

## **The Future of Regulatory Deference**

*Given on March 5, 2020 by Jody Freeman, Archibald Cox Professor of Law at Harvard Law School. It was part of the Regulatory Policy Program's lunch seminar series at the Mossavar-Rahmani Center for Business & Government.*

Recording:

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Joseph Aldy:

Hi, I'm Joe Aldy the Faculty Chair for the Regulatory Policy Program. Thank you all for joining us today for our seminar. We're thrilled to have our colleagues in the Law School. Jody Freeman here, share with us her thoughts about the future of regulatory deference. Professor Freeman is the Archibald Cox Professor of Law and the Director of the Environmental and Energy Law Program at Harvard Law School. Jody served in the White House as Counsel of Energy and Climate in 2009 and 2010.

Joseph Aldy:

Something I learned recently. She's the second most cited scholar in Public Law. How much you've got to do the ...

Joseph Aldy:

She's recently been named a fellow at the American Academy Bar of the Sciences. Jody has her presentation. She's willing to take thoughtful questions throughout the talk but also same time for bigger future discussions about the future regulatory policy and deference after opening remarks and we will close the seminar at 1:00. Jody, welcome back to seminar.

Jody Freeman:

Thank you for having me. Thank you. I also like turning over Kennedy School I like it particularly because there's a small group of devotees who care about regulatory issues which bore everybody else. I appreciate the fact that you understand how important this really is. I want to talk today about anxiety and the deciding theme is really about the anxiety directive of the administrative state at the moment.

Jody Freeman:

I'm talking about regulatory agencies that do the work of regulating every aspect of society in the economy from food and drug regulation to securities regulation to environmental protection and the whole list that you've now become accustomed to in the modern regulatory state. There's anxiety at the moment in particular because it's coming at the established bureaucracy from the bunch of directions, at least two prominent sources.

Jody Freeman:

One is the administration itself, which is in charge of the bureaucracy is directing a lot of antipathy toward it, undermining expertise of regulatory agencies, treating them as if they ought to accomplish

truly political aims and not consider scientific and technological data, et cetera. There's a lot of invective being aimed at long term bureaucrats as if they are performing a hugely valuable function in society.

Jody Freeman:

The second source of anxiety is coming from the Supreme Court and I'm going to talk a lot about law today and the vehicle for that is a conversation that is happening right now in and around the Supreme Court, around its attitude toward deference. No concept could be more abstract sounding and dull sounding than the idea of regulatory deference and I'd like to bring it to life and tell you why it matters.

Jody Freeman:

The core idea, what you think of deference as a stand in for judicial attitudes toward what administrative agencies are doing and how much leeway those agencies should have to carry out their regulatory mandate. The more deference that's afforded to administrative agencies, again you could pick your favorite one from the EPA to the FCC to the FDA to the Department of Homeland Security, whichever one you want to imagine as your stand-in. The question at the moment is, "Well how much room do they really have to maneuver when they go to interpret the law and implement the law?"

Jody Freeman:

There's a concern on the Supreme Court that has been growing for 7 years and I think is now intensifying about the idea that the administrative bureaucracy is too big, too strong, has too much flexibility and is in some sense in the court's view, I think in the modern court's view is tilting the separation of power scheme of our constitution out of whack, that is taking too much power from what properly belongs in the courts.

Jody Freeman:

There's a dialogue going on right now about the leeway that administrative agencies have and we're seeing the courts speak to this increasingly. It's a sort of 'fasten your seatbelt' moment because I think we're going to see more about this topic in the coming years. This starts with a case called Chevron that is on the lips of anybody who's ever studied regulation or administrative law or even just been an observer. The administrative state, you've heard about this case. Basically what Chevron said, and it dates to about 30 years old or what's '84? I can't even count now.

Jody Freeman:

It's a well established precedent. It's not 100 years old but it's a well established precedent that basically says when agencies are interpreting your statutes, think like the Clean Act as an example. Congress has not been crystal clear about exactly what the agencies should do. The agency should get some leeway in interpreting the ambiguities, the silences and the gaps in the law because on the theory that Congress means for the expert agency to have the first go at implementing or interpreting ambiguous language and silences because after all the agency has been entrusted with this law to implement.

Jody Freeman:

They have the relative expertise. That's what Chevron represents, a kind of tie goes to the runner notion. Well we can't tell what Congress means. The agency gets the first crack at it rather than the courts deciding, in each instance, what each of the bigger ambiguous terms means. The defense of this precedent goes like this. In theory, this is what Congress must've intended as the implicit assumption of

Chevron. Congress meant to hand this gap filling power to the agencies, not to the courts because they're experts. They know something.

Jody Freeman:

This is understood as pragmatic. The courts can't decide every single implementation question when it comes to complicated statutes that regulate the Securities Markets, regulate the food and drug supply, regulate consumer protection, regulate environmental protection. It's pragmatic in a modern complex society that we entrust agencies with the day to day management of the raft of laws that Congress has passed.

Jody Freeman:

There's also a theory of judicial economy. Judges just can't do all of this and Congress can't do all of this. Congress passes legislation. It's hard to get statutes through Congress. It's interesting to see the implementation over the years gets determined by the agencies. There's a critique

Male:

Can I ask a question on that?

Jody Freeman:

Yeah.

Male:

On this Congress can't do it, so we had to rely on the Executive to do it. We now have under Congressional View Act though that we give Congress the opportunity soon after a regulation is promulgated to actually review it.

Jody Freeman:

Correct.

Male:

Doesn't that give us some opportunity to think it's okay to defer to the regulator because the regulator has this ex-post check?

Jody Freeman:

Yeah.

Male:

Congress can say, "No, you took that as wrong. We want to reject this."

Jody Freeman:

Right. This could go on a list that has accountability after the fact. Congress has this power under this Act but about what we'd call the Congressional View Act where within 60 days, they have to have a look at the major rule and they can essentially through expediting procedures that are faster than normal legislative process, they can disapprove that rule. Means cancels it out.

Jody Freeman:

The problem with that is the Congressional remedy is a blunt instrument. There's no line item power in it to amend or adjust that rule. They can only eliminate the rule and it also comes with a really heavy backend effect which is the agency can never publish a rule that's substantially similar. It's a really powerful instrument. It has its risks and we can talk more about it but I could add that to my list, accountability after the fact.

Jody Freeman:

The other feature of this principle of deference that is giving the agencies a chance to fill in gaps is that it provides this rule, provides clarity for the lower courts. Whenever they hear cases challenging the agency action, they know, "Apply Chevron." It's formulaic, it's mechanical and it creates clarity and consistency in the lower courts. That's one of its great virtues says several Supreme Court Justices.

