DIALOGUE

LOPER BRIGHT/RELENTLESS AND THE FUTURE OF ADMINISTRATIVE LAW

SUMMARY

On January 17, the U.S. Supreme Court heard argument in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*. These cases discuss the National Marine Fisheries Service's interpretation of the Magnuson-Stevens Act, and will decide "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." The potential overruling or limiting of *Chevron* deference would have major consequences for environmental and regulatory law. On January 29, 2024, the Environmental Law Institute hosted a panel of experts who discussed these cases, takeaways from oral argument, and predictions for how the Court might rule. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

H. Jordan Diamond (moderator) is President of the Environmental Law Institute.
David Doniger is Senior Attorney and Strategist, Climate and Energy Department at the Natural Resources Defense Council.
Holly Doremus is Associate Dean of Faculty Development and Research and the James H. House and Hiram H. Hurd Professor of Environmental Regulation at Berkeley Law School.
Kevin Poloncarz is a Partner at Covington & Burling.
Steph Tai is Professor of Law at the University of Wisconsin-Madison and Associate Dean for Education and Faculty Affairs at the Nelson Institute for Environmental Studies.

Jordan Diamond: Our discussion today will center on the potential impacts of the U.S. Supreme Court's upcoming decision in *Loper Bright Enterprises v. Raimondo* and the tandem case *Relentless, Inc. v. Department of Commerce*.[1] Oral argument was heard on these cases on January 17, and the ruling should come down before the end of the Court's term in June. The cases involve fisheries law, but are garnering a great deal of attention for their potentially much broader impacts on the field of administrative law, including specifically the long-standing doctrine of *Chevron* deference.[2]

I want to take a moment to step back and provide a bit of context for those who have heard that this may be an important decision but are not entirely clear on why. I will give some background on the cases themselves and then provide broad strokes of why there is so much attention.

The original case of *Loper Bright Enterprises v. Raimondo* stems from implementation of part of the Magnuson-Stevens Fishery Conservation and Management Act,[3] which, since the mid-1970s, has provided the foundation of the federal framework for managing fisheries.

In the 1990s, an amendment to the Act declared that data collection is essential.[4] It stated that fishery management plans may require outside observers to be on board a vessel for data collection purposes to help ensure the healthy conservation of the fishery.[5] For certain fisheries, the U.S. Congress expressly stated that industry would cover the associated costs.[6] For most, it was silent on this payment issue.

Most people, unless they are involved in fisheries policy, probably have not heard much about the federal fisheries observer program before these cases, although these provisions have been on the books and have been used for more than 20 years. That all changed in 2020 when the National Marine Fisheries Service (NMFS) published a final rule requiring regulated Atlantic herring fishing vessels to pay for third-party observers to be on board.[7] The rule divided the costs between the agency and vessel operators, with provisions for waivers, exemptions, or alternatives to offset some or all of the costs.

1. No. 22-1219 (Jan. 17, 2024).
2. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
3. 16 U.S.C. §§1801 et seq.
4. Fishery Conservation Amendments of 1990, Pub. L. No. 101-627, 104 Stat. 4436; 16 U.S.C. §1801(a)(8).
5. 16 U.S.C. §1853(b)(8).
6. 16 U.S.C. §§1862(a) (North Pacific fishery), 1821(h)(4) (foreign fishing), 1853a(e)(2) (limited access privilege programs).
7. Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Industry-Funded Monitoring, 85 Fed. Reg. 7414 (Feb. 7, 2020).

A group of New Jersey-based herring fishermen filed suit challenging the rule. At the district court level, the presiding judge upheld the regulation, finding clear statutory authorization at what we call step one of the familiar *Chevron* test regarding agency deference.[8]

At the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, two judges found the statute ambiguous, but upheld the regulation as a reasonable agency interpretation under *Chevron* step two.[9] So, both courts applied the *Chevron* framework, which has been a core element of administrative law since the mid-1980s. However, one D.C. Circuit judge dissented, arguing that statutory silence should not be a reason for judges to apply *Chevron* deference and suggesting that the test itself has potentially outlived its usefulness.

This led to the fishermen appealing their case to the Supreme Court. The fisheries observer program at issue was discontinued last spring, citing lack of funds to cover its costs, but last May, the Court granted review in the *Loper Bright* case. They did so not on the narrow issue of whether the Magnuson-Stevens Act implicitly grants NMFS the authority to require domestic vessels to pay for onboard monitors, but rather on a much broader question—"whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute doesn't constitute an ambiguity requiring deference to the agency."

Because Justice Ketanji Brown Jackson had participated in an oral argument when the case was before the D.C. Circuit (though she didn't participate in that decision), she recused herself from hearing *Loper Bright*. Last October, the Court announced it would consider the case in tandem with another challenge to the NMFS rule, *Relentless, Inc. v. Department of Commerce*.[10] Since that case is on appeal from the U.S. Court of Appeals for the First Circuit, Justice Jackson is not recused from it. So, the full bench of nine justices heard oral argument on January 17 for more than three hours, and will be involved in the decision issued by the end of June.

Again, the matter on which the Supreme Court has granted review is not fees for elements of fisheries management programs, but rather the future of the *Chevron* doctrine and its role in rulemaking writ large. Although the question on which certiorari was granted included the lesser question of *Chevron*'s role when the statute is silent, the parties to the case have focused their arguments more on the broader question of whether *Chevron* should be entirely overruled.

So, with that as context, we will now turn to our panel of experts for discussion. It is my great pleasure to introduce our first panelist, David Doniger. David is a senior federal strategist in climate and energy at the Natural Resources Defense Council (NRDC), where he has been at the forefront of their work on air pollution and global climate change since 1978—whether it be helping formulate the Montreal Protocol, mandating the Clean Air Act (CAA),[11] or even taking a break from NRDC to serve at the Council on Environmental Quality and the U.S. Environmental Protection Agency (EPA).

I would be remiss if I did not highlight that David was the NRDC lawyer that argued *Chevron v. Natural Resources Defense Council, Inc.* in 1984, which is why we are particularly delighted to have him here today to walk us through that salient case, the development of the so-called *Chevron* deference test, and the effects on the administrative state for the past 40 years.

David Doniger: I would be remiss if I didn't mention that my first job in Washington was with the Environmental Law Institute (ELI), in 1978, before I went to NRDC. Shortly after I went to NRDC, the Ronald Reagan Administration came in and began to reverse prior EPA regulations to implement the CAA. Changing the definition of "stationary source" was one of the earliest rollbacks.[12] This definitional change radically undercut a provision Congress had adopted in 1977 that required the most advanced emission controls to be put on new industrial projects that were built in the dirtiest areas of the country.

