

The Chevron Doctrine: what it is and why it matters that the Supreme Court might kill it

A conversation with NRDC's David Doniger.
January 12, 2024



David Roberts

All right. Hello, everyone. This is Volts for January 12, 2024, "The Chevron Doctrine, what it is and why it matters that the Supreme Court might kill it." I am your host, David Roberts. In 1984, in a ruling on the case *Chevron USA v. NRDC*, the Supreme Court formalized what came to be known as the Chevron Doctrine. In essence, it says that courts should give administrative agencies wide latitude in how they interpret their legislative instructions. So, for instance, if Congress says in the Clean Air Act that air pollution should be reduced with the "best system of emission reductions," it is up to the EPA, which is charged with implementing the law, to determine what the best system is.

Even if a given judge does not like the way that the EPA has interpreted the law, the Chevron Doctrine says that the judge should, absent extraordinary circumstances, defer to the agency's interpretation. As none other than conservative Justice Antonin Scalia wrote, "No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency." That is Chevron at its most bluntly stated. However, Scalia also wrote another fateful sentence shortly thereafter. He said, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"

What does "clearly" mean, and what exactly does "vast" mean? Since conservatives took over the Supreme Court under Trump, extraordinary circumstances have become more and more common. The court has increasingly been inclined to deem agencies' actions more "vast" — or perhaps more "major" — than what Congress has instructed. In 2022's *West Virginia v. EPA*, Chief Justice John Roberts formalized what has come to be known as the Major Questions Doctrine, which says that if an agency is going to do something major, it has to be not just plausibly, but explicitly authorized to do so by Congress. It is entirely up to the justices what counts as "major" in any given case.

As you might notice, this somewhat pushes against the Chevron Doctrine, which counsels deference. And in fact, it looks like, based on a couple of cases that the Supreme Court is currently pondering, the conservative majority may just kill Chevron entirely, with potentially devastating consequences, not just for climate policy, but for the federal government's ability to operate at all. To talk through the history and significance of all this, I contacted David Doniger at the Natural Resources Defense Council. When he was but a wee young lawyer, Doniger argued the original Chevron case before the Supreme Court and lost it.

Now NRDC is arguing to save the Chevron Doctrine — and Doniger may well lose again. So with that excessively long and perhaps somewhat gloomy intro, David Doniger, welcome to Volts. Thank you so much for coming.

David Doniger

Thank you very much, Dave. And yes, you described the potential bookends on my career.

David Roberts

Yeah, it's a little dark irony there. So let's start with the original Chevron case. Let's go back in time to 1982. Miami Vice is on the TV, you probably have all your hair, and you're arguing this Chevron case. What was that case? Let's describe a little bit, sort of what prompted that case and what was at stake in that case.

David Doniger

Sure. Well, I was bald then and I'm bald now. So early in the Reagan administration, the EPA administrator, Anne Gorsuch, who happens to be the mother of the current justice —

David Roberts

Among many ironies here.

David Doniger

Yes. She issued a decision that cut back dramatically on one of the new programs Congress had adopted in the 1977 amendments to the Clean Air Act. Those amendments required that all major new stationary sources that were being built in polluted areas had to get permits, requiring them to use the very, very best pollution controls and more than offset the additional pollution that they would add to the area.

David Roberts

Right. New Source Review. I think some listeners may be familiar with this Clean Air Act program.

David Doniger

It turns out New Source Review comes in several different flavors in the Clean Air Act. But this was the strongest form of New Source Review, and the business community didn't like it. So they moved the Reagan administration to drastically narrow the scope of that requirement by changing the definition of what was a stationary source. I won't go into all the details, but the way they changed the definition of a stationary source had the effect of eliminating about 90% of the new industrial projects that would otherwise have had to get a permit. They could go forward without any such permits.

Right. She was basically saying, I think, that upgrades, even substantial upgrades, don't count. It only counts if you're literally building a brand new facility. Right, right. Which whacked 90% off of the alleged new sources out of the program.

Yeah. I mean, as I said a moment ago, one of the conditions was you had to make a net reduction in the overall air pollution of a plant as well as put the best controls on. And her regulation said, all you have to do is make a near equal reduction. You can actually have an increase, and then you wouldn't have to do all the other things that came with a permit program. So NRDC sued NRDC versus Gorsuch, and we won in the US Court of Appeals for District of Columbia Circuit.

David Roberts

The D.C. Circuit said basically that Gorsuch's interpretation of the Clean Air Act was – what? Just facially unreasonable?

David Doniger

Well, it got squirrelier than that, because there had been two prior cases about other parts of New Source Review, as it appears in other parts of the Clean Air Act. And in the first case, which was decided in the middle seventies, the D.C. Circuit had said, "You can't do this. The stationary source definition is what it is and you can't change it." In the second case, however, a different panel of the same court said, "Well, that particular program is only about limiting how much worse things get in the clean areas of the country. So you may do this, you may do the definition, which narrows the scope of the Vermont program."

And then our case came up third. And the court said, "Well, the law doesn't seem to be so clear one way or the other, but we have a law of the circuit, a law of this court, that when the program is one to make the air cleaner, you can't do this. And when it's one to limit how much the air gets dirtier, you can do this." And since our case fell in the first group, they ruled in our favor against EPA. And that decision was written by Judge Ginsburg, later to become Justice Ginsburg. So the Reagan administration took the case up to the Supreme Court.

And what the Supreme Court decided was, first, that NRDC hadn't shown this was unambiguous. This source definition that included all the projects – we hadn't shown it was unambiguous. So the court concluded that what Congress had done was leave the EPA some room to decide what the definition of source should be. In other words, what the scope of the permit program should be. And the court went on to reprimand the D.C. Circuit for its decision rule, which was just pure policymaking by judges.

David Roberts

Right. Judicial activism.

David Doniger

Right. And so Justice Stevens, writing for the full court, actually six members of the court, three were absent, said, "Look, when Congress has written a statute and told an agency exactly what it wants to do, when the law is unambiguous and clear, both the agency and the courts have to observe that." But in their view, this is a case where Congress had written a law with some space for the agency to make some choices. And there, he said, the judges should respect the choices made by the politically accountable agencies because Congress and the agencies who work for the president are responsive to the voters, whereas the judges are unelected.

David Roberts

Right. The quote is, "In such a case, federal judges who have no constituency have a duty to respect legitimate policy choices made by those who do." This will come back later, so I wanted to get that on the record.

