

## THE POWER CANONS

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### ABSTRACT

*With three recent decisions—Utility Air Regulatory Group v. EPA, King v. Burwell, and Michigan v. EPA—the Supreme Court has embraced a new trio of canons of statutory interpretation. When an agency charged with administering a long-existing statute asserts regulatory authority it has not previously used, in a matter having large economic and political significance, its interpretation will be met with skepticism. When an agency charged with administering an ambiguous statutory provision answers a question of large economic and political significance, one central to the statutory regime, and the Court believes the agency is not an expert in the matter, the Court may ignore the agency’s interpretation altogether. And when an agency charged with administering a statute interprets an ambiguous provision to permit the agency not to consider costs before deciding to regulate, the Court will likely find that the agency acted unreasonably. In each case, the Court took interpretive power from an administrative agency, power that would normally have been the agency’s due under the Chevron framework, and kept it for itself. And in each case, the Court’s seizure of power aligned with its basic distrust of an active administrative state. I call the new canons the “power canons.”*

*The power canons not only rearrange the Chevron-dominated relationship between the courts and administrative agencies; they also realign the relationship between the courts and Congress. The*

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*power canons are clear-statement principles, directed as much to Congress as to the agencies; they instruct Congress to speak clearly if it wants to make certain substantive results available under a statutory regime. And they require clear congressional language only to enable an ambitious regulatory agenda, not to disable one. This asymmetry is the sign that the power canons mask a judicial agenda hostile to a robust regulatory state.*

*This judicial agenda has no basis in law. The power canons are not based on a careful analysis of what Congress likely meant in employing broad or ambiguous language in the relevant statutes. Nor do they come from judicial precedent. Although two of the canons draw upon previous decisions alluding to the significance (in two different senses) of an interpretive question as a factor in statutory interpretation, the recent cases both resuscitate that factor after intervening cases had signaled its demise and add new, distinctive parameters. The last canon, on regulatory costs, is utterly new.*

*Although the power canons do not align with the relevant statutes or prior judicial precedents, they are consistent with the dissatisfaction some Justices have expressed with the scope and power of the modern administrative state. In recent years, Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas have all written or joined opinions decrying the growth of the administrative state and its tension with constitutional provisions on the separation of powers. No Court majority, however, has been assembled actually to strike down any law based on the broadest constitutional theories that these Justices have espoused. However, by trimming Congress's power to enable robust regulation through broad or ambiguous language, the power canons may achieve much of what the Justices have been unable to achieve directly through their constitutional views. Thus, one way to understand the power canons is as applications of an exceedingly strong version of the constitutional avoidance doctrine, one that would permit judicial amendment of statutes even in the absence of an articulation of the constitutional problem the statutory adjustments are designed to avoid. Viewing the power canons in this way does not redeem them.*

*Some scholars have suggested that interpretive canons may be justified by appealing to broader norms. Borrowing from Professor William Eskridge's normative framework for evaluating interpretive*

*canons, I assess the power canons according to whether they promote the rule-of-law values of predictability and objectivity, democratic values, and widely shared public values. I conclude that the power canons undermine rather than promote these values. The power canons' unpredictability and subjectivity upset rule-of-law values. Their blunt approach ignores details of statutory history and design, and thus their application drives a wedge between legislative objectives and judicial outcomes. They undermine the public values of separation of powers and deliberation by enlarging the judicial power at the expense of the legislative and executive branches and by pushing back against only one side of the debate over the scope of regulatory power.*

*The Supreme Court should renounce the power canons.*

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## INTRODUCTION

With three recent decisions, the Supreme Court has embraced a new trio of canons of statutory interpretation. When an agency charged with administering a long-existing statute asserts regulatory authority it has not previously used in a matter having large economic and political significance, its interpretation will be met with skepticism.<sup>1</sup> When an agency charged with administering an ambiguous statutory provision answers a question of large economic and political significance central to the statutory regime, and the Court believes the agency is not an expert in the matter, the Court may ignore the agency's interpretation altogether.<sup>2</sup> And when an agency charged with administering a statute interprets an ambiguous provision to permit that agency not to consider costs before deciding to regulate, the Court will likely find that the agency acted unreasonably.<sup>3</sup>

In each of these cases, the Court put Congress on notice that it would need to speak clearly if it wanted to give administrative agencies interpretive authority over certain kinds of decisions.<sup>4</sup> In each case, the Court took interpretive power from an administrative agency, power that would normally have been the agency's due under *Chevron v. Natural Resources Defense Council*,<sup>5</sup> and kept it for itself. And in each case, the Court's seizure of power aligned with its basic distrust of an active administrative state.<sup>6</sup> Consistent with this politically inspired shift in power from the executive branch to the courts, I call the new canons the "power canons."

The power canons are striking enough for their rearrangement of the *Chevron*-dominated relationship between the courts and administrative agencies; however, they are even more noteworthy, and troubling, for their rearrangement of the relationship between the courts and Congress. The power canons do not just oust *Chevron* deference, which, of course, is itself a principle of statutory

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1. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

2. See *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015).

3. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707-08 (2015).

4. See *id.* at 2710; *King*, 135 S. Ct. at 2489; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

5. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

6. See *infra* notes 111-17 and accompanying text (discussing the Court's distrust).

interpretation created by the courts.<sup>7</sup> The power canons also instruct Congress that it must speak clearly if it wants to make certain substantive results available under a statutory regime.<sup>8</sup> The power canons are, in other words, clear-statement principles, directed as much to Congress as to the agencies. And they require clear congressional language to enable an ambitious regulatory agenda but not to disable one.<sup>9</sup> This asymmetry is the power canons' tell; it is a sign that they mask a judicial agenda hostile to a robust regulatory state.

This judicial agenda has no basis in law. First, it has no basis in the statutes underlying the cases in which the power canons arose. The power canons were not based on a careful analysis of what Congress likely meant in employing broad or ambiguous language in the relevant statutes. Instead, the power canons came from somewhere outside of the statutes and put a big, grumpy thumb on the scales in interpreting them. Furthermore, the judicial agenda reflected in the power canons has no basis in prior judicial opinions. The power canons either depart from or ignore prior judicial opinions on statutory interpretation.<sup>10</sup> Although two of the canons draw upon previous decisions alluding to the significance (in two different senses) of an interpretive question as a factor in statutory interpretation, the recent cases both resuscitate that factor after intervening cases had signaled its demise and add new, distinctive parameters.<sup>11</sup> The last canon, on regulatory costs, is utterly new, and it sits uncomfortably beside prior decisions on the relevance of such costs to regulatory decisions.<sup>12</sup>

Although the power canons do not align with the relevant statutes or prior judicial precedents, they are consistent with the dissatisfaction some Justices have expressed with the scope and

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7. See, e.g., *King*, 135 S. Ct. at 2488-89 (declining to apply *Chevron* at all).

8. See *Michigan*, 135 S. Ct. at 2710; *King*, 135 S. Ct. at 2489; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

9. See, e.g., *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (indicating that Congress should speak clearly if it wants agencies to have control over decisions of vast economic and political significance without addressing Congress's intent regarding disabling the statutory scheme).

10. Compare *Chevron*, 467 U.S. at 842-44 (establishing two-step framework to review an agency's interpretations of the statute it administers), with *King*, 135 S. Ct. at 2488-89 (declining to apply the *Chevron* framework).

11. See *infra* Parts I.A-B.

12. See *infra* Part I.C.3.

power of the modern administrative state. In recent years, Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas have all written or joined opinions decrying the growth of the administrative state and its tension with constitutional provisions on the separation of powers;<sup>13</sup> but no Court majority has been actually assembled to strike down any law based on the broadest constitutional theories that these Justices have espoused. However, by trimming Congress's power to enable robust regulation through broad or ambiguous language, the power canons may achieve indirectly much of what the Justices have been unable to achieve directly through their constitutional views. In fact, one way to interpret the power canons is as applications of an exceedingly strong version of the constitutional avoidance doctrine, one that would permit judicial amendment of statutes even in the absence of an articulation of the constitutional problem the judicial adjustments are designed to avoid. Viewing the power canons as applications of a problematic variant of the doctrine of constitutional avoidance—itsself a problematic interpretive canon—does not redeem them.<sup>14</sup>

The lack of a legal basis for the power canons—in statutes, judicial precedent, or constitutional doctrine—should be enough to doom them. Some scholars, however, have suggested that interpretive canons may perhaps be justified by appealing to broader norms. Such norms must, as Professor William Eskridge has argued, spring from something other than, and more than, judges' own political preferences.<sup>15</sup> Borrowing from Professor Eskridge's normative framework for evaluating interpretive canons, I assess the power canons according to whether they promote the rule-of-law values of predictability and objectivity, democratic values, or widely shared public values.<sup>16</sup>

I conclude that the power canons undermine rather than promote these normative values. The power canons' unpredictability and subjectivity upset rule-of-law values.<sup>17</sup> Their blunt approach ignores details of statutory history and design, and thus their application

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13. See *infra* Part II.A.

14. See *infra* Part II.B.

15. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 576 (2013) (reviewing SCALIA & GARNER, *infra* note 27).

16. See *infra* Part III.

17. See *infra* Parts III.A-B.

drives a wedge between legislative objectives and judicial outcomes.<sup>18</sup> The power canons also undermine the public values of separation of powers and deliberation by enlarging the judicial power at the expense of the legislative and executive branches and by leaning hard against one side of the debate over the scope of regulatory power.<sup>19</sup>

Despite their legal frailty and normative weaknesses, the power canons have already played a highly salient role in litigation over some of the Obama Administration's most ambitious executive actions. In applications to the Supreme Court for a stay of the Environmental Protection Agency's (EPA) "Clean Power Plan," setting guidelines for state regulation of greenhouse gases from power plants, the five sets of applicants leaned heavily on one of the power canons, embraced in *Utility Air Regulatory Group (UARG) v. EPA*, in arguing that the rule violated the Clean Air Act.<sup>20</sup> There is reason to believe that the five Justices who voted to grant the stay relied on this interpretive principle.<sup>21</sup> Likewise, in their challenge to the Obama Administration's largest deferred-action policy on immigration, Texas and several other states relied on *UARG* and *King v. Burwell* to argue that Congress did not give the executive branch the authority it claimed.<sup>22</sup>

The interpretive principle embraced in *Michigan v. EPA* has also been playing a large role in lower court decisions. In rejecting the Financial Stability Oversight Council's designation of insurance giant MetLife as a systemically important financial institution—or "too big to fail"—a federal district court relied on *Michigan* in

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18. See *infra* Part III.C.

19. See *infra* Part III.D.

20. See, e.g., Application by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at iii-iv, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (No. 15A773), <http://www.scotusblog.com/wp-content/uploads/2016/01/15A773-application.pdf> [<https://perma.cc/XZ6Y-AC2P>] (indicating that *UARG v. EPA* and *Michigan v. EPA* can be found "passim" in the document). The petitioners challenging the Clean Power Plan in the D.C. Circuit have also relied heavily on *UARG*. See Opening Brief of Petitioners on Core Legal Issues at 3-4, 23-34, 66, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016), [https://www.edf.org/sites/default/files/content/2016.02.19\\_petrs\\_opening\\_brief\\_pt\\_1.pdf](https://www.edf.org/sites/default/files/content/2016.02.19_petrs_opening_brief_pt_1.pdf) [<https://perma.cc/8V46-A89E>].

21. See Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENVTL. L. REV. 425, 426-29 (2016).

22. See Brief for the State Respondents at 16, 44, 52, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).



faulting the agency for not considering the costs to MetLife of subjecting the company to more intense regulation.<sup>23</sup> In addition, the D.C. Circuit, citing *Michigan* for the reasonableness of cost-benefit analysis, made quick work of an argument that the Federal Aviation Administration should have regulated the hours of cargo pilots when it restricted hours for passenger flight crews.<sup>24</sup> Given that the key statutory term at issue in *Michigan*—“appropriate”—appears more than 10,000 times in the United States Code, *Michigan* may well turn out to be the most consequential of the three cases discussed in this Article.<sup>25</sup>

Of course, the composition of the Supreme Court has changed since these three cases were decided. Justice Scalia’s death may affect the future course of the power canons. He was not only the leading developer of these canons—he wrote the majority opinion for the Court in two of the three cases featured here<sup>26</sup>—but he was also the Court’s most ardent promoter of interpretive canons in general.<sup>27</sup> In addition, he authored the majority opinions in several of the other, most central cases in the discussion that follows.<sup>28</sup> Even so, the three decisions featured here were each joined by at least four Justices who remain on the Court.<sup>29</sup> More dramatically, two elements of the power canons have been embraced by all eight current Justices: the idea that the ordinary *Chevron* calculus might be altered for questions of great “economic and political significance,” either by denying deference to an agency<sup>30</sup> or by ditching the

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23. See *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 239-42 (D.D.C. 2016), *appeal docketed*, No. 16-5086 (D.C. Cir. Oct. 24, 2016).

24. See *Indep. Pilots Ass’n v. FAA*, 638 F. App’x 6, 7 (D.C. Cir. 2016) (per curiam).

25. As of March 14, 2017, a Westlaw search for TE(appropriate) in the U.S. Code Annotated returns 10,000 results, the maximum amount that Westlaw allows.

26. See *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2434 (2014).

27. See generally, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

28. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 212 (2009); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 462 (2001); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 737 (1996); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 220 (1994).

29. See *Michigan*, 135 S. Ct. at 2702 (syllabus); *King v. Burwell*, 135 S. Ct. 2480, 2484 (2015) (syllabus); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2432 (syllabus).

30. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442-44 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

*Chevron* framework altogether,<sup>31</sup> and the presumption that an agency must, unless Congress provides otherwise, consider costs before regulating.<sup>32</sup> Thus, although it would be foolish to predict that Justice Scalia's absence will have no effect on the Court's interpretive practices going forward, it would be equally foolish to ignore the substantial support on the current Court for the interpretive principles criticized here.

In Part I, I begin by analyzing the Court's decisions embracing the power canons. I describe the content of the canons and argue that these interpretive principles were not drawn from Congress's likely intended meaning in the underlying statutes or from prior judicial precedent. The power canons are, in other words, normative, insofar as they are not based on a meaningful assessment of what Congress likely "meant ... by employing particular statutory language,"<sup>33</sup> and they are new. In Part II, I discuss the possibility that the power canons adjust the permissible reach of regulatory regimes in order to avoid constitutional anxieties about the modern administrative state. I argue that the legal weakness of the potentially applicable constitutional doctrines and the problems of the avoidance doctrine itself, and of the warped variant that would be at work here, fatally undermine use of these doctrines to justify the power canons. In Part III, I argue that the broad normative grounds that Professor Eskridge has identified for evaluating the legitimacy of interpretive canons<sup>34</sup> do not justify the power canons.

I conclude that the Supreme Court should renounce the power canons.

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31. See *King*, 135 S. Ct. at 2488-89.

32. See *Michigan*, 135 S. Ct. at 2708; *id.* at 2714 (Kagan, J., dissenting).

33. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (distinguishing normative canons from descriptive canons). I use the terminology "normative" canons, but others use the label "substantive" to refer to canons that are not based on linguistic presumptions or grammatical conventions. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 447-48 (2014). I do not mean to imply a substantive message by choosing one set of the standard terms over the other.

34. See Eskridge, *supra* note 15, at 576-82.

## I. CANONIZING POWER

In *UARG*, *King*, and *Michigan*, the Court declined to defer to agency interpretations of statutes that the agencies were charged with administering.<sup>35</sup> In *UARG* and *Michigan*, the Court found that the agencies' interpretations were unreasonable and declined to defer to either of the agencies' interpretations.<sup>36</sup> In *King*, the Court declined to apply the *Chevron* framework at all.<sup>37</sup> Combining the Justices' votes in *UARG* and *King*, all of the current Justices have now signed onto the principle that the deferential *Chevron* framework might be altered for questions of great "economic and political significance," either by denying deference to an agency (*UARG*) or by deserting the framework altogether (*King*).<sup>38</sup> Collectively, these cases suggest that at least several Justices are in a bad mood about *Chevron*, and, for that reason alone, these cases may portend more trouble ahead for administrative interpretations.

More fundamentally, these cases create a new trio of clear-statement principles, the result of which is to lodge interpretive power with the courts when the underlying statutory framework is too ambitious for the Court's comfort. I believe that the asymmetric thrust of the power canons—pushing statutory regimes away from responsiveness and dynamism and toward regulatory passivity—is, more than their dilution of *Chevron* deference, their core problem.<sup>39</sup> In this Part, however, my main burden is to describe the power canons and to explain why I believe they are both normative and new. The canons' normativity supports my later insistence that the

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35. See *Michigan*, 135 S. Ct. at 2708; *King*, 135 S. Ct. at 2488-89; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442.

