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MIKE LIVERMORE: Welcome to the *Free Range* podcast. I'm your host, Mike Livermore. This episode is sponsored by the Program in Law, Communities, and the Environment at the University of Virginia School of Law.

With me today is Lisa Heinzerling, an environmental law professor at Georgetown and former associate administrator of the Environmental Protection Agency's Office of Policy during the Obama administration. Hi, Lisa. Thanks for joining me today.

LISA HEINZERLING: Hi. Thanks for having me.

MIKE LIVERMORE: So as you well know, the Supreme Court has issued some very important and very controversial decisions in the last few years on a wide range of topics. At this point, it's probably to say that this will be one of the most consequential courts in US history. We just don't know what the consequences are going to be yet.

And of course, environmental law is one of those areas that the court's been pretty active. In particular, two decisions I think many folks would cite are *West Virginia v. EPA,* which was, of course, a decision on EPA's power to regulate greenhouse gases under the Clean Air Act or at least one manifestation of that power, and also in separate case, *Sackett v. EPA,* which was on the Clean Water Act and jurisdictional issues related to that statute. And these are huge decisions that are going to have major consequences for US environmental law.

And of course, one of the things that's very striking about them is they represent a very big shift from a not that far recent past, in particular, when Justice Kennedy was the swing vote on the court. And we got decisions on very similar or very closely related topics in decisions like *Massachusetts v. EPA* on the Clean Air Act and greenhouse gas emissions and *Rapanos,* which, of course, was very, very similar to*Sackett* on jurisdictional issues under the Clean Water Act.

So maybe just to get us started with this conversation, we can think back to that happier time, again, not that long ago, although somewhat getting on in years. You, of course, played a huge role in the *Mass. v. EPA* case, so that might be a good starting place. This, again, is, obviously, as you well know, the decision where the court finds that the Clean Air Act unambiguously grants EPA authority to regulate greenhouse gases.

So just to get us started, in the lead-up to that decision and when that case was being litigated and in the years immediately prior to that, what was the state of the law and politics of greenhouse gas regulation as you recall? This is the early 2000s. And how did you see the *Mass. v. EPA* case playing into the overall dynamic of the time?

LISA HEINZERLING: This, of course, was the administration of George W. Bush. And the Bush administration came into office with an EPA that, I think, was prepared to move on climate change actually. Certainly, the bulk of the agency, the civil servants, but even the head of the agency at the time, former New Jersey Governor Christine Todd Whitman, had made pretty forceful statements about activities on climate change.

And that all very quickly got pulled back. And among the biggest manifestations of that reversal or change in direction was EPA's decision to deny a petition filed by citizen groups, a bunch of different, mostly little environmental groups, that had in the 1990s actually, first petitioned EPA to regulate greenhouse gases under the Clean Air Act.

Now one of the features of modern environmental law is that a lot of what happens that's significant in federal environmental law happens as a consequence of citizens, either ordinary private citizens or often, public interest groups representing environmental causes. It comes as a result of petitions to the agency to do its job under the environmental statutes.

And so these entities petition the agency and said, please regulate greenhouse gases from automobiles under the Clean Air Act. We think have the authority to do it. And indeed, we think that no, that greenhouse gases are endangering public health and welfare, which is the trigger for regulation under most of the Clean Air Act.

So the Bush administration finally answered that petition and said no. No, it said, we don't have the authority to regulate greenhouse gases under the Clean Air Act. And we wouldn't regulate even if we had the authority because we don't think it's a good idea policy-wise, and said some other things about why they just didn't like the idea of doing regulation under the Clean Air Act.

And so in other words, this was not an easy period, I would say. This is in brief, obviously, a brief treatment. But this was not an easy period for environmentalists. Many environmentalists were horrified by the environmental record of the Bush administration at the time, although I found myself during the Trump administration on occasion looking back with nostalgia at that administration.

But so the question then was what to do about that negative finding because that was a decision that said, we are not going to regulate greenhouse gases. That is, we are not going to address climate change under the federal statute. That makes the most sense for that purpose given that greenhouse gases are airborne.

And so the petitioners challenged that decision. And that made its way to the Supreme Court. In a decision in which, as you suggested, Mike, the Supreme Court made a 5-4 decision with Justice Kennedy really providing the deciding vote.

The court said, EPA, actually, you're wrong on each count. You have the authority to regulate under the Clean Air Act. And in fact, the definition of air pollutants under the Clean Air Act is so broad that it clearly allows, and indeed, in appropriate circumstances, requires you to regulate greenhouse gases.

And secondly, the court said that EPA couldn't, given that it had authority, it couldn't say, oh, you know, even if we had authority, we wouldn't regulate anyway because we really don't want to. [CHUCKLES] We really have other ideas about what the appropriate policy is.

And the court said, you really have to speak in the language of the statute. And therefore, because the statute turns on harm to health and to the public welfare, that is largely the environment, you need to speak in those terms and tell us either that we're not being endangered by greenhouse gases or that we are. And if we are, you need to regulate.

So that's a really quite enormous decision in terms of just the breadth and the clarity of the ruling. At the time, I think almost everybody thought it gave EPA the authority under the Clean Air Act to regulate these pollutants that were warming the planet and to regulate them under all the different kinds of provisions of the Act, stationary sources, automobiles, and so on, down the line.