David Doniger

Yes. And the first part of that decision is equally important, that when the law is unambiguous, the agencies and the courts have to follow it. But the controversy now is about the many instances in which things are somewhat ambiguous, or whether Congress has — either deliberately or because it was just something they couldn't foresee — they've used some words that have reasonable interpretations that go from A to B. And does the role of the courts is if the agency has chosen something which is totally outside the range Congress left — an unreasonable interpretation. Well, then they should be slapped down.

David Roberts

This is the legendary Chevron Doctrine. It's a two-step test. Right?

David Doniger

Right.

David Roberts

So the first is, did Congress speak unambiguously? And if it did, then the agency just has to do what Congress said.

David Doniger

Yes. And we were contending in this case that the definition of a stationary source was unambiguous. The court didn't agree with us, and then they went on to define step two.

David Roberts

Right. So the second part of the test is, if it's ambiguous, then defer to the agency.

David Doniger

If the agency has made a reasonable choice, not a wacko choice. And I'll give you one example of a wacko — thing that didn't survive. For example, in the Clean Water Act, there is a term, the total maximum daily limit (TMDL) for water pollution. And this is later in the Reagan administration, the EPA tried to define the limits as annual averages. And the D.C. Circuit, following Chevron, said, "Look, there may be some play in what daily means. It could mean a daily from twelve noon to twelve noon, or it could mean a 24 hours average, but it can't mean an annual average."

David Roberts

"Daily" can't mean "annual." That's unreasonable.

David Doniger

So, that was a step, one decision.

David Roberts

Right. So just to put a fine point on this, your contention, NRDC's contention in that original case is that Gorsuch's action should have failed that first step of Chevron because you thought that the source definition was unambiguous. But the court ruled that it was ambiguous and thus moved on to the second step, which is if it's ambiguous and reasonable, the agency gets to do what it wants. So you lost. NRDC lost that case. And that became, could be known — I mean, it's really interesting reading the history of this. You know, Stevens has said since that he didn't think it was that big of a deal.

He thought he was just sort of like stating what common judicial practice was, but it became this sort of foundational decision in administrative law, more cited than, I think, any other case in administrative law.

David Doniger

Yes. For the last 40 years. But you're absolutely right that what Stevens thought he was doing and what we think he was doing was sort of restating what had been 100 years or more of practice by the Supreme Court and the lower courts, saying, look, when the Securities and Exchange Commission or the Federal Power Commission, these are New Deal agencies, when they interpret their statutes, which are quite a bit vaguer, actually, than the Clean Air Act —

David Roberts

Yeah, there's a lot of vague statutes out there in the world.

David Doniger

Yeah. But when that Congress told the agency to figure these problems out, and if the agency has been reasonable, we give great weight, we defer to, we respect the various words, but they all amount to the same thing. We defer to the judgment of the agency on these questions. That would allow at least some play.

David Roberts

Right. Which makes sense for two reasons, which will come up later. One is those agencies are appointed by a president who was elected. Right. So they at least have a colorable claim to be democratic institutions, have some accountability to voters, whereas judges are unelected, so they have no accountability to voters. So democratically speaking, you want the decisions made closer to where there's accountability to voters.

David Doniger

Correct. And although the agencies report to the president, the Congress supervises what they do. It decides how much money they can get. It can put conditions on their funding. It could refuse to confirm someone because of the policy judgments that they might take or that the agency is already taking. So the Congress has leverage and the Congress can change the laws. So the Congress has leverage, and the Congress is politically accountable, too.

David Roberts

Right. So this is important. Agencies are democratically accountable and judges aren't.

David Doniger

They're the creatures of Congress.

David Roberts

Right. Right. But then secondarily, it's also the case that these agencies are full of technical experts who understand these areas, often very technical areas of law extremely well, and just a random group of judges doesn't. So it makes sense on both grounds, basically, to defer to agencies when you can.

David Doniger

It's not just that the question is technical, but they understand how a program fits together. They understand what they're trying to accomplish over a number of years and how this particular decision fits into that. They may have a better grasp of that than a judge who just sees one-off cases that pop up.

David Roberts

Okay, so that is the original Chevron case that established the original Chevron Doctrine, which has gone on to be absolutely foundational to US law. And what has happened since that case was passed? I mean, in that case, you have a bunch of judges saying, "You lefties, shut up. This Republican-controlled agency gets to do what it wants," but then ensuing years, all of a sudden, things kind of switched around, and the agencies came under control of Democrats, God forbid, and started doing all kinds of things that Republicans don't like. And then here you have the Chevron Doctrine sitting there saying very clearly, "Sorry, conservative judges, even if you hate this stuff, you are supposed to defer."

That's what the law says. That's what precedent says, what the Chevron Doctrine says. So over time, in the years between the 80s and the current day, conservatives have come to feel considerable hostility toward the Chevron — not uniformly.

David Doniger

A number of the judges and justices, at least until recently, regarded Chevron as a neutral principle. Yeah, it gives Republican administrations that don't like environmental laws or public health laws more freedom to interpret them narrowly, and it gives Democratic administrations more freedom to interpret them more expansively. And Scalia was a champ for the neutral application of that doctrine.

David Roberts

And did apply it sometimes against his own —

David Doniger

Exactly.

David Roberts

interests occasionally, like, he did apply it in a relatively neutral way in some high profile cases. But I think what's happened, and like conservatives used to say, they don't like judicial activism either. But it turns out what they really didn't like was liberal judges being activist. And what they really didn't like was liberal agencies having freedom. And I think over those years, as the right has, you know, the Republican Party has kind of drifted right and become more radical. I think they have come to see administrative agencies not as neutral, right. As kind of like intrinsically liberal, right, intrinsically leaning toward bigger government.

David Doniger

And I put it this way: If you're happy with conservative government when it's cutting back on regulations, and you're unhappy when liberal governments are expanding them, actually, the best remedy of all, from the most conservative point of view, is just to cut back on the authority of government. Because if the government can't do anything, it can't do any of this stuff.

David Roberts

I don't even think that's just conservatives. I think even political scientists have sort of come to see that the big administrative state sort of is kind of expansionist. Like, if you have agencies that can do things, they'll tend to do things because there's lots of problems in the country that need solving.

David Doniger

I would put it this way that we lived in a simpler time in 1789, but even then, the first Congress was delegating and tasking agencies to help them govern because there were stuff that the late 1700s US government, the Congress, couldn't figure out how to do by itself. So it called upon agents or agencies reporting to George Washington, the president, to carry out these laws, to interpret them and so on. And what I would think is the way to think about this is that the complexity of the world, the complexity of the problems we face and that the world throws at us has grown. And the government's capacity to meet these challenges has to grow too.

