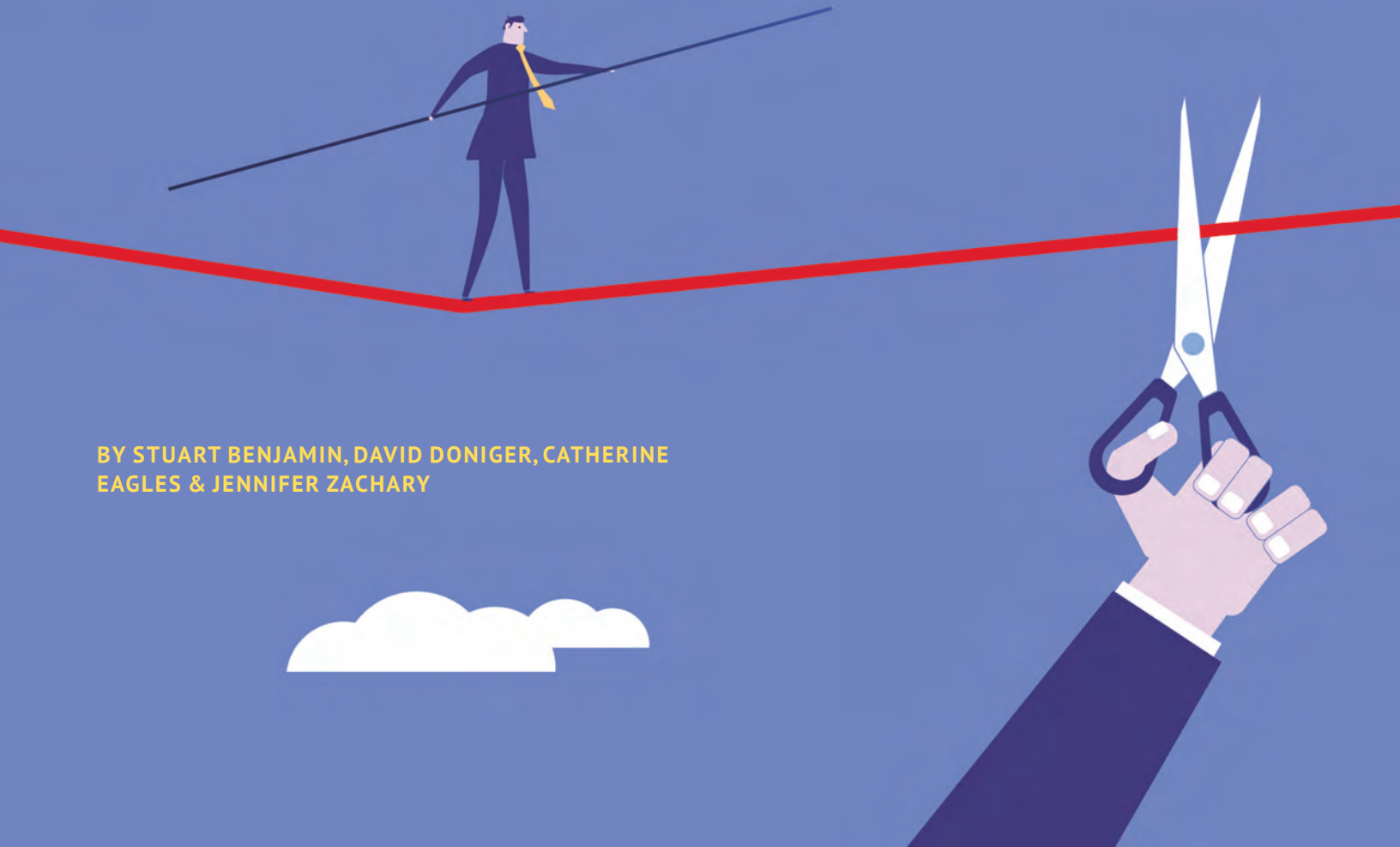
# THE NEW ADMINISTRATIVE STATE?



BY STUART BENJAMIN, DAVID DONIGER, CATHERINE EAGLES & JENNIFER ZACHARY

# HOW RECENT SUPREME COURT DECISIONS MAY SHAPE REGULATION, DEFERENCE, AND THE ROLE OF THE COURTS

When it comes to administrative agencies, the U.S. Supreme Court has been busy. Last term, the Court decided four key cases on the issue, including one that overruled the landmark 1984 case *Chevron v. Natural Resources Defense Council*, which had required courts to defer to reasonable agency interpretations of ambiguous statutes.

