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CleanLaw 88

The Loper Bright Case and Fate of the Chevron Doctrine, with Jody Freeman and Andy Mergan
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Intro: Welcome to Clean Law from Harvard's Environmental and Energy Law Program. In this episode, Harvard Law Professor and EELP's Founding Director Jody Freeman, speaks with Andy Mergen, director of Harvard Law's Emmett Environmental Law and Policy Clinic, about a case the US Supreme Court will hear this fall, Loper Bright Enterprises v. Raimondo, in which petitioners have asked the Court to overrule the Chevron doctrine—a legal doctrine that governs when a court should defer to an agency's interpretation of a law. The case arises under the Magnuson–Stevens Fishery Conservation and Management Act, which authorizes requiring commercial fishing vessels to carry onboard observers, but the statute doesn't specify that the fishermen should pay for those observers.

Jody and Andy talk about how the Supreme Court might cabin or overrule the Chevron doctrine, and what the case might mean for other environmental regulations and federal regulation more broadly. We hope you enjoy this podcast.

Jody Freeman: Welcome to Clean Law. Today, we're joined by Andy Mergen, the director of our environmental law clinic, the Emmett Environmental Law and Policy Clinic, and a 30-year veteran of the Department of Justice, where Andy was an appellate litigator, litigating environmental cases.

We'll talk to Andy about a case that will be heard this fall in the Supreme Court called Loper Bright, which involves a very important question of whether a famous case called Chevron might be overturned by the Supreme Court or severely cut back. Before we get any further, let me introduce Andy, and let him tell us a little bit about his career at DOJ before joining us.

Andy, welcome, not just to HLS, we're delighted to have you on the team, but also to our first podcast together.

Andy Mergen: Jody, thank you very much. Very exciting for me–my first podcast ever. It might be helpful for the listeners to know a little bit about what I did at the Department of Justice. As you mentioned, I was there for over three decades, where I represented federal agencies in court. There are lots of environmental lawyers in the federal government. They represent agencies like the Environmental Protection Agency, the National Park Service, the Forest Service, and relevant to our discussion today, NOAA Fisheries.

Those agencies and those lawyers craft regulations and policies that affect the regulated community, that are intended to promote conservation and environmental

values. When those policies are challenged in court, the Department of Justice represents them. In my 30 years, I've made countless Chevron arguments relevant to our conversation today about the Loper Bright case.

I should say at the outset, that Loper Bright was being briefed in the Court of Appeals during my time at DOJ. I'm not entirely an unbiased observer. I supervised the Loper Bright litigation and some related litigation during my time at DOJ.

Jody: Let's back up before we get too far into what Loper Bright is about, and provide a little context for why this is such an important case. This word Chevron comes up a lot, and legal aficionados and experts know what it stands for, but we need to explain that to everybody. We'll do that in some detail, but just to set the scene here, Andy, tell us a little bit about what the basic issue in the Loper Bright case is.

What is the question presented? As some of our listeners know, the Supreme Court grants cert or grants review, and accepts particular questions that it's going to review. In this instance, what is the question before the Court, and what will the argument focus on this fall?

Andy: Sure. The question presented by this petition, before the Court, in this case, is a dramatic one. The petitioners, Loper Bright, have asked the Court to overrule the Chevron decision, a decision that's been out there and informing administrative law since 1984.

Alternatively, the question presented asks the Court to limit the application of Chevron, in particular, where a statute is arguably silent about a particular issue, and the agency acts to fill that gap to fill that silence.

Jody: For our listeners who really aren't familiar with Chevron and what it stands for, let's just briefly review that. I'll try to summarize it, and Andy, maybe you can jump in with some additional commentary on it. This is a 1984 decision from the Supreme Court, in which the Court held that when a statute is silent on a matter, doesn't address a matter of statutory interpretation, they're often statutes that are unclear, or don't address details of a regulatory regime.

When that's true, the agency is entitled to interpret that statutory silence, or gap, or ambiguity, and as long as its interpretation is what the Court views as reasonable, the agency gets deference. To be more precise about it, the Court established a two-part test in the Chevron case, where it said, "Look, if Congress has addressed the precise interpretive question, what the statute means, then that interpretation governs. If Congress has not addressed the precise question at issue," and by that, the Court means if Congress has been ambiguous or silent, "Then the agency gets deference for its reasonable interpretations."

That sounds really abstract to the average listener, but the Chevron case was about whether the EPA could read the Clean Air Act in a way that gave it some flexibility to let companies add pollution at a particular location, and subtract pollution at a

particular location, and treat all of that as if it was under a bubble, and therefore didn't need to get a new permit for adding some pollution. That concept became known as netting out or bubbling out, and it was actually a deregulatory way of reading the Clean Air Act.

The Chevron case involved a reading by the Environmental Protection Agency in the Reagan administration that was actually helpful to business, and allowed them some flexibility in updating facilities without having to get new permits under the Clean Air Act. Those were the facts of Chevron. It was viewed as a flexibility-enhancing interpretation, a deregulatory, business-friendly interpretation.

It has gone on to great fame, because it established this principle of allowing agencies to have some interpretive flexibility in the face of ambiguous statutes. Andy, does that about capture it?

Andy: I think that's exactly right. It's not surprising that Chevron took form in a statute as sort of technical and as complicated as the Clean Air Act. Underlying the doctrine is the notion that the agency has some particular expertise, and might be in the best position to fill the gaps left for Congress, or to answer questions about ambiguities when you're talking about a statutory regime as complicated as the Clean Air Act.

Jody: In that case, this is a little bit too specific and nerdy, but since everybody talks about Chevron all the time, it's worth understanding what it involved. In that case, the statute defined a term called stationary source. That was really the regulated entity, right? If you operated a stationary source, you had to get a permit if you emitted pollution over a certain level. The case involved the question, "Well, what's a stationary source?"

Is every single unit that produces pollution at a particular facility, is every single unit a stationary source? Therefore, every time you add some pollution from that unit, do you have to get a new permit. Could the agency say, "Well, a stationary source could include this idea of this bubble over the facility, and so you could trade off new pollution for old pollution by retiring units, and you'd still be within your stationary source."