The 1977 amendments created an elaborate superstructure of requirements that a new major stationary source built in such an area had to meet. The clever folks on the other side thought that the simplest way to effectively repeal all these requirements would be to change the definition of "stationary source"—the term to which all these requirements apply. I won't go into too many details on the statutory terms or on the "bubble concept," but the alternative definition was one that effectively exempted 90% of the industrial projects that would otherwise have been subject to these pollution control requirements. They could then go forward with minimal pollution controls.

So, NRDC sued. The suit was named *Natural Resources Defense Council, Inc. v. Gorsuch*.[13] Anne Gorsuch, the mother of the current Justice, was the EPA Administrator at the time. We won in the D.C. Circuit, but we won on a screwy basis. This was the third of three cases involving the definition of "stationary source" in three different programs of the CAA. Our position was what one would now call "textualist"—that the statutory definition of "stationary source" as "any building, structure, facility, or installation" unambiguously covered major polluting units and couldn't be defined solely as an entire industrial plant. This is what the Reagan Administration had done to exempt the vast bulk of industrial projects from the statutory pollution control requirements.

In the first case, concerning new source performance standards (NSPS), a panel of the D.C. Circuit had ruled

8. Loper Bright Enters., Inc. v. Ross, 544 F.Supp.3d 82 (D.D.C. 2021).
9. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022).
10. 62 F.4th 621 (1st Cir. 2023), *cert. granted* 601 U.S. ___ (Oct. 13, 2023).
11. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
12. U.S. EPA, Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50766 (Oct. 14, 1981).
13. 685 F.2d 718, 12 ELR 20942 (D.C. Cir. 1982).

the whole-plant definition contrary to law. In the second case, concerning the prevention of significant deterioration (PSD) program, another panel had ruled the whole-plant definition acceptable because unlike the NSPS, which were intended to reduce pollution, the PSD program was intended only to keep pollution from worsening.

In our case, the third panel ruled in our favor that the whole-plant definition could not be used in the "nonattainment" program that applied in the country's most polluted areas. But instead of ruling on the basis of the text itself, then-Judge Ruth Bader Ginsburg applied what she called the "law of the circuit" derived from the first two cases: that the whole-plant definition was allowed in programs to limit pollution increases, but forbidden in programs intended to reduce pollution, such as the nonattainment program to clean up the dirtiest areas of the country.

Well, the Reagan Administration appealed. I was only in my early thirties, and I said to my colleagues, who is going to do this appeal? They told me that I had done well so far, so I should do it. I just gulped. I went on ahead, and I briefed and argued it. Although we weren't framing it in the now-familiar "step one" and "step two" terms, we argued that the statute was absolutely clear and there was no wiggle room for the kind of deregulatory policymaking that the Reagan Administration had indulged in.

The papers of Justice Harry Blackmun, which came out much later after he died, showed that the justices were actually closely divided in their conference on the case. There were only seven who participated in the argument. Justice Thurgood Marshall was sick. Justice William Rehnquist got up and walked out just before the argument began. (I later wondered whether it was because he had back troubles.) And Justice Sandra Day O'Connor recused herself after the argument, having inherited stock in some of the many companies that were lined up to support the Reagan Administration and the rollback.

The ultimate decision for the six justices, by Justice John Paul Stevens, was that they were not convinced that we had shown the statute to be unambiguous. Stevens found the statute to be ambiguous, to leave some room for EPA to choose the best policy. He went on to rebuke the D.C. Circuit, saying that since Congress often can't fill in all the details, it needs to pass statutes that enlist the assistance of the regulatory agencies on questions of implementation. These agencies are politically accountable—they report to the president and to Congress—and they, not unelected judges, should be making the policy decisions. The judges on the D.C. Circuit were told they had no business making up their "pollution increase/pollution decrease" policy-based rule to control the outcome.

Stevens made clear that judges first had to use all the tools of statutory construction to determine if a statute *is* unambiguous, and they must enforce that meaning where it is. But if judges determine Congress has left some space, some ambiguity—whether expressly or by silence—then it is the judges' job, whether on the lower courts or the Supreme Court, to defer to the reasonable policy choices of the agency.

Deference is not carte blanche. There are examples of ambiguity where the agency's interpretation was just wacko, and courts have properly held it impermissible or unreasonable. But within reasonable bounds, the central proposition of *Chevron* was that where Congress has left space for policy decisions, they should be made by the politically accountable branches and not by unelected judges with no constituency.

This view was immediately embraced by a lot of conservative judges, like Robert Bork, Ken Starr, Laurence Silberman, and especially Antonin Scalia, as well as by liberals. They saw it, I think rightly, as a neutral proposition. The *Chevron* framework took over, at the appellate court level in particular, as a convenient rubric for addressing whether the challenges to administrative agencies' decisions should be overruled because they were flatly and unambiguously illegal, or should be upheld because there were several reasonable statutory interpretations and the agency had chosen one. It was not up to the court to decide whether it preferred the one that the agency chose, only that it was one of the reasonable alternatives.

That became the rule for the past 40 years. It is actually a restatement of the preexisting rule. Justice Stevens always maintained he was not making any new law. He was restating the approach that the Supreme Court and other courts had used to review agency interpretations under the statutes Congress had assigned to them for 100 years or more before that. There's really 140, 150 years of precedent at stake.

Business interests began to get unhappy with this framework, however, when they saw that it did not work uniformly in a *deregulatory* direction. When President Bill Clinton came along, and later Barack Obama and now Joe Biden, their Administrations started using the flex that Congress placed in many of its laws to do *more* rather than *less*. For the last 10 years or so, there has been a concerted effort to gussy up legal and even constitutional arguments to support what is basically a business-driven objection to liberal administrations' use of the flexibility in the *Chevron* framework. Maybe others will talk about the argument that *Chevron* is inconsistent with the Administrative Procedure Act (APA) or unconstitutional—I don't think it is.

Scalia, a staunchly conservative justice, was a big defender of *Chevron*. He saw it as neutral. Sometimes, he voted against what might be called the "do more" decisions, and sometimes he voted to uphold them. He was an early proponent of what has now become the "major questions doctrine," an exception to *Chevron* for a limited set of agency decisions that are simultaneously very novel and very impactful. But he never abandoned the *Chevron* framework for the main run of cases. There is some apocryphal storytelling among Federalist Society types that he was changing his mind near the end of his life. But I'm not aware of his own words that indicate that.