36. See *Michigan*, 135 S. Ct. at 2708; *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442-44.

37. See *King*, 135 S. Ct. at 2488-89.

38. In *UARG*, Justice Scalia was joined in Part II-A of his opinion by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. 134 S. Ct. at 2432 (syllabus). In *King*, Chief Justice Roberts's opinion was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. 135 S. Ct. at 2484 (syllabus). For a thoughtful discussion of the Justices' potentially differing motivations for joining this part of the opinion in *King*, see Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 62-66.

39. But see Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 359-60 (2016) (arguing that the three cases discussed here are normatively justified precisely because they reflect selective carve-outs from *Chevron*).

canons at least be normatively justified.<sup>40</sup> Their novelty simultaneously begs for a normative justification,<sup>41</sup> and helps to defeat normative claims that might be made on their behalf.<sup>42</sup>

The power canons' novelty might also make one hesitant to call them "canons"; this category, one might insist, includes only very old rules—rules so old, indeed, they have Latin names.<sup>43</sup> By using the term "canon," I mean simply to refer to the way I believe the Supreme Court has treated the power canons—as rules or principles of interpretation. Litigants and lower courts have also been treating the power canons this way.<sup>44</sup> It may well be that valid or at least normatively unproblematic interpretive canons are usually distinguished by their antiquity. But it would be reckless to ignore the rule-like character with which the Supreme Court has imbued the power canons just because one thinks "canons" cannot be brand new. Apparently, for now, they can.

## A. Utility Air Regulatory Group v. EPA

### 1. *The Canon*

In *UARG*, the Court considered whether the Environmental Protection Agency (EPA) had reasonably interpreted the Clean Air Act to require permits for stationary sources of greenhouse gases once those air pollutants were regulated under a separate provision of the Act addressing mobile sources.<sup>45</sup> The Court concluded that this interpretation was unreasonable because it would have, for the first time, ushered in a permitting requirement for potentially millions of relatively small sources, straining government resources past the breaking point.<sup>46</sup> To forestall this result, EPA had issued a rule

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40. See *infra* Part III.

41. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125-26 (2001).

42. See *infra* Part III.A (discussing power canons' failure of predictability, partly on grounds of novelty).

43. See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344-45, 352 (2010) (discussing how canons of legal interpretation have been "used since antiquity," noting examples such as *expressio unius* and *eiusdem generis*).

44. See *supra* notes 20-24 and accompanying text.

45. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2434 (2014).

46. See *id.* at 2442-44.

phasing in the permitting requirement over time.<sup>47</sup> The Court, however, also rejected this attempt to soften the blow of the new permitting requirement by phasing it in over a period of years.<sup>48</sup>

The Court chastised EPA for finding in its longstanding Clean Air Act authority the power to regulate a large group of relatively small stationary sources.<sup>49</sup> The Court, with Justice Scalia writing for the majority, reviewed EPA's interpretation under the *Chevron* framework and concluded that EPA's interpretation of the triggering event for the Clean Air Act's permitting requirement was unreasonable, because it greatly expanded EPA's regulatory authority:

EPA's interpretation is ... unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." ... Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. Since ... the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.<sup>50</sup>

Part of the problem for EPA, then, was that it was at once claiming an obligation to regulate relatively small sources and disclaiming

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47. *See id.* at 2444-46.

48. *See id.* at 2446.

49. *See id.*

50. *Id.* at 2444 (citations omitted) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129 (2000); then quoting *id.* at 160; and then quoting Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,555 (June 3, 2010) (to be codified at 40 C.F.R. pt.70)). Here, Justice Scalia is speaking for five Justices. Two Justices joined Scalia for the entire opinion, and two other Justices joined those three in the second-to-last part of his opinion, discussing specific requirements for permitted sources. *See id.* at 2432 (syllabus).

the capacity to do so.<sup>51</sup> To the extent that EPA got into trouble because it had declined to exercise the full force of the regulatory authority it had just asserted, it might be fair to describe the interpretive principle of the above paragraph as applying only when an agency goes less than full bore in using its regulatory authority. In this rendering, the Court's decision in *UARG* could be understood as faulting EPA not for delivering a regulatory punch, but for pulling one.

It is hard, however, to ignore the antiregulatory tone of the quoted passage. The Court had, after all, declined to review the question involving a direct challenge to EPA's rule phasing in, over time, the permitting requirements for stationary sources emitting greenhouse gases.<sup>52</sup> Indeed, the D.C. Circuit had found that parties challenging this separate rule had no standing to do so because the rule relieved their regulatory burden rather than adding to it.<sup>53</sup> The direct target of the Court's review in *UARG* was not the relaxation of regulatory requirements under the Clean Air Act, but the activation of them.<sup>54</sup>

Given this context, it seems fairest to infer from the quoted passage a canon of interpretation along the following lines: when an agency interprets a "long-extant statute" to permit it to regulate in an area of "vast 'economic and political significance,'" the Court will, in the absence of clear congressional authorization, "greet its announcement with a measure of skepticism."<sup>55</sup>

This canon is normative, and it is new.

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51. See *id.* at 2444 (majority opinion).

52. See *Util. Air Regulatory Grp.*, 134 S. Ct. 418 (2013) (mem.) (granting review limited to question of "[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases"); Petition for a Writ of Certiorari at 1, *Util. Air Regulatory Grp.*, 134 S. Ct. 2427 (No. 12-1146) (asking for review on both the timing and substance of the proposed EPA regulation).

53. See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 147-48 (D.C. Cir. 2012), *aff'd in part, rev'd in part sub nom. Util. Air Regulatory Grp.*, 134 S. Ct. at 2427.

54. See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2438-39.

55. *Id.* at 2444 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

## 2. Normativity

The *UARG* canon does not rest on, or even purport to rest on, Congress's likely meaning in using the relevant language of the Clean Air Act. Instead, as the Court describes it, this interpretive principle rests on an expectation of clarity created by the Court itself: "*We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'*"<sup>56</sup> This canon is both a presumption against certain kinds of agency interpretations and an instruction to Congress: if Congress wants to assign economically and politically important regulatory questions to an agency, it must speak clearly. And it must have done so under "long-extant" statutes that (long) predated the Court's embrace of this canon.<sup>57</sup>

Even if the Court had purported to rest the new canon on the kind of language Congress would likely have used if it had intended to grant the asserted power to EPA, it would be hard to credit such a claim. The Court held that the Clean Air Act was ambiguous as to the inclusion of sources, based solely on account of their emission of greenhouse gases, within the stationary-source permitting program.<sup>58</sup> An assertion that Congress would have spoken more clearly if it had meant to give EPA the power to include these sources in the program<sup>59</sup> ignores the puzzle introduced by ambiguity: how is the legislature supposed to "speak clearly" in assigning interpretive authority to an agency, when the legislature is enacting a statutory provision that is, according to the Court, ambiguous?<sup>60</sup> The interpretive principle in *UARG* is an instruction to Congress to avoid ambiguity altogether in some cases.<sup>61</sup>

Moreover, the notion that Congress can be expected to explicitly delegate certain matters to administrative agencies if it wishes the agencies to resolve ambiguities related to them is belied by Congress's general reticence about such delegations. As then-Professors David Barron and Elena Kagan observed in an article on *Chevron's*

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56. *Id.* (emphasis added) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

57. *Id.*

58. *See id.* at 2442-44.

59. *See id.* at 2444.

60. *See id.* at 2442-44.

61. *See id.* at 2444.

reach, Congress has almost never expressly stipulated the level of, or fact of, deference to be given to implementing agencies.<sup>62</sup> Congress has remained silent on interpretive delegations despite the fact that, among congressional aides, *Chevron* itself is the best known of all of the judge-made rules of statutory interpretation.<sup>63</sup> It thus would be hard to credit an implication that the *UARG* canon reflects the clarity with which Congress can be expected to delegate interpretive authority over certain matters. It is not only that Congress does not speak clearly about interpretive delegations; most often, it does not speak at all.<sup>64</sup> The *UARG* canon is therefore best understood as the Court in fact describes it: as an instruction to Congress about the degree of clarity it must use in delegating certain kinds of questions to agencies, not as an observation about the degree of clarity Congress does use.<sup>65</sup>

In fact, Congress must not only be clear, but also clairvoyant. Congress must anticipate that it will not have foreseen all problems that will arise and that will come within a statute's regulatory range. Congress must then foresee that the agency to which it has given regulatory authority will, when new problems arise, try to address those problems with its existing authority even though—because the problems are new—the agency has not addressed them before. Having foreseen all of these events, Congress then must use statutory language that pellucidly covers the future problems and gives the agency the power to address them. The Court might as well have instructed Congress to fabricate a crystal ball.

### 3. Novelty

The *UARG* canon is also novel, departing from judicial precedent in several respects.

First, in requiring a clear statement from Congress in order to delegate to an agency interpretive authority over important questions,

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62. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 215-16.

63. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995-96 (2013).

64. See *id.* at 996-97.

65. See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.



*UARG* departs notably from *Chevron* itself. *Chevron*, of course, deemed the trigger for such delegation to be just the opposite: statutory silence or ambiguity, not clarity.<sup>66</sup> *UARG*'s reversal of the terms of *Chevron* deference came, moreover, on the heels of a Term in which the Court (also per Justice Scalia) had strenuously refused to withhold *Chevron* deference for interpretations that concern the scope of an agency's regulatory authority.<sup>67</sup> In *City of Arlington v. FCC*, Justice Scalia had called out any distinction between "jurisdictional" and "nonjurisdictional" agency interpretations—or, as he put it, between "the big, important" interpretations and "[o]thers—humdrum, run-of-the-mill stuff"—as a "bogeyman, but ... dangerous all the same."<sup>68</sup> Yet the *UARG* canon appears to embrace this very distinction: gimlet-eyed scrutiny for "big, important" agency interpretations, and a *Chevron* pass for the small stuff.<sup>69</sup>

Second, in disfavoring ambitious agency interpretations of "long-extant" statutes, *UARG* privileges, in a new and very un-*Chevron* way, stasis over change. Here, too, good evidence of *UARG*'s novelty comes from Justice Scalia himself. In *Smiley v. Citibank (South Dakota)*, Justice Scalia, on behalf of the unanimous Court, endorsed *Chevron* deference for an ambitious agency interpretation of the long-extant National Bank Act and affirmed a regulation of the Comptroller of the Currency deeming credit card late fees to be "interest" within the meaning of the Act and thus subject to state regulation "by the laws of the State ... where the bank is located."<sup>70</sup> The upshot was that Citibank could charge late fees to customers who lived in states where those fees were illegal.<sup>71</sup> The Comptroller's rule thus effectively loosened existing regulation of banks by condoning deregulation by states in which the banks were located. The Comptroller's rule (and the Court's endorsement of it) aided in South Dakota's capture of over \$2.5 trillion in banking assets held

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66. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

67. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013).

68. *Id.* at 1868, 1872.

69. See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2449.

70. *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 737 (1996) (omission in original) (quoting 12 U.S.C. § 85 (1992)).

71. See *id.*

in the state<sup>72</sup> and in the swelling of credit card fees across the country.<sup>73</sup>

In response to the argument that the Court should not defer to the Comptroller's brand-new interpretation of the 100-year-old National Bank Act, Justice Scalia wrote that "[t]he 100-year delay makes no difference," that "neither antiquity nor contemporaneity with the statute is a condition of validity."<sup>74</sup> Rather, he observed, the Court gives deference to agencies under *Chevron* "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>75</sup> The *UARG* canon, in contrast to the deference shown in *Smiley*, codifies distrust of agencies that find fresh authority in old statutes.<sup>76</sup> Assuming that *Smiley* itself is still good law, however, *UARG*'s new canon will apparently be triggered only by agency action that works in one direction: toward expansion, not contraction, of government regulation.<sup>77</sup>

Third, *UARG*'s canon does not follow from previous precedent emphasizing the significance of an interpretive issue in rejecting an agency's interpretation of a statute it administers. Here, it will be useful first to identify two variations on the significance of an interpretive question. An interpretive question can be economically consequential and politically fraught—the kind of significance the Court saw in *UARG*. An interpretive question can also be central to a statutory plan—so central that to decide the interpretive question in one way rather than another may fundamentally undermine the statutory scheme. The Court's decision in *FDA v. Brown & Williamson Tobacco Corp.* emphasizes the first version of significance,<sup>78</sup> and

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72. See James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 71-72, 74 (Daniel Carpenter & David A. Moss eds., 2014); *S.D. Bank Assets Total \$2.7 Trillion*, SIOUX FALLS BUS. J. (July 10, 2014, 10:00 AM), <http://www.argusleader.com/story/news/business-journal/2014/07/10/sd-bank-assets-total-27-trillion/12426911/> [<https://perma.cc/734Z-TYQY>].

73. See Robert M. Lawless, *Debtor Nation*, NATION (Oct. 16, 2008), <https://www.thenation.com/article/debtor-nation-0/> [<https://perma.cc/GNW3-THTE>].

74. *Smiley*, 517 U.S. at 740.

75. *Id.* at 740-41.

76. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

77. See *id.*

78. See 529 U.S. 120, 137-39, 147 (2000).

a line of cases beginning with *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* emphasizes the second.<sup>79</sup>

In *UARG*, the Court emphasized the first kind of significance and ignored the second; sensibly, the Court did not suggest that the proper interpretation of the provision triggering the stationary-source permitting requirement of the Prevention of Significant Deterioration (PSD) program was central to the operation of the Clean Air Act.<sup>80</sup> Indeed, if that provision were central to the regulatory scheme of the Clean Air Act, it would be hard to understand the Court's simultaneous decision to defer to EPA's interpretive judgment that the greenhouse gas emissions from the vast majority of the sources at issue in the case should be brought into the permitting program, because those sources were already in the permitting program due to their emissions of other pollutants.<sup>81</sup> If the Court had deemed the permitting requirement of the PSD program so central to the Clean Air Act that it would not defer to the agency's adjustment of the permitting requirement's scope as it pertained to *sources*, then it would have made little sense for the Court to defer to the agency's adjustment of its scope as it pertained to *pollutants*. Economic and political importance, not centrality to the statutory scheme, was the kind of significance the Court addressed in *UARG*.<sup>82</sup>

Although the Court in *UARG* found support for its emphasis on economic and political significance in the earlier case of *Brown & Williamson*,<sup>83</sup> and thus its gesture toward this factor was not entirely new, the *UARG* canon is a new, mutant strain of the interpretive principle embraced in *Brown & Williamson*. In *Brown & Williamson*, the Court cited the "economic and political significance" of the Food and Drug Administration's decision to regulate tobacco and tobacco products in counseling hesitation in concluding that Congress had delegated this decision to the agency.<sup>84</sup> In that case, the Court cited the significance of the issue at hand as but one

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79. 512 U.S. 218, 229, 231 (1994); *see also* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468-69, 469 n.1 (2001).

80. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2441-44.

81. *See id.* at 2448-49.

82. *See id.* at 2444.

83. *See id.*

84. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

factor in its decision,<sup>85</sup> and the Court concluded that the underlying regulatory scheme—including statutes passed after the passage of the statute the FDA was interpreting there—clearly precluded the agency’s interpretation.<sup>86</sup> The Court held, in other words, that the underlying statute was clear at *Chevron*’s step one.<sup>87</sup> In *UARG*, however, the Court used the significance of the interpretive issue as a reason to deny deference to EPA at the second step of *Chevron*.<sup>88</sup>

Unlike the interpretive observation made in *Brown & Williamson*, the *UARG* canon poses two riddles for Congress itself. How can Congress manage to “speak clearly” in assigning interpretive authority to an agency, when it is in the midst of enacting an ambiguous statutory provision? And how can Congress do so in enacting a provision that it puts in deliberately broad terms so that future problems—like climate change—can come within the statute’s reach?<sup>89</sup> These questions expose the true target of *UARG*’s new canon: it is Congress, as much as it is the agency.

Moreover, to the extent that *Brown & Williamson* and like cases can be explained in part by a norm of continuity in statutory interpretation,<sup>90</sup> *UARG* mutates that aspect of *Brown & Williamson* as well. In the rule at issue in *Brown & Williamson*, the FDA deliberately rejected its longstanding judgment that the Food, Drug, and Cosmetic Act (FDCA) did not give the agency authority to regulate tobacco.<sup>91</sup> However, in the rule at issue in *UARG*, EPA was aiming both to comply with its own longstanding interpretation of the Clean Air Act’s PSD permitting program<sup>92</sup> and to be faithful to the Supreme Court’s ruling that greenhouse gases were “air pollutants” subject to regulation under the Clean Air Act.<sup>93</sup> *UARG* disrupted, rather than continued, consistent agency interpretations on the

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85. *See id.* at 159.

