

It's not hard to imagine the conservative super-majority pursuing its campaign against regulatory agencies like vultures picking over the bones of environmental law. That's certainly possible – vulture eggs do, after all, generally hatch into vultures. But it's not by any means a done deal. There are multiple pathways the Court could take – none of them good, but some much more destructive than others.

The worst-case scenario is easy to envision based on opinions to date. There have been some striking rulings cutting back on agency power, such as *West Virginia v. EPA*. If the Court overrules *Chevron* this year, that will be another step down the same road. There are even more opinions drenched in anti-regulatory rhetoric. And the core ultraconservative group (Thomas, Alito, and Gorsuch) seem eager to undo as much of the last century of federal regulation as possible. It's not impossible to imagine that they will pick up two more votes.

But the hardliners do need to pick up two more votes – or to put it another way, they can afford to lose only one of the three other conservative Justices: Roberts, Kavanaugh, and Barrett). Two of the three are very recent appointments to the Court, and one (Barrett) doesn't have much of a track record on administrative law issues. None of the three is a big fan of government regulation, at least outside the contexts of abortion limitations and immigration restrictions. Yet, it isn't clear how far they are willing to go in translating their preferences into law.

There has been a strong effort to put forward conservative judges who will follow conservative dogma unthinkingly and never have any ideas of their own. But human beings are tricky and unpredictable, so we can't be sure of how they will behave under changed circumstances. Yogi Berra famously said that "prediction is hard, especially when it's about the future." What is true of baseball is equally true of courts.

In general, I think that humans have an innate tendency to extrapolate current trends into the indefinite future. In the short run, at least, that's not a bad approach in the absence of other information. But it can often lead us astray – even on relatively simple tasks like predicting next year's oil prices or electric car sales. Or predicting whether the next president would be a minor reality TV star with a checkered business career.

I'm not arguing that the doom of the regulatory state is an impossibility or even a terribly implausible outcome. It's plausible enough to be scary. But Yogi Berra was right, and so is the folk wisdom about counting too heavily on today's eggs to hatch into tomorrow's birds.

That matters, and not only because we may be more despondent than the facts justify. It

also matters because we may give up on the idea of using federal regulations too quickly, and we may ignore the possible rewards of arguing strenuously against the ideas that we fear may dominate tomorrow's legal doctrines. It's much too soon to give up on the idea of a robust regulatory state.