I often joke that my career will be bookended by the birth and death of the *Chevron* doctrine, and I'll be on the losing side both times. We will have to see. I am still hopeful that the Court's reconsideration of *Chevron* in the current cases will be limited.

Jordan Diamond: Thank you, David, for that enriching and necessary context in contemplating the effects of the upcoming decisions. It is a pleasure to turn now to Steph Tai. Steph is a professor of law at the University of Wisconsin-Madison and associate dean for education and faculty affairs at the Nelson Institute for Environmental Studies. After being raised by two chemists, their research now focuses on the interactions between environmental and health sciences and administrative law. They have taught in numerous and highly respected academic institutions, published widely in leading journals, and actively represent amici in federal Court of Appeals and Supreme Court cases.

Steph Tai: One of the things that struck me as I was listening to the oral arguments in *Loper Bright* and *Relentless* was the idea that Congress had intended a sort of best interpretation of the statute, especially in areas where they were not necessarily knowledgeable.

One of the things that I have written amicus briefs on is explaining the current state of the science in various environmental areas. One issue, for example, is that Congress doesn't have an extensive scientific staff. You could imagine how that plays out in other cases—not necessarily this one where the issue is whether or not observers would have to be paid for by ships, but in other areas of environmental law. Say, does something count as a pollutant that endangers public health?

It's not like Congress had in mind *x*, *y*, or *z* pollutants as it was drafting the statute. First, because it doesn't necessarily and cannot necessarily have that sort of scientific background to develop everything in the future. Second, because regulations have to evolve. There are a lot of things that we are now understanding. For example, per- and polyfluoroalkyl substances, which are in our nation's waters. They were not necessarily contemplated by Congress at the time that it was passing its various pollution control statutes.

Expecting that courts can somehow discern what Congress meant within the language of an act that encompasses both areas outside of its scientific expertise and also scientific developments that were not available at the time that Congress passed the statutes seems crazy to me. And the idea that courts can evaluate these scientific determinations itself is some what problematic.

One of the ways in which courts actually receive science is through amicus briefs. But as many of us know, in terms of amicus brief offerings, the briefs are usually in favor of one side or the other. There's a potential for cherry-picked science, with a contextuality that doesn't represent the overall views of the scientific community.

In contrast, agencies do have some mechanisms to search the entire scientific literature. They might fail to do so, in which case there can be challenges based upon the arbitrariness or capriciousness of the agency's decision. But the idea that every single term in the statute fully encompasses all of scientific knowledge and developing scientific knowledge is remarkable.

I'll point to some of the references to *Skidmore*[14] that were made within the oral argument. Many of the justices pushed back against characterizing *Skidmore* as deference. But whatever we call it, the *Skidmore* doctrine is that an agency's decision deserves some weight based upon its persuasive power and also based upon its consistency.

Some of the justices as well as the advocates argued that consistency is something that should be prized. That's not necessarily the case. Again, scientific development often finds that certain types of materials that were considered harmless at the time, for example the ozone-depleting compounds that were used as refrigerants, can be found not to be harmless. So, consistency isn't actually reflective of the state of scientific development.

There's a tension with this core application of *Skidmore*. Again, we'll leave it to the Court to decide how to characterize that, and actually scientific developments writ large. That's the science end of things.

I also want to mention, since I'm at the University of Wisconsin, that I am in a state that has gotten rid of deference. This was brought up in the oral arguments, saying that many states have experimented with getting rid of *Chevron* deference or *Chevron*-like deference and they've been fine. I would not characterize it as being fine. The experience with Wisconsin has suggested that agencies, both for reasons of overturning deference but also for other reasons, have been more reluctant to pass regulations.

The background is this: In 2018, the Supreme Court of Wisconsin got rid of deference in a case called *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*.[15] Before that, Wisconsin courts had historically, I think for more than 50 years, held that an agency's interpretation of law got what's called "great weight deference" if the following conditions were met. One, the agency was charged by the legislature with the duty of administrating the law being interpreted. Two, the interpretation is one that was long-standing. Three, the agency employed its expertise or specialized knowledge. And four, the agency's interpretation will provide uniformity and consistency. Kind of a mixture of *Chevron* and *Skidmore*, whether you call it deference or not.

If those conditions were met, great weight deference was required. The courts deferred to an agency's interpretation as long as it was reasonable, which is a fairly low burden for the agency. Then, in *Tetra Tech*, the Wisconsin Supreme Court overruled their entire history of giving great weight deference. What is in place now is what's called "due weight deference," which looks a lot more like *Skidmore*, which is just a matter of persuasiveness rather than deference. That too was enshrined in the law in 2018.

This experience with states getting rid of any kind of deference was brought up in the *Loper Bright* and *Relentless* arguments, and they were saying it's just fine. The undertone of this is that, yes, it's just fine because maybe we don't like regulation. That has been the case with this—to the

14. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
15. 914 N.W.2d 21 (2018).

extent that what you characterize as "just fine" in a post-*Chevron* world is itself a policy decision.

Jordan Diamond: Thank you, Steph. I'm happy to turn next to Holly Doremus. Holly is associate dean for faculty development and research, professor of environmental regulation, and director of the Law of the Sea Institute at the University of California (UC), Berkeley School of Law, where she teaches courses ranging from ocean and coastal law to environmental law policy, from water law to biodiversity law. With her background, including a Ph.D. in the life sciences, she brings a deep commitment to interdisciplinary teaching and scholarship to her work and research. I will also happily note that I had the pleasure of working with Holly for many years at UC Berkeley.

Holly Doremus: I want to make one overarching point, which is that there's a reason why *Chevron* has been the source of a lot of commentary and conflict since 1984. Before that, there was already a lot of commentary and conflict about how courts and agencies should relate to one another. This case isn't going to change that.

There is going to continue to be commentary, and conflict, and a lot of litigation about what agencies are permitted to do and how courts should oversee what agencies are doing. Actually, it has long been a joke in academia that anybody who does any work relating to administrative law has to write at least one article that is centered on *Chevron* and its interpretation and what it means. So, maybe once we get a decision in *Loper Bright*, we'll have a new version whereby everyone will have to write their *Loper Bright* article.

The reason that there's been so much room for discussion and so much ongoing conflict is that there are two key tensions that are essentially impossible to resolve. The first is what the appropriate institutional relationships are between Congress, the courts, and administrative agencies. The petitioners here, the lawyers representing the fishermen, have made a really concerted effort—and they've been helped along by some of the justices—to pose the question here as, if there's difficulty interpreting the statute, should that mean that the government wins versus the individuals? And why should we assume that the government gets deference rather than individual liberty getting deference?