Jody Freeman:

Here's the critique of this principle and this is probably the most important one, judges have abdicated their responsibility to decide what each and every aspect of every statute means, to decide what the law means. That takes the balance of power out of whack. It undermines the balance in the constitution between Congress and the Judiciary and among the three of them: Congress, Judiciary and the Executive branch. That just gives too much power to the agencies that are implementing the President's prerogatives and it undermines democratic accountability because these agencies aren't elected.

Jody Freeman:

The heads of these agencies are appointed by the President and they're only indirectly accountable. The other criticism is Chevron that is deference to the agencies invites Congress to be sloppy, to write broad big gap-filled statutes and just leave it to the agencies to really make the law. I just want to say as much as we hear about Chevron and as many people who argue that it doesn't matter and there are some who argue it doesn't matter and I'll tell you why they say it doesn't matter in a minute.

Jody Freeman:

I'm going to tell you what matters. It matters because traditionally the lower courts apply this principle and give deference to agencies on the theory embedded in this case. The theory that the agencies are expert, the Congress meant for them to take the power to fill these gaps and there is a study done that I think bears this out and that is agencies win 77% of the time when the courts review their decision when Chevron is invoked as the deference principle, and they win a whopping 93%, almost 94% of the time when they get to the second part of the Chevron test, which basically says, "Where it's ambiguous, the agency wins."

Jody Freeman:

If you can convince the court that the law is ambiguous, you can almost guarantee that the agency getting its way. That's in the lower courts and that means something that the lower courts adhere to this, they believe in this, they apply this principle. I'm going to start there with this principle matters.

Jody Freeman:

Over time, it has come under pressure and the Supreme Court has moved to constrain it. When I say that, I mean the court is trying to take back power. The court is trying to say, "There are fewer

circumstances that we're going to defer to you." For example, the court announced in the 1990s and it was announced a Supreme Court decision in 2000 about 20 years that the court was embracing what we call 'Major Questions' principle or major questions theory which says, "Wait a minute." When agencies try to do really big things, so when the FDA in this case tried to assert its jurisdiction over nicotine, over tobacco, treating nicotine as a drug under the Food and Drug Act, that's a really big deal said the court. That has such social and economic and political implications that it's just two major question to fit under the Chevron deference rubric.

Jody Freeman:

In other words, Congress couldn't have meant to hand that decision off to the agency. In cases of major questions like this that are so important, we're going to expect Congress to tell us very clearly they mean for the agency to have this power. Suddenly the major question canon look like a real limitation on the principle of deference or goes to the agency because if it's important, I guess it doesn't go to the agency.

Jody Freeman:

Now we're on the turning of arguing, "Oh, no. Every question is important." You can imagine the litigant saying, "This is too big to leave to the agency on every regulatory issue that matters." The major question again was a real threat, a real worry to the principle of deference to agencies. Then came along the famous case, that was Sandra Day O'Connor. She was the first woman Supreme Court justice, now no longer on the court. The next major case that really addressed this was Mass. vs EPA, the big climate case from 2007 in which the Supreme Court said, "Guess what, the Clean Air Act actually gives the EPA authority to regulate greenhouse gases as pollutants."

Jody Freeman:

A decision written by Justice Stevens, who recently passed away last year. This case looked like it killed off the major questions can. This case looked like it said, "What could be bigger than climate change?" The question of whether EPA has authority to regulate greenhouse gases that cause climate change, that's a big expansive idea that the EPA just traditionally regulated ground level pollution, has this power. Yet the Supreme Court said the statute is clear. It's a big question but Congress said yes they do. They define 'pollutant' very broadly.

Jody Freeman:

It looked like in a case where you might think the major question idea would come in and kill off the idea of giving the agency this power and you would imagine the court might send out back to Congress and say, "If you really mean this, you better tell us this clearly." It didn't work. Justice Stevens managed to collect five votes on his side for saying, "Notwithstanding that idea, the agency actually has this power."

Jody Freeman:

There were a bunch of us out in the academy who thought of the major question canon and this is no longer applied. Then it came back. This year is the cases that recently was decided by the court in the last decade, tells you that there is anxiety about giving agencies too much power to do what in the court's mind is an overreaching expansion of their authority especially when that agency is named the Environmental Protection Agency.

Jody Freeman:

In a case called, "Utility or Regulatory Group" that had to do again with EPA's power to regulate greenhouse gases but in no particular way and I will bore you with all the details, but it was a follow on case after Mass vs EPA dealing with greenhouse gas authority. The court said, "EPAs effort to regulate in this instance would have given it so much authority over so many sources of greenhouse gases across the entire US economy, that it would've represented a massive expansion of the agency's power." In that instance, the interpretation that EPA was offering to give itself that power was struck down by the court.

Jody Freeman:

What Justice Scalia who wrote the opinion for the court said at the time was, "In instances like this where the agency seeks to give itself this kind of massive authority, we're going to invoke the major questions canon," reviving it in essence in a 2014 case and saying, "We're especially skeptical and suspicious on the Supreme Court when agencies do this kind of thing."

Jody Freeman:

This was followed by the Chief Justice saving Obamacare. On the way came King vs. Burwell to saving Obamacare where the Chief Justice wrote the majority opinion for the court, upholding the Affordable Care Act in a series of challenges that you're now familiar with, the Affordable Care Act. The Chief Justice took pains and went out of his way to say, "We're upholding it for a variety of reasons," and I can explain those to you and it's really complicated and we don't need to do that now.

Jody Freeman:

He said, "We're upholding it but we are not deferring to the Internal Revenue Service." This agency is purporting to give tax credits to all Americans to buy health insurance. The case concerned those tax credits. The IRS's view was everybody gets them and everybody has to get them because even if you're on a Federally established Healthcare Exchange or whether you're on State established Healthcare Exchange, if you can't get the tax credits, if you can't get the subsidies, we won't have a robust healthcare market.

Jody Freeman:

We the IRS interpret the statute to mean you're eligible whether you're applying on a state established exchange or whether the state have failed to create that market and the Feds have come in and done it. The Chief Justice said, "The IRS doesn't have any authority to interpret a healthcare law. This is a major question of such social and economic importance," here we go again, the major questions canon, "That we're not going to follow the principle of Chevron," which the Chief Justice said in this case, "We sometimes use."

