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## From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference

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# FROM FOUR HORSEMEN TO THE RULE OF SIX: THE DECONSTRUCTION OF JUDICIAL DEFERENCE

By Keith W. Rizzardi<sup>†</sup>

*In its tumultuous 2022 term, the Supreme Court rebalanced the separation of powers, again. A tradition of self-restraint has evolved through case law and statutes when the judiciary reviews the actions of the other branches of government. The judiciary often accepts congressional judgments as to whether laws are necessary and proper and defers to executive agency interpretations of those congressional acts. The historical notion of judicial deference, however, earned criticism due to concerns about the potential unchecked decision-making power of unelected executive agency bureaucrats. The emerging alternative system might be worse.*

*History offers parallels. During the New Deal, a core group of Supreme Court justices known as the “Four Horsemen” often struck down agency actions or legislative acts, apparently based upon their views of economic policy. But during the “Switch in Time that Saved Nine” that followed, a changing majority of the Court exercised judicial restraint, upholding policy judgments by Congress and the executive agencies. The clock seemingly rewound in 2022, as a new conservative majority of justices declared statutes insufficient and struck down agency actions, embracing a logic akin to their New Deal predecessors. By deconstructing judicial deference, these justices can now impose the Rule of Six and selectively choose the applicable interpretive doctrine to achieve their personally preferred policy outcomes.*

*The fundamental question of American governance is “Who decides?”. In 2022, the unelected Supreme Court expanded its power over both unelected agency experts and elected officials. Inevitably, history will echo, and debates over court reforms will reemerge. But for now, in our extraordinary era of emergencies, epidemics, and a climate crisis, six robed riders on horseback have appeared.*

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## I. INTRODUCTION: LAW, AMBIGUITY &amp; SEPARATION OF POWERS

No statute can conceive of every situation.<sup>1</sup> Reasonable minds from the legislative, executive, and judicial branches of American government sometimes disagree over statutory requirements, intent, and interpretations. Legal ambiguities, especially in matters involving administrative agency actions, test our constitutional doctrine of separation of powers.<sup>2</sup> But in its tumultuous 2022 term, the United States Supreme Court asserted a dramatic degree of judicial authority – again.

To keep 2022 in context, a historical perspective, and perhaps a dose of cynicism, is needed. As former President Harry Truman liked to quip: “The only thing new in the world is the history you don’t know.”<sup>3</sup> And as Alexis de Tocqueville famously observed, judges have long had substantial power in the United States because “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>4</sup> The 2022 term was certainly not the first time that the Supreme Court has declared its own superiority and power to overrule the actions of the other branches.<sup>5</sup>

1. Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23, 23 (Jan. 1956) (“Language being what it is – an inexact, clumsy tool – words, however used and whoever uses them, must be construed and interpreted by those towards whom they are directed. This is particularly true of the language which legislatures use to express their will: statutory language can never be so precise as to eliminate the need for authoritative interpretation.”).

2. See Amanda Urban, *Defining Ambiguity in Broken Statutory Frameworks and its Limits on Agency Action*, 6 MICH. J. ENV'T. & ADMIN. L. 313, 313 (2016) (“The application of an unambiguous statutory provision may become problematic or unclear ... when a statute’s provisions become contradictory or unworkable in the context of new or unforeseen phenomena, yet the statute mandates agency action.”).

3. MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 21 (1974).

4. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 309 (2002).

5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–177 (1803) (“The authority given to the Supreme Court by the act establishing the judicial system of the United States to issue writs of mandamus

When the Constitution was drafted, Alexander Hamilton argued in the Federalist Papers that there must be a separation of powers, with each branch maintaining its authority without encroachment by other branches of government.<sup>6</sup> This balance of governmental powers nevertheless fluctuates. In the earliest decades of its existence, the Supreme Court defined its role with a sense of deference towards the executive and legislative branches, simultaneously declaring its power to interpret the law, while exercising a degree of respect for the President.<sup>7</sup> Congress, the Court also acknowledged at that time, could make any laws that were “necessary and proper” to carry out their enumerated powers.<sup>8</sup>

In the 1930s and the New Deal Era, however, the judiciary frequently questioned the actions of the executive and legislative branches, leading President Franklin D. Roosevelt to characterize the judiciary as a “super-legislature.”<sup>9</sup> After the upheavals of the New Deal era, Congress tried to define the judicial branch’s role in reviewing executive agency action, invoking their legislative power under the necessary and proper clause to pass the federal Administrative Procedure Act (APA) and codifying the process for judicial review of executive agency actions.<sup>10</sup> By its terms, the APA confined judicial review to an evaluation of whether agency actions were arbitrary or capricious, or otherwise in violation of law or the United States Constitution.<sup>11</sup> As the administrative state grew larger, the judiciary applied and interpreted the APA, adopting a framework to evaluate the legality of agency actions. Applying this new framework, the judiciary frequently gave deference to agency interpretations of the law.<sup>12</sup> Skeptics who denounced this system warned that an excessively deferential judiciary would create unaccountable agencies.<sup>13</sup>

The current Supreme Court’s approach to judicial deference, however, contains echoes of the New Deal debates. Just as the New Deal era conservatives used economic theories to set aside statutes and to prevent the expansion of executive

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to public officers appears not to be warranted by the Constitution. It is emphatically the duty of the Judicial Department to say what the law is.”).

6. THE FEDERALIST No. 48 (James Madison) (“It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”).

7. See, e.g., *Marbury*, 5 U.S. (1 Cranch) 137.

8. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

9. President Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937), in AM. PRESIDENCY PROJECT, U.C. SANTA BARBARA, <https://www.presidency.ucsb.edu/documents/fireside-chat-17>.

10. Administrative Procedure Act, 5 U.S.C. § 702.

11. 5 U.S.C. § 706.

12. See, e.g., *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

13. See, e.g., Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, THE HERITAGE FOUNDATION, (May 7, 2015), <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and>.

branch powers, the six conservatives of the modern Supreme Court conservatives apply doctrines of interpretation to strike down agency actions or to refuse to follow congressional acts. Both eras involved conservative majorities on the Supreme Court who were willing to strike down statutes purportedly because Congress did not speak clearly enough when it delegated power to the President.<sup>14</sup> A deconstructionist thinker can pierce this logic. Like their New Deal predecessors, judges can impose personally preferred policy outcomes by selectively choosing the applicable interpretive doctrine. A resurgence of judicial mischief is underway, led by non-deferential, unaccountable judges.

Parts II and III of this article discuss notable Supreme Court cases that shaped the separation of powers, demonstrating how the judiciary's deferential approach towards the other branches fluctuated over time. Part IV then evaluates three cases from the 2022 term,<sup>15</sup> comparing them to this historical context. Part V explains how these decisions have created a system of judicial review ripe for manipulation, empowering judges to use the selective application of precedent and interpretive doctrines to achieve preferred substantive outcomes. Part VI concludes that in an extraordinary era of epidemics and climate change, the unelected members of the Supreme Court have asserted a vast power over Executive agency experts, elected congressional lawmakers, and the President.

## II. PRE-1937: MARBURY, MCCULLOCH, LOCHNER AND THE FOUR HORSEMEN

The Supreme Court began defining the separation of powers and the role of the judiciary in its first three decades of existence.<sup>16</sup> In the historic case of *Marbury v. Madison*,<sup>17</sup> the Supreme Court considered the President's constitutional authority to make appointments. While upholding President Thomas Jefferson's decisions, the opinion emphasized the Court's role: "It is emphatically the province and duty of the Judicial Department to say what the law is."<sup>18</sup> The Court, though, limited its judicial review authority to only those disputes involving the Constitution or conflicting

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14. Compare, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (Congress cannot delegate "unfettered discretion" to the President); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body"); and *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam) ("We expect Congress to speak clearly" when it assigns agencies the power to make decisions "of vast economic and political significance.").

15. *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661; *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

16. *The Court as an Institution*, THE SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/institution.aspx> (last visited Dec. 27, 2022) (the Supreme Court's first session was in 1790).

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803).

18. *Id.* at 177.

statutes.<sup>19</sup> Nevertheless, this case marked an important assertion of judicial power when executive actions exceeded proper boundaries.<sup>20</sup>

In *McCulloch v. Maryland*,<sup>21</sup> the Court pondered congressional authority to pass laws based on the Constitution's "necessary and proper" clause.<sup>22</sup> The Supreme Court recognized that "a thing may be necessary, very necessary, absolutely or indispensably necessary," but held that a determination of whether a national bank was a "necessity" was not a role for the judiciary.<sup>23</sup> Disclaiming "all pretensions to such a power," the Supreme Court held that "Congress alone can make the election" on *how* to exercise its Constitutional powers.<sup>24</sup> Together, *Marbury* and *McCulloch* simultaneously established the role of the Court's judicial review while also displaying the Court's willingness to exercise a degree of self-restraint and respect for the other branches of government.<sup>25</sup>

In the following years, however, the Supreme Court became less restrained, especially when confronted with laws regulating economic activity. For example, in *Lochner v. New York*,<sup>26</sup> the Supreme Court struck down a state law regulating bakers' hours. Overturning the law while insisting that it was "not substituting the judgment of the court for that of the legislature," the Court held that a general right to make a contract was an individual liberty protected by the 14<sup>th</sup> Amendment of the Federal Constitution.<sup>27</sup> In its reasoning, the Court emphasized both the "limit to the valid exercise of the police power" as well as the "personal liberty" of individuals to enter into contracts, and declared that the bakers were "able to assert their rights and care for themselves."<sup>28</sup> The term "Lochnering" eventually became a verb meant to describe a specific sort of faulty constitutional reasoning<sup>29</sup> and the case defined an

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19. *Id.* at 177–78.

20. See, Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 543 (1914).

21. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

22. U.S. CONST. art. I, § 8.

23. *McCulloch*, 17 U.S. (4 Wheat.) at 414, 423.

24. *Id.* at 423–24.

25. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also *McCulloch*, 17 U.S. (4 Wheat.) 316; see also Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1–34 (1983) (describing some measure of judicial review of agency power as essential).

26. *Lochner v. New York*, 198 U.S. 45 (1905).

27. See *id.* at 56–57 ("There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.")

28. *Id.*

29. Jack M. Balkin, "Wrong The Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 682–683 (2005).

era. Despite these critiques, *Lochner's* conceptions of rights, state power, and sovereignty never completely disappeared.<sup>30</sup>

At the time, though, *Lochner* was merely the beginning of a trend in which courts routinely struck down all sorts of economic regulations, citing to the case's logic.<sup>31</sup> Notably, the Court struck down national laws prohibiting child labor, declaring the subject "a purely state" matter.<sup>32</sup> If Congress could regulate such matters, the Court warned, "all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed."<sup>33</sup> When Congress tried again, passing the Child Labor Tax Law, the Court held that child labor remained a purely state matter; the "prohibitory and regulatory effect and purpose" of the tax was "palpable" and a "penalty" that could not be considered constitutional.<sup>34</sup>

As the nation suffered through the Great Depression, Congress increasingly sought to regulate economics. This resulted in interbranch disputes as the various governmental institutions grappled with questions about agency actions, statutory schemes, and their constitutionality.<sup>35</sup> Tensions grew between the legislative and judicial branches. Led by a group of four conservative-leaning and pro-business justices, sometimes referred to as the "Four Horsemen," the Supreme Court regularly struck down agency actions and legislation associated with the New Deal.<sup>36</sup> In 1933, for example, Congress passed, and President Franklin D. Roosevelt implemented, the National Industrial Recovery Act.<sup>37</sup> Congress instructed the National Recovery Administration to create fair wages and stimulate economic recovery by creating "codes of fair competition."<sup>38</sup> Although the Supreme Court acknowledged precedent that permitted Congress to determine the necessity of a law under the necessary and proper clause, the Court held in *A.L.A. Schechter Poultry*

30. See generally Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1344–48 (2019).

31. See generally Ernest A. Young, *Sorrell v. IMS Health and the End of the Constitutional Double Standard*, 36 VT. L. REV. 903, 914–15 (2012) (discussing *Lochner* and its history).

32. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

33. *Id.* at 276.

34. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37–39 (1922) ("The case before us cannot be distinguished from that of *Hammer v. Dagenhart*, 247 U. S. 251").

35. See generally Russell W. Galloway Jr., *The Court That Challenged the New Deal (1930–1936)*, 24 SANTA CLARA L. REV. 65 (1984), <http://digitalcommons.law.scu.edu/lawreview/vol24/iss1/4>; see generally Barry Cushman, *Inside the "Constitutional Revolution" of 1937*, 9 SUP. CT. REV. 367 (2016).

36. See, e.g., NCC Staff, *How FDR Lost His Brief War on the Supreme Court*, NAT'L CONST. CTR. (Feb. 5, 2022), <https://constitutioncenter.org/blog/how-fdr-lost-his-brief-war-on-the-supreme-court-2> ("There were four Justices—nicknamed the "Four Horsemen": Justices George Sutherland, Pierce Butler, James McReynolds, and Willis Van Devanter—who were conservative enough that their votes against most New Deal plans were expected.").

37. Pub. L. 73–67, 48 Stat. 195 (*invalidated* by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

38. Pub. L. 73–67, 48 Stat. 195.

*Corp. v. United States* that it must evaluate whether Congress performed its essential legislative function in creating this regulatory scheme, or whether Congress improperly attempted to delegate its function to others.<sup>39</sup> Overturning the National Industrial Recovery Act, the Court held that Congress cannot delegate “unfettered discretion” to the President.<sup>40</sup> Emphasizing that “fair competition” was undefined by the statute, the Court said that the legislature’s delegation of authority to the executive branch in this instance “was not a valid exercise of federal power.”<sup>41</sup>

Similarly, in the 1936 matter of *United States v. Butler*,<sup>42</sup> the Supreme Court grappled with the Agricultural Adjustment Act<sup>43</sup> and whether its taxes and price regulations were inconsistent with the Constitution’s Spending Clause.<sup>44</sup> While claiming not to second guess Congress,<sup>45</sup> and acknowledging the range of congressional discretion,<sup>46</sup> the opinion by Justice Owen Roberts struck down the law nonetheless. The Court said Congress lacked the power to pass the statutory scheme because it was not explicit in the Constitution and infringed upon powers otherwise reserved to the states.<sup>47</sup> Justice Stone, in a prescient dissenting opinion, noted the absurdity of a decision that recognized a federal power to tax and spend but not a power to place conditions on that spending.<sup>48</sup> Instead, Stone called for judicial restraint:

The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their

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39. *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (1935).

40. *Id.* at 537.

41. *Id.* at 531, 550.

42. *United States v. Butler*, 297 U.S. 1 (1936).

43. 7 U.S.C. § 601 *et seq.*

44. U.S. CONST. art. 1, § 8, cl. 1.

45. *Butler*, 297 U.S. at 67 (1936) (“Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them.”).

46. *Butler*, 297 U.S. at 67 (1936) (“But, under our frame of government, no other place is provided where the citizen may be heard to urge that the law fails to conform to the limits set upon the use of a granted power. When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.”).

47. *Id.* at 74 (“Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance.”).

48. *Id.* at 85 (“It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure. The limitation now sanctioned must lead to absurd consequences.”).



wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.<sup>49</sup>

Sharing Justice Stone's frustration with the Supreme Court's resistance to the New Deal legislation, President Franklin D. Roosevelt threatened to "pack the court" by expanding its size and appointing new justices more inclined to support his policy goals.<sup>50</sup> Congress continued passing laws, delegating authority to the executive branch agencies to engage in rulemaking and standard setting.<sup>51</sup>

The conflicts of the New Deal Era eased in 1937 when the Supreme Court showed renewed acceptance of congressional discretion and executive action. For example, the National Labor Relations Act of 1935 had empowered the National Labor Relations Board (NLRB) to regulate and prohibit "unfair labor practices."<sup>52</sup> In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, the Supreme Court deviated from the rigidity of *Schechter Poultry* and broadly interpreted both the Constitution and the authority of Congress.<sup>53</sup> In the *NLRB* opinion the Court explained, "Congress cannot be denied the power to exercise that control" over collective bargaining.<sup>54</sup> Other labor law cases reached parallel conclusions, upholding NLRB agency actions as consistent with the statutory scheme and the Constitution.<sup>55</sup>

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49. *Id.* at 78–79.

50. *See generally*, William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966); *but cf.* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

51. *See generally*, Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 494 (1987).

52. 29 U.S.C. §§ 151–166 (Suppl. 2 1934).

53. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937).

54. *Id.* at 37.

55. The labor cases involved employees who alleged termination or retaliation for engaging in labor union activities, which the National Labor Relations Board regulated pursuant to the National Labor Relations Act. 29 U.S.C. § 151 *et seq.* The decisions upheld NLRB's actions as consistent with the statutory scheme and upheld the statute as constitutional. *See Associated Press v. NLRB*, 301 U.S. 103, 125–33 (1937) (holding that order of the National Labor Relations Board was within the scope of the statute and within the competence of Congress's power to regulate commerce); *see also NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937) (holding that objections to the construction and validity of the National Labor Relations Act were without merit for the reasons stated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 1); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937) ("the questioning relating to the construction and validity of the act have been fully discussed in our opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, decided this day. We hold that the principles there stated are applicable here.").

Similarly, in *Steward Machine Co. v. Davis*,<sup>56</sup> the Supreme Court considered whether agency actions associated with the Social Security Act<sup>57</sup> were constitutional. Distinguishing the Social Security Act tax scheme from the agricultural taxes struck down just a year earlier in *Butler*, the Court upheld the agency's action.<sup>58</sup> In *Helvering v. Davis* – another case involving the Social Security Act – a 7-2 majority embraced the logic of Justice Stone's dissent in *U.S. v. Butler* and upheld the statute, emphasizing the need for congressional discretion:

The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.<sup>59</sup>

...

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts.<sup>60</sup>

The jurisprudential shift reflected by the labor law and Social Security Act cases, known as the “Switch in time that saved nine,” rendered FDR's court packing plans excessive,<sup>61</sup> and became known as a “constitutional revolution.”<sup>62</sup> Whether the Supreme Court's shift was a response to FDR's proposal, or to public opinion, is a puzzling question for historians to debate.<sup>63</sup>

Political views surely shaped the Supreme Court's jurisprudential debates over the New Deal. Four conservative justices voting against the New Deal legislation on economic theories – Pierce Butler, James Clark McReynolds, George Sutherland and Willis Van Devanter – were known as “The Four Horsemen.”<sup>64</sup> Opposing them were three liberal justices – Louis Brandeis, Benjamin Cardozo and

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56. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 578 (1937).

57. 42 U.S.C. §§ 301–306.

58. *Steward Mach. Co.*, 301 U.S. at 592 (distinguishing *Butler* and stating “The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.”).

59. *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (upholding the Social Security tax by relying upon *Steward v. Davis*).

60. *Id.* at 644.

61. See generally, Michigan Law Review, *The New Deal Lawyers*, 81 MICH. L. REV. 977 (1983).

62. Barry Cushman, *Inside the Constitutional Revolution of 1937*, 9 SUP. CT. REV. 367, 403 (2016)

63. Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1893 (1994).

64. Cushman, *supra* note 51, at 559.

Harlan Fiske Stone –known as “The Three Musketeers.”<sup>65</sup> Chief Justice Charles Evans Hughes and Justice Owen Roberts were regarded as conservative-leaning swing votes.<sup>66</sup> Some scholars take an “Externalist” viewpoint when trying to explain this Court and the Switch in Time and suggest that Roosevelt’s landslide re-election in 1936 and proposed legislation may have shaped the Supreme Court’s newer decisions.<sup>67</sup> “Internalists,” however, claim that the Court’s own jurisprudential doctrines were gradually evolving.<sup>68</sup> Citing statistical evidence, one researcher argued that Justice Owen Roberts – whose vote was critical to the court’s switch – was historically a pragmatist who temporarily voted with the conservatives in an effort to earn the Republican Presidential nomination before 1936, and the “Switch in Time” might have been a natural reversal to the justice’s original views.<sup>69</sup> Whatever the reason, the Switch in Time, and the institution’s deferential approach, would define not only the extent of Congress’ lawmaking authority, but also the authority of the executive agencies it created, contributing to the expansion of the administrative state for the rest of the Twentieth Century.<sup>70</sup>

### III. 1937–2022: AGENCIES, THE ADMINISTRATIVE PROCEDURE ACT, AND *CHEVRON*

Congress passed the Administrative Procedure Act (APA) in 1947<sup>71</sup> to create uniformity in how administrative agencies participate in national

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65. Lee J. Strang & Bryce G. Poole, *Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents*, 86 N.C. L. REV. 969, 982 (2008) (citing ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 254 (1956) (“Together the Three Musketeers fought an unceasing battle against formalistic jurisprudence.”)).

66. Friedman, *supra* note 64, at 1892 (“The two swing Justices, Chief Justice Charles Evans Hughes and Justice Owen J. Roberts, seemed to have sided more with the Court’s four conservatives than with its three liberals.”).

67. Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 71 (2010).

68. *Id.*

69. Brian T. Goldman, *The Switch In Time That Saved Nine: A Study of Justice Owen Roberts’s Vote, in West Coast Hotel Co. v. Parrish*, CUREJ: COLL. UNDERGRADUATE RSCH. J., Jan. 1, 2012, at 107, <https://repository.upenn.edu/curej/150>.

70. *See generally*, Peter L. Strauss et al., *How the Administrative State Got to This Challenging Place*, DAEDALUS, Summer 2021, at 17 (explaining the challenges agencies currently face and the judicial use of techniques “invoking the expectations of those who wrote the Constitution”); *see also* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018) (explaining the constitutional challenges to the administrative state and arguing that various legal and political arguments do not provide sufficient “normative” bases for such challenges); *see also* Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 BYU L. REV. 147 (2021) (explaining the strategies used by Congress and the Supreme Court to resolve controversies over the emerging administrative state).

71. 5 U.S.C. § 551 *et seq.*

governance.<sup>72</sup> While the APA codified a framework for administrative agency actions, it further provided that courts could declare those executive agency actions to be “arbitrary, capricious, or otherwise not in accordance with law.”<sup>73</sup> Through the APA, Congress thus clarified and codified the terms by which the courts were empowered to engage in judicial review.<sup>74</sup> In the years before and after the APA’s passage, the Supreme Court would frequently defer to congressional acts and Executive agencies by upholding actions on matters such as the licensing of radio broadcasting stations,<sup>75</sup> implementation of labor laws for newsboys selling papers<sup>76</sup> or union workers building aircraft,<sup>77</sup> agency orders regulating management purchases of company stock<sup>78</sup> or calculations of backpay,<sup>79</sup> and agency regulations related to mortgages for veterans<sup>80</sup> or cable television.<sup>81</sup>

By the 1980s, the Supreme Court was again struggling with the judiciary’s role in reviewing agency actions and separation of powers concerns. Famously, in *Chevron v. NRDC*,<sup>82</sup> environmental advocates disagreed with President Reagan and the U.S. Environmental Protection Agency’s interpretation of the Clean Air Act. The Supreme Court, however, had become concerned about how Circuit Courts were using the judicial review process to reverse administrative agency decisions.<sup>83</sup> To add clarity to the nature of judicial review and set boundaries for judicial analysis of Executive Branch actions, the Supreme Court set forth a two-part approach. *Chevron*’s “Step One” stated the obvious, instructing that courts must look at the statutory text. If “Congress has directly spoken to the precise question at issue” and if “the intent of Congress is clear, that is the end of the matter.”<sup>84</sup> Agencies cannot deviate from the clear instructions of Congress. Ambiguities in the law, however,

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72. See, e.g., U.S. DEP’T OF JUST., ATT’Y GEN.’S MANUAL ON THE ADMIN. PROC. ACT 5 (1947) (“The Act sets a pattern designed to achieve relative uniformity in the administrative machinery of the Federal Government. It effectuates needed reforms in the administrative process and at the same time preserves the effectiveness of the laws which are enforced by the administrative agencies of the Government.”).

