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**Keynote Address:**

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**Panel:**

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## P R O C E E D I N G S

MS. AARONSON: Good afternoon, everyone and welcome virtually to Brookings. My name is Stephanie Aaronson and I'm the vice president and director of the Economic Studies program here at Brookings. I'm very pleased that you have chosen to join us for this important event.

We're here today to discuss the future of regulation at the Supreme Court. And we're honored to have several high-level experts with us today who are particularly well-equipped to provide their insights on this top.

For our keynote address, we welcome Anne Joseph O'Connell, the Adelbert H. Sweet professor of law at Stanford University. As our panelists, we're happy to host Simon Lazarus, public interest lawyer and writer, Susan Rose-Ackerman, professor of law and political science, emeritus, at the Yale Law School and Ilan Wurman, associate professor of law, Sandra Day O'Connor College of Law at the Arizona State University. And our moderator will be Bob Litan, nonresident senior fellow at the Economic Studies program in the Center on Regulation and Market.

Two important cases at the Supreme Court this term – [\*American Hospital Association versus Becerra\*](#) and [\*West Virginia versus Environmental Protection Agency\*](#) – could shape regulatory policy in this country for years to come. Rulings in each of these cases could invoke the "delegation doctrine" and/or the "major questions doctrine." And changes to either of these legal principles could inhibit one of the greatest strengths of regulatory agencies: the ability to relatively quickly enact rules in response to changing social, political, or economic circumstances.

I'm very much looking forward to the remarks by our speakers and the ensuing the discussion. And I'm now going to turn over the proceeding to Sanjay Patnaik, the director of the Center on Regulation and Markets at Brookings and a fellow in the Economic Studies program. Thanks again for all being here. Sanjay, over to you.

MR. PATNAIK: Thank you so much, Stephanie. And welcome everyone

from my side as well. As you know, our center works a lot on regulation and regulation markets. And so, the ability of regulatory agencies to be able to respond to changing market conditions is really critical and has been critical for the last decades for regulators actually to safeguard consumers and correct market failures and make sure that markets work most efficiently.

And so, the discussion will really be centered around the potential impact of these pending Supreme Court decisions on the ability of agencies to do so. And so, without further ado, I will hand it over to our moderator, Bob Litan. Thank you very much everyone. Bob, over to you. You are mute.

MR. LITAN: Thank you so much, Sanjay. So I'm not going to repeat the introduction of all our terrific people. I think the best way to get started is to have Anne Joseph O'Connell begin with our opening statement. And then after that we're going to go to a panel discussion. Anne, over to you.

MS. O'CONNELL: Thank you, Bob and Stephanie and Sanjay for inviting me to be part of this event. I'm thrilled to be a contributor to the Brookings' Center on Regulation and Market series on regulatory process and perspective. The platform has provided attention to some of my public facing work and I'm very grateful. I'm particularly excited to be on this panel which includes my very own administrative law professor, Susan Rose-Ackerman.

On November 7, 2000, election day, I was literally running for my polling place to the Supreme Court to observe my first oral argument months after graduating from law school. The case was at the time titled, *Browner versus American Trucking Association*. I had been sent to observe by my judge, Stephen Williams, as he had earlier held for a split D.C. circuit panel that the Environmental Protection Agency's interpretation of section 109 of the Clean Air Act, which has the EPA setting national ambient air quality standards for air pollutant violated the nondelegation doctrine.

That doctrine cabined the scope of congressional assessments to federal

agencies. Simply put, if there is an intelligible principle governing agency action, Congress is not unconstitutionally delegating legislative authority to the executive branch.

Judge Williams ruling the lower court had made the front page of the Washington Post. And he could not show up at the court to read the tealeaves so to speak. I was out of breath when the argument began and Justice Scalia, among others, forcefully expressed his skepticism of the argument that the statute, the Clean Air Act, lacked in intelligible principle.

I had to tell my judge afterward that it did not look good. He replied simply that he had lost nine to zero before the Court when he was a lawyer and he was reversed unanimously in American Trucking. In an opinion by Justice Scalia, the Court first held that the agency could not cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.

And second, the Court determined that there was no unlawful delegation in the Clean Air Act because Congress had provided an intelligible principle. The EPA had to establish uniform national standard at a level that is requisite to “protect the public health from the adverse effects of the pollutant in the ambient air.”

Now, I started teaching in 2004. From 2004 until 2015, I repeated told my students not to raise a nondelegation challenge. Or if they did to put it at the end of their complaints or briefs. But in 2015, then Judge Gorsuch descended from a denial to rehear a case on en banc in the 10th Circuit that involved the constitutionality of the Sex Offender Registration and Notification Act. Fighting one of the rare cases where the Supreme Court had found delegations unconstitutional, *Schechter Poultry*.

Then Judge Gorsuch argued that SORNA violated the doctrine. He said, it's so unusual is this delegation of legislative authority that defined an analogue. You might have to look back to the time Congress asked the President to devise a code of fair competition for the poultry business. A delegation of legislative authority, the Supreme Court unanimously rejected. And Justice Cardozo called unconfined and vagrant a

delegation running riot.

Times have changed. Now a justice, Judge Gorsuch does not stand alone. When the constitutionality of the delegation in SORNA reached the Supreme Court several years later in a different case, *Gundy versus United States*, Justice Gorsuch was joined by Chief Justice and Justice Thomas in his dissent that SORNA improperly delegated the legislative power to another branch.

For Justice Gorsuch, delegation to the Executive is permitted only in three categories, to fill in details, to apply a congressional rule governing private conduct with executive fact-finding, and to do non-legislative things.

In Justice Kagan's view in that case and that of many on the left, if that framework complied than most of the government is unconstitutional, Justice Kagan said. Dependent as Congress is on the need to give discretion to executive officials to implement his programs.

In *American Trucking*, the Court noted that section 109 of the Clean Air Act resembles the Occupational Safety and Health Act provision requiring the agency to set the standard which most adequately assures on the basis of the best available evidence that no employee will suffer any impairment of health. Which the Court upheld in *Industrial Union Department, AFLCIO versus American Petroleum Institute*.

Now, that OSHA case, that the Supreme Court in *American Trucking* cited was decided during the Carter administration in 1980, upholding the delegation to OSHA. But this January through which shadow docket but with oral argument, the Court returned to OSHA's authority under a related statutory provision. The Court in January did not permit OSHA's emergency temporary standard establishing a vaccine or test mandate for many private businesses on statutory ground, an issue I will return to in a moment.

But Justices Gorsuch, Thomas and Alito also noted constitutional concerns over delegation. Again, calling on Justice Cardozo when *Schechter Poultry*, their concurrence concluded that OSHA's reading of its statutory authority in the vaccine or test

mandate would “afford it almost unlimited discretion and certainly impose no specific restrictions that meaningfully constrain the agency.” OSHA would become little more than a roving commission to inquire into evils and upon discovery correct them in their words.

Now, what’s interesting is that although Judge Gorsuch, now Justice Gorsuch doesn’t stand alone, he doesn’t yet stand with the majority. So that position in the OSHA case did not garner five votes.