I've oversimplified it a bit, but that's the kind of question that can come up in a statute, where Congress might've defined a term, stationary source, but not thought of every possible interpretation of that term that could arise down the road. In that situation, the agency was given flexibility by the Supreme Court. Justice Stevens wrote the opinion in that case, laying out the two-part Chevron test, and it then went on to become really a cause celebre of administrative law.

There's really no more famous case in administrative law, right, Andy? So many law of your articles written about Chevron. Can you tell us what happened in the wake of this 1984 decision? Was it suddenly seen as a transformative case, where Courts were suddenly deferring to agencies in a way they had not before? How is it interpreted by the legal community at the time it was handed down?

Andy: Yeah, that's a really important question, because I think that the scholars who've studied Chevron have suggested that Justice Stevens may not have understood the decision to be as monumental as it's become, but Chevron has some important virtues for both the government and for the judiciary. The case itself arose in a very complicated technical area of the law.

For busy judges confronted with these sorts of questions, it gave them a framework to give a hard look at what the agency has done, but also informed by some deference to the agency's expertise. I do think that the doctrine has been transformative, and I think it has a lot of virtues that we shouldn't overlook. There are a lot of critics of Chevron, so it might be important to talk about what it does.

First off, it doesn't require judges to be experts. It allows judges to take a look at what the agency has done, and to, informed by the agency's own expertise, and make a judgment about whether or not the agency's action is reasonable. It also, generally, Chevron deference only applies to agency rulemakings, that's the area in which the agency is formally taking a position about what the statute means.

Of course, that process is informed by considerable public participation, and notice and comment, so that the process is very deliberative.

Jody: Let me jump in and just say, for those who aren't experts in this, this doctrine, Chevron Deference, as it's called, is about what should the court's attitude be when an agency interprets the statute that they're implementing? The idea is, what does it mean when a statute refers to a certain authority the agency has? These are legal interpretations, and people normally think, "Well, gee, isn't it the courts who make the legal interpretations? Don't the courts decide what the law means?"

What's happened over time, of course, in administrative law, is that courts have had to develop an attitude toward how much deference, how much they'll grant agencies flexibility to read the statutes they implement. If courts decided for themselves, every single interpretive question that an agency could possibly face, it would really be impossible for agencies to do their jobs. You were involved in many cases involving challenges to agency interpretations.

Can you give us a flavor of the kinds of things agencies have to decide on a day-to-day basis, that if the Court didn't give them any flexibility, would make it impossible for these regulatory agencies to do their jobs?

Andy: Sure. These things come up all the time. We're talking about authority that, and this is important, as I'm sure we'll discuss later, that Congress has delegated to the agency. Take, for example, the Endangered Species Act. We know that there are animals that are threatened and endangered. They have habitats. Those habitats are protected under the statute. The agency has to make fine-grained decisions about what sort of habitat supports an endangered animal? What are the essential elements of that animal's habitat?

An animal has different things that goes on for it. It looks for food, it looks for a mate, it needs shelter, it needs to avoid other predators, all of those sorts of things. The people who are best situated to make decisions about what critical habitat consists of are, not surprisingly, wildlife biologists who have a real feel for those sorts of things. Congress can't figure all of this out, so it gives the agencies authority to make those fine-grained judgements.

Those fine-grained judgements are made under a wide variety of statutes, not just environmental statutes, like the ESA or the Clean Air Act, but with regard to food, and health, and safety, and a whole variety of areas. We know that Congress can't possibly master all of those details, nor would we want Congress to be spending all of its time figuring out what the requirements are for the spotted owl.

The agency can do that, and the agency can craft rules that govern critical habitat informed by its own expertise, and that's part of the lift that Chevron's performing.

Jody: There are other examples, like the Food Drug and Cosmetic Act, which says that the FDA has to determine which drugs are safe and effective. That's a determination that Congress delegates to the agency. The agency's got to figure out what's safe and effective. We don't expect Congress to make every fine-grained decision to implement a statute. It delegates authority to the agency.

Now that we've given you a flavor for the kinds of day-to-day, nitty-gritty, interpretive questions that the agencies have to resolve, and the reason why we want experts resolving them, let's get back to Loper Bright. Andy, tell us the basics of this case. What statute does it involve? It's a fisheries statute, right? What was the decision that the agency made in this rule that it issued, and why does it implicate this Chevron precedent that we've been talking about?

Andy: This case arises under the Magnuson-Stevens Act, an act enacted in 1976, to regulate fishing and federal waters. Prior to 1976, there was not a sort of comprehensive federal statutory regime. The act is intended to promote sustainable fisheries, to promote the conservation of aquatic resources, so that we can continue to enjoy eating them, they can continue to be an important part of our economy, so that fishermen can continue to develop these resources and pursue their livelihoods.

It's a complicated statute, and a controversial one, in many regards. The act is a complicated statute. It envisions a role for the regulated community in the development of the regulatory regime, a really unique role, in that fishery councils and there are regional councils for New England, for Alaska, for the Western Pacific, those councils develop the rules, and present them to the federal government, to NOAA, the National Oceanic and Atmospheric Administration, and the National Marine Fishery Service an agency within NOAA, to accept the council's proposal.

The councils' membership consists of state fishery officials appointed by the governor, and fishermen themselves. They come up with the rules, and present them to the federal government. The federal government makes a decision about them.

Jody: This is a super unique statute, right, Andy? I'm glad you described it in that detail because Magnuson-Stevens actually creates a kind of participatory process, right? The council itself devising the rules under which they're going to operate, in order to preserve and protect these fisheries, and then the agency considers their proposals, their management plans, and adopts them as binding regulations.

That's a unique structure. It involves the people most affected on the ground by these rules in the development process, in a very robust way that's different from other statutes, right?

Andy: Yeah, it's a really unique statute. It's hard to think of a statute, another resource statute in which the regulated industry has such a unique role in the development of the regulatory regime. That has opened the statute up to criticism. Environmental groups sometimes compare it to a situation in which the fox is regulating the henhouse. Fishermen themselves often are unhappy with the regime, because not all fishermen fish in the same way.