86. *See id.* at 126.

87. *See id.* at 125-26.

88. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

89. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

90. *See* Theodore W. Ruger, *The Story of FDA v. Brown & Williamson (2000): The Norm of Agency Continuity*, in *STATUTORY INTERPRETATION STORIES* 335, 360-62 (William N. Eskridge, Jr. et al. eds., 2011) (discussing *Wyeth v. Levine*, 555 U.S. 555 (2009), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), in addition to *Brown & Williamson*).

91. *See* 529 U.S. at 125.

92. *See* William W. Buzbee, *Anti-Regulatory Skewing and Political Choice in UARG*, 39 *HARV. ENVTL. L. REV.* 63, 69 (2015).

93. *Massachusetts*, 549 U.S. at 532.

scope of the PSD program and the inclusion of greenhouse gases within the regulatory fold.

The Court in *UARG* could claim a fresh seizure of power by EPA only by fixing exclusively on the rule specifically at issue in that case, the rule triggering PSD permitting requirements.<sup>94</sup> Since EPA had not previously triggered these requirements based on greenhouse gas emissions alone, the Court characterized the triggering rule as a new assertion of power.<sup>95</sup> But EPA's rule was also characterized by continuity with the agency's general approach to PSD permitting and its specific approach to greenhouse gas regulation.<sup>96</sup> To insist that an agency be wary of continuing a general regulatory approach in one of its specific applications is to favor discontinuity over continuity, and thus, the interpretive principle in *UARG* breaks with prior precedent on the appropriate interpretive framework for questions of great economic and political significance.

Finally, *UARG* ignores intervening precedent that should have laid to rest any claim that there is an overarching, freestanding interpretive canon that disfavors economically and politically expansive readings of long-extant laws. In *Massachusetts v. EPA*, the Supreme Court rejected (over Justice Scalia's dissent) EPA's decision that greenhouse gases were not "air pollutants" within the meaning of the Clean Air Act.<sup>97</sup> EPA had relied on *FDA v. Brown & Williamson Tobacco Corp.* in adopting a narrow interpretation of the "broadly worded grant of authority" in the Clean Air Act, citing the "economic and political significance" of the "regulation of activities that might lead to global climate change."<sup>98</sup> The Court would have none of it.

Deeming EPA's reliance on *Brown & Williamson* to be "misplaced," the Court distinguished that case from *Massachusetts* on

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94. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2435, 2437-38 (2014).

95. See *id.* at 2444-46.

96. See *id.* at 2435-37.

97. See 549 U.S. at 529 & n.26. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Court cited a different kind of statutory breadth in observing, in dicta, that it would not have deferred to the agency's interpretation of the Clean Water Act even if it had found the relevant statutory language ambiguous. 531 U.S. 159, 172 (2001). There, statutory breadth concerned the extension of statutory authority to "the outer limits of Congress' power," not the economic or political significance of the underlying interpretive issue. *Id.*

98. Control of Emissions from New Highway Vehicles and Engines, Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

two grounds: the “extreme measures” that would have been required if the FDA had classified tobacco products as “drugs” or “devices” under the FDCA, and the “unbroken series of congressional enactments that made sense only if adopted ‘against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.’”<sup>99</sup> *Massachusetts* should have negated the general notion that statutory interpretation turns on the economic or political importance of the issue at stake, and, even more, it should have silenced the claim that the specific problem of climate change should be subject to special interpretive rules.<sup>100</sup> However, in *URG*, the Court abruptly resuscitated the idea that the sheer importance of an issue could be reason to reject an agency’s interpretive choices, turned it into a reason to insist on legislative clarity rather than ambiguity, and supplemented it with the notion that the problem was especially pronounced if regulatory authority under a longstanding statute grew rather than shrank.

## B. *King v. Burwell*

### 1. *The Canon*

In *King v. Burwell*, the Court faced the question of whether the Affordable Care Act’s provision making federal subsidies available for insurance purchased on health-care exchanges “established by the State[s]” precluded federal subsidies for insurance purchased on a federal health-care exchange.<sup>101</sup> The case came to the Court as one that pitted four words in a massive statute against the remainder of the statutory language and the avowed purposes and design of the law as a whole, which would have been thwarted if subsidies were available only on state-run exchanges.<sup>102</sup> In addition, the Court had before it the views of the Department of the Treasury, the agency charged with administering the federal health-insurance

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99. *Massachusetts*, 549 U.S. at 530-31 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 135-37, 144 (2000)).

100. See Lisa Heinzerling, Throwing Keynote Address, *The Role of Science in Massachusetts v. EPA*, 58 EMORY L.J. 411, 416 (2008) (discussing rejection of “climate exceptionalism”).

101. 135 S. Ct. 2480, 2487-88 (2015) (quoting 26 U.S.C. § 36B(a) (2012)).

102. See *id.* at 2492-94.

subsidies through the Internal Revenue Code.<sup>103</sup> The Internal Revenue Service, within the Department of the Treasury, had, after notice and comment,<sup>104</sup> promulgated a rule interpreting the Affordable Care Act to make federal subsidies available on the federal health-care exchange.<sup>105</sup>

All of this could have made for a quite straightforward statutory case. In an earlier age, when picayune textualism did not dominate the Court's approach to statutory interpretation in the way it does now, the answer could have been uncomplicated: the four words would not have trumped every other indicator of the meaning of the statute, and a decision that the statute, in full, clearly allowed federal subsidies for insurance purchased on federal exchanges would have been unsurprising. But a six-Justice majority of the Court, despite eventually ruling consistently with the government's view that federal subsidies were available on the federal exchange, found the statute ambiguous and then refused to take the agency's views into account.

Here is *King's* key passage on the irrelevance of the agency's interpretation:

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."

This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so

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103. See 26 U.S.C. § 36B(g) (2012); *id.* § 7805(a).

104. See Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (to be codified at 26 U.S.C. pt. 1).

105. See *id.*; 45 C.F.R. § 155.20 (2014).

expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the *IRS*.<sup>106</sup>

The Court thus declined to apply *Chevron* at all; it took the question away from the agency altogether and decided it for itself.<sup>107</sup> In the end, the Court's decision affirming the availability of federal subsidies on federal exchanges amounted to a roundabout way of coming to a sensible conclusion based on the entirety of the statute and its context, rather than on a bare four words in the law—a conclusion that the Court could have reached through application of *Chevron*'s famous first step. But all six Justices in the majority signed on to the principle that the *Chevron* framework simply did not apply.<sup>108</sup>

The interpretive principle embraced in *King* can be stated as follows: when an agency charged with administering an ambiguous statutory provision answers a question of great economic and political significance, the question is central to the underlying statutory regime, and the Court believes the agency is not an expert in the matter, the Court may “hesitate” to apply the *Chevron* framework at all in determining statutory meaning.<sup>109</sup> Note the complexity of this interpretive principle, with its five different features: ambiguity in the statute, economic and political significance, centrality to the statutory regime, the interpreting agency's status as an expert in the field, and complete withdrawal of the *Chevron* framework.

This combination of features is both normative and new.

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106. 135 S. Ct. at 2488-89 (citations omitted) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); and then quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

107. *See id.*

108. *See id.*

109. *Id.* Elsewhere in the opinion, the Court in *King* also embraced an interpretive approach that looked beyond the four disputed words and considered the broad purposes of the Affordable Care Act in finding that federal subsidies were indeed available on federal exchanges. *See id.* at 2492-96. Here, I am focusing on the portion of the opinion ousting the *Chevron* framework.



## 2. Normativity

The Court styles its interpretive principle in *King* as a description of likely congressional behavior (“had Congress wished to ... it surely would have”; “[i]t is especially unlikely that Congress would have delegated this decision to the *IRS*”), but it is squarely normative.<sup>110</sup> As I noted above, the most direct route to the Court’s ultimate result would have been to find that the Affordable Care Act, as a whole, unambiguously provided for federal subsidies on federal exchanges. Addressing the interpretive question at *Chevron*’s step one would have avoided the circuitous path the Court followed instead, finding first, that the statute was ambiguous; second, that *Chevron* did not apply; and, third, that federal subsidies were indeed available on federal exchanges. What did Chief Justice Roberts gain by proceeding sinuously rather than directly?

A possible answer comes from the Chief Justice’s extraordinary dissent, just a Term before, in *City of Arlington v. FCC*.<sup>111</sup> Recall that this is the case in which Justice Scalia, writing for the Court, concluded that *Chevron* applied even to an agency’s interpretation of a provision setting out the scope of its own jurisdiction.<sup>112</sup> Chief Justice Roberts, joined by Justices Alito and Kennedy, vehemently dissented, taking the occasion to launch an attack on the scope and power of administrative agencies in contemporary government.<sup>113</sup> Allowing as how it would be “a bit much” (just “a bit much”) to describe the “growing power of the administrative state,” including the *Chevron* framework, as “the very definition of tyranny,” the Chief Justice nevertheless made clear that he viewed federal agencies’ “poking into every nook and cranny of daily life” as a threat to the constitutional order.<sup>114</sup> He would have insisted that a court “not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”<sup>115</sup> His approach would effectively have had a court decide whether an agency is entitled to

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110. *Id.* at 2489.

111. *See* 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

112. *See id.* at 1874 (majority opinion).

113. *Id.* at 1879 (Roberts, C.J., dissenting).

114. *Id.* In Part II, we will return to the possibility that one or more of the power canons could be justified on constitutional grounds.

115. *Id.* at 1877.

deference by undertaking a “provision-by-provision, ambiguity-by-ambiguity” analysis of whether Congress delegated interpretive authority to an agency over the particular question before the court.<sup>116</sup> It is not hard to see how the Court’s roundabout route in *King* satisfies some of the Chief Justice’s larger goals as stated in his dissent in *City of Arlington*.<sup>117</sup> When *King* is analyzed against the backdrop of *City of Arlington*, the normative foundations of the interpretive principle announced in *King* become plain: the ouster of the *Chevron* framework in *King* makes forward progress on the Chief Justice’s evident desire to trim the power of administrative agencies.

The normative basis of *King*’s interpretive principle is also evident in the interaction between statutory ambiguity and the ouster of the *Chevron* framework. In *King*, the Court found that the central statutory provision, containing the key words “established by the State[s],” was ambiguous.<sup>118</sup> The Court’s suggestion that Congress could have been expected to have spoken more clearly if it had wanted to give interpretive authority to the agency assumes that Congress knew about the ambiguity it was creating and intentionally decided to leave it in the statute. Yet the interpretive conundrum posed by the four words “established by the State[s]” was created precisely because Congress appeared not to have been aware of it.<sup>119</sup> Therefore, as in *UARG*, the Court’s interpretive approach in *King* is effectively an instruction to Congress to speak plainly when it writes ambiguous statutory provisions. The instruction is not just normative, but nonsensical; it can only be understood as an instruction to Congress not to speak ambiguously at all in certain circumstances.

The earlier discussion of the novelty of the interpretive principle embraced in *UARG* helps to explain why another feature of the *King* canon, the economic and political significance of the interpretive issue, is also normative. In that discussion, we have already seen several examples of statutes in which Congress failed to clearly answer questions of large economic and political significance, such as whether “interest” under the National Bank Act included credit

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116. Hickman, *supra* note 38, at 61; *see also City of Arlington*, 133 S. Ct. at 1882-83.

117. For a similar perspective on *King*, *see* Hickman, *supra* note 38, at 62-63.

118. *King v. Burwell*, 135 S. Ct. 2480, 2491-92 (2015) (quoting 26 U.S.C. § 36B(a)(2012)).

119. *Id.*

card late fees<sup>120</sup> and whether “sources” under the stationary-source permitting program of the Clean Air Act included only individual pollution-emitting devices and equipment or also included all such devices and equipment within a facility.<sup>121</sup> These, too, were questions of large economic and political significance, and yet, in addressing them, the Court did not suggest that Congress would have spoken more clearly about the agency’s power to decide them if it had wanted to confer such power. In other words, in emphasizing economic and political importance in *King*, the Court is not calling upon a general presumption that Congress speaks clearly when it delegates big questions to agencies; many prior cases expose the factual inaccuracy of such a presumption. Instead, the Court is carving out a category of cases as to which it simply will not tolerate ambiguity.

The same goes for the Court’s assertion in *King* that “[t]his is not a case for the IRS.”<sup>122</sup> The Court asserts that it is “especially unlikely” that Congress would have delegated the relevant interpretive issue to the IRS<sup>123</sup>—but that is exactly what Congress did. Congress gave the IRS the authority to issue rules with the force of law under provisions of the Tax Code, including the provision at issue in *King*.<sup>124</sup> Moreover, in a previous decision, Chief Justice Roberts had written for a unanimous Court in holding that *Chevron* deference applied “with full force in the tax context.”<sup>125</sup> In *King*, too, Congress had spoken to the IRS’s authority, but the Court could not hear it. This is an act of resistance, not fealty.

This is not to say that all aspects of *King*’s interpretive principle, taken separately, come from somewhere outside the underlying statute. In particular, as an intuitive matter, it seems fair to assume that Congress would not construct an elaborate statutory framework that could be undone by ambiguity in peripheral statutory provisions, ambiguity that could then be exploited by an agency

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120. See *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 737 (1996).

121. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

122. *King*, 135 S. Ct. at 2489.

123. *Id.*

124. See 26 U.S.C. § 7805(a) (2012) (authorizing the Secretary of the Treasury to “prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue”).

125. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

unsympathetic to the underlying statutory framework. This is, I believe, the insight behind Justice Scalia's opinion in *MCI*,<sup>126</sup> and it is also one principle underlying his opinion for a unanimous Court in *Whitman v. American Trucking Associations, Inc.*<sup>127</sup> In *Whitman*, the Court held that the Clean Air Act unambiguously prohibited EPA from considering costs in setting the standards at the heart of the statute, the National Ambient Air Quality Standards (NAAQS).<sup>128</sup> Many provisions of the statute explicitly called for consideration of costs, but the provision instructing EPA how to set the NAAQS did not.<sup>129</sup> Justice Scalia recognized that the consideration of costs could undo the protective nature of the NAAQS, thus defeating the underlying statutory scheme.<sup>130</sup> He concluded that peripheral provisions of the statute should not be interpreted to undermine the health- and environment-protecting thrust of the NAAQS.<sup>131</sup> He captured his reasoning in a metaphor that has gone on to great fame: Congress does not, he observed, "hide elephants in mouseholes"<sup>132</sup>—that is, it does not adjust the central details of a statute in ancillary provisions. This principle at least gestures to Congress's likely behavior and desires, and it has intuitive merit. But this principle is just one thread of the interpretive tapestry created in *King*.

### 3. Novelty

The *King v. Burwell* canon is also new. The Court had, in the *Chevron* era, never before put the *Chevron* framework entirely to the side in the circumstances presented in *King*: an interpretation of a statute deemed ambiguous, arrived at after notice-and-comment rulemaking, by the agency charged by the statute with making rules

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126. See *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Note, however, that in *MCI* the concept of centrality was embedded in the precise statutory term at issue there, "modify." *Id.* at 225. The Court held that this term did not include fundamental changes, and thus if—as the Court held it was—the FCC's change to the filed-tariff regime was fundamental, it was inconsistent with the statute. See *id.* at 225, 227-32.

127. See 531 U.S. 457, 468-69, 469 n.1 (2001).

128. See *id.* at 470.

129. See *id.* at 466-68.

130. See *id.* at 465-66.

131. See *id.* at 468.

132. *Id.*

to implement the provision interpreted. Prior to *King*, the circumstances upsetting the *Chevron* framework had been ones in which either the relevant statute did not give the agency authority to set rules with the force of law or the agency had not used that authority in the circumstances under review.<sup>133</sup> These conditions did not hold in *King*. In that sense, the interpretive framework of *King* is a complete novelty.

In citing economic and political importance, the Court draws on both *Brown & Williamson* and *UARG*. In *King*, however, the mutant strain of *Brown & Williamson* created in *UARG* is active. That is, in *King*, as in *UARG*, the Court is instructing Congress to speak more clearly when it enacts an ambiguous statute.<sup>134</sup> This mutant strain is not brand new, given *UARG*, but it is not exactly venerable. Moreover, *UARG*'s interpretive principle rested in part on the age of the underlying statute in expressing skepticism about the agency's interpretive authority.<sup>135</sup> In *King*, the statute was very recent.<sup>136</sup> Neither very old, nor very new, statutes are safe from the Court's new canons.

