Intro:
Welcome to CleanLaw, from the Environmental and Energy Law Program at Harvard Law School. In this episode, EELP Founding Director and Harvard Law Professor Jody Freeman, speaks with Andy Mergen, Faculty Director of the Emmett Environmental Law and Policy Clinic at Harvard Law School and former chief of the Appellate Section of the Environment & Natural Resources Division at the Department of Justice. Jody and Andy break down what they call the "Quagmire Quartet" of recent Supreme Court decisions that overturn the *Chevron* doctrine and undermine administrative agencies. They discuss the new challenges that federal agencies will face as they work to protect the public, the ways in which the Supreme Court has centralized power in the judiciary, how courts can continue to uphold important federal rules, and why they have hope. We hope you enjoy this episode.

Jody Freeman:

Welcome to CleanLaw. Today, we will be discussing the blockbuster administrative law cases from the Supreme Court's recent term. They include *Ohio v. EPA*, *Jarkesy*, *Loper Bright*, and *Corner Post*. These four cases have important implications for agencies broadly across the federal government, but also particularly for environmental law.

And we are here today with me, Jody Freeman, your host, and Andy Mergen, who directs our clinic at Harvard Law School. Welcome, Andy.

Andy Mergen:

Great to be here.

Jody Freeman:

We've seen a lot of coverage in the media of especially the overturning of *Chevron*, which was what *Loper Bright* did. I think most Americans now actually know what *Chevron* means as a result of the saturation of media coverage. But these other cases I mentioned, the *Ohio* case, the *Jarkesy* case, the *Corner Post* case, they also are important. And I thought we'd go through each one and talk about what the Court did, what the Court didn't do, and how agencies might be reacting, and what the implications are both in the short term and the long term.

So before we get into each of these cases in detail, I just wanted to do a little bit of framing for the discussion, and especially if somebody starts listening to the podcast and decides to drop off after a short time. I want to make sure our key takeaways from the term are clear. My takeaway from the term is that the Supreme Court has made it harder for agencies to do their jobs in every respect, at every stage of the regulatory process.

So, harder to adopt rules that solve contemporary problems in a modern society and economy. Harder to implement those rules at every step. Harder to enforce those rules the way that they have traditionally done through administrative process and penalties, and harder to defend the rules against legal challenge. And I think if you add up these four cases, what you see is a collection of constraints, limitations, obstacles that the Supreme Court has put in place to agencies doing their jobs.

And the other theme, which I know you share and that we've talked about, is that in doing all of this, the Court winds up centralizing power in itself to make not just legal decisions that we all might agree are legal decisions, but also to make a lot of policy calls. And it's sort of amassing and accumulating a concentration of authority that I think throws off the separation of powers that it claims to be defending. And if you see these cases in light of those two themes, I think you really can appreciate their importance. Andy, I know you'll speak to this when we get into each of the cases, but we've talked about this a lot between us, but would you agree with that, and what would you add?

Andy Mergen:

I think that you've stated the problem extremely well. I think the bigger theme of these four cases, which I have sort of, in my own mind, called it the Quagmire Quartet, and I think that the quagmire is that they're all focused on keeping agencies from doing their jobs. And the jobs that we're talking about are jobs that they have been charged with doing by Congress. And the other part of this, the non-quagmire part, is the sort of judicial imperiousness and hubris of the Supreme Court.

The one other thing, which I think was implicit, and I'll just underscore it, is that one of the potential consequences of these decisions is a lot of litigation that my former colleagues at DOJ will have to deal with, that the agencies will have to support. And that, too, just makes it harder for government to do its job. For these folks, they're pulled away from other tasks to support litigation, and a lot of this litigation that's going to be prompted from these cases that we can talk about is going to be frivolous. And it's just a really unfortunate consequence of the way that the Court has decided some of these issues.

Jody Freeman:

The other thing we've talked about a lot is the idea of churn and uncertainty and unpredictability, and sometimes you hear this referred to in the media as chaos. There will be chaos. I don't think we need to go quite as far as chaos to say we will see a lot of conflicting decisions coming out of district courts and circuit courts.

The Supreme Court may not resolve all those conflicts, because it only takes, what now, 60 cases a year, something like that. So tell us about that from your perspective. It's going to lead to a lot of, I would just call it churn. And you've also mentioned to me, we talked a lot about forum shopping, which only adds to the feeling of uncertainty.

Andy Mergen:

Yeah. I mean, I think the churn thing is really important in terms of the agencies have missions. They take those missions very seriously, and all of this makes it harder for them to do their job. So there's going to be necessarily more hand-wringing and a lot of time trying to figure out what the heck is going on, and that's going to take them away from doing their work. There's also, as you and I have talked about a lot, the instability this creates for industries that rely on clear signals from the regulators, from the agencies. Right?

It creates instability and uncertainty. And I don't think the business community is monolithic, but I think there are a lot of people who want agencies to act in a consistent way, to want established rules to stay in place and not be subject to being reopened. And I think we're going to see a lot of folks... As we talk a little bit more about these cases, there'll be a push to revisit a lot of regulations, and that push will be focused on courts that people think are going to be most susceptible to those challenges.

And I think that a lot of the judgments that are made there are correct, that there are courts that are really virulently anti-regulatory. And I think that takes away from our faith in our judicial institutions, our faith in the rule of law, when everybody is focused on a few courts to move their own agenda.

Jody Freeman:

And I often say that the business community should be careful what they ask for, because while there may be a general feeling among many industry players that regulation goes too far, it's too expensive, too costly, if you create this kind of uncertainty, unpredictability, openness to challenge in the legal system, it may go too far and create a kind of instability that makes it hard to do business, hard to rely on the rules to make long-lived investment decisions.