Now, this term, the Court is considering *West Virginia versus EPA* on the agency’s regulation of powerplants’ carbon emission. The Obama EPA had implemented the Clean Power Plans which the Supreme Court stopped from taking effect. The Trump EPA then repealed the Obama plan and established a more lax one, the Affordable Clean Energy Rule. And on the last full day of the Trump administration, the D.C. Circuit rejected the reversal of the Clean Power Plan and rejected the new Affordable Clean Energy Rule leaving it to the agency to figure out what to do next.

Now, although the Biden EPA said it would not return to the Clean Power Plan of the Obama years, important targets had actually been achieved in the meantime. The Supreme Court agreed to hear challenges to the D.C. Circuit’s ruling.

Now, one argument against the D.C. Circuit’s decision that broadly interpreted section 111 of the Clean Air Act in this dispute is that such a broad reading violates the nondelegation doctrine. Now is this going to be the case where the nondelegation doctrine gets five votes? I’m doubtful, but our panel may take up that question.

Now, let me return to the statutory issue in the OSHA vaccine or test mandate case. What many call the major questions doctrine. Now, major questions doctrine is harder to explain succinctly. Cass Sunstein has described two forms of it, but not all would agree with his characterization.

The weak form in Sunstein’s word suggest a kind of carve out from Chevron Deference when a major question is involved. Now, Chevron Deference which is involved in

the *Becerra* case normally applies to agency interpretations of the ambiguous statutes where Congress has delegated to the agency the authority to act with a force of law and the agency has actually acted with that authority. For example, three notice and comment rule making.

So *King versus Burwell* would fall under the weak form of major question. The Supreme Court refused in that case to defer to the IRS's interpretation through a notice and comment rule making that the Affordable Care Act tax subsidies apply both to state established and federally established insurance exchanges, but it reached the same conclusion interpreting the statute on its own.

The strong form of major questions in Sunstein's phrasing is rooted in the nondelegation doctrine and operates as a clear statement principle. The idea Sunstein argues is not nearly that Courts will decide questions of statutory meaning on their own, it is that such questions will be resolved unfavorably to the agency.

In the OSHA vaccine or test mandate case, the Court quoted from its earlier ruling barring the Biden administration's eviction moratorium that it had implemented through the CDC in a case called *Alabama Association of Realtors versus Department of Health and Human Services*. But in the OSHA case, they didn't actually use the term major questions in the procuring opinion.

They wrote we expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. There can be little doubt that OSHA's mandate qualifies as an exercise of such authority. The question then is whether the act cleanly authorizes the Secretary's mandate. He does not. The act empowers the Secretary to set workplace safety standards not broad public health measures.

Now, the major questions doctrine also looms in the [West Virginia versus EPA](#) case pending at the Court. The argument is that the major questions doctrine applies to section 111 and does not permit the type of broad regulation under the Clean Power Plan.

In *West Virginia's* words, and its cert petition calling for the Court to clarify the major questions doctrine, Congress clearly delegated power over what? And whom EPA may regulate? The greenhouse gas pollution and powerplants. And the majority of the D.C. Circuit deems section 111 to give sufficient clarity to how as well.

Now, the oral argument last month showed some of the conflict lines here. *West Virginia* started its argument with major questions. Arguing that the EPA can now regulate and waive that cost billions of dollars, effect thousands of businesses and are designed to address an issue with worldwide effect. This is major policy power under any definition unless Congress clearly authorizes it, section 111 does not stretch so far and Congress hasn't done so here *West Virginia's* advocate argued.

Now, the United States countered that the issue did not fall under the doctrine suite challenging the claim that the effects were large because many of the targets had been met. And it added that there is no agency regulation for the Court to review to evaluate these kinds of effects. It characterized the major questions doctrine as an ambiguity resolving mechanism, quote, in cases like the eviction moratorium, the Court had said that if there were any doubt about what it has already articulated as the best interpretation of that statute. That ambiguity would be resolved by the fact that the particular agency action had sweeping consequences based on its cost or the number of people involved or the type of authority claimed.

Justice Barrett, whom I think will be a key vote in this case, wanted to know if there was any daylight between the nondelegation doctrine and major questions. And she asked how the case fit with the eviction moratorium on the major questions side? She asked, if you think about the eviction moratorium case from earlier this term, it was what the CDC can regulate the landlord/tenant relationship. Here if we're thinking about EPA regulating greenhouse gases, well, there's a match between the regulation and the agency's wheelhouse rights. You're saying when you look at this scheme instead, right, that this is a really big deal.



Another key administrative law case at the Court this term is *American Hospital Association versus Becerra*. Now, this case does not present the same nondelegation and major questions issues I have just discussed. Rather, it may bring the end of Chevron Deference, which I described briefly above or impose more limits on it. Perhaps, for example, when the government had the financial interest in the matter, the Courts won't defer.

So what's at issue in that case is a Medicare regulation that cut payments to hospitals for drugs given in outpatient departments. The D.C. Circuit had upheld the 2018 regulation on Chevron ground. Now the Court, the Supreme Court, could of course follow recent practice and hold that the Medicare statute unambiguously forbids the agency's interpretation.

That would allow the Court to reject the agency regulation without ever resolving the fate of Chevron Deference. So it could leave Chevron's fate to another case or to Congress.

So in closing, as I tell my students, the administrative state does more lawmaking than Congress. You compare the number of regulations to statutes. And it does more judging than the federal courts if you compare agency adjudication, think immigration, veteran's disability to article 3.

And the big question is what should be the constraints on that activity? Should they focus on agency leadership? The selection and removal of leaders? Or should they focus on agency structure? Should the constraints focus on agency procedures or agency reason giving? Should they focus on ex-anti-assignments? Or ex-post review? And what role should the Courts play? But also, what role should the White House and Congress play?

And we have some wonderful people on the panel to start thinking about these questions. Ilan has written on structural concerns and constraints. Susan has a new book on agency procedures comparatively looking at the United States and other countries.

And Simon, has written recently on judicial review in the OSHA cases.

So thank you. And I look forward to our panel discussion.

MR. LITAN: Thank you very much, Anne. That was a terrific overview. So for purposes of this panel discussion, I'm going to try to simplify this.

There are two cases here that we're talking about. And for lack of a better word, I'm going to refer to the *Becerra* case as a so-called Medicare case. And the Clean Air Rule case, I'm going to be calling the EPA case, okay?

And, Anne, as you have discussed, the two doctrines that we're here to discuss, which is a delegation issue and also the major questions doctrine may not be present in both cases, all right? But collectively we put them all here together because they seem to be related.

So before I get down into the detailed questions and have the panel discuss them, I want to go at 60,000 feet, right? And have all of our panelist weigh in on the following question. And I want to read a quote from President Ronald Reagan's Solicitor General, Charles Fried of Harvard Law School.

This was a quote that he stated about a year and a half ago in October of 2020. And he wrote that this is right before Amy Coney Barrett had been formally approved to be the Supreme Court Justice.