But it's important to remember that's not the question in this case, or in any case about who gets to interpret statutes. The question is: Does the agency get the first crack at interpretation? How much should courts care about what an agency thinks the statute means, as opposed to how they would read it? The conflict is fundamentally intergovernmental—between courts, agencies, and, in the background, Congress. It is not fundamentally about government control versus individual liberty. Or at least not unless you believe the courts are the only effective bulwark against unlimited government aggrandizement by the political branches.

The second key tension that is hard to resolve is at what pace the law should change. How much should we prefer stability to change, and who should be in control of how rapidly the law changes?

Policy whiplash is a real problem these days. When I say "policy whiplash," I mean the tendency of each new presidential administration to spend a lot of time and resources changing the rules that the previous presidential administration had put a lot of time and effort into creating. That's spinning our wheels. It can make it very difficult for regulated parties or others to understand what the law is and to govern their actions accordingly.

But that doesn't mean that the law should never change. There are at least three reasons why we should want the law to be able to change over time. First, the facts on the ground change. Those of us who are interested in environmental law certainly know and have watched climate change become increasingly important and have more and more obvious impact on the world. Second, knowledge changes. As Steph pointed out, we learn things from science over time, and we want the law to be able to respond to that. Third, our social values change over time, and law should respond to that sort of change.

The real question of this case, which is also raised by all of the other ways that judges, some academics, and the regulated community are pushing back on administrative agency action, is what institutions should govern and limit change. Petitioners here, and other agency skeptics, answer that Congress is generally better positioned than administrative agencies to determine the desirable pace and valence of change. I agree. That's what those of us my age learned, in civics class or from *Schoolhouse Rock*. Congress is our key democratic institution. But if we look at Congress these days, it's entirely incapable of responding to the current rate of change.

Jordan Diamond: Thank you, Holly. Finally, it is a pleasure to introduce Kevin Poloncarz, a partner at Covington & Burling, where he co-chairs the firm's Environmental and Practice Group, the Energy Industry Group, and the ESG Practice. In addition to his leading practice and array of accolades, including his prior service on ELI's board of directors for which we are most grateful, Kevin also represented a coalition of industry of major power companies in the *West Virginia v. Environmental Protection Agency*[16] decision that was issued in 2022 and is relevant to parts of today's discussion.

Kevin Poloncarz: I'll start by reflecting upon an exchange I had with Prof. Lisa Heinzerling when we convened to discuss *West Virginia*. I was trying to illuminate the daylight between the majority's opinion and Justice Neil Gorsuch's concurrence.

To summarize, in *West Virginia*, the Court found and named for the first time in a majority opinion the "major questions doctrine." The Court said that, even where an agency has proffered a plausible interpretation of a statute, they won't defer to the agency's interpretation if it is a ques-

16. No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).

tion of vast political significance or economic significance. If it involves this grab bag of factors, if it's something that's controversial, or if it's a long-existing statute that's being interpreted in new ways, the Court opened the door to say that this is an exception from *Chevron* and an instance in which they wouldn't defer to an agency's action.

Importantly, in the majority's decision, they announced that this is rooted in the separation-of-powers doctrine. That took these questions of what we thought we were doing—statutory interpretation, using canons of construction, and figuring out what the law is—and implicated these constitutional dimensions, saying instead this is really about the separation of powers.

But what Gorsuch's concurrence said is that he agreed they shouldn't be deferring to agencies on tough questions like this, but he went on to inflect his opinion with a sense of the long-dormant (we thought) nondelegation doctrine—that Congress can't possibly delegate certain decisions to agencies without an "intelligible principle." That doctrine had been long believed by most to not really exist for much of the century, but it's having a resurgence these days. It was represented most acutely, to me, during the argument in *Loper Bright* and *Relentless*.

When I tried to say that Gorsuch didn't get some restatement of the nondelegation doctrine as part of the majority opinion in *West Virginia*—he just got that statement that this was rooted in the separation of powers—Professor Heinzerling cut me off and made very clear that, no, the major questions doctrine is about nondelegation. I won't go that far, but I will say that what became abundantly clear during the oral argument in these cases was that there is a belief among a number of justices on the Court that this isn't about just pure statutory construction. This isn't the world we were living in when Scalia said, you look at the text, you start with the text, and you end with the text.

This is really about what is constitutional under Article III and what is the appropriate role of judges. In the mind of many of the justices on the Court, it is an abdication of judicial responsibility to defer to an agency's interpretation, that Article III says judges decide the law. The APA says that judges decide questions of law, constitutional statutory interpretation, and that means de novo review.

On the other side is Justice Elena Kagan, saying that is not a doctrine of judicial humility. That it's the opposite of judicial restraint for judges to presuppose upon themselves the prerogative of deciding what the statute means and not defer to the views of the agency charged with its implementation.

Where it leaves me, and what was most interesting in the argument, is that this implicit delegation from Congress when it leaves these interstices in the law to be filled by the executive branches, which have to figure out how to implement the law on the ground and make it most enforceable, is at risk in this case of being pronounced unconstitutional in some respects.

I think what Gorsuch said in the argument is that this implied-delegation theory is a fiction and that there is nothing more offensive to the idea that Congress must deliver an intelligible principle to agencies than the idea of ambiguity. He says that ambiguity is the tool of Congress when they can't agree on things, when they can't do the hard work of legislating that's required to come up with a compromise. He says what a lawmaker will do instead is say, I don't need to work to reach a compromise because I have a friend in the executive who will discharge this law if I write it ambiguously to suit my ends.

I don't really believe that. To what Steph is saying, Congress can't write laws that presuppose all the facts that are going to change. The one example putting it beyond the world of environmental law, which Justice Kagan used and I thought was very illuminating during oral argument, is artificial intelligence. She said that that's likely to be the next big area where Congress has to legislate, and how could they anticipate all the contours, problems, and permutations of things that are going to come up when they try to draft legislation that delivers to some existing agency, or some new agency, principles on how to regulate this new space that's quickly evolving?

It's no coincidence that many of these cases arise in environmental law, because we have these old statutes that serve purposes that have changed over time. But it really worries me if Congress is going to be in the business of legislating only if they can be abundantly clear, and not legislating in a way that anticipates that changes will occur.

Jordan Diamond: Let's take a step back now. This case centers on the question of deference, which is at least 40 years old if you're looking at the *Chevron* doctrine. I'd like to ask this group to comment on the role of precedent in U.S. law and how this case reflects or affects your perception of that.

Holly Doremus: I'm definitely not the best person to speak to this, but I will say one thing. In this circumstance where we're talking about what the courts do, what Congress does, who gets to authorize what from agencies and how clear they have to be, I actually think the role of precedent is at its most important.