In the days before the second Trump inauguration, the Bolch Judicial Institute and the American Bar Association co-hosted a panel at Duke University School of Law discussing these cases — and their potential effects on industry, lower courts, agencies, citizens, and more. Panelists included **CHIEF JUDGE CATHERINE EAGLES** of the U.S. District Court for the Middle District of North Carolina, **DAVID DONIGER** of the Natural Resources Defense Council (NRDC) (who originally argued *Chevron*), and **JENNIFER ZACHARY**, general counsel of Merck. **STUART BENJAMIN**, the William Van Alstyne Professor of Law at Duke, served as moderator. Their conversation, edited for clarity and length, follows.

**STUART BENJAMIN: The Supreme Court decided a suite of four cases last term that make it somewhat more difficult for the agencies to do what they might want to do.**

**You can have your own normative judgments about whether that's a good idea or a bad idea, but I think it is fair to say that agencies would have preferred basically all of these cases to come out the other way. And some of these cases create some uncertainty.**

**The most prominent is *Loper Bright v. Raimondo*. *Chevron* had said that if the statute was clear, then that was the end of the matter, and if the statute was not clear, then the court would defer to any reasonable agency interpretation. And in *Loper Bright*, the Court overruled *Chevron*.**

**It would be hard to overstate how many times *Chevron* was invoked over the years, although it had not been invoked for a while in the Supreme Court. So this is actually one of those situations in which getting rid of *Chevron* might have had less of an impact on the Supreme Court, since it was already pulling back from *Chevron*. But the key thing for our purposes is that in *Loper Bright* the Court said, "No, we are going to engage in the statutory interpretation and we are not going to defer to the agency interpretation. Agency interpretation may be entitled or is entitled to some respect under a case called *Skidmore v. Swift & Co.*, but giving some respect to an interpretation is different from deferring to the interpretation. We are still ultimately making the decision." There's debate about how much of a difference that actually makes.**

**The second case that I want to mention is one that you might not have heard of: *Ohio v. EPA*. It's fair to say that the Supreme Court majority was, depending on your perspective, more aggressive or careful than usual in evaluating whether the agency below had justified its factual and policy decisions. The more liberal justices dissented, along with Justice Amy Coney Barrett. Barrett wrote for the dissenters, essentially saying that the agency had in fact taken into account the arguments that the majority said that the agency should have taken into account.**

**The third case is *Corner Post Inc. v. Board of Governors of the Federal Reserve System*. *Corner Post* involved a statute that said you had to sue within six years after the right to sue "first accrues." The Court said, "Well, the right doesn't accrue until you've been injured. Even if the regulation ▸**

"ALL OF A SUDDEN, ANY DISTRICT COURT JUDGE CAN SUDDENLY INTERPRET IN A WAY THAT ISN'T CONSISTENT WITH THE UNDERSTANDING OF THE EXPERT SCIENTIFIC REGULATORS OR THE PEOPLE WHO PARTICIPATED IN THAT PROCESS OF SHAPING THE LEGISLATION. THAT IS DEEPLY UNSETTLING TO US."

*JENNIFER ZACHARY, MERCK*

**was issued 50 years ago, if your organization was just founded a year ago, then you get to challenge it." Now in some ways that sounds huge — there's no limit on the imagination of somebody to create a new entity.**

**But maybe it's not so massive. There are actually only 12 statutes that use the first accrued language. However, one of them is the Federal Tort Claims Act, which provides the default provision for suits against agencies and thus is a big deal. Lots of statutes specifically provide statutes of limitation. But, for those statutes that use the first accrued language, it is a big deal. But that is a subset of agency decisions.**

**The final case is *SEC v. Jarkesy*. The holding was that when the Securities and Exchange Commission is seeking civil penalties for anti-fraud violations, it can't adjudicate that. That looks too much like a common law fraud case. The SEC has to bring that case in an Article III court. So *Jarkesy*'s holding is reasonably narrow. The question is whether the Court will expand it and make it harder for agencies to engage in adjudication and instead send everything to courts.**

**So those are all cases from this past term. All of them are significant and, again, significant in ways that agencies might not be wild about.**

**The other element here is the major questions doctrine — the Court has said that, in extraordinary cases, Congress has to clearly give the agency authority to regulate. "Extraordinary" cases are defined as those that have enormous economic and political significance, and those that go beyond what the agency has done in the past. In those cases, the Court has said, "We're going to look for pretty clear language that Congress has provided the agency with authority, rather than do ordinary statutory interpretation." Justice Barrett, in a concurrence, said, "We actually should be doing ordinary statutory interpretation."**

**All right, I want to get to the discussion. All of these cases involve a fair amount of uncertainty. How do you view that uncertainty?**

**CATHERINE EAGLES:** Everybody always looks at me first.

**DAVID DONIGER:** You're the chief judge.

**EAGLES:** Any time the Supreme Court changes the law, I get told by the parties in my courtroom that it changes the law a lot. At least half the time it does not. Right now there are around 20 cases in the Fourth Circuit from either district courts or the circuit court addressing *Loper Bright*, and half of them say *Loper Bright* doesn't even apply here.