They use different gear, they pursue different species, and the rules necessarily might impinge on some operators, and be a boon for others. This rulemaking process is one that often leaves many folks unhappy at the end of the day. This particular regulation relates to observer coverage in the herring fishery in New England. The pursued fish is the Atlantic herring, fish really good for you, not a super important economic fish, but an important one.

Jody: Andy, in this case, the rule that NMFS adopted, the agency adopted, that had been proposed by the regional council, was a rule requiring the private fishermen themselves to pay for onboard monitors. Can you explain how that came to be?

Andy: Yeah. First monitoring and observers, the placement of an individual to record the catch and develop information about the catch that the fishermen are taking in, has long been part of the regulatory regime. It actually predates the act. NOAA started using observers in 1972, and there's no dispute that the statute authorizes the placement of observers in fisheries.

Often, NOAA itself will pay for the observers. In this particular case, what has made this controversial is that the rule requires the fishermen to pay the freight for the observers. The fishermen must have room for the observer on the vessel, and pay costs that are estimated to be around, everyone uses the figure of around $700 a day. That's somewhat unusual in the sense that often, the agency itself pays the freight on the observers.

Here, the question presented is not whether you can require observers. Plainly, the statute has long contemplated that. The question is, does the statute authorize the council and NMFS to adopt a rule? By NMFS, I mean National Marine Fisheries Service, to adopt a rule that requires industry to pay for the observers?

Jody: The reason why this is a Chevron question, if you will, and why we went into the long description of Chevron is, the statute doesn't precisely address this question. There's no specific provision in the law that says, "Yes, industry can be required in some instances to pay for these onboard observers." It's a question of, does it fit within the statutory regime?

There are other parts of the statute, right, Andy, that speak to the obligation to pay for onboard monitors, in some instances, but not this provision. It doesn't speak to it. That's really the interpretive question. Can the silence that Congress left on this, the ambiguity that Congress left, can that be reasonably interpreted to mean that the private party, the regulated industry itself, in some instances, would have to pay for the onboard monitor? Does that capture it?

Andy: It does. I would just sort of say that every lower court that has addressed this issue, let's say that there are four, two district courts, and two courts of appeals in DC in the first circuit, every district court that has looked at this issue has said that the agency's interpretation is reasonable. They've done that using traditional tools of statutory interpretation. There are provisions that talk about penalties for not paying observers, and that gives rise to an inference that maybe you could require observers.

Relatedly, there are a lot of regulatory requirements that fishermen pay the freight on. There are a large number of gear restrictions for certain fisheries, meaning that the agency and the council have determined that only certain types of nets or gear can be used by the fishermen, and that cost is borne by the fishermen themselves. So too are the costs for safety equipment, right? This is a dangerous business, and I think that context matters here. The cost of outfitting these fishing vessels is paid by the fishermen themselves.

The agency looks at all of that and sort of says, "We're not doing anything extraordinary here." The fishermen say, "This is doubly extraordinary. First, you're putting somebody on our vessel, and second, to add insult to injury, you're making us pay for it." That is sort of at the heart of this dispute. Now, I want to say that what gets lost in this rule a little bit is the idea that this applies to every vessel. It doesn't. NOAA was shooting for 50% coverage, and the rule itself provides a wide number of exceptions.

Although NOAA is requiring the fishermen themselves to pay for the observer, that $700 a day estimate, the agency pays for the training, and this requirement only kicks in if the agency has the money to do the background work, the training of the observers, et cetera. This is one of the cases that is before the Supreme Court. It's not clear whether or not these requirements were ever going to kick in for these particular fishermen, but they were sufficiently concerned about this, that a lawsuit did emerge.

Jody: In fact, there's not been an instance where the federal government has required any private party to pay for one of these onboard observers yet. In fact, the Biden

administration suspended the rule, because the agency did not have the money to do the training and the administrative support work for the monitor. In fact, none of this has actually been implemented yet, but as you say, it was still enough for the Supreme Court to grant review. Let's talk about granting review, because this is a really interesting process here.

The cert petition, the petition asking the Court to take this case, says some very interesting things, and it gives you a flavor of the narrative of the case. I wanted to talk to you about the framing of this case, Andy, and why it becomes the vehicle for the Court to reconsider this Chevron decision. First of all, the cert petition leads with the sentence, "Operating fishing vessels in the Atlantic is hard work." That sets the tone for the idea that really informs the request of the Supreme Court to please hear this case.

The idea is what you said, Andy, about this being sort of insult to injury. The idea is this rule is a horrible imposition, a terrible imposition, on the regulated industry because it saddles the vessels, it saddles the industry with having to have these unwanted onboard monitors on the vessels where they don't belong, and there isn't room for them. This is all the implication of the cert petition, and on top of it all, requires the industry to pay for them.

There's a paragraph in the cert petition I just want to read, because it gives you a sense of the tone of the case, and the way it's being pitched to the Court. The rule is being characterized as, "Authorizing the agency to force the governed to quarter and pay for their regulatory overseers without clear congressional authorization." This notion of the government imposing itself on the regulated industry is very powerful in the cert petition.

The idea is there's a little guy here being trampled on by the overreaching federal government. You and I talk a lot about narrative, Andy. Can you say something about this? Why is the cert petition framed in this way?

Andy: Yeah, I think it's important to understand that the people who care the most about the demise and elimination of the Chevron doctrine are people who are big businesses and highly regulated industries, because their goal is to render the regulators as toothless as possible. They understand that Congress can't possibly do the fine-grained analysis, as we've talked about, that EPA and other regulators have an important role to fill in, in terms of applying their expertise to Congress's goals, aspirations, intent, statutory language.

The more you weaken the regulators, the more freedom you have from regulation. The demise of Chevron is related to sort of a big business agenda, not everybody. There are many people who understand the importance of regulation, especially environmental and public health regulation, but there are many folks who would like to detooth the regulators, and getting rid of Chevron is a mechanism for doing that.

In order to develop a story about that, it really helps to focus on the little guy. Fishermen are the little guy. We see on TV shows like Most Dangerous Catch. We understand that these are really hardworking people, working super long hours in a dangerous industry, with often very low margins of return. In terms of a narrative about government overreach, the fishing industry is sort of a jackpot, right? It allows you to tell the story about government beating up on the little guy.

