Article

The Four Horsemen of the New Separation of Powers: The Environmental Law Implications of *West Virginia*, *Sackett*, *Loper Bright*, and *Corner Post*

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This Article explores how several of the Supreme Court's most recent environmental decisions—West Virginia v. EPA, Sackett v. EPA, *and* Loper Bright v. Raimondo—*will shift the constitutional balance of power, and how the polity might respond. Under the pretense of safeguarding legislative power, they consolidate judicial power to decide regulatory issues formerly delegated by the legislature to executive agencies. In so doing, the Court weakened specific environmental laws protecting air, water, and fisheries but also regulatory governance more broadly, by rejecting implementing regulations until Congress acts to specifically authorize them.* Corner Post v. Federal Reserve *furthers the deregulatory project by facilitating challenges to even time-honored regulations on these new grounds. Yet in an era in which Congress can hardly pass a budget, let alone authorize specific agency rules, the functional impact of these decisions is to shift power over environmental and other regulations to the Supreme Court itself.*

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The decisions have the potential to viscerally weaken the effectiveness of federal environmental law, with similar ramifications for any realm of law that depends on specialized expertise in design, implementation, or enforcement—especially West Virginia*'s "major questions doctrine," which requires express legislative approval of any rule implicating matters of major political or economic importance, and* Loper Bright*'s rejection of the Court's forty-year old* Chevron *doctrine prescribing judicial deference to an agency's reasonable interpretation of the congressional statute it implements. Eroding the reach of critical statutes like the Clean Air and Water Acts while eviscerating the administrative rulemaking that provides the core infrastructure of federal environmental law in general, these cases represent—if not the Four Horsemen of the Apocalypse—at least four very serious portents of what may follow in the years to come.*

While this is an admittedly confusing moment to parse the constitutional separation of powers, it is critical to recognize how these moves by the Supreme Court undermine interbranch checks and balances—even as we turn to the same Court to respond to unprecedented assertions of executive authority by the new President.

Combining scholarly and practical insights, this Article provides a roadmap for thinking about the Four Horsemen academically and responding to them politically. After reviewing the decisions themselves, it assesses their impacts on the constitutional separation of powers both horizontally and vertically. Horizontally, they shift power from agencies to courts, helping to prompt political proposals to curb the Court's growing power, including legislative reversals of Horsemen decisions, jurisdiction stripping acts, and even a constitutional amendment to end lifetime appointments for Supreme Court justices. Vertically, they shift power toward state and local governance while simultaneously disempowering their ability to effectively pursue their extraterritorial concerns through intergovernmental bargaining, by weakening federal agencies' flexibility to respond to subnational initiatives.

It then considers ways to push back against the Horsemen model of judicial interpretive supremacy by disaggregating interpretive authority over different constitutional questions, retaining judicial primacy on adjudicating rights and procedural matters while loosening it over certain separation of powers matters. Inspired by theoretical accounts of negotiated federalism and

interbranch structural bargaining, it considers analogous possibilities for sharing interpretive authority over separation of powers matters through judicial deference to consensually negotiated exchange not only between state and federal actors but between the political branches of the federal government, constrained by judicial review for core rule-of-law values. Finally, it considers how courts and legal advocates may respond to this changed legal environment in the near and far terms, offering advice for drafters and advocates involved in legislation, regulation, and litigation and considering how the changes wrought by the Four Horsemen may rebound in unexpected directions in the new Trump administration.

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INTRODUCTION

This Article, written in the wake of the Supreme Court's eventful 2024 Term and on the eve of the second Trump administration,[1] explores how several of the Court's most recent environmental decisions—*West Virginia v. EPA*,[2] *Sackett v. EPA*,[3] and *Loper Bright v. Raimondo*[4] (joined by *Corner Post v. Federal Reserve*[5])—will shift the constitutional balance of power, and how the polity might respond.

First, however, we must acknowledge that this a confusing historical moment to be thinking about the separation of powers at all. In fairness, there may never have been a time when the shape of the complex American experiment was fully clear; even at its origins, James Madison observed that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, [the] three great provinces—the legislative, executive, and judiciary."[6] Rivers of ink have surely been spilled making sense of both the horizontal and vertical structure of a government that is "mandated but incompletely

1. The scale and rapidity of changes to the federal order under the new administration make it hard to know how the coming months may confirm or undermine the assumptions on which some arguments in this Article rely. Legal scholarship presumes that the law will continue to evolve through conventional common law and political processes, but the chaos of this moment begs acknowledgement at the outset that some of these assumptions may be tested. Solid scholarship distinguishes between foundational and instrumental legal arguments—arguments that hold no matter what substantive agenda is advanced, and arguments that serve to advance a specific substantive agenda. This Article makes a formal, foundational argument about the importance of protecting the constitutional separation of powers against assaults from any direction, while acknowledging the functional, substantive implications of this argument for environmental protection. When the Article took shape, substantive environmental protection appeared most at risk from judicial threats to constitutional checks and balances. As it goes to press, unprecedented exercises of presidential authority may eclipse that threat at broader levels of good governance. While the rest of this Article focuses on the Supreme Court cases that instantiated the inquiry, it is important to affirm that assaults on the constitutional separation of powers from any direction warrant our most serious consideration and concern.

2. 142 S. Ct. 2587 (2022).

3. 143 S. Ct. 1322 (2023).

4. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

5. Corner Post v. Federal Reserve, 144 S. Ct. 1440 (2024).

6. THE FEDERALIST No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961).

described by the Constitution."[7] It is perhaps especially so from the perspective of environmental law, where evolving trends have most upended the status quo, but from any vantage point—as this piece goes to press, shortly after Inauguration Day in 2025—it is a very strange time to try to understand which actors in government do, and should, get to make what kinds of decisions about governance.[8]

It was especially hard on that January 20th. Both the outgoing and incoming chief executives issued an unprecedented flurry of controversial presidential pardons, both acting within their constitutional authority but with concerning implications for the effectiveness of other constitutional agents and values.[9] On his first day in office, the new President declared a record number of national emergencies and executive orders, including one designed to undo birthright citizenship[10] as the Supreme Court famously held in 1898 is promised by the Fourteenth Amendment.[11] The legislature had recently declined to reign in

7. *E.g.*, ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 8 (2011) [hereinafter TUG OF WAR] (discussing the constitutional ambiguities associated with the vertical separation of powers); *see also* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1661 (2014) [hereinafter Huq, *The Negotiated Structural Constitution*] (discussing them in the horizontal separation of powers context and observing that "[a]bsent some novel theoretical account of how to decompose the Constitution into clear and distinct elementary particles—an account that eluded the Founders—boundary disputes between branches and between governments recognized in the Constitution will remain pervasive). *See generally* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 357–435 (2016) (providing a comprehensive review of jurisprudence vacillating among contrasting theories of the separation of powers).

8. RYAN, TUG OF WAR, *supra* note 7, at xii (framing the central separation of powers question in the vertical context as "*who gets to decide?*").

9. *See* Sarah Ellison, *Biden Started the Day with Pardons. Trump Finished with Many More*, WASH. POST (Jan. 21, 2025), https://www.washingtonpost.com/politics/2025/01/21/biden-pardons-family-fauci-trump-january-6 [https://perma.cc/HZ68-NT9G] (describing both sets of pardons); Jeffrey Toobin, Opinion, *Trump Just Pardoned Himself*, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/opinion/trump-pardon-jan-6.html?smid=nytcore-android-share [https://perma.cc/8THQ-ZRA2] (describing Trump's pardons over his two terms and discussing the possibility that he may have pardoned himself when he pardoned those involved in the capital insurrection of Jan. 6, 2021).

10. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

11. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (interpreting the Citizenship Clause of the Fourteenth Amendment to hold that, with few exceptions, babies born on U.S. soil are citizens).

some of this executive authority by amending the National Emergencies Act that grants presidential power to unilaterally declare and act in emergencies.[12] The previous month, the same politically polarized Congress had just barely managed to keep the government functioning after the umpteenth threat of federal shutdown over budget conflict was temporarily defused.[13] Just a few months earlier, the Supreme Court granted Presidents unprecedented immunity from criminal prosecution[14] while also stripping executive agencies of long-held authority to interpret the legislative statutes they administer[15]—even when Congress intended to delegate these questions to agency experts.[16]

Even the relationships between these two faces of the executive branch is confusing, because some view agencies—mostly composed of nonpolitical career staffers—as providing institutional continuity between administrations and perhaps even desirable checks on the unbridled authority of the single individual at the apex of the presidency, while others see them as a dangerous challenge to the rightful prerogative of a unitary chief executive.[17] Certainly, each poses a very different challenge to the separation of powers.

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12. *See* Charlie Savage, *How Trump Is Pushing at Limits of Presidential Power in Early Orders*, N.Y. TIMES (Jan. 22, 2025), https://www.nytimes.com/2025/01/22/us/politics/trump-executive-orders.html [https://perma.cc/8SMJ-NMTH] (reporting on the President's extraordinary exercises of unilateral executive authority and the failure of Congress to reign it in by passing a 2023 bill that would have amended the National Emergencies Act).

13. *See infra* notes 186–192 and accompanying text (discussing legislative paralysis, serial government shutdowns, and threats of shutdown).

14. Trump v. United States, 144 S. Ct. 2312, 2347 (2024) (establishing absolute immunity for presidential acts taken within their constitutional purview and presumptive immunity for official acts within the outer perimeter).

15. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (reversing judicial deference to even reasonable interpretations by implementing agencies).

16. *See infra* Part I.C (discussing *Loper Bright* and its ramifications in detail).

17. *Compare* Anya Bernstein & Cristina Rodriguez, *The Diffuse Executive*, 92 FORDHAM L. REV. 363, 364 (2023) (describing how the diffusion of power across the executive branch promotes democratic values), *and* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322–42 (2006) (arguing that the federal bureaucracy of non-partisan experts can act as a check against executive power and offering a more nuanced view of executive power in contrast to a

The separation of powers has always been a fluid concept, and the direction of flow always warrants our scrutiny.[18] But while there are many concerning shifts of power to assess here, this analysis focuses on specific moves by the Supreme Court to assume more power over administrative governance. The four decisions that are the focus of this Article serve to disempower federal agencies—and environmental agencies in particular—threatening profound consequences for governance in all areas of law that depend on the development and implementation of technical regulations informed by scientific, economic, and other forms of specialized expertise.[19] Most of these decisions responded to legal challenges specifically targeting established environmental laws.[20] Issued over the Court's three most recent Terms, these four controversial cases—*West Virginia*, *Sackett*, *Loper Bright*, and *Corner Post*—consolidate a new era of hostility to environmental regulation, commenced in the first Trump administration and buttressed by a Supreme Court supermajority that the same administration helped install.[21]

Taken together, these decisions have collectively reworked the horizontal separation of powers in service of this deregulatory ethos, consolidating judicial power to decide environmental regulatory issues formerly delegated by the legislature to executive agencies.[22] In each of the first three decisions, the Court weakened both the specific environmental statute under review and environmental governance more broadly by rejecting implementing regulations until Congress acts to specifically authorize

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unitary executive), *with* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–68, 1206 (1992) (discussing the unitary executive theory, which sees all executive exercise of power as operating within a unified and hierarchical order under the direct and exclusive control of the President).

18. *See* THE FEDERALIST NO. 37, *supra* note 6, at 228 (highlighting the difficulty in defining the three branches).

19. *See infra* Part I.C (discussing *Loper Bright* and its ramifications in detail).

20. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2594 (2022) (challenging a rule promulgated under the Clean Air Act); Sackett v. EPA, 143 S. Ct. 1322, 1325 (2023) (challenging EPA action taken under the Clean Water Act).

21. *See* Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. PA. L. REV. 617, 625–82 (2023) (discussing the environmental deregulatory agenda during the first Trump administration).

22. *See infra* Part I (discussing the implications of *West Virginia, Sackett, Loper Bright*, and *Corner Post*).

them (while the fourth facilitates challenges to even time-honored regulations on these grounds).[23] Yet in an era in which Congress can hardly pass a budget, let alone authorize specific agency regulations, the functional impact of these decisions is to shift power over environmental regulations to the Supreme Court itself.[24]

The decisions have the potential to viscerally weaken the effectiveness of federal environmental law.[25] *West Virginia* and *Sackett* targeted regulations implementing the Clean Air and Water Acts, diminishing the efficacy of those laws while creating new legislative "clear statement" rules that burden all agency regulations—especially *West Virginia*'s "major questions doctrine," which requires express legislative approval of any rule implicating matters of major political or economic importance.[26] In invalidating a regulation implementing the Magnuson-Stevens Fisheries Conservation and Management Act, *Loper Bright* overturned the Court's forty-year old *Chevron* doctrine prescribing judicial deference to an agency's reasonable interpretation of the congressional statute it implements.[27] Meanwhile, *Corner Post* reinterpreted the relevant statute of limitations, facilitating legal challenge to even longstanding agency rules on these grounds.[28]

Eroding the reach of critical environmental statutes like the Clean Air and Water Acts while eviscerating the administrative rulemaking that provides the core infrastructure of federal

23. *See infra* Part I.

24. *See infra* Part II (discussing the relationship between legislative paralysis and judicial aggrandizement).

25. *See* Adam Liptak, *Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/supreme-court-chevron-ruling.html [https://perma.cc/G8SU-E3X4] (discussing the implications of *Loper Bright*).

26. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2594, 2614 (2022) (discussing the rule promulgated under the Clean Air Act and the major questions doctrine); Sackett v. EPA, 143 S. Ct. 1322, 1325 (2023) (discussing the EPA action taken under the Clean Water Act).

27. Loper Bright Enters. v. Raimondo, 144 144 S. Ct. 2244, 2271–73 (2024).

28. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447–48 (2024). Another case in the Court's 2024 Term, *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117 (2024), also shifted adjudicatory power from executive agency tribunals to Article III courts on Seventh Amendment grounds, but it is not a focus of this analysis, which addresses agency rulemaking and regulation.

environmental law in general, these cases represent—if not the Four Horsemen of the Apocalypse—at least four very serious portents of what may follow in the years to come.[29] At a minimum, they represent the Four Horsemen of the new approach to interpreting the separation of powers on which the Roberts Court has embarked.

While this is a perilously confusing time to parse the constitutional separation of powers, it is critical to recognize these surreptitious moves by the Supreme Court to undermine checks and balances even as we turn to the same Court to respond to the unprecedented assertion of executive authority by the new president. To protect the American experiment from here, we must be able to hold these two essential ideas in our minds simultaneously—the urgency of protecting judicial independence while also curbing judicial supremacy—despite the tension between them.

The courts must be able to reign in presidential moves that threaten constitutional values and illegitimately encroach upon the powers of the other branches. At the same time, courts have never been the sole guardians of constitutional meaning. The judiciary is the only branch that can protect counter-majoritarian rights against assault by the political branches, and it plays a critical role in checking aggrandizement by its coequal branches—yet it must still share with them some authority for navigating the indeterminacies of the structural Constitution at the margins. In the chaos of the moment, with political actors calling for the impeachment of judges enjoining potentially illegal executive orders,[30] this requires all Americans to rally in support of judicial independence. At the same time, we should rightly question the Horsemen decisions' usurpation of legislative and executive authority to negotiate the implementation of congressional statutes.

Combining scholarly and practical insights, this Article provides a roadmap for thinking about the Four Horsemen

29. *See infra* Part I (discussing the outcomes and implications of *West Virginia, Sackett, Loper Bright*, and *Corner Post*).

30. *See* Carl Hulse, *Musk and Republican Lawmakers Pressure Judges with Impeachment Threats*, N.Y. TIMES (Mar. 1, 2025), https://www.nytimes.com/2025/03/01/us/politics/trump-musk-republicans-congress-judge-impeachment.html?smid=nytcore-android-share [perma.cc/7QQ5-BKNS] (describing calls to remove judges who block Trump administration initiatives and other threats to judicial independence and the separation of powers).

academically and responding to them politically. After reviewing the decisions themselves in Part I, it assesses their impacts on the constitutional separation of powers both horizontally and vertically. Part II outlines how the decisions significantly alter the horizontal balance of power among the three branches of the federal government, aggrandizing power to the judiciary at the expense of both political branches.[31] Together with other recent decisions perceived as judicial power grabs, the Four Horsemen prompted political proposals to curb the Court's growing power, including legislative reversals of specific decisions, jurisdiction stripping acts, a statutory presumption of constitutional validity, and even a constitutional amendment to end lifetime appointments for Supreme Court justices.[32]

Part III reveals how the Horsemen will also alter the vertical balance of power between the national and state governments in realms of law, especially environmental law, where federal regulation will likely be weakened.[33] Environmental leadership will almost certainly shift toward local, state, and regional governance in the post-*Chevron* era of environmental federalism.[34] However, an important tool for enhancing local voice within the national conversation—environmental governance negotiated between state and federal actors—will likely be hampered by the weakened participation of federal environmental agencies, who may now be less able to respond flexibly and creatively to local initiative.[35]

Part IV considers ways to push back against the model of judicial interpretive supremacy the Horsemen represent in order to protect space for contributions by the political branches. Disrupting the Court's interpretive primacy is a fraught enterprise, especially if it were to threaten judicial centrality in resolving disputes and protecting the constitutional rights of individuals against majoritarian assault.[36] For example, it is appropriate for courts to apply Fourteenth Amendment brakes to the new

31. *See infra* Part II.A (discussing judicial supremacy).

32. *See infra* Part II.B.2 (discussing curbs on judicial authority).

33. *See infra* Part III.A (discussing environmental federalism).

34. *See infra* Part III.A (discussing local governments environmental actions after *West Virginia, Sackett, Loper Bright*, and *Corner Post*).

35. *See infra* Part III.B (discussing negotiated federalism).

36. *See infra* Part IV.C (discussing the apex of judicial capacity to protect constitutional rights).

Executive Order ending birthright citizenship.[37] Nevertheless, protecting the Court's primacy in interpreting constitutional rights does not require the same exclusivity in interpreting its structural constraints[38]—for example, the decision to wrest statutory interpretive authority from implementing agencies.[39] The Court has no vested interest in the adjudication of individual rights, but it has a potential conflict of interest in interpreting its own power relative to the other branches.[40]

In the central normative contribution of this Article, Part IV considers possibilities for disaggregating interpretive authority over different constitutional questions—retaining judicial primacy on adjudicating disputes, rights, and procedural matters while loosening it over certain structural matters. Inspired by theoretical accounts of negotiated federalism and interbranch structural bargaining,[41] it considers analogous possibilities for sharing interpretive authority over the separation of powers—at least at the margins of constitutional indeterminacy—through

37. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025); *see* Mike Baker & Mattathias Schwartz, *Judge Temporarily Blocks Trump's Plan to End Birthright Citizenship*, N.Y. TIMES (Feb. 3, 2025), https://www.nytimes.com/2025/01/23/us/politics/judge-blocks-birthright-citizenship.html [https://perma.cc/NV2T-XEA8XEA8] (reporting on a federal district court's order preliminarily enjoining President Trump's plan).

38. *Cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175 (1980) (arguing against judicially reviewable federalism constraints and in favor of political safeguards by the actions of the elected political branches); *infra* note 284 (listing additional sources distinguishing constitutional rights and structure).

39. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271–73 (2024).

40. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1679 (critiquing judicial intervention because, inter alia, judges' decisions can be influenced by the political context of their appointments and the perceived need to protect judicial resources).

41. *See id.* at 1646–64 (arguing that interbranch bargaining is a beneficial and inevitable feature of the constitutional order due to the incomplete specification of constitutional structural entitlements and the demands of modern governance); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 COLUM. L. REV. SIDEBAR 4, 8–24 (2015) [hereinafter Ryan, *Navigating the Separation of Powers*] (discussing the emerging literature on negotiated structural governance). *See generally* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 24–69 (2011) (exploring the role of state-federal bargaining in allocating authority, shepherding collaboration, and interpreting federalism in contexts of jurisdictional overlap).

judicial deference to consensually negotiated exchange, not only between state and federal actors but between the political branches of the federal government itself.[42]

Finally, Part V considers how courts and legal advocates may respond to the changed legal environment in the near and far terms, with practical suggestions for both minimizing and leveraging the force of the Horsemen doctrines.[43] It offers advice for drafters and advocates involved in legislation, regulation, and litigation, including consideration of public messaging about these issues.[44] The new focus on clear legislative authorization will put new demands on legislative and regulatory drafters to specify legislative delegations and rationales in the resulting texts and record of process.[45] Litigants will have clearer opportunities to challenge agency actions premised on ambiguous statutes, but defenders may also make good use of the Supreme Court's own reasoning in some of these decisions to establish why regulations represent a purposefully delegated judgment call.[46]

As the second Trump administration begins, the Article concludes with consideration of how the changes wrought by the Four Horsemen may rebound in unexpected directions, as agency action in the new administration becomes subject to these new degrees of judicial scrutiny.[47] As new environmental regulations are made and old regulations withdrawn, the Horsemen decisions throw the success of these efforts into greater uncertainty.[48] Environmental advocates may argue that many such

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42. *See infra* Part IV.C (discussing the relative superiority of political bargaining to interpret constitutional structure). As discussed in Part IV, the prerequisite for interpretive bargaining is that it takes place within the principled parameters of legitimately fair bargaining, which either side could theoretically violate by using extraconstitutional power to coerce or foreclose the constitutionally assigned power of another. *See infra* text accompanying notes 358–365 (discussing the possibility of such violations in the present political context).

43. *See infra* Part V.A (considering judicial responses).

44. *See infra* Part V.B (offering guidance for legislative, regulatory, and litigation advocacy).

45. *See infra* Part V.B (discussing increased specificity requirements after the Four Horsemen cases).

46. *Infra* Part V.B.

47. *See infra* Part V.C (considering the post-election implications of these decisions).

48. *See infra* Part V.C (highlighting the friction between environmental advocates and federal agencies engaged in environmental deregulation).

actions raise "major questions" of economic and political significance, warranting new judicial scrutiny.[49] Some of these agency decisions may be overturned, at least among some lower courts—but given the antiregulatory bias of the new doctrines, the strategy becomes more precarious the higher it reaches into the courts of appeal.[50] Little is certain in the future navigation of this new legal territory, except that there will likely be few dull moments.

I. THE FOUR HORSEMEN OF THE NEW SEPARATION OF POWERS

This Part introduces the complex constitutional design of horizontally separated legislative, executive, and judicial powers and vertically separated national and local authority—and then the four recent Supreme Court decisions that have further complicated that design, especially for environmental law.

A. CONSTITUTIONALLY SEPARATED POWERS

One of the defining features of the American constitutional experiment was the Framers' purposeful incorporation of structural features to diffuse power among separately acting agents of government.[51] This strategy for good governance was designed to avoid the well-recognized hazards that accord unchecked power, including the arbitrary and capricious deployment of sovereign authority against political enemies or disfavored groups, or in service of self-dealing personal agendas.[52] Accordingly, the

49. *Infra* Part V.C.

50. *Infra* Part V.C.

51. *See* THE FEDERALIST NO. 47, *supra* note 6, at 300–08 (James Madison) (arguing in favor of a system of checks and balances between interconnected but separated powers to avoid the tyrannical concentration of legislative, executive, and judicial authority in the same hands); THE FEDERALIST NO. 51, *supra* note 6, at 323 (James Madison) (discussing the "double security" for good governance provided by vertical federalism and the horizontal separation of powers).

52. *See* RYAN, TUG OF WAR, *supra* note 7, at xi–xxiii, 68–104 (introducing separation of powers and reviewing historical vacillations in interpreting the vertical separation of powers throughout U.S. history). *See generally* THE FEDERALIST NO. 47, *supra* note 6, at 300–08 (James Madison) (arguing in favor of a system of checks and balances between interconnected but separated powers to avoid the tyrannical concentration of legislative, executive, and judicial authority in the same hands); THE FEDERALIST NO. 51, *supra* note 6, at 323 (James Madison) (discussing the "double security" for good governance provided by vertical federalism and the horizontal separation of powers).

Constitution separates power horizontally, among the legislative, executive, and judicial branches of the national government, and also vertically, between the national level and the state governments that retain an independent well of sovereign authority within our federal system.[53] The separation of powers is a nested phenomenon in American governance, as most states follow a similar model, at least horizontally.[54]

The separation of powers doctrine thus helps us understand "who gets to decide" in matters of contest between the various participants in government—who must give way to whom, and how, in some circumstances, participants must work together.[55] It is a delicate design problem, because while the division of powers achieves important goals, the complex tasks of governance often defy strict categorization and require functional coordination among these separately acting branches, from the conduct of elections to the enactment of legislation to the approval of political appointees.[56] The American system has been roundly criticized for the lawmaking paralysis that can result from divided governance, when different agents of government are driven by

53. RYAN, TUG OF WAR, *supra* note 7, at xiii (introducing the horizontal and vertical separation of powers).

54. *See* THE FEDERALIST NO. 47, *supra* note 6, at 304–07 (James Madison) (discussing early state constitutions that implement separation of powers). Beyond requiring that states provide a republican form of government the U.S. Constitution does not mandate subnational governance structures, but the states follow generally similar models of horizontally separated powers, with different combinations of vertically separated powers in which municipal and regional governance are accorded varying levels of autonomy. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."); Keith H. Hirokawa & Jonathan Rosenbloom, *The Cost of Federalism: Ecology, Community, and the Pragmatism of Land Use* (discussing the difference between home rule states, which allow broader municipal autonomy, and Dillon's Rule states, which concentrate state sovereignty at the highest level), *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM 243, 252–53 (Kalyani Robbins ed., 2015).

55. *See* RYAN, TUG OF WAR, *supra* note 7, at xii (framing the separation of powers as an answer to the question of "*who gets to decide*?").

56. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1661 ("Efforts by the Court to determine whether and how to separate government functions have dominated debates in constitutional theory since the Founding.").

conflicting values, even across the two lobes of the bicameral national legislature.[57]

Crafting a government of separated powers addressed the governance hazard the Framers most feared—the tyrannical abuse of sovereign authority, exercised without structural constraints—and so they differentiated their new nation from the monarchy from which it achieved independence.[58] It differs even from the British parliamentary system, in which primary legislation remains invulnerable to judicial invalidation, even by the British Supreme Court (established only fifteen years ago in 2009).[59] The American model of separated powers also provides useful infrastructure for governing, enabling multiple ports of entry to policymaking among the diverse coalitions of interest that make up our comparatively large, pluralist nation.[60]

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57. *See, e.g.*, Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFFS. 126, 127 (1980) ("The separation of powers between the legislative and executive branches, whatever its merits in 1793, has become a structure that almost guarantees stalemate today."); *Paralysis in Congress Makes America a Dysfunctional Superpower*, THE ECONOMIST (Oct. 12, 2023), https://www.economist.com/united-states/2023/10/12/paralysis-in-congress-makes-america-a-dysfunctional-superpower [https://perma.cc/5JRY-J35MJ35M] (describing America's diminished leadership capacity in the global community as a result of legislative paralysis).

58. THE FEDERALIST NO. 47, *supra* note 6, at 301 (James Madison) (reviewing the dangers of tyranny and asserting "the preservation of liberty requires that the three great departments of power should be separate and distinct").