Some cases — like *United States v. Booker*, regarding the sentencing guidelines — really do change everything, and we knew it when it happened. Some of these cases we're told change a lot of things, but whether they actually do is a totally different matter. Appellate courts are always changing things on us. District courts are used to rolling with the punches, and we will be taking them as they come.

**BENJAMIN: Jennifer, the people I know who are in Fortune 500 companies by and large do not like uncertainty. Sometimes uncertainty can be an opportunity — like an arbi-**

**trage opportunity — but for companies, uncertainty is usually not their friend. How do you think about this?**

**JENNIFER ZACHARY:** First, I'll offer the caveat that while I am the general counsel of Merck, I'm not speaking on behalf of Merck, so it's not fair to quote me in briefs. And I'm probably also influenced by the fact that I started my career as a Food and Drug Administration [FDA] attorney arguing for the agencies and did the same at the Department of Justice.

But I think you're absolutely right that business abhors uncertainty. We can adjust to all kinds of bad laws — even unfair laws — if we know what they are and can plan for them. I think what's really challenging about this suite of Supreme Court opinions is that it's not clear what the law is going to be six months from now, a year from now. It used to be that we had a clear sense of the law that was coming, because we were engaged in the lobbying process, and we helped to shape policy.

Congress gives us a period of time in which to implement, so we usually have a lead-up. But now, all of a sudden, any district court judge can suddenly interpret in a way that isn't consistent with the understanding of the expert scientific regulators or the people who participated in that process of shaping the legislation. That is deeply unsettling to us.

And the idea that all of a sudden long-settled statutes can be upended with *Corner Post* . . . now a brand new biotech firm can go in and challenge something that's been on the books for FDA for a hundred years. That is really challenging.

So what we worry about is that uncertainty. I think it's going to be really challenging to navigate. There is a 10- to 15-year period between discovery and eventual marketing for a drug. That's a lengthy time horizon during which — if things change — our pipeline can be profoundly disrupted.

Just to give you an example of something concrete, the Food and Drug Act says that a drug can be approved if it's "safe and effective." Well, what does that mean? Over the course of time, through a lot of agency determinations, we've come out with this idea that a drug is safe and effective if there are two "adequate and well controlled" clinical studies. Well, what is adequate and well controlled? There's a lot of agency guidance that describes that, too — it's not one study, it's not three, it's two. If suddenly people can challenge that, and we've been working on a drug for 12 years with the understanding that the rule is two studies, then our whole development program could blow up. So the uncertainty has dramatic impacts. We'd rather just know what the rule is.

**BENJAMIN: But the drug trials only cost, like, a billion dollars.**

**ZACHARY:** Yeah, it's no big deal.

**DONIGER:** I have the maybe unique position of having been involved with *Chevron* from the beginning. I argued the case in 1984, and we filed an amicus brief in the *Loper Bright v. Raimondo* case. And so I like to say that my career has been bookended by the birth and death of *Chevron*, and I've been on the losing side both times.

In *Chevron*, the Supreme Court interpreted a provision of the Clean Air Act that we thought was absolutely clear. We failed to convince the Supreme Court of that. The Court decided that the definition in question was ambiguous and allowed [President Ronald] Reagan's Environmental Protection Agency to give it a deregulatory interpretation. The Court rebuked lower court judges for a series of related decisions in which the Court felt that the judges were inappropriately resolving ambiguities by inserting their own policy preferences. Instead, within the bounds of reasonableness, the Court directed lower court judges to defer to the policy preferences of the agency. When a law is ambiguous, the Court said, that reflects a congressional delegation of discretion to the agency. The political branches, the Court said, should make these policy decisions, not judges.

On its face, this was a neutral principle. It could be used to do less with laws or more with laws. And initially it got a lot of support from judges and scholars on the conservative side like Judges Ken Starr and Larry Silberman and — most importantly — then-Judge and later Justice Antonin Scalia. "This is the way it should be," they said.

I give Justice Scalia credit for consistency over the years, but many of the others got less consistent when first [President Bill] Clinton and then [President Barack] Obama were in charge and began to use the discretion under *Chevron* to do *more* rather than *less* with the environmental and other regulatory laws.

