Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022) or: How I Learned to Stop Deferring and Forget *Chevron*

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On June 24, 2022, the Supreme Court decided a relatively obscure case over a Medicare provision. The case marks another step in the trend of the Supreme Court ignoring Chevron deference.
The Supreme Court had granted certiorari to resolve a circuit split in which the Ninth Circuit diverged from other circuits over the application of Chevron deference. The Ninth Circuit applied Chevron analysis to overrule changes promulgated by the United States Department of Health and Human Services ("HHS"), while the Sixth and D.C. Circuits came to the opposite conclusion.
But—in a surprising twist—the Supreme Court issued a decision without so much as a whisper of Chevron deference. Instead, the Court applied general rules of statutory interpretation.

I. INTRODUCTION

Courts have long used *Chevron* deference to allow agencies to have discretion to interpret ambiguous statutory text while drafting regulations. So long as the interpretation is permissible, all federal courts must defer to the agency. In *Becerra*, the agency was the Department of Health and Human Services ("HHS") and the issue before the courts was how to calculate the percentage of low-income patients a hospital serves.[1]

The Ninth Circuit created a circuit split by striking down the HHS regulations while the Sixth and D.C. Circuits deferred to HHS.[2] When the Supreme Court granted certiorari,[3] the stage was set for the greatest *Chevron* deference Medicare fraction showdown of all time. The circuit split would be resolved and the Supreme Court would provide much-needed clarity on *Chevron*. Or so we thought.

1. Becerra v. Empire Health Found., 142 S. Ct. 2354, 2360 (2022).
2. *Becerra*, 142 S. Ct. at 2356 ("The Court granted certiorari to resolve a conflict between the Ninth Circuit and two other Circuit Courts, which had approved of HHS's regulation.").
3. *Id.*

In a strange twist, the Court split 5-4, with the Court's left and right wings overruling the center.[4] And, most surprisingly, neither the majority nor the dissent mentioned *Chevron*.

Section II of this Comment covers the case history, the legal background of the Medicare Disproportionate Share adjustment, and *Chevron* deference. Section III centers on *Chevron* application, or its lack thereof in this case.

II. BACKGROUND

A. Case Description

While *Empire Health v. Becerra* deals with a "downright byzantine" regulatory interpretation of an obscure provision of the Medicare statute, the precedential value is in the Court's application (or lack thereof) of *Chevron* deference to the issue at hand.[5] The Ninth Circuit opinion, which gave rise to the Supreme Court case, meticulously followed *Chevron* deference.[6] Upon identifying that it had previously held that the Medicare statutory provision underlying the case was unambiguous, it applied *National Cable & Telecommunications Association v. Brand X Internet Services* at step one.[7] Because the HHS regulation at issue contravened an unambiguous statute as interpreted by Ninth Circuit precedent, the Court concluded that the regulation was invalid.

In its opinion, the Ninth Circuit recognized that its holding seemed at odds with the D.C. and Sixth Circuits, but argued that this case and holding were distinguishable.[8] The Ninth Circuit held that its circuit precedent invalidated the HHS interpretation under *Chevron* step one—the statute was

4. Conservative Justices Thomas and Barrett joined the Court's liberal Justices Sotomayor and Breyer in signing onto Justice Kagan's opinion. Chief Justice Roberts and Justices Gorsuch, Alito, and Kavanaugh dissented.

5. *Becerra*, 142 S. Ct. at 2362 (quoting Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 916 (D.C. Cir. 2013) (discussing the same statutory provision)).

6. See Empire Health Found. v. Azar, 958 F.3d 873, 884 (9th Cir. 2020), *reh'g denied en banc* Nos. 18-35845, 18-35872, 2020 U.S. App. LEXIS 33108 (9th Cir., Oct. 20, 2020), *cert. denied sub nom.* Empire Health Found. v. Becerra, 141 S. Ct. 2884 (2021), *cert granted sub nom.* Becerra v. Empire Health Found., 141 S. Ct. 2883 (2021), *rev'd and remanded sub nom.* Becerra v. Empire Health Found. 142 S. Ct. 2354 (2022).

7. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); *Azar*, 958 F.3d at 878 ("Because *Legacy Emanuel* interpreted the meaning of 'entitled to [Medicare]' in 42 U.S.C. § 1395ww(d)(5)(F)(vi) to be unambiguous, the 2005 Rule's conflicting construction cannot stand." (brackets in original) (quoting Legacy Emanuel Hosp. & Health Ctr. v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996)).