59. *Cf. The Judiciary*, THE CONST. SOC'Y, https://consoc.org.uk/the-constitution-explained/the-judiciary [https://perma.cc/2XAU-WZSG] describing the doctrine of parliamentary sovereignty).

60. *See generally* RYAN, TUG OF WAR, *supra* note 7, at 8 (discussing the constitutional ambiguities associated with the vertical separation of powers); Erin Ryan, *Federalism as Legal Pluralism* (discussing shared emphasis in the dynamic federalism and legal pluralism discourse on systemic spaces for dialogue, contestation, and negotiation), *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 492, 498–526 (Paul Schiff Berman ed., 2020) (ebook); Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. 123, 128–77 (2017) [hereinafter Ryan, *Secession and Federalism*] (analyzing the history of secession in the United States, and how the United States has shifted to manage regional conflict through the decentralizing and dialogic dynamics of constitutional federalism); Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance,* 2017 WISC. L. REV. 17, 20–35 (2017) [hereinafter Ryan, *Dynamic Federalism*] (analyzing why the regulatory conflicts confronted by environmental governance almost uniformly call for negotiated multilevel governance); Erin Ryan, *Environmental Federalism's Tug of War Within* (analyzing how environmental law showcases the wider conflicts in federalism

The constitutional dynamics within this system of divided sovereign powers have evolved over history.[61] As Professor Aziz Huq has described, distinguishing between the nuances of executive and legislative functions has proven especially difficult for interpreters.[62] These challenges have prompted a lively scholarly and jurisprudential discourse about the separation of

theory and the structures of governance it has evolved to manage them), *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM, *supra* note 54, at 355 [hereinafter Ryan, *Chapter on Environmental Federalism*]; Ryan, *Navigating the Separation of Powers*, *supra* note 41, at 8–24 (discussing the emerging literature on negotiated structural governance); Ryan, *Negotiating Federalism*, *supra* note 41, at 24–69 (exploring the role of state-federal bargaining in allocating authority, shepherding collaboration, and interpreting federalism in contexts of jurisdictional overlap).

61. *See* RYAN, TUG OF WAR, *supra* note 7, at 68–104 (discussing the evolution of constitutional dynamics).

62. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1661–63 (discussing legislative and executive spillovers, or zones of overlapping function and authority).

powers both horizontally[63] and vertically[64] that goes beyond the scope of this Article. However, the changes wrought by this new

63. For a very small handful of interesting samples from a very large scholarly separation of powers literature, see, for example, Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 555–624 (2023) (arguing that state constitutional models of the separation of powers differ from the federal model by tolerating greater blending of governmental functions in service of enhancing public accountability); Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 134–73 (2021) (arguing for the incorporation of anti-subordination principles into separation-of-powers analysis, proposing reforms to address the inequalities perpetuated by existing structures); Huq & Michaels *supra* note 7, at 357–435 (revealing how the Court's jurisprudence alternates between different theories of the separation of powers emphasizing categorical separation and dynamic interaction); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 523–95 (2015) (exploring how the dynamic separation of powers adapts to maintain appropriate checks and balances with regard to contemporary governance challenges, especially those involving modern administrative practices); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–208 (2012) (arguing that the coordination challenges of agency action weighs in favor of executive authority); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 477–502 (2012) (emphasizing the importance of states in the implementation of federal statutes as a balancing force among the federal political branches); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–2038 (2011) (arguing that resolving separation-of-powers disputes through ordinary principles of statutory interpretation, as opposed to abstract constitutional theories, better respects the Constitution's text and structure); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1085–162 (2003) (exploring how the judicial precedents and the principle of stare decisis operates within the horizontal separation of powers to influence and constrain legislative and executive action); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1149–96 (2000) (criticizing the traditional debate of formalism versus functionalism in the separation of powers arena, which has obscured the underlying consensus); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–79 (1984) (arguing for a two-tiered separation of powers at the federal level, with separation of powers for the named constitutional entities and separation of functions for the lower entities).

64. For an equally small handful of interesting examples from the vast federalism literature, see RYAN, TUG OF WAR, *supra* note 7, at 8 (discussing the constitutional ambiguities associated with the vertical separation of powers); Ryan, *Secession and Federalism*, *supra* note 60, at 128–77 (analyzing the history of secession in the United States, and how the United States has shifted to manage regional conflict through the decentralizing and dialogic dynamics of constitutional federalism); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 19–177 (2012) (discussing the foundations of competitive federalism); JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR

INTERESTS IN NATIONAL POLICYMAKING 54–76 (2009) (discussing the political safeguards of federalism today); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 10–120 (2009) (discussing the revival of federalism and the return to dualism); JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 1–128 (2009) (discussing the complexities of federalism); ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 15–245 (2008) (discussing the development of federalism and how it is understood in the twenty-first century); MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 1–149 (2008) (discussing the origins, aspects, and types of federalism); EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 85–188 (2007) (discussing the consequential dynamics of federalism); David Landau et al., *Federalism for the Worst Case*, 105 IOWA L. REV.1187, 1204–24 (2020) (discussing the role of federalism during times of deep polarization and as a backstop to authoritarianism); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1108–34 (2014) (contending that that partisanship plays a central role in federalism, with political parties influencing the dynamics between state and federal governments that shape policy outcomes); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2002–42 (2014) (emphasizing the importance of Congress's role within the vertical separation of powers and arguing that the relationship between nationalism and federalism is complex and unresolved); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2100–33 (2014) (arguing that overlapping frameworks of negotiated federalism promote integration and collaboration between the various levels of government); Hari M. Osofsky & Hannah Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 780–839 (2013) (discussing the importance of federalism in energy governance); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 11–72 (2010) (discussing minority rule in the absence of sovereignty to explain areas of federalism often untouched by the discourse); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1260–306 (2009) (arguing that states are both allies to and adversaries of the federal government, leading to both collaboration and dissent); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1802–49 (2008) (rejecting the static optimization model of federalism for the emerging trend of dynamic federalism); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 147–64 (2007) (arguing that preemption and federal regulatory floors encourage innovation at the subnational level); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 163–87 (2006) (arguing that climate change can best be addressed by the dynamics of cooperative environmental federalism); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) (criticizing the Rehnquist Court's approach to state sovereignty and autonomy); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 699–700 (2001) (identifying key debates surrounding federalism and the need for the cooperative federalism model); Larry D.

series of Supreme Court decisions pose an especially hard break with past precedent.

These cases, the Four Horsemen, include *West Virginia v. EPA*, interpreting the scope of EPA's authority under the Clean Air Act and formalizing the major questions doctrine into statutory interpretation;[65] *Sackett v. EPA*, interpreting the reach of federal authority under the Clean Water Act in articulating another legislative clear statement rule;[66] and *Loper Bright Enterprises v. Raimondo*, a case about fishing regulations that reversed the long tradition of judicial deference to agency decision-making in all regulatory fields[67]—and whose wide-ranging impact was compounded by its partner case, *Corner Post, Inc. v. Federal Reserve*, which relaxed the statute of limitations on challenging agency decision-making in a way that expands opportunities to apply these new doctrines even to seemingly settled regulations.[68]

Each raises fundamental separation of powers questions about who should get to decide important matters of environmental law: the legislature, which sets forth statutory directives

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Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 220–97 (2000) (arguing that the political party system in the United States has preserved federalism better than judicial intervention); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1206–85 (1999) (exploring how federal regulation empowers local governments to act independently of state legislatures); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 754–802 (1999) (arguing that structural incentives promote the separation of powers sought in federalism); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2220–23 (1998) (arguing for a more limited approach to judicial federalism constraints).

65. West Virginia v. EPA, 142 S. Ct. 2587, 2594, 2614 (2022) (articulating the major questions doctrine as a constraint on executive regulation on matters of economic or policy importance in rejecting the regulation of certain greenhouse gas pollution under the Clean Air Act).

66. Sackett v. EPA, 143 S. Ct. 1322, 1344 (2023) (limiting federal authority under the Clean Water Act to regulate wetlands by rejecting previous interpretations of the Waters of the United States rule).

67. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2271–73 (2024). (overturning the *Chevron* doctrine of judicial deference to agency expertise).

68. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447–48 (2024) (with regard to challenges brought under the Administrative Procedures Act, holding that the statute begins to toll at the date of alleged injury, rather than the date of enactment, making it easier to bring new *Loper Bright* style claims against old regulations).

to achieve general public policy goals; the executive agencies, which interpret statutory directives and implement them through specific regulations premised on subject-matter expertise; or the courts, which ensure that all lawmaking and regulatory activity fall within constitutional constraints and statutory administrative procedures.[69] As the demands on modern governance have grown in complexity, especially over the last half century, sorting out appropriate branch roles and responsibilities has become a veritable project of negotiation, because no single branch can perform all its assigned functions in isolation,[70] and these purportedly separate powers occasionally overlap.[71]

In the context of lawmaking, while the legislature remains the primary progenitor of public policy, it can never foresee every potential issue that will arise in the application of the laws it enacts. Because statutes can never answer every possible question that could come up in implementation, the Supreme Court had long directed judges sitting in statutory interpretation cases to defer to the implementing agencies' interpretations of the statutes they are charged to administer, unless their interpretations were unreasonable.[72] Legislatures collaborated in this arrangement by consciously conferring discretion on agencies to fill in statutory gaps on the basis of comparatively superior subject matter expertise,[73] and just as important, expertise that may shift over time with new scientific data, discovery, and public

69. *See* JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) (2024) (outlining judicial review under the Administrative Procedure Act).

70. *Cf.* Ryan, *Negotiating Federalism*, *supra* note 41, at 24–69 (discussing the different functional capacities of the three branches of government).

71. *Cf.* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1661 (discussing the impossible and historically unsuccessful project of categorically distinguishing executive and legislative function).

72. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (setting forth the erstwhile rule of judicial deference to reasonable administrative interpretation), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

73. *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 951–86 (1999) (arguing that legislative delegations of authority to administrative agencies are a necessary and practical tool for efficient governance, enabling Congress to leverage executive expertise and manage complex policy areas). The authors argue that Congress does not delegate authority indiscriminately but balances the benefits of delegation against the need for control through administrative procedures and oversight mechanisms. *Id.* at 960.

input.[74] For nearly half a century, courts endorsed this legislative-executive partnership, reviewing for gross violations and errors to ensure that the process stayed within substantive and procedural bounds.[75]

B. THE FOUR HORSEMEN

Notwithstanding this long jurisprudential tradition of partnership and deference, the Supreme Court abruptly shifted gears over the last three years to disempower agency input through *West Virginia*, *Sackett*, *Loper Bright*, and *Corner Post*. And while it has done so in the name of protecting Congress, in this era of staggering legislative paralysis, the end result is to effectively aggrandize its own power to issue the final say on whether and how environmental regulation may proceed.[76] This Section introduces this quartet of new cases—the Four Horsemen of the New Separation of Powers—that may powerfully shift the balance of power both horizontally and vertically, and with special significance for realms of law in which regulatory expertise factors heavily.

1 *West Virginia v. EPA*

The first of the Four Horsemen to truly shift the balance of power was a case about the threat of climate change, and ultimately, who gets to decide how the federal government should respond.[77] *West Virginia v. EPA* concerned whether Congress had sufficiently authorized the Environmental Protection Agency (EPA) to phase out coal-fired power generation in its Clean Air Act (CAA) directive to set emissions standards for existing power plants.[78] EPA had drafted a rule that did so based

74. *See* Adam Keiper, *Science and Congress*, NEW ATLANTIS, Fall 2004–Winter 2005, at 19, 26–34 (discussing the Office of Technology Assessment's technical expertise).

75. *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823–24 (1990) (explaining how *Chevron* appropriately allocates interpretive authority across the three branches in light of Congress's appropriate delegations of interpretive authority to agencies, rather than courts, on policymaking matters).

76. *See infra* Part II.B (discussing the Supreme Court's supremacy following the Four Horsemen cases).

77. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2594 (2022) (discussing the challenge to the rule promulgated under the Clean Air Act).

78. *Id.*

on its interpretation of the statutory parameters and its evidence-supported judgment regarding "the best system of emission reduction" achievable, while taking account of costs, energy efficiency, and public health impacts.[79] However, the Supreme Court concluded that without clearer congressional authorization on a matter of such major economic and political importance, it would not defer to the agency's interpretation of the statute.[80]

The Court assessed whether EPA was authorized by § 111 to require coal-fired power plants to shift toward cleaner power production methods, including wind and solar energy, in order to reduce greenhouse gas pollution that contributes to climate change.[81] This regulation was part of the Obama administration's Clean Power Plan,[82] a complex regulatory scheme to advance national clean energy goals and comply with U.S. obligations under the Paris Climate Accord.[83] In establishing the rule, EPA relied on Congress's broad conferral of discretion in § 111's statutory directive to set performance standards for existing power plants that "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[84]

While the Supreme Court had previously acknowledged that the CAA authorizes EPA to regulate greenhouse gas emissions as air pollution,[85] the Court invalidated the requirement that existing power plants shift from coal-generated power to less

79. 42 U.S.C. §7411(a)(1); *see also id.* § 7411(b)(1) (charging the agency with setting emissions standards for existing power plants).

80. *West Virginia*, 142 S. Ct. at 2616.

81. *Id.* at 2603.

82. *Id.* at 2602.

83. *See* Coral Davenport & Gardiner Harris, *Obama to Unveil Tougher Environmental Plan with His Legacy in Mind*, N.Y. TIMES (Aug. 2, 2015), https://www.nytimes.com/2015/08/02/us/obama-to-unveil-tougher-climate-plan-with-his-legacy-in-mind.html [https://perma.cc/K57Q-97RZ] (explaining the Obama administration's plan to combat climate change by strengthening EPA regulations in preparation for the Paris Climate Accords).

84. 42 U.S.C. §7411(a)(1).

85. *See* Massachusetts v. EPA, 549 U.S. 497, 533–35 (2007) ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change . . . .").

polluting methods.[86] Even though the statute expressly conferred discretion on the Administrator to determine "the best system of emissions reduction," the majority rejected this rule that could "substantially restructure the American energy market" on the basis of "unheralded" authority the agency had suddenly discovered in a "long-extant" statute.[87]

Invoking a new "major questions doctrine" drawn from prior jurisprudence,[88] the Court concluded that the rule raised such major policy questions that clearer legislative approval was required—notwithstanding the clear invitation for administrative judgment already in the text of the law.[89] The dissent bitterly critiqued the new doctrine for rejecting the established norms of statutory interpretation that require judicial deference to reasonable agency interpretations of legislatively conferred discretion, and for departing from even the majority's preferred norm of textualist interpretation.[90]

Many scholars have critiqued the major questions doctrine,[91] which rejects agency rules that implicate questions of political or economic significance—even if they are "plausible" interpretations of the statute with a "colorable textual basis"—unless the agency can "point to 'clear congressional

86. *West Virginia*, 142 S. Ct.at 2612–16.

87. *Id.* at 2610.

88. For a thorough account of the slow evolution of the clear statement principle that evolved into the major questions doctrine, see Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 905–24 (2024).

89. *Id.*

90. *West Virginia*, *142 S. Ct.* at 2633–34, 2641 (Kagan, J., dissenting).

91. *See, e.g.*, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MITCH. L. REV. 55, 58–59 (2023) (arguing that the doctrine will impede executive management of foreign affairs and national security); David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. ON REGUL. 964, 969–70 (2022) (arguing that the doctrine will delegitimize environmental regulatory regimes); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 255–62 (2022) (criticizing use of the doctrine to weaken environmental regulation); *see also* Levin, *supra* note 89 (arguing, inter alia, that the doctrine makes overly optimistic assumptions about the extent to which a polarized and dysfunctional Congress will be able to resolve pressing problems statutorily or ratify agency regulations attempting to do so); Kamaile A.N. Turčan, *"Major Questions" About Preemption*, 69 VILL. L. REV. 737, 759 (2024) (arguing that the major questions doctrine operates as a "Step Zero" for litigation challenging the preemptive effects of federal rules).

authorization.'"[92] This may prove a virtually impossible standard for environmental agencies, among others, who are tasked with implementing decades-old statutes[93] after nearly a half-century tradition in which Congress crafted broad statutory directives that purposefully left space for interpretive agency rulemaking, drawing on subject matter expertise and public input.[94]

Most of these "long-extant" statutes, especially those in heavily scientific regulatory arenas, do not give that level of clear guidance for implementation by agencies—and in the current moment of extreme political polarization, it seems unlikely that Congress will be able to reach the needed consensus to enact more specific new laws or clarify old ones.[95] Amid this context of legislative gridlock, the *West Virginia* rule limits EPA's recognized authority to regulate greenhouse gas pollution to that of "solving technical engineering problems," like minimizing existing coal power plant emissions, rather than setting new emissions standards based on gas and renewable power generation.[96] Controversy over EPA's new rule fomented legal challenge, but the Court's self-appointed role as policy arbiter also stirred controversy. The case signaled growing judicial skepticism of administrative deference, a project further advanced in the next case.

2. *Sackett v. EPA*

In *Sackett v. EPA*, the Court doubled down on its demand for clearer statements from Congress to validate agency decision-making, this time in the context of regulating water pollution. The Court rejected the basic premises of the agency's statutory interpretation of the Clean Water Act (CWA) notwithstanding Congress's acquiescence for nearly fifty years,

92. *West Virginia*, 142 S. Ct. at 2609.

93. *See* Richard Lazarus, *Environmental Law Without Congress*, 301 J. LAND USE & ENV'T L. 15, 27–29 (2014) (noting that Congress stopped making and amending environmental laws in the 1990s, leaving federal agencies with the difficult task of adapting rulemaking to the changing shape of regulated pollution).

94. *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001) (exploring the impact of *Chevron*).

95. *See* Erin Ryan, Sackett v. EPA *and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 CASE W. RSRV. L. REV. 281, 308–10 (2023) (discussing this critique in the context of the *Sackett* decision and the Clean Water Act).

96. Turčan, *supra* note 91, at 743.

the support of previous Supreme Courts, and the low likelihood that the sitting Congress could possibly achieve a clearer statement in the foreseeable future—once again situating itself as the decider of import on this critical environmental issue.[97]

The plaintiffs in *Sackett* sued after EPA designated part of their Idaho property as federally protected wetland under the CWA.[98] Because wetlands on the lot drained into navigable waters that were clearly within federal jurisdiction, EPA concluded that these wetlands were also jurisdictional.[99] The Act itself designates "the waters of the United States" for protection, which uncontroversially includes all navigable waterways but has long left the inclusion of adjacent nonnavigable waterways to agency discretion, as set forth in the Waters of the United States (WOTUS) rule.[100]

A long series of interchanges between agency and judicial interpretations of the Act over many decades had culminated in the challenged WOTUS rule that found federal authority so long as the wetlands in question held "a significant [hydrologic] nexus" to navigable waters, including not only surface-hydrological connections but also groundwater, seasonal, and ecological connections.[101] The significant nexus interpretation, itself the result of extended deliberations over many administrations, was premised on Congress's clearly stated intention, in the preamble of the Act to protect "the chemical, physical, and biological integrity of the Nation's waters."[102]

On review, all members of the Court agreed that the property should not be subject to CWA jurisdiction, but the justices

97. *See* Ryan, *supra* note 95, at 308–10.

98. Sackett v. EPA, 143 S. Ct. 1322, 1331–32 (2023).

99. *Id*.

100. *See* Ryan *supra* note 95, at 19–25 (discussing the evolution of the WOTUS rule); *see also* Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 ENV'T L. 277, 294–97 (2016) [hereinafter, *Seeking Consensus on WOTUS*] (reviewing the history of the WOTUS rule).

101. *See Sackett*, 143 S. Ct. at 1332–35 (reviewing the history of the WOTUS rule); Rapanos v. United States, 547 U.S. 715, 759–62 (2006) (Kennedy, J., concurring) (offering the "significant nexus" rationale in the previous iteration of Supreme Court review); Ryan, *Seeking Consensus on WOTUS*, *supra* note 100 at 294–97 (explaining the historical development of the rule and how Justice Kennedy's concurring opinion became the controlling interpretation).

102. 33 U.S.C. § 1251(a); *Sackett*, 143 S. Ct. at 1359 (Kagan, J., concurring).

divided sharply in their reasoning.[103] The majority rejected decades of precedent and intergovernmental colloquy establishing the significant hydrological nexus rule to hold that the CWA protects only those wetlands that are relatively permanent standing bodies of adjacent water with a continuous surface connection to interstate navigable waters.[104] It concluded that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States,'" rejecting everything else up the tributary chain.[105]

Despite longstanding use of the significant nexus test and its hydrologically similar predecessors, the majority critiqued the test as "implausible."[106] And notwithstanding the scientific consensus that the wetlands made vulnerable by this decision form an integral part of the waterways Congress had expressly designated for "chemical, physical, and biological" protection, Justice Alito observed that the Act "does not define the EPA's jurisdiction based on ecological importance."[107]

This holding, made over vigorous objections by the more liberal wing of the court and even Justice Kavanaugh, an oft interpretive ally of this majority,[108] is credited with reducing the scope of national waters protected by the CWA by as much as fifty percent.[109] It also represents a further example of the Court's increasing willingness to substitute its judgment for that of nearly every other voice at the regulatory table. The majority not only dismissed the overwhelming scientific consensus on how to protect waterways and the decades of expertise accumulated by agency actors implementing this congressional directive, it

103. *Sackett*, 143 S. Ct. at 1333–35.

104. *See* Ryan, *supra* note 95, at 307; *Sackett*, 143 S. Ct. at 1340–41.

105. *Sackett*, 143 S. Ct. at 1340–41 (quoting *Rapanos*, 547 U.S. at 755).

106. *Id.* at 1341–42.

107. 33 U.S.C. § 1251(a); *Sackett*, 143 S. Ct. at 1343.

108. Justice Kavanaugh wrote separately to criticize the majority's "rewriting of 'adjacent' to mean 'adjoining'" and to express concern that the decision "may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies' regulatory authority." *Id.* at 1368 (Kavanaugh, J., concurring).

109. Erika Ryan et al., *More than Half of Wetlands No Longer Have EPA Protections After Supreme Court Ruling*, NPR: ALL THINGS CONSIDERED (Aug. 30, 2023), https://www.npr.org/2023/08/30/1196875240/more-than-half-of-wetlands-no-longer-have-epa-protections-after-supreme-court-ru [https://perma.cc/4Z5U-RUZX] (discussing the impacts of *Sackett* on CWA enforcement).

also rejected the Kennedy standard that became the controlling consensus after the last iteration of Supreme Court review—"the best collective attempt to forge consensus on the WOTUS question among all branches of government, including the judiciary, the executive agencies, and arguably even tacit legislative participation by acquiescence."[110] And it set the stage perfectly for the next Horseman decision, *Loper Bright*.

3. *Loper Bright Enterprises v. Raimondo*

The crowning blow to administrative interpretation came in the third environmental case that the Court heard over this three-year period, nominally about the legitimacy of fishing regulations implementing the Magnuson-Stevens Fisheries Conservation and Management Act.[111] Yet most observers understood that the case was really an opportunity for the Court to revisit its longstanding doctrine of deference to reasonable agency decision-making.

For the forty years prior, courts reviewing statutory interpretation cases had followed the Supreme Court's instructions in *Chevron v. NRDC*: to first give effect to Congress's unambiguous statutory directives, but if the statute was silent or ambiguous on the precise question of interpretation, then to defer to the implementing agency's reasonable interpretation of the statute, so long as the matter fell within that agency's subject matter expertise.[112] Judicial respect for legislative delegations of decision-making authority to agency subject matter experts on the particulars of implementation reflects the Court's previous understanding that "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[113]

Chevron was one of the most influential Supreme Court decisions of all time—referenced in over 17,000 lower court cases and seventy Supreme Court cases.[114] As recently as 2018, the Court affirmed this governance partnership between the legislative and executive branches against a nondelegation doctrine

110. *See* Ryan, *supra* note 95, at 307.

111. 16 U.S.C. §§ 1801–1891d.

112. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864 (1984).

113. Mistretta v. United States, 488 U.S. 361, 372 (1989) (upholding sentencing guidelines promulgated by the U.S. Sentencing Commission under federal law).

114. Liptak, *supra* note 25.

challenge in *Gundy v. United States*. In a decision upholding the Sex Offender Registration and Notification Act,[115] *Gundy* confirmed the Court's long understanding that Congress may delegate interpretive authority to implementing agencies so long as it has "made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [this] authority'" by some "intelligible principle" within the statute—one that constrains agency discretion to conform with the underlying legislative policy.[116]

Even so, *Gundy* was decided by a mere plurality, portending that support for broad administrative deference was weakening on the Court. In a concurrence to *West Virginia v. EPA*, Justices Gorsuch and Alito indicated that the new major questions doctrine articulated there was premised on the same separation of powers concerns as the nondelegation doctrine, all to ensure that "important subjects" would be "entirely regulated by the legislature itself."[117] Although *Chevron* deference was not directly discussed in *West Virginia v. EPA*, the articulation of the major questions doctrine itself was a harbinger that the judicial consensus behind *Chevron* deference was losing hold.

In *Loper Bright Enterprises v. Raimondo*, the Court used another environmental case to end the era of *Chevron* deference once and for all.[118] The plaintiff fishing companies challenged a regulation requiring them to pay for at-sea monitors required under the Magnuson-Stevens Fishery Conservation and Management Act (MSA),[119] to ensure that fishing operations comply with other statutory mandates for fisheries conservation. The plaintiffs alleged that the requirement for them to pay for monitoring exceeded statutory authority, arguing that the legislature never intended to impose this cost on industry.[120] The lower

115. Gundy v. United States, 139 S. Ct. 2116 (2019).

116. *Id.* at 2129, 2138 (holding that the Sex Offender Registration and Notification Act's provision authorizing the Attorney General to specify the applicability of sex offender registration requirements did not violate the nondelegation doctrine).

117. West Virginia v. EPA, 142 S. Ct. 2587, 2616–18 (2022) (Gorsuch, J., concurring).

118. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). In his concurrence, Justice Gorsuch pointedly noted that "Today, the Court places a tombstone on *Chevron* no one can miss." *Id.* at 2275 (Gorsuch, J., concurring).

119. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801–1884). Specifically, plaintiffs challenged a rule interpreting 16 U.S.C. § 1853(b)(8).

120. *Loper Bright*, 144 S. Ct. at 2255–57.

courts upheld the regulations under *Chevron*, concluding at the trial level that the statute unambiguously permitted such cost-shifting, and at the appellate level that the statute was ambiguous but the agency's interpretation reasonable.[121]

The plaintiffs asked the Supreme Court to decide whether the lower courts had properly interpreted *Chevron* in upholding the cost-shifting provision, and also whether the *Chevron* doctrine itself should be limited or overruled.[122] Revealing great eagerness to take up the issue, the Court granted review of only the second question—and then formally overruled *Chevron* once and for all, finding it "unworkable," impliedly for violating basic separation of powers principles.[123]

Writing for the Court, Chief Justice Roberts again wrested interpretive authority away from implementing agencies and back to the courts, reasoning that under the Administrative Procedure Act (APA) that governs agency action, it "remains the responsibility of the court to decide whether the law means what the agency says."[124] Noting that even the hallowed principle of *stare decisis* does not require the Court to maintain an unworkably erroneous decision,[125] he explained the majority's view of the properly privileged role of the judiciary in statutory interpretation:

> In an agency case as in any other . . . even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.
>
> Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. . . . The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the

121. *Id.*

122. *Id.* at 2257.

