THE RISE OF PURPOSIVISM AND FALL OF *CHEVRON*: MAJOR STATUTORY CASES IN THE SUPREME COURT

In 1994, Professor Thomas Merrill observed the simultaneous rise of two phenomena dominating the Supreme Court's statutory interpretation jurisprudence: textualism and *Chevron*[1] deference.[2] Times have changed. Although most commentators reflexively characterize the Roberts Court as a textualist Court, it has recently betrayed a purposivist orientation in major statutory cases. And although *Chevron* remains good law, the Court has recently spurned the framework in major cases involving agency statutory interpretations.

Some scholars have noted either the move toward purposivism or away from *Chevron*,[3] but this Note explores the connection between these two patterns. It argues that Chief Justice Roberts is the catalyst of both trends and proposes three explanations for their confluence: first, an inclination toward judicial empowerment; second, an effort to respect congressional will; and third, an impulse to afford major cases special treatment. These three explanations are equally plausible and in no way mutually exclusive, but the third carries the most problematic normative consequences.

This Note proceeds in three parts. Part I explores statutory interpretation in the Roberts Court and argues that the Court, led by the Chief Justice, has moved toward purposivism in major cases. Part II contends that this move has coincided with a shift away from *Chevron* deference in major cases, also led by the Chief Justice. Part III examines common threads between the rise of purposivism and fall of *Chevron*.

I. STATUTORY INTERPRETATION IN THE ROBERTS COURT

A. An Overview of Interpretive Methods

Scholars associate traditional purposivism with *Church of the Holy Trinity v. United States*.[4] There, the Court held that a statute prohibiting the importation of a foreigner "to perform labor or service of any kind in the United States" did not apply to a church's importation of a British pastor.[5] In so holding, the Court conceded that the "letter" of the statute clearly encompassed the pastor but found that its "spirit" — evidenced through "the circumstances surrounding its enactment," "the

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[1] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[2] *See* Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994).

[3] *See* Michael Herz, Essay, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1870–71 (2015); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015).

[4] 143 U.S. 457 (1892).

[5] *Id.* at 458; *see id.* at 472.

intention of its makers," and the "results which follow from [a broad reading]"[6] — suggested that Congress intended it to apply only to *manual* laborers.[7] Because of the "familiar rule" that a statute's "spirit" trumps its "letter," the Court explained, the statute could not be read to cover the pastor.[8] *Holy Trinity* purposivism, therefore, jettisons the text's literal meaning and affords controlling weight to (1) public knowledge of the circumstances surrounding enactment (what this Note calls legislative backdrop); and (2) the policy consequences of possible interpretations.

Yet most purposivists have abandoned *Holy Trinity*. The Court has not cited the case positively in over two decades,[9] and it has become a much-maligned symbol of judicial activism.[10] *Holy Trinity* purposivism has given way to a new brand of purposivism that places greater weight on the text's semantic meaning.[11] This method is sometimes called legal process purposivism because of its close link to the legal process theory espoused by Professors Henry Hart and Albert Sacks, which posits that judges should view statutes as the products of reasonable legislators seeking to advance reasonable goals through reasonable means.[12] Legal process purposivism still maintains that interpretation requires "attribution of purpose" but acknowledges that "semantic meaning of the text casts light — perhaps the most important light — on the purposes to be attributed."[13]

Textualism has also evolved over time. Early textualism prioritized the literal meaning of a given provision and often failed to appreciate the importance of context.[14] But modern textualism is a highly "sophisticated theory of interpretation which readily acknowledges that the meaning of words depends on the context in which they are used."[15] To understand context, textualists regularly consult unenacted interpretive tools, such as dictionaries, semantic canons, and evidence of specialized meaning — though not legislative history, which

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[6] *Id.* at 459.

[7] *Id.* at 465.

[8] *Id.* at 459.

[9] *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1312–13, 1313 n.119 (2010).

[10] *See, e.g.*, Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 90 (2015).

[11] John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 87 (2006).

[12] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[13] Manning, *supra* note 11, at 78.

[14] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2–3 (2006).

[15] Merrill, *supra* note 2, at 352.

textualists still swear off.[16] Textualists now even acknowledge that purpose can sometimes play an important role in interpretation: as Professor John Manning writes, "[b]ecause speakers use language purposively, textualists recognize that the relevant context for a statutory text includes the mischiefs the authors were addressing."[17]

With purposivists coming to realize the importance of semantic meaning and textualists coming to realize the importance of purpose, some commentators have argued there is no longer a meaningful divide between the two methodologies.[18] This view is mistaken. Among other things, although both theories appreciate the importance of context, they prioritize differing forms of context. Textualists primarily look to "semantic context" — that is, "evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words,"[19] which generally consists of "linguistic data, dictionary definitions, and canons."[20] In contrast, legal process purposivists give primacy to "policy context" — that is, evidence about "the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy."[21] Such evidence can include "public knowledge of the mischief the lawmakers sought to address" and "the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute's preamble, title, or overall structure."[22]

To boil down (and perhaps oversimplify) the interpretive methods that are central to this Note: textualist and legal process purposivist opinions account for both semantic and policy context, but textualist opinions prioritize semantic context, whereas legal process purposivist opinions prioritize policy context. *Holy Trinity* purposivist opinions, on the other hand, incorporate very little textual analysis and focus almost entirely on policy context.

B. The Roberts Court's Emerging Purposivism

Commentators have generally deemed the Roberts Court a textualist court.[23] Until recent Terms, this characterization would

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[16] Manning, *supra* note 11, at 78–82.

[17] *Id.* at 84. When textualists acknowledge the relevance of "purpose," they refer to objective purpose — evidenced through the language and structure of the statute — as opposed to subjective purpose — evidenced through what the actual legislators subjectively intended, often discernible only through legislative history. *Id.* at 73–76.

[18] *See, e.g.*, Molot, *supra* note 14.

[19] Manning, *supra* note 11, at 91 (emphasis omitted).

[20] Merrill, *supra* note 2, at 372.

[21] Manning, *supra* note 11, at 91 (emphasis omitted).

[22] *Id.* at 93.

[23] *See, e.g.*, Gluck, *supra* note 10, at 100; John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 30 (2014). Justice Kagan

have held true, and it remains so in the Court's run-of-the-mill statutory cases.[24] Examples of the Roberts Court's textualist approach abound.[25]

But the Court, led by the Chief Justice, has taken a different interpretive tack in its major statutory cases over the past three Terms. By "major" statutory cases, this Note refers to cases in which the federal government has exerted power — through a statute, administrative action, or criminal prosecution — in a novel and bold fashion, thereby raising a perceived threat to states' rights, individual liberty, or both. Such cases inevitably implicate constitutional principles, especially federalism, nondelegation, and the scope of federal power.