8. *Id.* at 885 ("[T]he Sixth and D.C. Circuits have affirmed the 2005 Rule's interpretation of the phrase 'entitled to [Medicare]' in [the DSH fractions] at *Chevron* step two." But "neither court dealt with binding circuit precedent holding that the statutory language was unambiguous, as *Legacy Emanuel* did." (quoting *Legacy Emanuel*, 97 F.3d at 1265)); *see also id.* at 884 ("The rulemaking procedure at issue here did not involve the unexpected 'volte-face' that the D.C. Circuit confronted in *Allina*." (quoting Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (2014))).

unambiguous.[9] The other circuits had no precedent holding that the language was unambiguous, and—holding the language to be ambiguous—deferred to the agency interpretation of the same language under *Chevron* step two.[10] The HHS petition for certiorari explained this difference and asked the Court to resolve the interpretive dissonance by deferring to its interpretation under *Chevron*.[11]

B. Medicare "Disproportionate Patient Percentage"

When the government reimburses hospitals for Medicare patients, the reimbursement is "based on the patient's diagnosis and regardless of the hospital's actual costs."[12] The diagnosis-based payments use an average cost and are adjusted for various factors. Adjustments include geographic location, rural or urban areas, and—as relevant here—treating an unusually high number of low-income patients. A hospital qualifying as a *disproportionate share hospital* ("DSH") receives higher rates from Medicare because low-income patients are more expensive to treat, on average, than high-income patients.[13]

The higher a DSH's share of low-income patients, the higher the per-patient rate the hospital receives. The DSH rate is set by Congress and calculated by hospitals and the HHS. Writing for the majority in *Becerra*, Justice Kagan quipped, "[w]ith that under your belt, you might be ready to absorb the relevant statutory language (but don't bet on it)."[14]

The statutorily proscribed calculation is performed by adding together two fractions: the Medicare fraction[15] and the Medicaid fraction.[16] The

9. *Id.* at 884.

10. *Contra id.*, *with Cath. Health Initiatives*, 718 F.3d at 920 ("Therefore, under [*Chevron*], we of course defer to the Department's construction."), *and* Metro. Hosp. v. U.S. Dep't of Health & Human Servs., 712 F.3d 248, 270 (6th Cir. 2013) ("[T]he resulting regulation . . . warrants judicial deference under *Chevron*.").

11. Petition for Writ of Certiorari at 27, Becerra v. Empire Health Found., 142 S. Ct. 2354 (No. 20-1312). ("[T]he Secretary's interpretation of the Medicare fraction 2004 regulation embodies the best construction of the statutory text in light of its context, structure, history, and purpose. At a minimum, it represents a reasonable reading that the court of appeals was obligated to uphold.").

12. Becerra v. Empire Health Found., 142 S. Ct. 2354, 2359 (2022).

13. *Id.* ("The mark-up reflects that low-income individuals are often more expensive to treat than higher income ones, even for the same medical conditions.").

14. *Id.*

15. 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I) ("[T]he fraction (expressed as a percentage), the numerator of which is the number of such hospital's patient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of this title [42 U.S.C. §§ 1395c et seq.] and were entitled to supplemental security income benefits (excluding any State supplementation) under title XVI of this chapter [42 USCS §§ 1381 et seq.], and the denominator of which is the number of such hospital's patient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of this title [42 USCS §§ 1395c et seq.].").

16. 42 U.S.C. § 1395ww(d)(5)(F)(vi)(II) ("[T]he fraction (expressed as a percentage), the numerator of which is the number of the hospital's patient days for such period which consist of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX

description of these fractions in the Medicare statute is the crux of what makes the interpretation so complicated.[17] The sum of the Medicare fraction and Medicaid fraction is the disproportionate patient percentage, which determines whether a hospital qualifies as a DSH and what rate adjustment it will receive for its Medicare reimbursements.[18]

The controversy in *Becerra* concerned the statutory reading of these formulae. Specifically, is a Medicare-insured patient who is not being paid for by Medicare considered "entitled to benefits under Part A" on any given day?[19] Hospitals did not want these patients counted because counting them tends to decrease their DSH percentage under the statute.[20] HHS regulations from 2004 said the patients should be counted.[21] The HHS interpretation is far easier to comprehend:

> The Medicare fraction is computed by dividing the number of patient days that are furnished to patients who were entitled to both Medicare Part A and Supplemental Security Income (SSI) benefits by the total number of patient days furnished to patients entitled to benefits under Medicare Part A.
>
> The Medicaid fraction is computed by dividing the number of patient days furnished to patients who, for those days, were eligible for Medicaid but were not entitled to benefits under Medicare Part A by the number of total hospital patient days in the same period.[22]

These fractions are intended to act as a proxy to increase reimbursement of hospitals when they serve a higher percentage of low-income patients. As more of these patients enter the patient pool, the fractions get larger, and the DSH adjustment results in higher compensation.[23]

C. Chevron Deference Concerning the Phrase "Entitled to Benefits"

The *Chevron* deference doctrine flows from the Supreme Court case, *Chevron, U.S.A., Inc. v. NRDC, Inc.*[24] Though repeatedly modified, the holding shaped administrative law and judicial interpretations for the next

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[42 USCS §§ 1396 et seq.], but who were not entitled to benefits under part A of this title [42 USCS §§ 1395c et seq.], and the denominator of which is the total number of the hospital's patient days for such period.").

17. *Becerra*, 142 S. Ct. at 2362 ("The ordinary meaning of the fraction descriptions, as is obvious to any ordinary reader, does not exactly leap off the page.").

18. *Id.* at 2359 ("To calculate a hospital's DSH adjustment, HHS adds together two statutorily described fractions, usually called the Medicare fraction and the Medicaid fraction.").

19. *See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I).

20. *Id.* at 2360 ("That percentage determines whether a hospital will receive a DSH adjustment, and if so, how large it will be.").

21. 42 C.F.R. § 412.106(b); *see also Becerra*, 142 S. Ct. at 2361 ("An HHS regulation, issued in 2004, says those patients remain so entitled.").

22. 69 Fed. Reg. 48916, 49090–91 (Aug. 11, 2004).

23. *Becerra*, 142 S. Ct. at 2360 ("The higher the disproportionate-patient percentage goes, the greater the rate mark-up that the hospital will receive.").

24. *See* Chevron USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

three decades: if a challenged agency interpretation is based on the agency's judgment, rather than its mandate, then the challenge fails.[25] Although once relying on *Chevron* extensively, the Supreme Court has increasingly refused to apply *Chevron* deference in favor of routine statutory interpretation and Court-created exceptions.[26]

1. Pre-2004 Appellate Precedent

HHS's original regulations on this point (which mirrored the regulations at bar in *Becerra*) were shot down by courts, beginning with *Jewish Hospital v. Secretary of Health & Human Services*.[27] In *Jewish Hospital*, the Sixth Circuit interpreted the DSH Medicaid fraction based on statutory language demonstrating congressional intent.[28] HHS argued for a DSH calculation where the terms "eligible" and "entitled" had the same meaning for the calculations which would shrink the DSH percentage and reduce payouts to DSH hospitals.[29] The Court disagreed, saying that this portion of the statute was not ambiguous, and the word "eligible" had a broader meaning than "entitled."[30] However, its holding stated that even if the statute was ambiguous, the HHS construction was impermissibly contrary to the statutory language.[31] Whether the Court's determination regarding the statute's unambiguousness was dicta is a matter of some debate.[32]

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25. *Id.* at 866 ("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.").

26. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))). For a chronology of the Court's recent decisions moving away from *Chevron*, see Nathan Richardson, *Deference is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 485–493 (2021).

27. Jewish Hosp. v. Sec'y of Health & Hum. Servs., 19 F.3d 270 (6th Cir. 1994).

28. *Id.* at 272.

29. *Id.* "Any day of a Medicaid patient's hospital stay that is not payable by the Medicaid program will not be counted as a Medicaid patient day since the patient is not considered eligible for Medicaid coverage on those days." *Id.* (quoting Medicare Program, 51 Fed. Reg. 17.777 (1986)).

30. *Id.* at 275 ("Adjacent provisions utilizing different terms, however, must connote different meanings.").

31. The Sixth Circuit dedicated the bulk of its analysis to its conclusion that the statute was unambiguous. *See id.* It then (apparently) relegated the section to dicta with its alternate holding that ambiguity was irrelevant. *Id.* ("We hold that, even if the language of the statute can be deemed silent or ambiguous, the Secretary's construction of the statute is *not* permissible.").