123. *Id.* at 2257, 2270–73.

124. *Id.* at 2261 (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring).

125. *Id.* at 2272.

> scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate.[126]

In their concurring opinions, Justice Gorsuch celebrated the return of the centrality of the courts in statutory interpretation that *Chevron* had derailed for so long,[127] and Justice Thomas explicitly emphasized that rejecting *Chevron* deference was necessary to protect the constitutional separation of powers.[128]

Writing for the three dissenters, Justice Kagan characterized the decision as a massive judicial power grab, acerbically noting that "[i]n recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies."[129] She observed that the Court has historically deferred to administrative decision-making on the basis of its logical presumption that Congress "would have 'desired the agency (rather than the courts)' to exercise 'whatever degree of discretion' the statute allows."[130] She further explained the logic behind this long presumption of congressional intent:

> This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and

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126. *Id.* at 2266 (citation omitted) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 836, 843 n.11 (1984)). In the same passage, the Court further explained:

> The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even Chevron itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." Chevron gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play.

Id. (citation omitted) (quoting *Chevron*, 467 U.S. at 843 & n.9).

127. *Id.* at 2275, 2284.

128. *Id.* at 2274.

129. *Id.* at 2294–95 (Kagan, J., dissenting).

130. *Id.* (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996)).

> interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer—to make rules about and otherwise implement—the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional delegation of interpretive authority.[131]

Reactions critical of the decision were swift, especially from environmental and public health advocates who recognized how the shift in interpretive authority from scientifically informed agencies to generalist judges could alter entire realms of regulatory law.[132] Others recognized that this was the entire point of the litigation.[133]

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131. *Id.*

132. *See, e.g.*, Liptak, *supra* note 25 (reporting on the case and quoting Justice Kagan's dissent: "The majority's decision today will cause a massive shock to the legal system, 'casting doubt on many settled constructions' of statutes and threatening the interests of many parties who have relied on them for years." (quoting *Loper Bright*, 144 S. Ct. at 2244 (Kagan, J., dissenting))); Nina Totenberg, *Supreme Court Just Made It Harder for Federal Agencies to Regulate in Sweeping Ruling,* NPR MORNING EDITION (June 28, 2024), https://www.npr.org/2024/06/10/nx-s1-4998861/supreme-court-chevron-doctrine [https://perma.cc/55ZZ-MRF4] (reporting on the controversy and quoting criticism by an environmental lawyer: "You may have a random judge in Amarillo deciding on the safety of heart medicines or clean air for our kids, or rules to keep the doors from blowing off airplanes . . . . Judges will now be able to essentially rewrite our laws").

133. Charlie Savage, *Weakening Regulatory Agencies Will Be a Key Legacy of the Roberts Court*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/supreme-court-regulatory-agencies.html [https://perma.cc/42ED-R242] (asserting that both *Chevron* and *Jarkesy* "pointed in the same direction: eroding the power of the federal regulatory bureaucracy. And the pair of decisions are only the most recent notes to sound that theme, making clear that the current majority's pursuit of a deregulatory agenda will be part of its legacy"); Maxine Joselow, *What the Supreme Court* Chevron *Decision Means for Environmental Rules*, WASH. POST (June 28, 2024), https://www.washingtonpost.com/climate-environment/2024/06/28/supreme-court-chevron-environmental-rules [https://perma.cc/2X3Y-W2F4] ("The real goal of the interest groups on the right that are backing this litigation is to enfeeble the federal government's ability to deal with the problems that the modern world throws at us . . . . We could end up with a weaker federal government, and that would mean that interest groups would be freer to pollute without restraint.").

Chief Justice Roberts stressed that the decision would be applied prospectively and should not "call into question prior cases that relied on the *Chevron* framework,"[134] indicating that the Court's rejection of *Chevron* deference should not overturn the forty years of regulatory governance that had been conceived and assessed in reliance on the old regime.[135] However, Justice Jackson pointed out that *Corner Post*, another Horseman case decided the same Term, would magnify the significance of *Loper Bright* by providing new means for plaintiffs challenging older regulations under the APA to evade what is normally a six-year statute of limitations.[136]

4. *Corner Post, Inc. v. Federal Reserve*

In *Corner Post*, the plaintiffs challenged the validity of a 2011 Federal Reserve Board regulation setting the maximum fees banks may charge merchants for debit card transactions, but the question the Supreme Court chose for review was whether the six-year statute of limitations on bringing claims under the APA had improperly precluded the lawsuit.[137] The Court considered whether a challenge must be brought within the first six years after the rule was issued, or within six years from the date that the rule first injures the individual plaintiff bringing the claim.[138] Notably, the latter choice would make it easier for plaintiffs to challenge old rules promulgated during the *Chevron* era of administrative deference under the newly articulated *Loper Bright* standard.[139] And by the same six to three margin that overturned *Chevron* in *Loper Bright*, the Court ruled that the statute of limitations on challenging regulations does not begin running until the harm accrues.[140]

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134. *Loper Bright*, 144 S. Ct. at 2253.

135. *Id.* ("The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite the Court's change in interpretive methodology.").

136. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting).

137. *Id*. at 2447–48.

138. *Id.* at 2447.

139. An entity subject to an order for violating a rule has always been able to challenge the order applying the rule to that entity, regardless of the six-year statute of limitations after the initial adoption of the rule—but Corner Post facilitates new facial challenges to the rule itself after the six-year statute, potentially rendering the rule inapplicable to every regulated party going forward.

140. *Id.*

The significance of *Corner Post* as a companion decision to *Loper Bright* is noteworthy. In *Loper Bright*, Chief Justice Roberts indicated that regulations previously upheld during the *Chevron* era would not be subject to retroactive challenge under the new standard, [141] but as Justice Jackson indicated, *Corner Post* enables *new* challenges to interpretations of old rules that have not yet been made and upheld under the old paradigm.[142] An ostensibly bland case about statutes of limitations, it facilitates the shift toward judicial intervention in regulatory policy by easing seemingly settled rules toward semi-selective invalidation under new clear statement rules that will likely be impossible to satisfy.

Corner Post potentially empowers judicial prerogative even more fulsomely than had the Court revived the moribund nondelegation doctrine[143] that some members of the Court longed to resuscitate in *Gundy*.[144] If that approach resurfaced, then the Court would be forced to treat *all* legislative delegations with skepticism. After *Corner Post*, courts now have more interpretive discretion to pick and choose which old regulations will be subject to the harsher scrutiny of *Loper Bright* (by deciding that a new injury has accrued under an agency interpretation that has not yet been reviewed) and which will be left intact (by deciding that the challenger's injury is time-barred), at least in the many ambiguous circumstances that will doubtlessly arise. After all, if it were not for the ubiquity of ambiguity in these circumstances, there would be no need for any of these doctrines at all.

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141. Loper Bright Enters. v. Raimondo, 603 U.S. 376 (2024) ("By doing so, however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology.")

142. Corner Post, Inc. v. Bd. of Governors of the Fed. Resv., 603 U.S. 799, 864 (2024) (Jackson, J., dissenting).

143. *See, e.g.*, Kerensa Gimre, Note, Gundy v. United States*: A Revival of the Nondelegation Doctrine and an Embrace of Cost-Benefit Analysis in Environmental Rulemaking*, 47 ECOLOGY L.Q. 339, 350–54 (2020) (discussing Justice Gorsuch's dissent in *Gundy* inviting revitalization of the non-delegation doctrine).

144. *Id.*; Gundy v. United States, 139 S. Ct. 2116, 2123–24, 2129–30 (2019).

II. HORIZONTAL SEPARATION OF POWERS IMPLICATIONS

The Four Horsemen, especially when taken together, alter the horizontal separation of powers by consolidating regulatory interpretive power in the Supreme Court. As many scholars have noted, they have pointedly wrested interpretive authority from the agencies that had shared it with courts during the *Chevron* era.[145] And despite their rhetoric to the contrary, these decisions have arguably shifted power away from even the legislature that had purposefully partnered with these agencies, strategically recruiting their subject matter expertise to fill in the details of complex regulatory lawmaking and freeing legislators to focus on matters that only Congress can address.[146]

This Part reviews the implications of these decisions for the horizontal separation of powers, both in terms of the judicial aggrandizement they achieve and the political response this aggrandizement has engendered, including various proposals for cabining judicial power. Because environmental law is a recognized creature of agencies,[147] the weakening of agencies' interpretive authority threatens to undermine the effectiveness of federal environmental law, but the same dynamic will haunt all legal realms that draw heavily on regulatory expertise.

As detailed in Part V, the magnitude of these consequences will partly depend on the extent to which future courts recognize implied delegations,[148] an important possibility preserved by a

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145. *Id.*; Gundy, 139 S. Ct. at 2123–24, 2129–30; *see, e.g.*, Kamaile A.N. Turčan, *The Bogeyman of Environmental Regulation: Federalism, Agency Preemption, and the Roberts Court*, 109 MINN. L. REV. 2529, 2537–47 (discussing this usurpation); Robin Kundis Craig, *The Impact of* Loper-Bright v. Raimondo*: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671, 2679–84 (same).

146. *See* Epstein & O'Halloran, *supra* note 73, at 982–86 (providing empirical evidence that Congress delegates authority more in areas where it lacks expertise or where the legislative process is inefficient, such as environmental and defense regulations, while retaining control over more politically sensitive areas like tax policy and social security).

147. *See generally* Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 ECOLOGY L.Q. 609, 619 (2015).

148. *See infra* Part V.A (considering whether lower courts will blunt the force of the Horsemen clear statement rules by implying larger delegations of authority than the Supreme Court may have intended).

critical paragraph near the end of *Loper Bright*.[149] However, important cases will presumably be appealed to the Supreme Court eventually, so this analysis takes the Court at its word in the Horsemen opinions, considering the full scope of impact they make possible. While it remains important to preserve meaningful judicial review of agency action as the APA intends, the wholesale negation of administrative deference by the Four Horsemen profoundly overcorrects for that concern, undermining the separation of powers, stare decisis, and other rule-of-law values.[150]

A. SUPREME COURT SUPREMACY

As even members of the sitting Supreme Court have recognized, the Horsemen decisions represent an audacious power grab over regulatory governance, and especially environmental governance.[151] They consolidate judicial authority within an arena of lawmaking previously characterized by nuanced and dynamic shared governance between the political branches with judicial oversight,[152] allocating power according to institutional governing capacity relative to the task at hand.[153] Executive agencies, staffed by scientists and specialists wielding technical

149. *Loper Bright*, 144 S. Ct. at 2263 (recognizing statutorily conferred administrative discretion in words like "reasonable" and "appropriate"); *see infra* Parts V.A, V.B (discussing the significance of this passage).

150. *See* Kent Barnett & Christopher J. Walker, Chevron *and Stare Decisis*, 31 GEO. MASON. L. Rev. 475, 476–77 (2024) (arguing, in advance of the *Loper Bright* decision, that the Court should not overrule *Chevron* because it advances rule-of-law values in the modern administrative state, including stare decisis, stability and uniformity in federal law, and reduction of judicial policy bias in administrative law).

151. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) (noting that a "rule of judicial humility gives way to a rule of judicial hubris").

152. *See* Epstein & O'Halloran, *supra* note 73, at 985–86 (concluding that, in order to address the complexity inherent to certain policy areas, a dynamic system of self-regulation exists that is characterized by shared governance among the branches).

153. *See* Blumm & Lang, *supra* note 147, at 610–15 (explaining how administrative law notably relies on "shared sovereignty as a major decision-making paradigm"); Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1656–65 (discussing the spillovers and negotiation among the horizontal branches); RYAN, TUG OF WAR, *supra* note 7, at 266 (discussing "the reality that all government actors are participating in the deciding, in different ways, all the time" by drawing on their unique capacity).

data in support of legislative policy implementation, lost power under these decisions directly, and Congress lost the option of recruiting and relying on these efficient partners in governing.[154]

These legislative-executive partnerships have long played an important role in federal environmental law, where the technical nature of lawmaking inputs and outputs demands a higher level of specialization at all stages of the process.[155] In framing them as dangerous executive encroachment, the Horsemen fail to distinguish between the powers of the President as Chief Executive—an individual much more vulnerable to the threats of tyranny, corruption, and conflicts that the separation of powers is intended to defuse—and the executive agencies that operate under presidential direction but are staffed by thousands of neutral career professionals, who are much less vulnerable to these concerns[156] and arguably more responsive to the governed, through administrative law procedures of public comment and consultation.[157]

More importantly, they unilaterally alter the finely integrated contributions of all three branches in the normal course of lawmaking.

For most of the previous century, the legislature has deliberated public policy issues and set forth broad policy directives in complex statutes,[158] such as the Clean Air and Water Acts.[159] These statutes, themselves tapestries of multiple policy

154. *See* Epstein & O'Halloran, *supra* note 73, at 986–87 (discussing the implications of "Congress's subcontracting arrangement with the Executive" and the importance of agency technical expertise).

155. *See* Blumm & Lang, *supra* note 147, at 612–17 (detailing the role of expert agencies in the decision-making process and the importance of their inputs and outputs in lawmaking).

156. *Cf.* Katyal, *supra* note 17, at 2316–19 (distinguishing between the President and executive agencies in the separation of powers context).

157. *See generally* Bernstein & Rodriguez, *supra* note 17, (arguing that an actual unitary executive is neither extant nor feasible in American democracy, and that the diffusion of power they find across the executive branch promotes the very values of democratic responsiveness and accountability that proponents of the unitary executive theory extoll).

158. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022) (laying out the major questions doctrine while discussing Congress's role as the policymaking branch and questioning whether agencies warrant interpretive deference to regulate on matters of economic and political significance).

159. Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7671q); Clean Water Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1389).

initiatives, require refinement in regulations that address the vast geographic, demographic, and industrial variation across the nation and enable consistent management of new variations of the harms targeted by the statute that may not come into focus until later.[160] Regulations specify the details of implementation in contexts that exceed the knowledge of elected legislators, who are generalists in the overall field of lawmaking, but that match the subject matter expertise for which agency staff are specifically hired.[161] Still, legislative direction frames both the substance and process of regulatory activity, providing initial instruction in the statute and ongoing direction under the APA.[162] The legislature further ensures that agency decision-making receives public input and scrutiny through APA notice and comment requirements.[163] Agency decisions remain accountable to voters through the election of executive branch leaders, while the possibilities for adaptive management enables them to remain flexible for adjustment as new facts and science emerge.[164]

Judicial review remains important in the administrative law context, enabling plaintiffs to challenge agency activity alleged to run afoul of rights, procedure, or record evidence. Judges, themselves subject matter experts on constitutional, statutory, and procedural constraints, play a supervisory role, ensuring that statutes and regulations remain consistent with relevant rights and obligations and that agency action conforms to APA requirements.[165] Courts ensure that agency decisions are reasonable, free of self-dealing, and supported by the evidentiary

160. *See* Blumm & Lang, *supra* note 147, at 612–17 (describing the regulatory refinement process through which action agencies consult with expert federal agencies and solicit comments from federal, state, and local agencies on a myriad of topics).

161. *See generally id* (detailing the role of expert agencies in environmental law as elected legislators notably rely on their input for certain matters).

162. *See* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (current version in scattered sections of 5 U.S.C.).

163. *See* 5 U.S.C. § 553(c).

164. *See* Epstein & O'Halloran, *supra* note 73, at 954 (noting the importance of the "ability of agencies to respond flexibly to changing conditions").

165. *See* 5 U.S.C. § 706; *see also* Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV 7, 7–8 (2022) (discussing how the APA has been a principal fixture in the legal system for seventy-five years and the ways judges interpret it in the context of agency action).

record on which they are premised.[166] Judges are ideally suited to these oversight tasks because they are trained in assessing evidence, due process, and conflicts of interest. The fact that federal judges are not elected enables them to review questions of pure law without bias, but it weakens judicial claims to authority over matters of pure public policy normally entrusted to the more democratically accountable political branches.[167]

The rise of administrative rulemaking in environmental law has not been without judicial controversy,[168] which largely reflects the failure of Congress to update the major environmental statutes of the prior century or pass new ones to cope with the changing nature of environmental harm.[169] In this era of legislative stagnation, agency rulemaking has provided an institutional workaround for coping with serious environmental harms on which the public has sought redress from government. By their very legislative design, agencies serve as intertemporal mediators between old laws and new problems.[170] For this reason, the roles of the three branches in environmental rulemaking

166. *See* 5 U.S.C. § 706; *see also* Levin, *supra* note 165, at 15–16 discussing judicial review of agency regulations).

167. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2300 (2024) (Kagan, J., dissenting) ("Absent a legislative directive, either the administering agency or a court must take the lead. And the matter is more fit for the agency. The decision is likely to involve the agency's subject-matter expertise; to fall within its sphere of regulatory experience; and to involve policy choices, including cost-benefit assessments and trade-offs between conflicting values."). *See generally* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review,* 90 WASH. U. L. REV. 141 (2012) (arguing that arbitrary and capricious "hard look" review allows courts to assess the factual and legal predicates of agency decisions but not their substantive value choices, because judges are well-suited to review the former and ill-suited to review the latter).

168. *See, e.g.*, Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 317–22 (1991) (describing the legal challenges and frustrations associated with environmental regulation); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 767–71 (2008) (providing an overview of how different variables influence the judicial review of environmental regulation).

169. *See* Lazarus, *supra* note 93, at 27–29 (discussing Congress's disengagement from environmental lawmaking after the 1990s).

170. *See* Cristina Rodriguez & Anya Bernstein, *Working with Statutes*, 103 TEXAS L. REV. 921, 922 (arguing that executive agencies are a primary way that the American system resolves the "dead-hand problems of democratic governance," balancing needs for stability, continuity, adaptation, and change).

have remained relatively stable since the 1970s—until the Four Horsemen threw a series of grenades into the field.

Loper Bright formed the capstone of this not-so-gradual reallocation of power over regulatory governance from the political branches to the courts.[171] As Justice Kagan acknowledged in her dissent, "[a] rule of judicial humility gives way to a rule of judicial hubris,"[172] because "[i]t is now 'the courts (rather than the agency)' that will wield power when Congress has left an area of interpretive discretion."[173] The decisions threaten to enable a new era of judicial policy supremacy, rebalancing the horizontal separation of powers to position the Supreme Court as the final arbiter of regulatory governance. The lower courts will also have opportunities to weigh in, though as discussed in Part V, they may lack the capacity to fully engage.[174] There may be more appetite among courts of appeal, but all decisions on matters of import will flow upward to the Supreme Court, conferring extraordinary authority over vast areas of technical governance to a tiny handful of judicial generalists.[175]

The great irony is that the Court justified these power-grabbing decisions as an effort to safeguard the separation of powers, framing them as protecting legislative prerogative against executive encroachment.[176] The common currency of the Horsemen is the requirement of clear statements of legislative intention before the Court will defer to an agency's potential overreaching statutory interpretation.[177] From the major questions doctrine to

171. *See supra* Part I.C (detailing the *Loper Bright* opinion and its critical impact on *Chevron* deference).

172. *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

173. *Id.*

174. *See infra* Part V.A. Lower court judges may lack the time, resources, and expertise to assess the details of technical agency decisions and their policy ramifications—which, after all, is the origin of administrative deference in the first place. *See infra* Part V.A.

175. *See Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting) ("In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law. As if it did not have enough on its plate, the majority turns itself into the country's administrative czar.").

176. *See id.* at 2274 (Thomas, J., concurring) ("By tying a judge's hands, *Chevron* prevents the Judiciary from serving as a constitutional check on the Executive.").

177. *See supra* Part I (describing the commonalities between the Horsemen cases in their rejection of *Chevron* deference, with *West Virginia*, *Sackett*, and *Loper Bright* all demanding clearer legislative statements).

the rejection of *Chevron* deference, the three primary Horsemen decisions take on heroic constitutional overtones in defense of the legislative role.[178]

The problem with this argument is that these doctrines come into play only *after* an ambiguous statute has already been enacted and implemented, when the only remaining choices are statutory interpretation by the agency or the court. While Congress can always amend the statute if enough members disagree with a judicial interpretation, it can just as easily correct an agency's misinterpretation.[179] That means that neither option is *a priori* superior—that is, *if* we presume Congress will correct errors. The real problem is assuming that Congress will be able to act to clarify the issue at all—an assumption that, at this time of unprecedented legislative paralysis, does not withstand scrutiny. Which is why the Horsemen really just empower the Court.

For this reason, the Court's heroic casting of the Horsemen as protecting Congress seems disingenuous. Eliminating agency rules implementing pre-existing legislative statutes until Congress can approve them doesn't clear the field for Congress to weigh in—it simply clears the regulatory field, and at the Court's sole interpretive discretion. It demands finely-tuned legislative activity that Congress simply cannot deliver at this time, when Congress can barely perform its most basic constitutional duty of keeping government operational.[180] If Congress can barely keep the lights on, let alone act on matters of basic import to its

178. *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2272–73 (noting that "*Chevron* was a judicial invention that required judges to disregard their statutory duties," and that the only way to ensure the law develops in a principled and intelligible manner was to leave *Chevron* behind).

179. *See, e.g.*, Walter Rugaber, *Congress Clears Auto Safety Measure Eliminating Seat Belt Interlock System*, N.Y. TIMES, Oct. 16, 1974, at 86, https://www.nytimes.com/1974/10/16/archives/congress-clears-auto-safety-measure-eliminating-seat-belt-interlock.html [https://perma.cc/JC9Q-9UQX] (reporting on a congressional fix to remove a National Highway Transportation and Safety Administration rule mandating an ignition interlock preventing automobile owners from driving their cars if they had not buckled their seat belts).

180. *See* Li Zhou, *How the Threat of a Government Shutdown Became Normalized*, VOX (Mar. 20, 2024), https://www.vox.com/politics/24106177/government-shutdown-funding-bills-normalized [https://perma.cc/GPC4-JVFZ] (discussing the normalization of government shutdowns during funding battles).

constituents,[181] is it realistic to expect it to iron out the finer details of implementing major environmental laws? Laws Congress has not even been able to amend over thirty years of evolving scientific and economic inputs?[182]

Consider what the Court is actually demanding when it required clearer legislative statements in *West Virginia*, *Sackett*, and *Loper Bright*. In the name of protecting Congress, the major questions doctrine now mandates express legislative approval of specific regulations before agencies can execute statutory directives in areas of law that impact matters of political or economic importance.[183] It requires Congress to provide clear approval not just of broad statutory goals nor even general regulatory targets but *specific implementing regulations*—like the monitoring and enforcement of fishing gear, catch, and seasonal restrictions at issue in *Loper Bright*.[184] Yet when Congress enacts a statute, the agencies won't yet have had an opportunity to craft scientifically sound regulations, nor to refine them through the APA notice and comment process that facilitates informed, transparent, and accountable results.

To demand such specificity from Congress on the front end, or even that lawmakers return to approve specific regulations later—when Congress is so patently gridlocked that it can't even pass a budget—is to effectively forbid these regulations in their entirety. More to the point, and abetted by the additional

181. The 118th Congress accomplished no lawmaking at all in its first quarter and little else noteworthy in the remainder of its term. *Statutes at Large and Public Laws*, *118th Congress (2023–2024)*, CONGRESS.GOV, https://www.congress.gov/public-laws/118th-congress [https://perma.cc/RM66-RMWG] (showing that no bills were enacted before mid-March, 2023, and revealing that the remainder of the term focused on reauthorizations, basic housekeeping measures, and limited or small scale initiatives, including multiple approvals of commemorative coins).

182. *See* Freeman & Rossi, *supra* note 63, at 1133 (arguing that the coordination challenges of agency action weighs in favor of executive authority).

183. *See supra* Part I.A (detailing *West Virginia*'s major questions doctrine and its respective intricacies and requirements).

184. *See id.* (noting how the major questions doctrine impacts congressional rulemaking); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting) (arguing that the majority opinion is unwisely straying from the notion that Congress must merely propose general regulatory targets as Congress lacks the necessary expertise and experience to create more specific regulatory targets).

opportunities for judicial intervention offered by *Corner Post*,[185] the Horsemen enable the Supreme Court to selectively disempower specific regulations that the majority of justices disapprove.

Though protecting legislative prerogative may be a worthy goal in the abstract, the rationale seems pretextual here, given the negligible likelihood that Congress could exercise anything close to this level of oversight. Even as this piece was in press, Congress found itself again poised on the precipice of a government shutdown while struggling for a durable consensus about spending obligations it had already committed to in prior appropriations, including funding for veterans, victims of natural disasters, federal employees, and other citizens they serve.[186]

The looming potential that the United States could default on its own financial obligations, together with fading confidence that Congress can act to prevent it before reaching the "debt ceiling,"[187] has threatened the nation's credit rating by independent financial institutions, imperiling the national and potentially even the global economy.[188] Worse still, legislative standoff positioning the federal government on the precipice of shutdown has become a regular affair.[189] Budget and debt management crises

185. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2482 (2024) (Jackson, J., dissenting) (noting the discretion now afforded courts to invalidate even longstanding agency rules challenged under the APA on these grounds).

186. *See* Noah Weiland, *Here's What Could Happen in a Government Shutdown*, N.Y. TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/us/politics/government-shutdown-funding.html [https://perma.cc/G42T-7P4V] (discussing the potential implications of the government shutdown threat during the winter of 2024–25).

187. *See* Alan Rappeport, *Yellen Warns 'Extraordinary Measures' Will Be Needed to Avoid Default*, N.Y. TIMES (Dec. 27, 2024), https://www.nytimes.com/2024/12/27/business/economy/yellen-debt-limit-warning-congress.html [https://perma.cc/3WWP-EC8K] (examining how Treasury Secretary Janet Yellen has warned that if lawmakers fail to raise or suspend the nation's debt limit by January 14th, she will likely have to implement "extraordinary measures" to avert a default on the United States' debt).

188. *See id* (noting that Treasury Secretary Yellen has urged Congress to protect the full faith and credit of the United States by raising the debt limit).