In four of these cases, the Court abandoned its textualist tendencies and championed a purposivist approach. Two of the cases, *Bond v. United States*[26] and *Utility Air Regulatory Group v. EPA*[27] (*UARG*), resemble *Holy Trinity* purposivism because of their meager textual analysis and focus on legislative backdrop and policy consequences. The other two cases, *Yates v. United States*[28] and *King v. Burwell*,[29] more closely resemble legal process purposivism because they seriously engage with semantic context but ultimately prioritize policy context.

Despite the common trope that the Roberts Court is a textualist court, some scholars have recognized a recent shift in the Court's methodology. Manning has argued that some Justices adhere to a "new purposivist" philosophy, under which background purpose "plays a decisive role if and only if Congress has framed the text at a high enough level of generality to accommodate it."[30] But this Note argues that *Bond*, *UARG*, *Yates*, and *King* prioritize purpose (and policy context) over text (and semantic context) even when the relevant language encompasses "[a] precise and specific command."[31] Additionally, Professor Richard Re has pointed to a "New Holy Trinity" philosophy ex-

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has acknowledged this trend, stating "we're all textualists now" in reference to the modern Roberts Court. Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/3BCF-FEFR].

[24] *See, e.g.*, cases cited *infra* note 166.

[25] *See, e.g.*, Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012) ("[P]etitioners' purposive argument simply cannot overcome the force of the plain text."). A particularly apt example of the Roberts Court's textualism is *Milner v. Department of the Navy*, 562 U.S. 562 (2011), where the Court, in an 8-1 decision authored by Justice Kagan, held that Exemption 2 of the Freedom of Information Act did not cover certain data by focusing on "the provision's 12 simple words" and citing two dictionary definitions. *Id.* at 569.

[26] 134 S. Ct. 2077 (2014).

[27] 134 S. Ct. 2427 (2014).

[28] 135 S. Ct. 1074 (2015).

[29] 135 S. Ct. 2480 (2015).

[30] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 117.

[31] *Id.* at 116.

hibited by the Roberts Court, under which the Court "aims to adhere to clear text when it's the product of deliberate compromise, but not when it springs from an inattentive mistake."[32] This Note, by contrast, differentiates between the Court's *Holy Trinity* purposivism and legal process purposivism and resists the notion that the Court has employed a version of the absurdity canon to mitigate statutory "mistakes" in its recent cases.

1. Bond v. United States. — Carol Anne Bond, a chemist, discovered that her best friend, Myrlinda Haynes, was pregnant with her husband's child. Seeking revenge, Bond spread an arsenic-based compound and potassium dichromate — potentially lethal chemicals — on Haynes's car, mailbox, and doorknob.[33] For that deed, she was charged with and convicted of "possess[ing]" and "us[ing]" a "chemical weapon" in violation of the Chemical Weapons Convention Implementation Act of 1998.[34] That Act defines "chemical weapon" to mean "any chemical which through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans."[35] Because both substances Bond used were "chemicals" that could "cause death, temporary incapacitation, or permanent harm to humans," the Act's literal meaning covered them.

Nonetheless, the Court overturned Bond's conviction.[36] Writing for the majority, Chief Justice Roberts[37] began by invoking the "background principle"[38] that an ambiguous statute should be read to avoid disrupting the "usual constitutional balance of federal and state powers."[39] Because permitting a federal prosecution of Bond's purely local crime might encroach on state police powers, the case implicated that principle.[40] The question was whether the statutory definition of "chemical weapon" is ambiguous despite its clear literal meaning.

Relying heavily on the Act's legislative backdrop and the "deeply serious consequences of adopting" the Government's "boundless reading,"[41] the Court found ambiguity. As to legislative backdrop: Congress passed the statute to implement the International Convention on

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[32] Re, *supra* note 3, at 418.

[33] Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

[34] Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended in scattered sections of the U.S. Code); *Bond*, 134 S. Ct. at 2085.

[35] 18 U.S.C. § 229F (2012).

[36] *Bond*, 134 S. Ct. at 2094.

[37] The Chief Justice was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

[38] *Bond*, 134 S. Ct. at 2089.

[39] *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

[40] *Id.*

[41] *Id.* at 2090.

Chemical Weapons,[42] a treaty that "arose in response to war crimes and acts of terrorism" and whose drafters were not "interested in anything like Bond's common law assault."[43] And as to consequences: the Government's interpretation was too implausible to accept, given that "[a]ny parent would be guilty of a serious federal offense . . . when, exasperated by the children's repeated failure to clean the goldfish tank, he considers poisoning the fish with a few drops of vinegar."[44] This "exceptional convergence of factors"[45] led the Court to hold that the statute did not cover Bond's conduct, despite the "extremely broad[]" definition of "chemical weapon."[46]

Bond embodies *Holy Trinity* purposivism more than legal process purposivism. With scarce textual analysis, the opinion affords nearly controlling weight to the Act's roots in an international effort to prevent war crimes and to the consequence of licensing U.S. Attorneys' Offices nationwide to make federal cases out of purely local crimes. The case presents the Roberts Court's first foray into purposivism in a major case.

2. Utility Air Regulatory Group v. EPA. — In *UARG*, industry groups challenged an EPA regulation that swept certain stationary sources into the Clean Air Act's[47] (CAA) coverage solely by virtue of their greenhouse-gas emissions.[48] The Act requires permits for construction or modification of "major emitting facilit[ies]" in any area where the Prevention of Significant Deterioration (PSD) program applies and mandates that such sources meet stringent emissions standards.[49] Under the Act, "major emitting facility" means "any stationary source with the potential to emit 250 tons per year of '*any air pollutant*.'"[50]

The EPA rule in *UARG* interpreted the phrase "any air pollutant" to include greenhouse gases.[51] Indeed, the agency believed the Act-wide definition of "air pollutant" *compelled* this interpretation.[52] Under that definition, an "air pollutant" is "any air pollution agent . . . , including any physical, chemical, biological, [or]

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[42] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. No. 103-21, 1974 U.N.T.S. 317.

[43] *Bond*, 134 S. Ct. at 2087.

[44] *Id.* at 2091.

[45] *Id.* at 2093.