He predicted that once she was sent to the Court that, quote, we would have a reactionary not a conservative six-three Supreme Court majority, "in the grips of the radical fantasy of taking a constitutional wrecking ball to the modern regulatory administrative state." All right? So that's the quote. Controversial.

So my question to the panel is what does the performance of the majority, that majority, six-three so far, before we even talk about these cases that we're talking about today. What is the performance of that majority so far indicate whether or not Charles Fried was right that we are on the "in the grips of a radical fantasy of taking a constitutional wrecking ball to the modern regulatory administrative state?" Who wants to start?

MR. LAZARUS: Well, I'll just try to be bold and start because I had written -  
- Anne was nice enough to note on the vaccine cases.

I think there's no doubt that when Professor Fried said what he said, he wasn't exaggerating because of the descent in the *Gundy* case by Gorsuch where he issued this incredible manifesto saying that Congress could not delegate to agencies any power to make policy grow. Eighty-five percent of what almost all agencies do is make policy. But I think that having watched the initial performance of that majority as Bob just said, the news is relatively good, I think, because it looks like Justice Gorsuch only has two colleagues willing to assign on to his radical roadmap.

And in the vaccine mandate case, you had three of the conservative justices, Roberts, Barrett and Cavanagh not only not joining with what Gorsuch was saying. But very emphatically saying something completely different. And I think I would just like to quote a little bit.

First of all, they did not question the constitutionality of the very broad delegation of authority at issue in the vaccine mandate case. They clearly said that that was very inclusive. They said that was constitutional. They said that not only was it constitutional, but that OSHA could have and could still promulgate a vaccine mandate applicable to millions of workers really that would be consistent with that grant of authority.

So I think that that case in particular and it jives with other things that the Court has said in this term and in previous terms. This Court, that case in particular, seems to indicate that what Stephanie, at the very beginning correctly, I think, said was the real key issue here. Which is whether Congress can give an agency authority to deal with relatively broadly defined kinds of problems or crises? And give the agency authority to deal with incidents of those kinds of problems that are very broadly defined and figure out what to do about them. And without that authority, EPA would be fangless. And much of our administrative state wouldn't work at all.

So you had a six to three majority counting the liberal justices in that case

saying, yes. Congress can do that. And so, I think that that's really very good news.

MR. LITAN: Ilan, want to take a stab at this question?

MR. WURMAN: Sure. And I'll also address Cass Sunstein's sort of view on the major questions doctrine, which Professor O'Connell highlighted.

I guess what I want to do is explain what I view the major questions doctrine is. Or I guess there are three ways to think of statutory interpretation and its connection to nondelegation. And in so, explaining this I'm going to try to suggest what the Court is, in fact, doing and going to do. And I don't quite think it will be a wrecking ball. I think it will sort of be my takeaway from this.

So there are sort of three ways to think of statutory interpretation and nondelegation, right? The way that nondelegation plays a role in statutory interpretation. And by the way, here I'm putting aside *King v. Burwell*. I'm putting aside Chevron Step Zero. This weak version of major questions because I don't understand them, right? If this is a question of major political and economic significance that Congress has delegated to someone, why does it matter whether it's the Court deciding or the agency? It doesn't make sense.

If it's a big question, it's a big question. Why should the Court be deciding such a thing? It doesn't make any sense and I don't think the Court has used it as a Chevron Step Zero, right? As this triggering threshold question whether deference is applicable outside of *King v. Burwell*. I think it was new in *King v. Burwell*. I'm not sure they've done it since then. And so, I just -- let's put that aside. Okay.

So there are three real ways, actual ways, of that we can think about this. One is major questions is a linguistic cannon. We look at a statute and think of the FDA. Can FDA regulate tobacco? The question is, okay, could Congress possibly have intended to delegate such a big major question to the FDA without speaking more clearly? If it had really intended to delegate this big question, it would have said so more clearly, right?

Justice Scalia colorfully called this once the elephants and mousehole's

doctrine, right? Congress doesn't hide elephants, big things in cryptic language. So this is a linguistic sort of cannon.

The other possibility is major questions is a substantive cannon. And I think this is what Cass Sunstein was talking about. It's like other clear statement rules. What is a clear statement rule? A clear statement rule is this idea that if Congress wants to do something, it can. But if it does, it has to tell us clearly or we're going to demand that it speak with clarity because there's some value at stake.

So a presumption against preemption. We all know Congress is allowed to preempt state law when it otherwise acts within its enumerated power. But we're going to presume it didn't intend to preempt or displace state law unless it speaks clearly. It can do it, but we're going to demand clarity because of the federalism values, some constitutional values.

This clear statement rule is a really poor fit for nondelegation because the whole premise again is, okay, Congress can do it, but it has to speak clearly. Well, here we don't know. Can Congress delegate these big and major questions? Well, that's the whole question, right? So it's not a good fit with the general clear statement cannons as substantive cannons.

Now, there's another way to think about nondelegation, which is as a -- and Professor O'Connell mentioned this as well. It shows up in OSHA. It shows up in *West Virginia* brief. Its nondelegation is a cannon avoidance. What is the cannon of constitutional avoidance? This is the cannon of statutory interpretation whereby the Court says, look, if this interpretation is, in fact, the correct interpretation, well, we have serious doubts as to whether that will be constitutional. And therefore, we're going to narrowly interpret the statute. We're going to pick another plausible reading of this statute that avoids that result, okay? And even if it is not the best reading of the statute.

Now, as Professor O'Connell said, I think most people think major questions falls into the second bucket that I mentioned. It's a substantive clear statement rule. I think

what's really happening here is a combination of one and three. It's a linguistic cannon. Look, could Congress possibly have intended to do this? We think not. But if Congress -- even if Congress did intend to do this, we think that might raise constitutional questions.

And so, we're going to more narrowly interpret the statute to avoid that result. That's what *West Virginia* argues in its brief. That's what Justice Gorsuch argued in his concurrence. I think that's what the liberals are doing *Gundy*. I think they are narrowly construing the statute to avoid what otherwise might be a serious nondelegation question.

So I think that this is what we're going to see going forward. A matter of steps pertaining to interpretation, major questions as this linguistic cannon at step one. And then maybe on the margins, narrowly interpreting statutes that might raise nondelegation concerns without actually having to address the nondelegation doctrine itself.

I suspect 99 percent of these cases are going to be resolved that way. Is that going to be a wrecking ball through the administrative state? I don't know. But then again, I also have a weaker understanding of the nondelegation doctrine than my formalists and originalist friends. I think it is not nearly as robust as some formalists have said. But in any event, that's where I think it's going. And I'll stop there.

MR. LITAN: All right. So we have a question from a questioner that I'll lead into my asking Susan about this.

And the question really is -- and it was on my list anyhow. Which is where this major question doctrine come from? I mean all of a sudden, we have some people talking about it on the Supreme Court. And, you know, for 60, 70 years nobody talked about this.