As discussed previously, the Court had in several prior cases found the centrality of an interpretive question to a statutory scheme important in determining its approach to the question.<sup>137</sup> Specifically, the Court had used the centrality of a question to avoid a conclusion that a statute allowed an interpretive result that would undermine the statutory scheme, holding in those cases that the statutes were unambiguous at *Chevron*'s step one.<sup>138</sup> As discussed, this would have been the most direct route to the ruling in *King* as well.

The perceived expertise of the interpreting agency also had some basis in prior precedent. In *Gonzales v. Oregon*, the Court found that Congress had not implicitly, through the ambiguity of the phrase "legitimate medical purpose," given the Attorney General the authority to criminalize the administration of federally regulated

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133. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

134. See *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

135. See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

136. See *King*, 135 S. Ct. at 2485.

137. See *supra* notes 78-82 and accompanying text.

138. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 547, 471 (2001); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225, 231-32 (1994).

drugs for use in assisted suicide.<sup>139</sup> The Court's decision in *Gonzales* had many facets, one of which was the Court's conclusion that the Attorney General's lack of medical expertise made it implausible to find, in the ambiguity of the statute, a delegation of interpretive authority to the Attorney General.<sup>140</sup> In *King*, in contrast, Congress had explicitly given the Department of the Treasury the authority to "prescribe such regulations as may be necessary" to implement tax provisions, including the Affordable Care Act's provisions on tax credits.<sup>141</sup> The Court's suggestion that, nevertheless, the IRS (in the Department of the Treasury) could not be given this authority because it was not an expert is a new development in the law: Congress must, it seems, not only speak clearly about its intended interpretive delegatee, but also pick the right one.<sup>142</sup>

The complex interpretive principle embraced in *King* is novel primarily for its ouster of the *Chevron* framework. The other elements of the principle—the economic and political significance of the interpretive question, the centrality of that question to the underlying statutory framework, and the agency's expert capacity on the relevant issue—had, individually, been presaged in prior cases (although those cases, too, were of recent vintage).<sup>143</sup> They had never before, however, been combined in one big, *Chevron*-ousting package.

### C. Michigan v. EPA

#### 1. *The Canon*

The last in the new trio of power canons addresses not the sheer importance or centrality of the relevant interpretive question, but the substantive content of the agency's interpretive choice.

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139. 546 U.S. 243, 265-67 (2006).

140. *See id.* at 266-67.

141. 26 U.S.C. § 36B(g) (2012); *id.* § 7805(a); *see also* Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does It Portend for Chevron's Domain?*, 2015 PEPP. L. REV. 72, 78-79 (contrasting *King* and *Gonzales* in same way).

142. The Court in *King* appeared unaware of—or indifferent to—the fact that the IRS administers many government programs that go beyond the IRS's traditional revenue-raising function. *See Hickman, supra* note 38, at 66-69.

143. *See id.* at 66 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53-58 (2011)).

In *Michigan v. EPA*, the Supreme Court considered whether EPA had acted unreasonably in refusing to consider costs in determining that regulation of power plants was “appropriate and necessary” under section 112 of the Clean Air Act, which regulates toxic air pollutants such as mercury.<sup>144</sup> The Court held, 5-4, that EPA had erred in choosing not to consider costs in deciding whether to regulate power plants under section 112.<sup>145</sup> Justice Scalia wrote for the majority, Justice Kagan for the dissenters.<sup>146</sup>

The point of agreement in *Michigan v. EPA* between Justice Scalia’s majority opinion and Justice Kagan’s dissent—and the focus here—was the proposition that an agency may not, unless Congress signals otherwise, impose regulatory costs without taking those costs into account. Both the majority and dissent used this general proposition as a starting point for their analysis of the specific statutory regime at issue in *Michigan v. EPA*—in Justice Scalia’s case, as a platform for rejecting EPA’s refusal to consider costs in deciding whether to regulate at all, and in Justice Kagan’s case, as a prologue to explaining why EPA did not run afoul of this principle in regulating power plants under section 112.<sup>147</sup>

Justice Scalia opened his analysis by quoting Supreme Court precedents calling for “reasoned decisionmaking,” logic and rationality, and “consideration of the relevant factors” in agency decisions.<sup>148</sup> Notably, the cases he cited at the outset—*Allentown Mack* and *State Farm*—did not involve statutory interpretation, but instead involved the scope of arbitrary and capricious review of the merits of agency decisions.<sup>149</sup> Justice Scalia again invoked rationality in explaining why “the phrase ‘appropriate and necessary’ requires at least some attention to cost[:]. [o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or

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144. *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

145. *See id.* at 2702, 2712.

146. *See id.* at 2699 (syllabus).

147. *See id.* at 2712 (majority opinion); *id.* at 2715 (Kagan, J., dissenting).

148. *Id.* at 2706 (majority opinion) (first quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998); and then quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

149. *See id.* These species of judicial review of agency action can be very similar in operation, but the Court has cautioned that they are distinct analytic frameworks. *See Judulang v. Holder*, 565 U.S. 42, 52 & n.7 (2011).

environmental benefits.”<sup>150</sup> Justice Scalia conceded that not all statutory references to judgments of appropriateness and necessity entail consideration of costs, but, he believed, statutory provisions triggering regulation are distinctive:

Section 7412(n)(1)(A) directs EPA to determine whether “*regulation* is appropriate and necessary.” ... Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that “too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.” Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether “regulation is appropriate and necessary” as an invitation to ignore cost.<sup>151</sup>

This passage marked the majority’s embrace of a general proposition that goes beyond section 112 of the Clean Air Act: agencies’ purportedly “established administrative practice” of considering costs in deciding whether to regulate has, according to Justice Scalia, made the interpretive default one in which agencies must consider cost in order to engage in “reasonable regulation.”<sup>152</sup>

Justice Kagan defended her embrace of this general proposition in strikingly similar terms. Here is her analysis of this point, in full:

Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing “a standard-setting process that ignore[s] economic considerations.” At a minimum, that is because such a process would “threaten[] to impose massive costs far in excess of any benefit.” And accounting for costs is particularly important “in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well

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150. *Michigan*, 135 S. Ct. at 2707 (quoting 42 U.S.C. § 7412(n)(1)(A)).

151. *Id.* at 2707-08 (citations omitted) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 233 (2009) (Breyer, J., concurring in part and dissenting in part)).

152. *Id.*



mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.” As the Court notes, that does not require an agency to conduct a formal cost-benefit analysis of every administrative action. But (absent contrary indication from Congress) an agency must take costs into account in some manner before imposing significant regulatory burdens.<sup>153</sup>

Unlike Justice Scalia, Justice Kagan would have upheld EPA’s rule because she concluded that the agency had adequately taken costs into account in the regulatory stages subsequent to its determination that regulation of power plants was “appropriate and necessary.”<sup>154</sup> She discerned cost considerations in the statute’s focus on the best performers in the relevant source category, in the agency’s categorization and subcategorization of power plants, in the compliance options the agency offered to regulated sources, in the agency’s general declination to set emissions limits beyond those associated with the best technology, and in the agency’s preparation of a cost-benefit analysis pursuant to presidential executive orders and in its submission of the rule to the White House for regulatory review.<sup>155</sup> It was only the majority’s “blinkered” approach, focusing just on the first stage of the regulatory process, that—she argued—allowed the majority to conclude that EPA had unlawfully and irrationally refused to consider costs.<sup>156</sup>

Despite Justice Kagan’s disagreement with the majority, however, her embrace of the presumed relevance of costs to regulatory decisions was plain: “I agree with the majority—let there be no doubt about this—that EPA’s power plant regulation would be unreasonable if ‘[t]he Agency gave cost no thought *at all*.’”<sup>157</sup> Notably, her description of the ways in which costs were embedded in EPA’s decision on power plants overstated the role of costs in determining the scope and shape of the regulation of power plants

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153. *Id.* at 2716-17 (Kagan, J., dissenting) (alterations in original) (citations omitted) (first quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and concurring in the judgment); then quoting *Entergy* 556 U.S. at 234 (Breyer, J., concurring in part and dissenting in part); and then quoting *id.* at 233).

154. *Id.* at 2726.

155. *See id.* at 2718-22.

156. *Id.* at 2714-15.

157. *Id.* at 2714 (alteration in original) (quoting *id.* at 2706 (majority opinion)).

under section 112.<sup>158</sup> For example, she assumed that any existing deployment of control technologies for hazardous air pollutants at these sources must have been cost-sensitive and profit-driven,<sup>159</sup> but they were more likely driven by regulatory initiatives that were less cost-sensitive than she imagined and certainly not profit-driven. Justice Kagan, in other words, not only accepted a presumption that regulation must be cost-sensitive, but also implicitly insisted upon a cost-sensitive regime that is more cost-sensitive than the actual program established by section 112.

In sum, in *Michigan v. EPA*, nine Justices agreed that an administrative agency must—unless Congress provides otherwise—consider the costs of regulation before imposing regulatory standards. Five Justices thought this principle so robust that it required an agency to consider costs even before starting down the path toward regulation.<sup>160</sup> Four Justices would have allowed an agency to take steps toward regulation without considering costs, so long as it brings costs into the journey at some point.<sup>161</sup> No Justice explained exactly what a proper consideration of costs would entail.<sup>162</sup> But all agreed that such an accounting—whatever it was—was, as a matter of law and basic rationality, required.

Here, too, the Court's new canon is both normative and new.

## 2. Normativity

The canon is frankly normative. Both Justice Scalia and Justice Kagan drew on what they apparently regarded as unimpeachable observations about regulatory rationality in asserting their new interpretive principle. Yet the appropriate role of costs in regulatory policy has been one of the most contentious issues in defining the scope and limits of the contemporary administrative state.<sup>163</sup> Moreover, neither Justice Scalia nor Justice Kagan even purported

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158. *See id.*

159. *Id.* at 2719.

160. *See id.* at 2702, 2711 (majority opinion).

161. *See id.* at 2714 (Kagan, J., dissenting).

162. *See id.* at 2711 (majority opinion) (declining to specify how EPA must take costs into account); *id.* at 2717 (Kagan, J., dissenting) (stating that an agency “must take costs into account in some manner”).

163. *See* Daniel A. Farber, *Taking Costs into Account: Mapping the Boundaries of Judicial and Agency Discretion*, 40 HARV. ENVTL. L. REV. 87, 87-88 (2016).

to rely on descriptions of the kind of language Congress would likely use in order to allow or require a cost-blind regulatory determination.

Instead, they supported their new interpretive principle by drawing on snippets from policy-driven, solo opinions in prior cases. Justices Scalia and Kagan both cited to and quoted from one passage in a solo opinion by Justice Breyer in *Entergy Corp. v. Riverkeeper, Inc.*<sup>164</sup> In *Entergy*, Justice Breyer concurred in part with and dissented in part to Justice Scalia's majority opinion for the Court holding that EPA reasonably interpreted a provision of the Clean Water Act to *allow* the agency to weigh costs against benefits in regulating the cooling water intake structures of power plants.<sup>165</sup> In the part of Justice Breyer's opinion to which Justices Scalia and Kagan refer, Justice Breyer was working hard to explain that the relevant provision of the Clean Water Act does not *prohibit* a limited comparison of costs and benefits.<sup>166</sup> This is a strange reference for the proposition that agencies *must* consider costs before they regulate. Justice Breyer's opinion in *Entergy* supports, at most, the idea that an agency faced with open-ended statutory language *may*—but need not—decide to balance costs and benefits to some extent. Indeed, this is the very position embraced by Justice Scalia's own majority opinion in *Entergy* (not cited by either Justice Scalia or Justice Kagan in *Michigan*).<sup>167</sup> Notably, moreover, Justice Breyer himself had cited no source, legal or otherwise, for his concerns about “massive costs” and “wasteful expenditure.”<sup>168</sup>

To the solo opinion by Justice Breyer, Justice Kagan added a citation to a solo opinion by Justice Powell.<sup>169</sup> In his partial concurrence in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute (The Benzene Case)*, Justice Powell argued that the Occupational Safety and Health Act (OSHAct) should be interpreted to require the agency charged with implementing it, the Occupational

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164. See *Michigan*, 135 S. Ct. at 2708; *id.* at 2717 (Kagan, J., dissenting).

165. See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 230 (2009) (Breyer, J., concurring in part and dissenting in part).

166. See *id.* at 233-34.

167. See *id.* at 224 (majority opinion).

168. *Id.* at 233-34 (Breyer, J., concurring in part and dissenting in part).

169. *Michigan*, 135 S. Ct. at 2717 (Kagan, J., dissenting) (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 670 (1980) (Powell, J., concurring in part and concurring in the judgment)).

Safety and Health Administration (OSHA), “to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits.”<sup>170</sup> Believing that OSHA’s approach of considering economic effects only in order to determine whether an occupational health standard was “feasible” was inadequate, Justice Powell wanted the Court to hold that an occupational health standard violated the statute if it called for “expenditures wholly disproportionate to the expected health and safety benefits.”<sup>171</sup> In a subsequent case, however, the Supreme Court rejected Justice Powell’s approach and accepted OSHA’s feasibility-based approach.<sup>172</sup> Justice Powell’s opinion in *The Benzene Case* has no present legal significance, and it—like Justice Breyer’s quoted opinion—cited no authority, legal or otherwise, for the proposition for which it is quoted.

Citation to fragments from one or two partial concurrences, neither joined by any other Justice, one explicitly rejected by the Court in a later case, makes for paltry legal precedent. Indeed, it is scarcely a legal argument at all. And, most important for present purposes, it is not an argument based on predictions about congressional behavior or preferences. It is an argument based on the Justices’ own judgments about sensible regulatory policy.

The Court in *Michigan* thus created another normative canon of statutory interpretation, one with potentially large implications for the balance of powers among the branches of government. The new canon not only chooses sides in a longstanding debate over the proper content and thrust of regulatory policy, but also enthrones the courts as the arbiters of this debate. With *Michigan v. EPA*, the Court has added another item to the list of canons that trump the deference ordinarily due an agency’s interpretation of an ambiguous statute under *Chevron* and, even more problematically, has schooled Congress on the clarity it must achieve if it wants to rule out the consideration of costs in the implementation of a regulatory regime.

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170. 448 U.S. at 667 (Powell, J., concurring in part and concurring in the judgement).

171. *Id.*

172. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 495 n.4, 540-41 (1981).

### 3. Novelty

The canon embraced in *Michigan v. EPA* is also new. The Justices had never before formed a united front, in this substantive direction, on this fundamental issue. Indeed, in the prior case closest in substance to *Michigan*, the Court had unanimously ruled in the opposite direction, deciding that an agency could *not* consider costs in setting national standards that were expected to cost billions of dollars.<sup>173</sup> As noted above, the Justices had previously divided over the role of costs in the regulatory process even when the question was whether the relevant agency was *allowed*—rather than *required*—to consider costs in regulating.<sup>174</sup> One may cite differences among the cases in terms of statutory language and context, but there is no denying the philosophical shift reflected in the Court's newfound unanimity in *Michigan v. EPA*.<sup>175</sup>

With *URG*, *King*, and *Michigan*, the Supreme Court has introduced three new canons of statutory interpretation. The power canons reflect the Court's own views about the kinds of interpretive issues that require an extra measure of clarity from Congress and an extra dose of reticence from administrative agencies. I argue next that these views are of a piece with several Justices' anxieties about the constitutional status of the modern administrative state. These anxieties have not matured into constitutional rulings on behalf of a majority of the Court, but they may have found a non-constitutional home in the power canons.

## II. AVOIDANCE COPING

Until very recently, the constitutional validity of the administrative state seemed secure. Only fifteen years ago, the Supreme Court unanimously rejected a challenge to the Clean Air Act based on the nondelegation doctrine.<sup>176</sup> The D.C. Circuit had held that EPA had violated the nondelegation doctrine by interpreting the statute's

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173. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 & n.3 (2001).

174. See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593, 1610 (2014); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226 (2009).

175. I return to this point in more detail in Part III when I discuss the instability generated by the Court's new canon.