[46] *Id.* at 2090. Justice Scalia, joined by Justice Thomas in full and Justice Alito in part, concurred only in the judgment, accusing the majority of "result-driven antitextualism." *Id.* at 2095 (Scalia, J., concurring in the judgment).

[47] 42 U.S.C. §§ 7401–7671q (2012).

[48] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2438 (2014).

[49] *Id.* at 2435.

[50] *Id.* (emphasis added) (quoting 42 U.S.C. § 7479(1)).

[51] *Id.* at 2439.

[52] *Id.* at 2442.

radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[53] As the Court held in *Massachusetts v. EPA*,[54] this definition's plain language embraces "all airborne compounds of whatever stripe" — including, in the *Massachusetts* Court's view, greenhouse gases.[55] Because EPA thought it a foregone conclusion that greenhouse gases are "chemical . . . substance[s] . . . emitted into . . . the ambient air," it deemed greenhouse gases regulable under the PSD program.[56]

Yet the Court disagreed. Writing for the Court, Justice Scalia[57] held that despite the plain meaning of the Act's definition of "any air pollutant," that definition cannot include greenhouse gases for purposes of the PSD program.[58] As an initial matter, the Court observed that the canon of consistent usage was not controlling, reasoning that the Act-wide definition of "air pollutant" need not apply each time Congress used that phrase.[59] Rather, the phrase's meaning depends on its location within the Act, and in the PSD program, "calamitous consequences" would flow from reading the term to include greenhouse gases.[60] Specifically, since even small sources, such as "retail stores, offices, apartment buildings, shopping centers, schools, and churches,"[61] emit over 250 tons per year of greenhouse gases, millions of these small emitters would be subject to the Act's "numerous and costly requirements," yielding a massive administrative burden.[62] The "plainly excessive demands on limited governmental resources" that would arise under EPA's interpretation compelled the Court to reject it.[63]

The Court in *UARG* (both the majority and the dissent, which also followed a purposivist route, just to a different conclusion[64]), like the majority in *Bond*, eschewed the best semantic reading to avoid results it believed Congress could not have intended. And as in *Bond*, the *UARG* Court hardly parsed the text at all. It found ambiguity in the

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[53] 42 U.S.C. § 7602(g).

[54] 549 U.S. 497 (2007).

[55] *Id.* at 529.

[56] *UARG*, 134 S. Ct. at 2439 (quoting 42 U.S.C. § 7602(g)).

[57] Justice Scalia was joined in relevant part by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

[58] *UARG*, 134 S. Ct. at 2442.

[59] *Id.* at 2441.

[60] *Id.* at 2442.

[61] *Id.* at 2446.

[62] *Id.* at 2443.

[63] *Id.* at 2444.

[64] Justice Breyer dissented in relevant part, joined by Justices Ginsburg, Sotomayor, and Kagan. Rather than reading an implicit greenhouse-gas exception into the phrase "any air pollutant," Justice Breyer would have read an implicit exception into the phrase "any stationary source with the potential to emit two hundred fifty tons per year" for sources that "emit[] unmanageably small amounts of greenhouse gases." *Id.* at 2452–53 (Breyer, J., concurring in part and dissenting in part) (emphasis omitted).

phrase "any air pollutant," not because of textual anomalies that would arise under the alternative interpretation (as in *King*, *infra*), but because EPA had given the phrase a narrower interpretation in past rules and policies.[65] It likewise deemed the Government's greenhouse-gas–inclusive interpretation foreclosed, not because that interpretation would undermine interlocking reforms in other provisions (again, as in *King*, *infra*), but because the Court determined that the policy consequences of that interpretation would be "calamitous."[66] By concluding that policy consequences trump clear text, *UARG* more closely tracks *Holy Trinity* purposivism than legal process purposivism.

3. Yates v. United States. — *Yates*, like *Bond*, involved a criminal prosecution and a memorable set of facts. In *Yates*, the federal government prosecuted an individual under the Sarbanes-Oxley Act of 2002[67] for intentionally impeding a federal investigation by concealing a "tangible object."[68] In this case, the tangible objects that the defendant concealed were fish: seventy-two undersized red grouper that he instructed a crewmember to toss overboard during an investigation into violations of conservation regulations.[69] The interpretive issue in *Yates* centered on whether a red grouper constitutes a "tangible object" for purposes of the Act.[70]

A four-Justice plurality held it does not. Justice Ginsburg, writing for the plurality,[71] conceded at the outset that the ordinary meaning of "tangible object" indisputably includes a fish: "A fish is no doubt an object that is tangible; fish can be seen, caught, and handled . . . ."[72] Similarly, the dictionary definition of "tangible object" — a "discrete . . . thing" — also supported the Government's interpretation.[73] But despite this compelling evidence of semantic meaning, the plurality refused to extend its interpretation "beyond the principal evil motivating [the law's] passage,"[74] which was "corporate and accounting deception and cover-ups" similar to those perpetrated in the Enron scandal.[75] Given this legislative backdrop, the plurality doubted Congress meant to enact a general evidence-spoliation ban in passing the

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[65] *Id.* at 2439 (majority opinion).

[66] *Id.* at 2442.

[67] Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

[68] Yates v. United States, 135 S. Ct. 1074, 1078 (2015) (plurality opinion) (quoting 18 U.S.C. § 1519 (2012)).

[69] *Id.* at 1079–80.

[70] *Id.* at 1081.

[71] Chief Justice Roberts and Justices Breyer and Sotomayor joined in the plurality opinion.

[72] *Yates*, 135 S. Ct. at 1079.

[73] *Id.* at 1081 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1555 (2002)).

[74] *Id.*

[75] *Id.* at 1079; *see also id.* at 1081.

relevant provision.[76] In accordance with the provision's "financial-fraud mooring," the plurality held, a "tangible object" under the Act "must be one used to record or preserve information."[77] Because a fish is not such an object, the plurality invalidated Yates's conviction.[78]

To be sure, the *Yates* plurality spilled much ink exploring semantic context, invoking the semantic canons of *noscitur a sociis*, *ejusdem generis*, and the rule against superfluity.[79] But the opinion is purposivist at its core — albeit legal process purposivist rather than *Holy Trinity* purposivist — because it is driven primarily by policy context.