Otherwise they go unmet. I mean, pollution is a classic example where you can't protect yourself as an individual. You need collective action from the government to constrain the dangerous activity.

David Roberts

I was going to make this point later, but let's just make it now because I feel like it is kind of one of the central points that people need to understand about all this, which is just a small body like Congress trying to govern a giant, sprawling, wealthy complex country like the US cannot administer all the details itself of financial regulation, of safety, standards, of pollution. I mean, go down the line. There's just like tons and tons and tons and tons of stuff that government needs to do. And these are just elected people. They can't be experts on all those things.

So they have to, if they want to do anything at all about these problems, they have to by necessity farm some of the judgment out to expert agencies.

David Doniger

Exactly right. They don't have the expertise. They don't have the foresight. I'll come back to that in a minute. And they don't have the bandwidth.

David Roberts

Yeah, bandwidth, most of all.

David Doniger

If you think about the late 60s, early 70s when we had the explosion of public health and environmental laws from a reform-minded Congress, even though they were bent on legislating and it was a bipartisan time, they still couldn't get down into the weedy details that come up when you try to administer any of these programs.

David Roberts

Right. And are explicit in the laws about that. Like it says, "EPA should do whatever the best science says." So that almost definitionally says EPA is responsible for figuring out what the best science says, we don't know.

David Doniger

They knew in 1970 that there were five big air pollutants polluting our cities and they told the new EPA specifically, "You've got to set standards for those five pollutants. But more than that, we're giving you the authority to recognize new pollutants when the science identifies them."

David Roberts

Conservatives hate those laws for exactly that reason is that they're open ended and they have developed and grown and expanded over time.

David Doniger

Right. But think about even the active, capable Congresses of that time period. They could not deal with the Clean Air Act more than once a decade. They had lots of other stuff to do.

David Roberts

Right.

David Doniger

And they certainly couldn't manage the clean air program and all these other programs on a day to day basis or a month-to-month basis; they could manage to come back to the Clean Air Act in 1977 and revise it based on what EPA had done and what they'd learned, and again in 1990, and it hasn't happened since. And the same story is true about any other major law they get. Congress is able to focus on them and legislate maybe once a decade. And this Congress or these most recent Congresses can't even name post offices.

David Roberts

And also, conservatives have very effectively more or less crippled the federal government's ability to pass laws at all with the filibuster and everything else, like they've more or less shut Congress down. So it's almost the agencies who are doing the only governing left, which is precisely why they're going after them.

David Doniger

Yes, but they have to be even the most active environmentalists, like me, or aggressive environmentalists. The agency can't just make stuff up. They have to be able to point to the Clean Air Act or some other law and say, "This Congress has already provided us the authority and the task to do this".

David Roberts

Right. So let's get back to our narrative. So as I mentioned in the intro, in one of these post Chevron cases, Scalia sort of, almost in passing, mentions, you know, "We defer to the agencies, but we are a little skeptical. If an agency claims to find vast powers, vast new powers in existing statutes." They won't hide — what is it — elephants in mouse holes or whatever. So over time, since Chevron, conservative justices have gone back to this quote and sort of wedged it bigger and bigger until it has become kind of its own freestanding doctrine. So describe that process. Kind of what happened.

David Doniger

Well, so you're talking about the emergence of what's come now to be named the major questions doctrine. It started off somewhat innocently and inconsistently. The first decision I know about that really matters is one over whether nicotine is a drug and cigarettes are a drug delivery device. That's the position the FDA took at the end of the Clinton administration, and that went up to the Supreme Court. And Justice O'Connor wrote an opinion which basically said two things. The wording of the FDA law is broad enough that to consider nicotine a drug or to consider cigarettes a drug delivery device makes sense and doesn't offend any sort of principles for how you interpret the words of the law.

But she said there's something else going on that is that Congress has passed other laws, a whole slew of tobacco specific laws that regulated or limited advertising and did some other things but the presumption in all those laws was that tobacco, that cigarettes were still a legal product to sell. And if the FDA deems nicotine a drug, they would have to ban tobacco. She said, "You know, we're not going to allow that to happen in so cryptic a fashion when it has such —" and she was the first one to use the term, "such broad political and economic consequences."

David Roberts

Right. The idea here is that if Congress had meant to ban tobacco —

David Doniger

They would have said so directly.

David Roberts

It would have said so. It would have said so, and it wouldn't go off making a bunch of other rules based on the presumption that tobacco was legal.

David Doniger

As an aside, it took ten years, but Congress later passed a law giving the EPA quite a bit of authority over regulating nicotine.

David Roberts

Oh, funny.

David Doniger

In that instance, Congress responded, but it took a decade.

David Roberts

Right? So conservatives found this aside, right? And they're like, there's our pinhole that we can get through.

David Doniger

But they didn't grab it right away. Scalia came up with the phrase, "you don't hide elephants in mouseholes." But the original use of that phrase was to reject an industry argument that purported to find authority to undermine the public health standards for air pollution in a few stray words in the Clean Air Act. And he said, "Come on, if Congress wanted to give the EPA the authority to disregard public health for economic reasons in this decision, they would have said so." And so he turned down an industry effort to weaken the Clean Air Act with this "no elephants hidden in mouseholes" phrase. But that got repurposed.

David Roberts

Right. And I want to stop and emphasize this, too, because I read this in your paper, and I feel like this is an important point. What Scalia was doing there, he did not see himself as outlining an exception to the Chevron doctrine. When he did that, he viewed himself as merely applying Chevron reasoning.

David Doniger

Right.

David Roberts

He thought he was doing Chevron.

David Doniger

At step one, that the law was clear on this point, that the public health standards were supposed to be health standards, not cost-benefit standards.

David Roberts

Right. But then, so he says this, then conservatives get their pinhole, then they get their sort of wedge that they can wedge farther and farther open.

David Doniger

Then came another good decision, again by Stevens. This was *Massachusetts v. EPA*. This was in the Bush administration — so another conservative administration. The administration says, "No, the term 'air pollutant' doesn't include carbon dioxide or the other greenhouse gases." And Stevens writes an opinion saying, "Yeah, plainly it does. The term unambiguously includes all chemicals that are thrust into the atmosphere from cars and power plants."

David Roberts

Right. So that was a step one *Chevron*, not a step two, not "We're deferring." But there's "No deferring to be had. It's unambiguous."