Jody Freeman:

These subtle little signs that this fundamental principle of agency power, that agencies are experts, that they ought to have the first go in ambiguity is eroding and it's eroding in these subtle ways when the Chief Justice says, "We sometimes use the Chevron but we're not using it here." Nevertheless, the court upholds the Affordable Care Act but I'm interested in the mechanics of what's going on underneath the surface that has to do with posturing an attitude towards deference.

Jody Freeman:

Then came another Supreme Court case quickly on its heels in which again Justice Scalia wrote for the court, again it was Environmental Protection. Again it was an ambiguous law. Again the agency interpreted the statute and again the court said, "No, no, no. Even though we think a statute is unclear, even though we acknowledge it's ambiguous, you lose agency. Your interpretation is rejected. It's irrational. We don't agree with it."

Jody Freeman:

Remember I shared with you the statistic that said, "If you get to step two. If you get to the point where you've shown the court it's ambiguous, you're supposed to win if you're the agency." Almost never do you lose that fight. In Michigan, this is the second time in just a couple of years and Scalia's writing the opinion and both instances say, "Sorry if you lose in step two." Which means, the United States Supreme Court doesn't seem to be observing much of the Chevron deference principle at all by this time.

Jody Freeman:

Then this happens. New Justice Kavanaugh on the Supreme Court and this adds to the anxiety about where agencies are seen to be amassing too much authority, exercising too much expansive reach in the economy and the society and this anxiety is heightened because these two justices when they were judges were very clear about their views about the administrative state. Their suspicion of administrative and regulatory overreach and they wrote very clear opinions again where they were on the lower courts, Kavanaugh on the DC Circuit Court of Appeals and Gorsuch on the 10th Circuit Court of Appeals made very plain that they thought the administrative state was a behemoth that needed to be controlled and constrained and made accountable and that the judiciary needed to take power back.

Jody Freeman:

It's essentially a power struggle between the judiciary and the administrative state. I'll give you an example of the views of these Justices and I'll pick particular cases that got a lot of notice. One is a lawsuit challenging the Obama's Administration's Clean Power Plan, which was the administration's plan to regulate carbon coming from donations oldest and dirtiest power plants, part of the climate plan agenda of the climate change policy of the Obama administration. This rule, very important for first rule ever regulating these power plant and their carbon emissions was attacked by a collection of states and private actors.

Jody Freeman:

In the litigation, the major question canon came back, that is the argument that this is too big a deal, that EPA attempting to regulate the power center for its greenhouse gas emissions requires such an expansive view of its power in one view, in the court's view that it's too big and we would need to send it back to Congress. We couldn't possibly approve this. We saw this being articulated by Judge Kavanaugh when he sat in the oral argument and heard along with the rest of the DC Circuit.

Jody Freeman:

This again was before he was elevated to the Supreme Court. He kept trying to make the point in oral argument going back and forth with counsel and this argument that this is a big deal case. Counter kept saying, "It's not a big deal case. You already decided in *Mass. vs EPA* and told us we have authority over greenhouse gases. Now we're making a perfectly reasonable interpretation of another provision of the law." Again, this is the argument EPA is making.

Jody Freeman:

You can say they're wrong but this was the argument they were making invoking Chevron, "You should defer to us if the law is not clear on our authority." Kavanaugh on oral argument, and I was sitting there with so much of my chagrin, he said this ...

Male:

[inaudible 00:21:03]

Jody Freeman:

You have to turn this up because it's vintage. He's going back and forth with counsel. Sorry, check.

Jody Freeman:

Kavanaugh is worth waiting for.

Joseph Aldy:

Oh, yes.

Jody Freeman:

Oh, yes. Okay, I know you know. He said ...

Male:

[inaudible 00:21:33]

Jody Freeman:

Yeah. What he basically said was, and we were all sitting in the court, these scholars who write about this have said it's a big case. We're all just looking down in our seats. He's basically saying, "It's too big a question the agency is engaged in and what I think of as overreach and we have to send this back to Congress."

Jody Freeman:

You know that Judge Kavanaugh always have in DC Circuit was a proponent and adherent of the view that courts should take back the power to decide the law or the minimum, send these big questions back to Congress and not leave them with the agencies. Then Judge Gorsuch on the 10th Circuit wrote a very interesting concurrence in a case called [inaudible 00:22:30], which some people view, this came out very close in time to when he was picked to be nominated as Supreme Court.

Jody Freeman:

Many people view it as a compelling try out because not only did he write the majority opinion in this. This was an immigration case and they didn't defer to the Bureau of Immigration appeals, which by the way is an outrageously inconsistent and unreliable agency that doesn't really deference but there are instances in which you can differentiate among the agencies and decide that it's such a bad behavior here and we can talk about that later.

Jody Freeman:

This was an immigration case. He wrote the majority opinion. The court agreed and on top of the majority opinion, he wrote a separate concurrence. He wrote his own concurrence so that he could write a broad side against the administrative state and principles of deference that he took issue with. Chevron and a following case after Chevron that reinforces it permits Executive bureaucracies to swallow huge amounts of court and judicial and legislative power and concentrate Federal power in a way that seems more than a little difficult to square with the constitution. In other words, the modern administrative state applying these principles of deference essentially might be unconstitutional.

Jody Freeman:

Maybe the time has come to face the behemoth. They're strong. I give this to you because we know from Judge Kavanaugh arguing from ... Judge Gorsuch's record before they become Justices about their views of the administrative bureaucracy. Then we get to the 29th Supreme Court which was decided, which ended with cases last June. I want to give you a sense of this anxiety that I see building from the recent decision. What I want to suggest to you, you may not have read these cases, know about these cases so you just have to trust me.

Jody Freeman:

There were two blockbuster cases that have to do with the regulatory state. One was a case called Kisor and the other was a case called Gundy. I'm just going to give you one minute on each because you've got to understand how important these are for people like me who watch the court and see how they're treating administrative agency flexibility, administrative agency latitude and how and whether they apply deference principles. In Kisor, the Supreme Court upheld a principle of deference that says, bear with me, agencies are entitled to get deference when they interpret their own rules.

Jody Freeman:

They make their own rules, implementing law and if that rule is vague, they get to tell you what they meant by their own rule. Well this for Justice Gorsuch is a worse offense than deferring to the first step of deference because you're telling them they can write the rule and then interpret the rule and that's just so far out of line with what he views as the correct assignment of interpretive power that it offends his sensibilities deeply.

Jody Freeman:

The Supreme Court upheld this principle of deference. It was a 5-4 win and it was viewed by people in the administrative law and they've watched the administrative bureaucracy as a major oof moment. It said, "Oh, a majority of the court still wants deferred administrative agencies." This was a skin by the skin of the teeth decision. The 5-4 vote on the Supreme Court was even closer than it might appear and I will tell you why in a moment.