4. King v. Burwell. — *King* involved a challenge that threatened to unravel the Affordable Care Act[80] (ACA). The assault centered on § 36B of the Internal Revenue Code, which makes ACA tax credits available on "an Exchange established by the State under [42 U.S.C. § 18031]."[81] An IRS rule made tax credits available on not only state-established exchanges, but also federally established exchanges, and the challengers argued that this rule flouted § 36B's text.[82]

Despite this compelling textual argument, the Court upheld the rule in an opinion written by Chief Justice Roberts.[83] In so doing, it acknowledged that the "most natural sense" of the words "Exchange established by the State" does not include exchanges established by the federal government,[84] especially because the Act defines "State" to mean "each of the 50 States and the District of Columbia."[85] And it conceded that the literal meaning of the phrase "under [42 U.S.C. § 18031]" would also preclude subsidies on federal exchanges because it is another provision that directs the federal government to "establish and operate such Exchange" when a state declines to do so.[86]

Nonetheless, the Court explained, "when read in context,"[87] the phrase "established by the State under [42 U.S.C. § 18031]" is ambiguous[88] because construing it to preclude tax credits on federally created

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[76] *Id.* at 1081–83.

[77] *Id.* at 1079.

[78] *Id.* at 1088–89. In dissent, Justice Kagan, joined by Justices Scalia, Kennedy, and Thomas, relied primarily on the provision's "ordinary meaning," *id.* at 1091 (Kagan, J., dissenting), bolstered by the Act's structure and comparisons to similar language in other statutes, to conclude that a fish is a "tangible object" under Sarbanes-Oxley. *Id.* at 1091–94.

[79] *Id.* at 1085–87 (plurality opinion).

[80] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[81] 26 U.S.C. § 36B(b)(2)(A) (2012).

[82] King v. Burwell, 135 S. Ct. 2480, 2487–88 (2015).

[83] The Chief Justice was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

[84] *King*, 135 S. Ct. at 2490.

[85] *Id.* (quoting 42 U.S.C. § 18024(d) (2012)).

[86] *Id.* at 2490 (alteration in original) (quoting 42 U.S.C. § 18041(c)(1)(b)).

[87] *Id.*

[88] *Id.* at 2491 (alteration in original).

exchanges would spawn surprising statutory anomalies. Among other things, there would be no "qualified individuals" on federally created exchanges,[89] and "literally none of the Act's requirements would apply to" those exchanges.[90]

After finding § 36B ambiguous, the Court "turn[ed] to the broader structure of the Act,"[91] which showed that the provision must allow tax credits on federal exchanges. Otherwise, in states with those exchanges, the tax credits designed to make insurance affordable and the "individual mandate" requiring all taxpayers to purchase health insurance — two of the Act's key reforms — would be practically nullified.[92] As the Court confidently declared, "[i]t is implausible that Congress meant the Act to operate in this manner."[93] Thus, the Court held, "the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[94]

King stands as a premier example of legal process purposivism, as policy context swayed the Court more than semantic context. As an initial matter, the Court analyzed the way in which the ACA's three major reforms work together to form a coherent program that addresses a distinct mischief.[95] The Chief Justice also emphasized the Court's duty not to undo the "legislative plan" embodied by the ACA,[96] aligning himself with the legal process principle of respecting the reasonable purposes of an objectively reasonable legislature. Of course, the Court did focus intently on the text — especially the textual anomalies that would have flowed from the challengers' interpretation — thereby making the opinion more legal process than *Holy Trinity*. Yet it did so as a means to arrive at "a fair understanding of the legislative plan,"[97] rather than as a dispositive end to interpretation.

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Bond, *UARG*, *Yates*, and *King* were four of the Court's most significant statutory cases in recent Terms, as each involved bold assertions of federal power and perceived threats to states' rights and individual liberties. In *Bond* and *Yates*, federal prosecutors invoked federal stat-

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89 *Id.* at 2490 (quoting 42 U.S.C. § 18031(d)(2)(A)).

90 *Id.* at 2491.

91 *Id.* at 2492.

92 *Id.* at 2493.

93 *Id.* at 2494.

94 *Id.* at 2495. Justice Scalia dissented, joined by Justices Thomas and Alito. "Words no longer have meaning," Justice Scalia wrote, "if an Exchange that is *not* established by a State is 'established by the State.'" *Id.* at 2497 (Scalia, J., dissenting).

95 *Id.* at 2486–87 (majority opinion).

96 *Id.* at 2496.

97 *Id.*

utes in surprising ways to target seemingly local activity, threatening state predominance in criminal law and implicating principles of fair notice. In *UARG*, EPA's construction of the CAA would have empowered the agency to regulate greenhouse-gas emissions from millions of small sources. And in *King*, Congress passed a law to overhaul the country's sprawling healthcare system, which the IRS interpreted in a manner that expanded the program's effect.

In each of these major cases, the Court deployed purposivism to reach atextual results. This emerging purposivist trend runs counter to the common trope that the Roberts Court is reliably textualist.

C. The Chief Justice at the Forefront

What accounts for the Court's emerging purposivism in major statutory cases? Looking at the decision lineups in these four cases is telling. Chief Justice Roberts is the only Justice in the majority (or in *Yates*, the plurality) in all four cases. Justices Ginsburg, Breyer, and Sotomayor were each consistently purposivist in all four cases,[98] but none prevailed across the board. Justices Kennedy and Kagan joined purposivist opinions in *Bond*, *UARG*,[99] and *King*, but they both dissented in *Yates* on textualist grounds. And Justices Scalia, Thomas, and Alito each either wrote or joined textualist dissents or concurrences in the judgment in *Bond*, *Yates*, and *King*, while also joining the purposivist majority in *UARG*.

The most striking feature of these decision lineups is that Chief Justice Roberts was the only Justice to be both consistently purposivist and consistently on the winning side. The Chief Justice's methodological consistency suggests that he has adopted a more coherent interpretive theory than scholars have given him credit for — at least in major cases.[100] And his repeated victories imply that Chief Justice Roberts is the swing Justice in politically charged statutory cases, much like Justice Kennedy has been recognized as the swing Justice in politically charged constitutional cases.[101]

II. *CHEVRON* DEFERENCE IN THE ROBERTS COURT

Chevron deference compels courts to uphold agency statutory interpretations that reasonably construe ambiguous provisions.[102] The

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[98] All three joined the majority in *King* and *Bond*, the plurality in *Yates*, and the purposivist dissent in *UARG*.

[99] In *UARG*, Justice Kennedy joined the majority, and Justice Kagan joined the dissent.

[100] *See, e.g.*, Gluck, *supra* note 10, at 100 ("It may be that the Chief Justice does not care too deeply about interpretive methodology . . . and will use whatever tools he can to reach the best, commonsense result.").

[101] *See, e.g.*, Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 39–40 (2008).