32. *See* Metro. Hosp. v. U.S. Dep't of Health & Hum. Servs., 712 F.3d 248, 273 (6th Cir. 2013) (McKeague, J., dissenting) ("The majority attempts to marginalize *Jewish Hospital*'s principal rationale by characterizing it as a 'suggestion,' because the court did not explicitly formalize its conclusion by so 'holding.' The majority proposes that the court's secondary or alternative rationale is really the decision's primary holding.").

In *Legacy Emanuel Hospital & Health Center v. Shalala*, the Ninth Circuit interpreted the same Medicaid fraction and agreed with the *Jewish Hospital* dicta that the statutory language was unambiguous.[33] It held, at *Chevron* step one, that the HHS interpretation was invalid because the word "eligible" had a different, broader meaning than "entitled."[34] The Ninth Circuit therefore incorporated the apparent dicta in *Jewish Hospital*: Congress clearly intended "entitled" to have a narrower meaning than "eligible," and only included days for which Medicaid was actually paying.[35]

In a per curiam opinion, the Eighth Circuit adopted the Sixth Circuit holding of *Jewish Hospital* in its entirety.[36] The Fourth Circuit likewise struck down the HHS interpretation, but, like *Jewish Hospital*, contended with a formidable dissent.[37] This settled the pre-2004 regulations with the circuits effectively agreeing that Congress unambiguously intended the words "eligible" and "entitled" to have different meanings (with "eligible" being more broad) and striking down the HHS's interpretation.

2. 2004 HHS Regulations Lead to Circuit Split

In 2004, HHS promulgated new regulations that, once again, treated the words "eligible" and "entitled" as effectively synonymous for purposes of calculating the Medicare and Medicaid fractions.[38] The first appellate court to address this regurgitated construction was the D.C. Circuit in *Northeast Hospital Corp. v. Sebelius*.[39] Holding that HHS could not

33. Legacy Emanuel Hosp. & Health Ctr. v. Shalala, 97 F.3d 1261, 1266 (9th Cir. 1996) ("Because the language of the statute clearly provides that the Medicaid provision includes all days attributable to Medicaid patients, whether paid or not, there is no need to look further.").

34. *Id.* ("We hold that the statutory language is clear because of Congress's use of 'eligible' rather than 'entitled,' and because Congress's overarching goal was to reimburse hospitals for the added expense of serving low-income patients.").

35. *Id.* at 1265 ("We believe the language of the Medicare reimbursement provision is clear: the Medicaid proxy includes all patient days for which a person was eligible for Medicaid benefits, whether or not Medicaid actually paid for those days of service.").

36. Because the content of the *Jewish Hospital* holding was itself ambiguous, this four-sentence, unsigned opinion provided no clarity. Deaconess Health Servs. Corp. v. Shalala, 83 F.3d 1041 (8th Cir. 1996).

37. *Compare* Jewish Hosp. v. Sec'y of Health & Hum. Servs., 19 F.3d 270, 278 (6th Cir. 1994) (Batchelder, J., dissenting) ("Medicare provisions, for reasons not readily apparent, regularly refer to potential beneficiaries under Medicare as being 'entitled' to benefits, while the Medicaid laws consistently refer to potential beneficiaries of that program as being 'eligible' for benefits."), *with* Cabell Huntington Hosp. v. Shalala, 101 F.3d 984, 992 (4th Cir. 1996) (Luttig, J., dissenting) ("Congress has . . . consistently used the words 'eligible' to refer to potential Medicaid beneficiaries and 'entitled' to refer to potential Medicare beneficiaries for no reason whatever that anyone . . . has been able to divine.").

38. 42 C.F.R. § 412.106(b) (2023).