A lot is lost in that narrative, but it's a very forceful one for getting the Supreme Court to review. This wasn't lost on the lower court, either. Judge Walker, who dissented in the DC Circuit, focused in his own dissent about how difficult this industry is, the demands of fishing. He talked about Billy Joel's song, The Downeaster 'Alexa,' which has to do with fishermen out in a storm. He talked about Ernest Hemingway, The Old Man and the Sea. It's a very romantic notion, and that, I think, has given the anti-Chevron folks a huge boost by focusing on this industry.

Notably right, though, the fishermen themselves are not funding this. These challenges have been funded by nonprofits that work to further an anti-regulatory agenda.

Jody: Back to Chevron in this case, make sure we understand how these things are connected, this is a case about, look, can a statute authorizing an agency to require fishermen to have onboard observers on their vessels, also be read to authorize the agency to require the fishermen to pay for them? That's the question. That's a standard interpretive question.

Does the statute allow this? Is this a reasonable view of the statute? The tension is over, well, who should decide that? Is that something the agency should get deference for, because it's in its wheelhouse, it's part of a regulatory regime that it implements, Congress gave it to implement? Or is that something the Court should decide?

Now, if Chevron stands for the idea that really, we should err on the side of deferring to the agency, the reason why you say people who are opposed to regulation and want to cut back the reach of the federal government, why they want to overturn Chevron, is that they'd rather have the Court interpret all the ambiguities in the statute, because they're making a bet that the Court's interpretation of these statutes will be less generous to regulation.

Chevron is just a marker. Chevron is just a symbol. Chevron is just a stand-in for who do we want making the interpretive call, the decision on what the agency is allowed to do under an ambiguous part of a law? If we think that the Court is probably going to favor the regulated industry, the Court's probably going to cut back on agency authority, then we don't want deference to the agency. We want the Court to decide. That's all Chevron is about.

It's funny in a way, because if you take the view that when it's a close call, we're not sure maybe what Congress meant. They were ambiguous or they were silent on

something. If we take the view that the experts should decide, the EPA should decide, the Department of the Interior should decide, whatever the regulatory agency is, the Securities and Exchange Commission should decide, if that's our view, that ought to favor whatever administration happens to be in power at the time.

If you're a Republican-led administration, and your executive branch agencies are interpreting statutes, then your interpretations will favor your Republican policy agenda. You would think a legal doctrine that says, "Let's defer to those agency experts," would favor the Republican administration in power, just equally as it would favor a Democratic administration in power.

It's always struck me as odd that this seemingly neutral doctrine that says, "No, no, no. Expert agencies should have some room to maneuver," why it has become such a target of the conservative anti-regulatory agenda. Can you help explain that?

Andy: Yeah, it's such a great point, Jody, because if we go back to the original Chevron case, who lost that case? The Natural Resources Defense Council, one of the premier environmental organizations in the United States, went down in flames. Who won that case? The Reagan Administration, one of the most notorious or effective anti-regulatory presidencies of all time. It seems odd, because it seems like a neutral principle.

I think that the folks who are advancing an anti-administrative state agenda are just worried that Congress has created a pretty robust environmental statutory regime, a pretty robust human health and safety regime, and the agencies are proceeding in good faith to implement Congress's goals there. I think that at this point in the game, folks who are anti-regulatory would rather detooth the professional staff in those agencies rather than abide by what really does appear to be a neutral doctrine on its face.

Jody: It does seem like the conservative critique of the Chevron doctrine is that administrations, they're going to take these laws and run with them, and try to fill in the gaps in these statutes, and find authority that isn't really there. The worry is that it's the Democrats who like regulation. They're going to do regulatory things with statutes, whereas Republican administrations probably won't. The idea is Chevron unequally helps the Democratic administrations accomplish their regulatory agenda.

That's the idea, that the administrative state is dangerous to start with, and that the people most likely to use it to actually accomplish some kind of agenda to regulate the private sector are likely to be the Democratic administrations. If you kill Chevron, if you kill the idea of deferring to those agencies, you're really disadvantaging the pro-regulatory Democrats. That sort of sound like the agenda?

Andy: I think that's exactly right.

Jody: Back to the case, I wanted to ask you one more, a couple more, actually, sort of inside baseball things. This cert petition was written by Paul Clement. Paul Clement is

a former solicitor general, extremely well-respected Supreme Court advocate who's going to represent the petitioners in this case. Does it matter who represents the petitioners? Does it matter to the Court that it's Paul Clement who's going to be arguing this?

Andy: I think it matters a great deal, and I think our colleague, Richard Lazarus, has written about this. There is a Supreme Court bar, sadly, mostly men who specialize in Supreme Court advocacy, who have a lot of credibility with the Court. The Court wants to hear from those advocates in particular. The fishermen, Loper Bright, by obtaining Paul Clement to represent them in this case, did a really smart thing.

Paul Clement is a very, very effective advocate. What the briefing has done here is pick on a number of themes that are maybe not directly relevant to the case at hand, but enhance the case that he's making. Let's talk about, for instance, what you mentioned earlier, the "quartering" of the observer, the notion that the observer is going to be on this fishing vessel. Well, that taps into the Court's Fifth Amendment takings jurisprudence, the notion that your private property should be sacrosanct, that the government or in Cedar Point, union organizers shouldn't be allowed access to private property.

Without referencing any of those cases directly, Paul Clement is picking up on some themes that are very important to the conservative Justices. He is an extraordinarily effective advocate who understands what the Court cares about.

Jody: That's so interesting too, because the quartering part of it, that is, having the individuals, the monitors on board the vessel, is actually not controversial. It's literally authorized specifically by the statute. Yet the cert petition emphasizes it, to sort of poke at this idea you talk about, that this is an intrusion into private property. There are other themes in the cert petition, and we're going to see it in the briefing when we get to the briefs, that have to do with separation of powers concerns.

There's another theme I wanted to ask you about, which is the brief emphasizes that to require these observers to be paid for, their salaries to be paid by the private business, is really an interference with appropriations, in some way. There's a separation of power concern that, for Congress to appropriate money to enforce regulatory schemes, that's the idea here, if Congress chooses not to appropriate money to the agency to do its job, then the agency can't do its job.