[102] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

framework proceeds in two steps: at step one, the court determines whether the provision is ambiguous; if so, the court moves on to step two and asks whether the agency's interpretation is reasonable.[103] The Court decided *Chevron* in 1984, and thereafter, *Chevron* deference became a staple of modern administrative law. Indeed, the Court's *Chevron* jurisprudence has moved primarily toward doctrinal entrenchment over the years,[104] albeit with some exceptions.[105] Until recently, *Chevron* seemed a firmly rooted doctrine.[106]

A. Curbing Chevron

Yet, as with textualism, *Chevron*'s reign is now in jeopardy. Over the last two Terms, three decisions have signaled a shift away from *Chevron* deference in major cases.

1. King v. Burwell. — First, in *King*, before reaching the statutory interpretation question of whether § 36B makes tax credits available on federally established exchanges, the Court concluded that *Chevron* did not apply.[107] It reached this conclusion by articulating an exception to *Chevron*: absent a clear statement from Congress, the framework plays no role in cases of "deep 'economic and political significance.'"[108] *King* was such a case, the Court reasoned, because it implicated "billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people."[109] Before *King*, the Court had held only that an agency's interpretation failed at either step one or two because it sought to regulate matters of deep economic and political significance without a clear grant of authority;[110] it had never held that *Chevron* was altogether inapplicable in such a case. This distinction matters, symbolically and potentially practically, be-

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103 *Id.*

104 *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013) (making clear that *Chevron* applies even to an agency's interpretation of its own statutory jurisdiction); Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that an agency's reasonable interpretation of an ambiguous provision must prevail over conflicting circuit precedent).

105 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001) (adding a threshold step).

106 *See* Jack M. Beermann, Chevron *at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 732 (2014) (arguing, based on empirical data, that the Court "seems to be deferring to agency decisions [under *Chevron*] in a higher proportion of cases" since Justices Sotomayor and Kagan joined the Court); Gluck, *supra* note 10, at 65. Scholars have, of course, debated how transformative *Chevron* has been. *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 772–75 (2d ed. 2013) (documenting this debate).

107 King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

108 *Id.* at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

109 *Id.*

110 *See UARG*, 134 S. Ct. at 2444; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 160 (2000).

cause *King*'s method indicates an inclination toward further discrete categorical incursions into *Chevron*'s scope.[111]

King's expansion of the so-called "major question" exception threatens *Chevron*'s predominance. The exception's trigger — "deep economic and political significance" — is vague and difficult to administer.[112] As such, five Justices could invoke it in a significant proportion of agency statutory interpretation cases, which would allow the exception to swallow *Chevron*'s rule.

More basically, the exception also undermines *Chevron*'s theoretical underpinnings. *Chevron*'s fundamental premise is that ambiguous statutory language functions as an implicit delegation from Congress to an agency.[113] Filling in ambiguous language, the theory goes, resembles policymaking more than interpretation, so Congress would prefer an expert, politically accountable agency for that task over a generalist, unelected court.[114] But this fundamental premise cannot be squared with the major question exception: for the same expertise and accountability reasons, reasonable legislators would want agencies, not courts, to decide "major" policy questions just as much as nonmajor ones.[115] In fact, they would likely see it as *especially* vital that the body with more expertise and accountability decide these pressing questions. Announcing an exception in major cases thus flouts *Chevron*'s core rationale. On this view, *King* is a harbinger of *Chevron*'s demise.[116]

2. FERC v. Electric Power Supply Ass'n. — In addition to announcing an express exception to *Chevron* in *King*, the Court chipped away at it sub silentio in another recent case. *FERC v. Electric Power Supply Ass'n*[117] (*EPSA*) involved a FERC rule that creatively sought to regulate consumer behavior by compelling energy-market operators to pay consumers for their "commitments *not* to use power at certain times" in order to reduce energy demand.[118] The question was whether the rule affected wholesale rates, or instead retail rates, under the Federal Power Act.[119] If the rule affected wholesale rates, the federal government could impose it; if it affected retail rates, it would invade the

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111 *See* Herz, *supra* note 3, at 1868–69; Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2205 (2016).

112 *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 611–12 (2008).

113 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

114 *See id.* at 865–66.

115 *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 232–33 (2006).

116 *See* Herz, *supra* note 3, at 1868 (citing *King* as evidence that "*Chevron*'s condition [is], if not terminal, at least serious").

117 136 S. Ct. 760 (2016).

118 *Id.* at 767.

119 16 U.S.C. §§ 791a–828c (2012); *EPSA*, 136 S. Ct. at 766–67.

province of the states and therefore violate the Act.[120] The highly technical subject matter and broad statutory language of "affecting or pertaining to [wholesale] rates"[121] made the case an obvious candidate for *Chevron* deference, and the Government argued in its brief that *Chevron*'s framework should govern.[122] But the Court, in an opinion by Justice Kagan,[123] instead eschewed *Chevron* altogether, citing it only to say that "[b]ecause we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*."[124]

Since *Chevron*'s early days, scholars and jurists have recognized that courts can sidestep deference by simply finding the relevant provision unambiguous. For example, Justice Scalia explained that *Chevron* rarely constrained him since he most frequently found "the meaning of a statute . . . apparent from its text and from its relationship with other laws."[125] But, as a general matter, it was the Court's textualist Justices who employed this tactic.[126] *EPSA* therefore signals a potential shift, as the majority consisted of the Court's more purposivist Justices.

What is more, whereas Justice Scalia's statement relates to finding a provision unambiguous at step one and therefore avoiding deference at step two, the *EPSA* Court invoked a lack of ambiguity as a reason *not to apply Chevron at all*.[127] To be sure, in both cases, the result is the same: the provision's unambiguous meaning prevails. But the *EPSA* approach poses a greater threat to *Chevron* writ large because it rejects the framework's applicability altogether through a sort of "clear cases" exception similar to *King*'s major question exception. Put differently, under the old regime, *Chevron*'s framework always applied, and the question was how the Court would operate within its confines; it was akin to a *doctrine*, a steadfast rule.[128] In the current regime, ev-

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120 *EPSA*, 136 S. Ct. at 767–68.

121 16 U.S.C. § 824d(a).

122 Brief for the Petitioner at 23, *EPSA*, 136 S. Ct. 760 (No. 14-840) ("[T]he statutory-authority question in this case is governed by the familiar two-step framework of *Chevron* . . . .").

123 Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor.

124 *EPSA*, 136 S. Ct. at 773 n.5.

125 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521.