39. The question of whether the 2004 HHS regulations were valid was not before the Court. This decision only ruled that the (presumably valid) 2004 HHS regulations could be retroactively applied. Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1, 18 (D.C. Cir. 2011) ("But we also hold that the Secretary's present interpretation, even if it would pass *Chevron* step two (an issue upon which we do not opine), may not be retroactively applied.").

retroactively apply its regulations, the court withheld judgment on the statutory provision itself.[40] Acknowledging the previous kerfuffle over the same provision, it latched onto the dissent's reasoning in *Jewish Hospital* and *Cabell Huntington Hospital, Inc. v. Shalala*,[41] stating—in dicta—that the statutory text was ambiguous, and the HHS interpretation was a permissible construction.[42] In his concurrence, then-Circuit Judge Brett Kavanaugh foreshadowed his dissent in *Becerra*, arguing that the HHS interpretation was not entitled to *Chevron* deference.[43]

The first decision on the merits of the 2004 regulations was—fittingly—in the Sixth Circuit once again. In *Metropolitan Hospital v. United States HHS*, a Sixth Circuit panel refused to accept its own reasoning from *Jewish Hospital*, instead holding that even though it had decided the unambiguous meaning of the words "eligible" and "entitled" in that case, that portion of the analysis was not part of its holding and stare decisis did not apply.[44]

Weeks later, a D.C. Circuit panel issued its own opinion on the HHS construction, relying on its *Northeast Hospital* decision and on *Metropolitan Hospital*.[45] It decided that the phrase "entitled to benefits" *was* ambiguous.[46] As a result, the court held that "under [*Chevron*], we of course defer to the Department's construction."[47] This history provided the framework upon which the Ninth Circuit upheld its decision in *Legacy Emanuel*, creating the circuit split at bar.[48]

III. COURT'S DECISION

In *Becerra*, the Court held that the HHS regulations are the correct interpretation of the Medicare statute at issue.[49] Remarkably—despite

40. *Id.*

41. *Cabell Huntington Hosp.*, 101 F.3d at 984.

42. *Ne. Hosp.*, 657 F.3d at 13 ("Congress . . . has left a statutory gap, and it is for the Secretary, not the court, to fill that gap.").

43. *Id.* at 23 n.4 (Kavanaugh, J., concurring) ("From my perspective, HHS's interpretation violates the statute, whether at *Chevron* step one or *Chevron* step two.").

44. Metro. Hosp. v. U.S. Dep't of Health & Hum. Servs., 712 F.3d 248, 256 (6th Cir. 2013) ("Answers to *other* questions that an opinion might provide, even ones that purport to define the allegedly unambiguous terms of related statutory language, are therefore not part of the *Chevron* step-one holding and thus do not foreclose future agency interpretations under *Brand X*'s analysis."). The dissent was not buying this reasoning, stating, "We have already wrestled with the very statutory provision at issue and arrived at definitive conclusions as to its meaning. In my opinion, *stare decisis* demands greater respect for our ruling in [*Jewish Hospital*]." *Id.* at 270 (McKeague, J., dissenting).

45. *See* Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 920 (D.C. Cir. 2013).

46. *Id.* ("We conclude that, although the Department's interpretation is the better one, it is not quite inevitable. Either interpretation seems permissible, a conclusion that is reinforced by our recent decision in [*Northeast Hospital*].").

47. *Id.*

48. *See* discussion *supra* Section II.A.

49. Becerra v. Empire Health Found., 142 S. Ct. 2354, 2368 (2022) ("Text, context, and structure all support calculating the Medicare fraction HHS's way.").

every previous appellate decision revolving around the application of *Chevron*—the majority holding contains no mention of *Chevron*, instead relying on good old-fashioned statutory interpretation.[50]

Justice Kagan, writing for the majority, unsurprisingly prefaced her analysis by framing the issue before the Court as whether to defer to the agency interpretation of the statute.[51] However, she never addressed that issue.[52] Instead, Justice Kagan engaged in a detailed and rigorous statutory interpretation, first explaining the statute, and then expounding the arguments of the HHS and Empire.[53]

In the analysis that followed, Justice Kagan engaged *only* with the interpretive reasoning of the HHS and of Empire,[54] relying solely on principles of statutory interpretation.[55] And, although many of her cited cases turned on the application of *Chevron*, the Justice made no mention of *Chevron* deference in her analysis.[56] The Court ultimately reached no conclusion on whether the HHS was entitled to deference, only that the HHS had the correct interpretation.[57] This is especially noteworthy because the Court upheld the statutory reasoning of the Sixth and D.C. Circuits,

50. *Id.*

51. *Id.* at 2361 ("As the Ninth Circuit recognized, two other Courts of Appeals had deferred to HHS's contrary view of the statute and upheld the regulation. . . . We granted certiorari to resolve the conflict.").

52. *See generally id.*, 142 S. Ct. 2354 (Justice Kagan never discusses agency deference in her holding).

