easier for an incoming administration to undo it. So I call this 'the April push.' So

15. Congressional Review Act, 5 U.S.C. §§ 801–808 (1996).

in light of the significant benefits in not waiting until too close to the end of the presidential term to complete priority regulations, the Biden Administration undertook a successful—and actually unprecedented—effort to do so earlier than had been the norm. And the early completion was actually made possible in part by the leadership that OIRA exercises in connection with the review and management of the regulatory process. And it happened, for full disclosure purposes, during a time in which I led the agency.

Every administration going back to 2001, which is as far back as I looked, concluded review on a disproportionate number of rules during the last year of a president's term. The proportion ranging from 29% for the second term of the [George W.] Bush Administration to 51% for the Trump Administration, but more than 25% is a disproportionate number. And it was disproportionate for every administration, Democratic and Republican, since 2001. So, in this score, the pattern is actually pretty similar across the administrations. But in the prior administrations, the last year rules were mostly done during the last four months of the president's term. That is sort of October through Inauguration Day. In contrast, in the Biden Administration, they were done during the first four months and the differences are stark. The Bush, Obama, and Trump Administrations respectively concluded a review on only 22%, 17%, and 19% of their last year rules during the first four months. So Bush, Obama, and Trump had very similar statistics on the score. In contrast, the Biden Administration concluded review on 52% of its last-year rules during the first four months of the President's last year.

Now, the effort to conclude review and regulations by the end of April 2024 was not just a noteworthy statistic. The output that month includes some of the Biden Administration's most significant regulatory priorities, particularly with respect to environmental and climate change rules. For example, the ten EPA rules in which OIRA concluded review in April included four important rules regulating the emissions of a range of pollutants from power plants, limiting their greenhouse gas emissions, hazardous air pollutant emissions discharges into navigable waters, and disposal of coal ash. Also included in those ten rules were two key rules under the Toxic Substances Control Act.[16] One setting forth procedures for chemical risk evaluation, and the other limiting methylene chloride, as well as a rule limiting the emissions of hazardous air pollutants from copper smelters, and one rule designated PFAS (which are forever chemicals) as hazardous substances under the Comprehensive Environmental Response Compensation Liability Act.[17]

By acting early by comparison to historical standards, the Biden

16. Toxic Substances Control Act, 15 U.S.C. §§ 2601—2629 (1976).

17. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601—9675 (2012).

Administration significantly added to the resilience of the regulations reflecting its key priorities. In particular, by the end of April 2024, the Biden Administration concluded review on its two most important climate change priorities: the rule limiting greenhouse gas emissions of power plants [and in March 2024] we concluded a review on EPA's vehicle emission standards, which also produced significant greenhouse gas reductions. And also during the first four months of the President's last year, OIRA concluded review on EPA's national quality standard for particulate matter, which is a rule with enormous net benefits. It's predicted to avoid, per year, 4,500 premature deaths, 800,000 cases of asthma symptoms, and 290,000 avoided workdays.

Now it turns out that, you know, in my world, in the world of my colleagues who are former [OIRA] administrators who will be on the panel after that, the most important date is the date on which OIRA concludes review on a regulation. We pay a lot of attention to that, and those things are publicly available. You can find them on reginfo.gov. It's actually not a legally important date. The regulation doesn't go into effect and basically nothing happens. I mean, the next steps are actually very important. The next steps are for the regulation to be signed by the agency head; and that usually, I mean, for priority rules where the administration cares about it, happens quickly thereafter, you know, a couple of days—a week at the most—in general.