For 40 years, Congress legislated in the shadow of *Chevron*. Congress of course is free to overrule cases, like *Chevron*, which are just about what the statutes mean and how they should be interpreted. But for the courts to go back now and to say to Congress, well, you've written a variety of statutes believing that you could delegate to the agencies and that you had done so by using broad terms and so forth, and then to say, now we're going to say that statute never had that impact, seems to me quite problematic. If they're going to go where Kevin suggested, Justice Gorsuch at least would probably like to say, Congress, you don't have the constitutional power to do that—that's one thing.

But what if they're going to say, you do have the constitutional power to delegate, but you have to be super clear about it. In *Chevron*, we told you that you didn't have to be that clear, but actually we now realize that you do. And you had to be that clear in the 1970s and earlier. That potentially unsettles an enormous swath of administrative law. And Congress, given its current dysfunction, will likely be unable to respond.

Steph Tai: I want to point out that the eagerness with which the Supreme Court wants to at least revisit precedent, if not overturn precedent, is really indicated by the grant of cert in this case itself. There are no actual observer fees at issue anymore. To me, that suggests how eager they are to revisit precedent, whether for good or bad.

David Doniger: I'm going to reflect a bit more on some of the good things the panelists have said about the legislative process. We have a Congress. And I think it would be wrong and a bad tactic to say that judicial deference to administrative authority is needed because Congress can't even name post offices anymore. No, deference to administrative policymaking is called for because Congress created those agencies and assigned them that role.

I think back to "the great Congresses." I'm not an American historian, but I'm familiar with some periods in our history when Congress was really on the ball and active. They were doing things of great moment. The Progressive Era is one. The New Deal Era is another. And again in the 1960s and 1970s. Among other things, there was bipartisan agreement then that the post-World War II earth had gotten horrendously polluted, and we needed strong federal laws to clean up that pollution.

There was also agreement that in the national economy, the size of companies and other economic actors outweighed the capacity of states to handle these problems. They believed in the federal government's capacity to solve these problems. They also knew, as Steph has said, that some of these problems were insanely complicated.

They also knew that they could not deal with these problems in detail and day-by-day. Congress has so much to do that it can only deal with any given statute, roughly speaking, once a decade. In the good old days, they would review and update laws like the CAA once every 10 years or so. They would review administrative decisions and change some of them, sometimes even flatly reverse them. They would recognize new problems and arm agencies with new provisions and powers.

In 1970, Congress had five major air pollutants in front of it that were well-studied, but legislators knew there were going to be a lot more pollutants of concern. And they were deeply familiar with a couple of major industries that they had extensive hearings on—the auto industry in particular. But they knew there were hundreds of industries emitting dozens and dozens of pollutants.

So, Congress determined it needed to enlist the capacity of EPA to help with the problems of bandwidth, expertise, and foresight that limited its own ability to write the perfect statute. We need help from executive branch agencies, they said. This has been true since 1789.

The world just keeps getting more complicated and throwing more complicated problems at us. So, what will happen if Congress cannot delegate to agencies in this way to help fill things out? Justice Gorsuch, for example, says, it's okay for Congress to tell agencies to fill up the details. But his definition of "filling up the details" may be so cramped that it leaves no policy space available to the agencies.

In other words, take a term like the "best system of emission reduction." That's going to be different for the 60 or 80 industries to which EPA has applied it. We couldn't possibly have a functioning government that meets today's challenges if Congress had had to legislate at the hyperspecific level that Gorsuch's writings suggest.

One other thing I thought was ironic. In the Occupational Safety and Health Administration COVID case, *National Federation of Independent Business v. Department of Labor*,[17] and in *West Virginia*,[18] Justice Gorsuch opines in concurrences that all this regulation constrained the liberty of the people who would be regulated, but he didn't say a word about the liberty of the people who were the intended beneficiaries of the regulation. In the case of COVID, it's so striking. The liberty of the regulated businesses taking total primacy over the liberty—sickness and death—of millions of Americans.

The whole purpose of the CAA or any pollution statute, and also any economic regulatory statute, like investor protection laws, is to protect a class of beneficiaries from wrongdoing by a class of wrongdoers. It's not always so clear what the right answer is, what the right amount of risk is or the right amount of data that it would take to justify pulling a product off the market in order to protect somebody's health versus the economic burden.

Those kinds of questions need to be dealt with at the top level by Congress, but Congress needs to be able to enlist the agencies to resolve questions at the sort of medium level. Agencies can't be limited to just pure fact-finding. There has to be some capacity in the executive branch to balance the factors Congress told the agencies to balance in order to make decisions that Congress, with limited bandwidth, expertise, and foresight, cannot make on its own. If that's unconstitutional, then we can't possibly have a modern government.

Jordan Diamond: We're getting questions from the audience, so I'm going to start fielding a few. Stemming from where essentially the decisionmaking authority would be centralized, one of the questions focuses on a very important element: that we are a nation of cooperative federalism. We would appreciate any thoughts and comments on how you anticipate a change in deference impacting cooperative federalism and the relationship between, say, federal EPA and state environmental programs?

Steph Tai: I think in a way it's going to create a lag in cooperative federalism, every time a regulation is promulgated that statutorily involves some kind of cooperative federalism. For example, issuing Clean Water Act (CWA)[19] point source permits. If there's a change in regulations at the federal level in terms of issuing discharge permits and then the states are going to have to implement that, they're

17. 595 U.S. 109 (2022).
18. No. 20-1530, 52 ELR 20077 (U.S. June 30, 2022).
19. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

going to be at sort of a standstill until the federal question gets resolved.

That's going to create a huge lag in cooperative federalism implementation. Then, given the amount of state-federal litigation, it's going to happen strategically. There might be certain states that do want to actually implement the regulation, but they're going to be hamstrung by certain states that don't want to implement the regulation. Then, there's going to be a whole dustup about that. I think it's going to complicate things.

David Doniger: You see this a lot in the *Sackett* case.[20] The justification for Justice Samuel Alito's cramped reading of the scope of the wetlands authority is that somehow the CWA is an intrusion on the prerogatives of states.

I thought we had established back in the New Deal, and certainly in the 1960s and 1970s era, that the federal government has the authority to regulate polluters directly. In fact, it does under the CAA. The federal government directly regulates the emissions of the auto industry, and it directly regulates the acid rain-causing emissions and hazardous air pollutants.