So that's the sort of moment we're in. We're in a moment where an administration that was not favorable to the environment lost because it hadn't been protective enough and lost in the Supreme Court.

MIKE LIVERMORE: Right, with a Supreme Court that, on a traditional understanding, had a majority of conservative Justices, right?

LISA HEINZERLING: Absolutely. It was not a liberal court even then.

MIKE LIVERMORE: Right. One of the interesting features of*Mass. v. EPA,* which we'll probably kind of return to this issue as we march our way through the last 15, 20, years, is deference because as you noted, the setup of *Mass. EPA* was contesting what the agency wanted to do, right? The agency was saying we don't want to regulate. Here are our reasons. And it was public interest groups that ultimately states that were on the other side.

And the majority opinion, which was holding in favor of the environment, was not being deferential to the agency's views, right? This was like the opinion was, this is what the statute says, right? It says that greenhouse gases are a pollutant. And yeah, there's some discretionary decisions that you have, but that discretion is going to be pretty constrained by the text of the statute. And of course, in dissent Justice Scalia, who was, at least, at certain times, a proponent of Chevron deference-- he certainly fashioned himself that way-- made a big deal about the issue of deference and just the fact that the court was running against the agency's discretion.

And so that's an interesting feature of this decision. And one of the questions I just have for you is as we see how things have proceeded-- obviously, there was an election. And Barack Obama was elected shortly after that decision came out. And so Obama was going to regulate greenhouse gases under the Clean Air Act if there was discretion and certainly, under *Mass. v. EPA.*

So I wonder how important you think it was ultimately that the court decided on statutory grounds versus discretionary grants. And again, this is a bit of a fine point for nonlawyers, but it's going to come up later. [CHUCKLES]

LISA HEINZERLING: Yeah, yeah. And just to take one step backwards to bring everybody aboard, the court had long held that if a statute is clear, the statute clearly tells the agency what to do in a particular circumstance, then the agency, it can't say, well, we want to do otherwise, and then get deference for that position. The agency needs to do what the statute clearly tells it to do.

And so that's the kind of one-two process of so-called Chevron deference, was to look to see whether the statute was clear. If so, whatever the statute said clearly had to govern. If the statute was ambiguous, then the agency got a great deal of deference in those days.

And as you say, what's so interesting about what the conservatives did in dissent in *Massachusetts* is they embraced that Chevron principle wholeheartedly, even though the EPA's decision was momentous significance, momentous in terms of the environment, in terms of economics, in terms of the greatest threat to the planet. In environmental terms, the agency was saying we're not going to use the most sort of obviously relevant statutory tool for regulating this enormous problem, so hugely important decision.

And Justice Scalia scolds the majority for not deferring. And I think this is going to come up in just a few minutes when we talk about the more recent cases.

MIKE LIVERMORE: Right, so it's just a super interesting dynamic there. And so, of course, you served in the Obama administration when the aftermath of *Mass v. EPA* was very much structuring the agency's decision making and structuring people's broader views about what the agency's authority was.

Yeah, one question I just have is, again, the majority could have-- well, no. The decision could have gone some different ways, right? So obviously, the decision went the way it went, that the agency has the authority and it's actually not a question of deference. It's just part of the statute. It's unambiguous.

Another way that the court could have gone and did not go very emphatically was to say it's unambiguous that the agency doesn't have any authority. It could have reached that decision. And then obviously, it could have said, well, the agency has discretion. It's decided that it doesn't want to regulate now. But it could change its mind later.

So just imagining that counterfactual, where there was that kind of-- let's just say Justice Kennedy had decided to vote with the conservatives but only on the discretionary grounds or something like that. Do you think that would have mattered much for the Obama administration if they had understood, OK, the court was clear, we have discretion, and we're just going to change our minds, versus we have a statutory obligation to essentially either regulate or explain why we're not going to?

LISA HEINZERLING: I think that's a very interesting question. I think ultimately, the actions that the agency ended up taking over that eight-year period, I'm not sure they would have differed if the command or if the instruction from the Supreme Court was stated in terms of the agency's discretion to figure out what to do or stated in terms that once you find endangerment of public health and welfare, you need to take action.

I think what that difference did, and as you say, it is a subtle one but a really important one, is what it did is it allowed the agency maybe more in a way politically, but to say, we have to do this. Not only is this something we're inclined to do anyway-- President Obama campaigned in part on taking on climate change-- but it also meant that the agency could say, we have to do this.

MIKE LIVERMORE: Right, absolutely. There's another interesting counterfactual since we're playing that game, historical counterfactuals, which is, it may have mattered even more the way the decision was written if John McCain had become president of United States in 2008 because he would have faced an enormous amount of pressure within his party to not act on climate change. But he obviously had been quite good on climate issues for a long part of his career. So that's another kind of-- back when the decision came out, no one knew how that election was going to play out.

LISA HEINZERLING: For sure. Yes, for sure. And the idea that the statute speaks clearly and gives agency instructions to do a particular job matters greatly depending on which person is in office.

MIKE LIVERMORE: Right, absolutely. OK, so maybe the thing to do is to follow through on the greenhouse gas track in time. And ther we can go back and rewind and talk about the Clean Water Act.