David Doniger

Scalia wrote a dissent in which he said, "I think this term is ambiguous, and we should leave this policy judgment to the agency." So he didn't go with major questions or anything like that. He went with straight *Chevron*. He just disagreed about whether the term "air pollutant" had wiggle room, which Stephen says it didn't. And he said it did.

David Roberts

Right. But even if it does have wiggle room, Scalia says we're deferring to the agency.

David Doniger

We should leave it to the agency, which in that case would have been the Bush administration saying "We're not going to regulate."

David Roberts

So the outcome, if Scalia had been in charge, was that he would have given Bush's EPA permission to exclude greenhouse gases?

David Doniger

Same as in Chevron with the definition of a source.

David Roberts

Right. But he was doing Chevron by doing that, not an exception to Chevron.

David Doniger

Exactly. Well, then came another case on greenhouse gases which involved – it all comes back around to this New Source Review program.

David Roberts

They really hate – conservatives really hate the New Source Review program.

David Doniger

Well, and this is a case where Congress was too specific because Congress wrote these New Source Review provisions. And the question was how many tons make a major source? And Congress, with advice from the EPA and experts and so on, said, "Well, look, a good dividing line is, I'm going to make this simple, is 250 tons." And that worked for all the old pollutants. 250 tons of SO₂, sulfur dioxide is a big source, but when it comes to greenhouse gases, 250 tons of CO₂ come from a McDonald's.

David Roberts

Right. Which would have — if you treat CO₂ as a pollutant and if you take the 250-ton threshold seriously, then virtually everybody ends up subject to New Source Review, which was obviously like no one wanted that.

David Doniger

The EPA had come up with a circuitous way of avoiding that. And Justice Scalia, in that decision said, "Come on, something with consequences as big as multiplying from a few thousand, a few hundred sources a year having to go through this review to millions of sources having to go through review, and millions of tiny sources at that. It couldn't be what Congress meant." So that's where he said, "We expect them to speak clearly if they want to do something with such vast political and economic consequences." And I can't say I disagree with the outcome because it would have made no sense to magnify the size of the program and dip down to every McDonald's and dry cleaner.

David Roberts

Right. So the EPA just instituted like —

David Doniger

An exception. They made up an exception.

David Roberts

An exception for greenhouse gases.

David Doniger

Yeah, they said, for greenhouse gases, we're going to change the number from 250 tons to, I think it was 75,000.

David Roberts

And was that okay with Scalia?

David Doniger

No, he said, you can't change a number. The number is in the law.

David Roberts

Right.

David Doniger

If Congress had said "EPA, you pick the number," he would have been fine with that.

David Roberts

Right.

David Doniger

But they didn't; Congress wrote the number into the law.

David Roberts

So Scalia's point then was, you can't "interpret" a very specific number, and if you follow up on the logic of the very specific number in this case, you're going to regulate everyone, which can't be Congress's intention. So his point was just, you can't make greenhouse gases part of New Source Review.

David Doniger

Yes, that's the bottom line. But there's another way. Basically, he upheld another part of what the EPA did. And basically, as he said from the bench, the EPA is getting 90% of what it's out for here. And so he didn't even think he was making a huge cutback because, again, he said, the EPA doesn't even want to do this. They've come up with an exception, and we think there's a more straightforward way to get the same result.

David Roberts

But he said the mouse hole thing, and now it's on record. And so then conservative justices start thinking, well, "What counts as a mousehole and what counts as an elephant? What counts as more major than what the law says?" And then they start making judgments on that basis.

David Doniger

Yeah, well, the next big one was the Obamacare decision in which Chief Justice Roberts upheld the law. But what he said is "This is too important to be thought of as a Chevron case. So we, the judges, need to decide this." Now, what he ended up deciding in that case is to uphold the government's position that the insurance exchanges, if a state didn't set up an insurance exchange, the federal government is supposed to set it up for the people in that state. And he upheld that.

David Roberts

But crucially put on record, this is not Chevron. This is an exception to Chevron because it's major.

David Doniger

Yeah.

David Roberts

So, that was very, like, this is —

David Doniger

It's creeping. It's creepy and it's creeping.

David Roberts

Put a footnote in here. Yeah, and purposefully creeping. This is what Roberts wants to do, in contradistinction to his lunatic colleagues. Roberts wants to incrementally, through the back door, wear away at the power of the administrative state. And that's sort of what he's doing. He's like, "I'm going to let you do this, but I'm just putting on record that that's our decision. That's a judge's decision, not the agency's decision."

David Doniger

So, the next — I'm going to skip really quickly through these — there were two decisions on COVID related regulations. One where the public health service tried to impose a moratorium on evictions on the theory that if you evict people, they're all going to congregate in public shelters and spread COVID around. So as a public health measure, we need to keep people in their apartments or in their homes. And the other case was whether the Occupational Safety and Health Administration could require big employers either to require that their employees be vaccinated or that they have to be tested. And in both of those cases, the court said, "Look, these things seem to be big departures from what the public health service has done in the past or what OSHA has done in the past."

You can argue about whether they're right — I think they were wrong — but they just applied this concept, "If it's big and novel and it isn't clear, we're not going to let it pass without Congress speaking to it again or speaking to it directly." And then we get to the West Virginia case that you mentioned.

David Roberts

Yes.

David Doniger

And the EPA had regulated power plants using a novel approach that involved emissions trading. And the explicit goal of the program was to encourage a shift from coal to gas to renewables.

David Roberts

Right. Like a fleetwide shift. This was Obama's Clean Power Plan.

David Doniger

And there Roberts wrote the opinion, 6-3 opinion. And he said, "Look, EPA has been regulating industries in a traditional way with sources being required to put pollution controls on themselves, and that's cool. But this novel approach —" which he exaggerated how impactful it was —

David Roberts

And exaggerated how novel it was, too.

David Doniger

And struck it down. In a way, you could imagine him saying, "Look, all the parties have told us that the goals of this program for 2030 were met eleven years early. So who cares?"

David Roberts

I know this case should live in friggin infamy because it's a case about a law that never passed. And furthermore, the goals of the law were met by just normal market activity. And Roberts knew this when he made his — like, this was public knowledge when he made his ruling that the target of the law had been met without any law, which almost by definition tells you it couldn't have been —

David Doniger

It couldn't have been major.

David Roberts

that major. It would have had literally no effect on the industry. The industry literally would have done it anyway. And yet he found it major.

David Doniger

They had done it.