73. 5 U.S.C. § 706.

74. See, e.g., ATT’Y GEN.’S MANUAL, *supra* note 73, at 100 (“The provisions of this subsection defining agency action subject to judicial review are said to ‘involve no departure from the usual and well understood rules of procedure in this field’”).

75. See *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190 (1943).

76. See *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944).

77. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

78. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

79. See *NLRB v. Seven Up Bottling Co.*, 344 U.S. 344 (1953).

80. See *United States v. Shimer*, 367 U.S. 374 (1961).

81. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

82. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

83. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275 (2014).

84. *Chevron*, 467 U.S. at 842.

sometimes require the application of Chevron's more nuanced "Step Two" analysis. As the Supreme Court explained, when Congress leaves a "gap" in its statutory scheme for the agency to fill, "the court does not simply impose its own construction on the statute."<sup>85</sup> Instead, the Supreme Court applied judicial restraint, holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>86</sup> In other words, when a congressional act is ambiguous but Congress gave authority to an expert agency in the Executive branch, the Judiciary should defer to the agency's interpretation of the statutory scheme.

Ultimately, the Supreme Court's reasoning in *Chevron* was "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."<sup>87</sup> But, as some have noted, deferring to agency interpretations that fill statutory gaps might conflict with the Supreme Court's conception of itself as the final interpreter of law.<sup>88</sup> *Chevron* deference thus tests the separation of powers, and the interpretive role of the courts versus executive agencies.<sup>89</sup> Justice Stevens, reflecting on his unanimous opinion in *Chevron*, never viewed the case as particularly remarkable. Instead, in his view, *Chevron* was simply a reflection of well-established constitutional thinking, and a restatement of existing law.<sup>90</sup> Justice Antonin Scalia also believed *Chevron* represented important democratic principles. His law review article describing *Chevron* noted that broad delegation to the Executive is the hallmark of the modern administrative state,<sup>91</sup> and *Chevron* deference protects the legislative process:

If that is the principal function to be served, *Chevron* is unquestionably better than what preceded it. Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known. The legislative process

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85. *Id.*

86. *Id.*

87. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

88. Justice Thomas even views the concepts of delegation and deference as a "fiction," because the judiciary must "exercise its independent judgment in interpreting and expounding upon the laws." *Michigan v. EPA*, 576 U.S. 743, 760–764 (2015) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92 (2015)).

89. See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

90. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275 (2014); see also *supra* notes 66–72, citing the cases discussed in the *Chevron* opinion.

91. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989).

becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether, if they say nothing about it in the statute, the ultimate answer will be provided by the courts or rather by the Department of Labor.<sup>92</sup>

Subsequent cases parsing *Chevron* carefully considered issues such as the relevance of legislative history,<sup>93</sup> whether the congressional statements are sufficiently plain,<sup>94</sup> and the distinctions between deference to agency interpretations of statutes as opposed to agency interpretations of rules.<sup>95</sup> Critics, though, warned that *Chevron* impermissibly diminished the judicial role in the balance of powers.<sup>96</sup> As those critics gained influence, history began to reverse itself and the Judiciary became less deferential to the executive branch. Debates first began to emerge over whether the agency's interpretation of statutes was formal enough to be given the force of law,<sup>97</sup> or whether Congress intended to delegate the decision to the agency.<sup>98</sup> Judges sometimes applied a less deferential approach, merely considering whether the agency's interpretation of a statute had the power to persuade.<sup>99</sup> Appellate courts struggled to apply the doctrine and its emerging nuances.<sup>100</sup> In concurring and dissenting opinions, various justices of the Supreme Court called for the revision or abandonment of the doctrine of deference to the agencies. Justice Anthony Kennedy was troubled by "reflexive deference" to an agency's statutory interpretation.<sup>101</sup> Chief Justice John Roberts dissented that the courts should not "leave it to the agency to decide when it is in charge."<sup>102</sup> Justice Clarence Thomas pondered whether "the

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92. *Id.* at 518.

93. *See, e.g.*, *Chem. Mfrs. v. Nat. Res. Def. Council*, 470 U.S. 116 (1985).

94. *See, e.g.*, *K-Mart Corp. v. Cartier*, 486 U.S. 281 (1988).

95. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (discussing an executive agency interpretation of its own ambiguous rules).

96. *See e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

97. *See, e.g.*, *Christensen v. Harris Co.*, 529 U.S. 576 (2000).

98. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also* *Barnhart v. Walton*, 535 U.S. 212 (2002); *see also* Lisa S. Bressman, *How "Mead" Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

99. *See, e.g.*, *Mead*, 533 U.S. 218 (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

100. Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts Are Solving the Mead-Puzzle by Avoiding It Altogether*, 85 GEO. WASH. L. REV. 1484, 1486 (2017).

101. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).

102. *Arlington v. FCC*, 569 U.S. 290, 327 (2013).

significance of the delegated decision is simply too great.”<sup>103</sup> Federalist Society thinkers declared *Chevron* a “pernicious doctrine” and “failed experiment.”<sup>104</sup>

In what became known to scholars as *Chevron Step Zero*,<sup>105</sup> some cases questioned whether *Chevron* deference should apply at all.<sup>106</sup> For example, in cases involving the Food and Drug Administration’s regulation of tobacco,<sup>107</sup> the Attorney General’s rule prohibiting assisted suicide under the Controlled Substances Act,<sup>108</sup> the Environmental Protection Agency’s regulation of greenhouse gases,<sup>109</sup> and the Internal Revenue Service rules for tax credits and health insurance,<sup>110</sup> the Supreme Court emphasized that when questions of deep “economic and political significance” are central to a statutory scheme, Congress needs to expressly grant authority.

The trend lines seem clear, and the end of *Chevron* deference seems near. As the Supreme Court’s term was underway, articles predicted the shutting down of the regulatory state<sup>111</sup> and a potential “generational shift.”<sup>112</sup> Although *Chevron*

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103. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001).

104. Suzanna Sherry, Stephen Burbank & Evan Bernick, *Why Scalia Was Wrong About Chevron*, FEDERALIST SOCIETY: FEDSOCIETYBLOG (Mar. 23, 2017), <https://fedsoc.org/commentary/fedsoc-blog/why-scalia-was-wrong-about-chevron>.

105. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2013).

106. *Guedes v. ATF*, 920 F.3d 1 (2019), *cert. denied*, 140 S. Ct. 789 (2020) (stating that *Chevron* “has nothing to say about the proper interpretation of the law before us” regarding the Bureau of Alcohol, Tobacco and Firearms’s interpretation of “possession [of] a machinegun” pursuant to 26 U.S.C. §5685(b) as including rifles with bumpstocks). Prior to his elevation to the Supreme Court, a dissenting opinion by Judge Kavanaugh claimed that *Chevron* should apply only to ordinary rulemaking efforts. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (“In short, while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules.”).

107. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

108. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (“The importance of the issue of physician-assisted suicide . . . makes the oblique form of the claimed delegation all the more suspect.”).

109. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“Since, as we hold above, the statute does not compel EPA’s interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”).

110. *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (“The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

111. Timothy Noah, *The Supreme Court May Soon Shut Down the Regulatory State. Let’s Use It While We Still Can*, NEW REPUBLIC (Mar. 22, 2022), <https://newrepublic.com/article/165802/supreme-court-chevron-deference-biden-regulatory-state>; Richard A. Epstein & Mario Loyola, *The Supreme Court’s Chance to Rein In the Regulatory State*, WALL ST. J. (Dec. 7, 2021), <https://www.wsj.com/articles/the-supreme-court-chance-to-rein-in-federal-agency-power-chevron-deference-gorsuch-barrett-11638888240>.

112. Brendan Pedersen, *What the end of ‘Chevron deference’ could mean for banks*, AM. BANKER (June 12, 2022), <https://www.americanbanker.com/news/what-the-end-of-chevron-deference-could-mean-for-banks>.

remains valid precedent—for the moment<sup>113</sup>—the impact of a changing Supreme Court is becoming clear, and the echoes of history can be heard.

#### IV. THE TUMULT OF 2022: REWIND THE SWITCH IN TIME

The history just described reveals a pattern of increasing, then decreasing, deference to executive agencies from the beginning of the twentieth century into the twenty first. In the early years of the New Deal up until FDR's landslide 1936 reelection, a conservative Supreme Court struck down legislative priorities and dictated the path of American society. After 1936, and especially during the post-war solidification of the administrative state, the Supreme Court adopted a different approach, with *Chevron* and its progeny finally defining a deferential view toward public policy made by Congress and the executive agencies. But *Chevron* deference decayed over time and chaos has re-emerged. Principles of statutory construction,

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113. As this article was being completed, the Supreme Court denied a petition for certiorari in the matter of *Buffington v. McDonough*, 143 S. Ct. 14 (2022), a veterans benefits case in which the federal agency relied on its regulations, Justice Gorsuch issued a sharp dissent, critiquing the lower court decisions:

Neither the Court of Appeals for Veterans Claims nor the Federal Circuit offered a definitive and independent interpretation of the law Congress wrote. Instead, both courts simply deferred to the agency's (current) regulations as "reasonable" ones and said this Court's decision in *Chevron* required them to do so. That kind of judicial abdication disserves both our veterans and the law.

*Id.* at 4. Gorsuch's dissent then reasserted his views of *Chevron*, referred back to *Marbury*, and crystallized his view of the role of the judiciary and its judges:

In this country, we like to boast that persons who come to court are entitled to have independent judges, not politically motivated actors, resolve their rights and duties under law. Here, we promise, individuals may appeal to neutral magistrates to resolve their disputes about "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Everyone, we say, is entitled to a judicial decision "without respect to persons," 28 U.S.C. § 453, and a "fair trial in a fair tribunal," *In re Murchison*, 349 U.S. 133, 136 (1955).

Under a broad reading of *Chevron*, however, courts often fail to deliver on all these promises. Rather than provide individuals with the best understanding of their rights and duties under law a neutral magistrate can muster, we outsource our interpretive responsibilities. Rather than say what the law is, we tell those who come before us to go ask a bureaucrat. In the process, we introduce into judicial proceedings a "systematic bias toward one of the parties." Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016). Nor do we exhibit bias in favor of just any party. We place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else. In these ways, a maximalist account of *Chevron* risks turning *Marbury* on its head.

*Id.* at 9.



including an emerging “major questions doctrine,” have now demarcated a new Supreme Court era of anti-deference.<sup>114</sup>

### A. *Becerra: Don't Bother Briefing Chevron?*

Sometimes, silence is significant, perhaps representing indifference or irrelevance. In *American Hospital Association v. Becerra*, the Court's unanimous opinion ignored the applicability of Chevron deference altogether, another indication of its slow demise.<sup>115</sup> In this case, hospitals sought to recoup \$1.6 billion in Medicare payments after the Department of Health and Human Services (HHS) interpreted the statutory scheme to allow the agency to “adjust” the average price of prescription drugs, which affected the hospitals' reimbursements.<sup>116</sup> In their briefs, both parties explicitly and repeatedly discussed and disagreed over the application of the Chevron doctrine.<sup>117</sup> The agency offered a traditional Chevron defense, arguing “that courts may appropriately defer under Chevron to an agency's ‘reasonable construction of [a] statute, whether or not it is the only possible interpretation,’ and even where other reasonable interpretations exist.”<sup>118</sup> Countering the HHS the hospitals argued that Chevron should not apply at all “unless the statutory provision is ‘genuinely ambiguous’ with respect to the question at issue” and emphasizing the need to apply the standard tools of interpretation.<sup>119</sup> The U.S. Chamber of Commerce<sup>120</sup> and other prominent interest groups<sup>121</sup> weighed in with an amicus brief calling for further limits on Chevron. The arguments had no effect. When the unanimous Supreme Court applied its scrutiny, it ignored Chevron altogether. “Under the text and structure of the statute, this case is therefore straightforward,”<sup>122</sup> it held, without any mention of

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114. Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (Apr. 23, 2022), <https://virginialawreview.org/articles/antideference-covid-climate-and-the-rise-of-the-major-questions-canon/>.