Jody Freeman:

The second case [Gundy 00:26:00] was even in a way more profound. It upheld the idea that Congress can hand off power to agencies at all to make discretionary decisions, interpreting the law that requires sexual offenders to register. Congress wrote a law that said sexual offenders must register or criminal provisions and then said to the Attorney General, you must interpret the registration provision. In other words, figure out the details of how they have to register.

Jody Freeman:

What the Supreme Court thought about was whether this is such a broad delegation of authority that it ought to be struck down because it's giving to the Executive branch lawmaking power. It goes too far, it delegates the legislative power that belongs to Congress. This principle of delegation, non-delegation doctrine it's called. It means you cannot delegate away Congress' court powers, has one good year as my colleague [inaudible 00:27:02] said, and 120 bad years.

Jody Freeman:

You have to go back to 1935 to find a case in which the Supreme Court struck down a law for delegating away Congress' court power. Over time, we've become accustomed to the idea that routinely Congress sets up administrative agencies, writes statutes that sometimes are quite broad, establishing broad principles and hands off the implementation of the agencies. If Gundy had come out striking down this delegation of power, it would've called into question hundreds of statutes across the government that set up agencies and give them authority to do things you now view as fundamental to running the society and the economy.

Jody Freeman:

The court decided 5-3 that to uphold the delegation, so again it was a moment of, "Oh, great. Core fundamental principles in the administrative state have been saved." They've been saved by Justice Kagan writing the majority opinion in both of these cases, but it was much closer. Those 5-4 decisions, the 5-4 and 5-3 decision were much closer than you think. There wasn't even a majority of those five that bought into Kagan's opinion. Justice Gorsuch had set himself up in opposition to Kagan, writing a scathing critique of the idea of delegating power to agencies and a scathing critique of the other principle of letting them interpret their own rules.

Jody Freeman:

In both cases, he wrote these dissents just with a broad side attack on the modern administrative state. The reason there were five votes to uphold them was because in the one instance, the Chief Justice said, "I'm going to vote with the majority here. I'm going to uphold the principle deference because of precedent. I'm not going to upset the other part because of precedent." He didn't buy into the reasoning which said, "Agencies are expert. Here are all the reasons we ought to entrust agencies with discretion." None of that.

Jody Freeman:

He said just precedential ground. In the second case, Justice Alito played the same role. He said, "I'm going to uphold this delegation of power, not because I like it but because we have upheld so many delegations of so many statutes but because it's precedent. I'm not going to upset apple case." He said, "In a case where I think there are five votes to overturn a delegation like this, that is to tell the agency they can't have this power, I'll do it."

Jody Freeman:

This was really consequential because they have five votes. It's just that Kavanaugh didn't sit on this case. He wasn't confirmed yet. So only eight Justices heard this argument. Alito said, "We're going to uphold this delegation but if there are five votes, I'll vote to strike it down." They could've put that back on the calendar, re-argued the case, reheard it and decided it differently. There are five votes to strike down that delegation and this is who they all are.

Jody Freeman:

What turns out to be a Supreme Court term with two blockbuster decisions that seemed to leave standing core establishment administrative law principles of deference to agencies turn out to be extremely close calls in which there are not five votes on the court really for the principles underlying this idea of deferring to agencies.

Jody Freeman:

That is why I think even the last term looked like Justice [Cayman 00:30:23] came to save the day. I think what it really tells you is there's a lot of grumpiness about the administrative state. There's a lot of discomfort with the power that it exercise and there's a lot of antipathy toward the idea that it may overreach. I think something is brewing at the Supreme Court, which will play out in the coming years. Chevron is under pressure, delegation to agencies at all is under pressure.

Jody Freeman:

There is antipathy and there is a case that was just heard this term that is going to come in June, that is going to rock the world because the Supreme Court I predict is going to strike down the structure of the Consumer Financial Protection Bureau as unconstitutional. The Consumer Financial Protection Bureau which was the brainchild that was formed had just dropped out I just learned and my former colleague at the Law School, she spent a good part of her career arguing to create this agency to protect consumers from financial fraud.

Jody Freeman:

The structure of this agency was designed insulate the top decision maker running the agency. The structure the Supreme Court I predict that overly protects against the view, the top of the agency making it harder for the President to fire the head of the CFPB, which was designed on purpose is going to be found to be unconstitutional. We can discuss the details later, I don't want to bore you with it but I want to say that this case which was just argued and in the oral argument, it was pretty clear that the majority of the Supreme Court is not comfortable with how it's structured and how protected this individual list from the President's supervision.

Jody Freeman:

Never mind the outcome that the structure of this agency will be struck down and we will see if it stays intact and if it disappears entirely. I think the court is going to try to find a way to rescue it but it will give an opportunity to the Justices on the court to unleash and unburden themselves of their views of administrative power and the growth of the administrative state.

Jody Freeman:

There are many, many agencies structured in a way that's not dissimilar to this, enough to call into question a bunch of independent regulatory commissions that have been set up in a unusual way to protect the heads of the Securities and Exchange Commission, the Federal Energy Regulatory Commission, anything that ends with the word commission, that has multiple members and is insulated from the President being able to fire them at will. They have to be fired for cause.

Jody Freeman:

There's a notion that this could be the tip of the iceberg and several members of the Supreme Court may be eager to question whether these independent agencies are even constitutional in the first place. If you eliminate the independent regulatory commissions from the administrative bureaucracy, that's a lot of parrying down of the modern administrative state. I don't want to suggest that's going to happen but I want to suggest the kinds of things that are brewing, in this case will come down no later than June.

Jody Freeman:

What's at stake? Why does it matter? Here's why it matters. This is the productivity of Congress in the modern regulatory era. Congress is not doing as much of its job or certainly not producing as much major legislation as it once did. That's the House, this is the Senate.

Female:

How do you define goals in that? That's just the ones that [inaudible 00:33:42]?

Jody Freeman:

Right. I can't remember how. I think they called out the meaningless postal service bill. I don't know if it limited to the most major legislation. For really major bills, I think it's even less productivity. This is to just give you a sense of what's going on. Polarization between the parties is growing. That's what this slide says.

Jody Freeman:

This is polarization of the House, polarization in the Senate. The Congress is not in the game of producing major legislation. Most of the statutes that the Environmental Protection Agency for example is dealing with, they are 40 years old. This is true in telecom. It's true across the board. We see old statutes across the United States Code that have not been updated any time recently.