126 *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (finding the word "modify" in the Communications Act clear despite conflicting dictionary definitions); *see also* Merrill, *supra* note 2, at 354 ("[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and the use of the *Chevron* doctrine.").

127 *EPSA*, 136 S. Ct. at 773 n.5; *id.* at 773–81 (never invoking the *Chevron* framework).

128 *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 798 (2013) (labeling *Chevron* a "settled . . . interpretive approach" that is "routinely referred to as a 'precedent' by courts and scholars alike").

idenced by *King* and *EPSA*, the Court may or may not invoke the framework in a given case; it is now more like a *canon*, an interpretive presumption that can be employed or discarded when convenient.[129]

3. Michigan v. EPA. — Another recent decision suggests that even when the Court applies *Chevron* in a major case, the deference it affords the agency's interpretation is sometimes so watered down that it approximates de novo review. The CAA permits EPA to regulate power plants under the hazardous-air-pollutants program if such regulation is "appropriate and necessary."[130] In finding this standard satisfied prior to issuing a rule targeting power plants' mercury emissions, EPA declined to consider the regulation's economic cost.[131] It did, however, diligently account for cost when determining the regulation's stringency.[132] The question in *Michigan v. EPA*[133] was whether EPA exceeded its statutory authority when it declined to consider cost before deeming regulation "appropriate and necessary."

In an opinion authored by Justice Scalia,[134] the Court held that EPA's refusal to consider cost was impermissible.[135] The Court applied *Chevron* but made clear that, even under its deferential standard, "agencies must operate within the bounds of reasonable interpretation."[136] And, it concluded, "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."[137]

Michigan jeopardizes *Chevron*'s supremacy because it suggests a refusal to take seriously the framework's deferential standard of review. As Justice Kagan argued in dissent, Congress's use of the capacious phrase "appropriate and necessary" evinces an intention to confer significant policymaking discretion to EPA in light of its "experience and expertise."[138] The Court ignored this obvious grant of discretion and instead substituted its own judgment for the agency's.[139]

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[129] Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1796 (2010) ("The Justices do not follow *Chevron* and other deference regime decisions as precedents entitled to strict stare decisis effect; they treat deference regimes more as canons of statutory construction . . . .").

[130] 42 U.S.C. § 7412(n)(1)(A) (2012).

[131] Michigan v. EPA, 135 S. Ct. 2699, 2705 (2015).

[132] *Id.* at 2719–22 (Kagan, J., dissenting).

[133] 135 S. Ct. 2699 (2015).

[134] Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

[135] *Michigan*, 135 S. Ct. at 2712.

[136] *Id.* at 2707 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014)).

[137] *Id.* at 2708.

[138] *Id.* at 2718 (Kagan, J., dissenting). Indeed, Manning has written that the phrase "necessary and proper" — which is materially indistinguishable from the phrase "appropriate and necessary" at issue in *Michigan* — "has the unmistakable feel of an 'empty standard' [of] the kind that Congress routinely uses to signal its delegation of power to agencies." Manning, *supra* note 23, at 54.

[139] *Michigan*, 135 S. Ct. at 2715 (Kagan, J., dissenting).

Michigan, moreover, departed from prior cases in which the Court concluded that ambiguous language permits agencies to choose whether or not to consider cost because *either* choice is reasonable under *Chevron* step two.[140] Those cases respected *Chevron*'s core tenet that ambiguous language connotes a congressional preference for administrative, not judicial, decisionmaking; *Michigan*, by contrast, effectively imposed a de novo standard of review.

Importantly, the erosion of *Chevron* in *King*, *EPSA*, and *Michigan* occurred in the context of major cases, under this Note's definition of that phrase. *King* qualifies as a major case for the reasons noted above.[141] *EPSA* counts as such a case because the FERC rule at issue sought to change consumer behavior, as well as indirectly regulate retail energy rates,[142] arguably an area of traditional state concern.[143] And *Michigan* likewise falls into the major-case category because it touched on the proper role of cost in agency decisionmaking, an issue directly related to the scope of federal administrative power.[144]

B. The Chief Justice at the Forefront Again

In analyzing the driving force behind *Chevron*'s decline in major cases, considering the decision lineups is again revealing. As in the purposivist decisions above, Chief Justice Roberts was in the majority in all three anti-*Chevron* decisions, and he authored *King*. Justice Kennedy was also in the majority in all three decisions, but authored none. This alignment suggests that both Chief Justice Roberts and Justice Kennedy tend to be swing Justices in cases that chip away at *Chevron*. Like Chief Justice Roberts and Justice Kennedy, Justices Scalia, Thomas, and Alito would have spurned deference in all three cases. But unlike the Chief Justice and Justice Kennedy, they did not prevail in all three.

Justices Ginsburg, Breyer, Sotomayor, and Kagan were in the majority in *King* and *EPSA*, where the Government prevailed, but dis-

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[140] *See* EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1604 (2014) (explaining that the Court "read[s] Congress' silence as a delegation of authority to EPA to select from among reasonable options" and noting approaches excluding cost as possible options); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 222 (2009) ("It is eminently reasonable to conclude that § 1326(b)'s silence is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."); *see also The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 311, 316–17, 316 n.68 (2015).

[141] *See supra* Part I.B, pp. 1229–37.

[142] The D.C. Circuit, which invalidated FERC's rule prior to being reversed by the Supreme Court, expressed serious concerns about the breadth of the agency's interpretation and its lack of a "limiting principle." Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 221 (D.C. Cir. 2014).

[143] *See* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983).

[144] *See Michigan*, 135 S. Ct. at 2707 (explaining how a cost-free calculus would allow agencies "to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits").

sented in *Michigan*, where the Government lost. These results suggest that these four Justices may acquiesce to an erosion of *Chevron* in major cases, so long as the Government's interpretation is still upheld under a de novo standard.

While there appears to have been a consensus among Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito when it came to diminishing *Chevron*'s stature, Chief Justice Roberts stands out as perhaps the staunchest advocate of the move. First of all, he authored *King*, the boldest of the three opinions because it created an express exception to *Chevron*. Further, the Chief Justice dissented in *City of Arlington v. FCC*,[145] where he would have held that *Chevron* never applies to the antecedent question of "whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."[146] As the majority (written by Justice Scalia) noted, the Chief Justice's rule would "transfer any number of interpretive decisions — archetypal *Chevron* questions . . . — from the agencies that administer the statutes to federal courts."[147] Consequently, it was clear that his "ultimate target [was] *Chevron* itself."[148]

III. COMMON THREADS BETWEEN THE RISE OF PURPOSIVISM AND FALL OF *CHEVRON*

In addition to both being spearheaded by Chief Justice Roberts, the rise of purposivism and fall of *Chevron* connect in at least three other ways: they both promote judicial empowerment, respect Congress, and afford special treatment to major cases.