There are two other steps that are more complex. So, one is publication of the Federal Register, and we wonder, 'Why is this a big thing?' It turns out it's a big thing. I worried about this a lot because in the run up to April 2024, which I had kind of thought of as like a really important date, I had noticed that a regulation which we had concluded a review in November [2023] which was an important administration priority—it was the regulation of the methane emissions of oil and gas installations—it was important as the centerpiece of the U.S. commitment to COP, the conference of the parties.[18] [The regulation needed to be] done in November so it could be announced by the relevant people in the administration the first week in December. We worked really hard to get this done, and it was signed by the EPA administrator who then flew to Abu Dhabi or wherever this thing was and announced it.[19] March [2024] came around, it hadn't yet been published in the Federal Register, and the media started paying attention to this. And I realized, if it's going to take three months to publish our April regulations, we're not going to accomplish what we're trying to accomplish. And

18. COP28, the 28th edition of the United Nations' annual conference on climate change; the summit is formally known as the "Conference of the Parties of the United Nations Framework Convention on Climate Change."

19. COP28 was held in Dubai, United Arab Emirates, from November 30 to December 12, 2023.

actually, it was even more troublesome because we hadn't done that many things in November 2023.

So, you would think the Federal Register would have a lot of time to devote to this rule. Whereas we, we did like eighty-one rules in April of 2024, and the Federal Register has like a fixed number of people working there. So, I was kind of worried about it. It turned out that we got every one of the rules done in April published in the Federal Register by May 20th. And this was actually kind of a record, and it took actually a lot of work with agencies. So, they would submit their rules in kind of a more Federal Register-friendly form. It turns out there's a lot to be learned by this, and you don't wanna learn about it now; but if anyone is interested, I actually learned a lot about it. The other thing that's relevant is that that's not enough either. Actually, publication in the Federal Register is enough for challengers to challenge the rule, and that's actually relevant because if a rule's gonna be challenged and the administration wants to defend it, it's better that it'd be challengeable earlier rather than later. Because a lot of these regulations have to be challenged within 60 days of publication of the Federal Register. A lot of the big environmental regulations have to be challenged in that way.

But in terms of protecting rules for CRA purposes, they have to be properly submitted to Congress, and that actually turns out to be a cumbersome process as well. And the Senate, in the Senate, it's interpreted to be the date on which the regulation is referred to a committee. And actually more importantly, the date in which the referral to the committee is published in the Congressional Record. As you know, during some weeks of the year, the Senate only has pro forma sessions, kind of meets twice a week for like 30 seconds, in order for the administration not to be able to do recess appointments. And the Senate parliamentarian has determined that during those performance sessions, things can be referred to committees.

This is actually a problem in election year—which is the only year that matters for these purposes—because in the summer, the Senate basically takes off for five to seven weeks for people to go campaign. And if you don't get this thing in and publish in the Congressional Record before they take off, then by the time they come back you're gonna have a problem. As a result of all these efforts, every rule on which OIRA concluded a review by the end of April was both published in the Federal Register and properly submitted to Congress. The last one of these rules was properly submitted to Congress on August 2nd. This is relevant because when the year started, the congressional calendar suggested the lookback period under the CRA would start on August 1st. So this was kinda like a real rush to get it all done, and we got it all done except one. Although, it didn't matter in the end because at the end of the session, the Senate met more days and they had anticipated, and so the relevant date became August 16th. So in fact, they were in the end all protected.

But that's kind of part of the problem, which is you don't know when you're kind of like making these decisions. And just like they can add days, they can also take away days, which also happens some years. And the other problem is that you know, the government operated under, I think, the threat of four lapses in appropriations that year. And, and if there are lapses in appropriations that can mess things up by having you know Congress in session fewer days. Anyway, the CRA has gotten the most attention, but it's only one of the reasons, as I indicated, for agencies not to wait until too late in the president's term to complete their regulatory priorities. And litigation is a big deal. A regulation is much more likely to survive judicial scrutiny if the administration that promulgated it is also the administration that defends it in court.

As you might imagine, a new administration that is hostile to the rule or wants to repeal the rule is either not gonna defend it in court and is gonna find various ways of doing that. Or even if it defends rules, in some cases, it might not raise all of the arguments the prior administration might have raised because it might not believe in all of the arguments that the prior administration might have raised. And again, this is true on both sides of the aisle. In the last few presidential transitions, Obama to Trump, Trump to Biden, and Biden to Trump, there were a lot of pending rules at the end of the president's term. And the incoming administration typically asks courts to place this litigation in abeyance while the administration reconsidered the rule[s].