115. *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022).

116. *Id.* at 1903–04, discussing 42 U.S.C. § 1395l(t)(14)(A)(iii) and § 1395l(t)(14)(A)(iii)(I) (related to reimbursement of hospitals), and § 1395l(t)(14)(A)(iii)(II) (requiring the agency to set reimbursement rates based on “the average price” charged by manufacturers for the drug as “calculated and adjusted by the Secretary.”).

117. *See* Brief for the United States in Opposition at 22, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114) (“petitioners principally contend (Pet. 17-26) that the decision diverged from this Court' precedents addressing the application of judicial deference to agency interpretations under [*Chevron*]. That contention lacks merit.”).

118. *Id.* at 23, citing *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012).

119. Brief for the Petitioners at 15–16, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (No. 20-1114) (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)).

120. *See* Brief for the Chamber of Commerce of the United States in Support of Neither Party, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (No. 20-1114).

121. *See* Brief for National Association of Home Builders et al. as Amici Curiae Supporting Petitioners, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (No. 20-1114).

122. *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. at 1904.

Chevron nor any form of the word deference. A Court applying Chevron and other precedents would have considered whether the Agency's interpretation was a permissible construction of the statute, even if not the Court's preferred one.<sup>123</sup> Instead, explaining its interpretation of the statutory scheme, the *Becerra* Court simply rejected HHS's actions: "[i]n sum, after employing the traditional tools of statutory interpretation, we do not agree with HHS's interpretation of the statute."<sup>124</sup>

Perhaps, in years past, this might have been understood as a Chevron "Step One" case, where the Court concluded that the statutory text was clear and unambiguous and therefore ruled against the Agency.<sup>125</sup> Alternatively, perhaps it was a matter where the Agency failed to meet its burden of showing that there was sufficient ambiguity to justify the use of Chevron, at all.<sup>126</sup> Regardless of its reasoning, the Court's refusal to mention ambiguity, permissibility, or Chevron in any respect in its opinion demonstrates the degree to which the doctrine of deference has declined. Or maybe, in some ways, a small piece of Chevron deference is still intact for future use.<sup>127</sup> But *Becerra*'s dismissal of Chevron can easily lead a person to conclude that bedrock administrative law precedent suddenly appears superfluous, and at a minimum, the case demonstrates "how not to do Chevron" deference.<sup>128</sup>

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123. See *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 n.11 (1984) (citing six prior Supreme Court decisions) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

124. *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. at 1906.

125. As Justice Scalia explained, the critical question in the implementation of *Chevron* is "how clear is clear?" Justice Scalia writes:

If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist. This is indeed intimated by the opinion in *Chevron*—which suggests that the opposite of "ambiguity" is not "resolvability" but rather "clarity." Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions (though still a better one than what it supplanted). How clear is clear?

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520–21 (1989). See also "How Clear Is Clear" in *Chevron's Step One?*, 118 HARV. L. REV. 1687 (2005).

126. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHICAGO L. REV. 757 (2017); see also, Note, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520 (2019).

127. Richard J. Pierce, Jr., *Is Chevron Deference Still Alive?*, REGUL. REV. (July 14, 2022), <https://www.theregview.org/2022/07/14/pierce-chevron-deference/>.

128. William Yeatman, *The Becerra Cases: How Not to Do Chevron*, 21 CATO SUP. CT. REV. 97 (2022), <https://www.cato.org/sites/cato.org/files/2022-09/Supreme-Court-Review-2022-Chapter-4.pdf> (arguing that *Becerra* was a literal example of "not doing" *Chevron* by avoiding the subject, but also arguing that the case represented an example of what courts should not do in the context of agency deference).

B. *NFIB and OSHA: Agency Authority Must Be “Clear” Even in an Emergency*

A second case involving public health statutes demonstrated *Chevron’s* further slide to irrelevance. Faced with the health emergency posed by the COVID-19 pandemic, President Donald Trump declared a national emergency and ordered preventative and proactive measures to protect public health.<sup>129</sup> Later, through an exercise of agency rulemaking authority, the Occupational Safety and Health Administration (OSHA) under President Biden required COVID-19 vaccines or, alternatively, mandatory workplace testing for businesses with more than 100 employees.<sup>130</sup> OSHA’s statutory grant of authority did not explicitly mention pandemics but did empower the Agency to adopt rules to ensure “safe and healthful working conditions” and to issue “emergency temporary standards” necessary to protect employees from “grave danger” in the workplace.<sup>131</sup> Reasonable people may disagree over whether a COVID-19 vaccine requirement and regular testing would ensure “safe and healthful working conditions” in line with OSHA’s statutory mandate. Yet, none of these issues were decided in *National Federation of Independent Business v. Department of Labor (NFIB)*.<sup>132</sup> Ignoring its deferential precedents, the Court declined to consider whether OSHA’s vaccine requirement rule was a permissible interpretation of an ambiguous statute by an executive agency as required by the APA and *Chevron*. Rather than deciding whether Congress had created a law “necessary and proper” to regulate labor by applying *McCulloch* or prior labor law cases,<sup>133</sup> the Supreme Court demanded more explanation from Congress to permit the agency to act in this way.

Apparently unbound by deference to congressional authority to pass sweeping legislation (required by *McCulloch*) and released from its own history of deference to the agency interpretation of that legislation (required by *Chevron*), the Court was free to undo the new regulation. Citing inaction by Congress – the notion that Congress had not granted OSHA “authority to regulate public health more broadly” – the Court invalidated the executive agency action and issued an emergency stay.<sup>134</sup> Invoking the “major questions” doctrine, the Court held: “We

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129. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020); *see also* Tedros Adhanom Ghebreyesus, Dir.-Gen., WHO, *WHO Director-General’s opening remarks at the media briefing on COVID-19*, WHO (March 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

130. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (withdrawn Jan. 26, 2022), *see also Occupational Safety and Health Administration, Statement on the Status of the OSHA COVID-19 Vaccination and Testing ETS*, OSHA (January 25, 2022) <https://www.osha.gov/coronavirus/ets2>).

131. *See Occupational Safety and Health Act of 1970*, 29 U.S.C. § 651 *et seq.*

132. *Nat’l Fed’n of Indep. Bus. v. Dep’t. of Lab.*, 142 S. Ct. 661 (2022) (per curiam).

133. *See supra* Part II (discussing *NLRB* and other labor law cases).

134. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. at 666.

expect Congress to speak clearly” when it assigns agencies the power to make decisions “of vast economic and political significance.”<sup>135</sup>

In the perspective of OSHA, and the Congress that created it, this reasoning contains obvious and serious flaws. The majority opinion, in its distinction between the “workplace” versus “public health more broadly,” disregarded the name and mission of the agency,<sup>136</sup> and the breadth of the legislation,<sup>137</sup> all of which include the word “health” in the title. The Court also failed to consider the fact that in other contexts, OSHA regulates toxic substances<sup>138</sup> and tuberculosis<sup>139</sup> in the workplace, concerns that – like COVID-19 – affect the public as a whole. Arguably, since every regulation of the American workplace has vast economic and political significance, the logic of *NFIB* means that anything OSHA addresses must meet *NFIB*’s standard that Congress must speak “clearly” in its legislation – which in turn begs the question of whether Congress adequately authorized OSHA to do anything at all.<sup>140</sup>

Further, the *per curiam* opinion cannot be easily reconciled with precedent and the actual text of OSHA’s assessment. The COVID-19 rule adopted by the agency explicitly relied on congressional authority to regulate grave dangers in the workplace, including the heightened risks of infection and death due to the pandemic.<sup>141</sup> Case law established that a finding of “grave danger” required “the danger of incurable, permanent, or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health.”<sup>142</sup> Circuit court cases also held that “gravity of danger is a policy decision committed to OSHA, not to the courts.”<sup>143</sup>

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135. *Id.* at 665 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021)).

136. Ana Santos Rutschman & Ruqaiyah Yearby, *Public Health Law and Policy in the Wake of NFIB v. OSHA: Probing Emerging Divides in the Supreme Court’s View of Public Health*, NYU J. LEGIS. & PUB. POL’Y QUORUM (Mar. 24, 2022) (explaining that the Supreme Court disregarded OSHA’s mission and deploys a reductionist view of public health by creating artificial and unsupportable distinctions).

137. Mark A. Rothstein, *The Occupational Safety and Health Act at 50: Introduction to the Special Section*, 110 AM. J. PUB. HEALTH 613, 613–14 (describing the OSHA as a combination of public health law, employment law, and environmental law).

138. *See, e.g.*, *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion); *see also* *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981) (discussing OSHA regulation of benzene and cotton dust); *cf.* Cynthia Ruggerio, *Referral of Toxic Chemical Regulation Under the Toxic Substances Control Act: EPA’s Administrative Dumping Ground*, 17 B.C. ENV’T. AFFS. L. REV. 75, 79 (1989) (noting EPA’s greater authority to regulate toxic substances compared to OSHA).

139. 29 C.F.R. § 1904.11 (2021).

140. *See* Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008) (discussing the nondelegation doctrine issues caused by OSHA’s deferential statutory guidance); *see also*, Elizabeth C. Gay, *Scrutiny of OSHA Regulations in the Courts: A Study of Judicial Activism*, 14 U. RICH. L. REV. 623 (1980) (noting the Judiciary’s lack of deference to OSHA).

141. *See supra* note 131 at 61405.

142. *Fla. Peach Growers Ass’n v. U.S. Dep’t of Lab.*, 489 F.2d 120, 132 (5th Cir. 1974).

143. *Asbestos Info. Ass’n v. OSHA*, 727 F.2d 415, 427 (5th Cir. 1984) (recognizing the authority to create rules for grave dangers, but ultimately finding that OSHA did not provide sufficient support for its action.)

Applying the grave danger standard, OSHA relied upon 148 sources spanning seven pages in the Federal Register,<sup>144</sup> and emphasized the risk associated with the transmission of the COVID-19 virus in shared workplace settings due to “working indoors, working with others for extended periods of time, poor ventilation, and close contact with potentially infectious individuals.”<sup>145</sup> The agency’s interpretation of its legislative authority proved impermissible.<sup>146</sup>

Most consequentially, the Supreme Court undermined OSHA’s authority to respond to the chaos of an emergency. As an analysis by the Congressional Research Service showed, courts had fully vacated or stayed temporary OSHA rules only 4 times in 11 cases, and all of those cases predated 1980 and various relevant procedural reforms.<sup>147</sup> But the invocation of the major questions doctrine in *NFIB* and the suggestion that Congress was not specific enough, raises especially challenging legislative drafting problems. By definition, an emergency involves the unknown and unexpected: “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”<sup>148</sup> Congress might never be able to provide sufficient clarity in a statute to permit the Agency to respond to these

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144. *Supra* note 131, at 61424–61429.

145. *See supra* note 131, at 61424.

146. Despite the lengthy explanation and deadly nature of COVID, the Court’s majority opinion even hints that the agency interpretation of its emergency standard setting authority was *impermissible*:

Such standards may “take immediate effect upon publication in the Federal Register.” See *supra* note 131 at 61405. They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards,” and (2) that the “emergency standard is necessary to protect employees from such danger.”

Nat’l Fed’n of Indep. Bus. V. Dep’t of Lab., 142 S. Ct. 661, 663 (2022) (per curiam).