The idea is that's a constraint or a control mechanism to help Congress oversee agencies. The suggestion in the cert petition is, by allowing an agency to require the regulated industry to pay for regulation, the agency is circumventing the appropriations process, somehow cheating it, and therefore, that removes a mechanism of congressional oversight.

That's the implication in the cert petition. Can you comment on why that's sort of ingenious by Paul Clement?

Andy: Yeah, the cert petition and the opening brief are really cleverly crafted. This idea that this somehow violates appropriations principles and separation of powers principles is well-developed in the brief. Frankly, I think it's a really dangerous idea for those of us who care about environmental regulation and protection. Congress doesn't have to appropriate money for scrubbers, for EPA to require scrubbers in power plants. We don't normally understand the agency to have to have a separate appropriation to require regulatory control mechanisms and improvements.

The fishing industry, for a long time, there are fine-grained decisions made by regulators, including down to what sort of hooks can be utilized by fishermen on long line fishing rigs. Depending on the kind of hook, it can be more expensive or cheaper to do. We don't suggest that Congress needs to appropriate money for the regulator to require those sorts of mechanisms. I think it's a very clever and powerful argument on its face, but very dangerous to environmental regulation in general.

I think it ignores the reality of how fishing has been regulated for decades, in terms of the imposition of certain regulatory costs on the industry itself.

Jody: You're talking now about the opening brief, because starting to see the briefs come. I was even still way back at the cert petition stage. The reason why I was interested in this is just getting the Court to take this case is a victory. It's interesting how the seeds are planted in that cert petition, to try to pique the interest of the Justices, and get them to say, "Yes, this is the vehicle in which to reconsider whether we're going to stick with the Chevron decision."

Andy: Yeah, it's a really powerfully crafted cert petition that pushes so many buttons for the conservative Justices.

Jody: One more question about it, one more inside baseball question. Why did it take the Justices five, I think it was, conferences before they decide to take the case?

Andy: I think there are a couple of reasons. First, in general, the Court won't grant cert after one conference anymore. The inside baseball, I think, is that they want to make sure there are no threshold sort of justiciability issues that would keep the Court from getting to the merits. As you note in the government's response to the cert petition, the government said, "Hey, this program's not even going to be implemented."

No one's ox is going to be gored anytime soon. The Court takes some time to understand whether that's... They want to grant cert on cases where they think the merits matter. This takes some time to do that. I think one thing we haven't mentioned is that Justice Jackson won't be hearing this case. She was on the initial DC circuit panel. She was ultimately replaced by Judge Srinivasan, but because she had prior exposure to the case, she is likely to sit this out, so it's only eight instead of nine Justices.

I think there's probably some discussion about whether they want to press forward on a case as big as this one without having the full Court. One of the criticisms of the

Chevron decision itself is that only six Justices took part in that decision. Here, you're talking about overruling Chevron with only eight out of nine.

Jody: That, Andy, is a great segue to the Justices themselves. It's worth talking about how they think about Chevron, what they have said about Chevron in the past, and the way the new super majority, the conservative super majority, looks to be leaning on these issues. Let's talk a little bit about that. I'll start by saying, several of the Justices have made very clear that they would like to overturn Chevron, that they think that it's for courts to decide what the law means in all instances, no deference to the agency.

That includes Justice Thomas, who made this plain, I think, most recently in a concurrence in the Michigan case in 2015, where he said basically, Chevron takes authority that belongs in the court and gives it to the executive branch. This notion of deferring to them is unconstitutional in Justice Thomas's view. Then there's Justice Gorsuch, who's written repeatedly and powerfully, he thinks Chevron should be overturned. I think most recently, it was in the Boffington case, where he dissented from a denial of review.

He said, "Chevron should be overruled and finished, dead, polished off forever." He wrote the same thing when he was a 10th circuit judge, of course, in a well-known case called Gutierrez-Brizuela. The chief himself has expressed a lot of skepticism about Chevron, famously in the Arlington case, where he would've voted to have a threshold test, asking whether Congress had delegated the matter, the specific interpretive question to the agency, so making it harder, shrinking the space for giving deference.

There are more Justices who've made their views known. I think Kavanaugh has also written about Chevron. Andy, can you help us understand where they're situated?

Andy: Yeah, I think as you point out, especially as far as Justice Gorsuch is concerned, in the administrative state, I think Justice Scalia would say, "This wolf comes as a wolf." He has it in for the administrative state, and he is anxious to dispense with the Chevron doctrine. I think we can assume that the same is almost certainly true for Thomas and Alito. The Chief has been very skeptical about Chevron. It's an interesting doctrine to track over time.

Justice Scalia, a revered conservative, has often been conceived as one of Chevron's biggest boosters. He had a particular view about Chevron, which that he wasn't ever going to need to get to step two, because using the tools of statutory construction, he could usually define Congress's answer. In many ways, he was not a Chevron skeptic. Thomas's views have also evolved over the doctrine over time, and the Chief seems to be very concerned about the doctrine not being overly broad, that there are several forms of the doctrine.

There's an aggressive form and a more limited form. It's going to be very interesting to see how this plays out. We don't know much about where Justice Barrett falls on

the spectrum, and we don't know whether the Court will overturn, or as the petitioners ask in the alternative, just constrain the doctrine.

Jody: It's worth going back now, thinking about the Justices and what they might do to Chevron, whether to cut it back, or to overrule it altogether, it's worth going back to the facts of Loper Bright. The question is whether the onboard observers can be required to be paid for by the regulated industry. Now, we're talking about a provision that doesn't explicitly answer that question.

Normally, Chevron would say, "You have a first step." The court goes step one and asks, "When we read the statute using normal tools of statutory construction, can we say Congress has answered that question?" A lot of times, the Justices will say, "Yeah, we can tell what Congress meant. We can say yes or no, using just the normal interpretive techniques we use." They never have to get to step two of Chevron, which is, the only reason you get to step two is you can't resolve it. Congress didn't address it.

You say, "We can't tell what they meant, so we're going to move to step two and ask, 'Is the agency's interpretation reasonable?'" That's the normal operation. You talked about Justice Scalia being a defender of Chevron. The reason he was a defender of Chevron, as you alluded to, was he said, "I normally can figure out what Congress was trying to do at step one, so I never have to get to deferring to the agency."