So obviously, if we fast forward on greenhouse gases, we have the Obama administration acting under this quite clear authority under *Massachusetts v. EPA.* It's regulating greenhouse gas emissions from automobiles. It goes on.

And we don't have to march through every decision here. Of course, this just would be a lot. But it goes on to regulate greenhouse gas emissions under different statutory authority having to do with certain kinds of stationary sources.

And then of course, we have the really big initiative, the Clean Power Plan, to regulate greenhouse gases of stationary sources under particular statutory provision. And so 111, I think we can go ahead and say it. [CHUCKLES] We're going to have to, right?

So that's that. So broadly, again, we can maybe return to the details if we want to, but it's a big regulatory program. So let's see. I'm just trying to think of the timeline. The Clean Power Plan at least was initially happening and maybe quite a bit of development while you were at the agency, I would think.

LISA HEINZERLING: Yes, yes. The very beginning of the Section 111 rule that became the Clean Power Plan started to be developed while I was at EPA. There were a suite of possibilities under the Clean Air Act for the EPA to take on.

And I think just about everybody agreed that an appropriate way to stage those different actions was to look at both the authorities of the agency obviously, but also the amount of good that could be done through a rule. And power plants, of course, are one of the largest sources of greenhouse gases, and specifically, coal-fired power plants.

And so the agency started to try to develop what is it that we can do with respect to power plants under Section 1 of the Clean Air Act, which gives EPA the responsibility to regulate stationary sources, again, that the categories of that stationary sources like power plants that endanger public health and welfare. And it tells EPA to set emission limits based on the best system of emissions reduction.

And then what is supposed to happen under that section for with respect to existing sources like existing power plants is the states are supposed to actually make sure that those emission limits are met. And so the EPA started developing that rule early on.

MIKE LIVERMORE: Right. OK, good. And of course, it's not like the agency snaps his fingers, and suddenly, there's a rule. There's a huge process. And this it was very complicated obviously.

There was also legislative action happening during the early portion of the Obama administration. There was some hope that there was going to be major potentially sweeping climate legislation. The agency obviously was involved helping to provide counsel on that.

So there was a lot going on in those early years during the development of the Clean Power Plan. But eventually, well, there was an election in 2012. And then the Clean Power Plan comes out.

And of course, there was this very bonkers litigation history, where very unusually, there was a motion to stay the Clean Power Plan, which is typically not granted on major public health, public welfare types of regulations because the idea being like, it's important that we get this stuff on the books while we litigate it. The stay was denied by the DC Circuit as, of course, you know all of this very well, but just to recount it.

And the Supreme Court takes up on cert the denial of the stay and then grants the stay. So the regulation does not go in place during the ending of the Obama administration. And then of course, there was the 2016 election, and Donald Trump takes over.

So just a couple of minutes ago, we were speculating about how the McCain administration would have potentially dealt with *Massachusetts v. EPA* being kind of "rule of law oriented" perhaps-- one have hoped that they would have been-- and having a president who was fairly sympathetic to climate issues. The Trump administration was different than that. [CHUCKLES]

And so, I mean, again, just thinking back to *Mass. V. EPA,* how much do you think it mattered that this was on statutory, that decision was on statutory versus discretionary grounds when it came time for the Trump administration to decide how they were going to respond to the Clean Power Plan, to the reality that the agency was very far along on regulating greenhouse gas emissions from power plants? And we should also note there were regular-- just to reiterate, there were all other greenhouse gas regulations on the books already having to do with stationary sources and having to do with some other programs as well.

LISA HEINZERLING: Yeah, well, I think that one important intervening event should be noted, which is that the Supreme Court had, in the years between, had struck down on EPA's application of a permitting requirement to power plants that emitted-- or to lots of sources that emitted greenhouse gases. And the Supreme Court effectively-- this is my reading. I'm not sure it's everybody's reading.

But my reading of the case is that what the Supreme Court effectively did was to say, you can't say that air pollutant in the statute, which is the trigger for just about all regulation-- having an air pollutant and having one that endangers public health and welfare-- you can't say that every mention of air pollutant includes greenhouse gases. You have to look at the context of the program.

And in this case, EPA's rule threatened to usher in permitting for lots and lots of sources that hadn't been in the program. And so the Court rejected that rule. And so that distinction that you rightly emphasize between statutory authority and discretion, because of the Supreme Court, had become less pronounced because other than the cars program, which was a subject of *Massachusetts,* I think we were already on track to have to prove in every case that a particular program was appropriate for regulation.

So by the times the Trump administration came in, they'd already had their deregulatory agenda. The way the path for that softened a little bit by the Supreme Court.

MIKE LIVERMORE: Right. Yeah, that's very interesting. That's a good point. And also, it's interesting because that was essentially the same court that decided *Mass. v. EPA* also decided that case, *UARG.*

LISA HEINZERLING: Which is so mind-boggling, if I may say so, because there, they said, we are not going to defer because this is a huge question. One of the things they said almost in passing, this is a really big question whether to subject these sources to this permitting program for the first time. And so we're not going to defer. And in fact, it almost said Congress needs to speak more clearly. It effectively said that.

So just compare that to *Massachusetts versus EPA,* what's the difference? *Massachusetts versus EPA* involved an even more enormous decision by the agency. We are not going to regulate at all under the Clean Air Act. And the conservative Justices said, pshh, defer. Defer to the agency, nothing about the importance.