Jody Freeman:

We see agencies wrestling with outdated laws to tackle new problems and what do they have to do to do that? They start updating and interpreting and creatively reading statutes in light of new circumstances to try to apply old law to new problems. If Congress is not doing its job updating statutes and responding to modern challenges, we have a set up. The set up puts administrative agencies, which after all have to implement their statutes and feel themselves bound to their missions.

Jody Freeman:

That is they have to protect the food and drug supply. They have to regulate the securities markets and they have to deal with more pollution. They are in a contest with the court for determining who's going to figure out what the law is ultimately and Congress is nowhere to be seen. If this is the balance of powers and you disappear one of the three branches, policy in the United States gets made by these two branches in a back and forth dialogue.

Jody Freeman:

If this branch thinks the Executive branch has too much power and thinks that they're deciding too much of what the law means, and starts to undermine principles of deference, what you have is the courts taking back the law deciding in a very significant way. The implications of that are the potential over

reach. This is the defense of this view. The over reach of agencies that just want to amass power and extend themselves beyond the boundaries of law is [inaudible 00:36:00].

Jody Freeman:

That's the defense of this view, that if courts control agencies, it will stop them from over reaching.

Male:

Just a question. What strikes me as you talk about it is the contradiction between the notion of unitary executive theory and what you're describing in the court. Some of the Justice seem almost schizophrenic when it comes to the power of the Executive, of the President, whether it's immigration or whether any other [inaudible 00:36:29]. They give extreme deference to the President.

Jody Freeman:

The President as the Presidency?

Male:

Right. What they're saying is the President controls the Executive branch.

Jody Freeman:

This is a really nice and important point which is that when it comes to the President and the President's sole authority and the conduct of foreign affairs and other core Article 2 Presidential Powers that derive from the constitution is ongoing deference to the President. It's also just a bit of color commentary, which I don't want to over read. I think it's an interesting thing to note.

Jody Freeman:

Many of these Justices spent part of their careers in the Executive branch. In fact, in the Office of Legal Counsel and the Department of Justice which is the office that basically figures out how the constitution applies to the Executive branch and limits or doesn't limit the Presidency, they've often grown up with and become of age within the Executive branch and have a very pro-presidency view, that is pro-presidential power just from their training and their experience.

Jody Freeman:

This is true of the Chief Justice. I believe it's true of Gorsuch, pardon me, of Kavanaugh and on down the list we go. I will say that the attitude towards administrative agencies that is separate from the President, to be supervised by the President is somewhat different. The idea that the agencies can read their statutes in these expansive ways or they can be delegating these broad authorities to interpret as they wish, that does come in to trouble because what the court thinks is we decide what those statutes mean.

Jody Freeman:

We're prepared to uphold the President's travel ban because there's a certain expansive view of Presidential Authority. When it comes to these agencies being delegated power, we're concerned about them overreaching. If your government that overreach, that is if your government trying to do something about societal problems. Let's say your government trying to do something, your Presidency and administration trying to do something about data privacy.

Jody Freeman:

We don't have a data privacy law in this country. We have sectoral privacy laws, we don't have a broad data privacy law that protects consumers as we know. If you want to do something about blockchain or distributed ledger technology and it's used for cryptocurrency. If you want to do something about autonomous vehicles and if you want to do something artificial intelligence and facial recognition and the surveillance. You're already talking about those problems. I'm just here to tell you, I'm teaching a course on this right now. So I'm speaking at the moment.

Jody Freeman:

All regulatory apparatuses behind, we don't have statutes in place to deal with many of these problems. There's certainly not statutes that have been adapted to deal with these problems. We have legal ways and legal gaps that are enormous and the agencies are between a rock and a hard place because how are they going to conduct their missions to protect consumers for example or to make sure that Tom's vehicles are safe if they're driving on the road? They're between a rock and a hard place.

Jody Freeman:

If you are a government that wants to do something about those problems, sees the fast pace of technological innovation, thinks that climate change is a serious challenge, wants to do something, then the core approach to discretion, the court's anxiety about overreach is going to clip your wings because your agencies may expansively interpret their authority to deal with these new problems and they will run headlong into the Supreme Court saying no.

Jody Freeman:

If you're a government, a Presidency and administration that doesn't want to do these things, then you will not be on the receiving end of pressure from the Supreme Court to get moving. That is this is a one way ratchet to deregulation or status quo'ism. It's also a one way ratchet to judicial lock-in by which I mean, if the judges interpret every aspect of the statute to say what the law means.

Jody Freeman:

Listen, I believe in judges saying what the law means. It's a core constitutional principle. I'm talking about filling up the intricacies of the statutes and in every instance declaring for how minute in authority and no matter how much Congress has delegated to the agency, the idea that it's the judge's job, it's the court's job to always decide every matter and afford no deference at all to the agency. That idea establishes for all time the interpretation of every small, medium and large size provision of these laws.

Jody Freeman:

Once they decide what they mean, that's it. You don't get to go back and revisit them. The principle of Chevron deference was designed to allow the agency to adapt over time, change his mind. To say now we understand we should apply the statute this way, the circumstances of change we're going to apply the statute this way. That's a built-in flexibility that is eliminated with judicial lock-in.

Jody Freeman:

I just have one or two more things to say. The point I made about under reach, that is when you don't want to tackle these problems, when agencies don't act, there's really not a good set of mechanisms to

force action. The court doesn't have anxiety about agency under reach. The court doesn't have anxiety about agency regulatory delay. The court doesn't have anxiety about inaction.

Jody Freeman:

It's harder to get into court to sue for those things. There are a lot of principles to make it harder to get access to the courts to sue. The risk is you have massive under reach, your overreach is checked. There's judicial lock in of existing understandings of law and Congress isn't doing anything. That my friends is a big problem.

Jody Freeman:

Joe asked me to talk about the future of regulatory deference, all of this is status regulatory deference. The future of regulatory deference I'll just say is I don't think Chevron the broad principle, is going to disappear. I don't think the Supreme Court is going to actually overrule the case, Chevron vs NRDC. What I think is going to happen is it will become along the lines of this major question canon that says when questions are too big we send it back to Congress, the agency doesn't need deference.

Jody Freeman:

There will be lots of situations where the court says, just like in the King vs Burwell Affordable Care Act case, they will say, "We're not giving deference to you. You're the wrong agency. You don't have any expertise." On down the line to various principles that will curtail Chevron so that it ultimately dies on the vine and indirectly the court will reassert itself as the preeminent decider of law. It will put the administrative bureaucracy back in its place, in its view I think where it will start to threaten that it will invalidate delegations but I don't see that really happening in any broad sense.