David Roberts

Right. Right. They had done it anyway. So what he said was "If Congress meant for EPA to regulate power plant fleets rather than individual power plants —"

David Doniger

It would have to say so.

David Roberts

It would have to say that. So that was major. And he struck it down, even though the law didn't exist, even though it clearly was not major in its economic effects, et cetera, et cetera. Just a terrible,— just like Bush v. Gore level terrible. I think, like comedically terrible judgment.

David Doniger

Well, yes, I agree, but I do want to give him credit for sort of leaving the door, the pathway open for EPA to regulate again in the traditional way. And that's what EPA is doing now.

David Roberts

Right, right. So he did say, like, "EPA can do what it normally does and CO2 is a pollutant, so it can, like, I'm not telling EPA it can't regulate the power plants. I'm just saying it can't do it this way where it regulates the fleet rather than the individual power plants." Was that the first time he used the term "major questions"?

David Doniger

Yeah, that's the place where it gets formalized and sort of articulated. As he said in his opinion, "It's been around for a while, implicit in our decisions and explicit in scholarly writings, but we never have articulated it formally, and we're doing so now."

David Roberts

I said "formalized," you said "formalized." But let's just make a note, like, he didn't say what counts as "major" or why or when or like he didn't give any way —

David Doniger

How new, how innovative, how different from the past?

David Roberts

There's no way for an agency to know in advance what the hell is going to trigger "majorness", you know?

David Doniger

And how clear does Congress —

David Roberts

How clear is clear. I mean, he just created this incredible ambiguity around everything, you know; if you know, a liberal administrative law type, they will say, "Well, that's the point. The point is to scare agencies in advance, to make them be cautious in advance. Like, that's what he wants to do." And that's sort of —

David Doniger

That's true. It's also true that if Gorsuch or Alito or Thomas had written the opinion, it would have said, "Agencies can never do this under any circumstance."

David Roberts

So once again, it was incremental.

David Doniger

Incremental. And it does leave a pathway for the EPA to regulate power plant carbon. So I have not given up hope on that. We're working very actively on that.

David Roberts

Right. So this brings us then to the current cases. Right. So the major questions doctrine is out there now. And as you write in your paper, all sorts of conservative institutions are going nuts, filing cases based on this now. They're trying to use it as widely as possible. And sort of – it remains to be seen a little bit what the lower courts are going to do with it, how widely they're going to use it. And this brings us to the current cases, which are before the Supreme Court, which they heard arguments on already, or they're... ?

David Doniger

They will. On the 17th of January.

David Roberts

On the 17th of January they're going to hear. And these cases, the details of these cases, they're about herring, they're about fish and some sort of obscure fish related agency.

David Doniger

So the National Marine Fisheries Service has the important task of making sure that our commercial fishermen don't overfish and destroy the various fisheries. So the herring fishery, there are quotas on how much can be caught each year, and there are allocations to each boat. It's like a cap and trade system. The problem is that there's not a good technical mechanical monitor that can tell how much fish the boat has caught and whether they've caught only herring or other things you're not supposed to catch and thrown them back and so forth. So you need a human monitor on the boat.

And there is an ambiguity in the law about whether the boat owner or the government has to pay the salary of the human monitor.

David Roberts

Right. And the agency said that the boat owners have to pay. They sue. They say, "One, this administrative decision is wrong and bad and violates Chevron. But secondly, maybe Chevron itself is bad." And that's the part that the court took up. That's why I was sort of being dismissive about the details. Is that the question that the court took up in both these cases, they neglected to take up the details and basically instead took up the second question, which is, "Is Chevron good? Should we keep Chevron?" Which is to say that they are explicitly now in these cases discussing whether Chevron is going to survive.

David Doniger

So there are some of the judges, and Justice Kavanaugh has voiced this before, and Justice Kennedy just as he was retiring. They think the lower courts are just too quick to conclude that the laws are ambiguous. They should struggle more with whether you can figure out what the clear meaning of the law is, the step one meaning. And it's a sort of funny position for textualists, because you don't just look at the words, but you look at the structure. But some of that is sound legal analysis. Is the term used in the same way in two parts of the law, or is there evidence that they meant it to mean something different in the two parts of the law?

Some justices still look at legislative history. What did the Congress, the committees and so forth say they were trying to do? Can we determine clearly what this, you know, the best example of that is Justice Roberts saying, "Look, the whole Obamacare would fall apart."

David Roberts

They can't have sabotaged their own law in the law, that they wouldn't do that.

David Doniger

From the structure of it, we can tell that this must mean that when a state refuses to set up the exchange, the feds can do so. So some of the justices think that the lower courts give up too easily on figuring out what the unique meaning is that Congress had in mind —

David Roberts

And thereby defer too much to agencies.

David Doniger

Quickly to defer at step two. You know, a minimal outcome here would be one where the justice says, "You have to struggle more at step one."

David Roberts

Right. So "Chevron's intact. Just be a little bit more strict about step one."

David Doniger

Right. There's another sort of minimal approach. There's a difference between when Congress says, "Here's a term you, the agency, are tasked to define this term." That's one version. And there are other things where they use words that are just ambiguous or people assert later are ambiguous, and they haven't told the agency explicitly that "You have the authority to define this term," or they leave a question unanswered. And you could say that the question of who pays for the monitors on the herring boats is a question Congress simply didn't address they left unanswered. So is there a difference between deferring to agencies when Congress told them that they have the authority to decide something versus deferring to agencies when the agency is just filling in a gap that the Congress silently left there?

And then the worst outcome would be to say the opposite of what Chevron said. Chevron said judges should not substitute their own policy views for

those of the elected branches or the politically accountable branches. And if this court were to say the opposite, "Yeah, judges, you should decide these —"

David Roberts

"We absolutely should substitute our judgment."

David Doniger

This is the fear of a juristocracy where the Supreme Court elevates the judges above the other two branches.

David Roberts

Yeah. And maybe you're too kind to say this, but as a cynic, let me just say that it is awfully convenient now that conservatives have captured the Supreme Court — in sidebar, grossly illegitimate ways — but now that they've captured the Supreme Court, it looks like, absent some radical intervention, that they're going to have a lock on the Supreme Court for decades, like decades, like 40 years. And so, knowing that it makes all the sense in the world for them to say, "Hey, well, then we should just be the final deciders on everything, shouldn't we? It just sort of like, locks in conservatives as being the final call on literally everything."