And so, there's a question about, is this really what the business community wants in the end? The final theme before we dive into the cases is, what should the agency posture be in reacting to these four decisions, and even to earlier cases that are related, like the major questions case from a couple terms ago? What should agencies do?

And the more I talk to folks, the more I think about it, the more my view is they should keep going. Now, that doesn't mean they should be reckless. Of course, they need to assess litigation risks. They need to be sure that their rules are well-designed, and they need to be sure that their enforcement policies will be constitutional. They have to make sure to comply with these decisions. But my attitude is, don't somehow over-constrain yourselves, agencies. Don't do the work of petitioners for them. Don't be so litigation risk-averse that you stop doing the important work of implementing your statutory mandates.

Andy Mergen:

Yeah. I agree 100%. There's a lovely poem by the poet Mary Oliver called The Wild Geese, and it sort of says, "There's a time for despair, but the world goes on." And I think that for all of the reasons you've said, the agencies should just keep on doing their mission. I think that the majority of Americans, may be not represented by the majority of the Supreme Court, understand that public health, consumer safety, all of these things, food safety are incredibly important.

And you speaking to the folks in the government, who might listen to this podcast, what you do is incredibly important. And just keep doing the job with the probity and the care, the dedication to mission, the attention to the direction that Congress has given you, that you have been doing all along. Do not fall onto the trap of thinking that all is lost here. It's not.

Jody Freeman:

Clearly, we don't think the sky is falling. These are serious cases. They pose some real challenges for the government's work in public health, safety, consumer protection, et cetera. But we are not of the mind the sky is falling and the administrative state has been dismantled. And with that in mind, let's dive into, first, the *Ohio* case.

This is a case in which the Supreme Court granted an emergency stay, stopping in its tracks an EPA air pollution rule that is known as the Good Neighbor rule. Give us the basics of what happened here. It's quite a complex set of facts. So first, for the civilians out there who may not know the ins and outs of the Clean Air Act, what happened here?

Andy Mergen:

Yeah. So it's a really extraordinary case. I think it's profoundly important that we draw people's attention to it. To set it up a little bit, this is a Clean Air Act case. The Clean Air Act is an example of cooperative federalism. It charges both the states and the federal government with taking actions to prevent, mitigate, cut down on air pollution.

But because air pollution doesn't abide by state boundaries, what the states and the federal government do needs to account for the fact that some states create pollution that flows downwind to other states. And so, what the Clean Air Act contemplates is that states, in the first instance, will come up with rules and a plan to curtail air pollution within their borders. EPA has final say about whether those plans do what's necessary to make sure that air quality is good across the United States.

And if the state plans don't do that, so-called state implementation plans, then the federal government and EPA can develop an FIP, a federal implementation plan. This is sort of a very general description of what's going on here. Here, the EPA determined that the state plans were not going to be sufficient, especially with regard to pollution in these downwind states. And it's a complex

litigation history here, but what is that issue in the Supreme Court case is a challenge to the federal implementation plan.

Jody Freeman:

So, Andy, let's talk about the majority opinion in this case and what your main takeaways are, and then I'll add a few comments of my own.

Andy Mergen:

Yeah. So I think there are two really important aspects to this case, and one sort of relates to the law issue and how the Court looks at the legal issues, and I'll turn to that in a second. But the first is the extraordinary relief that the majority has granted by staying this rule. And I think for people who have some legal training, it's equity and law, equity being sort of the issue of what's fair in this particular circumstance, and the law being sort of, how do we look at the legal issues?

And so, in deciding whether you're going to get this, quote, unquote, "equitable relief" of a stay, the Court has traditionally applied a four-factor test. And the first part of this is, how does injury relate here? Are the people seeking this relief injured in the here and now? And the second part of the test is whether they're likely to win their case. And the third part of the test is, how does it affect other people? And then the fourth part of the test is, how does this really serve the public interest?

Jody Freeman:

So, Andy, when I read this case, I was struck by how little most of those factors mattered to the Gorsuch opinion. The way I read it, what mattered was, are the petitioners likely to prevail on the merits? One aspect of that test, one element, and that's what the Court cared about most. And their conclusion was, "There is a likelihood of success, and so we're going to grant the stay." Have I oversimplified that?

Andy Mergen:

No, I think that's exactly right. And to me, as a lawyer who spent 30 years dealing with requests for emergency relief, either stays or injunctions, this is really remarkable. And it's not something a lot of people commenting on the decision have focused on, but this idea that it now comes down to likelihood of success on the merits is, I think, really rather dramatic, because normally, the first thing that you look at is sort of how are people injured in the here and now, and then you start thinking about who's going to win.

And in the Supreme Court, this is a particularly difficult area, because the Court has complete discretion over the cases that it hears. So sometimes we also talk about the cert worthiness of a case. Is this the kind of case that the Court, which doesn't hear everything, should spend its time on? Everything has dropped out of this issue except likelihood of success on the merits.

And the reason that Justice Gorsuch is able to do that is because earlier this year, they said in a sort of emergency decision that in a lot of these cases, as they perceive it, and particularly with regard to environmental rules, injury is at a wash. On the one hand, you have the harms that the rule is supposed to protect, which, in this case, is serious public health concerns.

And then the other is the imposition on the regulated community of taking the necessary steps for their power plants, for their emission facilities, and the costs that they would accrue. And the Court has sort of said, without any analysis, these things are a wash. And therefore, the only thing that matters is getting to likelihood of success on the merits.