And this is advantageous to the incoming administration because the one thing the incoming administration does not want—often the incoming administration wants to argue that the outgoing administration's regulation is illegal—and the one thing that would be kind of like bad from that perspective is to have the court uphold it because that will weaken the [incoming administration's] ability to kind of make that argument. And there are tools beyond abeyances. Incoming administrations could, during the pendency of litigation, ask courts to remand the regulation back to the agency; could conceivably ask for vacatur; or even could enter into collusive settlements with sympathetic parties like state AGs of the new president's party.

So, the Biden Administration actually gained a significant head start on the litigation front. It successfully got to litigate the state requests for some of EPA's most significant regulations. And in 2024, the D.C. Circuit, where many regulations of nationwide applicability are challenged—and then the Supreme Court—denied stays on four important rules that I already mentioned, three of the EPA power plant rules as well as the EPA methane rule, which I mentioned as well. And the D.C. Circuit denied stays on three other rules, and stays were then not sought on those rules in the Supreme Court. The denial of a stay on the EPA rule limiting the greenhouse gas emissions of power plants is significant because the Supreme Court had granted a stay

on the Clean Power Plan, which had been that rule's Obama Administration predecessor. Victories and stay applications matter because absent a stay, the clock or the rule's compliance deadline continues to tick. And as a result, the regular community is more likely to make durable investments necessary to come into compliance, thus effectuating the rule's purpose even while the litigation is pending.

Also, the Biden Administration got through the merits [of the] D.C. Circuit argument on the, on the power plant greenhouse gas emissions case. But importantly, you know, even though this was all good and better than if it hadn't happened, it wasn't enough on the litigation front. It was enough on the Congressional Review Act front, because at the end of the Biden Administration, the D.C. Circuit had not decided the challenges to any of the environmental regulations for which OIRA concluded review in April 2024. And predictably, the Trump Administration sought abeyances in these cases, and also predictably because it's happened the last few presidential transitions, the court generally granted these abeyances. So this actually presents a challenge, because to fully accomplish the goal of completing litigation over priority rules, getting them done in the first four months of the president's last term, even though it's better than had been done before, is actually not enough.

And to have a chance at doing that, these rules would have to be completed significantly before and almost certainly sometime during the president's third year and not fourth year. And that actually is difficult, because rules take a long time to do. Some empirical studies suggest that for complex rules, the period between when an agency starts thinking about doing something and when it publishes the proposed rule is around two years. And the median time from proposed to final is about a year, a year and a half. The median time for a D.C. Circuit review is a year, and that year starts typically 60 days after publication of the rule. And if you do the math, you're already kind of like past four years and you haven't even taken into account the possibility of Supreme Court review, which is also a problem.

Now, the Biden Administration was able to cut down the time, I mean, for these priority rules. The proposed-to-final time, the median, was a year—which is still long, but it was less than a year and a half. But if you actually wanna make significant improvements in this area to be able to protect more of the rules done during a president's term—this is assuming the president isn't reelected—but even a reelected president has the same problem in the second term. The planning would have to start way earlier than it does, and the obvious time to start it is during the presidential transition.

So, typically in the last, the last few transitions—this was true for certainly the Biden transition and the current Trump transition—very significant work was done in the transition. That's why both President Biden and President Trump issued a very large number of executive orders in the last, in the first

day and first week in office. But you know, that was a big accomplishment, but that is different than actually doing the work necessary to have regulations out. An executive order is a few pages long. You know, the regulatory materials accompanying a significant regulation can be a thousand pages of preamble, and then several thousand pages of technical support documents, regulatory impact analyses, and various other things. This is kinda like a hard thing to do, but I think it's unrealistic to think that this work would be written during the transition because a lot of this work has to be done by career people and agencies who actually have the expertise to do it. But the basic policy decisions could be made to a greater extent. Now, in order for that to happen, you have to empower whoever is working in the transition to be able to make policy decisions. And whether that can happen or not is complicated, but I think it's worth thinking about how to shorten the time from that it takes to actually come up with a proposal in a new administration. Okay, enough said about timing.