This other case comes along. *Utility Air Regulatory Group* comes along. And the conservative Justices say, we're not going to defer because of this question, which is much smaller than the one in *Massachusetts versus EPA.* It's so big. And the only difference between those two situations as far as I can tell is that in one case, the agency wanted to take on climate change, and the other case, it didn't.

MIKE LIVERMORE: Right. Exactly. I mean, to be honest, that is also how I read that case. We should just note for the listener, Justice Scalia wrote both of those. He wrote the dissent. So it wasn't like the justices were changing.

Right, and it's super interesting, like, yeah, this was supposedly hugely consequential question in the *UARG* decision. Ultimately, as you know, for reasons that are really complicated and probably not worth getting into, what ends up happening is a consequence of the Court overturning the agency's decision is the agencies could still do the permitting requirement for almost everybody that was initially covered in their version of the rule. So something that was obviously hugely consequential actually turned out to be like a rounding error on what the agency wanted to do.

LISA HEINZERLING: Right, yes.

MIKE LIVERMORE: Really something else. So OK, so the Trump administration, obviously, they go through their efforts to unroll the Clean Power Plan or wind back the Clean Power Plan. And one of the things that I think is probably underappreciated or I think it would be good if more folks emphasized this is they didn't try to roll back the endangerment finding, right? They weren't trying to say, there's no such thing as climate change.

I mean, they might have acted like there was no such thing as climate change. But they weren't saying that, which I always thought was important and big deal.

LISA HEINZERLING: Mm-hmm. Yeah, I agree. And notice that the Bush administration didn't say that either. They didn't say it's not happening. They said there's uncertainty. And we just don't have the authority. And we don't want to regulate.

MIKE LIVERMORE: Right, right. So the science even, when it's serious [CHUCKLES] and the decisions are going to be reviewed, the agency recognizes that it would be ridiculous for it to deny the basic facts.

So then this is going to bring us to the most recent decision. The Trump administration passes its own-- or adopts its own version of regulation under 111 that essentially gets rid of the whole program as it was envisioned under the Clean Power Plan. And ultimately, that leads to litigation unsurprisingly. And that litigation finds its way to the Supreme Court and the decision in *West Virginia v. EPA.*

So again, this was much more recently. In comparison-- you were closely involved in both these cases and just following all of this very closely at both times. How would you compare the political-- again, the political, the legislative, the broader dynamic around greenhouse gas regulation in the lead up to *West Virginia v. EPA* compared to in the lead up to *Massachusetts v. EPA.*

LISA HEINZERLING: Well, I think that the environment included a couple of important features, which is, one, we had President Donald Trump, who is even, I think, more hostile to environmental regulation than President Bush had been and was also less meticulous, let's just say, about the law. And so that I think there was a much more-- it feels like to me anyway-- scattershot kind of approach to deregulating. It certainly is implied broadly where the environment was concerned.

MIKE LIVERMORE: Yeah, so that's right. The Bush administration was much smart-- I'll just go ahead and say much smarter [CHUCKLES] in how they dealt with these things, which is why the Trump administration lost all the time. It was very ineffective.

LISA HEINZERLING: The other context that is obviously of crucial importance is the Supreme Court changed between these decisions. And so there were three Justices appointed by Donald Trump. Kennedy was long gone. And there's now such a solid 6 to 3 very conservative majority.

MIKE LIVERMORE: Right, it really, really, as in, really changes the dynamic. So there, of course, the decision had to do with the agency's authority to regulate under that language that you mentioned earlier-- what constitutes a best system of emissions reduction and whether essentially, the Obama era interpretation was overly broad.

And so the Court's going to approach this question. Discretion is going to be a big part of how-- a lens through, which is going to answer this question. So yeah, so what do you think the big takeaways ultimately were from *West Virginia v. EPA?*

LISA HEINZERLING: Well, I think what the Court ended up doing is to avoid the kind of intricate statutory questions that we had been accustomed to and avoided any nod toward the agency because of its expertise and its mild amount of political accountability and instead just created a quite powerful presumption against ambitious regulation. And that, of course, is the major questions doctrine. It really hadn't solidified either the existence or certainly, the meaning of that doctrine until *West Virginia.* I mean, there were earlier cases, but this case really crystallized that as a doctrine.

And so if you think about it, what that does is it just puts a thumb on the scales against environmental regulation, which takes us very far away from *Massachusetts versus EPA.* Whatever he thought of the Clean Air Act and climate change, Justice Kennedy was willing to say, I think the statute is clear in regulating greenhouse gases. But now the Court has created a real, as I say, presumption against ambitious regulation.

MIKE LIVERMORE: Yeah, and to just reiterate a point we were talking about earlier is-- and I'm just curious how you read this. So the major question doctrine in broad outline says-- I guess even when there's ambiguity in the statute-- we're not going to read that as giving agencies discretion. We're not going to defer to agencies on these decisions when they are very, very, very consequential, when they're very important, when they are major questions. We're going to assume that Congress wouldn't want to have essentially delegated that decision to the agency.

OK, so as we were saying with *Massachusetts v. EPA,* that was a very important decision that the agency was making, was deciding not to regulate when it turned, when it rejected the petition to regulate greenhouse gases under the Clean Air Act. That was extraordinarily consequential. And Justice Scalia writing for the conservative dissent makes a big deal about how the Court should be deferring to the agency.