Jody Freeman:

And in this instance, with the Good Neighbor rule, it's not just that there's harm to individuals because of air pollution. Right? We have states here, the downwind states that are suffering from air pollution wafting downwind from the upwind states that make it harder for them to meet the air quality standards that they're obligated to meet. So you have states here on both sides of the case, and it's fascinating that the Court didn't seem to give much weight to the imperative of the downwind states in this analysis. Did that strike you at all, or is there anything else about it that was sort of surprising?

Andy Mergen:

Yeah. I mean, the Gorsuch opinion uses the phrase sovereign interest, because there's two kinds of parties to this case. There are the sort of industry parties, the pipeline companies, et cetera, the American Paper, a whole bunch of commercial actors, and then there are the red states who are challenging this rule. And when Gorsuch talks about the red states' interests, he talks about their sovereign interests, and he says those interests are important.

Well, the downwind states, which are mostly blue states, also have sovereign interests, and their interests are related to the public health of their citizens. And the way that the Court deals with this is just to say, "Well, it's all a wash. Let's move briskly on to the legal merits," which I think is very, very troubling.

Jody Freeman:

Let's talk, too, then about this second question of moving on to the legal merits. Why is it that Justice Gorsuch writes the petitioners are likely to succeed? I mean, what is it that EPA has done here that leads him to that conclusion? This really I found quite alarming in terms of the sort of intrusiveness of the analysis, the flyspecking of the agency record. Tell us about it, Andy.

Andy Mergen:

Yeah. So I'm going to do my best, and I'm going to defer a little bit to you, because you teach administrative law regularly. So I know that you'll clean up what I'm going to say.

Jody Freeman:

I'll chime in. Yeah.

Andy Mergen:

So what we're talking about here is APA, sort of what we call arbitrary and capricious review, right? The statute says that. The agency's actions are generally reviewed under, I don't want to say deferential, but a standard that gives a lot of credit to what the agencies are going to do. But they can flunk that standard in two ways. One, they can say something that doesn't make any sense. It fails as a substantive matter, or they can sort of overlook an important part of the problem, or not fully explain themselves. And that's a failure of explanation, not so much as a failure of substance.

What Gorsuch leans in on is a perceived failure of the agency to respond to a comment. And that comment boils down to this, which is, the federal rule, the federal plan needs to be able to explain why it's still worth doing, why it still works, if some of the state plans are in effect. And what Gorsuch says is, "The states raised this issue, the parties raised this issue, and you failed to explain yourselves."

And there's two things that are really important about that. One is, the Barrett dissent, which we'll talk about in a second, is very compelling, and Justice Barrett says, "You're giving them way too much credit. They didn't really raise this comment. You are doing the work for them." And I think that

another thing that's worth noting is that EPA answered this question during the course of the litigation.

Jody Freeman:

EPA actually specifically said that if some of the SIPs were disapproved and others were not, if there was any problem and the federal implementation plan didn't cover all of the states, they still believe the federal implementation plan would operate as anticipated. Is that about right? And so, they actually addressed the problem already.

Andy Mergen:

Yeah. They addressed the problem between oral argument and the Court rendering the decision, and Gorsuch says, "That doesn't matter, because it's not part of the record that was before the Court." He says, "I'm not even looking at that, because they needed to deal with this before." And I find this as somebody who litigated in the federal Courts for a very long time, defending agency records.

I find this aspect of it really, really remarkable, because normally, we presume, as you and I have talked about in other occasions, that agencies are doing their work in good faith. They're entitled to a presumption of regularity.

Jody Freeman:

Yeah.

Andy Mergen:

And here, they've done the work, and they've said, "This is fine." And what Justice Barrett says is all of this is discernible from the record. You don't actually need this new statement from EPA, because if you look at the way the rule is structured, it doesn't matter for them because of the way the rule is getting at particular emitters. And that is not really going to change whether all of the states' SIPs have been approved or not approved.

Jody Freeman:

I think you and I would agree. We recommend the Barrett dissent to people, because it's really excellent, and it goes through step-by-step the flaws in the majority's reasoning. And I think there's something about this that once you read this dissent, it's hard to imagine that the chief or the chief in Kavanaugh didn't change their minds. Right? It's such a compelling taking-apart of the reasoning in the Gorsuch opinion that I personally was surprised. Did that strike you as a surprising thing, that they actually stuck with issuing this stay?

Andy Mergen:

To me, as somebody who litigated similar-type cases, this is mind-blowing, because it is exactly sort of what the executive branch usually pushes back against in a million cases. The work doesn't have to be perfect, but here, it was really good. And Barrett shows that the agency's explanations and pathways are very, very clear. And so, the Court has really, really flyspecked this, and I think that's a generous term for what has happened here.

Jody Freeman:

Yeah. So a couple takeaways. I read this case as yet another indication that the Supreme Court is really open to and prepared to stay important rules. And we used to think that these stays were extremely rare, until the Supreme Court stayed the Clean Power Plan.

And many of us sort of think the Court has developed a willingness to grant stays more often, largely in reaction to failing to do so in an earlier case called the Mercury and Air Toxics rule, whereby the time it worked through the litigation, that rule had already been implemented, and everybody had already complied, and the Supreme Court has decided, "Well, we're not going to let that happen again." So what I'm kind of saying is, there may be an attitude now on the Court that says, "We're not going to make business suffer and comply with these rules by not issuing a stay."

Andy Mergen:

Yeah. And I think if you are representing industry or states that are hostile to these efforts, you're going to seek emergency relief in every single case, and we're already seeing that in cases. Right? The power plant rule, there's a stay request in. I think the methane rule, there's a stay request in. The Supreme Court has sort of said, "We're open for business on staying the implementation of these rules."

One of the things that I think is really important, and what we have lost here, is by not focusing on injury. The Court is not paying attention to what's really going on. These rules have real public health benefits. Smog is very, very dangerous to human health, especially pediatric health. There is no discussion of that anywhere in the Gorsuch opinion.