189. A shocking novelty when the federal government briefly shutdown in 1995 and 1996 amid budgetary friction between Congress and President Clinton, threats to shut down the federal government over debt and budget conflicts have become increasingly frequent in the last decade. *See* Zhou, *supra* note 180 (explaining how government shutdowns between 1995 and 2013 became

are the clearest signs of systematic congressional gridlock, but hardly the only examples.[190] Especially with rising use of the filibuster to prevent Senate action with even majority support,[191] legislative productivity has declined substantially as political polarization has risen.[192]

The Horsemen requirements thus demand unrealistic legislative feats, just as Congress is increasingly struggling to achieve basic lawmaking. To borrow the Court's condemnation of *Chevron* in *Loper Bright*, it is "unworkable" to expect that Congress could satisfy the new clear statement requirements to enable agency implementation of statutory directives within evolving regulatory circumstances.[193] Like the environmental laws targeted in the Horsemen decisions, these could be longstanding

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"weaponized" to address policy disagreements, and noting that "[s]ince 2013, there have been three shutdowns, and many more times when a shutdown was threatened" as members of Congress have "used spending bills as leverage for other policy goals"); *see also* Maggie Haberman, *Trump Used Government Shutdowns as Leverage During His First Presidency*, N.Y. TIMES (Dec. 20, 2024), https://www.nytimes.com/2024/12/20/us/politics/trump-government-shutdown-threats-leverage.html [https://perma.cc/EWM4-NFXV] (reporting on President Trump's use of government shutdowns during his first term "as a leverage tool" to achieve political objectives and noting that the longest government shutdown in history happened during the first Trump administration—thirty-five days, prompted by policy conflict over border control).

190. The Pew Research Center notes that Congress increasingly "punts" on the budget resolution process, opting for temporary resolutions that last only until the next budget showdown a few months later, foreshadowing future conflicts. *See* Drew DeSilver, *Congress Has Long Struggled to Pass Spending Bills on Time*, PEW RSCH. CTR. (Sept. 13, 2023), https://www.pewresearch.org/short-reads/2023/09/13/congress-has-long-struggled-to-pass-spending-bills-on-time [https://perma.cc/YS6E-24VM] ("In nine of the past 15 years, the House and Senate have instead adopted a variety of legislative substitutes called deeming resolutions . . . used when the two chambers can't agree on a budget resolution, and typically only binds each chamber's own appropriators. Born in disagreement, they often foreshadow future spending conflicts between the two chambers.").

191. *See, e.g.*, Sadaf A. Bajwa, *Our Constitutional Democracy and the Minority Veto: A Case Against the Filibuster*, 32 S. CAL. INTERDISC. L.J. 643, 643 (2023) (noting the rising prevalence of the filibuster and how it is "used to torpedo social reform and essentially grant two-fifths of senators a minority veto").

192. *See supra* note 181 (describing the recent reduction in lawmaking); *see also* Clare Brock & Daniel Mallinson, *Measuring the Stasis: Punctuated Equilibrium Theory and Partisan Polarization*, 52 POL'Y STUD. J. 31, 41 (2024) (providing statistical analysis to show that increased political polarization in Congress has resulted in fewer laws being passed and at closer margins).

193. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2252 (2024) ("Experience has also shown that *Chevron* is unworkable.").

statutes that have been operating generally effectively since enactment, but that might not survive the modern filibuster regime were they put to a revote today. Many bedrock statutes that seem part of the fabric of U.S. governance—the Clean Air and Water Acts, or even the Civil Rights Act—might not pass if put to a vote before the current Congress.[194] One could argue that if Congress wouldn't pass these laws today, then we should question how strongly to enforce them—a provocative claim that also prompts strong counterarguments.[195]

The question, once again, is who should make that call—Congress? Agencies? Voters? Or five or six Supreme Court justices, the least democratically accountable group of all?

It is an important question, because despite its platitudes about protecting the legislature, in these circumstances, power accrues directly to the Court itself. If the agency now may not decide these questions as a matter of law, and the legislature cannot decide them as a matter of practical reality, then the Four Horsemen conveniently position the Supreme Court as the ultimate authority on all controversial matters of regulatory policy, prompting legitimate questions about whether they are truly faithful to the model of separated powers they herald.

B. POLITICAL RESPONSES TO JUDICIAL AGGRANDIZEMENT

This conundrum has left the rest of the polity wondering how to respond. While some question how much impact these decisions will ultimately have,[196] widespread perceptions of the

194. *See* Eliott C. McLaughlin, *Many Doubt 1964 Civil Rights Act Could Pass Today*, CNN (Apr. 9, 2014), https://www.cnn.com/2014/04/08/politics/lbj-civil-rights-act-50th-anniversary/index.html [https://perma.cc/E9C4-XYV2] (observing that "many political players doubt today's Congress and White House could pass the Civil Rights Act," in addition to many other household-name federal laws). "Where the political climate of 1964 allowed Johnson and Russell to sit down for a cordial meal . . . today's politics are too ugly to foster such relationships." *Id.*

195. *Cf.* Lazarus, *supra* note 93, at 27–30, 33 (acknowledging that Congress effectively disappeared from environmental lawmaking in the 1990s, leaving implementing agencies to maintain the aging and ill-fitting infrastructure of environmental law, but arguing that the need for these laws and legislative upkeep is critical to national wellbeing).

196. *See, e.g.*, Anuj C. Desai, Loper Bright *as Jurisprudence: Institutional Choice and the Expressive Value of Law*, 67 ARIZ. L. REV. (forthcoming 2025), https://ssrn.com/abstract=5049030 (arguing that *Loper Bright* is mostly a rhetorical victory for the conservative movement); Ellen P. Aprill, *Unpacking the*

Horsemen as judicial aggrandizement have generated strong reactions in the political sphere. Many involve proposals to constrain the assertion of judicial power, some in targeted ways that respond directly to the content of these decisions and others at a more systemic level.

This Section reviews proposals for both incremental and large-scale changes to the Horsemen rules and Supreme Court authority—noting that none have materialized to date, and given the heavy political lifts involved, may never do so. The importance of preserving judicial independence during turbulent political times counsels further caution. Nevertheless, these proposals reveal that debate over the separation of powers is not limited to disagreement among the justices of the Supreme Court. The other branches, and perhaps most importantly, the citizens to whom the entire system must remain accountable, are deeply concerned.

1. Reversing Judicial Decisions

One set of responses include legislative proposals to specifically reverse the Horsemen doctrines and others of the Court's recent breaks with past precedent. Within months of the *Sackett* decision in 2023, for example, one hundred members of the House of Representatives cosponsored a bill that would have amended the Clean Water Act to reverse *Sackett* and reinstate the former WOTUS rule,[197] but no version of the bill was taken up in the Senate.

Within months of the *Loper Bright* and *Corner Post* decisions in 2024, both the House and Senate introduced bills designed to codify the former *Chevron* doctrine of administrative deference and eliminate the *Corner Post* loophole to the statute of limitations for regulatory challenges under the APA. Versions of the Stop Corporate Capture Act introduced in both houses of Congress include provisions that would codify *Chevron* within a more elaborate bill addressing many parts of the regulatory

Most Important Paragraph in Loper Bright, YALE J.L. REGUL.: NOTICE & COMMENT BLOG; https://www.yalejreg.com/nc/ [https://perma.cc/98LP-XBUE] (Jan. 15, 2025) (arguing that its impact may be limited by the extent to which courts recognize implied delegations). For more on the importance of implied delegations, see *infra* Parts V.A–V.B.

197. Clean Water Act of 2023, H.R. 5983, 118th Cong. (2023).

process.[198] Lawmakers also introduced more targeted bills to reverse these decisions. The Restoring Congressional Authority Act,[199] introduced in the Senate, would also amend the APA to mandate administrative deference under the terms of the former *Chevron* rule and require courts to consider congressional intent when reviewing agency interpretation.[200] Among other provisions, it would also provide a means for Congress to overturn specific appellate court decisions invalidating agency regulations.[201] If these bills mandating administrative deference were enacted, they might also shelter regulations from the reach of the *West Virginia* major questions doctrine.

Within weeks of *Corner Post*, short bills were introduced in the House (the Corner Post Reversal Act)[202] and the Senate (the Agency Stability Restoration Act of 2024)[203] that would effectively reverse the ruling by, for example, amending the APA to require that most claims "be commenced within 6 years after the date on which the relevant agency action was finalized."[204] A similar legislative proposal could be made to preclude or cabin the major questions doctrine set forth in *West Virginia*.

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198. Stop Corporate Capture Act, H.R. 1507, 118th Cong. (2023); *see* Nevin E. Adams, *Bill to Codify Chevron Deference Introduced by Senate Dems*, NAT'L ASS'N OF PLAN ADVISORS (July 24, 2024), https://www.napa-net.org/news/2024/7/bill-codify-chevron-deference-introduced-senate-dems [https://perma.cc/2KDL-MAVC]] (discussing the Senate version of the bill).

199. Restoring Congressional Authority Act, S. 4987, 118th Cong. (2024).

200. *See id.*; *see also* Carten Cordell, *New Senate Bill Aims to Codify Chevron Deference with Congressional Intent*, GOV'T EXEC. (Aug. 2, 2024), https://www.govexec.com/management/2024/08/new-senate-bill-aims-codify-chevron-deference-congressional-intent/398540 [https://perma.cc/3JMP-52XJ]] ("The new bill would restore the Chevron deference by amending the Administrative Procedure Act—which governs how agencies develop regulations—to include judicial deference to federal agencies. It would also require courts to include congressional intent when reviewing an agency's interpretation of a statute.").

201. *See* Cordell, *supra* note 200 ("It would . . . provide a method for Congress to overturn appellate court decisions to invalidate an agency rule, similar to powers in the Congressional Review Act.").

202. Corner Post Reversal Act, H.R. 9014, 118th Cong. (2024).

203. Agency Stability Restoration Act of 2024, S. 4751, 118th Cong. (2024).

204. Corner Post Reversal Act, H.R. 9014, 118th Cong. (2024); *see also* BENJAMIN M. BARCZEWSKI & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB11197, *CORNER POST* AND THE STATUTE OF LIMITATIONS FOR ADMINISTRATIVE PROCEDURE ACT CLAIMS 5 (2024) (explaining how the Corner Post Reversal Act would amend the APA and affect the requirements of APA claims).

If any of the *Loper Bright* reversal statutes were enacted, it would enshrine *Chevron* deference as a feature of statutory law rather than judicial interpretation, placing it on firmer legal ground (for at least as long as congressional consensus supports it). Still, the Court might object to a law it sees as encroaching on the judicial role by legislatively mandating its interpretive method, escalating the separation of powers conflict into the next round. If only a *Corner Post* reversal were enacted, it would at least shelter more previous administrative rules from attack under the new *Loper Bright* standard.

As discussed further in Part V, additional legislative options for protecting administrative rulemaking going forward include inserting text in a statute clarifying that it specifically delegates a particular decision to agency rulemaking, or statutorily mandating deference to agency interpretations of specific features of a statute as that statute is enacted or amended.[205] If there is legislative consensus about the need for administrative deference to the implementing regulations of a specific statute, taking this more limited approach may prove more politically feasible (and less judicially provocative) than a universal legislative override of *Loper Bright*.

Of note, these Horsemen decisions are not the only cases to incite legislative proposals reversing recent Supreme Court decisions viewed as extreme—for example, the No Kings Act[206] was proposed specifically to reverse the Court's contentious decision conferring broad presidential immunity in *Trump v. United States*,[207] and legislation was also proposed to codify protection for reproductive rights[208] that had been constitutionally protected by longstanding Supreme Court precedent until its 2022 decision in *Dobbs v. Jackson Women's Health Organization*

205. *See infra* Part V (highlighting the legislative options for protecting administrative rulemaking that legal advocacy could encompass in both the near and far term).

206. No Kings Act, S. 4973, 118th Cong. (2024).

207. 144 S. Ct. 2312, 2333, 2347 (2024) (holding that Presidents have absolute immunity for acts within their constitutional purview and presumptive immunity for official acts within the outer perimeter of their official responsibility).

208. Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021). This Act passed in the House but failed in the Senate in 2022. Deepa Shivaram, *A Bill to Codify Abortion Protection Fails in the Senate*, NPR (May 11, 2022), https://www.npr.org/2022/05/11/1097980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely-f [https://perma.cc/L6C5-FLJN].

overturned *Roe v. Wade*.[209] So far, however, none of these legislative proposals have come to fruition.

2. Curbing Judicial Authority

Concerns over the Court's aggressive assertions of power (and its apparently weakening commitment to the doctrine of *stare decisis*) have also prompted legislative proposals to rein in federal judicial power more broadly. These proposals are at least partly inspired by the Horsemen decisions but do not respond directly to them. They include consideration of an enforceable Supreme Court code of ethics, the potential for jurisdiction stripping legislation, proposals to enlarge the membership of the Court, and a constitutional amendment to end lifetime tenure for Supreme Court justices.

a. An Enforceable Code of Ethics

During the same time period that the Horsemen decisions were issued, controversy erupted over revelations that some members of the Court had failed to disclose gifts, relationships, and conflicts of interest that would normally preclude members of the federal bench from sitting in judgment of related claims.[210] These concerns have prompted proposals to mandate ethical standards for Supreme Court justices, who are not bound by the same ethical requirements that apply to all other federal judges.[211] Many critics have assailed the institution for failing to require justices with alleged conflicts of interest to recuse

209. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overturning *Roe v. Wade* and holding that "the Constitution does not confer a right to abortion").

210. *See* STAFF OF S. COMM. ON THE JUDICIARY, 118TH CONG., AN INVESTIGATION OF THE ETHICS CHALLENGE AT THE SUPREME COURT (Comm. Print 2024) (detailing questionable acceptance of gifts, trips, and other potential ethics violations of Supreme Court justices); Brett Murphy & Kirsten Berg, *The Judiciary Has Policed Itself for Decades. It Doesn't Work*, PROPUBLICA (Dec. 13, 2023), https://www.propublica.org/article/judicial-conference-scotus-federal-judges-ethics-rules [https://perma.cc/Q3ZN-6N79] (detailing the history of Supreme Court justices' potential ethics violations and conflicts of interest, along with proposals for reforms).

211. *See, e.g.*, Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html [https://perma.cc/BY9K-6732] (reviewing critiques of the lack of a Supreme Court ethics code and analyzing proposals for rules and internal reforms).

themselves from hearing matters that pertain to these conflicts, some of which implicate the business interests of stakeholders with connections to individual justices.[212]

b. Jurisdiction Stripping Legislation

There have also been calls for Congress to strip jurisdiction from the Supreme Court over legal realms related to some of their most contested decisions.[213] Article III of the U.S. Constitution empowers Congress to control the jurisdiction of the lower courts and to strip entire categories of cases from review by the Supreme Court, except those specifically designated to the Supreme Court's original jurisdiction.[214] Congress has used this power in the past to exempt matters from federal judicial review, including urgent environmental regulations pertaining to wildfire management[215] and energy supply,[216] in addition to others

212. *See* Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/862H-W5LU] (analyzing conflicts of interest and cataloging gifts from wealthy donors to justices, especially Justice Thomas, who is alleged to have "enjoyed steady access to a lifestyle most Americans can only imagine" as a result of these gifts).

213. *See* Charles E. Schumer, Opinion, *To Protect Rule of Law, Congress Must Check Supreme Court Overreach*, WASH. POST (Aug. 15, 2024), https://www.washingtonpost.com/opinions/2024/08/15/chuck-schumer-supreme-court-reform [https://perma.cc/4E3S-6MBQ] (proposing that Congress limit the jurisdiction of the Supreme Court in response to its decisions during the 2024 Term, especially its rulings pertaining to presidential immunity).

214. U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

215. To take one example from the environmental field, Section 706(j) of the 2002 Appropriations Act limits both rulemaking requirements and the judicial review of actions it authorizes for managing emergency wildland fires: "Such actions shall also not be subject to the notice, comment, and appeal requirements of the Appeals Reform Act (citation omitted). Any action authorized by this section shall not be subject to judicial review by any court of the United States." Act of Aug. 2, 2002, Pub. L. No. 107-206, § 706(j), 116 Stat. 820, 868.

216. In 2023, Congress exempted judicial review of actions challenging any aspect of the construction of an oil pipeline. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e), 137 Stat. 10, 47–48 (2023) ("(1)

involving national security[217] and immigration,[218] labor unrest,[219] and Indian affairs.[220]

Using this authority, Congress could limit judicial review of statutory directives responding to, for example, environmental emergencies associated with climate change. The Court upheld Congress's exercise of its constitutionally specified authority to limit federal court jurisdiction as recently as 2018, in a dispute

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Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline . . . including any lawsuit pending in a court as of the date of enactment of this section. (2) The United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section."); *see also* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, tit. II, § 203(d), 87 Stat. 584, 585 (1973) (codified as amended at 43 U.S.C. § 1652(d)) (exempting most judicial review of actions threatening the completion of the Trans-Alaska pipeline system, similar to that of Section 324(e) of the Fiscal Responsibility Act of 2023).

217. *See* Real ID Act of 2005, Pub. L. No. 109-13, div. B, sec. 102, § 102(c), 119 Stat. 302, 306 (amending 8 U.S.C. § 1103) (limiting judicial review of claims relating to the construction of a southern border wall to only those permissible causes of action specified within the statute).

218. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009-607, 3009-611 (amending 8 U.S.C. § 1252(f)) (limiting judicial review of most actions under the law to only the Supreme Court, and eliminating all judicial review to "enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law").

219. *See* Norris-La Guardia Act § 1, 29 U.S.C. § 101 ("No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.").

220. *See* Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913, 1913–14 (2014) (affirming the Gun Lake reserve as trust land set aside for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and exempting any claims challenging the action from review in any federal court). The Gun Lake Trust Land Reaffirmation Act was upheld in *Patchak v. Zinke*, 138 S. Ct. 897 (2018).

over the disposition of tribal lands[221]—but not without internal controversy,[222] signaling the likely judicial challenge to follow a similar legislative Act today.

c. Packing the Court

Congress is also authorized to add members to (or "pack") the Court. While the Constitution requires a Supreme Court and specifies a presiding Chief Justice,[223] all other details regarding the composition and organization of the Court are left to Congress. Congress first established a six-member Court in the Judiciary Act of 1789[224] and changed its size several times during the nineteenth century to as high as ten members before settling on the modern panel of nine after the Civil War.[225] Ever since the Senate denied a hearing for President Obama's Supreme Court nominee in the final years of his term on grounds that the voters should have a chance to weigh in—and especially after the Senate then seated President's Trump final nominee with just weeks left in his term—there have been controversial calls for

221. In *Patchak v. Zinke*, six members of the Court upheld a federal statute limiting federal judicial review of an act designating 147 Michigan acres in trust for a local tribe of Pottawatomi Indians. *See Patchak*, 138 S. Ct. at 903.

222. Writing for the plurality, Justice Thomas held that the Act was consistent with Congress's powers under Article III. *See id.* at 905–08 ("Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. See 28 U.S.C. § 1331. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III."). Justices Ginsburg and Sotomayor concurred on the grounds that the Act was consistent with the government's constitutional privilege of sovereign immunity. *See id.* (Ginsburg, J., concurring) at 912–13. However, Chief Justice Roberts dissented on behalf of Justices Kennedy and Gorsuch, arguing that the statute impermissibly encroached on the judicial power. *See id.* (Roberts, J., dissenting) at 914 ("I would not cede unqualified authority to the Legislature . . . Article III of the Constitution vests that responsibility in the Judiciary alone.").

223. U.S. CONST. art. III, § 1 (establishing the Supreme Court); U.S. CONST. art. I, § 3, cl. 6 (anticipating the Chief Justice).

224. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73. For a detailed review of the history of the early Supreme Court, see 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971).

225. *See* Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (reducing the ten member Court to a panel of nine).

Congress to use this authority to add members beyond the current nine.[226]

Since the resulting conservative supermajority lies firmly behind the Four Horsemen decisions that followed, the call to "pack the Court" is relevant to potentially overturning them.[227] Yet the proposal is highly controversial. Some contend that it would dangerously undermine the judicial role and the horizontal separation of powers itself, deploying political branch authority to bully the sitting members of the Court and weaken judicial independence.[228] Others worry that the proposal is unstrategic, because the tactic is reversable.[229] If one political alliance succeeds in extending the Court beyond nine to protect its agenda, there is nothing to stop the next political alliance from extending

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226. *See, e.g.*, Judiciary Act of 2021,H.R. 2584, 117th Cong. (2021) (seeking to increase the number of Supreme Court justices to thirteen). Proponents advocate this strategy to overcome what they perceive as an illegitimate conservative supermajority that President Trump was thus able to secure. *See* Maegan Vazquez & Kevin Liptak, *Trump Nominates Amy Coney Barrett as Supreme Court Justice*, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/politics/amy-coney-barrett-supreme-court-nominee/index.html [https://perma.cc/BH8H-2KA8] (reporting on Trump's appointment of Justice Barrett less than six weeks from the presidential election, and less than four months from the end of his term, notwithstanding the Senate's earlier refusal to consider President Obama's nomination of Merrick Garland to the Court over a year from the end of his term).

227. A notoriously similar and unsuccessful attempt to pack the Court emerged in 1937, when resistance by the sitting court to New Deal era legislation prompted presidential allies in Congress to propose legislation adding members to the Court (who might prove more favorably inclined toward FDR's legislative agenda). *See* Judicial Procedures Reform Bill of 1937, S. 1392, 75th Cong. (1937). However, the Senate Judiciary Committee worried that such an Act could threaten constitutional principles of judicial independence, and the Act did not pass.

228. *See id.*; *see also* Paul G. Summers, Opinion, *If You Think the Supreme Court Is Political Now, Change the Number of Sitting Justices*, TENNESSEEAN (Mar. 7, 2024), https://www.tennessean.com/story/opinion/contributors/2024/03/07/https://www.tennessean.com/story/opinion/contributors/2024/03/07/supreme-court-keep-nine-amendment-court-packing/72778296007 [https://perma.cc/R3XB-BGLS] (arguing that packing the court would be disastrous).

229. *See* Summers, *supra* note 228; F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645 (2009) (arguing that the size of the Court should be set to best meet its institutional goals but that its size has historically been influenced by political goals); John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681 (2002) (outlining the history of the Court's structure and the influence of politics).

the Court even further, to a point that could dilute its ability to function. Presumably for these reasons, it has not advanced far.

d. Revising Terms of Appointment

Finally, the most ambitious proposal to bring democratic accountability to the Supreme Court is arguably the most justifiable and simultaneously the hardest to accomplish: amending the Constitution to end lifetime appointments for Supreme Court justices.[230] Increasingly debated in serious political and legal discourse,[231] this proposal would end the practice of life tenure and stagger the justices along eighteen-year terms that would ensure each sitting President the opportunity to appoint at least two new members of the Court.[232]

The change would enhance the accountability of the Court by creating a more direct link between the justices and the voters who elect the President that appoints them—providing voters at least some connection to the composition of the Court at any given moment and guaranteeing them at least some agency to weigh in on the judicial process on this four-year basis.

However, amending the U.S. Constitution is an extraordinarily difficult feat.[233] For that reason, it is the least likely

230. *See* U.S. CONST. art III., § 1 (appointing federal judges for terms limited only by "good behavior").

231. *See* David Firestone, *Biden Is Right: End Lifetime Tenure on the Supreme Court*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/2024/07/22/opinion/biden-supreme-court-term-limits.html [https://perma.cc/9VYH-GL6K] (noting that representatives of both parties have historically called for term limits and pointing out that the United States is the only major world power without either term limits or a mandatory retirement age for Supreme Court justices); Tobi Raji, *Supreme Court Term-Limits Amendment Proposed by Sens. Manchin, Welch*, WASH. POST (Dec. 7, 2024), https://www.washingtonpost.com/politics/2024/12/07/supreme-court-term-limits-amendment-manchin-welch [https://perma.cc/DNJ4-5DK6] (reporting on a constitutional amendment proposed by senators to limit Supreme Court appointments to a maximum of eighteen years).

232. Raji, *supra* note 231.

233. The U.S. Constitution can be amended by either a two-thirds majority vote in both the House of Representatives and the Senate (and then ratified by three-quarters of the state legislatures), or else by a constitutional convention called for by two-thirds, and then ratified by three-quarters, of the State legislatures. U.S. CONST. art. V. It is notoriously difficult to amend. *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022) (arguing that the U.S. Constitution "may be the world's most difficult to amend"); Jennifer Szalai, *The Constitution Is Sacred. Is It Also*

alternative—but the Court's Horsemen decisions disempowering agency interpretation and the recent presidential immunity decision have resurrected its contemplation.[234]

III. VERTICAL SEPARATION OF POWERS IMPLICATIONS

While these decisions most directly impact the horizontal separation of powers, they also portend important implications for the vertical separation of powers, especially in environmental law and other technical fields straddling the gray area between state and federal authority. The most obvious implication is that state environmental governance will become more important as federal environmental regulators come under more intense scrutiny by a clearly skeptical Court. Because American federalism enables dynamic overlap and fluidity, responsibility will shift toward subnational actors to manage collective action problems threatening shared environmental resources, as will the difficult task of coordinating on environmental harms that cross jurisdictional boundaries. Part III.A addresses this likelihood.

Less obvious but equally important, however, is that even as independent state and local governance becomes more important, the ability of subnational actors to accomplish coordinated goals will likely be weakened. Environmental law has long relied on programs of cooperative federalism that engage state and local actors in regulatory partnerships with federal counterparts, mostly administrative agencies.[235] By disempowering the dynamic responsiveness of federal agencies within these arrangements, the Four Horsemen could threaten a key feature of American federalism that enables state and local actors to pursue their interests and input within the wider polity. Much of

Dangerous?, N.Y. TIMES (Aug. 31, 2024), https://www.nytimes.com/2024/08/31/books/review/constitution-secession-democracy-crisis.html [https://perma.cc/HN5N-4A26] (critiquing the inflexibility of the American system because of the difficulty of constitutional amendment).

234. *See* NPR Washington Desk, *Biden Calls for Term Limits, Enforceable Ethics Rules for Supreme Court Justices*, NPR (July 29, 2024), https://www.npr.org/2024/07/29/nx-s1-5055094/biden-supreme-court [https://perma.cc/8ZBE-HLNE] (reporting on President Biden's call for Supreme Court term limits and strong ethics review in response to his concerns about the lack of a code of ethics and "extreme opinions the Supreme Court has handed down [that] have undermined long established civil rights principles and protections").

235. *See generally* Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 398–412 (describing the classical programs of cooperative environmental federalism).

this collaborative environmental governance involves intergovernmental bargaining,[236] but as Part III.B describes, the ability of federal agents to freely participate in these processes may be constricted, weakening national flexibility to respond to local initiative.

The Horsemen will thus make the state role in vertical environmental governance simultaneously stronger and weaker. They are likely to drive environmental governance further toward subnational leadership, but weakened federal engagement in multilevel governance platforms may threaten state effectiveness to manage interjurisdictional spillovers—undermining creative environmental governance right when we need it the most.

A. THE IMPORTANCE OF ENVIRONMENTAL FEDERALISM

For the proponents of state and local initiatives in environmental protection, the Four Horsemen herald both good and bad news. This Section begins with the good news for its proponents that environmental law will survive the Supreme Court's open hostility to regulation. These decisions may have weakened federal environmental law at its core by disempowering the agencies, but in our complex system of environmental federalism, important avenues for environmental protection remain at the state, local, and regional levels.[237] These subnational efforts will likely become stronger as federal avenues become weaker.