Starting with the Obama era, the Federalist Society and others began a campaign to overturn *Chevron*. It ▸

started with picking more conservative judges, especially for the high court. There's a tape of White House Counsel Don McGahn back in 2017 or so saying that the reason they picked Neil Gorsuch to be on the Supreme Court is that he had written an opinion calling *Chevron* into question.

Next, they went fishing, so to speak, for a client and they came up with two herring fishing boats in the Northeast. One of them is called "Loper Bright" and the other "Relentless." *Relentless* became the companion case (and would've been the better name for the case). The decision is based on a reading of the Administrative Procedure Act and avoids constitutional reasoning. *Loper Bright* contains a lot of pounding on the table that the legal questions are for judges, not agencies. The decision, however, contains an interesting passage noting that Congress frequently writes laws like the Clean Air Act, that delegate discretion to an agency to make a determination. The Court said that when Congress does that, that is the law. A judge's job, then, is to define the "outer boundaries" of the discretion delegated to the agency. If the agency's decision is within those boundaries, then the judge's job is to determine whether the action is arbitrary and capricious, which remains the most deferential test. Now that sounds a lot like *Chevron* Step Two. Adrian Vermeule at Harvard has said that what was *Chevron* deference is now *Loper Bright* delegation, but it's not all that different. So while *Loper Bright* is one of the string of cases Stuart mentioned that signal the Court's hostility to administrative agencies, it is not clear how much difference it will make in key agency questions. We will have to see if lower court judges remain restrained, or if they start inserting their own policy preferences over agencies' once again.

**EAGLES:** At least until some other court inserts its policy.

**DONIGER:** *Loper Bright* does introduce potentially a lot of uncertainty and instability. But the Clean Air Act, somewhat unusually, directs all nationally applicable clean air cases to the D.C. Circuit, which is the most practiced in dealing with administrative law issues, and the makeup of that court has not changed much ideologically. So I'm cautiously hopeful that *Loper Bright* actually won't make the sea change difference that the Federalist Society types were looking for.

**EAGLES:** I do think we're going to see some shift to talking about delegation instead of deference. That's going to be the word rather than deference. But, David, you were just talking about the language used in the opinion noting that the court fulfills its role by recognizing constitutional delegations and fixing the boundaries of the delegated authority. And then in connection with the other case you mentioned, "ensuring the agency has engaged in reasoned decision-making within those boundaries." Is that the same as arbitrary and capricious? I don't know. Fortunately, I'm not on the D.C. Circuit.

**BENJAMIN: Which of these cases do you think has the most impact on the system as a whole: agencies, judges, courts, corporations, etc.? And which**

"THE QUESTION I WANT TO ASK IS, WHOSE LIBERTY INTERESTS ARE AT STAKE? FOR EXAMPLE, THE CLEAN AIR ACT OBVIOUSLY RESTRICTS THE LIBERTY OF POLLUTERS, BUT WHY DID CONGRESS PASS IT? TO PROTECT THE LIBERTY OF PEOPLE SUFFERING FROM AIR POLLUTION."

*DAVID DONIGER, NATURAL RESOURCES DEFENSE COUNCIL*

**case do you think is the most important for your particular part of the world?**

**ZACHARY:** If *Loper Bright* ends up being sort of the broad version of *Loper Bright* whereby we disregard the technical competence and expertise of agencies, I think that across the whole economy it becomes a very big deal. So that, for me, would be the most impactful case.

**EAGLES:** I think the D.C. Circuit's world is really going to change with *Loper Bright*. They are going to get so many challenges. For district judges like me, none of these cases is going to affect our day-to-day world. We've seen Supreme Court cases relating to employment or sentencing that were much more impactful on us.

Still, I think we're going to see *Loper Bright* a lot. It comes up in sentencing guideline questions and in Title VII questions. Exactly how that plays out, I don't know. And we see major question arguments a lot, too.

**DONIGER:** I think that *Loper Bright* will have a lot more impact under statutes, unlike the Clean Air Act, where the cases go to district courts or to other circuits. The Fifth Circuit is so hostile to the government that they're even being corrected three, four times a year by the Supreme Court majority.

And this raises the issue of the judiciary becoming more partisan as you have cohorts of judges appointed by [President Donald] Trump. There's always some valence in the appointees with whoever is the president, but from my standpoint, Trump's first term appointees were quite extreme compared to the prior norms. People might think that [President Joe] Biden corrected in the opposite direction. Now Trump is going to have an opportunity to appoint more. But more partisanship or ideological division among judges leads to a lot of forum shopping.