The control technologies that are at issue here are established. EPA is not breaking any ground. Industry can do this. They don't want to do it. And EPA has paid considerable attention to cost, to not make it overly burdensome. Right? I think there are a lot of people in the public health fields would say, "This rule does not go far enough." And the reason it doesn't go farther is because EPA is acutely aware of cost to the regulated entities. So this is really a tragedy.

Jody Freeman:

And in addition, there's just a lag time here before anybody gets injured. Once EPA issues the Good Neighbor rule, there's time for the states to develop implementation plans. There's time for them to get into compliance. So this is something, I think, the Court is either ignoring on purpose or downplaying, because it doesn't really understand how the act operates, but they're prepared to overlook it one way or the other to grant the stay.

Andy Mergen:

And we could talk about it in terms of courts itselves, but I think it's really about the Supreme Court, because in sort of interrupting this process, they're saying to the D.C. Circuit, "We don't trust you to get this right. We have to come in and fix this." And I think that's a terrible state of play, because in the 30 years that I've been doing this, courts have always extended the utmost comity and respect for each other, and followed a deliberate process on the belief that each court would do its job. And the Supreme Court, in interrupting this process here, is sort of sending a message to the D.C. Circuit that, "We don't trust you."

Jody Freeman:

But let's move on to talk about what got most of the coverage, the *Loper Bright* case. You and I have done a podcast on it before. For listeners who didn't listen to that, we were anticipating the Court either severely limiting or overturning the *Chevron* principle. This was six to three. Unlike *Ohio*, it was six to three, and all the other cases we're going to talk about today were six to three.

And the Chief Justice said, "*Chevron* was wrong. It's for judges to interpret the law. That is what the Administrative Procedure Act requires of us, that courts determine all relevant questions of law. And *Chevron*, in offering deference to agencies to fill in the gaps and ambiguities in statutes, errs, because it conflicts, clearly, with our Administrative Procedure Act duty." That was the essence of the majority opinion.

Andy Mergen:

Right.

Jody Freeman:

We also saw a long Gorsuch concurrence and a vehement dissent by Justice Kagan. What's your takeaway from *Loper*?

Andy Mergen:

Yeah. So a couple of things. I think it's really important that the chief writes this decision, because he writes it in a particular way, which you and I have discussed previously. A lot of admin law professors and environmental law professors have reacted to this decision in a whole spectrum of opinions about what comes next.

But the decision does not go as far as some would have liked. Right? It's not a constitutional decision. It's not a question of whether what *Chevron* deference violated, or the *Chevron* doctrine violated the Constitution by imbuing this interpretive function into agencies. He bases it on the APA, and I think that creates, for me personally, some awkwardness. The APA has been in place for a very, very long time, and I think it's the majority's decision that upsets the applecart.

Jody Freeman:

Right. Since 1946, we've had the Administrative Procedure Act, and now, suddenly, it makes it impossible to grant this sort of presumptive deference to agencies.

Andy Mergen:

Right.

Jody Freeman:

Yeah.

Andy Mergen:

Which struck me as very odd reading it. I didn't realize that there are admin law professors who believe this is correct, and that this was an argument that has recently come to the fore as a criticism of *Chevron* deference. But the thing that's good about basing it on the statute is that we don't have to deal with this as being a constitutional limitation. And at the same time, the Chief Justice leaves open the possibility of something *Skidmore*-respect or something *Skidmore*-like going forward, which I think is important. It means that what agencies have to say about their implementing statutes is not irrelevant. Right? It may not be entitled to deference.

But the Chief, I think, is saying that it can be important in some cases. It's just not an abdication of interpretive authority to the agencies. It's rather, I think Dan Deacon at Michigan has said, "What the agency says is like a dictionary. You would be foolish not to consult a dictionary about the meaning of a statute." And some of what the agency can say is similar to that. And I think that should be helpful to the agencies going forward. But make no mistake, I just want to say one last thing. I find it very dramatic that the opinion says *Chevron* has been overruled.

Jody Freeman:

Yeah. There are people who went to law school and have practiced their entire careers using the *Chevron* framework as a way to understand how to approach court's handling of statutory interpretation in cases where Congress wasn't perfectly clear. And the assumption has always been

where Congress hasn't been clear and where traditional tools of interpretation don't give you a single right answer, where some people say the law runs out, let's say, then the agency gets the benefit of the doubt to fill the gap, and that's been established for all these decades.

I wanted to focus on the Chief's tone and tenor here. I mean, there are some quotes that are really striking, right? "It was fundamentally misguided," *Chevron* was. "It was a marked departure from historical practice." "Statutes, no matter how impenetrable, have a single, best meaning." "Every statute's meaning is fixed at the time of enactment."

And then this great line, "If it's not the best, it is not permissible," meaning there's one correct way to interpret the law. We, the courts, are responsible for determining it. And there's no notion of a zone of ambiguity or a zone of reasonableness into which an agency can make a choice to interpret it one way and then later change its mind.

And so, the notion that agencies will have that kind of presumption or latitude is gone. But at the same time, Andy, as you pointed out, the Court clearly believes... I mean, the majority opinion reads, very clearly, to say, "There are instances where Congress will have delegated discretion to the agency." And the Court can decide that that has occurred. Discretion to the agency to define a statutory term, they may delegate that. Congress may delegate to an agency the authority to fill in the details of a statutory regime.

And so, there's still these openings, where the Court may decide, "Oh, in this statute, they gave that matter to the agency." And so, it's possible the Court will still defer in those cases. But it's just not clear how often that will happen. It's just not clear what standard of review the Court will use, and how much respect it will give to agencies in the normal course of reading statutes.