147. SCOTT D. SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): COVID-19 EMERGENCY TEMPORARY STANDARDS (ETS) ON HEALTH CARE EMPLOYMENT AND VACCINATIONS AND TESTING FOR LARGE EMPLOYERS 6, 17, tbl.A-12 (2022); The document explained OSHA’s use of the ETS process as follows:

[I]n the 11 times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case. In five of the seven ETSs that were not challenged, were fully or partially upheld by the courts, or are still active, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS.<sup>30</sup> Each of these five cases, however, occurred before 1980, after which a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process.

*Id.* at 6.

148. *Emergency*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/emergency> (last visited Jan. 31, 2023).

circumstances; there could always be unspoken and unwritten items that Congress did not address. Yet *NFIB* has transformed democratic governance. Instead of honoring the role of the executive branch in times of emergency<sup>149</sup> subject to legislative powers related to oversight,<sup>150</sup> spending,<sup>151</sup> review,<sup>152</sup> or sunseting<sup>153</sup> of agency actions or laws,<sup>154</sup> *NFIB* effectively rejected the actions of both the executive and the legislative branches.

The logic of *NFIB* demonstrates a remarkable assertion of judicial power. Without the restraint of *Chevron* deference to executive agencies and *McCulloch*'s respect for the legislative power to pass laws as necessary and proper, the Supreme Court is now restrained only by the perspectives of the individual justices. The concurring opinion by Justice Gorsuch offered telling insights. Noting the lack of an explicit grant of authority empowering OSHA to require workplace vaccines, he warned that administrative agencies might “seek to exploit some gap, ambiguity, or

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149. See *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE, (Feb. 8, 2023), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>; see also Andrej Zwitter, *The Rule of Law in Times of Crisis A Legal Theory on the State of Emergency in the Liberal Democracy*, 98 ARCHIVES FOR PHIL. L. & SOC. PHIL. 95 (2012) (one fundamental characteristic of law in an emergency is that legislative power is shifted to the executive); but see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (“In the practical working of our Government, we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.”); *Youngstown Sheet & Tube Co.*, 343 U.S. at 629 (Justice Douglas, concurring) (“And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act.”); see also Marc Hertogh, *A Sociology of the Rule of Law: Why, What, Where? And Who Cares?*, 34 RECHT DER WERKELIJKHEID 1 (2013), UNIVERSITY OF GRONINGEN FACULTY OF LAW RESEARCH PAPER NO. 10/2013 (June 27, 2013) <https://ssrn.com/abstract=2285996>.

150. See CHRISTOPHER M. DAVIS, ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2021); see also TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2021); see also ADVOCS. FOR INT'L DEV., THE RULE OF LAW IN TIMES OF HEALTH CRISES 1–2, 20, 23 (2020) (acknowledging concentration of power in the executive and promoting parliamentary scrutiny of executive actions).

151. JAMES V. SATURNO, CONG. RSCH. SERV., R46497, AUTHORIZATIONS AND THE APPROPRIATIONS PROCESS 1–2 (2020).

152. See generally 5 U.S.C. §§ 801–808; see also GEO. WASH. REGUL. STUDIES CTR., BEYOND REPUBLICANS AND THE DISAPPROVAL OF REGULATIONS: THE INSTITUTIONALIZATION OF THE CONGRESSIONAL REVIEW ACT 3, 6 (2021), <https://regulatorystudies.columbian.gwu.edu/beyond-republicans-and-disapproval-regulations>.

153. See, e.g., Antonio Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT'L L. 29, 53–54 (2016) (discussing sunset clauses used in American emergency counterterrorism legislation); see also Saturno, *supra* note 152, at 1 (spending authorizations may have sunset provisions).

154. See, e.g., *United States v. Dickerson*, 310 U.S. 554, 555–56 (1940) (“There can be no doubt that Congress could suspend or repeal the authorization . . . and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise”).

doubtful expression in Congress's statutes."<sup>155</sup> In his view, courts are guardians against "government by bureaucracy supplanting government by the people."<sup>156</sup> Simultaneously, Justice Gorsuch declared that courts have the authority to second-guess Congress if the power the agency has claimed involves a "major question," citing to the judicial power to reject any law perceived to be an "unintentional, oblique, or otherwise unlikely" delegation of authority from Congress to the Executive.<sup>157</sup>

Arguably, a reversal of the Switch in Time is now underway. In 1937, *NLRB* deferred to Congress and its authority to empower an administrative agency to regulate the work force during the Great Depression. Eighty-five years later, the Court took the opposite approach in *NFIB*. Using logic akin to *Schechter Poultry*, the Supreme Court created a distinction—unintended by Congress—to second-guess statutory text and an agency's rule.<sup>158</sup> By enacting the Occupational Safety and Health Act of 1970, Congress empowered the executive branch to respond to "grave dangers" in an "emergency."<sup>159</sup> The executive branch, in turn, implemented that authority, and OSHA adopted Emergency Temporary Standards to address the risk of COVID-19 in the workplace, carefully explaining its interpretation of the legislative authority, at length, in the Federal Register. Yet the *NFIB* decision demonstrates that the Court may stop the agency action, anyway. With a simple declaration that a law is not "clear" enough, the Supreme Court can displace lawmakers' and agency experts' decisions, and assert an extraordinary power to supervise, override, and otherwise dictate public policy.

### C. *West Virginia v. EPA: Big Problems Need Explicit Solutions*

In *West Virginia v. U.S. Environmental Protection Agency* (EPA),<sup>160</sup> the Supreme Court reiterated, yet again, its ongoing shift away from judicial deference. In this case, the Court's majority applied the "major questions" doctrine<sup>161</sup> to overturn EPA regulations intended to combat climate change, which the Supreme Court has acknowledged as "the most pressing environmental challenge of our time."<sup>162</sup>

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155. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring).

156. *Id.* (quoting Antonin Scalia, *A Note on the Benzene Case*, 4 REGUL. 25, 27 (1980)).

157. *Id.*

158. Compare *supra* Part II (discussing *A.L.A. Schechter Poultry Corp. v. United States*) with *supra* Part IV.B (discussing *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*).

159. 29 U.S.C. § 655 (c)(1).

160. 142 S. Ct. 2587 (2022).

161. See generally, Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T. & ADMIN. L. 479 (2016).

162. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

Through the Clean Air Act, Congress bestowed EPA with authority to regulate “stationary sources” which “may emit any air pollutant.”<sup>163</sup> The statute empowered EPA to adopt standards for “emissions of air pollutants” and to achieve the standards “through the application of the best system of emission reduction” taking into account “environmental impact and energy requirements.”<sup>164</sup> Carbon emissions from power plants, EPA had concluded, were an air pollutant contributing to climate change.<sup>165</sup> Accordingly, EPA developed the Clean Power Plan to regulate emissions from power plants.<sup>166</sup> The regulations, interpreting the “best system of emission reduction . . . adequately demonstrated,” created a system to shift electrical generation in phases from coal plants to gas-fired plants to “new low- or zero-carbon generating capacity” wind or solar plants.<sup>167</sup>

In theory, the Clean Power Plan could have been understood as a permissible interpretation of an ambiguous but ambitious Clear Air Act. When the Clean Air Act was initially proposed, President Nixon said it would be “the most comprehensive and costly program in this field in America’s history.”<sup>168</sup> Senator Edmund Muskie – “father of the Clean Air Act”<sup>169</sup> – said the legislation would be transformational<sup>170</sup> with widespread economic effects<sup>171</sup> due to power plant closures or the need for “no measurable omissions.”<sup>172</sup> When signing the legislation, Nixon reemphasized EPA’s role in implementation and enforcement of air quality standards, calling the statute “the most important in our history.”<sup>173</sup>

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163. 42 U.S.C. § 7411(a)(3).

164. *Id.* at § 7411(a)(1).

165. Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories, 86 Fed. Reg. 2542 (Jan. 13, 2021) (to be codified at 40 C.F.R. pt. 60) (finding that carbon was an “air pollutant” that “may reasonably be anticipated to endanger public health or welfare” by causing climate change.).

166. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

167. *Id.* at 64,666, 64,729.

168. President Richard Nixon, Annual Message to the Congress on the State of the Union (Jan. 22, 1970) (“But clean air is not free, and neither is clean water. The price tag on pollution control is high. Through our years of past carelessness we incurred a debt to nature, and now that debt is being called. The program I shall propose to Congress will be the most comprehensive and costly program in this field in America’s history.”)

169. Adam Babich, *Back to the Basics of Antipollution Law*, 32 TULANE ENVI. L. J. 1, 8 n.38 (2018).

170. 116 CONG. REC. 32,900 (1970) (statement of Sen. Muskie) (“This legislation will be a test of our commitment and a test of our faith: in our institutions, in our capacity to find answers to difficult economic and technological problems, and in the ability of American citizens to rise to the challenge of ending the threat of air pollution.”).

171. 116 CONG. REC. 42,391 (1970) (statement of Sen. Muskie) (the legislation “undoubtedly will have an economic impact all across this country.”).

172. *Id.* at 42,385 (discussing potential for plant closures or no measurable emissions).

173. President Richard Nixon, Remarks on Signing the Clean Air Amendments of 1970 (December 31, 1970).



Despite this history, EPA's Clean Power Plan rule never became effective. The Supreme Court issued a stay of the rule,<sup>174</sup> and during the Administration of President Donald Trump, the EPA repealed the rule, questioning its authority and emphasizing the economic impacts.<sup>175</sup> Disregarding this apparent conclusion, petitioners from West Virginia, the North American Coal Corporation, and others continued to challenge the rule, alleging that some of the harms continued.<sup>176</sup> The Supreme Court accepted their petition, citing to the possibility of a future rulemaking,<sup>177</sup> leading Justice Kagan to characterize the case as an advisory opinion.<sup>178</sup> Ultimately, the Court rejected EPA's authority to regulate under the Clean Power Plan, holding that the words of the Clean Air Act "must be read in their context and with a view to their place in the overall statutory scheme."<sup>179</sup> Judicial review, the majority declared, must consider "whether Congress in fact meant to confer the power the agency has asserted."<sup>180</sup> And even when there is a colorable textual basis for the agency action, the court can apply its own "common sense" to determine whether "Congress [would have been] likely to delegate" such power, because "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"<sup>181</sup> In other words, even if the agency's reading of statutory text might be permissible, the Court can impose its own

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174. See *West Virginia v. EPA*, 577 U.S. 1126 (2016).

175. EPA repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,523, 32,539 (July 8, 2019). In *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022), the Court held, however, that the case was not moot, because the government did not voluntarily cease the conduct, and "vigorously defend[ed]" the legality of the Clean Power Plan. *West Virginia*, 142 S. Ct. at 2607 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288–289 (1982)). In her dissent, Justice Kagan accused her colleagues of issuing "an advisory opinion on the proper scope of the new rule EPA is considering" *Id.* at 2628 (Kagan, J., dissenting).

176. The Supreme Court held that because the government could reimpose emissions limits and "vigorously defends" the legality of the approach, the matter was not moot and remained justiciable. *West Virginia*, 142 S. Ct. at 2607.

177. Arguably, *West Virginia v. EPA* (2022) should have been dismissed as moot, because there was no pending rulemaking underway. Instead, the Court emphasized that "voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 2594 (citing *Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).

178. *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting) ("But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.").

179. *Id.* at 2607 (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

180. *West Virginia*, 142 S. Ct. at 2607 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

181. *West Virginia*, 142 S. Ct. at 2609 (citing *Brown & Williamson*, 529 U.S. at 133 and *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 468 (2001)).

alternative and preferred interpretations of that text. If the Court deems the text to be vague, it can override and reject an agency's view, purportedly because Congress did not explicitly authorize the decision. Ironically, the Court's restrictive interpretive approach in *West Virginia* even defied its own assertions of common sense, because it acknowledged the problem yet rejected the solution. More precisely, the Supreme Court accepted that "[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible solution to the crisis of the day[.]"<sup>182</sup> but concluded that "it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d)."