Congress engages the states in some programs, in a partnership called "cooperative federalism." In that partnership, the federal government has the lead role. In 1970, Congress took away state primacy in setting and meeting the air quality standards; it said, we'll set the standards, and you will have first dibs writing the plan to meet the standards. You don't have to do it, and we can't make you do it. You can choose to do it. But if you don't do it, we'll write a federal plan.

This kind of cooperative federalism is implicit in many kinds of statutes, including, for example, the Affordable Care Act.[21] What you see now is this red-state pushback against that. In fact, in the *West Virginia* case, North Dakota filed a brief trying to redefine "cooperative federalism" as the opposite—that the federal government has to cooperate in whatever the states want or don't want to do. Chief Justice John Robert's opinion reinforced that the federal government has the primary role. The feds can set the terms for an acceptable state plan and then enforce a federal one if the state defaults.

If that kind of cooperative federalism is now at risk, then we're sort of headed back from the United States "is" to the United States "are." I thought we crossed that Rubicon in 1860.

Jordan Diamond: I'm going to switch over to a couple questions asking you all to hypothesize. One person noted this in their question explicitly, and I will say it writ large: no one will hold it against you if you get any of these things wrong.

In general, if *Chevron* is deemed unconstitutional, do you foresee that Congress will need to increase their hiring and consulting for scientific or technical expertise? Do you think that one path forward would be more congressional deference to scientists or those holding technical or specialized expertise during the law making process itself?

Steph Tai: This relates to the Congressional Research Service (CRS), which consults and informs Congress on the science. They're great, but they are understaffed. To the extent that an increase in staff would help, I would welcome that.

However, here's the problem. There's nothing that mandates any congressional member or committee to actually consult with CRS. CRS was actually modeled on a similar thing from Wisconsin, the Wisconsin Legislative Reference Bureau. If they were more staffed, that still would not require congressional members to actually consult with them.

It's similar with the Federal Judicial Center, which also does a lot of scientific, legislative, and legal research for members of the judiciary. But the members of the judiciary do not often consult with them, nor do they even attend the orientations. So, there's a sort of voluntariness element to it that is absent from actual agency decisionmaking, where they are bound by the administrative record and there's mandatory consultation with all the experts involved in a particular thing.

There's also a strategic element to this. For congressional members who are opposed to regulation in general, they might also strategically oppose additional funding for these types of consultants so that no consensus can be reached that provides all the particular details. I think this strategic element would play out if *Chevron* is gotten rid of and it's all just about Congress having to anticipate everything that's going on in designing new laws.

Kevin Poloncarz: The question presupposes that we have a functional Congress. That narrative, and that's part of Gorsuch's narrative, is that if you take away this authority for agencies to fill in the gaps, you will actually hold Congress' feet to the fire and require them, as those who are accountable to the electorate, to make hard decisions and to legislate. I don't quite buy it in this day and age when we can barely keep our government funded.

Maybe we could roll things back to the era that David talks about when bipartisan legislation occurred. But that's part of the argument, that *Chevron* has been undergirding how laws have been written for 40 years. Truly that's why it deserves respect, stare decisis, because this is the way the legislature has functioned. The idea that you could just pull it away and say get at it, Congress, start writing those details, is one that I just don't quite buy.

Holly Doremus: I completely agree with what David said earlier, which, as I understood it, is that even at its most functional Congress could not possibly provide all the details and all the updating that's needed in many areas of modern law. We're nowhere near that idealized Congress given the degree of polarization, the degree of performa-

20. Sackett v. Environmental Prot. Agency, 143 S. Ct. 1322, 53 ELR 20083 (2023).
21. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

tive politics these days, and also just really practical things. Congress spends less and less time in session these days.

Jordan Diamond: I'm going to switch to a related question for David. And Kevin, this is going to pull in your reference earlier to the presumed-dormant nondelegation doctrine. Regardless of the outcome in these cases, would it behoove Congress to explicitly state in legislation that they recognize that things are going to change or evolve, that maybe not all knowledge is already obtained, that agencies will be required to respond, and the like? That is, can you get around delegation by being explicit about it?

David Doniger: I do think that it would be easier for the Court to come down against delegation by silence than it would be to say that Congress cannot delegate expressly. I can see an argument. It was made in the lower court litigation in these two fisheries cases that, if you use the traditional tools of statutory construction, you could conclude Congress expressly provided for the boat owners to pay for the monitors in some circumstances and was silent on the rest. That could be construed as withholding that power, not as just leaving it to the agency.

There is also an interesting analogy in the First Circuit opinion about publicly traded corporations regulated under the securities laws. Who would argue with a straight face that they don't have to pay for the certified public accountants that are required for their annual audit? Of course they do. That maybe didn't even need to be stated, because it was such an obvious background proposition that you have to pay for your own accountants, just like a polluter has to pay for the hardware that is required in a smokestack to measure the emissions coming through.

I could see something coming out of these cases that is really more about reducing the deference due to congressional silence. And Justice Brett Kavanaugh seemed to say that if Congress says to the Federal Communications Commission set a "reasonable" rate or "appropriate" rate, that's a valid delegation.

In the *Chevron* case, Congress wasn't silent. It didn't just use the term "stationary source." It *defined* "stationary source" as four other terms—"any building, structure, facility or installation." But it didn't define *those* terms, and it didn't expressly say to the agency that it had the authority to further define those terms. There are many places in the CAA where there's an explicit delegation—for example, to recognize new pollutants that "in the judgment of the Administrator" are determined to contribute to pollution that endangers public health or welfare.

So, I'm not convinced that there's a majority in the Court to go so far as to say Congress has to do all that work. You could even end up with a fairly modest ruling that, as Justice Kavanaugh has said in some of his writings, judges should not be so quick to jump from step one to step two and then to defer. They should struggle more with the traditional tools of statutory construction to try to figure out whether the statute has a clear meaning. That would affect things on the margins. But to deny Congress the ability to enlist agencies in second-tier policymaking and to demand that Congress do everything itself would be really serious.

One last point. You could treat agencies as the advisers. In other words, the agency writes a regulation, and it doesn't go into effect unless it's adopted by Congress. That's in the REINS Act,[22] for example, which has passed in the U.S. House of Representatives in the past, but never the U.S. Senate.

The problem with that is everything then becomes hyperpolitical. When administrative agencies make these decisions, there is some insulation from the politics of financing campaigns and so on. Yes, politics is present in the administrative process. For example, the president can make clear to agency heads he wants to go a certain way to enhance his reelection position. But if all these decisions came down to congressional logrolling and lobbying and who's got the campaign money, we'll just be further entrenching the powerful over the powerless.