A. Judicial Empowerment

A common bond between the rise of purposivism and fall of *Chevron* is their inclination toward judicial empowerment. It is easy to see why cutting back *Chevron* promotes judicial power. In *Chevron* cases, the agency is the primary interpreter, while the Court plays a supervisory role to ensure the agency does not stray from the bounds of reasonableness.[149] Undercutting *Chevron* flips this allocation of interpretive power.[150] Courts decide more statutory questions de novo without putting a thumb on the scale in favor of the agency's interpretation. This is exactly what the Court did in *King*: refusing to apply

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145 133 S. Ct. 1863 (2013).

146 *Id.* at 1881 (Roberts, C.J., dissenting).

147 *Id.* at 1873 (majority opinion).

148 *Id.*

149 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) ("If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . ."); Gluck, *supra* note 10, at 66.

150 *See* Note, *supra* note 111, at 2208.

Chevron allowed it to rule that § 36B is *best* read to make tax credits available on federally created exchanges,[151] as opposed to concluding only that the IRS reasonably read the provision that way.

The rise of purposivism likewise enhances judicial power. To see why, recall *Bond*, *UARG*, *Yates*, and *King*. In each, the Court could have written a short, restrained opinion in which it found the relevant phrase clear on its face. In *Yates*, for instance, it could have reasoned: in the English language, a fish is a "tangible object"; Congress wrote "tangible object"; *ergo* the statute permits Yates's prosecution. Such an opinion would, as textualists say, "enforce a *clearly worded* statutory text,"[152] and in turn, recognize a circumscribed judicial role when the statute has a clear literal meaning.[153]

But the Court instead chose a different course in these four cases. Refusing to stop its analysis even upon recognizing textual clarity, the Court pressed on and probed sources of policy context to derive the *best* interpretation. The result is an opinion that seems to say: we recognize what Congress *said*, but we know that Congress *meant* something else because we are confident that a reasonable legislator, in crafting this particular statute, would never have intended this consequence.[154] This type of opinion entails a more robust judicial role than an opinion in which the Court merely enforces the text's literal meaning.

This judicial-empowerment thesis fits reasonably well with Chief Justice Roberts's apparent preferences in other areas of law. The Roberts Court, often led by the Chief Justice, has struck down a substantial number of laws on constitutional grounds, thereby exhibiting a maximalist role in the constitutional arena.[155] It has also augmented judicial power through its novel use of the constitutional avoidance canon.[156] Finally, although not always in the majority, Chief Justice Roberts has written notable opinions emphasizing the need to protect

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[151] King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

[152] Manning, *supra* note 9, at 1304.

[153] *See* Manning, *supra* note 23, at 6.

[154] *See King*, 135 S. Ct. at 2494–95 (declaring that, despite "the most natural reading of the pertinent statutory phrase," *id.* at 2495, "[i]t is implausible that Congress meant the Act to operate in [the] manner [advocated by the challengers]," *id.* at 2494).

[155] *See* Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12 (2012) ("The Roberts Court's approach reflects a combination of institutional distrust — the Court is better at determining constitutional meaning — and substantive distrust — congressional power must be held in check."); *see also, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612 (2013) (striking down the Voting Rights Act's coverage formula after Congress had reauthorized it only seven years prior). *But see* NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the ACA under Congress's tax power).

[156] *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015).

the judiciary from congressional attempts to delegate power away from Article III courts.[157]

On the flip side, however, Chief Justice Roberts has shown a preference for high standing[158] and mootness[159] hurdles — a stance that limits the Court's role. And he has consistently joined majorities that have rigorously enforced contractual arbitration clauses, which, by definition, prevent courts from resolving disputes.[160]

Combining these lines of cases, Chief Justice Roberts seems to advocate a robust judicial role when Justices operate within their Article III lanes, while at the same time enforcing formalist lines regarding the Court's jurisdiction. Given this orientation, his tendency to wield significant power in statutory interpretation cases is unsurprising: jurisdiction is a nonissue, and oftentimes the judiciary faces a perceived threat from an agency deploying interpretive power.

B. Respect for Congress

Another explanation for the simultaneous rise of purposivism and fall of *Chevron* in major cases is that both trends are fueled by the Court's respect for Congress. Curtailing *Chevron* is arguably a way of paying Congress respect because deferring to an agency interpretation that pushes the limits of its statutory authority may risk aggrandizing that agency at Congress's expense.[161] Of course, if one firmly believes in *Chevron*'s implied-delegation rationale, then refusing to defer to an agency interpretation of ambiguous language may actually *thwart* congressional intent.[162] But the Court's recent decisions suggest that it believes it best effectuates congressional will by rejecting deference in major cases.[163]

Similarly, the Court's four major purposivist cases reject litigants' efforts to pull a fast one on Congress by enlisting the literal meaning of an isolated provision to subvert Congress's plan. Most prominently,

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157 *See, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329–38 (2016) (Roberts, C.J., dissenting); Stern v. Marshall, 564 U.S. 462 (2011).

158 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 535–49 (2007) (Roberts, C.J., dissenting).

159 *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 677–85 (2016) (Roberts, C.J., dissenting).

160 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

161 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting) ("[W]e do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide.").

162 *See* Manning, *supra* note 23, at 29.

163 *See* Michigan v. EPA, 135 S. Ct. 2699, 2710 (2015) ("Congress wrote the provision before us more expansively, directing the Agency to regulate power plants if 'appropriate and necessary.' 'That congressional election settles this case.'" (quoting CSX Transp., Inc. v. Ala. Dep't of Revenue, 562 U.S. 277, 296 (2011))); King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) ("In extraordinary cases, . . . there may be reason to hesitate before concluding that *Congress* has intended such an implicit delegation." (emphasis added) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))).

the *King* challengers sought to exploit four little words to destroy a landmark piece of legislation.[164] Instead of punishing Congress by enforcing the literal meaning of those words, the Court respected the overall scheme Congress enacted. That Congress may have executed its plan imperfectly was immaterial: the Court could divine Congress's broader will, which it felt duty-bound to protect.