So now, two things. So, these timing issues are because of the polarization of the parties, the parties didn't have such radically different regulatory agendas as they do now. You know, this wouldn't be a problem, and it hadn't always been the case. You know, I mean, even the Obama Administration when they took office, I don't think there was, like, a huge goal to undo as many of the Bush regulations as possible. In fact, you know, they didn't try to CRA anything. They, you know, they were basically focused on pushing their agenda forward, getting as many people confirmed by the Senate as possible and so on. It was different when the Trump Administration took office. It was different when the Biden Administration took office. And it's different now as the Trump Administration took office again. So, this is a change from the last 10 years, not a forever change.

The next two things I'll address, somewhat briefly, have to do with this more challenging legal landscape. So, one important way in which agencies have responded to the more challenging legal landscape has been to increase their efforts to ensure the judicial decision striking down one portion of a regulation is not fatal to the whole rule. And the relevant legal inquiry in this context is whether the portion of the rule struck down by the court is severable from the rest of the rule. If it is, the rule survives. If not, the whole rule gets struck down.

Agencies can put themselves in the best position to have the regulations found to be severable by adopting four best practices. *First*, an explicit discussion of favorability in the regulatory materials, either preamble or regulatory text, increases the probability of the first prong of a judicial test—which is intent—[being] satisfied. The agency tells you this is what they intend. If the agency doesn't tell you, lawyers can argue in court that that's what the agency intended. That's not as good. Often courts call those things post hoc

rationalizations by counsel, as opposed to the word of the agency. *Second*, robust discussion in the preamble about why portions of the rule should survive, even if others fail, make it more likely. The second prong of the test, judicial test, which is workability, is satisfied. The agency tells you, explains to you, why the rule is workable and makes sense even if parts of it don't survive judicial scrutiny. *Third*, discussion of severability in the proposed rule, as opposed to waiting for the first month of the final rule to discuss it, allows for public comment on favorability which the agency can then use in responding to those comments to strengthen its arguments and thereby put itself in a better position when the regulation is challenged. And also, I mean, the other side of this is if the agency discusses severability in the proposed rule, and no one comments on it, the ability to raise the issue that the rule is not severable in judicial review is presumably waived. And *fourth*, an explicit discussion in the regulatory text, as opposed to just in the preamble, increases the chance that the agency will be able to invoke issue waiver against severability arguments raised for the first time in litigation, because it kind of makes it difficult for litigants to say, 'oh, you know, what you said about favorability in the preamble was like one stray sentence buried in a thousand pages and wasn't clear enough.' Regular text is more concise, puts people in notice. It's, it's better.

So, in the last two years of the Biden Administration, the annual number of regulations published in the Federal Register that mention severability increased dramatically. In 2023 and 2024, these discussions were found in 147 and 327 published regulations, respectively. In contrast, for the 2001 to 2022 period, that is the preceding twenty-two years, the mean was twenty-six per year and the median was twenty-four. So, by 2024, there were severability discussions in fifteen times as many regulations as had been the average between 2001 and 2022. So, this is a really big increase. The same sharp increase is observed in mentions of severability in the regulatory text: seventy-three published regulations in 2023, 115 in 2024, compared to a mean of sixteen and a median of twelve over the prior twenty-two years.

And the discussions were far more robust. There is a neat feature on Westlaw called snippets which [is] really useful. And the number of snippets referring to severability in regulations increased dramatically. And so snippets are references that appear more than twenty words away. So they're kinda like, you know, if the sentence just says severability like six times or like, six contiguous sentences say, that only counts as one. But if it appears further away, that makes it more likely that the agency is actually making these arguments [in] different sections in kind of a more robust way. So, all of this increased dramatically.