Kevin Poloncarz: As I try to explain to the students I'm teaching this quarter, I don't think they're going to go that far. When you look at the justices who now occupy the center of the Court—Roberts, Kavanaugh, and Amy Coney Barrett—I think they're likely to do something like adopt the framework in *Kisor v. Wilkie*,[23] which dealt with *Auer* deference.[24] That is when the agency is interpreting its own rules, and *Kisor* essentially says don't be too quick to find ambiguity, and instead puts more checks on that.

That's the outcome the solicitor general appeared to be aiming her argument for, but what the petitioners were saying, particularly in the *Relentless* case, was that all these bells and whistles that the Court has developed around *Chevron*, like major questions, are not good enough. They don't solve the problem. *Chevron* is the problem in and of itself. I think what the center of the Court was looking for was more what to replace it with. Is that more like *Skidmore* deference? Is it more like the checks on agencies' interpretations announced in *Kisor*?

If *Chevron* is overruled on the specific question presented about statutory silence, and isn't interpreted more broadly, that would be a problem, but to be honest, agencies have already been regulating upon the presumption that *Chevron* is not good law. The Court acknowledged in their arguments that nobody's been arguing *Chevron* recently in the Court, and they certainly haven't been applying it because they know that there are these bells and whistles, these major questions exceptions. Agencies are being circumspect about their rulemaking, acknowledging that they're not going to get, as the conservatives would say, a thumb on the scale at step two.

I ultimately think that we probably end up with a decision that, while it might hyperbolically seem like a really big deal, may not actually move the needle to the extent

22. H.R. 277, 118th Cong. (2023).
23. No. 18-15, 588 U.S. ___, 49 ELR 20113 (2019).
24. Auer v. Robbins, 519 U.S. 452 (1997).

that I fear if the nondelegation doctrine is somehow inflected throughout it.

Steph Tai: Listening to the arguments, my biggest fear is that there are so many different theories coming from the various justices about what their approach to deference and approach to separation of powers is. I fear a completely splintered opinion where we don't actually know which is the narrowest concurrence. Sort of like *Rapanos*,[25] but maybe worse. I hope it doesn't happen.

Jordan Diamond: I would like to bundle together a couple of questions that get at the complexity of agency rulemaking today, both the number of steps and also how long it takes. This is not a quick process.

The first question, when you're looking at all those steps and the amount of time involved, if you're looking at judicial review of the process, is to actually decide whether that's permissible. If judicial review comes at the very end, we're talking about a huge time lag if the result is that you're then starting the process again under a different interpretation or different agency understanding of what their authority is. Is there an option for getting that judicial review earlier in the process before getting to the end of a rulemaking? Before then, when you're considering whether you have that authority?

The second question: there are many steps. We've talked a lot about agency expertise throughout the process. There are also other things that are included in the rulemaking process, including a lot of participation and a lot of stakeholder engagement and the voices of those affected. Is there an alternative for how that is incorporated into the process if it's not through the agency rulemaking?

David Doniger: I'll answer the second part first. I think it's been a strong principle that an agency can't claim deference if it hasn't gone through a rulemaking process, aired the options that it's considering, taken comments, and weighed those comments. The need to take input is one of the essentials of deference, I think. Agency pronouncements that come out of the blue shouldn't get the same *Chevron* deference as those that have been developed through rulemaking.

Another point would be that in the old days, and that means before my time, before the *Abbott Laboratories* case,[26] there was no preenforcement review. You wouldn't find out whether a rule was legal until it was enforced against somebody. Then, all the issues that arise now at the end of a long rulemaking wouldn't actually come up until five or 10 years later when somebody tries to enforce.

We've been moving in the direction of having earlier answers than we used to get and broader checks on administrative fiat, because there has to be public involvement in response to comments and so on. I think that's a generally healthy way to run the governmental railroads. But the Court recently heard argument in a case, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[27] that could take us far backwards on that principle.

Holly Doremus: I would add that agencies almost always have to go through a lot of procedure when they are making rules or resolving issues. The reality of agency decision-making is quite different than the vision that's put forward by the hard right in their challenges to giving agencies any authority. Petitioners insisted at oral argument that when Congress can't find or won't make a viable compromise, advocates who weren't able to get the legislative outcome they wanted simply go to their friends in the administration and get what they want from them.

That is not the way rulemaking works. Agencies are required to listen to all points of view, and to explain their choices. They don't just silently adopt the suggestions of those in their political camp. In fact, to the extent it does work that way, that's the vision of the right side of the political spectrum, of those that insist on a "unitary," all-powerful, president.

As a factual matter, agencies are quite politically responsive in many, if not most, situations. They have to hear all these different views through the notice-and-comment process. David's absolutely right. They don't get *Chevron* deference in general if they haven't gone through notice-and-comment rulemaking. In fact, in the modern rulemaking context, I would submit that agencies may well be more politically responsive than what we see in Congress these days.

Jordan Diamond: There are a few questions that are looking fundamentally at the nature of "cases and controversies" that led to the taking of this case as well as others recently. Would anyone care to comment?

Kevin Poloncarz: I'll say that this is a very different Court than prior Courts. That was reflected to some extent by the fact that they issued the decision they did in *West Virginia*, where they pronounced an already-dead Clean Power Plan dead. The Administration already said it was going in a different direction, that it had heard the Court when they stayed this rule, and was going to start on a clean slate. The Court nevertheless drove right by the argument about the lawfulness of the Donald Trump Administration's repeal of the Clean Power Plan, and instead decided whether the Clean Power Plan itself was a lawful interpretation of the CAA.

That reflected to me that—there were mootness questions there, standing questions—this is a Court that is going to decide these tough questions. No ifs, ands, or buts. And I think that's reflected similarly here. NMFS may have refunded the monies that have been paid or stopped enforcing the rule, but that wasn't going to deny the Court its opportunity to pronounce, on the merits, how this case fits within its view of where it wants the law

25. Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006).
26. Abbott Lab'ys v. Gardner, 387 U.S. 136 (1967).
27. No. 22-1008 (Feb. 20, 2024).

to go on administrative law, deference to agencies, and the power of Congress qua the power of the courts.

Steph Tai: One thing that also struck me was that during the oral arguments, what came up was if the agency hadn't issued a regulation but was just sort of engaging in some kind of enforcement action, wouldn't a court have to actually interpret the law itself? Therefore, why have this sort of extra deference for rulemaking?

I'm thinking a lot of times the way it comes up isn't through federal courts, but first through an administrative law judge (ALJ), which the same Court is trying to get rid of, the entire ALJ system. So, either it seems like there is an actual disconnect, or just a public disconnect, between whether courts would visit this statutory interpretation issue anyway. When most times this would enter into an Article III court through some review of an ALJ administrative decision on the record, will there be a lot more flushing out of the record versus just a court starting off with the regular rules of statutory interpretation?