And by the way, this is a larger issue, which is, you know, the so-called administrative regulatory stage has been percolating along since the New Deal and whatever. And going on pretty well undisturbed. And all of a sudden, we now have people talking about these doctrines like major questions or nondelegation or something. As a way to constrain the agencies from doing things. You know, after 70 or 80 years of nobody

asking any questions. And the presumption seems to be that the Supreme Court according to this view has to somehow more narrowly interpret what the actual statute says.

Without paying any attention to the separate volume law called the administrative law, the Administrative Procedures Act, which was enacted in what? 1938? Which basically governs how agencies are supposed to operator. And so, what I want to ask Susan is does this narrow focus on the words in a statute, you know, whether it's a major question or whether it's nondelegation. Does it somehow reflect the reality of the way regulations have been made for the last 70 or 80 years?

MS. ROSE-ACKERMAN: No. But let me just talk about this a little bit. I share what I guess is your skepticism.

I'm always worried when something gets called a doctrine because that implies that somebody wants to say that it has kind of authority, which should be as I think Ilan was talking about, up for grabs to be talking about it. Nondelegation itself is one of those things that gets seems to be giving it more authorities. And at least, I think it should have.

And I guess I would step back a bit to asking about how laws are made in the first place, right? So a key feature of the constitutional structure of the United States is a complicated process for making laws with two houses and a president, which can be of different parties.

So the whole process of those doctrines is going to have a big element of compromise in many cases and already weighed a compromise is to have a statute that doesn't spell out every little thing that has to be done over time. It going to leave policy questions to be resolved. And as other people were saying before. One response to that has been the Administration of Procedures Act and other procedural constraint in individual statutes that say, yes. Delegation is happening, but let's be sure that we have open hearings, that we have reason giving, that we have a level of publicity and input into what is going on.

So this most has to do with the use of expertise and it has to do with something I've been discussing, worried about or concerned with has to do with the democratic accountability. The accountability of what the administrative state is doing to the citizens of the state.

And that if you understand both the underlying, you know, so constitutional structure of the lawmaking process and the orders of responses at the procedural level in the administrative state then I think the Courts really need to recognize that is an essential piece of the way the state works. And another way to say that more acutely is you want to make sure the Courts be the ones who decide about this is, I guess, a point about something. The questions of Courts be the ones who get to decide whether something was a major question. Maybe not have the expertise to evaluate the policy issues in most cases that are before the legislature and then subsequently one of the states.

So I think that sort of underlines this whole debate has to do with the front row of the Courts relative to the other branches of government. Because the debate has focused on the legislature not giving enough instructions to the executive or the executive being somehow irresponsible even though they, themselves, have more constraints than the Congress does.

And leaving out of account what to me is very important which is the role of the Court vis-à-vis these other institutions and their own lack of capacity really to be more of the rest of us to have a lot of confidence in their resolving what fits and what Bob said. So maybe that's enough for now.

MR. LITAN: Okay. Anne, so there's a quote in I believe a 2000 opinion of the Supreme Court that attributes the origins of this major question doctrine to a law review article that Stephen Breyer wrote in 1986 where he meant in passing without calling it a doctrine. He just mentioned in passing that when Congress enacts a regulatory statute, it addressed, "it necessarily addressed what's called major questions." Because that's what it does. That's what Congress does.



And but from that quote it seems to me that all of a sudden, we now have people, including justices of the Supreme Court making a doctrine out of this. And I don't think Stephen Breyer ever intended that. Could you expound on this? Is my view about Stephen Breyer right? And is this the reason or is this where the so-called major questions doctrine came from?

MS. O'CONNELL: So I mean many have credited Justice Breyer and his 1986 law review article which is entitled *Judicial Review of Questions of Law and Policy* as one of the early sources for the doctrine.

So he said, "Congress is more likely to have focused upon and answered major questions while leaving interstitial matters to answer themselves in the course of the statute's daily administration." And we see this discussion of interstitial nature come back up in the aftermath of *Chevron* and constraints on Chevron doctrine.

And in a recent oral argument, Breyer himself talked about -- he goes, well, I'm supposedly credited. And so, I think he's open to having some part in it. I don't think it came out of nowhere between the law review article and, say, the eviction moratorium which was then followed by the OSHA vaccine or test mandate.

I mean we did have a case, *MCI versus AT&T* involving the Communications Act of 1934. And that's a 1994 decision, I believe, where the Court again not using the term major questions doctrine does use the idea that it would have vast economic consequences as part of an interpreted canon, an interpretative mechanism to figure out what that statute permitted or didn't permit the Federal Communications Commission to do.

I'd like to just add one thing which may tie major questions to this issue of Chevron Deference and all of the concern by many on the right about Chevron Deference together is what's interesting is in the 1980s, Chevron comes down in 1984. In 1986, you see then he is an academic, right? Breyer is talking about, you know, well, what kind of constraints can we put on Chevron Deference?

And indeed, my other judge, I refer Justice Ginsburg. When Ruth Bader Ginsburg was at her confirmation hearing through the Supreme Court nomination, she essentially called for Congress to overturn Chevron Deference by statute, right? So it was sort of the initially of the left that was concerned about judicial deference to agency action, deregulatory move of the Reagan administration.

So there's also a political economy story over the decades to see now this kind of push against judicial deference to "more regulatory agencies" and to also cabin the kind of scope more broadly of the administrative state.

MR. LITAN: Okay. So now we get a little more granular. Let's get back to the two cases. The Medicare case and the EPA case.

So I just like people to weigh in on just give me your views and what you think is going to happen. How are these cases going to get decided?

MR. LAZARUS: Bob, can I just respond to that real quickly because I don't want to take up too much time? But there's I think it's critical particularly with respect to the Clean Air Act case, the *West Virginia* case.

To clear up a point about the major questions, so-called doctrine. And that is it has never been just about whether what the agency is doing is a big deal to quote Justice Kagan in a very good passage in the oral argument in the *West Virginia* case.

It's always been is it the kind of big deal that the statute contemplates or not? It has to be both. It's always been -- the whole major questions doctrine has always been a part of construing a statute. There's never been any suggestion the way Justice Gorsuch is trying to say, and I think endorses. It's never been a matter of just saying, well, if Congress -- if the agency is trying to do something that is a big deal in terms of its impact, it can't do it. And maybe Congress can't even delegate the authority to do it.

It's never been that way. It's always been is it a big deal that it is central to the statutory scheme? That's what Chief Justice Roberts say in *King v. Burwell*. And that's also true in *Brown* and *Williamson* in the cigarette regulation cases. Always really true. And

we have to understand that to push outside of that constraint. You've got a whole different can of worms here.

MR. LITAN: Okay. But let's get down to the cases themselves.

MR. LAZARUS: Yeah.

MR. LITAN: Maybe we should take them in order. Let's just take the EPA case in order.

MR. LAZARUS: Well, in terms of that case, Bob, the previous people have talked about it. Justice Barrett said, well, this rule is in EPA's wheelhouse. And therefore, it seems like she is saying this is really not something that the major questions doctrine would get in the way of it at all.

MR. LITAN: Okay. So that's one prediction. So are you predicting in essence that at least the majority of the Court will rule that it was okay for EPA to have this broader greenhouse gas regulation that went beyond just the powerplants? Or went on other sources? You're saying that the EPA is going to be upheld. Is that your prediction?