And lastly, the last thing I'll talk about are regulatory antecedents. So, in *West Virginia v. EPA*, where the Court struck down the Clean Power Plan, the

Court said these words—Cass [Sunstein] already mentioned them in the prior talk—it said, when an agency "discover[s] in a long-extant statute an unheralded power" representing a "transformative expansion of its regular authority,"[20] courts are skeptical. So, the relevant words are "long-extant statute," "unheralded power," "transformative expansion." Now, these terms are actually not original to *West Virginia v. EPA*. In the use of all these terms, the case quotes another EPA case—called '*UARG*' among its friends—*Utility Air Regulatory Group v. EPA*,[21] a case decided in 2013 where the Supreme Court upheld part of an EPA greenhouse gas regulation and struck down a different part of a regulation. So, whether the power an agency asserts is "unheralded" depends exclusively on whether the regulation has antecedents and the more robust the antecedents, the less unheralded the power. Now *Loper Bright*. So, while regulatory antecedents are normally discussed in connection with *West Virginia v. EPA* and *UARG*, *Loper Bright* provides further support for the relevance of regulatory antecedents.

The Supreme Court repeatedly explains in *Loper Bright* the two factors that make it more likely for statutory interpretations by administrative agencies to be accorded respect. [First,] that the interpretation be issued roughly contemporaneously with the enactment of the statute, and [second,] that it remain consistent over time. That is, did it have antecedents? And when both factors appear together—both the interpretation being contemporaneous with enactment and being consistent over time—the respect accorded to agency interpretations by the Supreme Court is greater. And the Court actually shows that these principles have a long historical pedigree spanning two centuries. Recently, just last month in *Bondi v. VanDerStok*,[22] which is the ghost gun case, the Supreme Court again reaffirmed the importance of regulatory antecedents and actually used the existence of antecedents to uphold the Biden Administration's regulation of ghost guns. Now, it turns out that since these terms "long-extant statute," "unheralded power," "transformative impact," had been around since *UARG*—the Court had said in 2013 that they were relevant—agencies made almost no mention of them in the regulatory materials until 2023, but then began doing so.

This is important because often the grounds for challenge will that the agency's regulation does not have antecedents. This happened in *West Virginia v. EPA*; the Chief Justice's majority opinion said that the regulation did not have relevant antecedents. Justice Kagan disagreed; her dissent actually discusses antecedents at some length. I was actually happy because an amicus brief on antecedents I had written actually got cited in Justice Kagan's

20. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).

21. 573 U.S. 302 (2014).

22. 145 S.Ct. 857 (2025).

opinion. But nonetheless, the point is that agencies are gonna be in much better shape when these issues get litigated if they've discussed them in the regulatory materials, because that has a lot more credibility than disputes in court. And in particular, the agencies are in a better position if they discuss them initially in the materials accompanying the proposed rule because challengers will then, if they wanna basically argue in court that the regulation has no regulatory antecedents, they're gonna have to file comments saying, 'Oh, these antecedents the agency mentioned, you know, are not valid because they're not analogous for some reason.'

And that gives the agency a chance in the final rule, in responding to comments, to say, 'No, no, actually these are analogous for this reason.' And the agency will have crafted the argument that the agency thinks is best before this case goes to court. I mean, in *West Virginia v. EPA*, this issue of antecedents was essentially joined for the first time in the Supreme Court. And that's not a good place to do it. In part because there isn't a lot of time. I mean, you know, it takes, you know, a few minutes here and there, there are few pages in the brief, and there's a lot more leeway in the regulatory materials. So agencies have begun to respond to this.

Okay, conclusion: the timing effects of resilience of regulations is undisputable. You know, if you get things done in time to preclude, to get it out of the CRA lookback window you've gotten done in time to get it out of the lookback window, you get to litigate the rule to a conclusion. Difficult things have to happen for that to happen. Now, cynics—and I can't imagine there are any cynics in this room, but maybe there are—some might wonder whether the measures undertaken to make rules more resilient to legal challenges will end up having the desired effect because of what they might think is general hostility of the course to regulation. And I'm actually not a cynic in this regard. I think these measures will make a difference. Now, people often ask me when I was the OIRA administrator, 'What are you doing to make sure that these rules will be upheld by the courts?' And I said, 'Well, really, honestly, there's nothing I can do to ensure that these rules will be upheld by the courts.' But if we do a good job, we can increase the probability they'll be upheld by the courts. And that's important.