David Doniger

Well, it's a little more complicated than that for them because they handle 50 or 60 cases or maybe 80 a year, I don't remember.

David Roberts

Right.

David Doniger

But there are hundreds and hundreds and hundreds and hundreds of cases that come up every year.

David Roberts

It also says to conservatives in lower courts, all these Trump judges, "Go for it. Like, substitute your judgment for agencies. Green card."

David Doniger

Yes. But remember that through the current Biden presidency, lower courts are getting repopulated by a very substantial number of Biden appointed judges. So if the Supreme Court is conservatively locked in, as you were saying, for a long time, absent somebody retiring or dying, the lower courts are more volatile in that sense. And if you were to tell the judges, "Hey, you decide," then what you're telling the litigants is "Go find a judge."

David Roberts

Find, yeah. The outcome of your case depends on what judge you find.

David Doniger

Basically, you go forum shopping and all the conservatives go to the western district of Texas and the judges in southern Louisiana, and the liberals tend to go to judges in California or the East — it's more particular than that. And you can't be sure in most courts which judge you're going to draw, although there's one Texas district that has only one judge in it, and he's a far right guy. So, there's a lot of activity trying to go to that court.

David Roberts

And would you agree with this? Maybe this is just me being myself, but I really think if you look at the quality and character of the judges that Trump has appointed, I just feel like liberals going to liberal judges are more likely to get a verdict on the merits, which may or may not go against them. Whereas if you go to a conservative Trump judge, you're going to get the anti-agency ruling almost no matter what because they're a bunch of hacks.

David Doniger

Well, I'm not going to comment on that directly. Sometimes we have to appear before judges anywhere in the country.

David Roberts

I'll say that directly.

David Doniger

But Judge Kacsmaryk, I think, is how you say his name, from the western district in Texas, recently cited Chevron deference as a reason not to overturn Department of Labor regulations that allow fund managers to take climate risk into account.

David Roberts

Interesting.

David Doniger

The red state attorneys general went to him because they thought the guaranteed slam dunk would get him to overturn this crazy Obama-Biden policy, and he didn't. And he cited Chevron as the reason not to.

David Roberts

Interesting. But at the very least, if SCOTUS says in these cases, "The Chevron doctrine is not solid legal reasoning. We're getting rid of it. Now judges are going to be the deciders." You might not get uniformly anti-agency decisions, but what you will get, it seems to me, and tell me if I'm wrong, is effing chaos. Like, no one's going to know what laws — no one's going to know what's going to happen to any regulation. Like, it's going to depend on entirely on what judge you end up with or what court you end up with. And maybe you'll get a liberal ruling from a lower court judge, and then it goes to Supreme Court and gets overruled.

Like, it's just like fair game and chaos. Is that right?

David Doniger

Yes, and there are some briefs filed in these cases by administrative law professors and others that are saying, "Yeah, there's a certain amount of differences that you get now, but Chevron tends to limit how much difference you get from forum to forum."

David Roberts

Right. And predictability, let's just say, like, predictability in regulatory law is a very important thing.

David Doniger

Yeah. If the law has some ambiguity in it, and the rule is that the judges defer to reasonable agency interpretations, the agency's interpretation is going to be upheld more often, and you get more uniformity and predictability from that. The conservatives or the arch conservatives say "This is a terrible thing because the agencies win too often." But the justices have to decide if they're going to change Chevron. What are they going to change it to?

David Roberts

Yeah. They can't or won't just say "Chevron no longer applies. Good luck, everybody." They're going to —

David Doniger

Because there's still a hundred years of decisions before Chevron saying agencies should get a lot of respect from the court.

David Roberts

Yeah, yeah. If they scrap Chevron, does that throw all those previous cases up in the air as well?

David Doniger

Well, it really depends on what reasons they give or what new rule they announce. And if they simply said, "That was wrong." In other words, weirdly enough, it's not as easy as the Dobbs abortion decision. There was no hundred years of Supreme Court precedent before Roe protecting the right to abortion. So if you eliminate Roe, it's created lots of chaos.

David Roberts

It's merely 50 years old.

David Doniger

It's created lots of chaos and so on. But there was no other law — judicially made law to erase. Here you have a hundred years, not just to the new deal, all the way back to the progressive era when the first big agencies like the Interstate Commerce Commission were created and the Food and Drug Administration. You have Supreme Court case law saying that those agencies' decisions deserve a lot of respect, and we generally defer to the agency that is tasked by Congress to do this and knows what it's doing. So here, if they want to erase Chevron, they have to erase everything behind Chevron.

And they have to do that by articulating a new rule. And as I said, it could be as narrow as "Struggle more at the first step." It could be as broad as "Judges, you don't have to give a damn what the agency said. You decide what you think is best."

David Roberts

How would you even formalize that into a rule? Is there like a Heritage Foundation or somebody out there who has proposed what kind of rule conservatives would like to see in place of Chevron? Like, do we know what they're contemplating here?

David Doniger

Yeah, there's a ton of briefs filed by every one of those right-wing legal think tanks, all of them supported by the anti-regulatory right-wing billionaires. And this is about herring boats, but they're a red herring because this is really about the big industrial barons wanting to be free to do what they please. And it's oil and gas and big pharma. Those are the ones who are cheering this on.

David Roberts

Right. What would the rule be, though? Like, what rule do they want?

David Doniger

We don't know. I mean, it could be the way they're putting it is they're saying the Administrative Procedure Act tells the judges to decide all questions of law, and Chevron conflicts with that because it tells the judges to defer to the government's view of what the law is if it's reasonable.

David Roberts

That's Gorsuch's take, right. He's like, "We've given away what ought to be judicial authority in this."

David Doniger

Now, the answer to that is that, look, when Congress passes a law that's crystal clear, that's pretty straightforward. But when Congress chooses to pass a law and give the agency some range of space in which to decide things, that's also the law. So it's not in conflict with the Administrative Procedure Act, which tells the judges to decide the questions of law, for the judges to decide that the law is: the agency has some leeway because that's what Congress decided.

David Roberts

Right.

David Doniger

So they're going to struggle with how to interpret this. Now, I think Gorsuch and Alito and Thomas are going to swing for the fences.

David Roberts

They would favor — sort of the extreme right position here would be to just say, "Judges get to decide, more or less. Chevron is dead, judges now get to decide." And you think maybe Roberts might do one of his Roberts moves here and sort of like try to find a midway point.