MR. LAZARUS: I would say that on the basis of the oral argument that that is correct. But, you know, one never knows.

MR. LITAN: All right. Let's stop there. We'll get to the Medicare case in a minute. Other people weigh in. Where do you think -- other people where do you think the Supreme Court is going to come down in the EPA case? Ilan?

MR. WURMAN: Yeah. I'm less certain than Simon about this because I think when Justice Barrett was asking about whether the major questions doctrine is a linguistic cannon or a substantive cannon?

I think she wanted the answer to be look, it's a linguistic cannon. It's just how we do statutory interpretation. And if the answer is that, yes, in this case we can imagine Congress intending to have delegated the question then all of a sudden major questions isn't doing work here. But now cannon of avoidance is going to be doing work.

And they're actually going to then address, you know, the nondelegation

doctrine sort of, right? They're going to semi-address it through the cannon of avoidance. They're going to say, okay, now that we've agreed that this is the kind of thing Congress could have intended to delegate. Is that delegation problematic? We think it might be problematic. And therefore, going to narrowly construe the statute.

Now, I just wanted to -- so I think if Simon is right then I think that is a more likely outcome than upholding the EPA's action in this case. Now, I should say I don't like the cannon of constitutional avoidance. It is a weird, weird cannon.

Basically, what it says is we don't have to decide that this would be unconstitutional. We just have doubts, serious doubts, as to whether it would be unconstitutional. And therefore, we're going to narrowly construe Congress' statute. In other words, the Court doesn't even have to decide. Doesn't even do its normal job of deciding whether something violates the constitution. And without having even decided whether the statute violates the constitution.

If then proceeds to rewrite the statute and kind of like acting as legislature, it's a really weird cannon. And which raises this other point too. It's not even clear what the connection is between major questions and nondelegation, right? If the Court is going to talk about nondelegation, it should tell us what it thinks, right, the doctrine entails and its connection to majorness because it's not at all obvious that minor things are okay.

For example, delegating the authority to decide whether SORNA, the Sex Offender Registration Act applies to pre-act offenders. Politically significant? Probably not. Economically significant? Probably not. Probably a violation of the nondelegation doctrine if the statute was best interpreted as Justice Gorsuch wanted to, right?

So the cannon of avoidance allows them to get around actually telling us what they think the doctrine requires and then rewrite the statute while they're at it. And that's very, very dangerous if you ask me.

MR. LITAN: All right. Susan, go ahead and jump in.

MS. ROSE-ACKERMAN: Just I'm going to predict the Supreme Court is not

going to -- I don't have any inside knowledge about that.

But the important point is there is an important point, of course, as everybody understands about the Clean Air Act, which is that there's a part of it that focuses on treatment at the smokestack of individual discharges. And there's a part of it that has to do with ambient air.

Most of us in the policy community think these are focused on ambient air as kind of like the right way to do it. But the statute does have both of those things going on because they've managed to, you know, kind of balance that management over time. But it's kind of -- it shows up in this case as well as in Chevron, of course. That was partly what Chevron was about.

So I guess I want to say two things there is a drafting question about the Clean Air Act, but it's not one that I think it would be appropriate for the Supreme Court to decide, you know, what was the right way, you know, to have done it. But it's one of the things that makes it -- turns it into a lawsuit, right? That there are arguments within it.

MR. LITAN: Before I turn to go back to summarize in plain English what Ilan said. Anne, do you want to jump in? Or can I ask my question and then maybe you can jump in?

So here's my question. So, Ilan, if I paraphrase in plain English what you said. Is that you're predicting that in the EPA case what the Court is going to say is that the statute should be narrowly construed and because we're narrowly construing it, we don't have to worry about getting ourselves into constitutional issues about nondelegation, major questions or whatever.

We're just using our normal statutory construction principles. We're going to construe it narrowly and we're going to say the EPA, you couldn't do what you did. Is that a fair summary of what you said?

MR. WURMAN: Yeah. Look, I think that maybe this will stop with major questions as a linguistic canon because as Susan mentioned, the EPA, right? It can be a

major question as Simon says for purposes of a sketch, right?

The EPA has two different regulatory regimes. It has one that allows the federal government to regulate industrial policy by setting national air quality standards for the whole country. And then it has a specific regime involving specific fact three, smokestacks. How they can improve their systems. And if -- there's an open question in this case as to whether Congress created one regime or the other in this context?

If I were the Court, I would say, look, that is a big and important question for purposes of this statute. And Congress didn't speak clearly on this. And therefore, we're going to give the EPA the narrower authority with, you know, because Congress didn't tell us specifically you wanted to give it the broader authority.

If I were a betting person, and I'm not, since I, you know, for a number of reasons. I would think that that's what they're going to do. But if they don't do that. If they say, yes, we do think Congress intended the agency to choose which regulatory scheme it wants, a national one, an ambient air qualities type standard one or in the fence line client specific one.

Maybe that raises a delegation problem giving EPA the choice whether to regulate in the fence or outside the fence might raise a nondelegation problem. It may or may not, in fact, be a nondelegation problem. I just think that if the Court gets to that point, there's a real chance it narrows the statute to avoid what it perceives as the constitutional problem.

MR. LITAN: Okay. All right. Anne, do you want to weigh in?

MS. O'CONNELL: So I'll predict that the case is not going to get resolved on substantive nondelegation ground. Possible as Ilan says that nondelegation could be an interpretative mechanism for resolving the case.

I just want to raise two things we haven't discussed. Is, one, in order to get to the merits so to speak about the clean power plan, the Court has to decide that it has the authority to hear the case. And there's actually not a regulation that's in place with regard to

the regulation of carbon emissions from powerplants.

And on questions like standing and mootness, we also see divisions among, quote, that kind of conservative camp. And you often see Justice Thomas on a different side of these issues. So, you know, could there be a majority that would come together of members of the right and members on the left to say that there's not even a challenge here to be resolved. I'm a little skeptical after listening to the oral argument but it's possible.

And the second thing I would say is that if the Biden administration actually comes out with the regulation before the Supreme Court rules in this case, well, that would moot the case that is pending. It would then bring its own sets of litigation. But I think these preliminary questions about the Court even getting to the merits are still on the table.

MR. LITAN: Yeah. Go ahead.

MS. ROSE-ACKERMAN: One little point. Remember the original idea of nondelegation was the law was too vague, too general. It wasn't anything. That's not the case in this here. The law is quite specific is that all the ways of how you put together the different parts of the statute that have not been worked out within the statute.

But you could say that's just exactly what should be done when something gets delegated that the -- you know, the view is the specifics that may go into different views.

MR. LITAN: Okay. Have we adjusted the EPA case before I go to the Medicare case? Okay, Medicare. The Medicare case. Anybody want to offer a prediction there?

MS. O'CONNELL: So I'll jump in very quickly. I have a clear view of listening to the oral argument in that case. It just seems that a majority of the justices were not sympathetic to the government's position. So not sympathetic to the reading of the Medicare provision.