The Court's reasoning in *West Virginia* parallels *Schechter Poultry*. Congress did not adequately define "fair competition" in 1935 to satisfy the majority in *Schechter Poultry*,<sup>183</sup> and in 2022, Congress did not adequately explain the "best system of emission reduction" to satisfy the majority in *West Virginia*. For lack of sufficient explication, the *West Virginia* majority rejected both the executive agency actions and the legislative authority, purportedly because congressional intent was not "clear."<sup>184</sup> The implications of the *West Virginia* decision (and the *NFIB* decision as well) suggest that whenever the Court disagrees with an agency interpretation of statute, or even a grant of statutory authority itself, the justices can invoke the major questions doctrine and prevent implementation of the executive action until the legislature acts anew.

Adding further irony to the ruling, the *West Virginia* majority opinion was written by Chief Justice John Roberts, who, only a few days earlier, issued a concurring opinion in the controversial abortion rights case *Dobbs v. Jackson Women's Health Organization*. Highlighting the lessons of history and the risks of Supreme Court overreach,<sup>185</sup> Chief Justice Roberts' *Dobbs* opinion repeatedly emphasized the need for judicial restraint.<sup>186</sup> The cognitive dissonance between his *Dobbs* concurrence and *West Virginia* opinion is acute – in one case, Roberts calls for judicial restraint, in another he rejects it; in one he acknowledges precedent, in the other he ignores it. The Chief Justice's *West Virginia* opinion committed the very errors he warned against in his *Dobbs* concurrence: he applied a restrictive view of both legislative and executive authority, ignored the historical context, and deviated from basic principles of judicial restraint.<sup>187</sup>

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182. *West Virginia*, 142 S. Ct. at 2616 (citing *New York v. United States*, 505 U.S. 144, 187 (1992)).

183. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531 (1935).

184. *West Virginia*, 142 S. Ct. at 2616 ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body").

185. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2316 (2022) (Roberts, J., concurring) (explaining why the Switch in Time that Saved Nine occurred, and noting the "backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent.").

186. See *id.*

187. See, e.g., *supra* Part II (discussion of *Lochner* and the child labor law cases).

In contrast to Chief Justice Roberts, Justice Gorsuch separately concurred in *West Virginia* and rejected any pretext of judicial restraint, instead characterizing the Supreme Court as a separation of powers champion. Citing the Federalist Papers, and emphasizing the need for broad consensus to adopt legislation, he warned that Congress cannot delegate its powers to the Executive:

By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time... Permitting Congress to divest its legislative power to the Executive Branch would “dash [this] whole scheme.” Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him.<sup>188</sup>

Justice Gorsuch advocates to take power away from Congress, the President, and the EPA experts, while increasing the power of the nine members of the Supreme Court to determine the scope of the law. In some ways, his view of *West Virginia* claims a power even greater than exercised in *Schechter Poultry*. Whereas the *Schechter Poultry* justices instructed that Congress cannot delegate “unfettered discretion” to the President,<sup>189</sup> Justice Gorsuch went further. In *West Virginia*, his concurrence insists that his interpretation of a statutory grant of authority should always prevail over EPA’s, regardless of whether the grant is “unfettered” or simply broad, noting that “our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the [Clean Power Plan].”<sup>190</sup> Historically, this type of difference of opinion between the executive and judicial branch officials would suggest ambiguity, which under *Chevron* Step Two would have necessitated deference to an agency’s *permissible* interpretation. Instead, under *West Virginia*, and in Justice Gorsuch’s view, EPA’s expertise matters for naught, and the judiciary’s view prevails. Modern environmental law cannot be reconciled with this judicial philosophy, in which the Court can substitute its judgment for the executive agency’s whenever Congress allows a degree of ambiguity.<sup>191</sup>

*West Virginia v. EPA* leaves the nation’s climate policy in a precarious position. Congress passed the Clean Air Act, intending to create an historic and

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188. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (citations omitted).

189. *Schechter Poultry*, 295 U.S. at 542.

190. *West Virginia*, 142 S. Ct. at 2626 (Gorsuch, J., concurring).

191. Arthur F. McEvoy, *Environmental Law and the Collapse of New Deal Constitutionalism*, 46 AKRON L. REV. 881, 907 (2013) (arguing that modern environmental law precipitated from civic energy, social knowledge, and centralized, expert-driven economic regulation, with special protection for human rights).

extraordinarily powerful law.<sup>192</sup> Yet, the Supreme Court declared that the problem of climate change and a warming planet cannot now be solved by the executive branch. Policymaking on this existential matter is now frozen until Congress acts,<sup>193</sup> making the risks of climate change loom ever larger.<sup>194</sup>

In what some believe to be a partial response to the Supreme Court's decision, Congress did take action.<sup>195</sup> Through the Inflation Reduction Act of 2022,<sup>196</sup> Congress adopted a definition of greenhouse gases in the Clean Air Act,<sup>197</sup> incentivized renewable energy production,<sup>198</sup> and created a fund "to carry out other greenhouse gas emission reduction activities, as determined appropriate" by the EPA Administrator.<sup>199</sup> Time will tell whether this congressional action is "clear enough" to convince the Supreme Court of EPA's authority, or whether major questions still remain.<sup>200</sup>

## V. THE RULE OF SIX: A 2X2 MATRIX

In 2022, the judiciary dramatically expanded its power over both Congress and the executive branch. Without applying *Chevron's* notions of agency deference or *McCulloch's* broad acceptance of necessary and proper laws, the trio of decisions in

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192. Coral Davenport, *Obama Builds Environmental Legacy with 1970 Law*, N.Y. TIMES, (Nov. 26, 2014), <https://www.nytimes.com/2014/11/27/us/without-passing-a-single-law-obama-crafts-bold-environmental-policy.html>.

193. Amber Phillips, *Congress's Long History of Doing Nothing on Climate Change, in 6 Acts*, WASH. POST (Dec. 1, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/>; Maxine Joselow, *Congress is Back. Will it Act on Climate?*, WASH. POST (Apr. 25, 2022), <https://www.washingtonpost.com/politics/2022/04/25/congress-is-back-will-it-act-climate/>; cf. Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 731 (2009).

194. See U.S. GLOB. CHANGE RSCH. PROGRAM, *FOURTH NATIONAL CLIMATE ASSESSMENT 25, 31* (2018) (summarizing climate change's effects on communities, human health and safety, quality of life, economic growth, and the oceans).

195. Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How.*, N.Y. TIMES, (Aug. 22, 2022), <https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html>; but see, Kate Aronoff, *No, the Inflation Reduction Act Did Not "Overturn" West Virginia v. EPA*, NEW REPUBLIC (Aug. 24, 2022), <https://newrepublic.com/article/167520/inflation-reduction-act-overturn-west-virginia-epa>.

196. See Pub. L. No. 117-169, 136 Stat. 1818 (2022).

197. *Id.* at § 60101 (inserting section 132(d)(4) into the Clean Air Act defining "greenhouse gas" to mean "the air pollutants carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, and sulfur hexafluoride.").

198. See, e.g., *id.* at §§ 13101, 13801, and 22001.

199. *Id.* at § 60103 (amending section 134 of the Clean Air Act).

200. As the Supreme Court acknowledged at the end of its *West Virginia* opinion, the authority of the EPA to regulate greenhouse gas emissions and to force a transition away from coal requires Congressional action. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

*NFIB*, *West Virginia*, and *Becerra* revealed an increased willingness to question the wisdom of a congressional statute or an agency action and to substitute the Court's judgments for the political branches. The generalist judges now wield more power than the elected officials and agency experts – precisely what *Chevron* sought to prevent:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . .<sup>201</sup>

Perhaps the demise of *Chevron* is preordained.<sup>202</sup> For decades, cases have refined the *Chevron* doctrine,<sup>203</sup> and scholars have opined on *Chevron*'s inevitability,<sup>204</sup> aging,<sup>205</sup> death,<sup>206</sup> and resurrection.<sup>207</sup> Some claim the deferential doctrine favors the government to the detriment of the citizen challenger,<sup>208</sup> or declare it a language game<sup>209</sup> that can be manipulated for partisan outcomes.<sup>210</sup> Perhaps a return to the APA's "arbitrary and capricious" standard is needed.<sup>211</sup> Yet,

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201. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

202. In 2011, a dissenting opinion by Justice Steven Breyer warned of the potential for re-emergence of *Lochnerism*, with when "power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 591–92 (2011) (Breyer, J., dissenting) (criticizing an opinion striking down a Vermont law regulating pharmaceuticals, and expressing concern about the *Lochner* era.)

203. *See supra* Part III.

204. *See* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017).

205. *See* Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007).

206. *See* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990); *see also* Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015).

207. *See* Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983 (2016).

208. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016).

209. Adam Babich, *Fun with Administrative Law: A Game for Lawyers and Judges*, 4 MICH. J. ENV'T. & ADMIN. L. 341, 348, 353 (2015).

210. Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 839 (2010); *see also* Amy Semet, *Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621 (2022) (study of NLRB cases finding that Republican-majority courts disproportionately used substantive canons to uphold anti-employee interpretations while Democratic-majority courts favored language canons to reversing the appeals).

211. *Cf.* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives The Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 674 (2007) ("[T]he APA

whatever *Chevron*'s flaws, the major questions doctrine is, arguably, even more poorly suited for achieving a healthy balance between the judiciary and the political branches.

First, the doctrine is inscrutable, because the Supreme Court has nearly unrestrained discretion to set its own agenda.<sup>212</sup> Every case before the Supreme Court, according to its own rules, must be “compelling”<sup>213</sup> and “important”<sup>214</sup> involving difficult questions.<sup>215</sup> Therefore, any question of statutory construction reviewed by the Supreme Court will have been zealously litigated by committed advocates in the District and Circuit Courts, and will have earned four votes for certiorari from Supreme Court Justices who disagree with the lower court's decision.<sup>216</sup> Under these circumstances, no question of agency interpretation that comes before the Supreme Court could be classified as anything other than “major”. Second, the doctrine is ill-defined, leaving vast discretion to the jurist as to whether or not a “major question” of “magnitude and consequence” exists.<sup>217</sup> Third, the doctrine inhibits government efforts to solve problems – even in an emergency – because it ceases all policymaking on the issue until Congress acts again, undermining the effort that Congress put into the original legislation.<sup>218</sup> Fourth, the major questions doctrine ignores agency expertise: on matters of utmost national importance, where the benefit of administrative agency expertise peaks, judicial deference craters.<sup>219</sup> Finally, by purportedly saving democracy from the rule of the unelected bureaucrats in the executive branch, the major questions doctrine subjects the people to the rule of the unelected judiciary.<sup>220</sup>

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works better than the judge-made *Chevron* canons of the Supreme Court, and it is, after all, the scheme that Congress enacted into law.”).

212. Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 924 n.1 (2022) (citing 28 U.S.C. § 1254(1) (2018)) (explaining that cases may be reviewed by the Supreme Court by “writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”).

213. SUP. CT. R. 10 (“A petition for a writ of certiorari will be granted only for compelling reasons.”).

214. *Id.* (requiring consideration of whether the petition involves an “important matter” or “important federal question” or “important question of federal law”).

215. See Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113, 117 (1990) (arguing that there are no easy cases); see also Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 409 (1985).

216. See generally, SUP. CT. R. 16; see also Joan Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975 (1957).

217. Note, *Major Questions Objections*, 129 HARV. L. REV. 2191, 2202 (2016) (“As it has developed so far, the protean major question exception has an air of judicial improvisation.”).

218. The OSHA requirement that large employers require vaccines in the workplace was stayed. See *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 666 (2022) (per curiam).

219. See e.g., Suzanna Sherry, *Democracy's Distrust: Contested Values and the Decline of Expertise*, 125 HARV. L. REV. F. 7 (2011).

220. See Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY, (Sept. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions/>; See also Daniel T. Deacon and Leah M.