In some regards, the states already possess superior environmental authority in comparison with the federal government. In contrast to the reliance of federal environmental law on inexact sources of constitutional authority such as the Commerce Clause,[238] the states hold plenary police power to protect the public health and welfare.[239] Most use it to enact meaningful

236. *See generally* Ryan, *Negotiating Federalism*, *supra* note 41 (describing this phenomenon in many contexts of law); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 398–412 (discussing this phenomenon in the specific context of environmental law); RYAN, TUG OF WAR, *supra* note 7, at 265–314 (situating this phenomenon within a theory of Balanced Federalism that accounts for the different capacity of the different branches of government horizontally and vertically).

237. *See supra* note 64 and accompanying text (discussing the strength and dynamism of state and multilevel environmental governance).

238. U.S. CONST. art. I, § 8, cl. 3.

239. *See* Erin Ryan, *Public Trust Principles and Environmental Rights: The Hidden Duality of Climate Advocacy and the Atmospheric Trust*, 49 HARV. ENV'T

environmental laws that create environmental procedural requirements, pollution limitations, land use planning mandates, and resource conservation laws.[240] Nearly half the states include some constitutional provision supporting environmental law,[241] and one-fifth have enacted constitutional provisions explicitly establishing environmental rights or sovereign obligations to protect the environment directly.[242] States and local governments act as critical partners in the nationwide programs of cooperative environmental federalism outlined in such backbone federal environmental laws as the Clean Air and Water Acts, which rely on state leadership in the design and implementation of regional programs to meet national targets.[243]

Still, the limited jurisdictional reach of state environmental law means that state governance is a necessary but insufficient means of governing our most challenging environmental problems, including the kinds of air and water pollution that defy jurisdictional boundaries.[244] Many states have joined regional partnerships to reinforce state and local environmental governance, for example, in the absence of firmer national climate governance, but the results still leave a patchwork of regulatory response exposing problems of leakage, holdout, and fairness.[245] No matter how much effort one state puts into managing pollution or wildlife, those efforts will be ineffective if the same

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L. REV. 225, 2405 ("[S]tates have plenary authority to protect environmental values within them.").

240. *Id.* (citing the use of plenary authority to protect the environment).

241. *See* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 451 (1997) ("The constitutions of at least twenty states, plus Puerto Rico, include provisions that embody the fundamental commitment to environmental preservation . . . .").

242. *See* Ryan, *supra* note 239, at 7676–77 (discussing these state constitutional provisions).

243. *See* Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 398–412 (discussing the various mechanics by which state and federal actors partner within programs of cooperative environmental federalism).

244. *See* RYAN, TUG OF WAR, *supra* note 7, at 145–66 (discussing the interjurisdictional gray area that complicates environmental governance); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, 387–98 (discussing the response of environmental federalism to the problem of jurisdictional overlap). *See generally* Ryan, *Dynamic Federalism*, *supra* note 60 (summarizing the dynamics of environmental federalism).

245. *See, e.g.*, RYAN, TUG OF WAR, *supra* note 7, at 167–76 (discussing early state and regional climate governance initiatives).

pollution blows or washes in from a neighboring state, or if protected species wander through contiguous habitat beyond state boundaries,[246] or if the federal government displaces or preempts the state's efforts.[247]

As a result, U.S. environmental law is a complex project of local, state, and federal interdependence, because sound environmental governance requires the coordination of unique forms of governing capacity available at different levels of the jurisdictional scale.[248] While the federal government possesses superior financial and administrative resources for conducting research and setting national standards, only the state and local governments possess the physical capacity to appropriately implement environmental policy at the ground level.[249] The federal government cannot succeed at sound environmental governance without state cooperation in implementation, but the states cannot succeed without federal coordination to be effective.[250]

The interdependence of American environmental federalism thus creates a useful dynamic of regulatory backstop. It enables policymaking and enforcement to proceed on different levels simultaneously and creates multiple forums for policymaking and experimentation that enable workarounds when governance stalls in one node.[251] In this respect, the vertical separation of powers can function as a source of regulatory backstop to environmental governance failures in the horizontal plane, because dynamic federalism enables environmental law to operate even when there is a breakdown on one level or the other.

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246. *See, e.g.*, *id.* at 151–59 (discussing examples of water and air pollution).

247. *See* Erin Ryan, *The Twin Environmental Law Problems of Preemption and Political Scale* (discussing the threat of ceiling preemption of state environmental law), *in* ENVIRONMENTAL LAW, DISRUPTED 150–59 (Keith Hirokawa & Jessica Owley eds., 2021).

248. *See generally id.*; Ryan, *Dynamic Federalism*, *supra* note 60; Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 371–75.

249. *See* Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 371–75.

250. *Id.*

251. RYAN, TUG OF WAR, *supra* note 7, at 42–43; Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 364–65 ("Federalism promotes a balanced system of checks on sovereign authority at both the state and federal level, enabling . . . 'regulatory backstop,' which protects individuals against government excess or abdication by either side. When sovereign authority at one level fails to protect the vulnerable, regulatory backstop ensures that it remains available to do so at a different level.")

For climate advocates, Horsemen-inspired shifts to state and local environmental governance may seem like a frustrating second-best solution because the more limited jurisdictional reach won't match the full physical scale of the problem. Nevertheless, the laboratories of experimentation enabled by American federalism have produced important innovations in environmental governance, especially in the context of climate advocacy,[252] where federal law has long languished. Some of the most forward-looking climate governance strategies have originated at the subnational level, including renewable portfolio standards, tax incentives, green building incentives, net metering, mobile source emissions limitations, and even subnational carbon markets.[253] Late in 2024, Montana became the first state in which a constitutional right to climate stability was recognized by a state supreme court,[254] a decision that has helped to instantiate a new wave of youth climate activism specifically at the state level,[255] where the likelihood of success eclipses federal prospects.[256]

Innovative state and local strategies can expand their jurisdictional impact as models for other states, either outright or as adopted in interstate compacts or regional agreements.[257] Even

252. *See, e.g.*, Ryan, *supra* note 239, at 7575–85 (describing climate litigation involving state constitutional law).

253. *See, e.g.*, RYAN, TUG OF WAR, *supra* note 7, at 169–73 (describing the interjurisdictional complexities of climate governance).

254. Held v. State, 560 P.3d 1235, 1248–49, 1260 (Mont. 2024) (holding that the Montana Constitution's promise of a healthy environment included protections for climate stability, that the plaintiffs had standing on the basis of these rights to challenge statutes precluding consideration of greenhouse gas emissions during environmental impact assessment, and that these statutes were unconstitutional). The Montana high court explained, "Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system, which is clearly within the object and true principles of the Framers inclusion of the right to a clean and healthful environment." *Id.* at 1249.

255. *See* Ryan, *supra* note 239, at 75–76 (highlighting the involvement of youth climate activists at the state level).

256. *See, e.g.*, Juliana v. United States, Civ. No. 15-CV-01517, 2023 WL 3750334, at *9 (D. Or. 2023) (allowing an amended complaint filed by youth plaintiffs alleging injury from climate change to move forward); *In re* United States, No. 24-684, 2024 WL 5102489 (9th Cir. 2024) (ordering dismissal of the claim with prejudice).

257. *See* Ryan, *supra* note 247, at 159–71 (exploring local, regional, and private governance alternatives for achieving national-level policy without access to federal authority).

if the Horsemen cause federal environmental law to lose momentum in the near term, state and local governance will continue to press forward, demonstrating the regulatory backstop that has always strengthened American federalism. The allocation of overlapping authority along the vertical levels of U.S. governance ensures checks and balances that protect citizens against both the abuse and abdication of sovereign authority, including abdication to protect public health and environmental values.[258] When one level fails to protect the vulnerable, the vertical separation of powers ensures that authority remains available for those citizens to seek help at another level.[259]

B. THE WEAKENING OF INTERGOVERNMENTAL BARGAINING

After the Four Horsemen, then, the role of state, local, and regional environmental governance within our dynamic system of federalism will become ever more important. Yet paradoxically, even as these players take on a more important role, they may find themselves in a weaker position to accomplish their environmental goals. By weakening federal agencies, the decisions weaken the possibilities for the kinds of intergovernmental bargaining by which subnational actors have routinely pursued their environmental interests and influenced the development of environmental policy beyond their own borders.

Even if state environmental law becomes more important, it will still interface with federal environmental law. Federal environmental law may become less effective, but it will still exist. It will still provide the easiest means of coping with interjurisdictional problems, and it will still maintain constitutional supremacy over state and local law.[260] States will still need to participate in the programs of cooperative environmental federalism that ideally provide avenues for cross-pollination and negotiated exchange, enabling subnational actors to pioneer policy innovations and advocate for their own interests beyond their own jurisdictional reach. But in weakening the flexibility of federal

258. *See* RYAN, TUG OF WAR, *supra* note 7, at 42–43 (explaining how jurisdictional overlap allows for healthy competition between sovereigns); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 364 ("Federalism promotes a balanced system of checks on sovereign authority at both the state and federal level . . . which protects individuals against excess or abdication by either side.").

259. Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 364.

260. U.S. CONST. art. VI., cl. 2.

agencies to engage in these partnerships by limiting their interpretive discretion, the Horsemen threaten to undermine one of the most useful tools our dynamic model of federalism yields for good environmental governance—intergovernmental bargaining.[261]

A surprising amount of cooperative environmental federalism is negotiated between state and federal actors, working around pockets of uncertainty about constitutional boundaries in a variety of bargaining formats.

The constitutional indeterminacy driving federalism bargaining is a big discussion, but the nutshell version is that while the horizontal and vertical separation of powers are both designed to facilitate good governance,[262] like statutes requiring agency interpretation, the Constitution does not supply all relevant details about who gets to decide which parts of interjurisdictional environmental policy. State sovereign authority is protected by the Tenth Amendment and the enumerated federal powers are protected by the Supremacy Clause. Beyond that, however, much is left to interpretation in the gray areas of jurisdictional overlap, where both the federal and state governments hold simultaneous regulatory interests or obligations—like managing the different components of air or water pollution, or the various inputs to climate change.[263]

Constitutional indeterminacy about how to manage this overlap has led to profound instability in the Supreme Court's

261. *See generally* Ryan, *Negotiating Federalism*, *supra* note 41 (describing this phenomenon in many contexts of law); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 398–412 (discussing this phenomenon in the specific context of environmental law); RYAN, TUG OF WAR, *supra* note 7, 265–314 (situating this phenomenon within a theory of Balanced Federalism that accounts for the different capacity of the different branches of government horizontally and vertically).

262. Ryan, *Dynamic Federalism*, *supra* note 60, at 26–31 (introducing federalism as a strategy for good governance and the five core federalism values); RYAN, TUG OF WAR, *supra* note 7, at 7–17 (unpacking constitutional indeterminacy regarding the federalism directives); *id.* at 34–67 (describing the federalism values of accountability, transparency, localism, and problem-solving); Ryan, *Secession and Federalism, supra* note 60, at 154–58 (adding the additional value of national authority to cope with collective action problems and constitutional commitments as a component of the problem-solving value); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 362 (discussing the five core federalism values in the environmental context).

263. *See* RYAN, TUG OF WAR, *supra* note 7, at 145–80 (discussing the interjurisdictional gray area).

federalism jurisprudence, as the Court experiments with various models over time.[264] But the resulting uncertainty about the boundaries of authority in these gray areas has created a regulatory context in which federalism-sensitive governance is often negotiated by state and federal agents, working within available constitutional, statutory, and political frameworks.[265]

My previous work explores how U.S. environmental law is widely implemented through various forms of negotiated governance, including participation from all levels of vertical jurisdictional scale and across all horizontally separated branches of government within these levels.[266] This scholarship provides a typology of at least ten different ways that such governance gets negotiated,[267] represented by some of the most successful examples of cooperative environmental federalism in environmental law.[268] These include complex exchanges for state and federal bargaining over coastal land use planning within the Coastal Zone Management Act,[269] iterative policymaking negotiations over mobile source emissions limitations within the CAA,[270] and

264. *Id.* at 68–104 (describing contrasting models of federalism embraced by the Supreme Court over history, including contemporary dual and cooperative federalism).

265. *See generally* Ryan, *Negotiating Federalism*, *supra* note 41, (discussing how federalism-sensitive governance is the product of some form of negotiation); RYAN, TUG OF WAR, *supra* note 7, 265–67 (describing federalism-sensitive governance and the role it plays in state-federal bargaining).

266. *See generally* Ryan, *Negotiating Federalism*, *supra* note 41 (describing these dynamics in detail); Ryan, *Dynamic Federalism*, *supra* note 60 (summarizing these dynamics in the environmental context); RYAN, TUG OF WAR, *supra* note 7, 265–367 (incorporating these insights into a larger "Balanced Federalism" theory of American federalism).

267. *See* Ryan, *Negotiating Federalism*, *supra* note 41, at 24–73 (describing interest-group bargaining over lawmaking and implementation, interjurisdictional enforcement negotiations, negotiated rulemaking among various stakeholders, intentional joint policymaking forums created by legislative statute, and even long-term intersystemic signaling negotiations between state and federal policymakers); RYAN, TUG OF WAR, *supra* note 7, at 280–314 (identifying ways state and federal actors negotiate with one another).

268. *See* sources cited *supra* note 267.

269. 16 U.S.C. §§ 1451–1466 (allowing for state-federal bargaining over federal "consistency" determinations).

270. 42 U.S.C. § 7543 (establishing mobile source emissions controls); *id.* § 7543(b)(1) (setting forth the California waiver that allows it and other states following its standard to create a more stringent standard).

negotiated rulemaking over the Phase II Stormwater Rule of the Clean Water Act.[271]

While all three branches of government participate in these examples of intergovernmental bargaining at all levels of government, the predominant players, by far, are acting from within executive agencies.[272] Administrative staff responsible for the nuts and bolts of legal regulation, implementation, and enforcement are the primary participants in these examples of negotiated federalism because they are the agents of government tasked with navigating the interstices and uncertainty of jurisdictional overlap—those gray areas of governance where both state and federal interests or obligations are simultaneously implicated.[273] As I have previously described,

> Most federalism bargaining takes place between the executive actors on either side of the state-federal divide; it is axiomatic in enforcement negotiations and in most permitting and licensing negotiations. For example, EPA and state environmental agencies generally negotiate the terms of state implementation programs under the CAA, while HHS and state health and social service agencies negotiate the terms of Medicaid demonstration waivers. When federal executive agencies initiate negotiated rulemaking with state input, state participants are usually members of the executive branch. That executive actors lead in many instances of state-federal bargaining is not surprising, as they are charged with the details of statutory implementation and possess the most reliable substantive expertise about what each side can accomplish. Although high-ranking executive officials can play important roles in the process, the most important players are often the career agency staff on both sides.[274]

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271. Clean Water Act § 402, 33 U.S.C § 1342(p) (original version at ch. 758, 62 Stat. 1155 (1948)). The Phase II Final Rule was published in the *Federal Register* on December 8, 1999. *See* National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, 124). Another example of conventional intergovernmental bargaining in the Clean Water Act context includes negotiations over the setting of total maximum daily load standards. *See* 33 U.S.C. § 1313(d)(1)(A), (C).

272. *See* Ryan, *Negotiating Federalism*, *supra* note 41,at 74–75 ("Most federalism bargaining takes place between the executive actors on either side of the state-federal divide . . . ."); RYAN, TUG OF WAR, *supra* note 7, at 317–19.

273. *See* RYAN, TUG OF WAR, *supra* note 7, at 145–50 (citing examples of regulatory fields where both state and federal governments hold authority); Ryan, *Chapter on Environmental Federalism*, *supra* note 60, at 567–72 (addressing the challenges of "dual federalism" and jurisdictional overlap).

274. Ryan, *Negotiating Federalism, supra* note 41, at 74–75.

Other researchers have also documented the importance of negotiated governance in realms of law heavily characterized by administrative rulemaking and enforcement, indicating the important role that agency actors play. For example, Professor Abbe Gluck describes it in the context of health law,[275] and Professor Cristina Rodriguez describes it in the context of immigration, drug, and marriage law.[276]

Yet negotiated federalism is especially salient in environmental law. As Professor Dave Owen concludes, negotiation in the implementation of environmental law "is so central to the field that one cannot understand environmental law, either in theory or in practice, without understanding where negotiations occur, who participates, and what is up for discussion."[277] Administrators from within state and federal environmental agencies routinely participate in co-constructing environmental governance by negotiated means.[278] To the extent that the interpretive capacity of federal administrative agencies is curtailed, so too will be the opportunities for subnational actors to pursue objectives and form coalitions within negotiated environmental governance that is more likely to remain adaptive and responsive to local political preferences than fully preemptive federal lawmaking. Recent scholarship also shows how the Horsemen limit the preemptive force of agency rules promulgated within negotiated environmental governance, weakening the enforceability of the bargained-for results.[279]

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275. *See generally* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (analyzing health reform legislation and the allocation of authority among both state and federal implementers); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013) (highlighting federalism within the Affordable Care Act which entrusts states with significant implementation authority).

276. *See generally* Rodríguez, *supra* note 64 (examining the role of federalism on matters including immigration, marriage equality, and drug policy).

277. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137, 137 (2023).

278. *Id.* (noting the "centrality of negotiation to environmental law"); *accord* Ryan, *Dynamic Federalism*, *supra* note 60 (discussing negotiated environmental governance).

279. *See* Turčan, *supra* note 145, at 2566–67 ("Applying the rationale behind *West Virginia*'s major questions doctrine, it may be that all preemption cases involving fields traditionally regulated by the states are of economic and political significance and are, therefore, major questions cases.").

For that reason, even as the Horsemen elevate the importance of local, state, and regional environmental governance, reducing the flexibility of federal environmental agencies to collaborate with subnational actors could limit their influence on the national conversation and reduce the efficacy of subnational responses to interjurisdictional environmental challenges. Tragically, this may happen right as modern environmental challenges—especially those relating to climate—suggest that we need flexible, creative, and adaptive multijurisdictional environmental governance now more than ever.[280]

IV. INTERPRETING THE SEPARATION OF POWERS IN REGULATORY CONTEXTS

Having considered the negative implications of the Horsemen's horizontal power grab and vertical power shifts for environmental governance, this Part considers alternatives for reintegrating the political branches into the constitutional conversation from which the Court has pushed them out—without disempowering those features of judicial review that have nurtured and protected our cherished rule-of-law tradition.

It is extremely delicate business, because we rely on the authority and finality of Supreme Court rulings to confer order and meaning[281] within the chaotic American stew of cultural pluralism, political polarization, and institutional complexity—all spread out over a nation whose sheer size distinguishes it from most other democracies.[282] Courts provide a critical means of dispute resolution, and judges are the key interpreters of fundamental fairness and legal procedure. The judicial role as counter-

280. *See* RYAN, TUG OF WAR, *supra* note 7, at 167–76 (discussing the need for interjurisdictional climate governance); Alejandro E. Camacho, *De- and Re-Constructing Public Governance for Biodiversity Conservation*, 73 VAND. L. REV. 1585, 1626–27 (2020) (arguing that the lack of interjurisdictional efforts in environmental governance undermines efforts to restore and protect biodiversity).

281. *See* Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint*, 47 MD. L. REV. 118, 118 (1987) (proposing that the success of the American Constitution and its complex form of government is due to "the unique process of constitutional interpretation by an independent judiciary headed by the Supreme Court of the United States.").

282. The exception may be India, the world's largest and most pluralist democracy of all, which also values the distinct role that its Supreme Court plays. *See generally* S. Rajendra Babu, *Contribution of the Supreme Court to the Growth of Democracy in India*, 6 NUJS L. REV. 193 (2013) (discussing the importance of the Indian Supreme Court to India's democracy).

majoritarian protector of individual rights is especially sacrosanct.[283]

The Horsemen decisions prompt reconsideration of whether the Court's role in interpreting the Constitution of rights can be effectively disaggregated from its interpretation of the structural Constitution. The Court assumes a position of neutrality when adjudicating individual rights, but it faces an unavoidable conflict in allocating power among the three branches—as the Four Horsemen decisions are designed to do. In place of judicial supremacy in this context, consider whether judicial insight could be better integrated with the insights of the political branches that can often react more holistically to the demands of regulatory governance, responding with the needed mix of deliberative and democratic accountability for managing the inevitable policy tradeoffs. Advocates for the political safeguards of the structural constitution have long sought greater recognition of the roles played by the political branches in these contexts, with a correspondingly tempered role for judicial review.[284]

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283. *Cf.* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 3 (1998) (reviewing the history of judicial invalidation of legislation to protect counter-majoritarian rights).

284. *See, e.g.*, CHOPER, *supra* note 38, at 175 (advancing the political safeguards theory of federalism, in which the political branches are trusted to better advance constitutional values than judicial interpretation); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15–16 (2010) (arguing that the political branches exercise self-help to enforce the horizontal separation of powers without the need for judicial intervention); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7, 252 (2004) (arguing that judicial review of constitutional issues is already shared due to the long tradition of nonjudicial actors interpreting and applying the Constitution); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 54–71, 154 (1999) (arguing that Congress is better suited to constitutional interpretation than the courts and advocating for limiting or eliminating certain aspects of judicial review); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515–16 (1992) (arguing that administrative agencies may be not only better than courts at deciding controversial regulatory matters but also more accountable than Congress and the President); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 226 (1990) (arguing that while judicial review is essential, it should not be the primary mechanism for resolving separation of powers disputes, and that the political branches should take greater responsibility for interpreting the Constitution and negotiating their differences to promote effective governance).

Drawing on the negotiated federalism and structural bargaining literature,[285] this Part considers possibilities for preserving judicial primacy in review of rights while sharing interpretive authority over certain structural matters through deference to legitimately consensual interbranch bargaining.

The analysis unfolds in three parts. Part IV.A advances a variation on the political safeguards theory of disaggregating the primacy of judicial interpretive authority over constitutional rights from its authority to interpret constitutional structure—preserving judicial leadership in the adjudication of rights, procedure, and disputes while opening possibilities for shared interpretive authority of structural matters that arise within the inevitable zones of overlap at the margins of separated powers. Part IV.B recognizes that the vertical separation of powers already provides some checks on the horizontal separation of powers, including intergovernmental federalism bargaining that provides a nonjudicial means of interpreting vertical separation of powers overlap. Such bargaining acts to counterbalance judicial authority in practice, but it can also do so as a normative matter, by providing nonjudicial means of constitutional interpretation.

Inspired by interpretive federalism bargaining in the vertical context, Part IV.C suggests that interpretive authority over horizontal overlap also be shared among all branches by recognizing the interpretive potential in qualifying political bargaining. These proposals join others in an emerging separation of powers literature that explores new means of diffusing and deconcentrating sovereign authority from any one center of power.

A. DISAGGREGATING JUDICIAL INTERPRETIVE PRIMACY OVER RIGHTS AND STRUCTURE

The contemporary proposals for curbing judicial power reviewed in Part II.B.2 are hounded by the formidable dilemma of delineating those circumstances in which Supreme Court interpretive primacy seems critical and those in which it seems

285. *See generally* Ryan, *Negotiating Federalism*, *supra* note 41 (exploring the interpretive value state-federal bargaining in the vertical separation of powers context); Huq, *The Negotiated Structural Constitution*, *supra* note 7 (exploring the value of interbranch bargaining in the horizontal separation of powers context); Ryan, *Navigating the Separation of Powers, supra* note 41 (comparing the use of bargaining in the horizontal separation of powers context and in the vertical-federalism context).

dangerous. It is a puzzle, because Supreme Court interpretation is often the hero of American legal storytelling (e.g., *Brown v. Board of Education*[286])—but also the villain (e.g., *Dred Scott v. Sandford*[287]). Judicial interpretation of the separation of powers, in which it often holds a patent conflict of interest, is especially fraught. Constitutional checks and balances are designed to prevent any one branch from becoming too powerful, but we rely on the Supreme Court, as the oracle of constitutional meaning, to interpret separation of powers conflicts in which it has a direct stake.[288]

As the political safeguards literature has long indicated, the mistake may be in assuming that all forms of judicial interpretation, even different forms of constitutional interpretation, must be taken together—when in fact, they can be disaggregated between those that involve rights and those that involve structure.[289]

As reviewed in Part II.B, the Horsemen's concentration of power in the judiciary has renewed public conversation about how to ensure that other branches participate in their shared, foundational duty of ensuring the actualization of constitutional values in governance. Since 1803, when the Supreme Court clarified the federal judicial role in *Marbury v. Madison*, it has been regarded as the final arbiter of constitutional interpretation, and its rulings cannot be countermanded by interpreters from the other branches[290] or other levels of government who may disagree.[291] While Congress can always enact clarifying legislation to effectively countermand the Court's interpretation of statutes, when the Court interprets *the Constitution itself*, goes the received wisdom, its word is final.[292]

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286. 347 U.S. 483 (1954) (invalidating school desegregation laws).

287. 60 U.S. (19 How.) 393 (1857) (enslaved party) (upholding the constitutionality of slavery).

288. *See* U.S. CONST. art III., § 1.

289. *See* sources cited *supra* note 284 (listing proponents of political safeguards for the structural constitution).

290. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

291. *See* Cooper v. Aaron, 358 U.S. 1, 17–19 (1958) (holding that state attempts to nullify federal law are also ineffective).

292. *See id.* at 18 (asserting that the federal judiciary is "supreme" in its exposition of the Constitution).

This judicial assumption of inviolate interpretive authority is what enables the Court to invalidate unconstitutional legislative statutes, in contrast to the British tradition of parliamentary sovereignty (which roughly presumes that if parliament enacts a law as the representatives of the people, then it is constitutional by definition).[293] The distinct American presumption is what has enabled proud jurisprudential moments like *Brown v. Board of Education*[294] and *Loving v. Virginia*,[295] in which the Supreme Court famously protected cherished constitutional commitments against misled majoritarian impulses.

That said, the same constitutional presumption also enabled such moments of profound jurisprudential shame as *Dred Scott v. Sandford*[296] and *Korematsu v. United States*,[297] in which the Court failed to uphold constitutional commitments to individual rights, leading to legitimate skepticism in the inerrant constitutional judgment of the Court.[298] After *Citizens United v. Federal Elections Commission* rejected a century of bipartisan legislative limits on corporate campaign donations,[299] *Shelby County v. Holder* overturned key portions of the Voting Rights Act approved by previous Congresses, Presidents, and Supreme Courts,[300] *Trump v. United States* shielded the President from criminal prosecution,[301] and *Loper Bright* usurped longstanding

293. *See The Judiciary*, *supra* note 59 (explaining why British courts lack power to invalidate primary legislation).

294. *See* 347 U.S. 483, 495 (1954) (invalidating school desegregation laws).

295. *See* 388 U.S. 1, 2 (1967) (invalidating anti-miscegenation laws).

296. *See* 60 U.S. (19 How.) 393, 454 (1857) (enslaved party) (upholding the constitutionality of slavery).

297. *See* 323 U.S. 214, 223–24 (1944) (upholding the internment of Japanese citizens during World War II).

298. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (citing *Dred Scott* and *Korematsu* as "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute. Together, they map out the land mines of the American constitutional order, and thereby help to constitute that order: we are what we are not.").

299. *See* 558 U.S. 310, 365–66 (2010) (invalidating laws limiting corporate campaign donations).