I don't have to forum shop because most of my litigation is automatically in the D.C. Circuit, but with FDA litigation or most other regulatory litigation, you can go anywhere your headquarters or operations are, and challengers tend to want to go to the Fifth Circuit.

You might ask whether *Loper Bright* will have other consequences. Do we still need the major questions doctrine, announced in *West Virginia v. EPA*, if there's no *Chevron* deference? And does *Loper Bright* change the interpretation of the Clean Air Act provision at issue in that case? The Supreme Court struck down a pretty expansive Clean Air Act rule on power plant carbon pollution, but at the same time, the Court determined that the agency had authority to regulate that pollution in more traditional ways under the same provision. And *West Virginia* implicitly affirmed a line of cases, now four Supreme Court cases, holding that carbon dioxide and other greenhouse gases are air pollutants subject to the Clean Air Act. The quarreling now is just with *how* the EPA may regulate carbon pollution, not whether. So there is a pathway still to act under that statute, but you have to have an administration that wants to do it.

**BENJAMIN: I think that the major questions doctrine may well be more significant than the ruling in *Loper Bright*. But again, there is a fair amount of uncertainty as to what we're even calling major questions after *Loper Bright*. After *Loper Bright*, the Court is supposed to do ordinary statutory interpretation and to accord respect to the agency's interpretation under *Skidmore v. Swift & Co.*, which has been around for 80 years. The uncertainty for major questions is: What are we calling a major question?**

**Guess what every litigant says in response to the major questions rulings? "What I'm suing about is really incredibly important — that's why I'm suing." The Court has said it also has to be something beyond what the agency has done in the past, but still as a litigant you can say, "Yeah, I think what the agency is doing is beyond what it has done in the past."**

**There's also the question of nationwide injunctions. If a district judge can issue a nationwide injunction, that makes a single district judge's determination that some regulation deals with a major question a big deal. A single district court judge can decide that Congress has no power to regulate and therefore this rulemaking that applies to the whole country can now be enjoined as to the whole country. And so the interaction of the possibility of a nationwide injunction and both major questions and *Loper Bright* is of particular significance.**

**EAGLES:** That ties in with the rule of law, because there are a number of places — in the Fifth Circuit, but also elsewhere — where you have one-judge divisions. And so the judge shopping is easy, Congress has expressed some concern about this, and if judges don't let the new administration do what ▸

"ONE OF THE CRITIQUES OF *CHEVRON* IS IT ALLOWS AGENCIES TO SWITCH POLICIES EVERY FOUR YEARS — BECAUSE THE WHOLE POINT IS: IF THE STATUTE ISN'T CLEAR, THEN WE'LL DEFER TO ANY REASONABLE INTERPRETATION. . . . BUT OTHERS WOULD SAY THAT'S NOT A BUG OF *CHEVRON*, IT'S A FEATURE. WE WANT THAT. WE WANT ELECTIONS TO MATTER."

*STUART BENJAMIN, DUKE LAW SCHOOL*

it wants to do, you have to wonder if Congress will impose some restrictions on nationwide injunctions.

**BENJAMIN: Now I want to focus on each of your worlds. For the NRDC, for district judges, for Merck, which of these cases is the most significant?**

**ZACHARY:** For my industry, but also probably for a lot of big business, *SEC v. Jarkesy* is the most important.

A lot of what the administrative state does is through administrative law judges, who are employees of those agencies and ultimately report to the top agency heads. For example, almost everything that the Department of Health and Human Services regulates, which is more than 25 cents of every consumer dollar, has a civil money penalty associated with it currently that goes through the administrative law court.

For instance, if someone underage walks into a vape shop and they try to buy a vape and they sell it, the fine comes as an administrative penalty. Now if *Jarkesy* is expanded in the way that I think is the only fair reading of it, that vape case has to go to a district court judge. So we're talking about hundreds of thousands of cases that are now going to flow through the courts. Personally, I think there's a lot of efficient ways to deal with those. But I do think it's a fundamental fairness question: You can end up with hundreds of millions of dollars of fines being assigned by agencies where a company or an individual had no right to be heard by a jury. So, I think that *Jarkesy* is going to be huge.

**BENJAMIN: What is the efficient way of dealing with these?**

**ZACHARY:** Most people are going to settle, so you can batch them and process them in the district courts.

**BENJAMIN: And then Judge Eagles has to approve all of those.**

**ZACHARY:** It's going to take a little while.

**EAGLES:** I will say this has gotten very little attention from the district court bench. I guess maybe we're just avoiding the whole possibility of it. Magistrate judges have jurisdiction to deal with a lot of things. If you go over to a Veterans Affairs medical center and you park where you shouldn't in the hospital parking lot, or you get into an altercation in the parking lot, or you get a speeding ticket on the Blue Ridge Parkway, these end up in front of United States magistrate judges and they impose fines and penalties, but they're not very big dockets in our district. But we are pretty good at coming up with processes to handle things like this.