176. See *Whitman*, 531 U.S. at 472-73.

provisions for setting national air quality standards not to allow the agency to consider economic costs or technological feasibility in setting those standards.<sup>177</sup> These standards are highly consequential, imposing costs that run into billions of dollars and requiring major adjustments in central economic sectors such as energy and transportation.<sup>178</sup> Yet the Supreme Court had no trouble brushing back the constitutional challenge to EPA's approach.<sup>179</sup> The Court emphasized the breadth of the statutory delegations it had previously upheld and rejected the lower court's renovation of the nondelegation doctrine in condemning the agency for failing to curtail its own discretion under a statute that itself did not violate the nondelegation doctrine.<sup>180</sup> As the Court—with Justice Scalia writing for the majority—observed, allowing an agency to correct an overly broad statute would itself violate the nondelegation doctrine.<sup>181</sup>

In determining the constitutional validity of the modern administrative state, the nondelegation doctrine is the big one. The only doctrine that could come close, in terms of damage to the premises underlying the administrative state, would be the substantive due process theory embraced and then abandoned in the first half of the twentieth century.<sup>182</sup> With the nondelegation doctrine in a state of desuetude and economic substantive due process discredited, the two constitutional doctrines that might have posed a broad threat to the administrative state seem to have been taken out of service.

Nevertheless, in recent years, several Justices have expressed large-scale, constitutionally inspired anxieties about the modern administrative state.<sup>183</sup> The anxieties are potent enough, and broad-ranging enough, that they must derive from equally potent and broad constitutional doctrines—such as the nondelegation doctrine or the doctrine of economic substantive due process. The problem for

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177. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom. Whitman*, 531 U.S. 457 (2001).

178. See Brief of Non-State Petitioners on Fine Particulate Matter National Ambient Air Quality Standards at 23, *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440).

179. See *Whitman*, 531 U.S. at 472-73.

180. See *id.*

181. See *id.* at 473.

182. See *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

183. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring) (railing against the practice of deference to agency determinations).

the Justices, however, is that they do not have a majority for revitalizing these doctrines. The power canons may have sprung from a desire to avoid statutory interpretations that make the Justices constitutionally anxious. Understood this way, however, the power canons would reflect a deeply problematic variation on the already problematic canon of constitutional avoidance.

### A. *Constitutional Anxieties*

In the past several years, several Justices have launched broad, strident, and constitutionally inflected attacks on the administrative state.<sup>184</sup> These attacks, however, have appeared in concurring or dissenting opinions that have not attracted a majority of the Justices.<sup>185</sup> Where broad objections have led to majority opinions, they have been in cases raising legal issues that have nothing to do with the Court's embrace of the power canons.<sup>186</sup>

In *City of Arlington v. FCC*, Chief Justice Roberts, joined by Justices Alito and Kennedy, dissented from the majority's ruling that an agency could receive deference under *Chevron* even for its interpretation of the scope of its own jurisdiction.<sup>187</sup> Roberts began his dissent with a lengthy preamble, offered by way of "background" to the specific dispute before the Court.<sup>188</sup> His discussion is highly suggestive but ultimately inconclusive. He laments the combination of legislative, executive, and judicial powers within administrative agencies; the substantive reach of the agencies into "almost every aspect of daily life"; the numerosity of agencies and their independence from presidential control; and the "reams" and "thousands of pages" of regulations.<sup>189</sup> He shares Judge Friendly's concern that congressional delegations to agencies often express "a mood rather than a message."<sup>190</sup>

The latter observation equally applies to the Chief Justice's dissent. He expresses great worry about the administrative state and

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184. See, e.g., *id.*

185. See, e.g., *id.*

186. See *infra* note 205.

187. 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

188. *Id.* at 1877-79.

189. *Id.*

190. *Id.* at 1879 (quoting Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1311 (1962)).

strongly hints that his concern is constitutionally inspired, but he does not come out and say that the entire structure, or even a large part of it, is unconstitutional, or even name the constitutional source of his anxiety.<sup>191</sup> Indeed, even on the discrete issue presented in that case, he intimates, but does not clearly assert, that deferring to an agency without first determining that Congress has delegated interpretive authority to the agency on the specific matter at issue betrays the Court's responsibility to "police the boundary" between the judicial and executive branches.<sup>192</sup> Nevertheless, it is fair to say that the "mood" reflected in the dissent is decidedly unhappy.

Justice Alito was a bit clearer about the constitutional origins of his concurrence—joined by no other Justice—in *Department of Transportation v. Association of American Railroads*.<sup>193</sup> There, he wrote that, if the arbitrator who resolves disputes between the Federal Railway Administration and Amtrak over standards for passenger railroad services may be a private person, the underlying law "is unconstitutional."<sup>194</sup> Justice Alito suggested that delegation of legislative authority to private parties necessarily violates the nondelegation doctrine.<sup>195</sup> He also appeared uncomfortable with the Court's general failure to enforce the nondelegation doctrine "with more vigilance."<sup>196</sup> He cited the majority opinion in *City of Arlington* for the proposition that the Court's leniency with respect to nondelegation could be explained by the fact that "other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking"—but then he seemed to characterize this reasoning as "a fig leaf of constitutional justification."<sup>197</sup> Combining this concurrence with his agreement with Chief Justice Roberts's vehement dissent in *City of Arlington*, it seems fair to predict that Justice Alito would welcome revitalization of the nondelegation doctrine.

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191. *See id.* at 1877.

192. *Id.* at 1886.

193. 135 S. Ct. 1225, 1234-35 (2015) (Alito, J., concurring).

194. *Id.* at 1237. On remand, a panel of the D.C. Circuit held that the Passenger Rail Investment and Improvement Act of 2008 violated due process by granting regulatory authority to Amtrak, which the court characterized as a self-interested economic competitor of the plaintiffs. *See Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016).

195. *See Ass'n of Am. R.Rs.*, 135 S. Ct. at 1237-38.

196. *Id.* at 1237.

197. *Id.*



Justice Thomas's views are plainer still. Over the years, he has written a series of separate opinions making clear that he views much of the regulatory apparatus as unconstitutional. In *Whitman v. American Trucking Associations, Inc.*, his concurring opinion suggested that perhaps the longstanding "intelligible principle" requirement for legislative delegations to administrative agencies was not sufficient "to prevent all cessions of legislative power," and that "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"<sup>198</sup> He left the issue for "a future day," however, since no party had asked the Court to reconsider its precedents on nondelegation.<sup>199</sup>

That future day has come for Justice Thomas. In recent Terms, Justice Thomas has given full voice to his belief that many features of the administrative state are unconstitutional. In *Department of Transportation v. Association of American Railroads*, he concluded that the intelligible principle test "largely abdicates our duty to enforce that prohibition."<sup>200</sup> He advocated a "return to the original understanding of the ... legislative power," one that would "require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."<sup>201</sup> In addition, he has argued that "*Chevron* deference raises serious separation-of-powers questions" under Articles I and III of the Constitution<sup>202</sup> and that the practice of deferring to agencies' interpretations of their own regulations was "constitutionally infirm from the start."<sup>203</sup>

None of the opinions I have just described convinced a majority of the Court. The opinions by Justices Alito and Thomas were solo opinions. Chief Justice Roberts's dissent in *City of Arlington* was joined by two other Justices.<sup>204</sup> All together, four of the Court's current Justices—Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito—have joined or written at least one of the

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198. 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring).

199. *Id.* at 487.

200. 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment).

201. *Id.*

202. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

203. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring in the judgment).

204. *See City of Arlington v. FCC*, 132 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

opinions expressing discomfort with the current scope and structure of government. As of yet, therefore, the Court does not have a majority to undertake a broad renovation of constitutional doctrine, and it did not even have a majority to do this at the time the power canons were created.<sup>205</sup> The discontented rumblings from four current Justices, however, and the strong message of the power canons themselves cannot but make one wonder whether the Justices' dissatisfaction with the power of administrative agencies has found its way into statutory interpretation. Next, I examine whether the power canons can be justified as applications of the doctrine of constitutional avoidance. I conclude they cannot.

### *B. Constitutional Avoidance*

None of the cases creating the power canons explicitly connects the canons to a constitutional theory. The one possible, tiny *hint* at a constitutional link for one of the canons appears in Justice Scalia's opinion in *UARG*, in which he cites *The Benzene Case* as one of several sources for the principle that Congress must speak clearly if it wishes to delegate to an agency interpretive power over a matter of great economic and political significance.<sup>206</sup> One of the pages

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205. This is not to say the majority has been passive. In *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*, the Court held that the Public Company Accounting Oversight Board was unconstitutional insofar as its members were insulated from removal by two layers of job protection. 561 U.S. 477, 484 (2010). Chief Justice Roberts's opinion for a 5-4 majority purports to extend no further than cases in which this unusual double layer of protection exists, but at the same time, much of its language would suggest that independent agencies are constitutionally problematic because they are not accountable to the President. *See id.* at 483-84, 495-96, 499. Moreover, cases working their way through the lower courts raise the question whether the system of administrative law judges in the independent agencies violates the separation of powers because the judges are insulated by two layers of job protection. *See, e.g., Duka v. SEC*, No. 15 Civ. 357 (RMB) (SN), 2015 U.S. Dist. LEXIS 124444, at \*15-16 (S.D.N.Y. Sept. 17, 2015).

For present purposes, however, *PCAOB* and cases following it are of little moment. The agencies put on a tight leash in *UARG*, *King*, and *Michigan* are executive agencies, headed by officials subject to removal by the President. *See Michigan*, 135 S. Ct. at 2704; *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2432 (2014). The rules that were undone in *UARG* and *Michigan* were subject to review and approval by officials in the White House. *See Michigan*, 135 S. Ct. at 2715 (Kagan, J., dissenting); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2434. If one is looking for a constitutional basis for the power canons, in other words, one will not find it in *PCAOB*.

206. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality opinion)).

he cites from *The Benzene Case* contains the plurality opinion's famous paragraph suggesting that a delegation to the Occupational Safety and Health Administration of power to regulate toxic substances in workplaces without an initial quantification and finding of a "significant" risk "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*."<sup>207</sup>

In citing *The Benzene Case*, Justice Scalia may have coyly gestured toward a constitutional basis for his new canon, but he did not explicitly assert a constitutional claim or even suggest that avoiding such a claim through a narrowing interpretation would be appropriate. Moreover, no party in the three cases I am discussing here argued that Congress *could not* delegate to the agencies the power to make the interpretive choices they did. The sole question was whether Congress had done so.

Is it possible to defend the power canons on constitutional grounds even though the Court itself did not attempt to do so? In particular, does the nondelegation doctrine supply a constitutional basis for the power canons' shift of interpretive authority from the agencies to the courts? Given the desuetude of the nondelegation doctrine as a lever for direct invalidation of federal statutes, such an argument would need to use the nondelegation doctrine as a lever for narrowing federal statutes to avoid a constitutional issue.<sup>208</sup> The power canons, in other words, would need to function as canons of avoidance in order to claim a constitutional foundation in the nondelegation doctrine.

The problem is that there was no constitutional problem to avoid in the cases embracing the power canons. Characterizing the interpretive principle embraced in *King* as one designed to avoid a nondelegation problem would be especially strange.<sup>209</sup> What unconstitutional result, exactly, would the Court have been avoiding in declining to defer to the IRS? The IRS reached the same result the Court eventually reached, albeit through a less circuitous

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207. 448 U.S. at 646 (citations omitted).

208. See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223-24.

209. See *King*, 135 S. Ct. at 2488-89.

route.<sup>210</sup> Once the Court was finished with its analysis of the Affordable Care Act, it was plain that there was only one reasonable answer to the question of whether federal subsidies were available on federal exchanges, and that answer was yes.<sup>211</sup> It is very hard to imagine a nondelegation problem created by a statute that, altogether, made just one interpretive result reasonable. The Chief Justice may still have been worked up over the constitutional status of the administrative state, as he was in *City of Arlington*, but *King* was not an appropriate outlet for his pique.

Nor does the nondelegation doctrine support the canon embraced in *UARG*. The closest case, as Justice Scalia may have recognized,<sup>212</sup> is *The Benzene Case*. In *The Benzene Case*, the Occupational Safety and Health Administration (OSHA) had issued a regulation setting a permissible exposure limit for benzene in the workplace.<sup>213</sup> The agency had identified benzene as a human carcinogen for which a safe threshold could not be identified; thus, in accordance with its policy on carcinogens, the agency had assumed that benzene could cause cancer at any nonzero level.<sup>214</sup> The agency thus set the workplace standard at the lowest level it found to be economically and technologically feasible for the affected industries.<sup>215</sup> In the paragraph cited by Justice Scalia in *UARG*, a plurality of the Court was explaining why it concluded that the agency needed another step in its analysis: a quantitative finding that a risk was "significant."<sup>216</sup> Without such a finding, the plurality worried that a finding that a substance was probably a human carcinogen would justify "pervasive regulation" that might "impose enormous costs that might produce little, if any, discernible benefit."<sup>217</sup> Here, Justice Stevens spoke only for himself and three other Justices, and even so, his opinion intimated only the *possibility* of a constitutional issue.

Any actual constitutional implications of Justice Stevens's opinion in *The Benzene Case* faded fast. In a sequel to *The Benzene Case*,

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210. *See id.* at 2488.

211. *See id.* at 2496.

212. *See supra* note 206.

213. *See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 611 (1980) (plurality opinion).

214. *See id.* at 623-25.

215. *See id.* at 637.

216. *See id.* at 646.

217. *Id.* at 645.

*American Textile Manufacturers Institute, Inc. v. Donovan (Cotton Dust)*, the Court held that the Occupational Safety and Health Act (OSHAct) did not permit OSHA to balance costs and benefits in setting workplace standards for harmful substances, relegating constitutional worries to a terse footnote.<sup>218</sup> The Court brushed off Justice Rehnquist's charge that the OSHAct permitted OSHA to choose among three very different understandings of its regulatory authority and thus violated the nondelegation doctrine by simply noting that "this would not be the first time that more than one interpretation of a statute had been argued."<sup>219</sup> And, as discussed above, in *Whitman v. American Trucking Associations, Inc.*, a unanimous Court rejected the claim that the Clean Air Act unlawfully delegated legislative power to EPA by directing it to set national air quality standards without regard to economic cost or technological feasibility.<sup>220</sup> After *Cotton Dust* and *American Trucking*, it is no longer plausible to argue that the sheer breadth of regulatory authority—in terms of either the agency's choice among decision-making frameworks or the economic effect of the regulatory policy in question—truly poses a nondelegation problem. To bend statutory interpretation to avoid a nonexistent constitutional problem would be to go beyond even the constitutional penumbra into territory with no landmarks at all.

*Whitman* even more clearly separates the interpretive principle embraced in *Michigan* from the nondelegation doctrine. The question the Court faced in *Whitman* was simply a variant of the question faced in *Michigan*: Was it lawful for EPA not to consider costs in setting economically and politically consequential air pollution standards? The Court, per Justice Scalia, easily rejected the nondelegation challenge to the cost-blind framework of the program for criteria pollutants.<sup>221</sup> After *Whitman*, it is not credible to object on nondelegation grounds to a cost-blind framework for a different set of air pollutants.

The only difference between the two cases is that in *Whitman* the Court held that Congress had clearly created a cost-blind program

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218. See 452 U.S. 490, 541 n.75 (1981).

219. *Id.*

220. See 531 U.S. 457, 472-76 (2001).

221. See *id.*

for NAAQS,<sup>222</sup> whereas in *Michigan*, the Court seemed to conclude that Congress had been ambiguous about its intentions for the air toxics program.<sup>223</sup> But *Whitman* also teaches that this difference does not make a difference for nondelegation purposes. There, the Court reviewed a D.C. Circuit decision holding that EPA's cost-blind interpretation of the NAAQS provisions violated the nondelegation doctrine because EPA had not provided an "intelligible principle" to guide its discretion; the lower court "hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine."<sup>224</sup> The Supreme Court quickly dismissed this twist on the nondelegation doctrine in a single paragraph:

We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.... The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.<sup>225</sup>

The Court's decision in *Michigan* makes it clear that EPA would have prevailed if it had adopted a cost-sensitive interpretation of section 112 of the Clean Air Act.<sup>226</sup> But if there had been a true nondelegation problem in that case, the agency's "voluntary self-denial" in adopting a limiting interpretation would have been irrelevant to the outcome.<sup>227</sup> A nondelegation problem, *Whitman* teaches, inheres in the statute itself.<sup>228</sup> The Court did not avoid a constitutional problem by construing section 112 the way it did; the statute did not have a constitutional problem.<sup>229</sup>

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222. *See id.* at 486.

223. *See Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

224. *Whitman*, 531 U.S. at 472.

225. *Id.* at 472-73.

226. *See Michigan*, 135 S. Ct. at 2706-07.