Jody Freeman:

When striking down the Consumer Financial Protection Bureau, which I predict will happen, that will be a shot across the bow that Congress better be careful when it structures these agencies in the future. I don't see dramatic unraveling of the modern administrative state but what I see is a chilling effect that says to the agencies, "Be careful. Don't try to do too much. Don't try to stretch these statutes too far or you're going to run into a very grumpy Supreme Court that will put obstacles in your way."

Jody Freeman:

If an administration were to come back and if the Democrats were to win the White House, I think the Supreme Court presents a very different kind of obstacle to regulatory action than was true in President Obama came into office 2008. If it's still true Congress is not doing very much to adapt, you have neither new legislation nor the ability to really pull the levers of the regulatory state and you have a lot of status quo. That's it.

Joseph Aldy:

Great.

Joseph Aldy:

[Crosstalk 00:44:04]

Jody Freeman:

Oh, yes. Can you tell people who you are?

Female:

[inaudible 00:44:10]

Female:

I'm at the School [inaudible 00:44:13]. The question I was going to ask before, I think you already answered which was we do regulatory of the President on top of ...

Jody Freeman:

Yes.

Female:

Just to make us all feel better for a minute.

Jody Freeman:

Yeah, I can do that.

Female:

What are the ways out of this box? Just assuming for somebody who believes that agencies have some expertise?

Jody Freeman:

I think this state of affairs exerts a disciplinary effect on the agencies to not think they march into the ... certainly not the Supreme Court. I think the lower courts, I had a conversation as it turned out, it happened to be a conversation with Judge Garland, the Chief Judge of the DC Circuit. He said, "Look, the lower courts are still applying Chevron."

Jody Freeman:

In other words, this phenomenon of deference is a problem seems to be unique to the Supreme Court in the vociferousness of it. You may well see a lot of cases decided in the old ways by all the circuits and very few circuit cases wind up in the Supreme Court. There's going to be a lot of law decided under Chevron principles I think for the future.

Jody Freeman:

For the broad cluster of cases that do go Supreme Court, I think this is going to go exert a disciplinary effect and I don't think the Solicitor General of the United States who argues can go in there and just go Chevron. I think it's going to have no impact whatsoever and I think the agencies that helped write those briefs and support the Department of Justice in those cases because they are after all about the agency's rules.

Jody Freeman:

Those agencies have ownership and they're going to have to come up with persuasive arguments that are textual and contextual and use the tools that the majority of the court uses and persuade them, that

on their own understanding of how read statutes, this is not just plausible but persuasive reading of the statute. There won't be any shorthand under Chevron is my expectation.

Jody Freeman:

I don't think the judges and justices are unpersuadable. They wrestle when confronted with their own textual moves, they sometimes are put in a spot. We'll see but I think it changes the nature of the arguments you leave with. I don't see, in cases where we used to see the litigants citing Chevron, I don't see them doing it as much anymore, at least not in the Supreme Court.

Jody Freeman:

Yeah?

Male:

I'm convinced that some degree of deference is necessary and it's a balancing act here that's going on all the time. You didn't say anything about the problem that works anymore, although you mentioned it in passing, and that's bad behavior. You get agencies which come forward and they mumble a lot. They mumble over many pages and then they say it's ambiguous so you should do the way we say we do it.

Jody Freeman:

It's not just bad behavior, it's bad lawyering. In fact, the Trump Administration has run into a lot of trouble in the first round of litigation over a bunch of policies across the various regulatory domains because they were sloppy and made a lot of procedural mistakes and mumbled some things. They lost. They've just been losing over and over again.

Jody Freeman:

I think the courts, we would always say about this. Our objectives, no matter whether Democratic appointees or Republican appointees tend to be conservative in a small sense. They don't like sloppiness. They don't live in a factory world. They don't accept irrationality that presents as rationality. They're prepared, I think even conservative justices and judges, to strike down that bad behavior.

Jody Freeman:

I think the harder question and I think now we're getting to the round of Trump Administration rules and decision that are not obvious procedural fouls, not terribly reasoned by they're better done and I think when we start to see those decisions come down, because everything is delayed. Rules take a couple of years then they get litigated. You only find out if they get upheld maybe after the administration's gone in some instances.

Jody Freeman:

Those will present hard cases where the question will be, "Can they plausibly defend their interpretation with anything other than because we think so?" In some instances, they will win. In some instances, they will have a good faith argument about a plausible argument that their reading of the law is reasonable and it fills the gap and the court may well under Chevron say, "Okay, we're going to give you the latitude."

Jody Freeman:

I don't think they're going to lose every case but there are other cases where they're going to have terrible trouble defending themselves. The fuel efficiency rollback right now, the administration cannot make the numbers work for itself. They cannot fudge the numbers enough and I'm not making this up.

Jody Freeman:

They can't show that cutting back fuel efficiency the way they want to will save any lives and cost consumers any less. In fact, it will kill people more and cost consumers more and they're not going to get through the courts with it. They're not going to finish it by the time we get to that number. They might just finish it. I guess my response to you is I think there's plenty of opportunity to check bad behavior in the sense of sloppy, poor reasoning, bad facts and manipulation of the record.

Male:

Excellent presentation. On the more negative scenario side.

Jody Freeman:

Are you saying I'm negative?

Male:

No. I'm saying she was trying to put forward. You said they won't settle this law as to revive the non-delegation doctrine. They had five votes which are pretty strong. Suppose Trump's re-elected. There's another Republican seat that's very conservative and then after that, you get a Democratic administration that's trying to use the power of the Clean Air Act or other ambiguous statutes to try to do climate policy because they can't get it. Could you then get a court actually going over that really far in a very rabid interpretation.

Jody Freeman:

[Crosstalk 00:50:16]

Male:

There's a lot of assumptions.

Jody Freeman:

What if three Justices unfortunately pass away right at the same time. Then we can do this.

Male:

Could you see scenarios where it goes really far?

Jody Freeman:

Every prognostications I've made in recent years turns out to be wrong. I told my Aunt Shirley, who won't forgive me, who's 82 that Trump get reelected. I like the family who won't talk to me. I don't know what to say to you except this is not the first time in history that the Supreme Court has been a conservative court. The court has clearly moved to the right.

Jody Freeman:

Justice Kennedy was a centrist swing vote. He was not a liberal. In fact, Justice Kennedy's parting shot in one of the last cases he wrote in, the joined the fray and said, "This deference thing needs rethinking." We were headed that way I think anyway. I think there will be some readjustment and then more conservative courts still, we may well find itself in a situation where the broadest delegation to come across the court's desk will give rise to a moment of using the non-delegation factor.