300. *See* 570 U.S. 529, 536–39, 557 (2013) (summarizing the enduring history of the Voting Rights Act before *Shelby County* and invalidating the Act's coverage formula).

301. 144 144 S. Ct. 2312, 2327 (2024). *Trump v. United States* could be interpreted as cutting in the opposite direction, empowering the chief executive against prosecution in the courts or by members of Congress. Still, empowering

interpretive authority from administrative agencies,[302] this skepticism was renewed. Scholars and commentators began considering new theoretical bases on which the legislature could reclaim its responsibility to participate more meaningfully as an interbranch partner in constitutional interpretation.[303]

The question presented is how to wrest sole authority for interpreting these questions, especially separation of powers questions, away from a Court so unnervingly comfortable with substituting its own judgment in place of the political branches—while preserving the force of its leadership on resolving disputes, ensuring fair process, defending rule-of-law values, and protecting counter-majoritarian rights from the whims of the majoritarian political branches against whom we hold them. The question is even more pressing today, given the Court's weakening commitment to *stare decisis*, which has empowered the current Court's supermajority interpretive alliance even further, by weakening the previously meaningful institutional constraints of prior Supreme Court consensus.

Voicing this alarm after the Court's 2024 Term, Professors Nikolas Bowie and Daphna Renan offered one potential answer, urging Congress to invoke its Article I power to enact "necessary and proper" laws to effectuate its constitutional duties[304] and its Article III powers to regulate the federal bench[305] in legislatively declaring that—like the British model—congressional statutes

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the President against the other branches, especially the specific President who helped appoint the Supreme Court supermajority that ruled in his favor, can also be interpreted as a decision shifting power toward the partisan alliance on the Supreme Court with which he is allied. *Cf.* Bulman-Pozen, *supra* note 64, at 1092–93 (discussing how partisanship intersects with the separation of powers).

302. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*).

303. *See, e.g.*, NIKOLAS BOWIE & DAPHNA RENAN, SUPREMACY: HOW RULE BY THE COURT REPLACED GOVERNMENT BY THE PEOPLE (forthcoming 2025) (on file with author) (challenging the increasing concentration of power in the Supreme Court); *see also* Nikolas Bowie & Daphna Renan, Opinion, *The Supreme Court Has Grown Too Powerful. Congress Must Intervene.*, N.Y. TIMES (Oct. 11, 2024) [hereinafter Bowie & Renan, *The Supreme Court Has Grown Too Powerful*], https://www.nytimes.com/2024/10/11/opinion/laws-congress-constitution-supreme-court.html [https://perma.cc/MS44-AFF4] (arguing that Congress must reclaim interpretive authority from the Court by statutorily creating a rebuttable presumption of statutory constitutionality).

304. U.S. CONST. art. I, § 8, cl. 18.

305. U.S. CONST. art. III, § 2, cl. 2.

are presumptively valid unless a court demonstrates that the law is "unconstitutional beyond honest dispute."[306] As they argue:

> The Supreme Court's stunning decision this summer interpreting the Constitution to give presidents broad immunity from federal criminal laws is only the latest of its many opinions undermining Congress's efforts to protect constitutional democracy, from its 19th-century invalidation of federal civil rights laws to its more recent curbing of the Voting Rights Act.
>
> Today even Americans who decry these opinions largely accept the idea that the court should have the final say on what the Constitution means. But this idea of judicial supremacy has long been challenged. And the court's immunity decision has set in motion an important effort in Congress to reassert the power of the legislative branch to reject the court's interpretations of the Constitution and enact its own.It might seem unusual for Congress to instruct federal courts how to interpret the Constitution. But [it] follows an admirable tradition, dating back to the earliest years of the United States, in which Congress has invoked its constitutional authority to ensure that the fundamental law of our democracy is determined by the people's elected representatives rather than a handful of lifetime appointees accountable to no one.Though the court has declared itself supreme in constitutional interpretation, the only thing the Constitution explicitly allows the Supreme Court to do is exercise "the judicial power." The Constitution does not define this phrase. Nor does anything about the phrase inherently give judges the power to review acts of Congress. In Britain, the same phrase has long referred to judges' power to enforce, not second-guess, the laws passed by Parliament.[307]

Following the same intuition, the No Kings Act introduced in the Senate last fall would have affirmed that Presidents and Vice Presidents do *not* have immunity for actions that violate U.S. criminal law, while also precluding the Supreme Court from hearing constitutional challenges to the Act, removing the Supreme Court's appellate jurisdiction to interfere with such criminal proceedings, and creating an interpretive presumption of constitutionality for the Act itself.[308] The appellate jurisdiction-stripping elements of the bill would arguably fall cleanly within

306. Bowie & Renan, *The Supreme Court Has Grown Too Powerful*, *supra* note 303.

307. Bowie & Renan, *The Supreme Court Has Grown Too Powerful*, *supra* note 303.

308. *See* No Kings Act, S. 4973, 118th Cong., §§ 3(a)(1), 4(a)–(b) (2024) (codifying these limitations to Supreme Court authority, executive immunity, and unconstitutionality).

Congress's authority under Article III.[309] However, the Court would likely view the presumption intended to bind its review of the constitutionality of legislative statutes as an impermissible encroachment on the judicial power.[310] While Professors Bowie and Renan provide historical and theoretical support for the move, it would escalate an interbranch separation of powers conflict into potentially new territory.

The Restoring Congressional Authority Act described in Part II.B.11 similarly repositions Congress with regard to Supreme Court interpretive authority, restoring the *Chevron* doctrine overturned in *Loper Bright* by amending the APA to include judicial deference to reasonable administrative interpretations of statutes.[311] The bill would also provide a means for Congress to overturn appellate decisions invalidating agency rules[312] (similar to powers Congress already possesses in the Congressional Review Act),[313] and it would mandate that courts consider legislative intent and purpose when reviewing agency interpretations of a statute.[314]

Legislatively second-guessing judicial interpretation of the statutory APA is a less thorny proposition than second-guessing judicial interpretation of direct constitutional doctrine—for

309. *See* U.S. CONST. art. III, § 2, cl. 2 (empowering Congress to make exceptions and regulations regarding the Supreme Court's appellate jurisdiction); *see also supra* Part II.B.2.b (discussing the potential of jurisdiction stripping legislation).

310. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 518–19 (1997) (rejecting the Religious Freedom Restoration Act because Congress does not have unlimited power to enact legislation to expand First Amendment free exercise rights through its enforcement powers in Section 5 of the Fourteenth Amendment). In *Boerne*, the Court held that it alone holds the power to interpret the substantive rights guaranteed by the Fourteenth Amendment, and that while Congress may enact proportional preventative or remedial legislation to protect this zone of rights, it may not add or detract from constitutional rights as they have been defined by the Court itself. *Id.* at 519–20 (distinguishing between preventative and remedial legislation and "measures that make a substantive change in the governing law" of constitutional rights).

311. *See* Restoring Congressional Authority Act, S. 4987, 118th Cong. § 2(b)(2) (2024) (permitting courts to order relief from agency action "only if the interpretation by the agency . . . was not reasonable").

312. *See id.* § 2(c) (providing a mechanism for "fast-track consideration" of such legislation).

313. *See* 5 U.S.C. §§ 801–802 (providing for congressional review and disapproval of certain "major rules").

314. S. 4987 § 2(b)(3)(A).

which the Court castigated Congress in *City of Boerne v. Flores*, at least in the context of Congress's power to enforce Section 5 of the Fourteenth Amendment.[315] But a Supreme Court so jealous of its own authority would almost certainly reject a statutory command to consider legislative purpose in its interpretative activity as an encroachment on the judicial role—especially a Court with a majority preference for the interpretive methodology of textualism over purposivism.[316]

Should these bills become law, they would further escalate interbranch conflict within the horizontal separation of powers—but it is a contest that the Court arguably set in motion with hegemonic moves like the Four Horsemen decisions. Commentators, theorists, and legislators are all contemplating ways to wrangle constitutional interpretive hegemony back from the Court, or at least to expand interpretive partnerships between the judiciary and the other branches, without upending the rest of our constitutional system.[317] As discussed in Part II.B.2, proposals ranging from jurisdiction stripping to constitutional amendment have been made to reign in judicial excess.

Nevertheless, none of these proposals grapples openly with the underlying problem of distinguishing those realms in which judicial primacy serves constitutional values from those realms in which it threatens them. The remainder of this Part explores ways of puncturing judicial hegemony in the separation of powers contexts that impact regulatory governance while leaving judicial primacy on dispute resolution, due process, rights protection, and rule-of-law values intact.

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315. *See* 521 U.S. at 518–19 (asserting the limited nature of Congress's power to enact legislation expanding First Amendment free exercise rights through its enforcement powers in Section 5 of the Fourteenth Amendment).

316. *See, e.g.*, VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, at Summary (2018) (describing textualism and purposivism as competing theories of statutory interpretation and explaining that "[w]hile purposivists argue that courts should prioritize interpretations that advance the statute's purpose, textualists maintain that judges should primarily confine their focus to the statute's text"); William N. Eskridge, Jr. et al. *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1612–16 (2023) (describing the textualism revolution on the Court following the leadership of Justice Antonin Scalia and observing that "[t]he Supreme Court is now dominated by devoted textualists").

317. *See supra* Part II.B (discussing such options).

B. VERTICAL FEDERALISM BARGAINING AS A CHECK ON THE HORIZONTAL SEPARATION

Short of an unlikely constitutional amendment to clarify roles or an equally unlikely judicial ruling sharing power, the best available check and balance on Supreme Court authority already in operation is the vertical separation of powers itself. As Professor Jessica Bulman-Pozen recognizes, the vertical separation of powers already provides an important check on the horizontal separation, in part because national programs of cooperative federalism counterbalance federal executive power by enabling states to participate in the policymaking and implementation that follows such legislation.[318]

Yet the mechanics of vertical federalism can also provide a valuable check on federal judicial authority, especially in regulatory contexts such as environmental law. For example, my own exploration of the Balanced Federalism model reveals an alternative way of understanding interaction in zones of vertical jurisdictional overlap that decenters courts as the sole agents for managing constitutional uncertainty.[319] Other scholars, such as Professor Aziz Huq, have identified similar dynamics within zones of overlap among the horizontal separation of powers (framed as "spillovers"),[320] important work that is the subject of the next Section.[321] This Section indicates how diffusing interpretive authority in the vertical federalism context already disrupts the pretense of judicial supremacy in constitutional interpretation, yet carefully limits its impact to structural uncertainties at the margins of separated powers. This is the realm that so often becomes the subject of intergovernmental and interbranch bargaining—including, in the horizontal context, the legislative delegation of interpretive authority to administrative agencies.

As discussed in Part III.B, I have previously described the widespread phenomenon of negotiated federalism—the use of intergovernmental bargaining in vertical separation of powers

318. *See* Bulman-Pozen, *supra* note 63, at 470 (asserting the impact of states' implementation of federal law as a check on federal executive authority).

319. *See* RYAN, TUG OF WAR, *supra* note 7, at 370–71 (summarizing the model).

320. *See generally* Huq, *The Negotiated Structural Constitution*, *supra* note 7 (examining these horizontal zones of overlap).

321. *See infra* Part IV.C (analyzing Huq's scholarship).

contexts to resolve constitutional uncertainty over jurisdictional boundaries, thereby facilitating both collaborative and competitive interaction.[322] *Negotiating Federalism*, and the fuller treatment of Balanced Federalism that followed in *Federalism and the Tug of War Within*, partner a fulsome positive account of federalism bargaining with a normative account theorizing why certain instances, nearly always conducted by political branch actors, warrant judicial deference as a legitimate means of bilaterally interpreting the vertical separation of powers.[323]

Observing that "negotiated governance is not just a de facto response to regulatory uncertainty about who should decide, but can be, in and of itself, a constitutionally legitimate way of deciding,"[324] I explained why procedurally qualifying negotiated governance can be as principled a means of allocating power along the vertical plane as unilateral judicial interpretation:

> [W]here unilateral tools fall short, bilateral bargaining offers procedurally based interpretive tools to fill gaps. Intergovernmental bargaining grounds the legitimacy of its outcome in the legitimacy of its process, when that process is consistent with the principles of fair bargaining on the one hand, and federalism values on the other. The procedural principles of fair bargaining are the necessary prerequisite, and procedural consistency with federalism values—themselves procedural values of good governance—are the ultimate criteria for interpretive deference. Once again, the values-based theory of federalism on which this inquiry is predicated locates the central purpose of federalism in the good governance values that it fosters: checks and balances, accountability and transparency, local autonomy and innovation, and the problem-solving synergy available between local and national regulatory capacity. Federalism bargaining that is procedurally faithful to these values constrains public behavior to be consistent with constitutional goals, just as federalism interpretation intends.[325]

A core insight in this work is that the constitutional directives establishing separated powers are of a different order than the directives articulating individual rights. As other theorists have also suggested,[326] defined counter-majoritarian rights

322. *See supra* Part III.B (discussing negotiated federalism in the environmental context).

323. Ryan, *Negotiating Federalism*, *supra* note 41, at 102–04 (supporting the legitimacy of bilateral federalism bargaining); RYAN, TUG OF WAR, *supra* note 7, at 339–41 (supporting the same).

324. Ryan, *Negotiating Federalism*, *supra* note 41, at 102.

325. *Id.* at 103.

326. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–86 (2000) (arguing that

directives are more appropriate for judicial interpretative primacy than the comparatively amorphous directives regarding the structure of government and separation of powers:

> In contrast to adjudicating rights, a substantive realm in which the Constitution's directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation. The boundary between state and federal authority is implied by structural directives such as the enumeration of federal powers in Article and the retention of state power in the Tenth Amendment, but neither commands the clarity of commitment that the Constitution makes to identifiable individual rights. . . . It is equally clear on the allocation of certain state and federal powers, such as which is responsible for waging war (the federal government) and which is responsible for setting the location of federal elections (the states). Yet the document gives less guidance about the correct answers to the federalism questions that become the subject of intergovernmental bargaining, such as how to balance local and national interests in coastal zone management, or how to allocate state and federal resources in criminal law enforcement. For these reasons, negotiated federalism is not only inevitable but appropriate, and arguably constitutionally invited—at least when negotiations take place within the boundaries of federalism values that are most directly understood as procedural directives.[327]

Yet when the agents of government negotiate at the margins of structural boundaries in ways that help actualize the good governance values of checks, accountability, subsidiarity, and synergy that underlie the separation of powers itself, those negotiated outcomes may themselves warrant judicial deference as a legitimate means of constitutional interpretation:

> Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court, or any branch actor interrogating the result. Of course, not all federalism bargaining will warrant such interpretive deference. Bargaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine innovation, and frustrate problem solving is not consistent with federalism values and does not warrant deference. The more consistency with these values of good governing process, the more

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political parties and other political institutions effectively safeguard federalism); *see also* sources cited *supra* note 284 (emphasizing political safeguards over judicial intervention for safeguarding federalism). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (articulating a general process-based theory of constitutional interpretation).

327. Ryan, *Negotiating Federalism*, *supra* note 41, at 112–13.

> interpretive deference is warranted; the less procedural consistency with these values, the less interpretive deference is warranted.[328]

At least in the context of the vertical separation of powers, then, this work suggests that acts of negotiated governance—when appropriately constrained by the good-faith bargaining principles of mutual consent[329] and the good governance principles that the separation of powers is designed to operationalize[330]—can prove as faithful to guaranteeing constitutional principles as any interpretive guidance the Court could come up with unilaterally. It works, in large part, because the constitutional values of accountability, transparency, autonomy, and problem-solving are essentially procedural values,[331] as legitimately advanced through appropriately constrained negotiation as they could be through armchair legal theorizing (and sometimes more so).

In other words, if the goal of interpreting constitutional directives is to ensure that these values are actualized in governance, and the political branches can advance them through appropriately constrained negotiation (that, within this theory, is independently subject to judicial review for procedural constraints),[332] then this procedural method of bilateral interpretation through bargaining can be as faithful to constitutional goals as judicial interpretation, warranting judicial deference beyond the ability of the Court to second-guess. This model of vertical interpretive bargaining provides one means of balancing interpretive aggrandizement by the Court, at least in the context of the vertical separation of powers, by recognizing at least this area of structural constitutional interpretation that is not the exclusive prerogative of courts.

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328. *Id.* at 113–14.

329. *See id.* at 105–10 (discussing the "legitimizing principle" of mutual consent); RYAN, TUG OF WAR, *supra* note 7, at 342–47 (discussing the same).

330. *See* Ryan, *Negotiating Federalism*, *supra* note 41, at 110–21 (highlighting the manner in which good governance principles can be realized through negotiated governance); RYAN, TUG OF WAR, *supra* note 7, at 347–56 (highlighting the same).

331. *See* Ryan, *Negotiating Federalism*, *supra* note 41, at 110–11 (explaining that each federalism value is "essentially about process"); RYAN, TUG OF WAR, *supra* note 7, at 347–48 (explaining the same).

332. *See* Ryan, *Negotiating Federalism*, *supra* note 41, at 114–18 (articulating the role of judicial review under a negotiated governance theory); RYAN, TUG OF WAR, *supra* note 7, at 350–54 (articulating the same).

C. POLITICAL BRANCH INTERPRETATION THROUGH CONSENSUAL BARGAINING

This analysis of interpretive bargaining in the vertical context offers an even more important means of diffusing judicial hegemony in structural interpretation—by inviting an analogous theory of interpretive bargaining in the horizontal context. As Professor Huq has shown in *The Negotiated Structural Constitution*, there is a meaningful analog between vertical federalism bargaining and the horizontal negotiations among the branches to allocate authority in the inevitable zones of overlap that exist even there. As he wryly observes, "[t]he concepts of 'legislative' and 'executive' cannot be applied to the complexities of observed governance in ways that yield resolving clarity."[333] Within these marginal zones of overlap, the political branches "have principally resorted to bargaining" as the preferred means of resolving separation of powers spillovers,[334] which may present as overlapping claims to authority or opportunities for interbranch collaboration.[335]

Huq explains that the negotiated resolution of structural uncertainty is a beneficial and inevitable feature of the constitutional order, due to the incomplete constitutional specification of governing powers and responsibilities (which, analogizing to private law bargaining, he frames as "entitlements") and the evolving demands on governance from changing social, economic, and geopolitical pressures.[336] As he describes, the legislative and executive branches have "long experimented with diverse permutations of the lawmaking process, including the legislative veto, fiscal-sequester mechanisms, line-item vetoes, and presidential budgeting."[337]

He explores the broader negotiations that arise in the contexts of rulemaking, where the legislature consensually

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333. Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1661.

334. *Id.* at 1663.

335. *See* Entin, *supra* note 284, at 177–79, 223 (arguing that Congress and the President should engage in meaningful dialogue and negotiation to resolve their disputes, rather than relying excessively on the judiciary).

336. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1601 (observing the routine nature of institutional bargaining over these entitlements).

337. *Id.* at 1600.

negotiates responsibilities for rulemaking to executive agencies,[338] and fiscal authority, where line-item vetoes represent negotiations between the branches to reallocate fiscal authority conferred to Congress in Article I.[339] Analogizing to the principles of fair economic bargaining between individuals, Huq argues that interbranch bargaining should be presumptively acceptable, as long as they do not create negative externalities, internal collective action problems, or problems of paternalism.[340]

While he does not frame his account of interbranch bargaining as "interpretive," Huq contends that the political branches, and not the courts, should determine its limits—differentiating those instances in which interbranch bargaining is beneficial and not harmful—on grounds similar to my account of negotiated federalism.[341] Although judicial review could theoretically resolve institutional boundary questions left open to interpretation by the structural constitution, Huq argues that negotiation is the superior alternative, because political branch actors are better informed about the causes, costs, and ramifications in each instance and are directly accountable to the electorate for their choices.[342] Judges lack the necessary impartiality and expertise to accurately assess benefits and drawbacks, and they may be swayed by such exogenous factors as the political context of their own appointments, the desire to protect judicial

338. *See id.* at 1621–24 (summarizing the common delegation of authority from Congress to executive agencies).

339. *See id.* at 1627 (examining the line-item veto).

340. *See id.* at 1603 ("Private negotiation and bargaining are typically viewed as augmenting social welfare through Pareto efficient trades. The apotheosis of that perspective is the Coase theorem, which predicts that private parties will bargain to efficient results, regardless of how the law assigns initial entitlements, provided that transaction costs are zero. The argument developed here, to be clear, is *not* that institutional trades are akin to deals struck by utility-maximizing individuals in a thick private marketplace. . . . [I]t is rather that the private-law context provides rough-and-ready analogies to aid in thinking about when intermural bargaining will generate desirable results on roughly welfarist grounds and when it will founder.").

341. *See id.* at 1679 (questioning that judges are well positioned to umpire interbranch bargaining).

342. *See id.* at 1683–84–4 (emphasizing democratic accountability and the capability of political branches to take constitutional questions seriously).

resources, and concern over executive enforcement of judicial orders.[343]

Moreover, judicial review is limited to resolving only those boundary negotiations that result in justiciable disputes, often between participants, thus eliding all examples in which the political branches negotiate consensually and nobody (with judicial standing) is left harmed:

> Article III's "case" and "controversy" language precludes judicial pronouncement on questions of law absent a sufficiently concrete dispute. Since the Early Republic period, Justices have resisted elected actors' exhortations to resolve hard questions of constitutional law absent some concrete dispute. At least as long as abstract review remains verboten, judicial review cannot be a comprehensive solution to the problem of institutional spillovers: At a minimum, one branch or government has to make a unilateral claim to a disputed power before the federal courts can step in. Yet . . . the prevalent pattern has not been such aggressive unilateralism, but rather a distinctly un-Madisonian cooperative spirit. Absent some reason to think that this tradition has always been wrong-headed or misguided, the persistence of spillover problems provides a threshold reason for accepting intermural bargaining as a legitimate constitutional practice.[344]

Finally, Huq critiques judicial resolutions because they often rely on "grand constitutional theory" that is contentious and may fail to provide clear answers, leading to greater uncertainty and high litigation costs that further destabilize good governance in these realms of overlap.[345]

Analogous to the vertical separation of powers context, then, the three branches of government also compete and collaborate in these marginal zones of functional overlap with uncertain constitutional boundaries. In this way, each branch contributes to the overall constitutional project by drawing from their unique well of governing insight and capacity to advance constitutional values and instantiate them in democratic governance.[346] Based on their own specialized capacity, the political branches negotiate the resolution to those uncertainties in ways that can

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343. *See id.* at 1679 (highlighting these biases and concerns); *see also* Entin, *supra* note 284, at 176 (arguing that the Court's inconsistent and uncertain methodology for analyzing the separation of powers shows that the political branches are better suited to resolve interbranch conflicts without judicial intervention).

344. Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1663.

345. *Id.* at 1676.

346. *Cf.* RYAN, TUG OF WAR, *supra* note 7, at 368–72 (presenting the analogous effect of Balanced Federalism).

outperform courts.[347] And for the same reasons that vertical federalism bargaining deserves deference, qualifying examples of horizontal interbranch bargaining also deserves judicial deference as a form of structural constitutional interpretation.

When that bargaining operates within the procedural and constitutional bounds identified in both my work and Huq's, it deserves judicial recognition and respect as a legitimate means of interpreting the structural questions it resolves. In *Negotiating Federalism* and *Federalism and the Tug of War Within*, I argued that when it is operating within fundamental fair bargaining constraints and does not violate independent constitutional rules, vertically negotiated federalism can provide a meaningful form of constitutional interpretation to establish a genuinely bilaterally negotiated answer to vertical separation of powers questions.[348] It may even do so more effectively than judicial interpretation can, because it incorporates the perspectives, interests, and consent of the very competing parties the constitution balances in equipoise, in contrast to vacillating theorizing by a small group of judges forced to imagine those perspectives and interests because they have neither experience nor a stake in the matter.

Huq's work shows that the same can be true in the horizontal context. Just as state and federal actors negotiate to interpret vague federalism directives, so legislative and executive actors interpretatively negotiate horizontal endowments in a variety of contexts, and most important to environmental law, administrative rulemaking partnerships. When the legislature delegates authority to the executive in the form of a broad statutory mandate with invitations for administrative infill, it can be understood as a form of bilateral negotiation about dividing legislative and regulatory function—in a realm where the Constitution leaves a lot of room for interpretation.[349]

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347. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1663 (stressing the necessity and efficacy of interbranch bargaining).

348. *See* Ryan, *Negotiating Federalism*, *supra* note 41, at 113–14 (asserting the effectiveness of vertically negotiated federalism under the appropriate conditions); RYAN, TUG OF WAR, *supra* note 7, at 349–50 (asserting the same).

349. *See* Entin, *supra* note 284, at 182 (1990) (explaining that the delegates to the Constitutional Convention opted for "a more ambiguous system of checks and balances, under which each branch was given a limited control over the exercise of the functions of the other branches").

If Congress decides that an executive agency has deviated from its role within the partnership or from the legislatively intended policy itself, Congress always retains the power to take back its policymaking primacy through statutory correction, as it has occasionally done to reverse an agency rule.[350] But when it accepts an agency's interpretation of its statutory command by leaving the regulation in place—as, for example, it did for decades with regard to the WOTUS rule of the Clean Water Act before *Sackett*,[351] or campaign finance limitations before *Citizens United*,[352] or the Voting Rights Act before *Shelby County*[353]—then its acceptance should be understood as a consensually and bilaterally negotiated interpretive partnership. Absent clear indications of abuse, the judiciary should respect it as a reasonable means of managing the complexity of making and implementing policy at the margins of legislative and executive power.

The interstices left unresolved in the Constitution's structural directives leave more to interpretation than the countermajoritarian commitments to individual rights enshrined in the Bill of Rights.[354] Courts lack the relevant expertise, and their judgment can be compromised by the stake they hold in the outcome[355]—a veritable conflict of interest. The temptation to interpret their own powers broadly best positions them as a co-negotiator of the resolution, rather than the unchallengeable hegemonic decider.

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350. *See* KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46673, AGENCY RESCISSIONS OF LEGISLATIVE RULES 23 n.197 (2021) ("Further, amendments to the statute granting an agency rulemaking authority could require the agency to amend or repeal a rule issued under such authority."); *see, e.g.*, Repeal of Regulations Concerning the Rural Telephone Bank, the Public Television Station Digital Transition Grant Program, and the Local Television Loan Guarantee Program, 84 Fed. Reg. 59,919 (Nov. 7, 2019) (adjusting the Code of Federal Regulations and modifying rules to remove references to several Rural Utilities Service programs that Congress repealed in the 2018 Agricultural Improvement Act).

351. Sackett v. EPA, 143 143 S. Ct. 1322 (2023).

352. Citizens United v. FEC, 558 U.S. 310 (2010).

353. Shelby County v. Holder, 570 U.S. 529 (2013).

354. *See* Entin, *supra* note 284, at 176 (critiquing judicial intervention in separation of powers interpretation).

355. *See* Huq, *The Negotiated Structural Constitution, supra* note 7, at 1679 (critiquing judicial intervention because, inter alia, judges' decisions can be influenced by the political context of their appointments and the perceived need to protect judicial resources).