227. *Whitman*, 531 U.S. at 473.

228. *See id.* at 472-73.

229. *See Michigan*, 135 S. Ct. at 2706-07, 2711.

Since the current Court lacks a majority for renovating and revitalizing the nondelegation doctrine, the Court necessarily also lacks a majority for finding a constitutional problem in situations that are unproblematic from the perspective of the prevailing nondelegation doctrine. And since the situations presented in *UARG*, *King*, and *Michigan* were unproblematic in this way, the Court would have had no warrant to use the canon of constitutional avoidance to adjust the statutes underlying those cases.

The Court did not, in any event, say that the power canons were necessary to help avoid a plausible constitutional problem; it did not describe a constitutional problem at all. Even when it is explicitly invoked, the avoidance doctrine is a weaselly basis for trimming statutes Congress has passed. As a silent partner to the Court's statutory emendations, it would be even less honest.

Moreover, Professor Manning has offered a compelling argument against deploying the nondelegation doctrine as a canon of avoidance. Using nondelegation in this way, he has explained, founders on an internal contradiction:

If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment, it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute's conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process.<sup>230</sup>

The judiciary “undermines, rather than furthers,” the interests underlying the nondelegation doctrine by using it, “in effect, to rewrite the terms of a duly enacted statute.”<sup>231</sup> Using the nondelegation doctrine in this way, moreover, reintroduces the very same kinds of line-drawing problems that have helped persuade the Court to refrain from direct enforcement of the doctrine; as Professor Manning puts it, “[t]he move from judicial review to avoidance does not eliminate the difficulties in judicial line-drawing; it simply moves the line.”<sup>232</sup>

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230. Manning, *supra* note 208, at 224.

231. *Id.* at 228.

232. *Id.* at 258.

The nondelegation doctrine is not even the constitutional idea that seems most aligned with the power canons. The nondelegation doctrine is about the clarity of the instructions Congress gives to the executive branch.<sup>233</sup> Those instructions might be equally unclear—and thus equally problematic—for deregulation as for regulation. The power canons, in contrast, disfavor regulation, not deregulation. When *UARG* speaks disapprovingly of *expansions* of regulatory authority, and when *Michigan* highlights the special meaning of agency “*regulation*,” these cases are signaling the Court’s one-way concern about regulation.<sup>234</sup> Agencies can, even with the power canons in place, expect a *Chevron* pass when they *deregulate*. Indeed, recall that *Chevron* itself came to life during the Reagan Administration, and its light touch blessed many of the Administration’s deregulatory policies.<sup>235</sup> It is possible that the power canons speak not to nondelegation but to a different constitutional norm—the idea, associated with the *Lochner* era, that government intervention in private markets comes with a heavy presumption against it.<sup>236</sup> If this is indeed the tradition the Court was calling upon in creating the power canons, no wonder the Court said nothing about it. Considered thus, the rulings in the cases discussed here would be boldly passive rulings indeed: ones that resuscitated a long-discredited constitutional norm while not daring even to name it.

### III. THE POWER CANONS’ NORMATIVE PROBLEMS

Professor William Eskridge has offered several normative principles for evaluating canons of statutory interpretation. In this Part, I apply Professor Eskridge’s normative tests to the power canons, and I find the canons fail these tests. I do not claim that the power canons—or any interpretive canons—are necessarily justified if they pass the normative tests I apply here. It may be that these are the kinds of tests that unelected judges are unsuited to administer. My

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233. See Eskridge, *supra* note 15, at 535-36.

234. See *Michigan*, 135 S. Ct. at 2706-07; *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444, 2448-49 (2014).

235. See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

236. See generally *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).



more modest claim is that interpretive canons that fail all of these tests—as the power canons do—should be shunned.

Professor Eskridge’s evaluative principles draw on rule-of-law values, democratic values, and “unquestionably cherished” public values.<sup>237</sup> As Professor Eskridge has observed, interpretive rules that cut across statutes and put a thumb on the scales of particular interpretive outcomes may upset rule-of-law values such as predictability and objectivity;<sup>238</sup> their emergence and application may be unexpected or uneven, and they may merely reflect judges’ own political or philosophical preferences. Interpretive rules may also either facilitate or imperil democratic values by facilitating or imperiling “Congress’s adoption of statutes that will, in operation, reflect the aims, goals, and compromises that drove the legislative process.”<sup>239</sup> Finally, interpretive rules may be appealing insofar as they embrace unquestionably cherished public values such as the separation of powers and deliberation.<sup>240</sup>

In many places in this discussion, I fault the power canons for their departure from *Chevron*. The principle of deference embraced in *Chevron* is itself an interpretive rule, one that also should be subject to normative analysis.<sup>241</sup> If any interpretive principle has been subjected to normative analysis, however, it is *Chevron*’s, and I do not intend to cover that vast territory here. Other scholars have ably argued that *Chevron* promotes several of the norms I discuss.<sup>242</sup> More fundamentally, as I have argued throughout this Article, the power canons are not only, or even primarily, about *Chevron*. The power canons instruct Congress itself to speak clearly or to have its voice go unheard. The power canons put the courts in the position of a passive-aggressive drill sergeant (“I cannot *hear* you,” the Court seems to be insisting) rather than an attentive and

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237. Eskridge, *supra* note 15, at 576-82.

238. *See id.* at 576-77.

239. *Id.* at 578.

240. *See id.* at 580.

241. *Cf.* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (identifying that the EPA’s interpretation of the statute at issue was reasonable and entitled to deference).

242. *See generally, e.g.*, Eskridge, *supra* note 15.

respectful listener.<sup>243</sup> The power canons are problematic independent of their rejection of deference under *Chevron*.

### A. Predictability

The power canons defeat predictability in several ways. Most basically, the power canons' very novelty undermines any reliance Congress might have placed on a stable interpretive regime when enacting statutes prior to the Supreme Court's embrace of these canons.<sup>244</sup> In particular, the power canons' retroactive demand for clarity from Congress departs from the Court's prior approach to statutory ambiguity. Some of the Justices who joined the opinions creating the power canons have, in prior opinions, argued that the Court should not apply new interpretive principles to statutes enacted before the Court embraced those principles.<sup>245</sup> They did not heed that advice in creating the power canons.

Moreover, to the extent the power canons undermine the *Chevron* framework, they betray any reliance legislative drafters may have placed on this framework in developing legislation. Although Professors Gluck and Bressman have compellingly shown that it is often wrong to assume familiarity with and use of canons of statutory interpretation by legislative drafters, *Chevron* stood out in their study as an interpretive principle that was both known and used by many legislative drafters.<sup>246</sup> The power canons also upset the reliance administrative agencies likely placed on the preexisting interpretive regime.<sup>247</sup>

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243. For a compelling argument that knowledge of congressional procedure—"how Congress does in fact make decisions"—should inform courts' interpretation of statutes, see generally Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70 (2012).

244. On the general problem of transition posed by the creation of new canons, see Philip P. Frickey, *Interpretive-Regime Change*, 38 *LOY. L.A. L. REV.* 1971, 1981-86, 1990 (2005).

245. In *B&B Hardware, Inc. v. Hargis Industries, Inc.*, Justice Thomas, joined by Justice Scalia, argued in dissent that the Court should not apply a principle of statutory interpretation to statutes passed before the principle was announced. See 135 S. Ct. 1293, 1311 n.1, 1314 & n.3 (2015) (Thomas, J., dissenting).

246. See Gluck & Bressman, *supra* note 63, at 927 fig.1, 928 fig.2, 941 fig.5, 995-98.

247. On reliance by agencies on the interpretive regime embraced by courts, see Barron & Kagan, *supra* note 62, at 227-28; on their reliance on *Chevron* itself, see Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 *STAN. L. REV.* 999, 1005-07, 1020 (2015).

The interpretive principles embraced in *UARG* and *Michigan* are especially disruptive. *UARG* is specifically aimed at agencies' work in "long-extant" statutory regimes, the very kinds of regimes most likely to experience disruption when the interpretive ground rules suddenly change.<sup>248</sup>

To the extent there was a coherent jurisprudence on agencies' discretion to consider costs before *Michigan*, it cut in the opposite direction: where the Court had limited agencies' discretion regarding consideration of costs, it had done so by preventing consideration of costs altogether<sup>249</sup> or by precluding a balancing of costs against benefits.<sup>250</sup> A strong theme in previous cases concerning statutes aimed at protecting human health and the environment was the recognition that a consideration of costs or a balancing of costs against benefits could undo the underlying, protective statutory mission.<sup>251</sup> To be sure, in two recent environmental cases, the Supreme Court had upheld, as a reasonable interpretation of the underlying statutes, EPA's decision to consider regulatory costs.<sup>252</sup> In each case, however, the majority was careful to say that EPA would have been within its legal rights in taking a different view of the role of costs in the underlying regulatory decisions.<sup>253</sup> In short, the Supreme Court's pre-*Michigan* jurisprudence on the relevance of cost to regulatory determinations gave little notice of the cost-sensitive canon to come. Brand-new canons do not promote predictability.

The canons will also prove unpredictable in operation. The power canons are triggered by circumstances that are highly subjective, and this subjectivity will undermine predictability going forward. *UARG* and *King* each turn in part on the economic and political importance of the question at issue. As Professor Sunstein observed in discussing *FDA v. Brown & Williamson Tobacco Corp.* some years ago, judgments about economic and political importance are subjective and unpredictable.<sup>254</sup> Indeed, as he pointed out, *Chevron*

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248. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

249. *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468-70 (2001).

250. *See* *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509-13, 519-21 (1981).

251. *See, e.g.,* *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976).

252. *See* *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593, 1610 (2014); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224, 226 (2009).

253. *See* *EME Homer City*, 134 S. Ct. at 1607; *Entergy*, 556 U.S. at 218.

254. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 245 (2006).

itself involved an economically consequential and politically contentious decision about the appropriate deployment of market-based regulatory measures under the Clean Air Act—yet, obviously, no interpretive principle based on significance prevented the outcome there.<sup>255</sup> And just last Term, the Supreme Court upheld a highly consequential rule issued by the Federal Energy Regulatory Commission, incentivizing “demand response” energy programs, without any hint that the economic and political significance of the matter affected the Court’s review.<sup>256</sup> Canons that appear after a long absence, then disappear as suddenly, perhaps to return some other day, undermine legal stability.

*UARG* and *King* exacerbate the uncertainty of the “major questions” idea by adding new, untested factors to the interpretive calculus. *UARG* adds the “long-extant” nature of the statutory regime,<sup>257</sup> while *King* adds the perceived inappropriateness of the agency identified by Congress.<sup>258</sup> Changing the interpretive calculus for longstanding statutory frameworks likely worsens the reliance problem, especially since *Chevron* itself focused so intently on the freedom of administrative agencies to change their policy preferences under existing statutes.<sup>259</sup> And threatening to throw out the *Chevron* framework altogether when Congress is perceived to have chosen the wrong agency for the job may be highly disturbing to a wide variety of regulatory regimes. In fact, tax lawyers are already bracing for the possibility that courts may be emboldened to second-guess the interpretive choices of the Internal Revenue Service in contexts ranging well beyond the highly salient Affordable Care Act.<sup>260</sup>

The cost-sensitive default principle of *Michigan v. EPA* is also unpredictable in operation. That case largely turned on the Clean Air Act’s use of the word “appropriate” in instructing EPA to decide whether to regulate power plants under section 112 of the Act.<sup>261</sup>

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255. *See id.* at 232-33.

256. *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 766-67 (2016).

257. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

258. *King v. Burwell*, 135 S. Ct. 2480, 2494 (2015).

259. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 856-59 (1984).

260. *See* Ellen P. Aprill, *King v. Burwell and Tax Court Review of Regulations*, 2015 PEPP. L. REV. 6, 7, 16-17.

261. *See Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015).

The Court cautioned that not every use of this term in statutes would trigger the obligation to consider costs, emphasizing that the Clean Air Act used this language in reference to “*regulation*.”<sup>262</sup> Despite this limit on its holding—which, as I will discuss in the next Section, only highlights the political valence of the Court’s new principle—the fact remains that the U.S. Code uses the word “appropriate” more than 10,000 times.<sup>263</sup> Many of these uses relate to regulatory decisions. Indeed, in just the one provision of the Clean Air Act at issue in *Michigan*, section 112, Congress thirty-three times qualified the exercise of EPA’s discretion with the term “appropriate.”<sup>264</sup> By constructing a principle of statutory interpretation that by its terms goes beyond the case at hand, the Court has created unnecessary and unhealthy uncertainty about the meaning of a pervasive statutory concept. Not only are we now faced with uncertainty about what the broad term “appropriate” means in specific statutory contexts, but we also cannot reliably predict which branch of the government will ultimately decide its meaning.

What is more, the *Michigan* canon appears not to turn on specific statutory language. Justice Scalia offered it as a general principle of rational agency decision-making, and Justice Kagan opined on the general relevance of costs to regulatory policy without alluding to the language of the Clean Air Act.<sup>265</sup> It appears, therefore, that all nine Justices have signed on to the proposition that agencies must, unless Congress provides otherwise, consider costs either when deciding to regulate or in developing regulations. The potential reach of the canon decreases legal stability, both for Congress and for agencies. The canon does not depend on magic words (like “appropriate”) that can be either avoided or deployed by Congress, or treated with special care by agencies; it depends on an overarching view of rationality that will, almost inevitably, be unpredictable in application.

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262. *Id.* at 2707.

263. *See supra* note 25.

264. *See* 42 U.S.C. § 7412 (2012).

265. *See Michigan*, 135 S. Ct. at 2707; *id.* at 2716-17 (Kagan, J., dissenting).

### B. Objectivity

As Professor Eskridge has observed, substantive canons derived from “context-driven substantive judgments by ideologically inspired judges ... can undermine the rule of law.”<sup>266</sup> The power canons fit this description. The basic problem with these canons is that they appear to assume that a passive agency is better than an active one. But this is so only if passive government is one’s preference. This is not an objective preference.

The interpretive principles embraced in *King v. Burwell* and *UARG v. EPA* are highly subjective. Their common feature is the presence of an issue of great “economic and political significance.”<sup>267</sup> This is not an objective test of statutory meaning. The very identification of issues as economically and politically significant in the relevant way involves subjective judgments.

This point is well made by comparing *UARG* to *Chevron* itself. In both *UARG* and *Chevron*, the Court considered the circumstances that would trigger the requirements for stationary-source permitting under the Clean Air Act.<sup>268</sup> In *UARG*, the permitting program at issue was the Act’s Prevention of Significant Deterioration (PSD) program.<sup>269</sup> In *Chevron*, it was the Act’s New Source Review (NSR) program.<sup>270</sup> These are two sides of the same coin; the difference is the relative cleanliness of the air in the area where a permitted source is located. But in *UARG*, the Court thought ambiguity in the statute did not justify the agency’s triggering of the permitting requirement,<sup>271</sup> whereas in *Chevron* the Court thought ambiguity in the statute did justify the agency’s declination to trigger the permitting requirement.<sup>272</sup>

What is the difference in the two situations? In *UARG*, sources were regulated on account of the agency’s interpretive choice; in *Chevron*, they were deregulated on account of the agency’s inter-

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266. Eskridge, *supra* note 15, at 577.

267. *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442-44 (2014).

268. *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2435; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984).

269. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2435.

270. *Chevron*, 467 U.S. at 846-47, 855-57.

271. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2435.

272. *Chevron*, 467 U.S. at 846-47, 855-57.

pretive choice. If there were still any doubt about the political thrust of the *UARG* canon, it would be laid to rest by the Court's emphasis on EPA's "expansion" of regulatory authority.<sup>273</sup> To make interpretive deference turn on the regulatory or deregulatory, or contractive or expansive, thrust of an agency's choice is not a neutral choice.

The subjectivity of the canons that turn on "economic and political significance" is deepened by the fact that the same economically and politically significant issue lies on both sides of the interpretive question, yet the Court has privileged certain kinds of agency decisions over others. In *UARG*, if EPA had interpreted the Clean Air Act *not* to trigger permitting requirements for stationary sources of greenhouse gases once mobile sources were regulated, this would have been answering the very same question that the Court thought was of such great economic and political significance.<sup>274</sup> It just would have been giving a different answer to the question. An agency does not stay away from issues of great significance by answering them in one way rather than another; either answer engages with the same issues that the Court has deemed so significant Congress could not have meant to give them to an agency through subtle or indirect signals. The fact that the Court in *UARG* did not see it that way shows that the Court's real worry was not that the agency would make a really big interpretive decision without clear statutory language telling it to, but that it would make the *wrong* interpretive decision.