You see the Chief saying, "Well, they're owed due respect." And I'm not sure what due respect amounts to. The Court cites *Skidmore*, this old case that many of us know, and *Skidmore* refers to a standard of review that says there are many factors that the Court should consider when deciding how much deference to give to the agency, including the long-standingness of the interpretation and the persuasiveness of the agency's reasoning, and all the other factors that give an agency view, the power to persuade.

Well, that's a very open-ended test, *Skidmore* is. And it's not clear that the Court has said, "We're going to use *Skidmore*," because it also cited *State Farm*, the arbitrary, capricious standard, which has a slightly different set of factors. And the Court said, "We look for reasonableness, the agency's ability to explain itself as reasonable."

So one can leave the opinion, and I don't know if you agree with me, leave the opinion wondering, "So wait a minute. What's a reviewing Court supposed to do? Is it supposed to embrace *Skidmore*? Is it supposed to embrace arbitrary, capricious review, or is it supposed to decide to just give the agency due respect?" And that means every federal district court judge will read statutes like the Clean Air Act, Clean Water Act, Endangered Species Act, Federal Trade Commission Act, and the Securities and Exchange Act, and so on, and bring to it whatever those judges feel is the right interpretation, using whatever methodology they want to use, and then decide how much respect to give the agency. What do you think is the takeaway for what the standard of review is now going forward?

Andy Mergen:

Yeah. Before I answer your question, can I just vent for one second-

Jody Freeman:

Yes, please. Please go ahead.

Andy Mergen:

... and just sort of say, this is what I find very aggravating about the case. I mean, the people who sought this result and sought to overrule *Chevron* felt that agencies were too aggressive, that they were getting way out ahead of Congress and aggrandizing power to themselves, faceless bureaucrats, et cetera, et cetera. I guess in my 30 years, I saw very little evidence of that. I'm not going to say that agencies aren't ever ambitious in the ways that are maybe too ambitious, but by and large, not a problem in my view.

I think that this is just a lot of rhetoric. And if you wanted exhibit one here, I would say the case itself, which we've sort of stopped talking about, involves a rule that was unlikely to ever be implemented to the detriment of the regulated community, in a very obscure federal statute where industry has an incredible amount of say about what the rules look like.

Jody Freeman:

Right. I mean, *Loper Bright* itself, which, of course, this all falls out of the case, because the Court only took the question whether *Chevron* is still good law. But you're right. It's a fisheries conservation case, and the issue is whether the agency can require the owners of the fishing vessels to pay for the onboard monitors when those monitors are required to be on board, and there are good arguments for why absolutely, this is just like any other regulatory requirement for which the regulated parties have to pay. Right, Andy? I mean, it's debatable, but there are good arguments.

Andy Mergen:

Right. So the Court decided to tear down and overturn *Chevron*. And then you did an amazing job of describing the many pieces of the Chief's opinion, which is sort of like, as one of those kids who start writing a bad term paper sometimes say, "This poem means many things to many people." And I feel that's exactly the same thing with this opinion, that you can read it in a variety of ways to get to a different result.

And is this better than *Chevron*? I don't think so. I think this is what a lot of admin law professors said in their amicus briefs. If you tear it down, what have you got that's better? And I don't think the Chief... I mean, I feel for him, because I realize he's got a bunch of people he's got to work with, but I don't think that this really gives a lot of clarity. And so, just one last thought here. The people who are anti-regulatory know that all that matters for this opinion to the judges that they're going to go to is it says *Chevron* is overruled.

Jody Freeman:

Right.

Andy Mergen:

And so, while there's a lot for judges to work with, who are concerned, who are modest, and care what the agency might have to say about something that they don't know anything about, that they were not trained in amino acids, and they might care about what the agency has to say about that. Well, those judges may not get to hear these cases because of the way that forum shopping is working in our courts right now.

Jody Freeman:

Now, if *Chevron*'s overturned, judges will feel emboldened. And you're saying judges, in particular, who will be targeted will be, I think you're trying to say, a more conservative set of judges, because of forum shopping. They will be invited to say, "You decide what the law means, and you don't owe any respect whatsoever to these agencies, no matter how expert or experienced they may be. And no matter how much this legal question we're bringing to you involves policy discretion and facts and

technological information and science, you can ignore all that if you want, judge, because the Supreme Court said, 'judges must decide.'"

And so, this is worrying, if you think about food and drug cases, where the Food and Drug Administration is regulating medical devices, and dealing with AI, and how it's connected to medical... I mean, think of the complexities in so much regulation, and the notion of judges without a ton of experience deciding that they don't have to pay any mind to the experts is what's so disturbing.

There's a variety of commentary on the case, Andy. Some of it is saying the sky is falling. And so, my colleague, Adrian Vermeule, wrote a really interesting post saying, "Look, everybody, take a breath. There will still be lots of opportunities for courts to defer, and now they'll just be doing it under a different rubric. They'll first say, 'We, the judges, under the Administrative Procedure Act, have the duty to interpret the law,' but they will go on in many cases to defer. So what's the big deal?" How do you react to that?

Andy Mergen:

So I think in the short term, I expect a lot of instability and uncertainty. And then I think that because of the way the chief wrote the decision, there is some possibility that this will settle out, and also because there are a lot of good judges appointed by all presidents in the federal system who will accord the agencies' judgments respect out of a sense of judicial humility.

But I think one of the cases that I... not really an admin law case, that I find very disturbing is the bump stock case. And that case was, the majority, in the dissent, focus on an entirely textual read of whether the bump stocks are covered by this 1934 machine gun law. And you look at that, and you think to yourself, "How can there be one clear meaning here when both sides have done such a great job?" Right? And I think in those cases, we're still going to have a problem. I think I'm not convinced by the majority, and the fact that they have to include a heck of a lot of diagrams of firing mechanisms doesn't help me be convinced.