I don't think necessarily that it spells the end of Chevron Deference. There was a lot of discussion. Could you use footnote nine of Chevron which is about using the tools of statutory construction and trying to interpret whether Congress has spoken directly?

And the ideas that Congress has spoken directly, there's no need for deference.

So I do think that there was a lot of attention and interest by the justices on the left and on the right to say that without even getting to deference that Congress spoke precisely and would not allow what happened in the 2018 regulation to the extent that I think something is going to happen with regard to Chevron Deference. Maybe there's support for what Justice Gorsuch raised in oral argument, which was a limitation on Chevron. But at least when the government has a pecuniary or financial interest at stake, it shouldn't get deference.

MR. LITAN: Any other views on the Medicare case before I have a more general question? Because we have one from the audience which I think is a good one.

MR. WURMAN: I'll just add to what Anne said, which I think is exactly right. You know, a lot of people were surprised that Justice Scalia was this big fan of Chevron Deference. He had these articles for, you know, advancing Chevron Deference.

And when asked to explain one -- I actually don't know if it's apocryphal at this point I don't know where I heard this or read this, right? But he would say, look, what's the big deal with Chevron Deference? If I, as a judge, rarely find statutes ambiguous than I'm never going to have to deploy Chevron Deference. Or I'm rarely going to have to deploy Chevron Deference.

And the reality is that 99 percent of these cases, if you are a textualist, formalist, originalist judge who uses all the tools of statutory interpretation or if you're a purpose of this judge who wants to look to congressional intent. Ninety-nine times out of 100, there is a better reading of the statute. And Chevron tells us, we don't go with the better reading of the statute unless it's clear, right?

But often judges conflate the two. If you think the best reading of this statute is X. Well, chances are I'm pretty darn sure that the best reading of this statute is X. And so, I think it's clear that my position should prevail and then there's no room for deference. I would suspect that in most of these cases that's what is going to happen.



And so, Chevron will linger for another century but not actually really used in any way is my analysis.

MR. LAZARUS: Can I just say one really quick thing before you go on?

MR. LITAN: Yeah.

MR. LAZARUS: The fact that Justice Scalia was a major fan of Chevron Deference is not some aberration or accident. He was actually a major architect of the legal scaffolding for the administrative status as we know.

And it is his vision, at least his vision before this century. His vision that Gorsuch and his allies are taking dead aim at. It is -- he wrote the decision defining the reach of the nondelegation authority which is the leading case in the year 2000. In which he said, we have -- we, the Court, have never wanted to question the scope of Congress' authority to delegate policymaking authority to the agencies.

And so, it just -- that is a measure of how radical the shift to the right that people such as Justice Gorsuch are promoting is.

MR. LITAN: Let me take off of that actually. I've got a question from an audience which I think picks up that thread. And that is, is there a tension between people who advocate textualism. You know, stick to the text. And the argument that we ought to have more scrutiny about so-called major questions?

Because the major advocates of a major question doctrine are really advocating the Courts ought to look to legislative intent. What Congress really intended to mean. Did they really mean to, you know, regulate this whole big damn thing? Or do they just really focus on a rifle shot?

And once you get into intent, of course, you've moved away from textualism. You've moved away from the text. So is there, in fact -- is this tension actually true? And then if it is true how can you be a concerted justice and hold both thoughts -- both of these thoughts simultaneously in your head?

MS. ROSE-ACKERMAN: Yeah. I think that says a good point. That's a good

discussion of what it means to be, you know. Some people are who looking at the text of the constitution are forgetting about the people behind it who wrote it. So that's a good point.

MR. LITAN: Anybody else want to wager? Because I thought it was an excellent question from the questioner?

MR. LAZARUS: Like you said, the answer is you can be a fair weather textualist which is what a lot of conservatives are.

MR. WURMAN: Since I'm the, you know, resident, textualist, formalist on the panel. Let me say something, though. Of course, my textualist and formalist friends often think I'm squishy. So, you know, take this for what it's worth.

I do think the disconnect between intent and text is overplayed, right? I mean what gives texts their authority as law? Often it's the authority to people who enacted them. Having said that though, we are not bound by unenacted intentions of the legislature. So these two things feed off each, right?

Alexander Hamilton in his debate with James Madison over the Bank of the United States. Madison said, look, in the convention we talked about this, and we voted against this. And Hamilton said, you can't look at the secret intent. Do you know of what we did in the convention. Because he said nothing is more common than laws expressing both more and less than what may have been intended by particular people, right? This is particularly the problem with collective bodies.

So I think a textualist, you know, believes in two things. One, is you don't look to unenacted intentions, but what the legislature hope to accomplish? What its objectives were is evidence of the meaning of the text that they wrote, right?

And then the second thing is textualist really just don't like looking to a particular piece of evidence of intent, which is legislative history. You know, they're okay looking at the legislative history of the constitutional convention. That's good. You know, the recent Congresses and we can debate whether that's consistent. But I don't think textualists think intent is totally unimportant. I think they understand that intent helps us figure out what

the text they wrote actually means.

I think major questions can fit in that, but I admit there is some obvious tension that maybe should be brought more to the surface and addressed squarely on by these judges.

MR. LITAN: Okay. So here's another 60,000 foot observation. From all these discussions, I'm hearing today. It sounds like in these two cases, they are not going to do what a lot of the legal analysts who started writing about these cases, you know, a month or two ago when they were here.

I mean if you look at a lot of articles that proceeded these cases, they say, oh, here the Court is going to get a big opportunity to weigh in and establish some new "major questions doctrine" or whatever. Or establish, you know, the leaps and bounds of a resurrected nondelegation doctrine.

And what I hear the panelists today saying is, nah, we don't really think they're going to do either one of those things. They're going to split hairs. They're going to find a way to make distinctions. But we're not going to so-called get a definitive statement of the "non-delegation doctrine" or the major questions doctrine. It's still going to be up in the air for future litigation and all that. Is that a fair summary?

MS. O'CONNELL: I'll jump in if I can. I think that's right. I do think you're going to get concurrences or descents, which do lay out a big vision about what major questions should be. Or what nondelegation as a constitutional matter should be.

I coedit one of the administrative law casebooks. And this goes back to your very first question, Bob, about the changes and composition to the Court. And our annual supplements are hundreds of pages because there is so much said, right? There's a lot of rhetoric. There is a lot of angst. There's a lot of pontificating on these subjects.

But as Christian Hickman recently discussed in an article and in a clubhouse conversation on the delegation doctrine. You know, she talks about it being largely symbolic. And so, I do think there is something about the rhetoric on one hand and the practical effects

on the other.

And we see this also in cases that are in different areas. I mean with this new court, we have sailor law which is about the constitutionality of the structure of the Consumer Financial Protection Bureau, right? Where you couldn't have removability protections on a single head of the CFTB. But if you look in the separation of -- and that's a major decision. That's a shift. But if you look at the remedies in these cases. The remedies are not huge remedies, right?