The factor of economic and political significance also privileges agency inaction over action. The Court's cases make clear that only some kinds of very important decisions fit within the canon. In considering "economic" significance, the Court seems to weigh only the burdens on industry of agency action, not the burdens on regulatory beneficiaries of agency passivity. The Court did not much care about the problem of climate change and the costs of stepped-down agency action in *UARG*,<sup>275</sup> nor did it appear to take into account the gargantuan economic and human-health costs of passivity on smoking in undoing the FDA's rule in *FDA v. Brown & Williamson Tobacco Corp.*<sup>276</sup> *Not* acting on the dangers of smoking

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273. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

274. *Cf. id.*

275. *See id.*

276. *See* 529 U.S. 120, 159-61 (2000).

in light of the FDA's newly discovered evidence that the tobacco industry deliberately manipulated nicotine levels in cigarettes to produce a desired physiological response also would have answered a question of enormous significance, but the very premise of the Court's decision in *Brown & Williamson* is that inaction was the proper course.

"Political" significance also has a skewed application. In *Brown & Williamson*, for example, the Court explicitly noted the political power of the tobacco industry in highlighting the political significance of the regulation of tobacco and tobacco products.<sup>277</sup> If "political significance" is tied to political *influence*, an interpretive canon that turns on such significance will surely favor regulated industries over regulatory beneficiaries.

The cost-sensitive canon of *Michigan v. EPA* is similarly ideological. This canon, too, is triggered only by regulation, not by agency inaction or deregulation.<sup>278</sup> Justice Scalia makes this point explicitly in explaining that the use of the term "appropriate" in the context of section 112 of the Clean Air Act must mean that the agency may not omit consideration of costs because "appropriate" is used in reference to "*regulation*."<sup>279</sup> Justice Kagan also expressly links her cost-sensitive canon to regulation: "(absent contrary indication from Congress) an agency must take costs into account in some manner before *imposing significant regulatory burdens*."<sup>280</sup> Regulatory burdens alone—not the burdens associated with the absence or withdrawal of regulatory protections—trigger the obligation to consider costs. The preference for the absence or withdrawal of regulation over the use of regulation is not neutral or objective.

This preference appears to match the ideological preferences of the majority and dissenting Justices. Justice Scalia had long copped to his antiregulatory leanings, particularly in the environmental domain.<sup>281</sup> He had for years maintained that a failure to follow

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277. *See id.* at 147.

278. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015).

279. *Id.* (emphasis added).

280. *Id.* at 2717 (Kagan, J., dissenting) (emphasis added).

281. *See, e.g.*, Antonin Scalia, Paper, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 105-06 (1987) ("An agency that exercises its discretion in the direction of more limited application of the environmental laws is not necessarily false to its responsibilities; and an agency that exercises it in the direction of more expansive application is not necessarily true to them.").



through on the environmental promise of the environmental laws may be a good thing, not a bad thing.<sup>282</sup> What may be less obvious is how Justice Kagan's cost-sensitive interpretive principle also appears to match her own ideological preferences. Her signature piece of scholarship as a law professor extolled the virtues of "presidential administration," or the active intervention by the President in agencies' regulatory decisions.<sup>283</sup> A centerpiece of presidential administration in the current era is White House review of agencies' major rules, and a centerpiece of this review is cost-benefit analysis.<sup>284</sup> Justice Kagan's dissent in *Michigan v. EPA*, in fact, draws on the practice of White House regulatory review and its accompanying cost-benefit analysis as support for her view that EPA adequately considered costs in deciding to regulate power plants under section 112 of the Clean Air Act.<sup>285</sup> Her interpretive default principle matches her ideological preference for the kind of regulatory evaluation that takes place within the White House.

The power canons are also subjective insofar as they rely on factors that may be turned on or off, depending on the level of generality at which they are described. Consider the Court's insistence in *King* that Congress choose the right agency for the interpretive job.<sup>286</sup> Although the Court does not acknowledge it, in fact, the Court needed to do important interpretive work even in deciding that the IRS was not the right agency for this job. In choosing to focus on agency expertise, the Court needed to choose a substantive frame for the Affordable Care Act: Was it a health-care statute, ill-suited to the IRS's skill set, or was it a tax revenue statute, well within the IRS's wheelhouse? The best answer was probably that it was both—an exceedingly complex regulatory regime that contained many different elements, calling on a variety of forms of agency expertise. But the Court's search for *the* correct interpretive agent pressed it to identify just one characterization of the Affordable

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282. See, e.g., *id.*

283. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383-84 (2001).

284. See Lisa Heinzerling, Lecture, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 350 (2014).

285. See 135 S. Ct. at 2715, 2721-22 (Kagan, J., dissenting).

286. See *King v. Burwell*, 135 S. Ct. 2480, 2489, 2496 (2015).

Care Act. This was not a neutral—or even sensible—antecedent interpretive decision.

The factor of economic and political significance also surges or recedes depending on the way one frames the underlying legal question. In *UARG*, the Court could have looked at EPA's overall framework for bringing greenhouse gas emissions into the permitting program for stationary sources. If the Court had done this, it would have found that EPA's program actually only moderately increased the number of sources in the program.<sup>287</sup> Seen this way, the question whether any sources should be brought into the program based solely on their greenhouse gas emissions was not actually a question of great economic and political significance. Instead, however, the Court chose to look at just one aspect of the regulatory framework—the triggering rule—and declare it of “vast economic and political significance.”<sup>288</sup> When so much turns on the initial framing of the issue, results going forward are bound to reflect subjective preferences.

### C. Democratic Values

Professor Eskridge argues that normative canons may be justified by “democracy values” insofar as they “help unelected judges, strangers to the statutory project, to understand the policy assumptions, trade-offs, purposes, and deals that characterize the serious process of statute-making in our system.”<sup>289</sup> The power canons do the opposite: they substitute a one-size-fits-all presumption for meaningful engagement with the details of the underlying statutory scheme.

In *UARG*, the Court's interpretive principle disfavoring fresh exercises of authority under longstanding statutes brushed past the possibility that the breadth of the Clean Air Act's language—particularly its definition of “air pollutant”—signaled a congressional desire for the agency to reach new environmental problems without

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287. Cf. Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,454 (Sept. 28, 2009) (to be codified at 40 C.F.R. pts. 86 and 600 and 49 C.F.R. pts. 531, 533, 537, and 538) (describing the vehicles to be affected by regulation).

288. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

289. Eskridge, *supra* note 15, at 579.

further recourse to the legislative process.<sup>290</sup> A basic purpose of broad statutory language is to allow precisely the outcome the Court disapproved in *UARG*: the fresh assertion of regulatory authority as information develops showing that regulatory intervention is warranted. To introduce a presumption against this kind of regulatory evolution is to disrespect the choices implicit in broad statutory terms.<sup>291</sup>

*King* has a different problem when it comes to democratic values. Ultimately, this decision respected the legislative process insofar as it declined to upend Congress' work product through fixation on four words in a complicated statute and instead looked at the whole of the statutory framework. However, before engaging in a sensible analysis of the legislative process that led to the Affordable Care Act, the Court embraced an interpretive principle that is not, itself, sensitive to detail and context. Elements of the interpretive principle embraced in *King*—economic and political importance and the perceived appropriateness of the agency Congress chose for the interpretive job<sup>292</sup>—are insensitive to the fine-grained details of the legislative process. In fact, with the exception of a brief discussion of the political influence of the tobacco industry in *Brown & Williamson*, the Court has never explained the factual assumptions underlying its determinations of “economic and political significance” or identified exactly how much economic and political significance is enough.<sup>293</sup> The interpretive principle embraced in *King* did not, as it happens, upend the legislative work product at issue in that case, but it did plant a land mine for future cases.

Understanding how the cost-sensitive canon embraced in *Michigan v. EPA* disrespects the “policy assumptions, trade-offs, purposes, and deals”<sup>294</sup> embedded in section 112 of the Clean Air Act requires a deeper dive into section 112 and the legal context surrounding EPA's rule.

The regulation at issue in *Michigan* was decades in the making.<sup>295</sup> This regulation—known as “MATS,” for “Mercury and Air Toxics

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290. See *Util. Air Regulatory Grp.*, 134 S. Ct. at 2431-32.

291. See *id.*

292. See *supra* Part I.B.

293. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000).

294. Eskridge, *supra* note 15, at 579.

295. See *Michigan v. EPA*, 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting).

Standards”—limited toxic air pollution from power plants.<sup>296</sup> The provision of the Clean Air Act under which the rule was promulgated, section 112, had called for control of hazardous air pollutants from stationary sources since 1970.<sup>297</sup> After EPA had managed to regulate only seven hazardous air pollutants in twenty years under section 112’s original framework, Congress in 1990 overhauled section 112 in the hope of creating a regulatory program for hazardous air pollutants that would actually regulate some hazardous air pollutants.<sup>298</sup>

Congress listed the initial pollutants to be regulated—187 in all—and set strict and precise technology-based requirements for sources emitting these pollutants.<sup>299</sup> However, cognizant of its simultaneous creation of additional new regulatory requirements for power plants, in particular an emissions trading program to address acid rain,<sup>300</sup> Congress tasked EPA with first studying the hazardous air pollution that would remain once the other new requirements were in place and then deciding whether regulation under section 112 was “appropriate and necessary” in light of the agency’s research.<sup>301</sup>

After Congress revamped section 112 of the Clean Air Act in 1990, a decade passed before EPA determined, at the very end of the Clinton Administration, that regulation under section 112 was “appropriate and necessary,” despite the other requirements imposed by Congress in 1990.<sup>302</sup> The Clinton Administration then gave way to the Administration of George W. Bush, and almost another decade passed while the latter Administration tried to substitute regulation under section 111 of the Clean Air Act for regulation under section 112, so that it could avoid the rigorous technology-based requirements of section 112 and in their place create a trading program for hazardous air pollutants from power plants.<sup>303</sup>

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296. Flexible Implementation of the Mercury and Air Toxics Standards Rule, 76 Fed. Reg. 80,727, 80,727 (Dec. 27, 2011).

297. See H.R. REP. NO. 101-490, pt. 1, at 151 (1990).

298. See *id.* at 151, 154 (discussing the amendment’s creation of a statutory list of over 170 air pollutants).

299. See 42 U.S.C. § 7412(b) (2012) (listing pollutants); *id.* § 7412(d) (describing technology-based requirements).

300. See H.R. REP. NO. 101-490, pt. 1, at 468.

301. 42 U.S.C. § 7412(n)(1)(A).

302. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,825-26 (Dec. 20, 2000).

303. See Standards of Performance for New and Existing Stationary Sources: Electric

The D.C. Circuit rejected this legal experiment because EPA had not followed section 112's requirements for deregulating sources of hazardous air pollutants.<sup>304</sup> At last, in 2012, EPA issued a final rule governing hazardous air pollutants from power plants.<sup>305</sup> This is the rule the Supreme Court rejected, as premised on an inadequate threshold finding of appropriateness, in *Michigan v. EPA*.<sup>306</sup>

A key to understanding the MATS rule is the legal environment in which it developed. During the rule's long gestation, the D.C. Circuit repeatedly affirmed the broad applicability and unyielding strictness of the technology-based requirements of section 112 in rejecting EPA's efforts to avoid them.<sup>307</sup> EPA lost case after case in the D.C. Circuit, with most of the decisions faulting EPA for regulating too little rather than for regulating too much.<sup>308</sup> When EPA tried—more than once—to regulate only some of the hazardous air pollutants emitted by sources covered under section 112, the D.C. Circuit rebuffed the agency, directing it to regulate all of the hazardous air pollutants from those sources.<sup>309</sup> When EPA tried to avoid the pollution controls required by section 112 by explaining—in the words of section 112—that such controls were not “appropriate” or “viable,” the court again scolded the agency for failing to impose controls on all covered sources.<sup>310</sup> When EPA tried to soften the technology-based standards of section 112 by requiring sources to install only those controls all sources could achieve, rather than the controls the best performers achieved in practice, the agency lost again.<sup>311</sup> When EPA tried to create a “low-risk”

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Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, and 75) (describing EPA's decision to regulate air pollutants under section 111 of the Clean Air Act).

304. See *New Jersey v. EPA*, 517 F.3d 574, 578, 583 (D.C. Cir. 2008).

305. See *National Emission Standards for Hazardous Air Pollutants*, 77 Fed. Reg. 9304, 9304 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60 and 63).

306. 135 S. Ct. 2699, 2706-07, 2712 (2015).

307. See, e.g., *Cement Kiln Recycling Coal v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001) (per curiam) (finding the maximum emissions reduction achievable cannot be less than what the best-performing sources achieve).

308. See, e.g., *Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 633-34 (D.C. Cir. 2000) (holding EPA must regulate all hazardous air pollutants under section 112).

309. See *Nat. Res. Def. Council v. EPA*, 489 F.3d 1364, 1371-73 (D.C. Cir. 2007); *Nat'l Lime Ass'n*, 233 F.3d at 633-34.

310. See *Sierra Club v. EPA*, 479 F.3d 875, 883 (D.C. Cir. 2007) (per curiam).

311. See *Cement Kiln Recycling Coal*, 255 F.3d at 861.

subcategory of sources eligible for exemption from all emission reduction requirements (under a provision directing the agency to subcategorize sources “as appropriate”), the court found that the attempt violated the plain language of section 112.<sup>312</sup> When the agency created an affirmative defense to citizen suits, giving a pass to sources exceeding emissions limits due to “unavoidable” malfunctions, the court again held that the agency had gone too far in letting sources off the hook, rejecting the agency’s plea for the court to “*presume* a delegation of power absent an express *withholding* of such power.”<sup>313</sup> And when EPA tried to avoid regulation of power plants under section 112 by citing the superior efficiency and cost-effectiveness of its preferred regulatory approach under section 111 of the Clean Air Act,<sup>314</sup> the D.C. Circuit, in *New Jersey v. EPA*, instructed EPA that the only way to deregulate power plants under section 112 was to make the strict, risk-based findings specified in section 112(c)(9).<sup>315</sup> The court chided the agency for using “the logic

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312. *Nat. Res. Def. Council*, 489 F.3d at 1372-73.

313. *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014) (quoting *Ry. Labor Execs.’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)).

314. Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants, 70 Fed. Reg. 15,994, 15,994, 16,005 (Mar. 29, 2005) (to be codified at 40 C.F.R. pt. 63) [hereinafter Revision of December 2000 Regulatory Finding].

315. *See* 517 F.3d 574, 578 (D.C. Cir. 2008). Section 112(c)(9) of the Clean Air Act, 42 U.S.C. § 7412(c)(9) (2012), specifies the following risk-based determinations as prerequisites to delisting sources under section 112:

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator’s own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

of the Queen of Hearts, substituting EPA's desires for the plain text of section 112(c)(9)."<sup>316</sup>

EPA and industry thus found themselves in a legal bind after the 2008 decision in *New Jersey v. EPA*. According to the explicit terms of section 112, no one could challenge EPA's 2000 finding that regulation of power plants under section 112 was "appropriate and necessary" until EPA actually finalized emission standards for power plants.<sup>317</sup> Yet with the 2000 determination in place, EPA remained under a legal obligation to regulate power plants under section 112.<sup>318</sup> EPA could avoid that obligation by making the risk-based findings specified in section 112(c)(9), but the agency had not made such findings and had never claimed it could do so.<sup>319</sup> Awkwardly, then, the only realistic way for the agency to avoid its obligation to regulate power plants under section 112 was to actually regulate power plants under section 112—and then wait for a court to confirm what the agency at that time believed, which was that the predicate determination of appropriateness and necessity was mistaken.

Urging the full D.C. Circuit to correct this "absurd" result, EPA and industry petitioned for rehearing en banc of the panel decision in *New Jersey v. EPA*. The agency argued, in essence, that it was ridiculous to require the agency to go through a laborious rulemaking process only to obtain a judgment as to the legality of the predicate determination underlying the whole rulemaking. The D.C. Circuit was not convinced; the court denied the petition for rehearing en banc.<sup>320</sup>

EPA, states, and industry groups then filed petitions for certiorari, making the same basic legal pitch they had made to the D.C. Circuit. EPA argued:

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316. *New Jersey*, 517 F.3d at 582.

317. See 42 U.S.C. § 7412(e)(4); see also *Util. Regulatory Grp. v. EPA*, No. 01-1074, 2001 WL 936363 (D.C. Cir. July 26, 2001) (per curiam) (finding that EPA's 2000 determination that regulation of power plants was "appropriate and necessary" under section 112 was not final agency action subject to judicial review).