Justice Scalia explained that he liked this structure, he liked this way of approaching what the statute means, because it would be a good format that would constrain and discipline the lower courts. He thought that first asking them to say, "Has Congress addressed this?" Then saying, "Well, no, if Congress hasn't, the statute's ambiguous, or it's silent, we will move to step two." He thought that was a good structure to keep the lower courts in check.

Justice Kavanaugh and other Justices, like Justice Scalia, have admitted that they think they pretty much can answer the question at step one, so they don't need to defer to the agencies in many instances. I get into this in detail only to say, there are options here for how to resolve this that fall short of overturning the Chevron precedent. The Court could say, "Well, there are more steps to take before you ever get to this question of whether the agency's interpretation is reasonable, and therefore we defer."

They could, in other words, create more limitations on the Chevron two-step test. Andy, it's always so abstract to describe it this way, and I always worry that we lose people when we talk about it in this detail, but can you give us a flavor of how this case could come out, in a way that would preserve the essence of Chevron, but still cabin it somewhat?

Andy: Yeah. I think that the question here really relates to silence, and what do you do with silence? We know that silence and ambiguity are related concepts, but different. Ambiguity means that there are some clues, but I can't really tell. It's not clear to me

which of the options I should choose. In a case of genuine ambiguity, Chevron teaches, you take the agency's option as long as it's reasonable, but silence, that's something else altogether. What do you do with something that just doesn't answer the question at all?

I think a constrained view, a cabined view of Chevron would be, there's no role for any deference to the agency, if what you're dealing with is just silence. If it's just silence, then you can't conclude that Congress delegated any authority to the agency. Now, I personally, going back to the facts of this case, the petitioners, the fishermen, would argue, that it's silent. There's nothing in the statute that says it's okay to require the fishermen to pay. In the absence of that, the agency gets no deference, and it's simply not reasonable for all of the reasons they've laid out.

I think the government has a good case to make here. It's a case that other courts have accepted in this arena, that there are all sorts of other clues, including statutory language, that would suggest that this has been delegated to the agency, and it is a reasonable construction of the statute. Imagining a scenario where the statute's absolutely silent, you can imagine a court, and maybe this Court, saying, "There's no role for Chevron."

It fails at sort of, if the first step of Chevron is whether the doctrine applies, the Court could say it doesn't apply to statutory silence, and that would be constraint of the doctrine, but not overruling it.

Jody: Does the government in this case, would you say, Andy, have a good argument at step one of Chevron, that Congress has actually addressed this question of whether the observers, their salaries have to be paid, or could be paid, in some instances? Is there a good argument that we can collect enough clues, and use our canons of construction, and come to a conclusion that actually, this is clear?

Andy: I think that are. One of the things that skeptics of Chevron say is that, for all of these constitutional and other reasons, deference to the agency is inappropriate. Courts know how to use the tools of statutory construction, to divine meaning and to render principal decisions. We all know that you and I could deploy the same statutory toolkit, and reach different decisions in tough cases.

Here, I think that there is a way to apply the statutory construction toolkit, in a way that the government wins at step one, but the government hasn't won at step one so far, so it seems unlikely that they will at this point.

Jody: Give us a flavor of what you think the government's best arguments will be here, to try to prevent the Court from overturning Chevron altogether.

Andy: Yeah. Let's just focus on the big picture. There are two briefs that have already been filed in this case by distinguished administrative law scholars, one brief by Tom Merrill at Columbia, and one brief by Chris Walker at Michigan. Both of these gentlemen fall into a conservative camp. They're not liberal or progressive scholars.

They're more conservative than that. Both argue strenuously that to overturn Chevron is destabilizing, in a way that's unhelpful to the Courts.

For different reasons, and for some similar reasons, they argue, exactly as you indicated earlier, alluded to earlier, Jody, that Justice Scalia understood the framework to be very helpful to the lower courts. It is helpful to the lower courts. At step one, it asks them to deploy the tools that they're very used to using to discern congressional intent. At step two, it admits that they can't be experts in the Clean Air Act. They can't be experts in the Food Drug and Cosmetic Act, and that there's a role for deference to the agencies there.

If you're a busy district court judge, or a busy court of appeals judge, that framework is going to help you make the right decision nine out of 10 times. Now, what Paul Clement argues is that we know Chevron is bad, because the Supreme Court hasn't applied it for something like six years, but the Supreme Court hears 70 cases a year. It's not hearing hundreds and hundreds of cases buried in the weeds of the Clean Air Act or the Food Drug and Cosmetic Act.

That analogy just doesn't work. This is a profoundly important tool for the lower courts, to get their handle on issues that they're confronting every day from agencies. It's a really, really important framework for promoting stability and rule of law values. I think we would lose a lot if we were overturning Chevron. I think that case is made very profoundly well by these conservative scholars who say, "What's the alternative? This is a framework that has worked well."

The Court has some skepticism, but the Court only hears these big ticket items and has other tools in its toolkit to deal with situations where it feels like the government is engaged in overreach.

Jody: The other thing that's interesting is the rationale here for why you preserve Chevron, to keep things controlled in the lower courts, has to be accompanied by an argument, doesn't it, that says, "You, the Supreme Court, have plenty of ways around Chevron when you want to get around it."

Isn't that the other piece, Andy, that the briefing is going to suggest to the Justices, "You don't have to worry about Chevron, you don't have to apply it. In fact, you don't." As the last several years of shown, and as you said, the Court just doesn't cite Chevron much anymore. That's partly because litigants don't cite it anymore, because they know the Court's not very friendly to it.

Can you talk a little about that dynamic? Litigants not citing it, Court not citing it, and how it's sort of gone into disuse, in a way, in the Supreme Court?

Andy: Yeah, it's definitely gone into disuse in the Supreme Court because we know enough about the Justices and where they land on this issue that the government is not going to cite Chevron to the Supreme Court. It has other ways of making its point, by sort of focusing on traditional statutory construction analysis, which is what it has done in some of the HHS cases, the Becerra cases from the last couple of terms.