Jody Freeman:

Striking out one statute makes everybody shiver but the unraveling of them modern administrative state seems to me extremely far fetched. These are well entrenched institutions. They're sticky and I think Congress might well be moved by an effort to maybe, I don't know, but then you have to imagine our account size about the Congress. To eliminate agencies, they will appreciate ... I mean, people in this room might but people in society take for granted and appreciate the amazing accomplishment of a working administrative apparatus, that makes sure that there aren't thumbs in your meat.

Jody Freeman:

If you go back to St. Claire in the jungle, I'm not making this stuff up. The idea that our equality has gotten markedly better while we've grown our economy, added population, added transportation, vehicle, travel, this is an amazing thing. We have regulatory success and the last person in the world left I think defending Federal Government is something you actually need to be competent.

Jody Freeman:

Without saying the Federal Government is always right. Of course the Federal Government overreaches and of course we have regulatory mistakes and of course there's bad behavior. It's true, the Kennedy School and the Law School and private business and the Fortune 100, there's imperfection everywhere but the idea that you could what we do as a modern temperate society, without a set of bureaucrats who actually think often in my experience anyway.

Jody Freeman:

I don't know, Joe. I think you would agree. Joe who spent years on the Hill and in the EPA and we all worked together in the Obama Administration, I was so impressed with the Civil Service, I can't even begin to tell you. I come at this with these priors of course. I'm an enthusiast for a competent Federal apparatus. I think it's necessary for business. I don't think you can make any money unless you have a competent Federal apparatus.

Jody Freeman:

In this instance, we've seen with a lot of these deregulatory moves of late is industry hasn't been asking for all of them because they find destabilizing and uncertainty is the worst possible thing.

Male:

Asking to stop.

Jody Freeman:

As I say, anxiety is my thing. You all feel it. I don't think Chevron gets overruled. Delegation, there's an opinion that looks to wipe out all the independent regulatory commission. I don't see it that way but there's appetite there on doing this because there's appetite on the court to make some

pronouncements that we have had it and we're charge in. I think we're going to see some of those pronounced.

Male:

[inaudible 00:54:07]

Male:

This is great. This is really interesting. Ask lots of questions but let me ask one.

Jody Freeman:

Before the talk, you asked me about the renewable fuel standard.

Male:

It's a legal question.

Jody Freeman:

It was good though.

Male:

If we go back following up on this non-delegation issue. If we go back to Mass. vs EPA where there's this interpretation. I'm not a lawyer but I've certainly read decision or the relevant parts of it and it seemed to me that Congress just gave an extremely explicit definition of a pollutant.

Male:

It was actually an incredibly capacious definition but an extremely explicit definition of a pollutant and it just seemed to be a natural reading that CO2 would fit in there, gives some technical considerations that whether endangering human health and welfare and then they had to go back to EPA for them to be able to make that decision.

Male:

How is that over delegate? Where do you draw the line? Why is that over delegation? PFAS wasn't in the rule either but now everybody is including PFAS. How do you draw the line?

Jody Freeman:

Nobody else has PFAS in.

Male:

Perfluorooctanoic carbon.

Jody Freeman:

Pesticide, is it?

Male:

No. It's Perfluorooctanoic carbon. It's the non-GHT version of fluorocarbon.

Jody Freeman:

Here's what I have to say. Mass. vs EPA had fudged a bit because it's even more complicated. That case is even more complicated than I thought. I didn't want you to leave or anything. It was a pretty interesting case because the Supreme Court was dealing with an agency. This was the George W. Bush Administration and that EPA did not want to regulate greenhouse gases.

Jody Freeman:

They said, "We want deference for our decision not to regulate." They also said, "This question of our authority over greenhouse gases, are they a pollutant as defined by the law?" That's such a major question you should say send this back to Congress. They said, "We weighted two ways. It's too big and important, get it out of here. Number two, we don't want to do it." The court, Justice Stevens, corralled Justice Kennedy's vote. There's a great book by the way about this litigation by my colleague.

Jody Freeman:

[inaudible 00:56:31]

Jody Freeman:

His new book, just came out that the history of this case and this litigation they could've done that better. What I'd say to you is, it's astonishing that the court under those circumstances, where the major questions canon and Chevron deference are pulling in the direction of finding you don't have authority over greenhouse gases, that the court said, "You know what, this law defines pollutant so poorly as any radiological, chemical or biological emitted into the air."

Jody Freeman:

That's what the definition says. I'm leaving out maybe five words or something. You can check it. It fits moreover. Congress passes the Clean Air Law knowing there would be new science. It has to be adaptable over time. This was the argument of the majority. It's a forward looking statute and you have to give the agency room to maneuver and that managed to convince those five votes. I can promise you almost that if this case were litigated, you would not have five votes for that.

Jody Freeman:

You arguably will not get in the door because the court would likely hold that there's no standing to challenge an agency that doesn't want to regulate, in the case where the harm is globally shared and nobody has what the court might regard as a crystallized harm in fact to any individual that's different than any of it.

Jody Freeman:

Mr. [Gothman 00:57:55].

Male:

Who or what [inaudible 00:58:00] when it sets its face against overreach?

Jody Freeman:

You. Us.

Male:

I know. Is it simply the petitioner and the case who's harmed by overreaching action, deregulatory agency and this just goes on or is there a broader principle?

Jody Freeman:

This is what I tell my students, I say you need figure out the best case for the other side's already made when you find yourself disagreeing with it and you need to think of the most charitable way what are they up to? Not decide you don't like them or whatever. In this case, I truly believe that this compilation of justices to one extent or another believes that there constitutional principles in their corner, that is the Executive branch was not to meant to interpret law to this extent, that the court deferring to the agency on the meaning of statutes is somehow wrong constitutionally.

Jody Freeman:

That Article III says the judicial power shall be vested in the Supreme Court and such inferior courts as Congress shall create. It belongs to them. If you start allowing the Executive branch to amass that interpretative lawmaking power, you have thrown the separation of powers and the constitution out of whack. Now, of course that benefits the court in amassing its own and protecting its own power.

Jody Freeman:

When you say, "Who is being protected?" The court is being protected but the court, I think these Justices would say, "I'm defending the constitutional allocation of power." If the agency finds itself stretching the Clean Air Act or the Securities and Exchange Act or the 1996 telecom law that deal with net neutrality, and it can't jam its theory into the existing language, then you need your Congress to do something and it's not our fault that you people keep electing these guys.