And in this case, in *West Virginia v. EPA,* the Court, of course, makes a big deal out of how big of a decision this is. But it's not any bigger of a decision than the decision that was under review in *Massachusetts v. EPA.* It's just that the decision came out the other way, right? Where in *Mass. v. EPA,* the agency had decided not to regulate, whereas in *West Virginia v. EPA,* the issue that was being litigated was the form of the agency's regulation.

So do you think there's embedded within, at least as it's been announced and applied by this Court, an actual antiregulatory component of the majors questions doctrine? Because you can imagine a neutral version, which is if it's important, we're not going to defer. We could query the wisdom of that kind of doctrine. But that would be one form of the doctrine.

LISA HEINZERLING: Yeah. Yeah. A couple of things-- I do think there is that. It's impossible to read those cases without thinking, huh, why did these cases come out differently? And the only difference I can see is that in one case, the agency got the answer wrong, which is it enacted an ambitious regulatory program. In another, it got the answer right, which is either it did nothing or it did something very weak.

And they don't say it. But all you have to do is read the cases to see that point. And *West Virginia* itself illustrates this point beautifully, even though it's subtle to see strangely enough. But in that case, because the Court-- I won't even get into justiciability. It's too much. It's too much.

But let's just say that through a strange series of legal maneuvers, the Supreme Court basically had in front of it, both the Clean Power Plan and the Trump replacement for that plan, which was very, very weak-- in fact, might have done nothing at all at the end of the day, literally nothing. And at the end of the day, the Supreme Court rejected the Clean Power Plan and approved the ACE rule. I mean, it takes looking through the judgment sheets and all this, but that is a fact.

So in the very same case with the very same question present, which is, does the Clean Air Act allow the agency to enact a program that shifts generation from some kinds of sources to others, in each case, the Trump rule, the Obama rule, they were answering the same legal question with basically the same administrative record, that is the same facts in front of them. In one case, they answered yes, in another case, no. In the case where they answered no, the Supreme Court, without even elaborating, without commenting on it, silently blesses the place where they say no.

So this is why I've suggested that it shouldn't be called the major questions doctrine. It should be called the major answers doctrine. It depends entirely on the answer the agency gives.

MIKE LIVERMORE: Right. It's very interesting. So just to poke on that a little bit and exactly what we mean by that, I could actually imagine two different versions, one a little bit more principled than the other. I'm curious which one you think is happening here.

So I'll give the more principled version first, which would be like a libertarian major questions doctrine, something that was like, where there's a major exercise of coercive government authority over the economy and over people's decision making, we're going to be skeptical that Congress intended to grant the agency broad discretion to make those decisions. And so that's going to be a major question. We're not going to defer. So it would be the more principled version.

The less principled version would be whenever an agency decides something, we don't like the answer-- either pro or con because, of course, the conservative Justices are not always libertarian in their orientation. They have some very nonlibertarian elements. Certainly, that's true within the Republican coalition broadly. And so it's not really about whether it's the imposition of government authority or not. It's just whether it lines up with the preferences of the Justices at the time.

So yeah, I'm curious which one of these-- or maybe it's too early to tell which one of these versions you think more accurately reflects what's going on.

LISA HEINZERLING: If I may, I actually think those are the same thing given the Justices' prior beliefs. I think they may well be inclined to doubt government authority, right? Maybe it's libertarian, but it's the same thing as not liking a particular outcome.

So I guess I'd push back a little bit in thinking that one is more principled than the other when they align perfectly. The deregulatory perspective, maybe you could call it libertarian. But it aligns perfectly with the deregulatory agenda of the Republican Party.

MIKE LIVERMORE: I guess-- yeah, I think that's fair broadly. What I'm thinking of is there are certain areas where liberals are more deregulatory than conservatives-- think immigration or policing or other domains. So I'm just trying to think outside of the environmental context, where the deregulatory pro-protection thing lines up pretty well with partisan preferences or partisan political programs. I think there are other areas where the Republican Party is actually more pro-government and pro-government power than the Democratic Party, so yeah. And again, this is--

LISA HEINZERLING: Yeah, yeah. So we'll have to see how that-- because this is being asserted in all sorts of cases. So you're right that we haven't seen-- I mean, we haven't seen exactly the full sort of blossom [CHUCKLES] of the doctrine.

I'll also say, if I may, I'll also say, I just think that government decisions not to act on climate change are actually pretty darn coercive.

MIKE LIVERMORE: Oh, absolutely, yeah. I think this is right. Just to be clear, this was a very particular version [CHUCKLES] of--

LISA HEINZERLING: No, I get it. I get it.

MIKE LIVERMORE: --what constitutes and the difference between action and inaction and-- right, exactly. From a broad, well-being perspective, failing to act can have extraordinarily serious consequences.

LISA HEINZERLING: Yeah, especially against the backdrop of lots of actions promoting the use and production of fossil fuels.

MIKE LIVERMORE: Absolutely. Exactly. So OK, great. So that's where we are. OK, so that's where we are with the *West Virginia* case.