There'd be a much larger administrative record. Much like rulemaking, although a little bit different. I find that to be kind of striking in terms of the questioning, which also suggests, to me, potentially a bit of insincerity on the part of the Court given the status of ALJs right now before the Supreme Court.

Jordan Diamond: I'm going to offer up an audience comment to see if that triggers any responses:

> In my view, there is a significant difference between Congress providing the big policy direction and having the executive fill in the regulatory structure by agency rulemaking about exactly what will be done, and a court deferring to an agency expert on a specific issue or on a specific case when there's an industry expert who is equally qualified.

In the audience member's state, they've done away with the level of agency deference in administrative proceedings. So, here we're looking at the question of, within government, where the level of detail lies. This is the question of deference to an agency expert versus a private-sector or nongovernmental expert. Would any of you care to comment or respond to that?

David Doniger: I think that's a different question. That's a question of "arbitrary and capricious" review. It's when you get down to the level of, is this chemical a carcinogen or not, or is this exposure route demonstrated to occur or not. Those kinds of factual questions I hope are secure in arbitrary and capricious review. When the environmental expert, the industry expert, and the government's experts get the chance to make their factual case, the government expert doesn't win because he or she says, I have a bigger Ph.D. than you do. The government has to at least say these things are equally likely or this is more likely than that. Even if this is less likely than that, we put a thumb on the scale of protecting human health. That's the way we're going to go.

It's very hard to get a government decision deemed arbitrary and capricious unless it's two plus two equals 12. But in a close call, you defer to the agency. Then with things like policy, how do you weigh the relative value of protecting the person versus the relative cost on the company of the restriction? Those are policy questions. I hope those are relatively secure even if there are some big changes in *Chevron* itself.

Jordan Diamond: We have time for one or two more questions. One is actually returning to the question of ambiguous versus unambiguous and what can Congress do. If we assume that we don't actually want ambiguous statutes, how do we try to get Congress to pass unambiguous laws? If the general idea is that we would like clear and unambiguous statutes, what are some tools for trying to get Congress to pass those?

David Doniger: There are at least two kinds of ambiguity. There's the ambiguity that comes when I want *x* and you want *y* and we fuzz it up by picking some words that allow for the agency to choose between *x* and *y*. Then, there's another kind of ambiguity, which I think is the most pernicious. It's when Congress is actually trying to be clear. Like who in 1970 or 1977 would have doubted what a stationary source is? Is it a building, a structure, a facility, or an installation? Those four words connected by "or."

Congress is trying to give examples of the kinds of components that you would find in a factory. If Congress had wanted to say a major stationary source is an entire factory, it could have said so directly. If it had wanted to allow most major industrial projects to evade advance pollution controls through the bubble concept, it could have said so directly. If they wanted to say it, they could have said it clearly.

But in normal human parlance back in the 1970s, they weren't going to list furnaces, boilers, and 75 other nouns. They gave the four examples. And yet afterwards, clever lawyer combatants start retroactively making words ambiguous. That is a pernicious thing that's happened under *Chevron*. We got a lot of decisions moved to step two because creative lawyers manufacture ambiguity post hoc to escape the clarity Congress actually thought it was providing.

Only at the extreme does this not work. In the CWA, there's something called the "total maximum daily load." At one point, the George W. Bush Administration interpreted that to mean an *annual average*. Judge David Tatel wrote an opinion in which he said, there's some flex to the term "daily." It could mean midnight to midnight. It could mean some rolling daily average. It can mean many things, but it can't mean an annual average. That was just going too far.[28]

28. Friends of the Earth, Inc. v. Environmental Prot. Agency, 446 F.3d 140, 36 ELR 20077 (D.C. Cir. 2006).

The trouble is, many of the decisions—agency deregulatory decisions and maybe some pro-regulatory decisions—get upheld with that kind of creative interpretation of words for which Congress really thought they had been clear. That's my experience.

Jordan Diamond: I would like to ask all of you in closing to either reiterate a point you already made or state one takeaway that you would like to offer the audience as we wrap up this discussion.

Holly Doremus: I think the key takeaway is that we should expect the Court to try to come up with a result that will further limit agency discretion. I'll be super surprised if they get to nondelegation here, but I think they are probably most likely to say, courts, be more careful about *Chevron* deference. I really think the overall lesson, which others on this panel have pointed out, is that Congress can't possibly do it all and the courts should be humble enough not to demand that.

Steph Tai: I echo what Holly said. I think that the lack of humility is really striking. It might not be lack of humility. It might just be not understanding how much knowledge there is out there. There's a tendency for lawyers to think that we can do everything. We can't. So, the breadth of technical knowledge is necessary to create any kind of interpretation, much less see the future. It's something that we should be concerned about, and I didn't really hear that in some of the justices' questions.

Kevin Poloncarz: I think it's important for us as lawyers to realize, when we're considering these questions of statutory interpretation, that we really need to think about the larger separation-of-powers doctrine, constitutional dimensions, and the political implications of any particular interpretation that we're either trying to defend or attack, because that's where the Court has been going these days.

David Doniger: I would say that all those points are at stake in *Relentless* and *Loper Bright.* There's also a broader attack on the power of ALJs, a broader attack on powers that it is assumed the federal government has had since the New Deal.

The goal of the interest groups that are framing up these cases is to destroy modern government. It's to destroy the capacity of government in a timely way to limit the freedom of action—let's face it—of the powerful. It's only if the middle of the Court begins to push back and realize that these laws are there to protect the less powerful—their liberty interests too—that we'll get some balance here.

I have some hope that Roberts, Barrett, and maybe even Kavanaugh don't really share the same "destroy modern government" mission of the other three. We'll see. I found in the *West Virginia* opinion—though, as Kevin said, it did announce some very broad principles—that it actually sketched out a pathway for EPA's legitimate or traditional authority to regulate greenhouse gases. Then, when Congress reacted with the Inflation Reduction Act,[29] they reinforced some of those same powers both with changes to the CAA and with a lot of money in the form of incentives to make regulation cheaper. So, I think there are still pathways forward, if the Chief Justice and a couple of the others take a moderate approach instead of a radical approach.

29. Pub. L. No. 117-169, 136 Stat. 1818 (2022). *See* David D. Doniger, West Virginia*, the Inflation Reduction Act, and the Future of Climate Policy*, 53 ELR 10553 (July 2023), https://www.elr.info/articles/elr-articles/west-virginia-inflation-reduction-act-and-future-climate-policy.