Dodd Frank and the whole Consumer Financial Protection Bureau didn't go away. And so, what's going to happen at the end of the day? I think it's still going to be pretty small. Now, here's the downside is I do think it creates ambiguity and uncertainty for agencies.

MR. LITAN: Right.

MS. O'CONNELL: And if you're federal agency looking at the legal landscape, you might hesitate to do something that you view as important to do in the regulatory space because you're worried that it might face legal challenges in that way. So you could still have real effect on what agencies take on. And that could have negative consequence.

MS. ROSE-ACKERMAN: Well, maybe this is a question for Anne, but -- so the -- what does the reason giving part of the EPA mean, right? So I take it those reasons why this is good policy. Or, you know, why you carried out the like procedures? And why this was good policy given the statute in which you operate.

There's another sort of reason, which is the reason why we're regulating here is because we think it's constitutional. Well, we're kind of trying to take on some of these things that might arise in the context of a judicial challenge as opposed to the other sort of reason giving, which has to do more directly with the link between the policy choice and what you're coming up with, right?

MR. LITAN: I could get blown away on this because I have a final observation for a final question, but other people?

MR. LAZARUS: I just want to say a little bit. I'd be willing. I could be very wrong, but I would be willing to say that on the basis of the oral argument in the *West Virginia* case that first of all that -- and the OSHA vaccine case seem to me to indicate we're really getting a pretty clear indication that Gorsuch's as bid to radically invigorate the nondelegation doctrine isn't going anywhere with this Court. And maybe that will be demonstrated by the fact that the issue is just never really discussed.

With respect to the major questions, I think that there's a chance, and I could be wrong, but there's a chance that there will be a clear majority. It would be nice if it were six instead of five. But we're really don't exactly know where Kavanaugh is going to come down on this.

That would make clear that major questions is really only a tool of statutory interpretation and that the big deal aspect of it is cabined by a big deal in terms of what the statute says the agency is supposed to do. And that would be quite significant, I think. It may not happen though and they would be right.

MR. LITAN: So this is my big picture observation and leading into the last question.

So I mean what we've established here today is that there's just a hell of a lot of ambiguity going forward about where we're going. But I think as a generalization, even with all the differences and, you know, the abuse of the six in particular that we're talking about. There's just a lot more skepticism now.

Is there greater risk that when agencies regulate, they're going to run into a skepticism under whatever name you want to put it? You know, delegation, major questions, constitutional avoidance. I mean avoidance doctrine, whatever. There's just a lot more skepticism.

Now, in a perfect world. In a world in which we're not so politically polarized, the logical reaction of Congress in this environment is to say from now on when we legislate, we're just going to be a lot more careful, all right? We're just going to really

we're not going to add -- we're not going to have some big pronouncement about we're going to regulate everything, you know, under the sun.

We're going to be very specific about what we want. And they're going to give a lot less discretion to the agency and be a lot more specific. But we don't live in that world. We live in a highly polarized room where nothing passes, all right? But I don't see any new regulatory statutes passing at least for the next five or 10 years given where we are politically.

So that means that all the actions of the Supreme Court as a practical matter. And if that's right then are we in over the next four or five, seven or eight years or whatever it is or how ever long we have the sixth person, you know, semi-majority.

Are we in for basically incrementable modifications of these doctrines and sort of maybe we're in a world with a bunch of concurrences and there's no clear guidance except that there's this overwhelming different sources skepticism? Is that the future that these agencies are facing? In fact, the whole society is facing is this tremendous uncertainty about what the Supreme Court is going to say about new rule that comes down? So this is really the final comments for people.

MS. ROSE-ACKERMAN: Can I just add a sentence to that?

MR. LITAN: Yeah.

MS. ROSE-ACKERMAN: Well, it doesn't hear very many cases over the year. There's no prediction is right that they ought to increase their caseload? Right or not?

MR. LITAN: That's a good point. Others want to weigh?

MR. WURMAN: Let me say one thing about your comment about in an ideal world, the Congress would do more legislating. I honestly don't think it has to do with polarization at least in this context.

I mean obviously polarization plays a role, but this is just public choice theory 101. This is John Hart Ely in 1980, right? Why does Congress want to delegate power? Because it's a win/win situation for them, right? Making policy, picking winners and

losers. Who's going to bear the costs of social policy?

Those are questions we would rather not address, right? We rather pass a statute. We want clean air. Of course, the joke is the Clean Air Act is much more detailed actually. Congress did use to know how to legislate, right? But it's much easier to pass a statute that says, we want clean air. And then when the agency comes back and says, okay, here's how we're going to do it. Here's who suffers the consequences. Here's who pays the cost. Then the legislators can win on the back end too because they can say, well, I'll lobby the agency on behalf of my constituents. I can bat. I intended to -- it's a win/win for them, right?

And so, this actually brings us back full circle to something Susan said initially, which is could there be an argument for why courts should get involved in these questions? Again, I don't know if it's majorness versus something else that is nondelegation. But one argument is because of public choice there is. This idea that actually Congress can't be trusted to legislate properly here and stay within its bounds and not delegate authority because of its perverse incentives so to speak.

But if the Court started striking down statutes, what would Congress do then? I have no idea what public choice theory tells us about this. But someone should write a paper if they haven't about the public choice implications of the Court reinvigorating the nondelegation doctrine.

MR. LITAN: At least I give you the --

MR. LAZARUS: Can I just say --

MR. LITAN: Yeah, you gave me an idea for a paper, right? Go ahead, yes.

MR. LAZARUS: And I as a public choice theorist are often theorists in worse sense. They actually have no direct knowledge or experience of the Congress as it actually functions. And so, I think they should be modest in simply dismissing the Congress of the United States as a sort of a vehicle for personal ambitions of the people who are in it instead of people who actually want to respond to constituents or who have very deep

concerns about what the environmental and other policies should be.

MS. ROSE-ACKERMAN: I just want to be heard.

MR. LAZARUS: I wasn't talking about you.

MS. ROSE-ACKERMAN: Yeah, I know. But well, I guess I want to say something similar to what Simon was saying. I didn't want to be heard as saying everything Congress did was terrible. Of course, they're making compromises.

And some of those compromises are political compromises that benefit some and hurt others. And that's just the nature of legislation. It's not something bad. It's the nature of what it means to make legislation.

And sometimes delegation can be a form of compromise that doesn't imply that everybody has been paid off somehow. But you're going to give certain kinds of discretion to the cabinet department and to the agencies to make these decisions.

And we in Congress are going to be overseeing it too. You know, it's not that Congress has sort of given up. Just stands back and watches while all that happens. It's everything is a mixture. And it's pretty obvious, right? Everything is a mixture of some kind of sort of responsible technical and ideological decision making and political bounty necks that produce outcomes. And that's all the compromises we're stuck with.

I assume, you know, any of this is more like a one-party state in which the party just dictates everything to everybody, right? And we don't want that. We want -- you've got to live with some of these compromises that are inherent, you know, in the constitutional infrastructure.

MR. LITAN: So I'll make this an empirical observation back to Ilan's point. And that is there are regulatory statutes and in my advanced age, I can't give the exact name of the statute. But there are regulatory statutes that are incredibly detailed, all right?