And this has all been in a way just to encapsulate really big changes on the Court and how the Court views questions around things like broadly deferring to agency judgment but really specifically, environmental law. And we're talking about greenhouse gas emissions specifically, but just an enormous space between *Mass. v. EPA* and *West Virginia v. EPA* in a relatively short amount of time.

Now did you-- I mean, this unfolded slowly. We've had a little bit of time to cognitively deal with it. But when you compare those two decisions in your mind, yeah, what do you make of how the country's been going over the last nearly 20 years or so, 15 to 20 years, and where the Court has gone? What's your general sense of your takeaway there?

LISA HEINZERLING: Oh, I am not happy about it. And what I feel my takeaway is, to some extent, that there is this feeling of a phalanx of six conservative Justices who really have the bit in their teeth, if you want to put it that way, really are running with their power.

And so it becomes quite difficult to look around, especially with something so all purpose as the major questions doctrine that can be used in any kind of a case. And with lower court judges that are more than eager to knock down programs, it can be honestly, a little dispiriting given the nature of the problem at hand and the current tenor of the courts. The road that we've traveled is, I think, pretty sobering.

MIKE LIVERMORE: Yeah, it is. I mean, I tend to agree. OK, so let's talk about just another lens on this that's actually very different legally in a lot of important respects, but it tells a similar sobering story over the very similar time frame. So here we're talking about essentially, the jurisdiction of the Clean Water Act, in particular, the program that protects wetlands.

And there was another statute. There's some statutory language here that has been interpreted, really, over a long period of time, several decades really, as long as the Clean Water Act has been around. And it had been controversial, the interpretation of this particular provision. We'll get into it in a second.

But the contrast that we have here is between a decision where Justice Kennedy was, again, the swing vote, this decision, *Rapanos,* which allowed for quite broad jurisdiction under the Clean Water Act wetlands program. And then we're going to move through to the recent decision in *Sackett,* which was, really, a huge change.

So *Rapanos* wasn't that long before you joined the agency either. And I assume the agency was dealing with that as well. So maybe we could just explain quickly what that decision was about and then maybe during your time during the Obama administration, how folks were thinking about that decision.

LISA HEINZERLING: Yeah, so the *Rapanos* decision in 2006 was a question about how far the Clean Water Act reaches. It's a really basic question under the statute-- what are the waters covered by the Clean Water Act. If you're not a water covered by the Clean Water Act, then the Clean Water Act doesn't protect you.

And so the statute refers to waters. It says that it covers navigable waters defined as waters of the United States. And so the Court in *Rapanos* was grappling with the question, how do we think about wetlands under this statute?

And just to be brief about it, the Court split badly, just badly-- 4-1-4. So four Justices led by Justice Scalia would have taken a narrow view of the statute. Four Justices led by Justice Stevens would have deferred to the agency's broader view under the statute. And Justice Kennedy sat in the middle, really controlling the outcome.

And he took what, at this point, seems like a quaint opinion position for the Supreme Court. He thought that it mattered whether-- the ecology of it mattered. In other words, he thought that waters-- wetlands that had a significant nexus to more traditionally navigable waters rivers and lakes, for example, that they had a significant ecological connection. Those were covered. A nexus is what he called it.

And so he controlled that decision in the way that we treat these things. There was, I think, pretty good argument that the lower courts and that the agencies should look to his position for the kind of authoritative view of the court, even though that wasn't a traditionally authoritative view.

MIKE LIVERMORE: Right, great. So everyone's looking to this-- it is kind of odd, right? Really, in a way, the decision left the lower court in place. And so it was probably Justice Stevens' opinion maybe.

But in any case, everyone's looking to Kennedy. And you have this significant nexus language, which is evocative. And you're right, it absolutely has this connection to the physical world that is just almost seem quaint. But we are talking about environmental law at the same time.

So yeah, so how was the Obama administration then grappling with how to deal with because again, it's very complicated. And it's good to what the jurisdiction of the Act is, right? People want to know. And the field offices want to know when they're writing permits. And landowners have an interest in having some clarity about what is or is not covered.

LISA HEINZERLING: Absolutely. So at the time, it's like, what do we do? What do we do? There had been an interim decision, I think, from the Bush administration that questions what could the Obama administration do.

There's a big question of procedural question. Can they just do so-called guidance? Can they just tell their field offices, here's what we want you to look for when you're inspecting a property to see whether it's wetland, here are the things you should look for? Or do we need to do a rule, in which case, there's a big process, the public comments, you have to explain yourself and on down the line?

So there's that initial question and then the question of, what does this decision mean, right? And the Supreme Court had been silent, was silent until the *Sackett* case that we're about to talk about about exactly what it meant in its 4-1-4 confusion. And so the agency was just trying to grapple with that, figure out how to do it procedurally, and then what to say about the wetlands that were covered given the massive split in the Court.

MIKE LIVERMORE: Right, exactly. So it's a really hard thing for the agency and of course, some folks perhaps who don't follow this very, very closely. It can be hard to sympathize with the agency. Or people don't realize, the agency is just in an incredibly difficult position of having to make these difficult decisions. They're not getting a lot of guidance from the courts.

And there's another, really, as you well know, there's this very hard problem, which is the agency has to commit an enormous amount of resources to rulemaking and to collecting comments and processing the comments and working with stakeholders and thinking through things and bringing in the engineers and bringing in the lawyers. And it's a huge commitment of resources. And then you hope and cross your fingers when it eventually goes out the door and gets litigated that that five, six, seven, or longer years of effort is going to just not get totally dinged by the court. It's a very difficult position that agencies are in often.