Jody Freeman:

I think there is a way to say that there's a strong constitutionally based offense for this view. The problem I have with the Gorsuch broad side against this, it's time to confront the behemoth is that he adheres to a truly ancient premodern view of how to run the country.

Male:

[Crosstalk 01:00:29]

Jody Freeman:

Which does not allow, see they don't do that. We don't do that kind of thing. Which no personal attack, which that view says this modern architecture that was erected doesn't have a strong constitutional foundation and the notion that you could run society this way is so deeply unpragmatic that I'm just not persuaded that this is fitting with the way law has evolved over time.

Jody Freeman:

The great defender of that view that we're in a modern different age and these principles are now well established is [inaudible 01:00:59]. She is going to emerge as the champion of that perspective to counter the other perspective. You'll see a war play out. Justice Brier would be right there with Justice [Katie 01:01:10] as Justice Brier is a great believer in the regulator state.

Jody Freeman:

Used to be in history of law professor at Harvard Law School.

Male:

[inaudible 01:01:19]

Male:

A lawyer that has never practiced. I'm interested in hearing your commentary about the regulatory agency and its helpfulness in executing a predictable environment. Some economists maintain that the difference of age in the regulatory framework currently, it's probably has made a major contribution to the improvement of business and perhaps this more importance to improve the tax policy.

Jody Freeman:

Tax policy and regulatory policy are two very different things.

Male:

I'm only commenting on the contribution to how businesses. We may not see [inaudible 01:02:17] but we saw a financial crisis in a fast moving environment. Regulators have difficulty reaching ahead of these things. Boeing business is a big deal as well. Regardless of how the structure comes out, is it time to take a look at regulatory structure as it's engaged in the United States differently?

Jody Freeman:

It's a very broad question and a whole bunch of things on the way that are worth engaging with. So just try to take a couple. I think that if the presumption is that regulation is what holds business back, which is what one often hears, that same environmental rules are the reason why business can't make any money. I actually just don't believe that.

Male:

It says something to regulation that is probably ineffective.

Jody Freeman:

I'm the first to say there's probably laws in excess of regulation that's inefficient. I absolutely sign up for trying to root it out. I'm not trying to defend regulation on instances. What I would start with though, if you're worried about how well these regulatory agencies function is to see if they're actually equipped to do the job that Congress delivers to them to do, tasks them with.

Jody Freeman:

Often what we find is underfunding. Congress doesn't appropriate sufficiently. The Congress is essentially undermining the agencies that they task with carrying out these regulatory mandates. The idea what's going on, these hollowing out of core functions of administrative agencies by eliminating or re-jiggering science advisory boards by moving key personnel around so that they're moved out of their jobs they become expert at over the years and are assigned new tasks or moved geographically far away, there's all kinds of shenanigans going on across the regulatory state that make it difficult for even well intended regulators to do a good job. If you're underfunded and undermanned, it's really hard to keep up with industries that are fast moving.

Jody Freeman:

There's a lack of technologists in agencies now that are having to deal with cybersecurity issues, autonomous vehicles, data privacy. If you talk to the people running these agencies, they say, "We don't have the person." That's where I start. I don't start with whether they're either corrupt or inefficient or ineffective or ill-intended. I think Congress often is repealing statutes by implication indirectly by making it impossible for agencies to do their jobs.

Jody Freeman:

I think it's a handy dandy excuse to say the reason our industry can't make even more profit is because we're hamstringed by all these environmental rules. I think clear rules in the road most businesses can comply and they want clear rules on the road and they have lots of access into those rules before they're issued in order to put their point of view forward.

Jody Freeman:

They are the most powerful voices in the rulemaking process. I'm not especially worried about that.

Joseph Aldy:

One last quick question before we ramp up.

Jody Freeman:

Yeah.

Male:

His name I think Justice Kavanaugh or Gorsuch. What's their view and role of expertise? In putting it at a high level, to give our congressmen credit. One of the reasons they defer is because they know that's where the expertise is. It's not in Congress, so they defer. Gorsuch clearly doesn't view himself as a renaissance man, I'm sure. What is the role of expertise in making these kinds of arcane decisions?

Jody Freeman:

Well the way I put it to is I think the Justices all have a view of rather institutional competence. I'm not going to use the word expertise, I'm going to say institutional competence, meaning there are things that the agencies are supposed to be doing as Executive branch or independent regulatory agency after and there are things that we the court ought to be doing because of our relevant confidence and our confidence is interpreting law.

Jody Freeman:

That's what we do. This is how they would talk about it. To the extent that agencies have decided they can interpret and reinterpret law over time, they're stealing from us. They're not expert at that would be the view. The historical view of course. We go back 50 years ago. Courts would say, "We don't defer on matters of law. We never defer on matters of law. We are the law decided."

Jody Freeman:

Principles of deference evolved, they emerged to recognize that there is a lot of complexity in the statutory mandates and agencies need the flexibility, et cetera. There's nothing wrong with a view that says Congress would've preferred the agency to make those calls because Congress in fact derives on

the expertise of the agents. That's the theory but I think the court says that expertise only goes so far and you can't cross into lawmaking.

Jody Freeman:

There is a downside to agencies having this flexibility of course, which is that you can see real pendulum swings from administration to administration and that's a problem because there isn't stable regulatory policy and again, for business or for society, that's a challenge to think that we have one interpretation of the Clean Air Act under Obama and another interpretation under Trump and we have another. It's not ...

Male:

That's also making it political.

Male:

Insulation for the leaders in the agencies.

Jody Freeman:

That's why you have to what?

Male:

Have the political insulation in the Consumer Protection.

Jody Freeman:

Yes, there's an ongoing tension between trying to provide some insulation and protection for certain kinds of regulatory agencies and yet make sure they're sufficiently and politically accountable. We're not going to get rid of that tension any time soon. I'm worried about what I see as this talk about Chevron. You don't even have to care about Chevron per se. What I am detecting is a really concerning building, intensifying. Has been building for a while antipathy toward the notion of a Federal bureaucracy or government capable regulating in a modern society.

Jody Freeman:

I'm really worried about that erosion of institutional capacity. I don't think it's good for democracy. I don't think it's good for the United States. I don't think it's good for the world. That's the notion that I'm defending and that's the anxiety I'm sharing.

Joseph Aldy:

Before we wrap up, let me note that we will meet again next Thursday at 11:45. Share the floor, the former chair of regulators that's written on. The Federal Energy Regulatory Commission, she will come to speak about her thoughts about the future of energy and climate change policy.

Joseph Aldy:

[inaudible 01:09:07].