As noted earlier, the Chief Justice has often led the charge in invalidating congressional legislation on constitutional grounds. Why, then, does he appear more deferential to Congress on pure statutory interpretation questions? Similar to his philosophy of judicial power, he seems to see a difference in kind between strictly enforcing constitutional limits on congressional power on the one hand and interpreting statutes that Congress passes pursuant to its valid authority on the other.[165] In the former case, the risk is a constitutional transgression, so the Court must be tough on Congress to guard against its aggrandizement of power. In the latter case, the lone risk is that Congress gets away with inartful drafting — a far lesser threat to the separation of powers.

C. Major Cases

As reiterated throughout, this Note defines major cases as those implicating bold and novel applications of federal power that pose perceived threats to federalism and liberty interests. It also posits that each of the seven cases highlighted fits into that category. Notably, then, the Roberts Court's emerging purposivism and its incursions into *Chevron* both reserve special treatment for major cases.

The Court's recent statutory interpretation jurisprudence therefore splits into two categories: mundane cases and major cases. In mundane cases — those that involve deployment of federal power in a manner that fits with past practice and presents no perceived threat to states or individual liberty — the normal rules of textualism and *Chevron* still apply.[166] In major cases, however, the Court has adopted a special set of rules: purposivism and de novo review of agency action.

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164 Gluck, *supra* note 10, at 63–64 (describing these efforts).

165 *Cf.* NFIB v. Sebelius, 132 S. Ct. 2566, 2577 (2012) ("We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.").

166 *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2142–46 (2016) (applying *Chevron* in normal course to Patent Office regulation and finding regulation reasonable); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1946 (2016) (in preemption case concerning a Puerto Rican bankruptcy law, holding that "[t]he plain text of the Bankruptcy Code begins and ends our analysis"); Lockhart v. United States, 136 S. Ct. 958 (2016) (exhibiting a textualist battle of canons in case involving sentencing-enhancement provision); T-Mobile S., LLC v. City of Roswell, 135 S. Ct. 808 (2015) (texualist opinion interpreting whether Telecommunications Act provision requires localities to provide reasons when they deny applications to build cell phone towers);

This two-track system of statutory interpretation breeds a host of normative implications. On the one hand, it comes with significant costs. For example, it obscures the landscape upon which Congress must legislate. Many have defended both textualism and *Chevron* as stable background rules that assist congressional drafting.[167] By fostering uncertainty about when courts will actually invoke those rules, the Court has made Congress's job harder. Additionally, the current regime opens the door to judicial activism. A purported virtue of both textualism and *Chevron* is their ability to constrain judicial decisionmaking.[168] With these doctrines uprooted, Justices may choose their methodology based on how important a given case is to *them* and which method suits their preferred outcome.

On the other hand, this two-track regime could make pragmatic sense. Purposivism may have more merit in major cases if one thinks congressional intent is easier to discern in those cases.[169] For instance, legislators might more closely consider the scope of federal power a statute embodies (for example, does it allow prosecution of all evidence spoliation, or just destruction of documents?), as compared to the intricacies of particular provisions, given that the former issues carry greater political saliency. If so, the textualist critique focused on the impossibility of divining legislative "intent"[170] may apply less forcefully in major cases. And in the *Chevron* context, spurning deference in major cases may serve nondelegation principles by assuming Congress

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Whitfield v. United States, 135 S. Ct. 785 (2015) (textualist opinion interpreting the meaning of a bank-robbery statute); Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 826–29 (2013) (applying *Chevron* in normal course and deferring to the Department of Health and Human Services' interpretation of whether a filing time limit under the Medicare Act could be subject to equitable tolling); Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017–21 (2012) (applying *Chevron* in normal course and deferring to the Board of Immigration Appeals' interpretation of an Immigration and Nationality Act provision concerning cancellation of removal).

167 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates . . . ."); Manning, *supra* note 23, at 29 ("[B]oth *Chevron* and the Court's textualism enhance Congress's capacity to determine not only the ends, but also the means, of legislation.").

168 ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed., 1997) ("Long live [textualism's] formalism. It is what makes a government a government of laws and not of men."); Herz, *supra* note 3, at 1875 (characterizing *Chevron* as a "self-imposed [judicial] limitation").

169 *Cf.* Gluck, *supra* note 10, at 96 ("*King* may have been an easier case for use of the plan concept than the typical statutory interpretation dispute — precisely because the question at issue in *King* was so objectively central to the statute's ability to function. The concept of a plan may not be nearly as helpful for smaller disputes . . . .").

170 *See, e.g.*, SCALIA, *supra* note 168, at 16–23; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005).

did not intend to delegate politically significant decisions to less accountable agencies.[171]

Ultimately though, these pragmatic justifications for a two-track system are vulnerable to criticism. Although legislators may more thoroughly deliberate on major questions, this argument seems entirely speculative. The textualist rejoinders grounded in the incoherence of legislative intent and the "risk [of] upsetting a complex bargain"[172] thus apply with full force in major cases. As to *Chevron*, the nondelegation rationale for disavowing deference in major cases crumbles when one realizes that such a maneuver effectively delegates major questions to courts — bodies even less accountable than agencies.[173]

Regardless of which combination of principles one might prefer (for example, *Chevron* and textualism, *Chevron* and purposivism, and so forth), it should be common ground that the current sub silentio two-track system is problematic. To improve the status quo, the Court should either (1) select some stable combination of principles to apply to all cases, or (2) retain the major-case distinction but articulate a coherent rationale to justify it, as well as a metric to distinguish major cases from mundane ones.

CONCLUSION

It remains to be seen how Justice Scalia's passing will affect the Court's statutory interpretation jurisprudence. The addition of a new Justice, moreover, may alter Chief Justice Roberts's role on the Court, especially in statutory cases. For the time being, though, the Court, led by the Chief Justice, has moved toward purposivism and away from *Chevron* in major cases, with scarce explanation. With important cases implicating these trends on the horizon,[174] the Court should either right its course or provide transparency by acknowledging and justifying its new two-track system.

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[171] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242 (explaining that cases invoking a major question exception to *Chevron* illustrate an attempt "to promote nondelegation interests").

[172] Manning, *supra* note 9, at 1290.

[173] *See* Gluck, *supra* note 10, at 95 (arguing that the "nondelegation presumption" underlying the major question exception "increases the power of *courts*"); Manning, *supra* note 171, at 228, 257.

[174] *See, e.g.*, West Virginia v. EPA, No. 15-1363 (D.C. Cir. filed Oct. 23, 2015) (challenge to EPA's "Clean Power Plan" implicating *Chevron*'s major question exception and a text-purpose interpretive battle).