53. *See id.* at 2358–61.

54. *See, e.g.*, *id.* at 2362 ("HHS's regulation correctly construes the statutory language at issue."); *id.* ("The text and context support the agency's reading: HHS has interpreted the words in those provisions to mean just what they mean throughout the Medicare statute."); *id.* ("Empire primarily contends, echoing the Ninth Circuit, that 'different words [mean] different things' when used in a single statute—and so 'entitled' means something different from 'eligible.'"); *id.* at 2365 ("But we cannot understand Congress to have changed the statute's consistent meaning of 'entitled to benefits' simply by adding '(for such days).'").

55. *See, e.g.*, *id.* at 2363 ("Age or disability makes a person 'entitled' to Part A benefits without an application or anything more." (citing Hall v. Sebelius, 667 F. 3d 1293, 1294–1296 (D.C. Cir. 2012))); *id.* at 2364 ("The Sixth and D.C. Circuits have cataloged several other statutory provisions that Empire's reading would render unworkable or unthinkable or both." (citing Metro. Hosp. v. U.S. Dep't of Health & Hum. Servs., 712 F.3d 248 (6th Cir. 2013); Ne. Hosp. v. Sebelius, 657 F.3d 1, 18 (D.C. Cir. 2011))); *id.* at 2365 ("If Congress 'does not alter the fundamental[s]' of a statutory scheme 'in vague terms or ancillary provisions,' then it ordinarily does not do so in parentheticals either." (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001))); *id.* ("To the contrary, a parenthetical is 'typically used to convey an aside or afterthought.'" (citing Boechler v. Comm'r, 142 S. Ct. 1493, 1498 (2022))).

56. *See Becerra*, 142 S. Ct. at 2364. A prominent example appears at the end of Justice Kagan's analysis rejecting Empire's argument that "entitled" excludes Medicare recipients not being paid for by Medicare Part A. *Id.* Justice Kagan cites *Metropolitan Hospital* and *Northeast Hospital*, both of which predicate their holdings on *Chevron* (*see* discussion *supra* Section II.C.2), but utilizes them for the statutory analysis (theoretically conducted at *Chevron* step one), ignoring the *Chevron* implications. *Id.*

57. *Id.* at 2368 ("Text, context, and structure all support calculating the Medicare fraction HHS's way.").

independent from *Chevron*—impliedly rejecting the *Chevron*-based holding of the Ninth Circuit.[58]

The dissent also made no reference to *Chevron*.[59] Although Justice Kavanaugh wrote the concurrence in *Northeast Hospital* (arguing that the HHS construction fails at *Chevron* step one and two), the *Becerra* majority did not reference *Chevron* in its opinion.[60] This creates a situation in which *Chevron* is irrelevant to Justice Kavanaugh's contention that the HHS had an incorrect statutory construction.[61] Because the majority did not mention *Chevron*, the dissent relegated it to the "dog's breakfast" category of arguments by both parties that are not worth considering.[62]

In the dissent, Justice Kavanaugh applied his own statutory interpretation before grappling with the majority opinion.[63] Interestingly, despite addressing this precise issue as a circuit judge, he claimed that "from the time the statute was enacted in 1986 until 2003, HHS interpreted this statutory provision in the exact same way that I do."[64] But, strictly speaking, this is not true. The agency had originally attempted to promulgate roughly the same regulations at bar in this case—and was blocked by the courts.[65]

IV. COMMENTARY

In summary, five Supreme Court Justices think the agency tasked with enforcement of a statute has correctly interpreted the provision at bar. Four Justices think it has not. Neither side voices any suspicion that the text—although "downright byzantine"—might be ambiguous.[66]

58. *See id.* The majority ultimately holds that the HHS construction "best implements the statute's bifurcated framework by capturing low-income individuals in each of two distinct populations a hospital serves." *Id.*

59. *See id.* at 2368–70 (Kavanaugh, J., dissenting).

60. *See supra* notes 54–56 and accompanying text.

61. *See Becerra*, 142 S. Ct. at 2368 (Kavanaugh, J., dissenting) ("Whatever HHS's precise motivations for the 2004 change, we now must focus on the statutory text and HHS's current interpretation of it."). Applying *Chevron* would have aided the majority, but the majority did not mention *Chevron*. Therefore, there was no reason for *Chevron* analysis in the dissent, either. *Id.*

62. *Id.* (Kavanaugh, J., dissenting) ("[B]oth parties offer a dog's breakfast of arguments about broad statutory purposes, real-world effects, surplusage, structure, consistent usage, inconsistent usage, *agency deference*, and the like." (emphasis added)).