My former colleagues in the Solicitor General's office have been very wary of making Chevron arguments to this Court, because they don't want to see it overturned, and that's because it still has utility in the lower courts. I think the government is probably being very cautious about how it deploys the doctrine, but I don't think it should step back from deploying the doctrine where courts have again and again said on a particular issue, "This is exactly the kind of issue in which the agency gets Chevron deference."

Since the doctrine's been around since 1984, there are plenty of cases that are around like that, where the courts have said sort of like, "No, this is a reasonable construction by the agency. Whether you call it Chevron or not, it's fine." I think the doctrine is still deployed in the lower courts in that way, and I think that the lower courts benefit from that application of the doctrine. I think the last thing lower courts want to have to do is master the details sort of de novo of the Clean Air Act.

I think they want to understand that what the agency has done is reasonable. What's happened since 1984, and I think this is really important, is that the litigation is so much more sophisticated. In the 1980s, there were public interest groups on the environmental side, like NRDC, pressing their agenda. There was Ralph Nader and his litigation components. Now, there's a whole bunch of major players. The Chamber of Commerce is very sophisticated.

There are organizations like the organization here, Cause of Action Institute, that are policing government overreach, that are constantly looking for examples of those cases where the government needs to be reined in. In that circumstance, I don't think the Court needs to overturn Chevron to know that the cases on the margins, those cases that they're worried about, where bureaucrats are running amok, that there will be people there to call the government out. You can rest assured that that's the case without overturning this doctrine.

Jody: It's interesting, because I don't think there's an administrative law case that has attracted more attention. The last 40 years, the law reviews have been filled with articles, pages and pages discussing Chevron, what it means, who ought to decide these cases, does the power belong in the judiciary? Has the judiciary abdicated its role by giving too much deference to the agencies?

There are scholars who say, "Look, let's say you go overturn it. Let's say the Court says, 'We're no longer going to abide by this principle, that agencies can fill in the

gaps and ambiguities,' and they're not going to get any deference for legal interpretation. Where would that leave you? You'd have to go back and reconstruct some legal principles around when an agency's expertise counts for something, and when the Court's going to supplant it."

You can't escape this question, which is, how much room are you going to give the agencies to implement statutes that regulate consumer protection, the financial integrity of the markets, the safety of the food and drug supply, whether the air and water is clean enough to breathe and to drink? These questions, the nitty-gritty details of statutes with so much complexity, at some point, the courts have to decide whether they're going to give the agencies a little bit of room to maneuver, to accomplish their statutory missions that Congress delegated to them.

Even if you overturn Chevron, right, Andy, you can't avoid the fundamental problem, which is that Congress is giving agencies a job to do, and they need to have some flexibility interpreting their mandates. Does that sound right to you?

Andy: I think that's exactly right. I think your point is extremely well taken, that if Chevron were overruled, the courts would continue to find instances where deference should be accorded to the agency. Good judges act in the spirit of not complete confidence. I think there's a famous Learned Hand quote to something of that effect, "The spirit of liberty is a spirit that's not too sure of itself." In those cases, I think you would see courts anxious to defer, or concluding that it is appropriate to defer.

I think in all of the academic literature about Chevron, what's meaningful to me, and I say this as a former three decades as we started, government lawyer, that the scholars who are advocating for the preservation of the doctrine, like Tom Merrill, like Chris Walker, were litigators themselves. Tom was in the Solicitor General's office. Chris was in the Appellate section of the Civil Division, where he confronted tons and tons of these cases. I would say that, to some extent, their scholarship is informed by the practical realities of what happens in the courts every day.

To go back to your excellent point about Justice Scalia, this framework is one that courts can use that promotes rule of law values. It matters a lot to me that the scholars who are endorsing it are the scholars who have been in the courtroom and have seen that for themselves.

Jody: There's tremend ous anticipation waiting for this case, because the stakes are much higher than this being about one fisheries case, right? Whether or not it turns out that the statute here, Magnuson-Stevens, can be read to let an agency require private industry to pay for the onboard observers, that's an important question, but it's not why everyone cares about this case. They care because we're waiting to see what the Justices do around this question of deference.

It's become a kind of trope, right? It's a stand-in for where the Court is headed in terms of its interest in reining in the administrative state. It's part of a much bigger picture. We've seen some decisions in recent years, the last few terms from the new

six Justice supermajority, in which it's quite clear that there is some deep skepticism about regulation. There is deep concern about what the Court seems to view as a tendency to regulatory overreach.

There's these themes that the Court keeps hitting on, and I think this case plays right into those themes. Concern about what the Court would say is an unaccountable bureaucracy trampling on liberty. You see this language laced throughout decisions, and I think that puts in context why everybody is waiting with bated breath to see what'll happen in Loper Bright. Do you see it in that same framework?

Andy: Yeah. I think the case is somewhat extraordinary in terms of the briefing. The Loper Bright's brief, its merits brief, is mostly devoted to overturning Chevron. There's very little discussion of this actual controversy that arises under the Magnuson-Stevens Act. This is a concerted effort to cut back on the administrative state, and it is plain as day that is what's happening here.

One thing that makes me sad is that these observers, this sort of coverage, exists to meet conservation goals. One of the things that both the Fishery Management Councils and the regulator, National Marine Fisheries Service here is bycatch of other species, river herring, shad. The observers help further a conservation goal, help to manage the fishery in a scientific way. You'll see no discussion of that in the opening brief by the fishermen.

There's no mention of the conservation goals. There's no mention of the need to manage these fisheries for sustainability. That, I think, tells you a lot about this case, that it's not about this particular controversy. It's about a bigger agenda. I mention it because I do think that this rule was generated by the council in order to further the conservation goals of the statute. That matters too, right?

Jody: Yeah.

Andy: That's also important.

Jody: Well, it's reminiscent of Sackett. We can go back to other cases, other big decisions, where what's missing from the Sackett decision is a discussion of the goals and purposes of the Clean Water Act. It seems that, especially in environmental cases, the agenda that Congress has established in those statutes, the need to protect the environment, in this case, the need for conservation of fragile fisheries, it just falls out of the litigation at some point, and they become about other things.