LISA HEINZERLING: Absolutely. Absolutely. It takes years, a huge amount of effort, huge s of resources. This is the most deliberative process, I'm just going to say it, in the United States. [CHUCKLES]

I mean, it goes through so much vetting. So many different people have eyes on those rules. It's the only agency in government-- or the only institution in government, the administrative agency, that needs to explain itself in reasoned terms when it makes a big decision, the only. And so at the end of the day, when you have a rule, it at least should get a nod. At least it is a significant achievement in a way but certainly a significant decision.

And if the agency is afraid that at the end of the day, either the Supreme Court or some district court judge, let's say Texas or Louisiana, is going to look at it, sort of eyeball the problem, and say, that looks big to me, and strike it down, what does that do to the agency's mission, to its ability to do its job, even to morale among the staff, which I'm sure lots of people don't really care about. But you should actually, you should.

And so that is the disjunction between the incredibly deliberative laborious process of issuing a rule and the very "back of the envelope," quick-look process so-called of the major questions doctrine. It's just painful.

MIKE LIVERMORE: Yeah, it really is. And it's not like you could check either. It's not like at the beginning of the process, you could say, hey, Court, is this a major question?

LISA HEINZERLING: Yeah, yeah, exactly.

MIKE LIVERMORE: Yeah. OK, so the agency goes down the rulemaking path, issues the Waters of the United States rule. That gets litigated. The litigation history of this is even more complicated than the Clean Power Plan. There's injunctions, there's different, appeals courts doing different things. It goes up to the Supreme Court on various technical, jurisdictional type things.

Eventually in the case, the Trump administration comes into power. They issued their own version. All of this gets litigated. It gets up to the Supreme Court. And we have the second decision.

So we're essentially revisiting *Rapanos,* I mean, through the *Sackett* decision. I mean, was there any notable differences that are worth mentioning? Or is it literally just like, hey, let's get another look at this-- essentially, exactly the same question?

LISA HEINZERLING: Well, I don't know if you have anything in mind, but it does strike me, it's the same question. It's the same question with a very different answer, which is significant nexus, no thank you, no Justice stood up for it. Nine Justices rejected significant nexus. So that is quite stunning after a period in which that had, as I say, good argument was that that should have been the reigning principle. Everybody rejects it.

MIKE LIVERMORE: Right, and so we have an opinion written by Justice Alito in this case. So as you note, the question, in one way, I think about this is there's a sliding scale in some sense between water bodies that everybody recognizes are in the jurisdiction of the Clean Water Act. And no one is trying to deny this. And that would be your, just take a river or a lake or something like that. That's clearly in.

And then you can slide it down to-- I mean, the reality is water is all interconnected. We live in a big hydrological system. And so if you're going to have limits, it could go very, very far indeed into a very small, saturated land or something like that, let's just say. And then we're going to draw a line somewhere on where the jurisdiction is going to be.

And the significant nexus, as you noted, draws on some ecological concepts. And it's really about how substantial is the degree of connection between the wetland in this picture and some traditional jurisdictional water body. And so that's the significant nexus.

And the Obama administration put out the Waters of the US rule, which clarified what was in and what was out. There's all kinds of complicated questions around, like seasonally inundated lands and stuff that dries up and so on and so forth. And so there's all this kind of rulemaking to try to clarify that.

And yes, and then the Trump administration does its own version dialing that way, way, way, way back. And what does the Supreme Court ultimately decide this-- they're interpreting the statute. So they're saying what the statute ultimately says. And what do we get in the second decision?

LISA HEINZERLING: Well, one, we get the idea that waters in the United States, those waters that are to be protected under the statute are, and I'm quoting here because it's so striking, "relatively permanent bodies of water connected to traditional interstate navigable "waters. So in a traditional navigable waters, there's a question like-- whether it's navigable has nothing to do whether it's ecologically significant, nothing to do with that.

And note again, you could say the Congress itself threw away navigable when it said the waters that we're talking about are navigable, but we're going to define them as waters of the United States, which is much, much broader. So they say those are the water, bodies of water to be protected but then said if you have a wetland, it has to have continuous surface connection to those kinds of waters.

So it strikes me-- and tell me if you think this is unfair. But it just seems like a very cartoonish view about waters in the United States. It's like the kind of thing that children's books would show us where rivers and lakes, that we can tell where they end and where they begin.

We can tell whether a tributary is a river-- what it is? It a river? What is it? And so the idea that we can just, again, kind of eyeball it is just massively ignorant to me.

And also, just to get back to your theme about how far we've come in just a few short years, again, Justice Kennedy's approach at least had some ecological connection. He was sensitive to the purpose of the Clean Water Act, which is to keep the waters clean. That's not true of this Supreme Court.

MIKE LIVERMORE: Yeah, yeah. No, it really is striking. And we could get into the quality or lack thereof of the legal reasoning that drives the Court's decision. But I think it's worth pausing and reflecting on, what does this do in the real world, right? So what are the consequences of the degree to which the Court has dialed back on the agency's-- or on the statutes, I should say, what the statute claims jurisdiction over?