David Doniger

Yeah, Roberts maybe with Kavanaugh and Barrett, and in dialogue with the liberals, try to figure out if there's a more modest revision than where Alito or Gorsuch or Thomas would be. And I have no idea where the majority is or what the majority would coalesce around. The cynical view is they're out to kill Chevron, but what do they replace it with? And is it just Chevron slightly altered in a different name, or is it radically different from that?

David Roberts

I know maybe trying to hold conservatives to conservative principles is a mug's game, but what conservative legal principle says unelected judges should be deciding the nature of laws rather than the executive branch? Is there a conservative theory of the case here, or is this all just working backward from them, wanting to cripple the administrative state?

David Doniger

The comic book version of separation of powers is that Congress legislates, executive branches execute and administer. They don't make any policy. All the policy decisions are made by Congress. The executive branch simply carries them out, and the judiciary is there to police it and make sure that —

David Roberts

Everybody's playing their part, correctly.

David Doniger

This is maybe what Roberts meant in his confirmation hearings about calling balls and strikes. But in reality, these functions are mixed. And it goes back to the founding. The early congresses gave the executive branch jobs not just to carry out like a robot all the decisions that Congress has made, but they gave the executive branch, they delegated some of the policymaking decisions to the executive branch agencies.

David Roberts

And as we said up top, there is no reasonable way that a Congress could govern a country like ours without doing that.

David Doniger

Exactly. So the irony is that Justice Gorsuch is the one who's most rigid about Congress has to do all the policymaking and all the agencies are there for is to, quote, "fill up the details." And his mother would have lost the case, the original Chevron case, if that were the rule.

David Roberts

Yes, but she probably did not realize the perils of the deep state, though. And now, he's alert to this. So with our last few minutes here, let's just talk about consequences. Then, if they just do something, let's say on the relatively mild side of the spectrum, if they just say deference has been a little too automatic, let's tighten up step one and put a little more work into interpreting Congress. Versus if they say "Chevron is dead," like, what is the sort of range of possible consequences here?

David Doniger

Well, at the near end, you get a relatively small change in what lower courts do from day to day. The irony of that would be if they'd struggled a bit more at step one, we might have won the original case about the definition of a stationary source. But NRDC is not against that. I mean, we are sometimes frustrated by how quickly judges have deferred to the interpretations of the Bush administration, the Reagan administration, the Trump administration.

David Roberts

Right. Because some of their decisions were pretty obviously attempts to use technicalities to substantially cripple these laws that they were passing.

David Doniger

But then at the other end of the spectrum, you have a juristocracy where lower court judges are making most of the decisions because even the appellate courts, but certainly the Supreme Court, handle only a fraction of the cases. It might have the least effect on the Clean Air Act, because the Clean Air Act is an unusual provision that the national regulations all go to the D.C. Circuit. You cannot challenge —

David Roberts

Oh, interesting.

David Doniger

a national regulation in the Fifth Circuit.

David Roberts

Oh, goodness, I forgot something. David, too, before we're done here, I forgot a crucial piece of this puzzle, which is, let's just briefly talk about what the Inflation Reduction Act said about this, because this is on the minds of Democrats in Congress when they pass the Inflation Reduction Act. Just say briefly what IRA does about this question.

David Doniger

Let me make a more general point first, and then get to that. And that is, since Chevron, Congress, even though it hasn't passed as many blockbuster new laws as the Congress of the 1970s, early 70s did, Congress passes lots of consequential laws, and they have done so on the background that, "Look, we know that when this is interpreted by agencies, if we want to pin them down to a specific, clear result, we have to say so. If we want to give them some leeway, there are ways, there are formulas and ways to say that, too." So Congress has legislated using the Chevron formula as the sort of how-to, how to write a new law.

David Roberts

Right.

David Doniger

So then you come in 2022 to the Inflation Reduction Act, which was enacted six weeks after the West Virginia case and the announcement of the major question doctrine and the striking down of the clean power plant. And Congress did two really important things in the Inflation Reduction Act. First, it says now in the Clean Air Act that greenhouse gases are air pollutants.

David Roberts

Right, right. Because some conservatives were muttering about revisiting *Mass v. EPA* and trying to overturn that. So that's off the table now.

David Doniger

There were really three things. So that's the first. The second thing is it said "You need to do a do-over on power plants. So we're instructing you to write a new standard for power plants." And since this was right after Justice Roberts' opinion saying, you know, "There is a traditional way to regulate power plants," we see that as Congress telling EPA to go do it again under the traditional approach.

David Roberts

It couldn't be more clear, right? There's no amount of judicial discretion that's going to find wiggle room in that; it said, "EPA, go do this."

David Doniger

Yeah. And then there's a third thing Congress did, which is actually the most consequential. It put hundreds of billions of dollars in incentives out there, incentives. Many of them apply to renewable electric power generation, and many of them apply to putting control, carbon capture and hydrogen, clean hydrogen as a fuel. So Congress has incentivized and thus reduced the cost of doing standards in the traditional manner because Congress has said the taxpayer is going to underwrite these costs.

David Roberts

Right. It's just worth saying. In case any listeners — just as a little bit of background, the reason Obama's EPA did this fleet-wide approach is precisely because when it looked at what's available for individual power plants, you either get utterly ineffectual, right? Like tweaking your heat rate or whatever, or you get CCS or hydrogen, which especially back then were just sort of outrageously expensive. So EPA was trying to do this in a way that created the lowest costs and the most flexibility for power plants, which you might think conservatives would approve of. But now the court threw that out.

So now that you have to do the individual power plant stuff, but as you say, CCS and hydrogen, because of IRA subsidies, are now much more viable.

David Doniger

Not only that, but the buildout of renewables and batteries and so forth is going much faster. So, in that sense, Congress has incentivized the shifting to clean power as well as the cleanup of dirty power. And EPA then has to write traditional Clean Air Act standards for the dirty power plants. But taking into account the real cost that the companies would face, which has been radically reduced by the incentives.

David Roberts

Right. The new IRA baseline, basically.

David Doniger

Yeah. And it makes it economically reasonable to have a much more stringent standard for the individual coal and natural gas-fired plants than you might have been able to bring off without those incentives.

David Roberts

Right. So specifically, in the case of regulating stationary sources of greenhouse gases, Congress has cleared its throat and been much more explicit and removed some ambiguity here, thereby reducing the freedom of movement for judges to interpret this. In that narrow case of administrative law, they've insulated themselves pretty well. But as you note in your paper, that's unusual. That's going to be the exception that an administrative action is so sort of overdetermined by explicit congressional authorization. In most cases, there's going to be more ambiguity.