Indeed, it runs counter to the constitutional theory of checks and balances underlying the separation of powers that the Supreme Court would have unquestioned final say on the scope of its own powers relative to its coequal peer branches. We should be especially skeptical of self-aggrandizing horizontal interpretations like the Horsemen (accompanied by the Court's insistence that it and *only* it can interpret the Constitution), when it does so with a vested interest in empowering itself—the smallest, least democratic, most unaccountable body of governance in the system—through the result.[356] Of the three branches, it has the least legitimate claim to interpretation in what often amounts to a policy-adjacent sphere.[357]

Even so, the Court is not without a critical role to play, for it must still ensure that the prerequisites for deference to interpretive bargaining are met. The most important constraint is that negotiations must align with the basic principles of legitimately consensual bargaining[358]—and the rule of law itself—which either side could theoretically violate by using extraconstitutional sources of power, such as personal threats, intimidation, or other unlawful means to foreclose the constitutionally assigned role of another branch.

The early days of the second Trump administration are undoubtedly a daunting occasion to construe the properly functioning separation of powers, because the President is alleged to have violated exactly these constraints by unfairly manipulating the bargaining space in his favor.[359] These allegations follow a

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356. *See id.* at 1683 (explaining that the political branches are generally better informed and more accountable than courts when it comes to resolving institutional boundary disputes because elected officials are directly responsive to the electorate, all of which makes them more suitable for negotiating and implementing interbranch deals).

357. *See id.* at 1676 (critiquing the history of ideological voting on the Supreme Court as a destabilizing force).

358. *See* RYAN, TUG OF WAR, *supra* note 7, at 342–47 ("The Legitimizing Principle of Mutual Consent"); Ryan, *Negotiating Federalism*, *supra* note 60, at 105–10 (same).

359. *See* Lisa Lerer & Michael Gold, *Trump Escalates Threats to Political Opponents He Deems the 'Enemy*,*'* N.Y. TIMES (Oct. 15, 2024), https://www.nytimes.com/2024/10/15/us/politics/trump-opponents-enemy-within.html [https://perma.cc/6T6Z-XU2D]; Dean G. Pruitt, *What Have We Learned About Negotiation from Donald Trump?*, 35 NEGOT. J. 87, 87 (2019) (academic assessment of Trump's negotiation style, which includes maximizing leverage over the other side before bargaining); *see also* Hulse, *supra* note 30 (discussing

series of early moves in his presidency designed to threaten any who stand in the way of his controversial assertions of executive power,[360] including direct and implied threats to use his influence to unseat legislators and impeach judges who oppose his agenda.[361] While politicians are free to influence elections through endorsements, campaign support, and other legal means, they should not cross the line into undue coercion, extortion, or other means that threaten the very rule of law[362]—and as Chief Justice Roberts recently reminded President Trump in an extraordinary public rebuke, it is *never* appropriate to threaten judges over an adverse ruling.[363]

As this Article goes to press, it is still too early to formally assess these bargaining dynamics, but if the legislature is disempowered from truly consensual bargaining out of undue fear or extraconstitutional coercion by the president and his allies, then the Court should scrutinize those moves before deferring to any claims of interpretive interbranch bargaining at the margins of separated powers.

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impeachment threats against made by Elon Musk and other Trump surrogates against judges who ruled against his executive orders).

360. *See supra* text accompanying notes 10–11 (discussing the unprecedented executive orders that Trump issued immediately after his second inauguration, including the elimination of Fourteenth Amendment birthright citizenship).

361. *See* sources and discussion *supra* note 359.

362. Whether an individual has crossed that line is a highly individualized question that a reviewing court would have to decide on the basis of careful, neutral fact-finding—but further complicating the picture, some courts may be reluctant to hear a claim against a political actor that could interfere with a highly salient election on grounds of the political questions doctrine. *Cf.* Alan Morrison, *Trump's Ballot Issue Is a Political Question Courts Can't Answer*, BLOOMBERG L. (Jan. 17, 2024), https://news.bloomberglaw.com/us-law-week/trumps-ballot-issue-is-a-political-question-courts-cant-answer [https://perma.cc/W8YM-967U] (arguing that courts should invoke the political questions doctrine to dismiss the case against Donald Trump for election interference).

363. *See* Andrew Chung & John Kruzel, *US Chief Justice Roberts Rebukes Trump's Attack on Judge*, REUTERS (Mar. 18, 2025), https://www.reuters.com/legal/us-chief-justice-roberts-calls-judges-impeachment-are-inappropriate-after-trump-2025-03-18 [https://perma.cc/SB5R-RDFB] ("U.S. Chief Justice John Roberts rebuked President Donald Trump on Tuesday for urging the impeachment of a federal judge, laying bare tensions between the country's chief executive and the judiciary as Trump's sweeping assertions of power run into judicial roadblocks."). As the Chief Justice warned, "For more than two centuries, it has been established that impeachment is not an appropriate response to disagreement concerning a judicial decision." *Id.*

Indeed, an individual president acting quickly at (or beyond) the margin of executive authority poses a much more serious threat to the separation of powers than the comparatively slow and diffuse deliberations of an agency staffed by politically neutral career personnel—and such bargaining accordingly deserves more searching scrutiny. If anything, the latter acts as a potentially salutary safeguard against the former.[364] The most important check on excess in either case remains judicial review, even if analysis reveals circumstances in which fairly conducted separation-of-powers bargaining deserves deference.[365]

In this unsettled constitutional moment, then, recognizing the interpretive nature of interbranch bargaining is a logical proposal for sharing horizontal power more effectively across the three coequal branches. It protects judicial primacy at the apex of courts' constitutional prowess, by continuing to privilege their roles as the resolvers of disputes, the interpreters of procedural constraints, the protectors of rule-of-law values, and most of all, the defenders of counter-majoritarian rights against the unconstitutional whims of majoritarian mobs—potentially including the legislature and executive branches.[366] Yet, courts are near the nadir of their capacity when attempting to resolve the structural constitutional uncertainties associated with comparatively vague separation of powers directives.[367] In fact, they are

364. *See* Katyal, *supra* note 17 (making this argument); Berstein & Rodriguez, *supra* note 17 (same).

365. *See supra* text following note 29 and accompanying note 30 (discussing the need to protect judicial independence, for example, to reign in presidential abuses of authority, at the same time that we must also scrutinize judicial encroachment, for example, into agency interpretation).

366. *See id.* at 1663–64 (explaining how an argument against extrajudicial constitutional interpretation and interbranch negotiation is that it compromises stability between branches and minority rights).

367. *See* Entin, *supra* note 284, at 176 (arguing that the inconsistent and uncertain methodology for analyzing the separation of powers that the Court has developed suggests that the political branches may be better suited to resolve interbranch conflicts without judicial intervention); Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1674–83 (arguing that elected actors are better suited than the courts to determine the limits to interinstitutional bargaining for a variety of reasons, including the Court's history of limiting beneficial deals while failing to address harmful ones and its lack of impartiality and expertise to accurately assess the benefits and drawbacks of interbranch deals).

patently bad at it[368]—as demonstrated by the Supreme Court's notoriously unstable separation of powers jurisprudence—creating the very uncertainty that has led to so much federalism and interbranch negotiations to resolve open constitutional questions about who gets to decide.[369]

The proposal thus protects the judicial interpretive supremacy the Court itself established in *Marbury v. Madison*[370] in the realms where judicial primacy is most warranted, but relaxes it in the contexts where the Court is most prone to err, due to the vagueness of structural constraints at the margins, and where it is most prone to self-aggrandize, due to its inherent conflict of interest in interpreting its own power relative to the other branches.

The proposal does not eliminate judicial review of structural bargaining, which could mirror a heightened hard look, arbitrary and capricious standard of review.[371] Normal judicial review should remain for procedural and nonconstitutional legal questions, with more searching review for alleged corruption or extraconstitutional abuses and more restrained review for uncomplicated consensual negotiations, following a deferential standard such as that contemplated by the Restoring Congressional Authority Act (RCAA).[372] Patent collusion between the political branches to undermine core constitutional values would trip this standard (for example, a bargain between the President and legislative majorities to disband Congress and govern solely by executive order), but a consensually negotiated interpretation

368. *See* Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1676 ("Second, the tools courts employ to resolve institutional border disputes may be clumsy, costly, and prone to manipulation—and so not necessarily superior to institutional bargaining.").

369. *See* RYAN, TUG OF WAR, *supra* note 7, at 7–17 (reviewing sources of interpretive ambiguity in the Constitution's structural directives); *id.* at 68–104 (reporting on instability in the Court's vertical jurisprudence); Huq, *The Negotiated Structural Constitution*, *supra* note 7, at 1661—64 (reporting on instability in the Court's horizontal jurisprudence).

370. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

371. *Cf.* Mark Seidenfeld, *Foreword to the Annual Review of Administrative Law: The Role of Politics in a Deliberative Administrative State*, 81 GEO. WASH. L. REV. 1397, 1448–56 (2013) (arguing that, using hard look review, courts can reject agency action that they find insufficiently justified but cannot substitute their own decisions for that of the agency).

372. *See supra* Part II.B.2 (discussing the Act and its contemplation of a reduced but preserved scope of judicial review for unconstitutionality).

causing no independent constitutional harm deserves deference of the kind the *Chevron* doctrine long afforded.

Of note, the RCAA is essentially a move to balance the American tradition of judicial review with the British tradition of parliamentary sovereignty that predated it, the legal tradition from which we inherited much of our own legal system. And today, just as the British are moving toward recognition of a greater judicial role to police for systematic abuses,[373] so should the American system recognize the importance of preserving democratic accountability by enhancing the legislative interpretive role. From the two extremes from which each system began, perhaps both are converging on a sensible zone between them.

This preliminary sketch opens a conversation that requires far deeper exploration. It leaves many open questions, such as interpretive leadership in ambiguous circumstances that raise a mix of constitutional rights, procedure, and structural questions (e.g., did the presidential immunity decision interpret a right of the President or a feature of the executive branch?). Yet recognizing interbranch negotiations not only as a feature of the system but a method of constitutional interpretation provides a potential means of de-escalating the intensifying horizontal contest for power without fully undoing the *Marbury v. Madison* regime that protects our rule of law. It retains *Marbury* for the interpretation of rights and procedure while recognizing interpretive partnerships with the political branches on structural questions at the interstices of legislation and implementation.

Congress could ratify it even over judicial objections by legislation akin to the RCAA, using its constitutional authority to strip the Supreme Court's jurisdiction over related matters. The Court is unlikely to be receptive, but that could invite even heavier-handed interbranch negotiation, akin to the "switch in time that saved nine"—the apocryphal interbranch negotiation in which legislative threats to pack the Court with executive appointees more sympathetic to the New Deal prompted key justices to rethink their own interpretations.[374]

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373. *Cf. The Judiciary*, *supra* note 59 (describing the recently established British Supreme Court but noting that it lacks the power to invalidate legislation enacted by the British Parliament under the doctrine of parliamentary sovereignty).

374. *See* Paul D. Moreno, *"So Long as Our System Shall Exist": Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 738–39 (2005)

Further research is called for, and future inquiry may reveal still other possibilities for shared horizontal interpretation. For example, Professor Jonathan Marshfield has revealed how familiar horizonal separation of power directives in state constitutions have been interpreted entirely differently from their federal counterparts, allowing for greater functional overlap and interplay among the three branches when doing so advances such core constitutional values as public accountability.[375] Such scholarship suggests other possibilities for future judicial interpretation of the analogous federal arrangement.

V. ADMINISTRATIVE ADVOCACY IN THE NEAR AND FAR TERM

This final Part imagines what legal advocates can expect to encounter in the near and far term, with various suggestions for strategy in legislative, regulatory, and judicial venues. It begins with an overall assessment of how the courts are likely to handle the Four Horsemen rules of deference in the short and long run, including the implications for how policymaking should best incorporate scientific expertise. Then it considers practical ramifications for legislation, rulemaking, and litigation, offering guidance for advocates seeking to minimize Horsemen impacts on administrative deference and, alternatively, for those seeking to leverage the new doctrines to challenge agency action. It concludes with consideration of how the Four Horsemen are likely to intersect with environmental advocacy during the second Trump administration.

A. JUDICIAL DEFERENCE IN THE NEAR AND FAR TERM

While predicting the future has become only more perilous in recent times, judicial deference to agency interpretation may prove surprisingly stable in the near term and likely inevitable in the far term—although the unfolding Trump Presidency may throw a wrench into the mix. This Section considers likely

(reporting on the events but questioning the standard interpretation). *See generally* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994).

375. *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 572–78 (2023) (arguing that state constitutional models of the separation of powers differ from the federal model by tolerating greater blending of governmental functions in service of enhancing public accountability).

judicial reactions in the immediate and distant future, as well as Horsemen-created incentives to shift scientific regulatory input from the administrative to the legislative domain—where it may be more likely to withstand judicial scrutiny, but less subject to APA norms of transparency, accountability, and public participation.

1. Judicial Deference

Notwithstanding the Four Horsemen, judicial deference to administrative action may initially remain relatively stable, at least in the lower courts—and importantly, even if they call it something else. While *Loper Bright* and *Corner Post* have already prompted many new claims,[376] advocates may encounter judicial review that is effectively consistent with traditional *Chevron* deference, or at least the weaker form of *Skidmore* deference that directs courts to defer to agency interpretations to the extent the agency has provided a persuasive basis, which even *Loper Bright* instructs courts to continue to follow.[377] If a court is persuaded independent of any formal doctrine of deference, that too is effectively a way of deferring.

A vigorous scholarly debate has erupted over the extent to which *Loper Bright*'s rejection of *Chevron* will actually change judicial practice (although there is less debate over the likely impact of *West Virginia*'s major questions doctrine).[378] A key question concerns the extent to which future courts will be willing to recognize *implied* delegations of authority to agency decisions through a small trapdoor *Loper Bright* left open. In the decision, Chief Justice Roberts shielded a class of purposeful congressional delegations by such bland statutory words as

376. *See* Thomas W. Merrill, *The Demise of Deference—and the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 245–46 (2024) (outlining the increased burden on district courts after *Loper Bright*); Craig, *supra* note 145 at 2732–45 (summarizing the early judicial response to the Four Horsemen).

377. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority; do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). *See generally* Ryan D. Doerfler, *How Clear Is "Clear"?*, 109 VA. L. REV. 651 (2023) (reviewing different principles and rationales for deference in statutory interpretation).

378. *See* Desai, *supra* note 196 (arguing that *Loper Bright* heralds more rhetorical change than actual change).

"appropriate" or "reasonable"—vague words that nevertheless imply discretion:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable."[379]

As discussed further in Part V.B.3, if the lower courts are willing to read these broadly enough to confer discretion on even agency rules that impact important political and economic policies—and reviewing appellate courts do not reverse them—then the Four Horsemen doctrines may prove less burdensome on agency rulemaking than critiques like this one have feared.[380]

Why so much anticipated deference, when it is no longer jurisprudentially required (or perhaps even desired)? Regardless of new jurisprudential hurdles, judicial deference to agency interpretation will probably remain a practical necessity for trial courts lacking the required expertise, time, and resources.[381] While the Supreme Court hears an average of eighty hand-picked cases each year, the lower courts don't get to choose their dockets.[382] Judges are experts at assessing procedural compliance, identifying clear statutory violations, and determining if rules run capriciously contrary to the rulemaking record—but assessing the content of technical agency decisions for policy ramifications falls outside the judicial wheelhouse (which, after all, is the origin of administrative deference in the first place).[383]

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379. Loper Bright, 144 S. Ct. at 2263 (citations and footnotes omitted).

380. *See* Aprill, *supra* note 196 (discussing the interpretive questions left open for courts by this passage).

381. *See* Merrill, *supra* note 376, at 245–46 (outlining the increased burden on district courts after *Loper Bright*).

382. *Id.*; *FAQs - General Information*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/XW77-Z5MA] ("The Court grants and hears oral argument in about 80 cases.").

383. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864–65 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

There is much more uncertainty among the courts of appeal, however. Some may continue to defer for similar reasons, but others will likely jump at the opportunity to impose their own interpretive judgments. The deliberation that necessarily takes place among the three judges on an appellate panel usually has a moderating effect on the most far-reaching ideological and interpretive ambitions—but not always.[384] It's already clear that the Supreme Court will not hesitate to intervene if the content of the rule holds sufficient interest for the majority (as environmental rules apparently do).[385]

Moreover, as discussed further below, the Trump administration's unprecedented moves to eliminate previous regulatory programs (and even the regulatory agencies that promulgated them) will likely prompt litigation capitalizing on the Horsemen doctrines to challenge these actions, to which courts at all levels may be receptive.[386]

Even so, the blanket judicial supremacy established by the Four Horsemen seems unsustainable in the longer term. These rules shift the equilibrium away from agency deference, but the doctrine will almost certainly have to evolve and adjust before too long—again, for the very same reasons that administrative deference arose in the first place. While the Court should continue to police for clear abuses of administrative process, the claim for substituting judicial judgment for agency expertise in what is essentially a policymaking partnership with Congress is a weak one.

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: 'Our Constitution vests such responsibilities in the political branches.'").

384. *See generally* Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319 (2009) (analyzing the results of panels at the appellate level).

385. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254–55 (2024) (describing the environmental rules providing the backdrop of the case).

386. *Cf.* Robert E. Litan & Peter M. Shane, *Trump's Regulatory Housecleaning Won't Be Easy*, BROOKINGS (Jan. 20, 2025), https://www.brookings.edu/articles/trumps-regulatory-housecleaning-wont-be-easy [https://perma.cc/5CGM-3UWB] (noting that *West Virginia* and *Loper Bright* will likely "justify far fewer rescissions than DOGE has been anticipating" and that given *Loper Bright*, "it would be incongruous for the Court in a future-litigated rescission case to give even more deference to an agency's policymaking authority than it already has under the 'arbitrary and capricious' standard of the APA")

There's a reason Congress conferred technical discretion on agencies and a similar reason why courts started deferring to their combined judgment about these delegations. Like the Court, Congress is a body of generalists—strong on broad legislative principles, weaker on the finer details of implementation—and they would struggle to muster the necessary consensus to repeatedly adapt statutory guidance with continually changing data. Indeed, neither Congress nor the courts are in as strong a position as executive agencies to evaluate the scientific inputs to policy implementation.

2. Shifting Scientific Input for Deference

One solution to the post-Horsemen insecurity of regulatory science that may no longer command deference, floated after *Loper Bright*, is to shift the research presently conducted at the agency level to the legislative branch.[387] Ideally, this would ensure that the congressional committees drafting legislation are informed by the same scientific data that, until now, has always informed agency rulemaking—and also that reviewing courts will defer to the results. Courts won't necessarily defer to scientifically informed agency rules, but they will defer to congressional directives, if the statute is sufficiently clear. Accordingly, after the Four Horsemen, there have been proposals to better fund legislative committees to hire more staff scientists, who can help legislatures craft science-informed policies at the front end, in statutes, rather than in back-end regulations.[388]

Ensuring that legislation is informed by sound science is obviously beneficial, but fully shifting the conduct and consideration of science from agencies to legislative committees is problematic for a number of reasons. Will generalist legislators be able to understand the science sufficiently to use it in articulating the finer details of policy? What if new scientific data leads to a new scientific consensus that bears on policy

387. *See* J.D. Rackey & Michael Thorning, *Building a Congress for a Post-*Chevron *World*, BIPARTISAN POL'Y CTR. (June 28, 2024), https://bipartisanpolicy.org/blog/building-congress-for-post-chevron-world [https://perma.cc/3FVL-KD37] ("To assume a more active role in policymaking, Congress will need access to levels of expertise, staff capacity, tools, and information it currently lacks. Much of the technocratic expertise of government currently resides in the executive branch. In some cases, Congress might consider how to redeploy that expertise within the legislative branch.").

388. *E.g.*, *id.* (discussing how Congress should increase its internal capacity).

implementation? Can legislative decision-making adapt as quickly as administrative rulemaking? Will the public be adequately involved?

Taking the last concern first, legislative committees receive far less public oversight than agencies subject to APA procedures.[389] Under present legislative rules, it is unclear how Congress could ever maintain the level of public participation in technical decision-making that is currently required of agencies. Congressional committees are under no formal obligation to engage public input comparable to APA notice-and-comment rulemaking.[390] Shifting scientific expertise to legislative committees would therefore undermine other core constitutional values associated with the separation of powers, such as public accountability and transparency in governance. We will never know what goes on in legislative committees, as there is tremendous pressure to keep the sausage-making that goes on in the legislative process out of public view.[391]

In addition, shifting scientific input to congressional committees would encounter the challenge of slow legislative response to changing data that requires frequent revisitation, such as key climate, demographic, or economic indicators. Agencies are the ideal branch to engage in adaptive management, especially in environmental law, where implementation efforts can be regularly adjusted in response to evolving scientific data and

389. TODD GARVEY ET AL., CONG. RSCH. SERV., IF10015, CONGRESSIONAL OVERSIGHT AND INVESTIGATIONS (2024) (describing the formation and roles of legislative committees and noting that only the legislators have oversight of committee operations, not the public).

390. 5 U.S.C. § 552 (original version at Pub. L. No. 89-554, 80 Stat. 383 (1966), amending Administrative Procedure Act § 3, ch. 324, 60 Stat. 237, 238 (1946)) (setting forth requirements for public notice and comment on proposed agency rules).

391. *See* MILDRED AMER, CONG. RSCH. SERV., RS20145, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW (2008) (describing authority for closed-door sessions of both houses of Congress); *see, e.g.*, John Larson & Nancy Altman, *Rep. Larson and Nancy Altman: Voters Want Congress to Expand Social Security—Not Cut It Behind Closed Doors*, DATA FOR PROGRESS (Feb. 29, 2024, https://www.dataforprogress.org/insights/2024/2/29/voters-want-congress-to-expand-social-security-not-cut-it-behind-closed-doors [https://perma.cc/7627-KQLB] (registering public dissatisfaction with the closed-door model of legislative deliberation)

the incoming results of initial implementation efforts.[392] Even with APA public participation requirements, it is much easier to adapt agency regulations than to amend legislative statutes. And there's no way around it: Agency subject matter experts are more likely to be able to meaningfully interpret and utilize the science than even the most quick-witted legislative generalist.

For these reasons, there will likely be mounting pressure on the Court to revise the Horsemen jurisprudence sooner rather than later. If Congress must now know at the time of drafting all the answers to the kinds of questions that agencies can no longer supply, regulatory governance threatens to break down.

Which, to give credit where it is due, is probably the entire point of the Horsemen jurisprudential approach.[393] The *Loper Bright* and major questions doctrines may appear to be neutral rules of general applicability that will symmetrically impact all agency interpretation, but as discussed in Part V.C, these rules have an antiregulatory bias.[394] All agency regulations that a paralyzed Congress did not think to specifically justify in the past and/or cannot act to justify in the present are now at risk of judicial invalidation, by a Court with a demonstrably itchy finger—and especially with regard to environmental law. Collectively, the Four Horsemen put a thumb on the scale toward regulatory inaction.[395]

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392. *See* J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J.L. SCI. & TECH. 21, 21–24 (2005) (describing that despite the initial successes of agency regulation, emerging challenges are highly complex, rapidly evolving, and difficult to understand, and thus required the development of more nimble adaptive management methods); Robin K. Craig et al., *A Proposal for Amending Administrative Law to Facilitate Adaptive Management*, ENV'T RSCH. LETTERS, July 2017, at 1, 11–16 (proposing updates to administrative law that would facilitate enhanced usage of adaptive management practices).

393. *See* sources cited *supra* note 133 (discussing the anti-regulatory bias of these decisions).

394. *Cf.* Ryan, *supra* note 21, at 630–35, 646–82 (describing the recent growth of an antiregulatory bias in both political and judicial decision-making regarding the protection of public environmental values in natural resource commons).

395. *See* sources cited *supra* note 133 (discussing the anti-regulatory bias of these decisions).

B. ADVICE FOR LEGISLATIVE DRAFTING, RULEMAKING, AND LITIGATION

In light of this changed legal context, how should legal advocates prepare to do things differently? This Section briefly reviews practical guidance for advocates and legal participants in legislation, rulemaking, and litigation.

1. Legislation

There will be new considerations for those drafting or advocating for legislation that anticipate a role for agency interpretation. In the post-Horsemen era, legislative drafters must be careful to clarify precisely when decisions are being deferred to agency experts. When delegating interpretive authority to an agency, the statute must explicitly state that the legislature is purposefully doing so, for the specific reasons laid out in the statute and legislative record.[396]

The blanket administrative deference once routinely implied by Congress will now invite judicial scrutiny in ways that may run counter to legislative objectives. It will no longer be possible to simply punt the details to the agency without directly addressing it as a legislative choice. In the new paradigm, drafters must identify clear and unambiguous congressional support for every delegation of authority, or the default rule will empower judicial interpretations without agency deference—especially in matters of economic or political importance that provide a hook for operation of the major questions doctrine.[397]

For those advocating for legislation that delegates or codifies administrative interpretive authority, such as the Restoring Congressional Authority Act,[398] it is also important to consider the challenge of public messaging to voters and stakeholders who would lobby regarding the proposed legislation. Communicating with the public about the issues raised by the Four Horsemen is difficult but critical. The public should understand that the allocation of this interpretive authority has ramifications for basic governance decisions that will directly affect people's lives

396. For a discussion of the Supreme Court's new clear statement rules in the Four Horseman decisions, see *supra* Part I—especially Part I.A (discussing the new major questions doctrine in *West Virginia*) and Part I.C (discussing the rejection of *Chevron* deference in *Loper Bright*).

397. *Id.*

398. *See supra* note 199 and accompanying text.

and businesses, including public health, safety, and environmental regulation—yet those without legal training may struggle, understandably, to grasp what is at stake.

In the wake of *Loper Bright*, the Coalition for Sensible Safeguards, a partnership of NGOs with interests in regulatory governance, researched public response to these issues and learned that most Americans don't know anything about *Chevron*.[399] Focus groups revealed that seventy-five percent of participants had never heard of the case, and when group leaders attempted to explain the issue, it was difficult for participants to understand their explanation.[400] Even those with legal training can have sympathy for this dilemma. The interbranch dynamics of allocating interpretive authority for the various components of lawmaking, implementation, and interpretation is a genuinely confusing feature of American governance.[401]

The lesson of this research is that, as with most public messaging, framing is everything.[402] Introducing judicial curbs on the ability of agency bureaucrats to interfere with legislative policymaking sounds like a good thing, even for participants whose policy preferences align with the agency regulations this approach has rejected.[403] However, reframing the same project as reducing judicial interference in the government's ability to protect the public through regulation flips the reaction.[404] Focus group leaders learned that there is low public support for "protecting federal bureaucracy," but high public support for "ensuring that civil servants can protect public health and safety."[405]

The resulting recommendations are clear for each side of the debate. Those advocating to reduce agency interpretive

399. *Public Hill Briefing on the Stop Corporate Capture Act* (Zoom meeting July 11, 2024).