**DONIGER:** In terms of all these cases together, what do they mean? The first thing that they obviously mean is that at least five members of the court are quite hostile to our government, to big government. Gorsuch says regulation should be really hard. Probably passing laws should be hard because they restrict the liberty of the people who are subject to those laws.

Well the question I want to ask is, whose liberty interests are at stake? For example, the Clean Air Act obvi-

ously restricts the liberty of polluters, but why did Congress pass it? To protect the liberty of people suffering from air pollution. Because unrestricted air pollution causes illness and death, undoubtedly a serious restriction on their liberty.

Congress didn't ban air pollution, but it ended the previous period of basically free license for air pollution. It tried to balance competing liberty interests — interests of the regulated and the interests of the beneficiaries of regulation. Gorsuch doesn't seem to have the beneficiaries of regulation in his view. Justices Clarence Thomas and Samuel Alito and sometimes Justice Brett Kavanaugh display the same tendencies.

So why do we have these laws? Because in this complex, industrial world, there are many examples where one group's actions harm another group. Often it's corporations harming ordinary people, whether it's pollution or unsafe drugs or economic fraud. There are so many such issues — many highly technical and fine-grained — that it is impossible to expect 535 generalists in Congress to write laws of the exacting specificity needed. That's why we have these regulatory agencies.

Congress can't do the workload of administrative law judges. Neither can judges. But if you reject these premises and are bent basically on destroying the federal government, then as one wag said, you want to get the government small enough that you can drown it in a bathtub. This is the theme of some of these decisions. So we have to see how far they take this and how much it hamstrings our ability as a people to have a government capable of dealing with modern problems at the speed and gravity that they come at us.

**EAGLES:** Well, it's going to be interesting to see, too, if they don't seem to have the same objections to state regulation. The states have much broader powers — police powers — and there are some powers that overlap with the FDA's authority. You're going to have preemption questions that come up, and if the federal government can't regulate, are they going to let 50 states regulate differently?

**BENJAMIN: Are you looking forward to dealing with any of these cases? Do you look at any of these cases and see benefits?**

**ZACHARY:** Congress has been broken for a couple decades now, and you see presidents trying to deal with this by executive order or trying to take some statute and push something into it that doesn't fit. I think maybe this forces us as a society and a culture to confront the fact that we've let Congress get broken. Instead of the president trying to do creative things to get around this, maybe we can go back to acknowledging that we have to compromise in Congress if we're going to have any laws, if we're not just going to grind to a halt.

The major questions doctrine cases say, "Whoa, whoa, stop. There's no way that when Congress passed this law 30 years ago it intended this thing to happen." Maybe that will force Congress to take it up. If Congress wants to do something about student loans, for example, they're now going to have to deal with it. So, I think that's a positive.

**DONIGER:** I just don't know if it'll work. It's true that Congress is broken. But even the great Congresses of the late '60s and '70s, which passed all these environmental and civil rights laws on a bipartisan basis, and which were led by exceptionally capable congressmen and staff — even they couldn't act in granular detail or anticipate future problems clearly enough. So they knew they had to delegate to agencies, subject to transparent processes, congressional oversight, and judicial review.

I think the goal of some judges and academics is to use an electric cattle prod to get Congress back into legislating again. I doubt that will succeed, because others are fine with not having an effective government anymore. They just want to drown it in a bathtub.

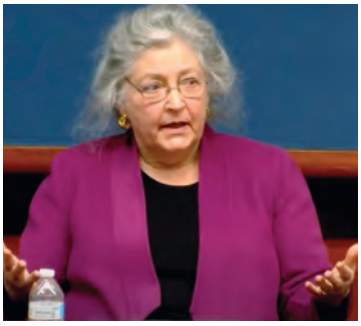
**BENJAMIN: Judge Eagles, do any of these make your life in any way better?**

**EAGLES:** They don't make it worse, but they don't make it better.

**BENJAMIN: But it sounds like the uncertainty may make it worse, right?**

**EAGLES:** Well, yes, but I mean that's my bread and butter. If there's no uncertainty and no crime, I don't have anything to do. That is why I am a judge — to resolve uncertainty. So if I don't have uncertainty because of *Loper Bright*, I have factual disputes to resolve and jury cases to try. So uncertainty is just what I do every day.