What does that mean on the ground for-- in particular, we have this very important, very substantial wetlands program that agencies of both political parties have been administering for decades now. So what is the on-the-ground significance of this decision?

LISA HEINZERLING: Yeah, I think it remains to be seen exactly what it is. But it strikes me, as far as I've read, it eliminates a significant portion of the EPA's jurisdiction. Or at least that's the idea going in the immediate aftermath of the case.

I don't remember what the numbers are. Maybe you have them. But they're sort of appallingly large, the acreage that seems to be eliminated by the Court's approach.

MIKE LIVERMORE: Right. And of course, we don't want to make too dire predictions in a sense because it could always work out to be slightly better. And we don't want to argue in favor that there's only one interpretation of this decision. So we have to be a little circumspect.

LISA HEINZERLING: Yeah, for sure. That's always, I think, the delicate balance.

MIKE LIVERMORE: Right, right, because you want to be realistic about what it actually accomplishes to. And I think just to be, again, just super clear, what this means is that wetlands-- everyone agrees are wetlands-- there would have been a regulatory regime that governs them, that tells you what kinds of activities you can and can't undertake on these wetlands, which have the purpose of essentially preserving these ecologically important areas. I'm just going to not deregulate it, at least at the federal level.

So one argument that folks might think of at this moment would be, well, OK, does that mean they're entirely unregulated? Or can states play a role? Is there some other actor out there that could be engaged in protecting wetlands that maybe should give us at least some comfort that there will be someone stepping into the regulatory void?

LISA HEINZERLING: Yeah, I think states could step up. I think some states tend to step up. But they don't have to, right?

And the very weird thing to me-- one of the weird things about this decision to me is that the Clean Water Act of 1972, which is a basic statute we're talking about, was written in a self-conscious rejection of the state-by-state approach, right? It was written because it had been, in the words of Senator Muskie, a failure in every respect. And so the idea that the Supreme Court comes today and cites the preservation of state autonomy as a reason to cut way back on the authority of EPA to protect waters is just deeply problematic in my opinion because the Clean Water Act was itself a really, really powerful rejection of that kind of approach.

MIKE LIVERMORE: Yeah. OK, so now that we've got these two different timelines coming to fruition, one on basically dealing with certainly two of, if not the two most important environmental statutes. Obviously, I don't want to just imply that the Endangered Species Act isn't important or NEPA or whatever else.

But two very important statutes and really, huge changes, fundamental in the case of the Clean Water Act-- we're talking about the jurisdiction over a huge program. And the Clean Air Act, the question is whether the agency can address-- or how it functionally can address one of them or if not, the single most important environmental issue facing the world.

OK so that's where we're at. And I guess the question is, what does this mean going forward? I mean, obviously, the Court has become-- the Court's always been, at least for as long as I've been paying attention, quite a controversial institution. Arguably, it is at its most controversial that it's ever been or certainly for many, many, many years. Public opinion of the Court is quite disfavorable.

But we still have the 6-3 majority. And it doesn't look like that's going to change anytime soon. And if it does, it will just go to a 5-4 majority. It could be a very long time that we're dealing with some version of this Court, decades potentially.

And so I guess the question is, what does that mean? What does that mean for executive action. What does it mean for environmental groups? Is there strategizing? For folks at the agency, is there considering what to do?

Even thinking about Congress, how do you feel about the strategic situation? And what are your thoughts about what it means for the next, potentially, couple of decades?

LISA HEINZERLING: Well, I'll be honest, I really do worry. I know that sometimes at this portion of a show, it's very good to have a hopeful idea. But in this moment, we don't what the future holds. Things could change tomorrow. But in this moment, it doesn't look good.

Nevertheless, I'll say this, that there are people out there just hitting everything they have, getting out there with arguments and lawsuits and petitions with everything that they have. And so that it seems to me that at some point, that wall has to break. But that may be sort of the triumph of hope over experience.

MIKE LIVERMORE: [CHUCKLES] Yeah. I mean, nothing lasts forever, as you said. And 20 years is a long time, but it's not forever, of course. And things can change. It is very interesting.

But it is hard to see what that path looks like. I mean, folks are focusing on the states. But the courts seem like-- let's just say this, the courts seem like a place that we have to deal with rather than a place that we could look to for help, in some sense.

LISA HEINZERLING: Yeah, that is what it feels like. And I guess that's a good place to be coming to a conclusion in the sense that also illustrates the long road we've traveled since before in *Massachusetts versus EPA.* We actually looked to the Court to rescue us from a bad government decision.

MIKE LIVERMORE: Right, and that seems much less on the agenda these days.

LISA HEINZERLING: I think so.

MIKE LIVERMORE: Yeah. Well, that's a bit of a downer of a note. But [CHUCKLES] but that's just where we find ourselves, right? And we just need to be honest about that.

So I appreciate you taking the time. Lisa, it's been a super interesting, if somewhat dispiriting conversation. [LAUGHS] And thanks for all of your great scholarship and all of the great work that you've done in the public interest over the years.

LISA HEINZERLING: Thanks for having me.

MIKE LIVERMORE: And listeners, if you enjoyed this episode, let us know. You can give us a like, a rating. Subscribe to the podcast. And follow us on social media. It'd be great to hear from you. Till next time.

[MUSIC PLAYING]