400. *Id.*

401. *Cf.* Kevin Tobia et al., *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 413–39 (2023) (discussing how ordinary people think about statutory interpretation).

402. *Cf.* Nadine R. Gier et al., *Why It Is Good to Communicate the Bad: Understanding the Influence of Message Framing in Persuasive Communication on Consumer Decision-Making Processes*, FRONTIERS HUM. NEUROSCIENCE, Sept. 5, 2023, at 1, 13–14 (asserting that strategic use of message framing with an appropriate assessment of audience needs is essential to communicate effectively).

403. *Public Hill Briefing on the Stop Corporate Capture Act*, *supra* note 399.

404. *Id.*

405. *Id.*

authority should center negative messaging on the unpopular "federal bureaucracy" and "unelected bureaucrats," which is likely to produce a correspondingly negative response. Those advocating to preserve agency authority should avoid reference to "federal bureaucrats" and even "federal agencies" entirely—reorienting the message to emphasize the role of "civil servants who protect the public," and reframing agency regulations as tools for "defending the American people."[406] Partly for this reason, the Stop Corporate Capture Act introduced in the House after *Loper Bright* included the codification of *Chevron* as part of much larger legislative project, framing it as part of an overall effort to disempower the capture of government, including the judiciary, by corporate and deregulatory interests unconcerned with the wellbeing of average Americans.[407]

2. Rulemaking

Those involved in regulatory drafting and advocacy will also need to alter their approach. It will now be incumbent upon those drafting regulations to provide thorough, substantive, and explicit explanations—with legal and scientific analysis in the record—clarifying why the agency should be entrusted with the particular decisions that appear in the new rule. The same explanations should become part of the comments made in response to the proposed rule, and potentially even the agency's responses to public comments. Regulatory architects should include robust discussion of the historical or legal foundations of the agency's interpretations and conclusions in the text of both the rule and the record. If at all possible, involving legislators in the comment process will be supportive of a judicial determination that deference was legislatively intended.

After the Four Horsemen, rule drafters must make clear why the statutory interpretation promulgated in the given rule is not merely a reasonable interpretation of the statute, which was the lower threshold agencies had to meet under *Chevron*.[408] In the new paradigm, the agency's interpretation must not only

406. *Id.* As one participant explained, "If you're talking about a public agency, stop and reframe your message so that the focus is about a citizen. Reverse the subject and object if that's what you need to do." *Id.*

407. Stop Corporate Capture Act, H.R. 1507, 118th Cong. (2023).

408. *See supra* Part I.C (discussing the rejection of *Chevron* deference in *Loper Bright*).

be reasonable, but ideally, the *only* interpretation of the congressional directive that would not be an arbitrary and capricious response to the agency's own science and fact-finding in support of the rule.[409] Drafters will need to work harder than before to justify agency decision-making to generalist judges who may not understand the history, regulatory context, or technical details.

Waiting to raise these arguments until litigation defending the rule, as was possible under the old regime, may now be too late (especially in amicus briefs that courts are free to ignore).[410] To be safely persuasive in the new paradigm, all such material ideally belongs in the rule itself, the record of the rulemaking, and the comments, regardless of redundancy.

For those opposing agency rulemaking alleged to exceed congressional authority, it will be equally important to introduce opposing comments into the record that identify the core Horsemen concerns—lack of clear congressional authorization, lack of a specific delegation, ramifications for major economic or political questions—which will provide powerful tools for litigating against the rule afterward. During the rulemaking itself, opponents would be wise to ensure that as much contrary support, scientifically and otherwise, becomes part of the rulemaking record. This will facilitate opponents' subsequent arguments that the rule is arbitrary or capricious under the APA because it is unsupported by record evidence (that they introduced).

3. Litigation

Guidance for litigators will vary widely with context. As noted, some courts will likely continue to defer to agency interpretations, while others will not. For that reason, the most strategic (if unseemly) advice for litigants challenging or defending agency interpretation is to forum shop with extreme care.[411] Advocates seeking to uphold an agency rule will look for reasons to file in courts they believe are likely to support stability in

409. *Id.*

410. *See* Lefebure v. D'Aquilla, 15 F.4th 670, 673 (5th Cir. 2021) ("Courts enjoy broad discretion to grant or deny leave to amici under Rule 29.").

411. *See* Brooke Masters & Stefania Palma, *Fight over 'Forum Shopping' Heads for US Supreme Court*, FIN. TIMES (Dec. 29, 2024), https://www.ft.com/content/f3111dc3-435c-4578-84f2-642ef30234e1 [https://perma.cc/H78J-78SP] (describing controversy over the process of forum shopping, or attempting to strategically file cases in venues that are likely to be most friendly to one side of the case).

deference to agency interpretation, while those looking to overturn them will look hard in the other direction. The early filings will be extremely important, as these will be the cases and courts that will help build the post-Horsemen era of administrative law jurisprudence from the bottom up,[412] but the more deliberative appeals courts will be where precedents are forged.

Of course, the legal arguments made will reflect the strategic position of the advocate. Those seeking to overturn agency rules will be well-equipped with the language of the Four Horsemen, emphasizing the economic and political importance of the issue to invoke the major questions doctrine and the lack of a clear legislative delegation to relieve the reviewing court of administrative deference obligations. Environmental advocates resisting the barrage of deregulatory moves by the second Trump administration may capitalize on Horsemen doctrinal tools in opposing the recission of existing environmental regulations or the adoption of contrary new regulations—especially with the benefit of the rulemaking record produced in support of the original rule.[413]

Those seeking to uphold them will be wise to adapt the advice offered above for regulatory and legislative drafters—extracting all available signals of the legislature's intended delegation of interpretive authority and agency discretion. To the extent feasible, the strategic defender of an agency rule will argue that it is not only a reasonable realization of legislative intent, but the *only* possible one based on the congressional command, or that any rule stating otherwise would be an arbitrary and capricious abuse of discretion. They should strive to

412. *See generally* sources cited *supra* note 376 (discussing these early filings).

413. *See, e.g.*, Tim Henderson, *Supreme Court Ruling Hailed by Red States Could End Up Helping Blue States Resist Trump Policies*, MD. MATTERS (Jan. 2, 2025), https://marylandmatters.org/2025/01/02/ruling-by-a-conservative-supreme-court-could-end-up-helping-blue-states-resist-trump-policies [https://perma.cc/F9XN-PQMQ] ("Blue states now have a new weapon to fight conservative federal rules on issues such as immigration, climate change, abortion access and civil rights."); David Hood, *Blue State AGs Prepare to Use Loper Bright Ruling to Defend ESG*, BLOOMBERG L. (Dec. 18, 2024), https://news.bloomberglaw.com/esg/blue-state-ags-prepare-to-use-loper-bright-ruling-to-defend-esg [https://perma.cc/Y4A6-C6Z9] ("The top law enforcement officers for blue states are planning to turn conservatives' own legal arguments against them to defend environmental, social, and governance principles during the Trump-Vance administration.").

characterize the regulation they are defending as following reasonably from past practice, distinguishing the broad departure from the "long-extant" CAA approach that the Court critiqued in *West Virgina* and overturned on major questions grounds.

In fact, defenders may be advised to tailor their arguments to avoid the word "deference" entirely, in an effort to evade the political valence that now attaches to this formerly neutral concept. Instead, they might encourage the court to "give significant weight" to persuasive agency fact-finding and interpretation.

The Four Horsemen have not changed the standard mechanics of arbitrary and capricious review under the APA,[414] so the associated arguments will remain available as both a shield and a sword in litigation. At the risk of repetition, the argument could function as a shield if the advocate defends an agency rule on grounds that any other interpretation would subject the rule to reversal as an arbitrary and capricious betrayal of the congressional directive or rulemaking record. It could function as a sword if an advocate attacks an agency rule, especially one that changes or withdraws existing environmental regulations, as being arbitrary or capricious. For example, even on the cusp of overturning *Chevron* deference, the Supreme Court rejected the first Trump administration's effort to alter the administration of the 2020 Census with a new citizenship question, on grounds that the changes sought were premised on pretextual rationales that lacked support in the rulemaking record.[415]

Finally, advocates for regulations can likely exploit the Court's own recognition of the different means by which Congress may statutorily delegate interpretive authority to agencies. As noted, *Loper Bright* preserves judicial deference to agency interpretation when it is specifically invited by Congress. In the critical passage of the decision quoted in Part V.A.1, the Court describes both the kind of statute that "'expressly delegate[s]' to an agency the authority to give meaning to a

414. 5 U.S.C. § 706(2)(A) (setting forth the arbitrary and capricious standard of judicial review).

415. Dep't of Com. v. New York, 139 139 S. Ct. 2551, 2575–76 (2019) (concluding that the Commerce Department had failed to offer a persuasive record or rationale for adding the question); *see also* Ariane de Vogue & Kate Sullivan, *Supreme Court Blocks 2020 Census Citizenship Question in Setback for Trump Admin*, CNN (June 27, 2019), https://www.cnn.com/2019/06/27/politics/census-supreme-court/index.html [https://perma.cc/NYT4-88XF] (reporting on the controversy raised by the case).

particular statutory term"[416] and the kind that "empower[s] an agency to prescribe rules to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'"[417]

In either case, the Court concludes that judges must "independently interpret the statute and effectuate the will of Congress subject to constitutional limits . . . . [B]y recognizing constitutional delegations, 'fix[ing] the boundaries of the delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[418] Still, this passage clearly recognizes purposeful legislative delegations in statutory words indicating administrative judgment calls, such as "reasonably," "prudent," "necessary," and "feasible"[419]—distinguishing these statutory invitations for agency input from merely ambiguous statutory text suitable only for judicial interpretation.

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416. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)). By way of example, the Court points to the statutory requirement that the Nuclear Regulatory Commission be notified "when a facility or activity licensed or regulated pursuant to the Atomic Energy Act 'contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*.'" *Id.* at 2263 n.5 (emphasis in original) (quoting 42 U.S.C. § 5846(a)(2)).

417. *Id.* at 2263. Here, the Court offers two additional examples from environmental law, recognizing interpretive delegations to EPA in (1) the statutory directive "to regulate power plants 'if the Administrator finds such regulation is *appropriate* and *necessary*,'" *id.* at 2263 n.6 (emphasis added) (quoting 42 U.S.C. § 7412(n)(1)(A)); and in (2) a separate statutory directive that EPA establish effluent limitations "'[w]henever, *in the judgment of the [] Administrator* . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure' various outcomes, such as the 'protection of public health' and 'public water supplies,'" *id.* (emphasis added) (quoting 33 U.S.C. § 1312(a)).

418. *Id*. at 2263 (citation omitted) (first quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); and then quoting Michigan v. EPA, 576 US 743, 750 (2015)).

419. *Accord* Kisor v. Wilkie, 139 S. Ct. 2400, 2448–49 (2019) (Kavanaugh, J., concurring) ("To be sure, some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule.").

These delegated judgment calls appear frequently in environmental statutes.[420] Indeed, most of the examples the *Loper Bright* decision used to demonstrate these types of statutory delegations are taken from environmental laws, including an express delegation in the Atomic Energy Act and delegated judgments in the Clean Air and Water Acts.[421] The Court's recognition that these statutory words constitute broad delegations of authority to an agency to decide what constitutes reasonable, prudent, necessary, or feasible regulatory measures will provide important openings for advocates defending those regulations against allegations either that the statute is ambiguous and the rule entitled to no deference, or that the agency has substituted its judgment for that of Congress without express legislative approval.

Drawing on the same passage, advocates may argue that broad statutory language inviting agency judgment to "fill up the details"[422] must be recognized not as a congressional oversight but as a purposeful delegation. These arguments may not be powerful enough to head off challenges under the major questions doctrine, but they should at least provide some form of insurance against the most skeptical form of judicial review afforded to agency interpretations of ambiguous statutory commands.

Whatever happens from here, advocates on all sides of the issue will likely be focusing much more on statutory interpretation than they did before. Legal advocates of all stripes should take stock of the changed legal circumstances and consider how the new Horsemen doctrines can alternatively help or hurt their objectives. It is a good time to consider which regulatory actions are more and less vulnerable to challenges under these new rules. And for that matter, it may be worth considering how the changing legal context intersects with the changing political context as the second Trump Administration comes into power.

420. *See supra* notes 416–417 (providing examples quoted from the *Loper Bright* decision itself).

421. *See supra* notes 416–417 (providing examples).

422. *Loper Bright*, 144 S. Ct. at 2263.

C. POST-ELECTION ANALYSIS: THE FOUR HORSEMEN AND A SECOND TRUMP TERM

As a final point of consideration, it is worth reviewing the significance of the Four Horsemen now that Inauguration Day 2025 has ushered in the second Trump administration. Now that the executive branch is once again led by a President with a proud antiregulatory agenda,[423] will the new rules limiting administrative interpretive authority ricochet in unexpected directions?

Many environmental advocates initially hostile to *West Virginia* and *Loper Bright* may view the doctrines in a different light when they consider the opportunities they present to attack new agency rules or regulatory rollbacks over the next four years.[424] Commentators and strategists are already deliberating how to deploy the strategies offered in the forgoing sections to push back against the new administration's ambitious plans to eliminate both longstanding agency regulations and longstanding agencies themselves.[425] Indeed, some such optimism among environmental advocates may be warranted—to an extent.

If the first Trump administration offers any indication, there will be much friction between environmental advocates and federal agencies engaged in environmental deregulation.[426] In the post-*Chevron* era, however, agency rulemaking under President Trump will be subject to much more extensive judicial scrutiny. Courts will now have the opportunity to second-guess executive expertise, throwing the success of major agency initiatives into more uncertainty than they might have faced during the *Chevron* era.

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423. *See generally* Ryan, *supra* note 21 (discussing the antiregulatory environmental agenda of the first Trump administration).

424. *See* sources cited *supra* note 413.

425. *Cf.* Hood, *supra* note 413 ("The blue state AGs are ready to use the Supreme Court's June Loper Bright Enterprises v. Raimondo decision as a line of attack if the Trump administration issues anti-ESG edicts that aren't prescribed by Congress, Minnesota Attorney General Keith Ellison said.").

426. *Id.*; *see also* Nadja Popovich et al., *The Trump Administration Rolled Back More than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021) https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html [https://perma.cc/XD7X-XDAH] ("[N]early 100 environmental rules [were] officially reversed, revoked or otherwise rolled back under Mr. Trump. More than a dozen other potential rollbacks remained in progress by the end but were not finalized by the end of the administration's term.").

Suddenly, many agency actions—including regulatory recission—may raise "major questions" of economic and political significance, warranting new judicial scrutiny. Advocates will likely make good use of the new Horsemen tools for challenging agency decisions, litigating roadblocks to the administration's deregulatory agenda that were unavailable during the first Trump presidency. If what's good for the post-*Chevron* goose is just as good for the gander, some of these agency decisions may be overturned—at least in the lower courts.

Appointing presidents hardly predestine judges' later decisions, but presidents do strive to appoint judges with their preferred judicial philosophy. President Trump was more successful at seating federal judges than most of his recent predecessors, but President Biden caught up by the end of his term with many new appointments of lower court judges.[427] His progress was facilitated by a bipartisan Senate compromise on judicial appointments, in which Republican Senators agreed to withhold disapproval from President Biden's district court nominees if he agreed to leave the filling of four open appellate seats to incoming President Trump.[428]

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427. *See* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [https://perma.cc/P4NE-N4G5] (noting the large number of judges appointed by President Trump in a single term, which included fifty-four federal appeals court judges in four years, only one shy of the fifty-five appointed by Obama over the eight years of his two terms); Char Adams, *Biden Has Appointed More Black Federal Judges than Any Other President*, NBC NEWS (Dec. 13, 2024), https://www.nbcnews.com/news/nbcblk/biden-judicial-nominees-federal-judges-people-color-black-judges-rcna182847 [https://perma.cc/KYL2-3U4G] (noting that Biden has appointed 235 judges as of December 13, 2024, one more than President Trump appointed during his term). Although Biden appointed one more judge than Trump during his first term, Biden appointed roughly twenty percent fewer appeals court judges than Trump. *See* Cooper Burton & Amina Brown, *How Biden Reshaped the Judiciary*, ABC NEWS (Jan. 16, 2025), https://abcnews.go.com/538/biden-reshaped-judiciary/story?id=117717279 [https://perma.cc/6APP-68J4] (comparing Trump's fifty-four court of appeals appointments to Biden's forty-five).

428. *See* Nate Raymond, *Trump Gains Ability to Fill Four Appellate Judge Seats Under US Senate Deal*, REUTERS (Nov. 21, 2024), https://www.reuters.com/world/us/trump-gains-ability-fill-four-appellate-judge-seats-under-us-senate-deal-2024-11-21 [https://perma.cc/5WC6-CDNB] (describing an agreement between Senate Democrats and Republicans that allowed President Biden to appoint a group of federal trial court judges in exchange for withdrawing four nominees for federal appellate courts, leaving them to President Trump).

With such ideological diversity on the federal bench, many federal district court judges may prove more sympathetic to administrative deference than the current Supreme Court majority, and more sympathetic to deregulatory pushback by environmental advocates and others who challenge anticipated regulatory rollbacks.[429] Still, the strategy may stall once it reaches the federal courts of appeal, which include a greater number of appointees chosen by President Trump to reflect his own deregulatory philosophy. Especially his Supreme Court appointees.[430]

Regardless, it is important to note that the Four Horsemen will not have an even-handed impact on all regulatory challenges, regardless of who is presiding over the lawsuit. While these new doctrines are framed as neutral rules of general applicability—implying that whatever is good for the goose really will be equally good for the gander—the truth is that they portend a politically asymmetrical impact because they operate with an inherent, built-in antiregulatory bias.[431]

At the end of the day, the Horsemen doctrines make it easier for courts to undo regulations and harder for agencies to enforce

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429. Just as a handful of Texas district court judges were willing to enjoin Obama and Biden administration regulations nationwide, so may a handful of judges emerge willing to enjoin Trump regulations, reinforcing the unseemly practice of forum-shopping that is nevertheless becoming a litigation best-practice. *Cf.* Stephen I. Vladeck, *Why the Fifth Circuit Keeps Making Such Outlandish Decisions*, ATLANTIC (Nov. 28, 2023), https://www.theatlantic.com/politics/archive/2023/11/fifth-circuit-conservative-supreme-court/676116 [https://perma.cc/75UQ-YT3G] (cataloging "the most ridiculous—and alarming—recent rulings to come out of the U.S. Court of Appeals for the Fifth Circuit" and equating them to a judicial power grab, enabling unelected, unaccountable federal judges to implement their own policy preferences); Jeevna Sheth & Devon Ombres, *The 5th Circuit Court of Appeals Is Spearheading a Judicial Power Grab*, CTR. FOR AM. PROGRESS (May 15, 2024) https://www.americanprogress.org/article/the-5th-circuit-court-of-appeals-is-spearheading-a-judicial-power-grab [https://perma.cc/P9XL-3NSJ] (asserting that the Fifth Circuit has used "unmoored legal theories, unprecedented procedural maneuvers, and unchecked politicization" in "a judicial power grab . . . stripping power away from elected officials and American voters").

430. *See* Joan Biskupic, *Trump's Supreme Court Nominee List Reflects His Us-Versus-Them Approach to Judges*, CNN (Sept. 10, 2020), https://www.cnn.com/2020/09/10/politics/supreme-court-trump-judiciary-rule-of-law/index.html [https://perma.cc/HZ7T-PYBP] (analyzing Trump's strategy to appoint justices who are loyal to him and to his policy agenda).

431. *See* sources cited *supra* note 133 and text accompanying notes 393–395 (discussing the asymmetry of the Four Horsemen).

them. This is especially so if the rules constrain economic activity or property use—as many existing environmental regulations do—rather than facilitating economic activity. Those opposing economic constraints are more likely to allege harms that will support judicial standing, and the aggrieved parties will be more likely to sue. Advocates seeking to create new rules or enforce existing economic constraints will gain fewer benefits from these doctrines, and their claims will be less likely to achieve standing.

The Horsemen effectively weight the scale toward regulatory inaction by facilitating the rejection of any regulatory initiative that hasn't been specifically approved by Congress and which the court considers of economic or political importance—which is probably all of them. Given how this bias aligns with President Trump's stated deregulatory goals,[432] and given that the majority of the Court that will ultimately administer these challenges seems to favor related judicial goals,[433] the Horsemen may not provide equally meaningful support for environmental advocacy in the near term. Nevertheless, the wholesale regulatory recission President Trump has promised may yet trigger Horsemen scrutiny, or even trip standard APA scrutiny as arbitrary and capricious for departing from the evidentiary record that supported the initial rulemakings.

From a strategic standpoint, environmental advocates may also benefit from the inevitable delay that litigation affords. While President Trump will likely have the support of a sympathetic Congress for his first two years, he may well face a changed Congress after the 2026 midterms if past patterns hold.[434] The judicial process will take time, and just as deregulatory activists used time to stall and ultimately kill

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432. *See* Biskupic, *supra* note 430 (discussing Trump's appointment of justices loyal to him).

433. *See* sources cited *supra* note 133 (discussing the Trump administration's policy goals).

434. *See* Paul Steinhauser, *'Independent-Minded': DCCC Chair Reveals Blueprint for Winning Back Majority During 2026 Midterms*, FOX NEWS (Dec. 24, 2024), https://www.foxnews.com/politics/independent-minded-dccc-chair-reveals-blueprint-winning-back-majority-2026-midterms [https://perma.cc/L9XG-YAP5] (discussing the Democratic Party's plans to regain a majority in the House of Representatives in the 2026 midterm elections, based on historical precedent and strategy).

implementation of the Obama administration's Clean Power Plan,[435] so environmental advocates may attempt to stall until today's political winds shift.

Buying time through litigation could thus help the opponents of environmental regulatory rollbacks stall until a new Congress is seated—but only if that new Congress is able to provide legislative clarification in support of the challenged rules—itself a big "if."[436] If the Congress elected in 2026 proves as divided as it has been in recent years, it is more likely to remain paralyzed by political polarization and unable to act at all—once again, leaving the ball in the hands of the courts and the agencies, though after the Four Horsemen, mostly the Court.

CONCLUSION

The Four Horsemen decisions threaten to fundamentally alter the mechanics of lawmaking in ways that may weaken long established regulatory programs, especially in realms involving environmental protection, public health and safety, and other technical inputs. They have arguably aggrandized power to the Supreme Court at the expense of the political branches, straining the horizontal separation of powers and inspiring calls to curb judicial authority—even as judicial review remains the bedrock foundation of the rule of law. While the Trump administration may strain the separation of powers for independent reasons, we must not fail to recognize how the Court's Horsemen have undermined checks and balances even as we turn to the same Court to respond to the audacious assertions of executive authority by the new president in his first few weeks in office.

The Horsemen also affirm the importance of the vertical separation of powers. Environmental federalism has always been important—enabling multiple ports of entry to policymaking and regulatory backstop against abdication at any point on the vertical scale—and it will become even more so now. Reinvigorated environmental regulation at the subnational level will

435. *See, e.g.*, *Supreme Court Puts Obama's Clean Power Plan on Hold*, PBS NEWS (Feb. 9, 2016), https://www.pbs.org/newshour/nation/supreme-court-puts-obamas-clean-power-plan-on-hold [https://perma.cc/5W95-NQ3N] (reporting on a lawsuit by twenty-seven states, prompting the Supreme Court to take the unusual action of issuing a preemptive stay, precluding the Obama era rule from taking effect until it was mooted by the new Trump administration).

436. *See supra* Part II.A (discussing the role of Congress).

provide important opportunities for negotiated federalism, much of which is conducted by agency actors best poised to conduct the informed, adaptive, collaborative, and accountable decision-making that takes place there. Yet by weakening the interpretive flexibility of federal agencies to engage in these forums of vertical exchange, the Horsemen disempower negotiated environmental government right when we will need it most—potentially leaving state, local, and regional initiatives less empowered to cope with nationwide environmental problems without the benefit of federal authority

In response to these decisions, policymakers and academics are considering ways to wrest interpretive authority back from the Supreme Court, questioning its self-established presumption that only it can interpret all aspects of the Constitution. Proposals to revive Congress's role in constitutional interpretation and executive agency roles in interpreting legislative statutes have been introduced to Congress, including specific proposals to reverse *Sackett*, *Loper Bright*, and *Corner Post*, and to instantiate a new presumption that legislative statutes are constitutional absent overwhelming evidence to the contrary.

On the academic side, scholarly recognition of the interpretive potential of intergovernmental and interbranch bargaining provides another potential means of piercing the veil of Supreme Court interpretive supremacy while protecting judicial primacy in protecting rights, procedure, and the rule of law. The inevitability and preferability of political branch bargaining provides theoretical justification for horizontal power sharing in structural constitutional interpretation, indicating that both vertically and horizontally negotiated governance deserves interpretive deference from courts that continue to police for clear abuse.

After assessing the potential for political bargaining to balance judicial interpretation of constitutional structure, this Article offers guidance for legal advocates working in contexts of legislative drafting, rulemaking, and litigation over long and short horizons. It offers practical suggestions for those hoping to minimize Horsemen doctrinal impacts on agency interpretation—and alternatively, for those hoping to capitalize on these new doctrinal tools for challenging regulations. It also predicts that the Horsemen have swung the pendulum away from administrative deference and toward judicial interpretive supremacy beyond a stable equilibrium. The balance is likely to shift again, for the same reasons administrative deference arose in the first

place—neither the courts nor Congress possess the institutional capacity to oversee technical rulemaking the way agencies do, under the constraints of the APA, with appropriate public supervision and input.

Construing the constitutional dynamics of who should make which decisions across the horizontal and vertical dimensions of American governance is a herculean task, and this project takes on a mere sliver of the overall puzzle. Yet it begins from the conviction that the object of democratic government is to help citizens manage those problems that they cannot solve on their own, through legal means that maximize fairness, efficiency, and accountability while minimizing the potential for tyranny, corruption, and conflicts. From that vantage point, the Horsemen jurisprudence goes awry, aggrandizing power to the Court under the disingenuous guise of protecting the legislature, and failing to distinguish the vast power of the President—a single individual acutely vulnerable to the constitutional threats of tyranny and corruption—from the diffuse powers of the agencies under presidential directive. Historically, agencies are staffed by neutral career professionals who are far less powerful, much more constrained, and ordinarily less vulnerable to these concerns.

In misunderstanding these dynamics, the Four Horsemen threaten the interbranch partnership that has protected public health, safety, and welfare—including a healthy environment—for nearly half a century. Potential workarounds and political instability raise questions about the decisions' ultimate impacts, but the Supreme Court's stated intention to assume sole power for interpreting legislative statutes misses the mark. While judicial review of agency action remains an important means of advancing the rule of law, even the judicial role must have limits within a healthy separation of powers—just as each of the coequal branches of government must do.

In this moment of extreme stress on the American experiment, democratic legitimacy and accountability are on the line. As a polity, we must recommit to protecting judicial independence, while simultaneously scrutinizing the judicial usurpation of properly and inevitably political roles. It is a demanding task, but one we must not fail—and Americans have always been ripe for the challenge.

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