MS. ROSE-ACKERMAN: Yeah, I know.

MR. LITAN: So I'll take, for example, the regulatory statute dealing with pesticides. It's got a long name to it, all right?



I remember when I was in the government 30 or 40 years ago. It was unbelievably detailed, you know. And it seemed to leave the agencies very little room for doing anything. I think Dodd Frank is incredibly detailed. So, you know. And so, it's not always the case that Congress just passes the buck, you know?

MS. ROSE-ACKERMAN: Let me just say something. In this comparative work I've been doing, you know, some people -- you look at -- you pay or a German parliamentary system. Their statutes are much less detailed. Why? Because it's a unitarian system. And with the executive wants detailed statutes. They wouldn't, right?

And you can't -- and the people in power at that particular point in time in the parliament system can't lock in the future because another unitarian government will come in and can undo it. So it's a part and parcel of our separation of power and presidential system that we have some incentives for people that try to lock these into the statute alignments because it's not that easy to change statutes.

MR. LITAN: Right. Any other final observations from what has been, I think a terrific discussion? Any other?

MR. WURMAN: Bob, let me just say one more thing about your observation. I think it's right. Which is why I actually think reinvigorating the nondelegation doctrine won't do as much damage as we think.

The Clean Air Act is incredibly detailed, right? Is this delegation a power to make national ambient air quality standards would that be a violation of the nondelegation doctrine under some theories? Yeah, under some theories. Under Phillip Hamburger's (phonetic) theory, I think. Maybe under Peter Thomas' theory. But is that, you know, Congress made all the important decisions. Congress knows the consequences of the 18-day national ambient air quality standards. It is a very detailed scheme.

You know, would I if I were a judge under my theory of nondelegation which I've written a bit about. Would I strike that down? Probably not, right? A lot of these statutes are detailed, right? On the other hand, *Gundy* at least has not narrowed in the way that Justice

Kagan narrowed it, right? I think her narrowing was plausible, but under the dissents reading of the statute it was an Attorney General decide whether we should apply the sex offender requirements to pre-act defenders.

And it's like, well, that's not detailed at all. That's totally a (nakeddelegation and, you know, I think as a plausible candidate for validation. You know, is the Clean Air Act plausible? Well, less plausible candidate.

MR. LITAN: Others want to weigh in?

MS. O'CONNELL: I just want to raise two points quickly.

MR. LITAN: Yeah.

MS. O'CONNELL: The first is what would happen if we got sort of reinvigorated doctrines? It's like and it gets pushed back to Congress?

And I think you have to look to omnibus legislation then. So I do think Congress gets stuff accomplished, but a lot of the substantive work that it does in order to have kind of make it through the filibuster is this kind of must pass legislation. So you're going to not stop an omnibus spending bill.

And so, you're going to get regulatory provisions as we have now in omnibus spending legislation. And I don't know if that's the ideal place to give direction to agencies because I don't know sort of how much kind of negotiation and working out of all the details is happening when some group manages to convince leadership to kind of get it in the omnibus package. If I'm thinking about institutional competence, I think I'm going to prefer the agencies to provision in omnibus spending.

The second point is what --

MR. LITAN: Anne, can I stop you there? Just one question. You said there are problem if you put a bunch of regulatory junk in a spending package? No. Basically, it all can go in?

MS. O'CONNELL: Yeah. Well, there are some -- I should be careful. There are some constraints. You can put in a bunch on the regulatory side.

MR. LITAN: Okay.

MS. O'CONNELL: And you can at least stop. So you can reappeal certain things. So if you've changed from one administration to the other, right, you could have a rider that kind of prevented any enforcement action, for example, on a particular regulation.

MR. LITAN: All right. Thank you.

MS. O'CONNELL: Yeah, fair enough. And then the second point is what are we going to allow states to do if stuff changes at the federal level?

And, you know, the Court just this week, right? Has taken a case with regard to California and some of its provisions with regard to, you know, various products, right? Pork products? And kind of what can states do? And there are certain states that are more regulatory than the federal government. Even when the federal government is under a democratic administration. And then of course states that are more conservative than the federal government when the federal government is again under Republican administrations.

And so, the question is sort of what then is going to be allowed by the states. And how will that play out on regulatory beneficiaries and regulatory entities that they're facing kind of competing regulatory systems.

MR. LITAN: And to add to that one of our commentators just wrote in that in this world of ambiguity, we could end up getting a proliferation of lower federal court decisions. Going off in all kinds of different directions just to even further cloud the regulatory environment. And I see Simon nodding his head that that's a distinct possibility. Any other closing thoughts? There's no need for us to go completely the full hour because I think we fully exhausted or being --

MR. LAZARUS: Well, I'll just add that what you just said, Bob. That what the commentator said is very important. And I think with respect to Chevron. I think that *King versus Burwell*, other people might disagree with this. That *King versus Burwell* basically decided that the scope of Chevron issue would -- in saying that where there are major questions with big impacts that are central to the statutory schemes the Supreme Court by the courts are

going to decide it.

But with respect to all the other decisions, Chevron Deference will stay in effect. If Chevron Deference didn't stay in effect for all these other zillions of less than major regulatory decisions had to be made anew by the courts, the courts would go crazy and they wouldn't do it. So I think we basically there on that. Other people may disagree with that.

MS. ROSE-ACKERMAN: I thought that was part of Scalia's, you know, behind part of Scalia holding in the early cases. You know, you didn't want to be inundated with all this other rule making stuff.

MR. WURMAN: Well, can I, Bob, jump in and say, we haven't talked much about Chevron, but actually and Simon just opened up a nice opportunity.

I will say one thing, right. I joked earlier that Chevron will survive because a lot of judges aren't going to find ambiguity in statutes. But there's another way in which Chevron survives. And there's a big literature here. I wrote a piece in the University of Pennsylvania, a law review called the Specification Power. Chrisman Hickman wrote something called Chevron's Inevitability and the George Washington Law Review. Mike Hurst has done something similar.

And the idea here is what if what the agencies are doing here isn't actually interpreting law? What if it's actually just interstitial policymaking which I think was the case in Chevron. Or just to put a point on it as Justice Kagan said in a Chevron like case called Kaiser.

I say Chevron like because it's about an agency's interpretation of its own regulation. She said, look, sometimes we deploy all the tools of statutory interpretation and the law just runs out. That's what she said.

Well, excuse me. If the law has run out what are you interpreting? You weren't interpreting anything. You are filling in a gap, right? It is a policymaking legislative type rule that the agency is doing. And the only limit would be the nondelegation doctrine which doesn't apply to most of these interstitial rule making. So Chevron might survive in the

guise, but that's really just arbitrary and capacious review, I think at that point. So it might survive in that guise.

MR. LITAN: Interesting. Okay. I think we will leave it there and I want to thank everybody for what I found to be an illuminating discussion. And maybe one or two people were watching. They'll get more ideas from it. Thanks so much for being here. Okay. Bye-bye.

\* \* \* \* \*

## CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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