**BENJAMIN: You had mentioned delegation as a potential watchword for the future. I would appreciate if you all could read the tea leaves a little bit** ▸



"THAT IS WHY BUSINESSES ARE HERE IN THE UNITED STATES — BECAUSE WE HAVE THE RULE OF LAW. . . . THAT'S ALSO WHY WE HAVE OUR INDIVIDUAL LIBERTIES."

*CATHERINE EAGLES, CHIEF JUDGE, MIDDLE DISTRICT OF NORTH CAROLINA*

**more. Is delegation going to come up more precisely?**

**EAGLES:** It's so statute-specific, right? Everything's going to have to be decided. This is how we always do it, case by case, statute by statute, subsection by subsection, and, beyond that, I know nothing.

**ZACHARY:** I think we will see the nondelegation doctrine, and it is going to be interesting. I think it will be a pullback to the idea that, actually, Congress does have a job to do.

**DONIGER:** Justices Thomas and Alito would like to just wipe out large parts of the government. And you could do that through reviving the nondelegation doctrine. So far, the Chief Justice has written more carefully, and he realizes the convulsive implications of going with constitutional rulings that Congress couldn't change.

I thought the *Ohio* case, which is not about delegation, was really interesting, because Justice Barrett basically said, "Enough of using the shadow docket and enough of getting into the nitty gritty of this; the EPA did a damn good job on this and we should keep our noses out of it." I wasn't surprised that the liberals would think so, but it was a welcome surprise that she did. So I don't know where the Court's going to go on this — how radical.

**AUDIENCE MEMBER:** Does the focus on returning power back to Congress possibly lead to more certainty? Agencies have to deal with changes in administrations, which could upend a whole set of rules and regulations every four years, right? So I'm wondering whether you think that was a problem the Court was thinking about, and whether it was just returning to something that would actually be slightly more stable.

**BENJAMIN: One of the critiques of *Chevron* is it allows agencies to switch policies every four years — because the whole point is: If the statute isn't clear, then we'll defer to any reasonable interpretation.**

**In 20 years, after all of these various statutes have been interpreted, then we might have a lot of certainty and knowledge. And that is one of the critiques of *Chevron*. But others would say that's not a bug of *Chevron*, it's a feature. We want that. We want elections to matter. The key is that *Chevron* allows for this flip-flopping in a way that *Loper Bright* may not.**

**DONIGER:** At least in my area, there are a couple of areas where there have been flip-flops, but the vast majority of the regulations are stable. So I think flip-flopping is sort of an occasional cause célèbre rather than a deeply problematic thing.

**BENJAMIN: Let's imagine what I fear is a very likely scenario: We have a government budget that has been slashed by $2 trillion, a dysfunctional Congress, and a court system overrun with cases that it cannot handle. Here we have a representative of industry, a chief judge, and a lawyer from a group that does impact litigation. What can we all do in response to the paralysis?**

**EAGLES:** Maybe work to end gerrymandering. You can work locally at the

state level. States decide voting districts. In North Carolina, where I have some experience with gerrymandering litigation, if your districts are divided that clearly, then you often don't get moderates and you often don't get people who are going to compromise. The Supreme Court doesn't like gerrymandering lawsuits either and is fine with the state deciding based on partisanship pretty much as long as it's not a cover for race discrimination. So a lot of it starts there.

**DONIGER:** So, within that context, there are often situations where industry and the environmental community can find common ground. We have worked out common positions and agreements in regulatory, legislative, international treaty, and other settings. I helped pass the only major environmental law enacted during the first Trump administration, regulating refrigerants. It was developed and passed on a bipartisan basis with the support of the industries and environmental groups. We have to find ways to do that more often.

**ZACHARY:** I like to think about balance over time in the United States — we swing one way and then we swing back another way. Europe is regulating itself out of existence. The workweek there, the different regulations that exist just for the sake of giving the European Union something to do — these are not regulations that are actually advancing anything meaningful. And if you look at the European economy and what's happening there, it's easy to see. There's a reason why all the COVID-19 vaccines were developed in the United States. It's the strongest pro-innovation, but also, by the way, the best safety record for vaccines of any country on the planet.

So if people are worried that the United States has shifted in the last 25 or 30 years to this very regulatory state, maybe what's coming now is a little bit of a swing back, and my hope is we're going to stay somewhere in the middle at the end of the day.