Aware of its limitations, some scholars contend that the highly subjective major questions doctrine should be applied *only* by the Supreme Court and never by lower court judges.<sup>221</sup> Yet, the Supreme Court gave no such instructions to the lower tribunals.<sup>222</sup> Even Justice Gorsuch's attempt to give clarity to the doctrine accomplishes little. His concurrence suggests that the doctrine applies when a matter is of great "political significance," seeks to regulate "a significant portion of the American economy," or if it intrudes into an area that is "the particular domain of state law."<sup>223</sup> Meanwhile, judges remain free to apply the principles of statutory construction, which are equally open to manipulation and internal contradictions, as Professor Karl Llewellyn famously observed.<sup>224</sup> These competing and contradictory principles, of course, can be carefully selected to achieve a judge's preference.<sup>225</sup> For example, if the statutory text readily achieves a desired outcome, it can be narrowly construed, and a judge can invoke principles stating that "[a] statute cannot go beyond its text" or "[w]here design has been distinctly stated no place is left for construction."<sup>226</sup> But if the language falls short, then a judge can refer to alternative principles, such as: "[t]o effect its purpose a statute may be implemented beyond its text" or "Courts have the power to inquire into real-as distinct from ostensible-purpose."<sup>227</sup> When judges disagree with Congress or the executive agencies, they may struggle to accept those different official conclusions.<sup>228</sup> But, by choosing a seemingly neutral tool of judicial interpretation, they can alter those conclusions and achieve their own desired substantive outcome.<sup>229</sup> As Congressman John Dingell quipped:

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Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), [https://repository.law.umich.edu/law\\_econ\\_current/239](https://repository.law.umich.edu/law_econ_current/239).

221. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779 (2017).

222. District court judges have, in fact, applied the major questions doctrine to strike down important policy initiatives by the Executive Branch. *See, e.g.*, *Brown v. Dep't. of Educ.*, No. 4:22-cv-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022) (striking down student loan forgiveness based on the major questions doctrine).

223. *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, concurring).

224. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

225. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992).

226. Llewellyn, *supra* note 224, at 401–02.

227. *Id.*

228. *See, e.g.*, Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 266–67 (2009) ("Judges sometimes have difficulty abiding with a lower court's ruling when they disagree with it. A recent study revealed that judges are prone to believe their judicial decisions are more legally sound than the decisions of other judges.")

229. *Id.* ("Judges who attempt to force what is in their view an equitable result must artfully maneuver their way around the appropriate standard of review and the constraints it imposes."); *cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict...").

“I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.”<sup>230</sup>

Whatever the text of a statute or rule might say, a deconstructionist<sup>231</sup> (or even nihilistic<sup>232</sup>) thinker can reasonably critique judges for exploiting ambiguity and manipulating *Chevron* deference, principles of statutory construction, or the major questions doctrine, as desired, to shape policy. If a judge agrees with the outcome, then the interpretive choices can endorse the outcome and ensure that it remains fixed in place. If the judge disagrees with the outcome, then the interpretive choices can enjoin the outcome, and force the Executive agency or Congress to act anew. A cynical view of the judicial review process could reasonably argue that the judiciary can impose its own will, superseding the decisions of the executive and legislative branches, as follows:

1. CEMENT POLICY. If a judge agrees with both the legislative text and agency action, a straightforward interpretation of statutory language can declare that Congress spoke to the issue in question. This approach is akin to, but does not require, *Chevron* Step One. The judge emphatically exercises authority, finds no need for deference, declares congressional intent clear, and interprets the statute so that no other agency interpretation is allowed.<sup>233</sup> In effect, the judiciary can cement agency policy in place, preventing a change in course.
2. ALTER POLICY. Alternatively, if the judge finds the legislative text acceptable, but not the agency action, the judge can opportunistically interpret the statute to prohibit only the particular agency-chosen action. Invoking *Chevron* Step Two, the agency policy can be enjoined as an “impermissible” construction of an otherwise acceptable but ambiguous statute. The judge can explain (in dicta) an alternative, more reasonable interpretation, and then force the agency (probably the next presidential administration<sup>234</sup>) to reconsider. Alternatively, omitting *Chevron*, a court might find, as a matter of statutory construction, the agency interpretation inconsistent with the statute, and remand the matter.

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230. Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 138 n.198 (2011) (citing *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Reguls. of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983)).

231. See, e.g., Aaron L. Nielson, *Deconstruction (Not Destruction)*, DAEDALUS, Summer 2021, at 143.

232. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1 (1984).

233. Cf. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

234. See Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L. J. 1385 (1992) (discussing the time and resources required by agency rulemaking); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989) (“Administrative procedures erect a barrier against an agency carrying out... a fait accompli by forcing the agency to move slowly and publicly, giving politicians (informed by their constituents) time to act before the status quo is changed.”).



Either way, the judge steers policy and requires the agency to adopt a different (likely more acceptable) policy outcome in the future.

3. HALT POLICY. In circumstances where the judge or court disagrees with legislative text and the agency action, the judge can invoke the major questions doctrine, and ensure that no further governmental action happens until both the legislature and agency take additional measures. Specifically, the judge declares the statute unclear and finds that the agency action is not explicitly authorized by the legislative text. In this manner, the judiciary can repeal the policy choices made by the other branches of government, forcing them to act anew.
4. JUDGE'S CHOICE. Lastly, when a court approves of an agency action related to an otherwise unacceptable statute, the court can "choose." Applying statutory construction or *Chevron* Step 1, the judge can declare there to be "only" one acceptable interpretation of the statute and find that Congress has therefore spoken directly to the matter in question. This choice cements the policy so that no other viable interpretations of the text exist. Alternatively, finding that the statute involves a major question that requires further congressional direction, the judge may enjoin the agency action and invoke the major questions doctrine to halt the implementation of any policy choices, forcing Congress and the agency to act anew.

In her *West Virginia* dissent, Justice Elena Kagan accused her peers of this type of gamesmanship:

Some years ago, I remarked that "[w]e're all textualists now." ... It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get out-of-text-free cards.<sup>235</sup>

Appropriately, Kagan's critique can be reduced to a descriptive 2x2 matrix—sometimes known as a magic quadrant analysis<sup>236</sup>—as follows:

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235. *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

236. See Matteo Ronzani, *Designing for Complexity: Data Visualizations in Megaproject Management 45* (2018) (Ph.D. thesis, University of Edinburgh) (on file with Edinburgh Research Archive, University of Edinburgh).

DECONSTRUCTING JUDICIAL REVIEW OF AGENCY ACTION: How Choice of Interpretive Approach Shapes Substantive Policy Outcomes		
THE JUDGE'S SUBSTANTIVE VIEWS	Judge approves of legislative text	Judge disapproves of legislative text
Judge approves of agency interpretation	<b>CEMENT POLICY.</b> Apply statutory construction or <i>Chevron</i> Step 1 to the statutory text, uphold the Agency interpretation as proper, and establish precedent to prohibit alternative interpretations.	<b>CHOOSE: CEMENT OR HALT.</b> <sup>237</sup> Use statutory construction or <i>Chevron</i> Step 1 to cement the policy or apply the major questions doctrine to halt the policy and enjoin agency action until Congress acts anew.
Judge disapproves of agency interpretation	<b>ALTER POLICY.</b> Apply statutory construction or <i>Chevron</i> , to enjoin the Agency interpretation as contrary to the text (Step 1) or otherwise impermissible (Step 2) offer an acceptable alternative and order the agency to act anew.	<b>HALT POLICY.</b> Invoke the major questions doctrine by declaring the agency action consequential and the congressional text unclear and enjoin agency action until Congress acts anew.
<b>THE JUDGE'S INTERPRETIVE APPROACH</b>		

This 2x2 chart summarizes “The Rule of Six”<sup>238</sup> now applied to judicial review of agency actions. Specifically, Chief Justice John Roberts, considered an incremental conservative,<sup>239</sup> and Justices Samuel Alito and Clarence Thomas, considered hardline conservative voters,<sup>240</sup> were joined by President Donald Trump’s three conservative appointees – Neil Gorsuch, Brett Kavanaugh, and Amy Coney

237. A “judge’s choice” might also include choosing not to decide based on constitutional standing or political question doctrines. See e.g., Scott Novak, *The Role of Courts in Remediating Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 GEO. ENV’T. L. REV. 743 (2020); see also Ian R. Curry, *Establishing Climate Change Standing: A New Approach*, 36 PACE ENV’T. L. REV. 297 (2019); see also James May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L. J. ONLINE (2011). Conversely, as *West Virginia v. EPA* (2022) demonstrates, the judge’s choice can also include a decision to go forward with an opinion, even when there is no rule to adjudicate. See *supra* notes 179–180.

238. Ruth Marcus, *The Rule of Six: A Newly Radicalized Supreme Court is Poised to Reshape the Nation*, WASH. POST (Dec. 2, 2021, 6:30 PM), <https://www.washingtonpost.com/opinions/2021/11/28/supreme-court-decisions-abortion-guns-religious-freedom-loom/>.

239. Andrew Chung, *After Sharp Right Turn, U.S. Supreme Court Conservatives Step on the Gas*, REUTERS (Sept. 29, 2021, 1:15 AM), <https://www.reuters.com/legal/after-sharp-right-turn-us-supreme-court-conservatives-step-gas-2022-09-28/>.

240. John Kruzel, *Thomas? Kavanaugh? Roberts? Conservatives Dominate Supreme Court but Lack Clear Leader*, HILL (Oct. 25, 2022, 11:13 AM), <https://thehill.com/regulation/court-battles/3703025-thomas-kavanaugh-roberts-conservatives-dominate-supreme-court-but-lack-clear-leader/> (mentioning Clarence Thomas for his “hard-line conservatism [that] has increasingly moved from the court’s fringes to its frontiers as the bench has swung rightward” and noting the “attack dog” role of Samuel Alito, “an unapologetic conservative”).

Barrett<sup>241</sup> – to form one of the most conservative Supreme Courts in 90 years.<sup>242</sup> The opinions issued by these six justices in *Becerra*, *NFIB* and *West Virginia* demonstrated a willingness to strike down legislative acts and executive agency actions, and to otherwise evade long-standing judicial precedents. While a magical quadrant analysis obviously oversimplifies the nuances of judicial logic, it exposes any illusion of judicial restraint. By selectively choosing an interpretive approach to achieve a substantively preferred policy objective, judges can manipulate judicial review of agency actions to override congressional judgments and reject agency expertise. Ultimately, this new Rule of Six will shape the nation for years to come.<sup>243</sup>

## VI. CONCLUSION: WHO DECIDES?

At best, judges prevent arbitrary, capricious, and unconstitutional governmental actions, guarding the balance of power between the legislative and the executive branches.<sup>244</sup> At worst, judges compete for power to impose their own will.<sup>245</sup> As Chief Justice Charles Evan Hughes said: “We are under a Constitution,

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241. Joan Biskupic, *Trump's Appointees are Turning the Supreme Court to the Right with Different Tactics*, CNN (Jul. 26, 2021, 5:02 AM), <https://www.cnn.com/2021/07/26/politics/trump-kavanaugh-gorsuch-barrett-supreme-court/index.html>; Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (Jul. 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/>.

242. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NAT'L PUB. RADIO (Jul. 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative>.

243. See, e.g., Blake Hounshell, *Three Huge Supreme Court Cases That Could Change America*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/us/politics/supreme-court-conservative-politics.html> (discussing upcoming cases on voting rights, affirmative action and partisan gerrymandering); see also Stephen Jessee, Neil Malhotra & Maya Sen, Opinion, *The Supreme Court Is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022), <https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445> (“Our research shows the Court took a sharp swerve two years ago—and its decisions now closely mirror the views of the average Republican, not the average American.”).

244. In 2021, the judiciary rejected President Trump’s unsupported efforts to reject the results of an election. See William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>. When Congress investigated the matter, and the Court rejected Presidential claims of Executive Privilege. *Trump v. Thompson*, 142 S. Ct. 680 (2022).

245. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting) (“Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress’s. And that means the Court substitutes its own ideas about policymaking for Congress’s. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.”).

but the Constitution is what the Judges say it is.”<sup>246</sup> And Justice William Brennan reportedly noted that “With five votes around here you can do anything.”<sup>247</sup> Thus, debates over judicial review and constitutional separation of powers are encapsulated in two words: “Who decides?”<sup>248</sup> Citing this phrase in *NFIB v. Labor*, Justice Gorsuch’s concurrence warned of “bare edicts” by “unelected officials” and “aggressive assertions of executive authority” leading to “government by bureaucracy supplanting government by the people.”<sup>249</sup> The dissent countered that the Court should demonstrate greater wisdom by deferring to the expert agency given the authority to administer laws passed by an elected Congress during an emergency.<sup>250</sup>

In Federalist Paper No. 78, Alexander Hamilton declared the Supreme Court “the least dangerous branch,” emphasizing how Congress “prescribes the rules by which the duties and rights of every citizen are to be regulated” while courts “take no active resolution whatever.”<sup>251</sup> Instead, “the courts were designed to be an intermediate body between the people and the legislature... to keep the latter within the limits assigned to their authority.”<sup>252</sup> Noting risks that “the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature,” Hamilton reassured the people that the “independence of the judges” and “strict rules and precedents” would define judicial duty.<sup>253</sup>

Two centuries later, Hamilton’s confidence proved misplaced. In 2022, the Supreme Court abandoned several longstanding precedents.<sup>254</sup> Interpretations of labor laws that shaped the Switch in Time in the 1930s began to unravel in a 2022

246. Hughes made the famous comment during his campaign for governor, long before he would preside over the Supreme Court’s New Deal debates. Charles Evans Hughes, *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* 139 (1908) (May 3, 1907, speech before the Chamber of Commerce, Elmira, New York).

247. Robert Stein, *A Consequential Justice*, 101 MINN. L. REV. HEADNOTES 1, 4 (2016) (discussing Brennan’s “rule of five”).

248. See, e.g., Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2099 n.421 (2011) (citing NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 162 (2001)) (“Constitutional law raises the central issue of who decides who decides.”); Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 309 (1999) (“[T]he basic question in constitutional law is often ‘who decides?’”).

249. Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring).

250. *Id.* at 676 (Breyer, J., dissenting) (“When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise.”).

251. THE FEDERALIST No. 78 (Alexander Hamilton).

252. *Id.*

253. *Id.*

254. See *supra*, Part IV.A. (discussing *Beccerra* and the failure to apply *Chevron*); see also, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (rejecting the need for *stare decisis* and stating that its own 50 year old binding precedent, *Roe v. Wade*, 410 U.S. 113 (1973), was “egregiously wrong,” and “exceptionally weak”).

labor law case about COVID-19.<sup>255</sup> Doctrines of deference shaped by the Clean Air Act and *Chevron* in the 1980s were undermined by a 2022 Clean Air Act case in which the Court refused to grant EPA any deference at all.<sup>256</sup> Applying Professor Karl Llewellyn's approach, the shift can be understood as a *Chevron* thrust, requiring judicial deference to an agency's permissible interpretation, and a *West Virginia v. EPA* parry, allowing a court to use its own common sense even if the agency interpretation has a colorable basis.<sup>257</sup>

COMPETING INTERPRETIVE APPROACHES	
<i>Thrust (Chevron)</i>	<i>Parry (West Virginia)</i>
If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. <sup>258</sup>	Even when there is a colorable textual basis for the agency action, the court can apply its own common sense to determine whether Congress would have been likely to delegate such power. <sup>259</sup>

Actions have reactions, and the judiciary's doctrinal shift will trigger opposition, because this change to interpretive rules empowers the judicial branch while diminishing the executive branch. President Biden has already convened a commission to study court reforms,<sup>260</sup> and accused the Supreme Court of making "terrible decisions"<sup>261</sup> and "playing fast and loose with the facts."<sup>262</sup> Congress has considered reforms to judicial review, too.<sup>263</sup> A Presidential Commission has mentioned judicial term limits<sup>264</sup> leading to debates in the Senate and the fourth

255. See *supra*, Part II (discussing the Switch in Time); see also Part IV.B (discussing *NFIB*).

256. See *supra* Part III (discussing *Chevron*) and Part IV.C. (discussing *West Virginia v. EPA* (2022)).

257. See Llewellyn, *supra* note 225.

258. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984).

259. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

260. See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REP. (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

261. Kevin Liptak & DJ Judd, *Supreme Court Has "Made Some Terrible Decisions," Biden Says*, CNN (June 25, 2022, 9:50 AM), [https://www.cnn.com/politics/live-news/abortion-roe-v-wade-supreme-court-06-25-22/h\\_8b8bfd4f1b9806abc590459da9f09fa](https://www.cnn.com/politics/live-news/abortion-roe-v-wade-supreme-court-06-25-22/h_8b8bfd4f1b9806abc590459da9f09fa).

262. President Joseph R. Biden Jr., Remarks by President Biden on Protecting Access to Reproductive Health Care Services (July 8, 2022) ("The truth is today's Supreme Court majority that is playing fast and loose with the facts."), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/>.

263. See JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) (2020).

264. See *Term Limits and Turnover on the U.S. Supreme Court: A Comparative View, Testimony for the Presidential Commission on the Supreme Court* (2021) (statement of Tom Ginsburg, Professor of Law, University of Chicago Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf>.

estate over court expansion.<sup>265</sup> Scholarly articles discuss impeachment,<sup>266</sup> and editorials warn of the Supreme Court eviscerating its own legitimacy.<sup>267</sup> Supreme Court justices have experienced protests at their homes<sup>268</sup> and an angry public may intensify its protests.<sup>269</sup> President Franklin D. Roosevelt's fireside critique of the Supreme Court reverberates:

The Court, in addition to the proper use of its judicial functions, has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there...

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself.<sup>270</sup>

After FDR's reelection in 1936, his battle with the Supreme Court ended when one justice resigned, changing the composition of the court.<sup>271</sup> But in the current times, given the Supreme Court's conservative supermajority and the overt willingness of some justices to rethink legislative powers,<sup>272</sup> basic individual

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265. Martin Pengelly, *Republican Ted Cruz introduces bill to block US supreme court expansion*, THE GUARDIAN (Mar. 23, 2023), [https://www.theguardian.com/law/2023/mar/23/republican-ted-cruz-supreme-court-expansion-bill?CMP=oth\\_b-aplnews\\_d-1](https://www.theguardian.com/law/2023/mar/23/republican-ted-cruz-supreme-court-expansion-bill?CMP=oth_b-aplnews_d-1). See also, Matthew Rozsa, *When FDR Tried to Pack the Supreme Court: A Lesson for Dark Brandon?*, SALON (Sept. 4, 2022, 6:00 AM), <https://www.salon.com/2022/09/04/when-fdr-tried-to-pack-the-court-a-lesson-for-dark-brandon/>; see also Charlie Savage, *'Court Packing' Issue Divides Commission Appointed by Biden*, N. Y. TIMES, (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/us/politics/supreme-court-packing-expansion.html>.

266. See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006).

267. Jennifer Rubin, Opinion, *Supreme Court Eviscerates Abortion Rights and Its Own Legitimacy*, WASH. POST (June 24, 2022, 12:09 PM), <https://www.washingtonpost.com/opinions/2022/06/24/supreme-court-abortion-legitimacy-radicalism/>.

268. See Ian Fisher, *Supreme Court Marshal Demands End to Protests in Front of Justices' Homes*, TIME (July 2, 2022, 3:03 PM), <https://time.com/6193512/maryland-antipicketing-laws-supreme-court/>

269. See, e.g., Gregory Yee, Rebecca Schneid & Christian Martinez, *Organizers Call for 'Day of Mass Disruption' as Abortion Rights Protests Continue*, L.A. TIMES (June 27, 2022, 7:39 PM), <https://www.latimes.com/california/story/2022-06-27/day-4-of-abortion-rallies-downtown-l-a-post-roe-hell-no>.

270. See *supra* note 10.

271. Larry DeWitt, *The 1937 Supreme Court Rulings on the Social Security Act* n.5, SOC. SEC. (1999) (citing WILLIAM LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 143–44 (1999)) (discussing resignation of Justice Van Devanter), <https://www.ssa.gov/history/court.html>.

272. See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("If the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of "intermediate scrutiny" often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.").

liberties,<sup>273</sup> or even Presidential war powers,<sup>274</sup> continued conflict seems inevitable. Perhaps another Switch in Time will follow,<sup>275</sup> but in an apocalyptic era of

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273. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2300 (2022) (Thomas, J., concurring) (calling for the reconsideration of *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives), *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to same-sex marriage)).

274. See, e.g., *Austin v. U.S. Navy Seals*, 142 S. Ct. 1301, 1302 (2022) (Alito, J., dissenting) (questioning powers of the President as commander-in-chief, and suggesting that servicemembers could challenge the military's vaccine requirements).

275. In multiple cases related to the federal health care laws known as Obamacare, Chief Justice Roberts was perceived to engage in another politically expedient "Switch in Time" in which an otherwise conservative-leaning justice joined the liberal-leaning justices to uphold the Congressional act. See, e.g., Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012, 1:01 PM), <https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/?sh=521cb032d701>; Ilya Shapiro, Opinion, *Justice John Roberts's Obamacare Decision Is an Orwellian Mess*, TIME (June 26, 2015, 12:11 PM), <https://time.com/3937366/john-roberts-obamacare/>.

epidemics<sup>276</sup> and a climate emergency,<sup>277</sup> time may be running out.<sup>278</sup> Six robed riders on horseback have appeared.<sup>279</sup>

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276. See, e.g., Kai Kupferschmidt, *WHO Monkeypox Decision Renews Debate About Global Alarm System for Outbreaks: Critics Say the Agency Is Often Late to Declare a "Public Health Emergency of International Concern"*, SCIENCE (June 30, 2022, 10:05 AM) (discussing COVID, Ebola and Monkeypox), <https://www.science.org/content/article/who-monkeypox-decision-renews-debate-about-global-alarm-system-outbreaks>.

277. As the Secretary General of the United Nations explained with the release of the 2022 Report by the Intergovernmental Panel on Climate Change, our governments lack the luxury of further delay:

We are on a fast track to climate disaster. Major cities under water. Unprecedented heatwaves. Terrifying storms. Widespread water shortages. The extinction of a million species of plants and animals. This is not fiction or exaggeration. It is what science tells us will result from our current energy policies. We are on a pathway to global warming of more than double the 1.5°C limit agreed in Paris. Some Government and business leaders are saying one thing, but doing another. Simply put, they are lying. And the results will be catastrophic. This is a climate emergency. Climate scientists warn that we are already perilously close to tipping points that could lead to cascading and irreversible climate impacts. But, high-emitting Governments and corporations are not just turning a blind eye, they are adding fuel to the flames.

Press Release, Secretary-General, Secretary-General Warns of Climate Emergency, U.N. Press Release SG/SM/21228 (Apr. 4, 2022) (discussing IPCC, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2022)), <https://www.ipcc.ch/report/ar6/wg2/>).

278. The head of the Catholic Church, Pope Francis, has also warned of the risk of mass extinctions and rising seas, with extraordinary consequences for humanity:

If present trends continue, this century may well witness extraordinary climate change and an unprecedented destruction of ecosystems, with serious consequences for all of us. A rise in the sea level, for example, can create extremely serious situations, if we consider that a quarter of the world's population lives on the coast or nearby, and that the majority of our megacities are situated in coastal areas.

POPE FRANCIS, ENCYCLICAL LETTER LAUDATO SI' OF THE HOLY FATHER FRANCIS ON CARE FOR OUR COMMON HOME (May 24, 2015), [https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_encyclica-laudato-si.html](https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_encyclica-laudato-si.html).

279. See Part III (Switch in Time and the Four Horsemen); see also Revelation 6:2-8 (King James) (discussing the Four Horsemen of the Apocalypse: Conquest on the white horse, War on the red horse, Famine on the black horse, and Death on the pale horse).