I'm struck by the briefing, it goes back, again, to the cert petition which laid the seeds for this, but the briefing that sort of uses these hyperbolic claims about how Chevron, this mild-mannered doctrine that lets agencies have some room to maneuver, led to a catastrophe, an explosion of regulation from unaccountable agencies. That's the framing, and that's just not true. What's the evidence that this doctrine led to an explosion of regulation?

The idea here is there's a fear that overzealous, unilateral presidents with regulatory agendas are going to somehow use this flexibility in the Chevron doctrine to do big things under statutes that don't really allow them to do that. There's a conservative agenda to stop them. The stoking of this fear of the government as hostile, foreign interloper, intruding upon liberty-loving, regulated communities. That's the framing, and I note it because it's a very striking anti-government framing of these issues.

Andy: Yeah, I couldn't say it any better. That's exactly right.

Jody: The very last point to make before I let you go is just I was remiss in not mentioning the major questions doctrine, and I don't want to get us into a whole other long conversation, but just quickly, the Court recently has embraced this other canon, this major questions doctrine idea and said that in cases of major social and economic importance where agencies are interpreting statutes on big questions, the Court is not going to allow the agencies to read general broad grants of authority to let them do things that are very specific. They're going to insist Congress be very specific in giving these agencies the authority. The Court has been clear about that. How do you think the major questions doctrine affects this case, if at all?

Andy: Well, I think some of the amicus briefs, I think Tom Merrill's brief makes this point that you don't need to overturn Chevron having embraced some form of major questions doctrine if the concern is the agency acting outside of delegated authority. Well, that's what the major questions doctrine is all about. So having endorsed this doctrine, it seems like there's a stronger argument that you don't need to overturn Chevron because you have other tools in your toolkit to deal with agency overreach. I think it's interesting that at least one of the amicus briefs on the side of the fishermen and Loper Bright has actually characterized the case as a major questions case. They say, well, going back to your point about appropriations and making the fishermen pay the freight here, they describe that as a major questions issue and I think they're wrong about that. But I think it illustrates that the major questions doctrine does sort of exist to deal with these sorts of non-delegation issues. And I think the advocates who are arguing that the existence of the doctrine means that it's less necessary to overrule Chevron are correct.

Jody: Yeah, I think the problem is if this question of whether observers have to be paid by the private vessel, if that's a major question, then everything's going to be a major question. I mean, the problem is, and we've talked about this on other podcasts so I won't go on about it, but we have a problem here, which is the major questions doctrine allows the court to decide that any issue that it thinks is important enough is pulled out of the normal deference framework, and in a way that's helpful here because it says, look, you have this opportunity, you can avoid Chevron. You don't have to use it. On the other hand, we don't want them deploying the major questions doctrine in that way for all sorts of questions that really are run-of-the-mill decisions that should be left the agencies.

Jody: Andy, before we conclude, I just wanted to ask a final question of you, which is, what are you betting on? How do you think this case would come out? Is there a soft landing that you're counting on? Where do you think the Court will land? What do you think the most important implications will be for how the government does its job? That is, how agencies then approach implementing environmental statutes, and other statutes too?

Andy: Yeah, I'm hopeful that the doctrine will be constrained. Cabined, to me, seems like the more likely result, I think. That's probably because as an environmental lawyer, I have to be something of an optimist. We're in the business of training students up to do good things, and I think that requires that I be optimistic. I think that the case has been made by people like Tom Merrill and Chris Walker, that it would be incredibly destabilizing to overturn the doctrine. I'm hoping the Court will take that into consideration.

I think you've made the point, which I wholeheartedly agree, that if the doctrine were overturned, courts would still defer to agencies in a myriad of cases, because they would have to, because they lack the expertise. Some judges would be more willing to do that than others, and others would implicate policy judgments as they saw fit, which I think is a real downside of overturning the Chevron doctrine.

I think in the immediate aftermath of a decision, overturning Chevron, the job gets a lot harder for government and for agencies. It gets harder for them to know how to proceed. It gets harder for the government, for DOJ to know how to defend the agencies. That, after all, is the goal, right? For the people who are hostile to the administrative state, to make it harder for government to do its job. That all tracks into a myth that government isn't useful and is incompetent.

If you make it harder and harder for the government to do its job, then you can always say, "Well, they're not doing a very good job," because you've made it difficult for them to do it.

Jody: It's a self-fulfilling prophecy. If you disable the government enough, and you beat up on it enough, then it becomes harder for it to deliver on its responsibilities. As an administrative law professor myself, I always look forward, in a way, to these big cases, because they're wonderful teaching opportunities, but they're so consequential, they're so important. They have such far-reaching implications.

I think we don't really have many defenders anymore of why the administrative state is so important. We don't talk anymore about what the meat supply looked like in the United States before the Food and Drug Act. We don't talk anymore about rivers exploding into fire because they were so polluted. We don't talk anymore about the serious consequences of financial markets if they were completely unregulated, and had no boundaries around them, and consumers weren't protected from fraud.

We could go on and on through a variety of laws that are meant to regulate a modern economy, a modern society, and protect public health against modern threats. Government is deeply involved in those enterprises. Those are enterprises that are good for society. This is not to say the government never overreaches. It's not to say the government's always efficient. It's not to defend the government in every instance.

I'm the first to say we need better government, but this narrative of there's important stuff that needs to be done, there are important protections that people care about, we don't hear about that. What we hear about is a deep state overreaching and treading upon a liberty-loving people. That's what bothers me so much about the narrative of these cases, that cumulatively, they feed to the public, and they feed to the press, a kind of one-way notion about what's negative about government. I think it's pernicious, and I think it's corrosive.

Andy: Completely agree.

Jody: Let's not end on that note. Andy, thank you so much for your expertise on this. I'm going to put myself in your lifeboat and say, I think that the Court may well cabin Chevron, keep it around, so that the lower courts have a kind of guidepost for how to approach how agencies make expert decisions in run-of-the-mill cases. The Court will not use it when they don't want to.

Well, Andy, this has been really fun. I hope we get to do many more podcasts together. Let's make a plan to reconvene and talk about Loper Bright after oral argument, so we can get your impressions and talk about where we think the court might be headed. We shall meet again on this very same issue. I hope it's a date.

Andy: Thank you. I look forward to it.