I think during the Biden Administration, actually during most recent administrations, most recent administrations promulgated close to a thousand significant rules during a presidential term. And if you just changed the probability by 10%, which I think is not actually a lot, that means that a hundred rules are significant, that are probably a priority of the administration, get upheld that otherwise would be struck down. Well, that's actually pretty good, important work to be done. But there are some specific reasons why I'm not a particular cynic here.

First, the very poor record of the Trump Administration in its first term in defending its deregulatory measures in the courts. And this was true even late in its term, when the composition of the judiciary was actually more favorable to it because President Trump had appointed more judges. There are empirical studies showing that the Trump Administration had a worse record in defending its regulatory measures, which were mostly deregulatory, in courts than any subsequent [*sic*] presidential administration. That basically in prior administrations, both Democratic and Republican, there were pretty similar success rates for challenges in court: around 70%. And in the Trump Administration it was 23%. It was kind of pretty bad. So, if the courts were just hostile to regulation and wanted things to just go away, they, the Trump Administration, might have actually done better. And even the Supreme Court, with close to its full complement of Trump-appointed justices, dealt the Trump Administration a significant blow late in its term on the regulatory front.

And I'll end with one example which is, again, it's just one, but I think it's telling. It's the case I mentioned early: *Michigan v. EPA*. So, this was a case where the Obama Administration had determined that the regulation of the hazardous air pollutant emissions of greenhouse gases was appropriate and necessary. The Supreme Court remanded that regulation on the grounds that the analytical work done by the Obama Administration had not met its standard. So, what happened then after that was, you know, it looked like it was gonna lead to like an interminable situation. So, the Obama Administration then reissued, on remand, the appropriate necessary determination. There was litigation on that. Litigation was pending at the beginning of the Trump Administration, which asked for it to be placed in abeyance. The Trump Administration eventually repealed that determination.

Litigation on the Trump Administration's repeal was pending when President Biden took office. The Biden Administration put this thing in abeyance. The Biden Administration then reissued the appropriate necessary determination, but this time provided a lot more analytical support, particularly with respect to benefits that can be quantified or monetized. Justice Scalia had called the benefits into question because he said that the very small fraction of benefits that could be quantified—which were benefits to the very small subpopulation of people in the United States who are subsistence 'fisherpeople'—not a lot of people in the United States live that way. Those were quantified and monetized. The benefits to people who consume fish in other ways, like I do, by buying fish at the store, those were not quantified or monetized. And there were issues with the analytical studies' ability to do that. But this time the Biden Administration followed a lot of best practices in having robust qualitative discussions explaining clearly why certain things

couldn't be quantified or monetized. So, it didn't look like this was just kind of a strategy used to create some concept that would outweigh the cost.

And this time, once this determination was published, sixty days went by and actually, I kind of looked at the calendars [and] was interest[ed] to see what was gonna happen. Sixty days went by; this regulation has to be challenged in these circles in sixty days. It wasn't challenged. And it wasn't that no one cared about this, because this regulation was the basis for a companion rule, which was working its way through the system, which was gonna make the actual substantive standards that applied to these plans more stringent. And industry groups were all up in arms about that, and very quickly brought a challenge to the substantive regulation. But if they had thought they could prevail on the appropriate necessary determination, they could've just challenged that and not even have to bother with challenging the substantive standard. And to give you a sense of how salient this issue is, the substantive standard is the subject of one of President Trump's executive orders that is seeking to undo various regulations.

So again, you know, my non-cynical view has to do with the poor track record of the Trump Administration's first term in defending its deregulatory initiatives, and also the fact that this one case study that had seemed unresolvable with administrations going back and forth, and pending litigation being placed in advance and so on, actually did get resolved. And the analysis for the case that wasn't challenged was significantly different than the prior analysis had been. So, I'll end here. It was a real pleasure to be here, and if there's time for questions, I'd be delighted to take them.