Jody Freeman:

Yeah. It's interesting you cite that case. What troubles me is not just what feels like a disregard or a mood of disrespect toward the agencies that I think the *Loper Bright* case embodies. For me, it's not so doctrinal, the impact. It's about announcing an attitude. And the attitude is, these agencies aren't very important to decision-making, to deciding what statutes mean, even though they've been tasked with implementing them.

And it's that disrespect, I think, that is so troubling when you pair it with textualism. The Supreme Court can't agree on textualism at the moment, but they have various versions of it that the different Justices embrace. But they do agree on some things, and among them are the irrelevance of legislative history. And so, if you are now reading statutes and you say, "We're not interested in what Congress thought it was doing when it adopted this law, and we're not interested in the purpose of these statutes. Purposivism is not important. What matters is the dictionary, our canons of construction, our consideration of what the statutory provision means in context comparing it to other provisions."

Justice Stevens once accused the textualist judges of putting on their thick grammarian spectacles and opening up their dictionaries to decide. That methodology, which leaves so much out and is so ascetic and so narrow, that's what worries me, when you pair it with this attitude of disrespect for expert agencies operating in the real world. So I view *Loper* that way, not so much as, will it make a big difference to how much deference you get in a particular case? The government might still win, right? The government can still make good arguments and win.

Andy Mergen:

100%. The government can make good arguments and win, and I think they will win a lot of cases. To my former colleagues in the government, you've got this. You know how to write rules that will survive under the standards of *Loper*. But I completely agree with you about the disrespect that's been shown to the federal agencies. And I think that, going back to *Ohio* for a second, I mean, Barrett, not the most liberal judge on the Court, so emphatically shows that the agency showed its work here in a way that the rule should be sustained. This is a public health rule, and there's no sort of respect being accorded to the agency here.

Jody Freeman:

Yeah. Okay. Let's move on to our last two cases. I'm going to do *Jarkesy* first. It's a little bit different than the other two cases we just described, because it's about agency adjudication. So *Jarkesy* held that the Securities and Exchange Commission's internal administrative process for assessing civil penalties violates the Seventh Amendment, which requires a jury trial for all suits at common law.

So the enforcement of an anti-fraud provision in the statute is not properly conducted by in-house tribunals. It's unconstitutional. The defendant is entitled to a jury trial. And it's a complicated case that turns on a long-standing dispute about what kinds of issues Congress is allowed to assign to administrative law judges or internal tribunals within the agencies, and what kinds of disputes must require the opportunity for a jury trial.

And that turns on a distinction between what's called public rights and private rights. We don't need to get into it in tremendous detail here. But this case is a real change in announcing that the SEC can't move forward with fraud proceedings in-house and must offer a jury trial, in part because it goes well beyond the SEC. There are a lot of enforcement agencies, including the EPA, FERC, the health and safety agencies like OSHRC, the Occupational Safety Health Review Commission, the mining enforcement body, a variety of enforcement agencies that administer penalties.

They basically say to people, who violate their statutes, whether those individuals are engaged in fraud or fail to protect privacy, or fail to disclose information, or they mislead and deceive consumers, or they expose workers to dangerous working conditions that result in their death or their injury. In all these situations, there are penalty assessments, and this goes for violators of environmental laws too. You violate the Clean Water Act. You fill wetlands when you're not supposed to. Right? You injure or harm an endangered species when you're not supposed to. There is a potential for civil penalties.

And what this case, *Jarkesy*, seems to say is, if what the agency is enforcing has a common law analog, so it's part of the statute, yes, but it has a common law antecedent that preexisted the statute, then enforcing that provision, whether it's fraud or any other common law claim that has an analog to what the agency is doing, requires the opportunity for a jury trial.

I'm summarizing a hard, complicated case. I hope that's clear enough. Andy, what do you think of the legs of this decision? Do you think it's going to have a broad impact, as I alluded to, as I suggested it might? For a lot of enforcement agencies, it will require them to offer the defendants jury trials, or do you think it's more limited in its impact, as some commentators are saying, "This is really just about the SEC"?

Andy Mergen:

Well, I hope it's just about the SEC. Right? We know that the Court thinks pretty highly of itself, and I think they've all long understood that part of their job is to provide clarity to the lower courts about how things work. And I don't think that this case succeeds on that metric, because we have so many questions about how the public rights doctrine would apply to the work of these other agencies that just go unanswered.

And so, the bottom line is that I don't know what to advise my colleagues at DOL or EPA, or elsewhere, about how this is going to work, or what the courts are going to say. And I do feel, as

we've talked about previously, but that's part of the game, just to make it really hard for the government to do its job. I mean, it's really hard to be disappointed in government when it looks like it's not doing anything. It's taking your tax money and not doing anything. And I think we should focus, illuminate the fact that the Court makes it very hard for agencies to protect consumers, to protect workers, to protect the environment.

And so, they are culpable in failures of government. And I really, really hope that the agencies can take a hard look at this and press forward, because I think, as Sotomayor's dissent makes very clearly, it's a really important tool for the modern world. And just one last thought. I always thought going to law school, which I did a very long time ago, that the genius of the common law was that it could evolve. But the Court's conception of the common law is that we're locked in, whether it's standing in TransUnion or the private rights doctrine here.

The common law doesn't ever change. It's just what it was so long ago. And that's why I think we've long understood that the protection of the environment, the protection of health requires statutory commands, and these are commands from Congress. Congress set this up, and the Court is really discounting Congress's hard work here.