63. *Id.* at 2368–69 (Kavanaugh, J., dissenting) ("But this case is resolved by the most fundamental principle of statutory interpretation: Read the statute.").

64. *Id.* at 2368 (Kavanaugh, J., dissenting).

65. *See* discussion *supra* Section II.C.1.

66. *Becerra*, 142 S. Ct. at 2362 ("The 'language is downright byzantine.'" (quoting Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 916 (D.C. Cir. 2013))). In an amusing twist, neither side even uses the word "ambiguous." *See generally id.* at 2354 (no use of the word "ambiguous" in the holding).

The major question doctrine is nowhere in sight.[67] If only there were some doctrine, shaped by nearly forty years of jurisprudence, that might be instructive. Oh well.

This commentary first examines possible explanations for the omission of *Chevron* in this case, then compares the Court's decreasing use of *Chevron* deference to a similar pattern with the *Lemon* test,[68] before finally speculating on the future of *Chevron*.

A. Ignoring the Elephant in the Room

It would be fair to take away the idea that the Court's liberal wing made a pact with the Court's originalists to agree on a conclusion for this case that did not rely on *Chevron*, thereby sparing *Chevron* further scrutiny during the Major Questions Term.[69] However, there are a couple peculiarities which cut against this view.

First, by not applying *Chevron*, the Court rejects, *sub silentio*, *Chevron*'s utility for resolving statutory ambiguity. The elephant tapdancing in the corner is the appearance that this case is tailor-made for the application of *Chevron*. If—in this case of tortuous statutory text having little import—*Chevron* is not useful, then where could it ever be useful again?

Second, in the same term, the Court decided *American Hospital Association v. Becerra*, unanimously holding that HHS had the *wrong* construction of a different Medicare provision.[70] This case *also* revolved around whether the lower courts correctly applied *Chevron* and, as here, the Supreme Court again disregarded *Chevron* and did not address whether the statute was ambiguous.[71] Justice Kavanaugh, writing for a unanimous majority, struck down the HHS interpretation of a different Medicare

67. The statutory interpretation at bar is about as deep in the weeds as the Supreme Court ever gets. *Id.* at 2360 ("This case is about how to count patients who qualify for Medicare Part A—because they are over 65 or disabled—at times when the program is not paying for their hospital treatment.").

68. *See* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

69. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022) ("This is a major questions case."); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J. concurring) ("The Court rightly applies the major questions doctrine . . . ."); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."' (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

70. Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896, 1899 (2022) ("The question is whether the statute affords HHS discretion to vary the reimbursement rates for that one group of hospitals when, as here, HHS has not conducted the required survey of hospitals' acquisition costs. The answer is no.").

71. *Compare* Am. Hosp. Ass'n v. Azar, 967 F.3d 818, 834 (D.C. Cir. 2020), *rev'd by* Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896, 1899 (2022) ("At a minimum, the statute does not clearly preclude [the HHS interpretation]. . . . That is enough to reject the Hospitals' argument under *Chevron*."), *with Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. at 1906 ("In sum, after employing the traditional tools of statutory interpretation, we do not agree with HHS's interpretation of the statute.").

provision without invoking *Chevron*.[72] A mention of *Chevron* (even in a concurring opinion) might have made *Becerra* seem less like *Chevron*'s coffin lid.

B. When the Court Hands You Lemon Analogs

Another Court-created test followed a trajectory similar to *Chevron*. In the same term the Court decided the case at bar, it also decided *Kennedy v. Bremerton School District*, which finally put a formal end to a different decades-old Court doctrine: the *Lemon* test.[73] *Kennedy* made plain that *Lemon* was no longer valid precedent, but this occurred only after decades of Court attempts to tweak the test, followed by decades of ignoring it.

The entanglement test was first employed in *Lemon v. Kurtzman* in 1971.[74] But two years later, the Court referred to it as "no more than helpful signposts."[75] In 1984, a concurrence proposed a modified-*Lemon* endorsement test.[76] Then, in 1989, the Court invoked both prior tests, while a partial dissent proposed a new coercion test.[77] By 1992, the Court notably could not be bothered to even apply *Lemon* at all.[78] And in *Town of Greece*,[79] decided in 2014, *Lemon* was relegated to a single throwaway quote in the dissent.[80] By 2022, *Kennedy* merely represented the inevitable dagger.[81]

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

73. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) ("The Court overrules [*Lemon*] and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision.").

74. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (creating the controversial test: "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.").

75. Hunt v. McNair, 413 U.S. 734, 741 (1973) ("With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three 'tests': purpose, effect, and entanglement.").

76. Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.").

77. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise.").

78. Lee v. Weisman, 505 U.S. 577, 587 (1992) (declining to apply the *Lemon* test and holding, "Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.").

79. *See* Town of Greece v. Galloway, 572 U.S. 565 (2014).

80. *Id.* at 615 (Breyer, J., dissenting) (asking if the situation "'was one of the principal evils against which the First Amendment was intended to protect.'" (quoting v. Kurtzman, 403 U.S. 602, 622 (1971))). Justice Breyer answered his question by rejecting *Lemon*: "In seeking an answer to that fact-sensitive question, 'I see no test-related substitute for the exercise of legal judgment.'" *Id.* at 615 (quoting Van Orden v. Perry, 545 U.S. 677, 600 (2005)). The majority does not mention *Lemon* at all. *See id.* at 569–92.

81. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (holding, "[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.").

With the Court invoking exceptions to *Chevron* in some cases, and ignoring it where the exceptions did not apply, is *Chevron* on the *Lemon* path?

Like *Lemon*, the *Chevron* test is court-created doctrine, intended to provide an analytical tool for lower courts to decide as the Supreme Court would.[82] Like the *Lemon* test, the *Chevron* doctrine has been repeatedly modified as the Court has attempted to guide appellate decisions.[83] Like *Lemon*, *Chevron* has been criticized by the Court.[84] And now, like the *Lemon* test, the Court has declined to apply *Chevron* even in appropriate cases.[85] All that is lacking to complete the *Lemon* incremental cycle of marginalization is a direct overruling of the test by a Court majority.[86]

C. Is Chevron *Sunk?*

Whether the final dagger falls or the Court breathes new life into *Chevron* remains to be seen. But in either case, lower federal courts are taking note of the Court's decreasing use of *Chevron*.

While ambiguity is still undesirable for litigants, they will likely benefit from the Court's decreasing deference to the government. One way to view this is that the Supreme Court is increasingly less willing to hold that a statute is ambiguous. *Becerra* is a signal to lower courts to perform a rigorous statutory analysis, and Justice Kagan leads by example. Whether the analysis is within the *Chevron* step one framework, or is *Chevron* agnostic, courts will likely attempt to make a decision on the merits, rather than use *Chevron* as an escape hatch.

Federal agencies may still argue that statutory ambiguity should entitle them to deference, but increasingly, they are waiving *Chevron*.[87] If this

82. Chevron USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."); *see also* discussion *supra* Section II.C.2.

83. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001); Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

84. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

85. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022); Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022).

86. *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (discussing judicial minimalism and incrementalism).

87. *See, e.g.*, Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1474 (2020) ("Neither the Solicitor General nor any party has asked us to give what the Court has referred to as *Chevron* deference to EPA's interpretation of the statute."); Guedes v. BATFE, 920 F.3d 1, 21 (D.C. Cir. 2019) ("In particular, in its briefing before the district court, the government expressly disclaimed any entitlement to *Chevron* deference."); Cargill v. Garland, 57 F.4th 447, 465 (5th Cir. 2023) ("First, *Chevron* does not apply for the simple reason that the Government does not ask us to apply it. Indeed, the Government affirmatively argued in the district court that *Chevron* deference is unwarranted."). Agencies may

case is any indication, courts will find less ambiguity and more legislative intent in the text of federal statutes.

V. CONCLUSION

Chevron, its progeny, and its offshoots appear to be out of fashion, if not dead. Even in a case such as *Becerra* where *Chevron* is seemingly most appropriate, the Court plunged headlong into the byzantine text. Decisions based on traditional statutory interpretation could be all the rage at this year's gala. Court watchers can be hopeful that something good may emerge from the hazy penumbra of *Chevron* precedent: clarity.

attempt to waive *Chevron* for various reasons, including an attempt to have a Court reverse its own notice-and-comment rulemaking. *See* Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1946 (2018).