David Doniger

In that sense, the Inflation Reduction Act is sort of a throwback or an exception. It's a big statute with big ambitions and a lot of specificity. But it was capable of being enacted only because the Democrats had control of both houses and they used the procedure that avoids the filibuster called reconciliation, which they were able to do only once per year.

David Roberts

You're not going to be able to do that for every —

David Doniger

Exactly.

David Roberts

contested program.

David Doniger

Yeah. So most efforts to legislate die on the hill of the filibuster or they die in a Republican-controlled House. But it also means that efforts to repeal things die on those two hills also, because the Democrats or the Republicans have only a one vote margin now in the House.

David Roberts

I mean, Congress is pretty well frozen. So a lot of the contested space now for governance is in the administrative agencies and what they do and how wide their interpretation.

David Doniger

You know, if you could get Gorsuch or Thomas or Alito to be candid about it, I think they would say they don't like that. And they're trying to do two things. One is they're trying to squelch the ability of the executive branch to fill the space that a paralyzed Congress isn't filling. And the other thing they're trying to do, they say, they're trying to sort of give Congress a kick in the ass and tell them that you've got to make these decisions. But they know very well what the institutional constipators are.

David Roberts

Yes.

David Doniger

And another reason you'd rather have agencies decide many of these questions than Congress is even if they knew what they were doing and they had the foresight and they had the bandwidth, they're also so much dependent on major interests for campaign contributions. And the other party dynamics that have taken the Republican party where it's gone, mean that there's just no freedom of movement to come up with that bipartisan stuff that characterized the legislation of 1970 and thereabouts.

David Roberts

So they locked up Congress. They've now locked up the highest court. And so now they're trying basically to lock up the executive branch, too. And so just to sort of wrap up the consequences of these decisions, which are going to come down later this year, are they scheduled yet, when they're going to?

David Doniger

By June.

David Roberts

By June. So on the low end, the consequences could just be a little bit more scrutiny, which is manageable in step one of Chevron decisions, basically, which is manageable. On the other end, this could be Chevron goes out the window, you get a judiciocracy or however —

David Doniger

Juristocracy

David Roberts

you get judges basically making calls on whether agencies are doing the right thing, depending on their political leanings. And the major problem with that is not just that any given program might be struck down. I think the big problem with that latter outcome is just that it would serve to paralyze —

David Doniger

It would make agencies gun shy.

David Roberts

Yes. As they say about fascism, "Don't obey in advance." It would make agencies rein in their ambitions and rein in their discretion voluntarily, just to avoid the uncertainty and avoid these court cases. So it would get in their heads, basically. That's the idea, I think.

David Doniger

That's right. And it would remain very, very hard to pass new legislation. I will just say that the one piece of legislation I've been able to get enacted on behalf of NRDC, on the clean airspace in the last 15-20 years, is a new law to curb the refrigerants called HFCs.

David Roberts

Right.

David Doniger

That was passed in 2020, and it was bipartisan. And it was because the industry actually was comfortable with what the judges had upset, and they wanted new legislation to sort of repair what a court decision had done. And so we went in and they brought the Republicans and we brought the Democrats, and we got this thing through on a bipartisan basis, but it required the industry to want to be regulated. And that is a very rare thing these days.

David Roberts

Yes. So this is all about basically their pursuit of the administrative state, what they call the deep state. And this is in keeping with their plans, explicit, published plans, if Trump wins, to defenestrate the administrative state, to fire, literally fire most of the people involved and hire a bunch of hack loyalists, which then you'd never have agencies being ambitious again, and the whole thing would become kind of moot. But this is sort of like a multi-front war.

David Doniger

Right. So, Justice Gorsuch, there's something very, I think, that deserves a lot of attention in the way he puts this, and he said it most emphatically in the COVID cases and in his concurrence in the West Virginia. He said that "The function of the judges is to protect the liberty of entities that would be regulated, in other words, to make sure that their liberty is not infringed, except for very good reasons or on very clear instructions from the Congress." And in the COVID cases, that struck me as such an insensitive thing, hundreds of thousands of people getting sick and dying, which is probably the most severe infringement on your liberty.

David Roberts

You can see a real loss of freedom there.

David Doniger

Yeah. And in the case of air pollution or climate change, people are victims of the impacts and the laws are intended to protect their liberty and their lives. And Gorsuch prioritizes the liberty interests of the businesses that would be regulated and doesn't even mention the life and liberty interests of the people who the laws are supposed to protect.

David Roberts

Well, you've inadvertently triggered one of my rants, which I will try to keep very short. But this, to me, is the conservative definition of freedom is freedom to act without care about consequences. Right. Freedom to act in ways that hurt other people without worrying about consequences, which sort of, definitionally, not everyone can have. Right? It can't be the case that everyone can do whatever they want, even if it hurts other people. It's always that kind of freedom, by definition, only limited classes of people can have that, and it entails other classes of people suffering the consequences of it.

David Doniger

Yeah.

David Roberts

So that's the vision of freedom that Gorsuch has a hold is like the freedom of the important people, the elites, the business guys —

David Doniger

The people already powerful.

David Roberts

the already powerful to do what they want, which necessarily sort of disregards the interests and freedoms of the people who suffer the consequences.

David Doniger

And the more neutral version of this is the freedom for me to swing my fist ends at the beginning of your nose. So both the actor and the victim have rights, and that's what our government is there to protect. Both not 100% for the victims or 100% for the perpetrators. But Congress passes laws that say, "There are limits on what you can do to other people."

David Roberts

Well, who is it that is whining and dining conservative justices on the Supreme Court as we've learned in great detail over the past few years, who is it that's taking them out to dinner? Who do they hear from? What social circles are they moving in? Right? What's their epistemic environment? They don't hear from victims.

David Doniger

Exactly.

David Roberts

All right, this has been super helpful, super clarifying. I know that the term Chevron flies around these circles a lot, and I think it's going to help people to get a little historical grounding and what it means and its significance, and then maybe when a ruling comes down in June, we can reconvene and survey the damage.

David Doniger

Yeah. Dave, thank you very much for having me on, if that's what you say about a podcast.

David Roberts

I think it is.

David Doniger

Thanks a lot.

David Roberts

Thank you for listening to the Volts podcast. It is ad-free, powered entirely by listeners like you. If you value conversations like this, please consider becoming a paid Volts subscriber at volts.wtf. Yes, that's volts.wtf. So that I can continue doing this work. Thank you so much and I'll see you next time.