Jody Freeman:

Yeah. It's interesting, because in *Jarkesy*, when you see there are fraud prohibitions included in the securities laws, the Court treats that as Congress incorporated the common law into the securities laws, and therefore always preserved a Seventh Amendment jury trial, and therefore cannot assign the adjudication of statutory violations to the agency, to the administrative process.

So think about this in applying it to environmental cases. Right? You can think of enforcing the Clean Water Act or the Clean Air Act and assessing civil penalties. That's, by the way, what this concerns. Right? This is about imposing fines on violators. So it looks like injunctive relief, compliance orders, and such aren't covered by *Jarkesy*. One could analogize what the defendants are doing in those cases, polluting air, polluting water, polluting the ground that leads to exposure to toxics, to lead paint, and so on.

You could imagine somebody saying, "Well, those are just negligence cases. Well, those are just nuisance cases." They have a common law antecedent. And, "Yeah. Congress included this as part of the Clean Air Act and Clean Water Act and TSCA and RCRA and so on," but they're still common law claims. And so, if you're going to enforce them and try to impose penalties, which EPA does, right? I think it's got somewhere between 1,500 and 3,000 civil enforcement cases every year, and most of them settle, but many of them are penalty cases.

Somebody is going to argue, "Well, you're going to need to offer a jury trial. You can't just assess these penalties in-house." And when those arguments happen, that may lead the EPA or other agencies similarly situated to say, "Well, we just can't process these penalty claims. We need to go to the Department of Justice, and they're going to have to go into federal district Court and impanel a jury and so on." And what does it mean, for example, for the Department of Justice that may be bearing the burden of a lot of enforcement agencies now, saying, "Hey, listen, can you take this over and go pursue a jury trial?"

Andy Mergen:

Yeah. No. I mean, I think you're exactly right. And what does it mean for the Department of Justice? Well, to prosecute any case, civil or criminally, is a choice in terms of allocation of agency resources. Right? FTEs, the people, and the time that these things are going to take. And the Department of Justice and the U.S. attorney's offices that compose DOJ, they have a lot on their plate. Right?

Jody Freeman:

Yeah.

Andy Mergen:

Having to prioritize these things is very, very difficult in the world that they're acting on. And I think it made sense for Congress to invest in these agencies the ability to bring these sorts of penalty actions, and I think that's what Sotomayor is getting at. The Court doesn't live in a modern world, and I'm not quite sure why.

Jody Freeman:

And I think Sotomayor's dissent is also great, because it reminds us over and over again that these administrative processes for imposing penalties, administrative law judges, then there's usually an internal appeal within the agency to the top of the agency, whether it's an appeals board or a commission or something like that, and then there's judicial review.

Andy Mergen:

Right.

Jody Freeman:

So it's not like the defendants are stuck, as *Jarkesy* was, with a $300,000 penalty then has nowhere to go. It's just that in the first instance, it's allowed to be pursued by the agency. I think where this all leads, and I'll take us now to our final case, *Corner Post*, but I think where this all leads is to a situation where agencies are scrambling and reassessing and de-risking their enforcement policy, just like they need to be de-risking their approach to issuing rules.

And in some sense, of course they can do that, but they will be pursuing, in some instances, fewer cases than they would otherwise. They'll be saying, "This isn't worth the jury trial, so we won't pursue this enforcement action." And so, on balance, it's less enforcement. And on balance, they have to make hard trade-offs. And it will shake out, but it's a real burden. And I think, overall, it will lead to some chilling for at least some time for some agencies of enforcement actions.

So let's move now to *Corner Post*. This was the last case of our four cases today decided this term. It came out the same day as the presidential immunity decision. And to a very significant extent, it was drowned out, of course, by a discussion of the Court's sweeping decision granting near-total immunity to presidents for official acts. But *Corner Post* is really important, as another one of these impositions on the normal operation of the administrative state.

Corner Post essentially holds that the default six-year statute of limitation on challenging agency rules and actions is not applicable, and that, in fact, petitioners can continue to challenge agency rules, even long-settled rules that have already been challenged and upheld, far into the future, perennially, forever. And the default statute I'm referring to refers to the accrual of a cause of action, and the Court says the accrual of a cause of action is plaintiff-specific. It focuses on the plaintiff.

And when their injury arises, that's when they are entitled to begin the clock running, the six-year clock running. And the bottom line is, you can create a new company, let's say, merely for the purpose of challenging a long-standing rule, which is exactly what happened, I think, in *Corner Post*. And that means that we can never rely on at least some subset of agency rules. We can never rely on them being final, because somebody can always come along and challenge them. Do I have it about right?

Andy Mergen:

I mean, I think this too, again, is a massive sea shift in where the law has been. It promotes a tremendous amount of instability. And I would say that I find this case incredibly remarkable. I was very surprised that the Court wanted to take this up, because it does seem like it's open season on regulations. Most of these regulations, many of them may have been challenged previously. And if

they haven't been challenged heretofore, then maybe there's no reason to challenge them. But for sure, we know that there are already law firms and organizations going through the CFR-

Jody Freeman:

Old rules.

Andy Mergen:

... which just seems like incredibly a terrible way for us to do our business. Right? And there were always exceptions to this rule. There was sort of a doctrine in the Ninth Circuit, a case called Wind River, that sort of allowed for as-applied challenges. You can get this in the enforcement context. So I see no reason for this radical sea change, and I think the only reason to do this is to sort of destabilize the administrative state.

And my understanding of this case is that it was originally brought by entities that could have challenged the rule when it was initially promulgated, and *Corner Post*, the small business, was added later to sort of clear this hurdle. It's hard for me to understand what it is that we are accomplishing here.