**BENJAMIN: Let's imagine there's a government shutdown or an FDA that's unable to function. Is that basically a disaster for Merck?**

**ZACHARY:** Absolutely. We talk about the suite of cases as potentially weakening the regulatory state. I think that most of business would say that isn't a good thing. This idea that we have government that has rigorous regulations and oversees what we do is really important. We know that when we buy a product and it's a cell phone, it's going to do certain things for us and it's not going to steal all of our personal privacy information — the government stamp of approval that comes from our regulatory state is really important. When I travel to Germany, I don't ride the rollercoasters at Oktoberfest because they don't have our regulatory system. If you strip the agencies of their power, that is bad for business as well and it permits a race to the bottom.

My company's been around 130 years. We believe in producing quality products. If some upstart can come up and not have very adequate or well-controlled studies and just say, "Hey, my product cures cancer, too," then we're back to the 1800s with the wagon rolling through with the patent medicines, and it's a bad state of affairs.

**BENJAMIN: I should not drink raw milk then.**

**After the election, Elon Musk and Vivek Ramaswamy said in a *Wall Street Journal* op-ed that the major questions doctrine and the death of *Chevron* together suggest that a plethora of current federal regulations exceed the authority that Congress has granted under the law. And that the Department of Government Efficiency [DOGE] will work with legal experts embedded in government agencies aided by advanced technology to apply these rulings to federal regulations and present a list of regulations to President Trump who can by executive action immediately pause the enforcement of those regulations and initiate the progress for review.**

**So, all of a sudden, *Loper Bright* and *West Virginia v. EPA* very much come front and center as a basis for someone to decide by fiat that these legal rulings now mean that the regulations we have in place are themselves already invalid. I was wondering what you all thought might result from this process.**

**EAGLES:** Lawsuits. That's what I think.

**BENJAMIN: As president or as an agency, there's a certain set of rules that are on the books and everybody's obliged to follow those rules unless you actually go through a rescission process, which is the exact same process as it takes to implement a regulation in the first place. Now you have some ability to change enforcement. But the Supreme Court has said that if the enforcement gets to the point of simply abdicating, then that isn't effectively a rescission, and you** ▸

**don't get to do that. So if they say, "We are simply not going to enforce this," then I predict there will immediately be a challenge citing to a set of cases that are triggered that say this is effectively a rescission of the statute, and you have to go through the same process that created the rule. That, by the way, takes a very long time. So I think this is, to use a technical term, "blowing smoke" on the part of those two op-ed writers.**

**DONIGER:** I won a case of that nature in the first Trump administration where they said they were just not going to implement certain regulations, and the NRDC sued in the D.C. Circuit. And the court said, sorry, you can only do that through rulemaking.

**AUDIENCE MEMBER:** What happens if we have a reprise of the *Cherokee Nation* decision, in which President Andrew Jackson famously said, "John Marshall has made his decision, now let him enforce it?" And you have an agency that says, "Well, fine, but I think you're wrong, and we're not going to do it anyway." Where do we go from there?

**ZACHARY:** I would hope, criminal contempt. We're talking about the rule of law. I mean, I hope that people take that seriously forever.

**BENJAMIN: Judge Eagles, what do you think?**

**EAGLES:** I've held people in contempt. It's pretty challenging. It's got all kinds of procedures. Direct criminal contempt has to occur in front of the court. Indirect criminal contempt requires a jury and other protections if the punishment is substantial. Civil contempt is what you do to enforce compliance for violations outside the courtroom, and you have to have hearings and trials. But yeah, it's always an option. But if we don't care about the rule of law anymore, I mean, I don't know what we do. That is why businesses are here in the United States — because we have the rule of law.

**ZACHARY:** Absolutely.

**EAGLES:** That's also why we have our individual liberties. Because if you don't have the rule of law, then does that mean the police can stop you and throw you into jail without probable cause? Does that mean they could search your home without probable cause? I mean there are a lot of ramifications.

**BENJAMIN: I don't know if this is ending on a cheerful note or not.**

**There's a set of norms, and we hope that people will follow them. We hope that a variety of people will say, "I understand the president or whatever important person in the executive branch is saying X. I also understand the Supreme Court has ruled not X, and therefore I'm going to follow the Supreme Court."**

**That is actually what happened in the civil rights movement in terms of desegregation of schools. And, in fact, one particularly notable example was when the Arkansas National Guard, which ordinarily operates under the governor, at the governor's order blocked the desegregation of a school. The Guard was then federalized by President [Dwight] Eisenhower and, having been federalized, they were now subject to the commander-in-chief, and they then did enforce the desegregation of that school. And they probably didn't want to enforce integration in their heart of hearts, either. But they did it, because they understood the role that they were in.**

**Thank you for being here today.**