318. See 42 U.S.C. § 7412(c)(9).

319. Revision of December 2000 Regulatory Finding, *supra* note 314, at 16,032-33.

320. *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. May 20, 2008). Five of the active judges on the circuit—out of a total of ten active judges—did not participate in the decision whether to grant rehearing. See *id.* (noting that Judges Ginsburg, Henderson, Randolph, Garland, and Kavanaugh did not participate).

If left unreviewed, the court's ruling will ... require EPA to devote considerable resources to the formulation of emission standards that will be rendered superfluous if the initial 2000 listing decision—a decision that the agency itself has since concluded was flawed at the time it was issued—is ultimately overturned on judicial review.<sup>321</sup>

The agency asserted that the lower court's interpretation "frustrates Congress's purpose in establishing distinct criteria for regulation of power plants under Section 7412"<sup>322</sup> and that "Section 7412(n)(1)(A) is properly understood to vest EPA with *continuing*, temporally unbounded discretion to determine, based either on new data or on re-examination of previously considered evidence, whether regulation of power plants under Section 7412 is 'appropriate and necessary.'"<sup>323</sup> Along similar lines, the Utility Air Regulatory Group argued in its petition that the decision below required it "to participate in many more years of unnecessary rulemaking activities simply because the court has refused to address EPA's authority to list [power plants] in the first place."<sup>324</sup>

Then the administration changed hands again. The Obama Administration disagreed with the Bush Administration's view that the predicate finding for regulating power plants under section 112 was inadequate. Indeed, the new Administration soon resolved to comply with *New Jersey v. EPA* by developing emission standards for power plants under section 112. For the government, this decision mooted the petition for certiorari it had recently filed, as the government now intended to meet rather than avoid the regulatory obligation created by its 2000 determination on power plants. The Solicitor General's office was persuaded to withdraw its petition for certiorari with the explanation that the government intended to move forward with emission standards under section 112.<sup>325</sup> States and industry groups, for their part, had no such change of heart and

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321. Petition for Writ of Certiorari at 11, *EPA v. New Jersey*, 555 U.S. 1162 (2009) (No. 08-512).

322. *Id.* at 16.

323. *Id.* at 17.

324. Petition for Writ of Certiorari at 19, *Util. Air Regulatory Grp. v. New Jersey*, 555 U.S. 1169 (2009) (No. 08-352).

325. See Motion of the Environmental Protection Agency to Dismiss the Case, *EPA v. New Jersey*, 555 U.S. 1162 (2009) (No. 08-512).



continued to press for Supreme Court review using the same kinds of arguments that the government had initially asserted. The Court denied certiorari.<sup>326</sup>

Thus the matter rested once more in EPA's hands. After more than a decade of losing cases in which it had attempted to moderate the strict technology-based standards of section 112, EPA faced a straitjacketed legal environment in crafting a response to the court's rejection of its attempt to take power plants outside the confines of section 112. The D.C. Circuit's invalidation of the agency's efforts to ease section 112's requirements meant that sources already regulated under section 112—oil refineries, cement kilns, brick kilns, wood products, and more<sup>327</sup>—would be obligated to follow the technology-based requirements of section 112 to the letter. All of these sources, combined, emitted a lower volume of many hazardous air pollutants than the single category of power plants.<sup>328</sup> If EPA did not subject power plants to the same legal burdens, it would, incongruously, be regulating the more highly polluting sources less strictly than the less polluting sources. Moreover, in the interval between the listing of power plants under section 112 and the promulgation of emission standards for these sources, EPA and the states were under an obligation to apply the technology-based requirements of section 112 to new, modified, and reconstructed sources on a case-by-case basis—meaning that even without a final rule on power plants in place, such sources (if newly built or modified) would be required to comply with section 112's technology-based requirements.<sup>329</sup> In addition, EPA's losing streak in the D.C. Circuit featured a long list of cases in which the court reminded the agency that section 112 had been amended in 1990 precisely in order to tighten regulation of hazardous air pollutants and to ensure that the agency could not once again evade its regulatory obligations.<sup>330</sup>

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326. *Util. Air Regulatory Grp.*, 555 U.S. at 1169.

327. See *National Emissions Standards for Hazardous Air Pollutants (NESHAP)*, EPA, <https://www.epa.gov/stationary-sources-air-pollution/list-national-emission-standards-hazardous-air-pollutants-neshap> [<https://perma.cc/JB8E-Z7B3>] (last updated Nov. 15, 2016).

328. Brief of Respondents American Academy of Pediatrics at 10, *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (No. 14-46) (citing EPA's figures showing that power plants emitted 50 percent of mercury air emissions, 62 percent of arsenic, 82 percent of hydrochloric acid, 62 percent of hydrogen fluoride, and 83 percent of selenium).

329. See 42 U.S.C. § 7412(g)(2) (2012).

330. See, e.g., *Sierra Club v. EPA*, 551 F.3d 1019, 1028 (D.C. Cir. 2008) (Rogers, J.);

The court's message—delivered by judges spanning the political spectrum—was that EPA had overreached by under-regulating.

When it came time to issue the final rule on power plants, EPA heeded the D.C. Circuit's admonitions to favor pollution control over economic efficiency, to avoid inventing escape hatches through which sources could wriggle out of section 112's technology-based requirements, and to regulate all hazardous air pollutants from covered sources. Following the lower court's legal instructions meant creating a giant rule.

The Supreme Court acknowledged no part of this legal context in *Michigan v. EPA*. Rather than understanding, and working with, the unwaveringly strict scheme created by section 112 and elaborated on in numerous cases in the D.C. Circuit, the Court majority created an interpretive principle that cast doubt on the very rationality of such a scheme.<sup>331</sup> And Justice Kagan, in dissent, may have damned the section 112 regulatory framework by indirection when she overstated the sensitivity of that framework to fundamental concerns about costs.<sup>332</sup> The blunt tool of the cost-sensitive canon allowed the Court to ignore statutory history and design, and its use in *Michigan* drove an undemocratic wedge between the legislative framework and the judicial outcome.

#### D. Public Values

For Professor Eskridge, a last category of substantive values that might justify some normative canons are “[s]ubstantive values that are unquestionably cherished in our history.”<sup>333</sup> He predicts that “the public values that courts can most effectively support are institutional or process values, such as separation of powers, federalism, and deliberation.”<sup>334</sup> He concedes that “judicial enforcement of public

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Mossville Env'tl. Action Now v. EPA, 370 F.3d 1232, 1235-36 (D.C. Cir. 2004) (Sentelle, J.); Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 857 (D.C. Cir. 2001) (per curiam) (Randolph, Roger & Tatel, JJ.); Nat'l Lime Ass'n v. EPA, 233 F.3d 625, 633-34 (D.C. Cir. 2000) (Ginsburg & Tatel, JJ.); Sierra Club v. EPA, 167 F.3d 658, 660, 664, 666 (D.C. Cir. 1999) (Williams, J.); Nat. Res. Def. Council, Inc. v. Reilly, 976 F.2d 36, 37-41 (D.C. Cir. 1992) (Buckley, J.).

331. See *Michigan v. EPA*, 135 S. Ct. 2699, 2706-10 (2015).

332. See *id.* at 2714-15, 2718-22 (Kagan, J., dissenting).

333. Eskridge, *supra* note 15, at 580.

334. *Id.*

values typically comes at the expense of democracy and often the rule of law as well,” thus raising the “devilish question of competing values.”<sup>335</sup>

As applied to the power canons, however, Professor Eskridge’s values do not compete with each other; they all move in the same direction, against the normative validation of these canons. We have already seen how the power canons undermine democratic values and rule-of-law values like predictability and objectivity.<sup>336</sup> They also undermine the public values of separation of powers and deliberation.<sup>337</sup>

The power canons aggrandize the courts at the expense of Congress and the executive. They change the ground rules of statutory interpretation after the other branches have acted, upsetting the reliance the other branches may have placed in the preexisting interpretive regime and yet not replacing that regime with stable and predictable rules that could foster reliance moving forward. The very selectivity of the new interpretive principles must put Congress and the agencies in a state of anxiety about how they can avoid the narrowing tendencies of these principles. For its part, Congress must try to predict which statutory questions the courts will later deem economically and politically significant—even as it writes broad language that may not foresee every issue that may arise or may be taken as ambiguity rather than breadth by a court eager to trim an ambitious statutory regime. For their part, agencies face the prospect of having their work least respected even while it is most important—economically, politically, and statutorily. In these ways, the courts—through the power canons—put the other branches in a position of submission rather than strength. From a separation-of-powers perspective, in a context where, as I have discussed, there is no underlying constitutional problem,<sup>338</sup> this situation is exactly backwards.

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335. *Id.*

336. *See supra* Parts III.A-B.

337. I focus on these two values, and omit federalism, as the content of the power canons does not directly implicate federalism—unlike, for example, the principle that Congress must speak in “unmistakably clear” terms if it “intends to alter the ‘usual constitutional balance between the States and the Federal Government.’” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

338. *See supra* Part II.B.

Deliberation also suffers under the three cases discussed here. The Court's circuitous route to the correct result in *King* initially prized beady-eyed textualism over close attention to the overall structure and purposes of a massive piece of legislation. This interpretive method renders congressional deliberation quite beside the point; hearings, statements, findings, and all of the other parts of congressional deliberation are sidelined to treat a panic attack induced by four errant words in a massive law. Although the Court eventually recovered enough to reach the correct result despite its circuitous methodology, its opinion gives comfort to those who would ignore the deliberations of Congress and focus only on its words. In *UARG* and *Michigan*, an agency's years-long, public processes of outreach and reason-giving—and close attention to the whole set of legal constraints under which it believed it was operating—meant little compared to the Court's rage over regulatory ambition.<sup>339</sup> In all of these cases, it was the agencies, not the Court, which operated openly and publicly, subject to continuous oversight by Congress and the White House and to the basic administrative law command to explain themselves with reasons and evidence. Interpretive principles like the power canons, with their simplifying assumptions and barely concealed antipathy to regulatory ambition, are perfect instruments for cutting off debate. They are not instruments for promoting it.

It may be hardest to see this point with respect to the canon embraced in *Michigan v. EPA*. This canon came wrapped in deliberative rationality, offered as the only sane approach to deciding whether to undertake a major regulatory program. As Justice Scalia observed, after all, “costs” are simply “disadvantages,” and “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”<sup>340</sup> What could be wrong with the Court imposing a requirement that agencies consider advantages and disadvantages in developing regulation?

In fact, however, it is not clear that the Court means to require—or even allow—attention to *all* the advantages and disadvantages of regulation. The Court declined to say, for example, whether the

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339. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707-10 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

340. *Michigan*, 135 S. Ct. at 2707.

“ancillary” benefits of regulating power plants under section 112—in particular, the benefits associated with controlling air pollutants not covered by section 112—could be considered by EPA on remand.<sup>341</sup> If *Michigan* truly were—as the Court styles it—an affirmation of a duty to consider both the advantages and disadvantages of government action,<sup>342</sup> it should have necessarily followed that there are no artificial constraints on the kinds of advantages an agency may and indeed must consider. Yet not only did the Court decline to confirm the relevance of “ancillary” benefits, it insisted on reporting the benefits of the MATS rule as if the ancillary benefits did not exist.<sup>343</sup>

Beyond ignoring certain environmental benefits in *Michigan* itself, the Court has long condoned agencies’ failures to consider these benefits across a wide variety of cases. Indeed, the Supreme Court has been a primary force in weakening statutory requirements, found in the National Environmental Policy Act, to consider the environmental consequences of agency decisions.<sup>344</sup> In other words, even in a context in which agencies operate under a special statutory requirement to consider environmental consequences in their decisions, the Supreme Court has done all it can to soften that requirement. It would be bold to suggest that the Court in *Michigan* took all of that back and put in place a requirement that agencies making decisions that affect the environment must consider all kinds of consequences beyond economic ones. Unless that is what the Court meant to do, however, its decision does not promote the form of rationality that counsels consideration of the balance of reasons.

Congress itself operates as much by instructing agencies what not to consider as it does by telling them what they must consider. A huge question in administrative law, in fact, has been to figure out what factors agencies may consider in coming to regulatory decisions.<sup>345</sup> Often, the Supreme Court has declined to require agencies

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341. *Id.* at 2711.

342. *See id.* at 2707.

343. *Id.* at 2706 (reporting benefits of \$4 to \$6 million per year).

344. *See* JONATHAN Z. CANNON, ENVIRONMENT IN THE BALANCE: THE GREEN MOVEMENT AND THE SUPREME COURT 239-65 (2015). The Court has, famously, never ruled in favor of an environmental plaintiff in a case under the National Environmental Policy Act—the federal statute that aims to ensure consideration of environmental consequences in federal agency decision-making. *See id.* at 232-33.

345. *See generally* Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making*

to consider issues that are logically relevant to the matter the agency is deciding.<sup>346</sup> Sometimes, the Court has *forbidden* agencies to consider logically relevant issues.<sup>347</sup> A court-imposed requirement that agencies consider all of the logically relevant advantages and disadvantages of regulatory decisions would not only depart from this tradition, but it would also increase the discretion of administrative agencies to go their own way. Enlarging the range of factors considered in administrative decision-making gives agencies more, not less, power to come out either way on any given decision. If the Court is indeed worried about the discretion of administrative agencies, it should disfavor rather than favor an all-things-considered analysis by the agencies. If, however, the Court is actually worried not about discretion that could cut in either regulatory direction, but only about the power of agencies to constrain economic behavior, then a rule that agencies consider regulatory costs makes sense—if one is able to accept the naked political premises of such a rule.

To rule out some considerations, even important ones, in making regulatory decisions is perfectly consistent with rationality. In everyday life, we often make decisions not based, all things considered, on the balance of reasons, but instead based, as Professor Raz has put it, on a reason “to refrain from acting for some reason.”<sup>348</sup> Professor Raz defends the idea of “exclusionary reasons” by positing individuals who refrain from acting on the balance of reasons—the person who refrains from making a financial investment at the end of a hard day, not because the balance of reasons is against the investment, but because she has a good “reason not to act on the merits of the case”;<sup>349</sup> the soldier who obeys an order not because the balance of reasons supports it but because “[t]he order is a reason for doing what you were ordered regardless of the balance of

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*a Decision?*, 2009 MICH. ST. L. REV. 67.

346. *See id.* at 69-73 (discussing *Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211 (1991); and *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990)).

347. *See id.* at 71-72, 78-81 (discussing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007); *Massachusetts v. EPA*, 549 U.S. 497 (2007); and *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001)).

348. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 39 (Oxford University Press 1999) (1975) (discussing “exclusionary reasons”).

349. *Id.* at 37.

reasons”;<sup>350</sup> the father who does not consider the effects on his own career choices of sending his child to private school because he has promised his wife to make decisions about his child’s education based only on the child’s interests.<sup>351</sup> Recognizing our own occasional inability to make judgments based on the balance of reasons and making decisions based on our role in institutional or social contexts is not to act irrationally even if the actions taken on the basis of a restricted set of reasons are not the actions that would be taken if the balance of reasons were guiding the action.

Exclusionary reasons likewise may support an agency that “refrains from acting based on some reason,”<sup>352</sup> even if its enabling statute does not require that it so refrain. As noted, an agency acting with constraints on the considerations it brings to bear on regulatory decisions actually enjoys less, not more, discretion. An agency that perceives its institutional role as subordinate and the broadest discretion as inconsistent with this role might well choose to limit the considerations it may bring to bear on its decisions. Far from showing an out-of-control agency, the concept of exclusionary reasons demonstrates how an agency that has not acted based on the balance of reasons is a more tightly rather than less tightly constrained agency. Certainly, an agency is not acting irrationally when it declines to act based on the balance of reasons.

## CONCLUSION

The power canons are the most dangerous kind of canon from a democratic perspective—normative instructions from unelected judges to the legislative and executive branches, unhitched to any plausible constitutional post. The three decisions discussed here are still young, and so it remains to be seen what the Supreme Court and lower courts will make of the power canons. Perhaps the canons will be deployed only occasionally, or abandoned altogether for a time, to be resuscitated at a later date. This would not make them harmless. While they exist, they make Congress uncertain of the words it must use to set in motion an active regulatory program and

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350. *Id.* at 38.

351. *See id.* at 39.

352. *Id.*

to make agencies rather than courts the interpreters of first resort, and they make agencies uncertain of their interpretive authority. This uncertainty may be a great comfort to those hoping that legal anxiety will encourage regulatory timidity, but it should not please anyone else.