Jody Freeman:

I wish listeners could see you instead of just hear you right now, because what I love to see is your utter exasperation at this ruling. And it's a little mystifying. I agree, but I wanted to be a little contrarian about it for a minute and say, maybe in the end, *Corner Post* doesn't have quite as sweeping an impact as it might first appear.

And I say that because in Barrett's opinion for the majority, she distinguished between statutes of limitation, which I think she's trying to refer to statutes where there's a time clock that starts running that is specific to plaintiffs and statutes of repose, which I think refers to a sort of jurisdictional requirement that petitioners have to take an action, like seek a rehearing, within a certain time period. And after that time period, if they don't take that action, then the Court lacks subject matter jurisdiction to consider a petition for review.

There are lots of statutes of repose, if I'm understanding it correctly, in the U.S. Code. So the Clean Air Act, for example, the Clean Water Act, there are lots of examples we could cite where the entitlement to bring an action, the time clock starts running, triggered by something the agency does.

So that isn't covered, I don't believe, by *Corner Post*, because *Corner Post* refers to the accrual of a cause of action. You have six years. Well, we have a specific provision of the Clean Air Act that refers to a certain amount of time in which you can challenge a rule period, and it's keyed off of when the agency does something, that is issue a rule or, say, issue a permit, or does something else.

So for those reasons, one has to go statute by statute, and every agency, I'm quite certain, is already doing it, to figure out if they are subject to this default six-year statute of limitation that is covered by *Corner Post*, in which case, right, their rules can be challenged forever, or whether something in their statute says, "No, no, no. You have a certain amount of time in which to challenge the rule, and after that, you're out of luck." And so, they're kind of exempt from *Corner Post*. And I think that assessment is going on across the agencies, and it may be that *Corner Post* has less of an impact than we initially might think. I don't know what you think of that, Andy. Is that too optimistic?

Andy Mergen:

Well, I think I want to end our excellent conversation on an optimistic note. So I hope that that's right. I mean, I do think that the statutes that set up review of EPA rules and orders from particular agencies like the FAA and STB and FCC, all that are channeled into the courts of appeals, that *Corner Post* doesn't reach them.

Sometimes parties rely on an equitable tolling argument that might apply in those circumstances. But by and large, I tend to agree that there's a whole area of government activity that *Corner Post* won't apply to. I think it's interesting that the *Corner Post* comes out the same day as the immunity decision. And the immunity decision, in talking about the president, who is the head of the executive branch, the majority falls back on, I think it's Federalist 70, where Hamilton talks about the need for an energetic executive, a president who is going to get things done.

And what I find aggravating about this quartet of cases that we're talking about is that they all seem to make it harder for agencies to do things. So while I share your optimism, I do think there'll be some time spent defending regs and new lawsuits. That could be where I would like the energy of the executive branch to be spent on something besides what I think are going to be many frivolous lawsuits.

Jody Freeman:

Yeah. I mean, I agree. All told, these four cases, if you really take the full impact of them into account collectively, they are a real challenge to the modern consensus about how the government should operate, and the freedom it needs to get the work done that Congress has assigned to it. I mean, it's as simple as that. And they have to bulletproof their records to an even greater extent than they already do, and they have to contend with judges who feel newly emboldened to just assert their own view of the best meaning without any presumption of deference to fill in ambiguities.

If you imagine that they also have to now scour through their statutes to see if there's an exception, essentially, to *Corner Post*, they have to scour their statutes to see if they have the option of offering a jury trial instead of just pursuing penalties administratively. Some statutes don't let them offer that option. So what do they do? If you picture them trying to sort that out now, do they have to go to Congress and ask for that addition to their enforcement powers? If you picture them then dealing with the potential for emergency applications for stays, like in *Ohio*, and knowing that that's going to be a much more common threat to important rules, and that the Supreme Court is open to those emergency stays.

I mean, if you add this all up, you could be feeling quite grim if you're in the executive branch or one of the independent agencies. This is a bunch of nips and cuts and bumps and bruises, and the Supreme Court is doing real damage. And it's rhetorically doing a lot of damage, too, to respect for what the administrative agencies do every day. It doesn't seem to think that it's important that these agencies are carrying out the wishes of Congress to protect civil rights and protect worker safety, and protect consumers from fraud, and protect the food and drug supply, and protect environmental health and safety.

It seems not to think those missions are very important. But at the same time, I think our message is, you do the work. You do the work. You do the work. You don't do the challengers' work for them. You don't sort of give up too much by deciding you don't have a hope of success in the courts. I think you just gird yourself for battle. I mean, that would be my message.

Andy Mergen:

Yeah, I agree. I think you really well stated, and I would just add to this, to the extent that there are law students or students thinking about going to law school listening to this podcast. The Supreme Court has erected a lot of challenges here to the function of government, and that means that government needs you more than ever. And so, if you are a superstar law student or somebody thinking about being a scientist, go to the government and take this challenge on. I think you're not going to be bored, and your skills are going to be really, really needed.

Jody Freeman:

Right. I mean, good lawyering is always in demand, but think of now the demand. Think of what it means to now have to march into federal district court and advance all the best textualist arguments you can for why your reading of the law is the right reading. We may have to think of creative ways to communicate to district court judges about how statutes operate, and show them. I don't know. You were joking with me earlier about photos and other kind of visuals that can help illustrate the operation of these laws. Were you kidding, or do you think we can do that in district court?

Andy Mergen:

Yeah. I think there's stuff that we can do in the rulemaking process to lay out why the agency's reading is absolutely the best reading.

Jody Freeman:

So as we were saying, good lawyering will be in more demand than ever. Thank you, Andy. It's always such a treat to get to talk about these cases with you.

Andy Mergen:

Thank you so much, Jody. It's been great.