Article

Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation

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INTRODUCTION

We live in an "administrative state."[1] Civil servants and political appointees make rules of general applicability, adjudicate

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1. City of Arlington v. FCC, 133 S. Ct. 1863, 1879 (2013) (Roberts, J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state."); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 755 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."). *See generally* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 12 (1985) ("It

individual cases, and enforce the laws within complex, hierarchical organizations. At the same time, we are committed to democratic-constitutional principles, which require that "We the people" remain the authors of the laws that bind us.[2] Bureaucracy can serve democratic governance because the public purposes outlined by statute often require "administrative machinery" to come into force.[3] But democracy is also seen to conflict with the delegation of discretionary authority to administrative institutions, since bureaucratic decision-makers stand removed from electoral accountability.[4]

The latest doctrinal expression of this conflicted partnership between democracy and bureaucracy is the major questions doctrine.[5] This doctrine is a prominent exception to the general principle of judicial deference to administrative interpretations of statutory ambiguities.[6] Courts will normally afford agency in-

is not only trite, it is no longer sufficient to say that we have a cradle-to-grave administrative, welfare state. Administrators make decisions that affect us from *before* the cradle to *beyond* the grave."); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 1 (1983) ("[A] conception of public administration free from judicial oversight would have damaged the fundamental political axiom of limited government and thus undermined in advance a principal buttress for the legitimacy of the modern 'administrative state.'").

2. U.S. CONST. pmbl.

3. Int'l News Serv. v. Associated Press, 248 U.S. 215, 263 (1918) (Brandeis, J., dissenting).

4. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980) ("The point is not that such 'faceless bureaucrats' necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected . . . ."); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 289–300 (2d ed. 1979); WILLIAM SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 1–3 (1994) ("If state action is to be rendered normatively legitimate, many of the giants of modern political thought argue, we need to make sure that law takes a form capable of carefully regulating bureaucrats. . . . Poorly constrained state action undermines political and social autonomy.").

5. *See, e.g.*, 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, 990–95 (2013) ("[T]he major questions doctrine [has] been described as '*Marbury's* revenge,' an effort to reclaim some of the judicial power that *Chevron* shifted to agencies."); Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236–45 (2006) (discussing the development of the major questions principle and the conflicting opinions on the proper authority for and application of the doctrine).

6. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of

terpretations of such ambiguities some degree of weight or deference, depending on the level of authority Congress has delegated to the agency and the formality of the procedure through which such interpretations have been issued.[7] However, in a series of cases in the past three decades, the Supreme Court has held that where a statutory ambiguity raises a question of great "economic and political significance," it will presume that Congress did *not* intend the agency to resolve the issue.[8] Instead, the Court will resolve the ambiguity itself, without giving any weight or deference to the agency's position.[9]

The major questions doctrine has played a key role in recent, high-profile cases. In *King v. Burwell*,[10] the Supreme Court refused to defer to the Internal Revenue Service's (IRS) interpretation of the Affordable Care Act's provision of tax credits for health insurance purchased through "an Exchange established by the State."[11] The Court noted that this provision was "among the Act's key reforms, involving billions of dollars" and affecting the health insurance coverage of millions of Americans.[12] The interpretation of this provision therefore raised questions of such "deep economic and political significance," that the Court presumed Congress did not intend the IRS to resolve them.[13] "This is not a case for the IRS. It is instead our task to determine the

authority to the agency to elucidate a specific provision of the statute by regulation."); Gluck & Schultz Bressman, *supra* note 5, at 990 ("[T]he major questions doctrine presumes that Congress does not intend to delegate interpretive authority over major policy questions to an agency, even if it leaves a statutory ambiguity.").

7. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that agency interpretations are entitled to "*Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law"); *id.* at 234 (explaining further that some deference is still given to the agency interpretation, despite falling outside of *Chevron* deference, in proportion to the agency's "specialized experience and broader investigations and information").

8. King v. Burwell, 135 S. Ct. 2480, 2489 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (2000).

9. *E.g.*, *King*, 135 S. Ct. at 2489.

10. *Id.*

11. 26 U.S.C. § 36B(b)(2)(A) (2012); *King*, 135 S. Ct. at 2489 (refusing to defer to the IRS's interpretation because of the major question implicated by the statutory ambiguity).

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

13. *Id.*

correct reading . . . ."[14]

In *Texas v. United States*,[15] the Fifth Circuit likewise found that the Department of Homeland Security's (DHS) Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program was likely unlawful, in part, because it "undoubtedly implicates question[s] of 'deep economic and political significance.'"[16] If Congress had wished to give DHS authority to defer removal proceedings for over four million undocumented immigrants, "it surely would have done so expressly."[17]

These cases show that, in spite of its relatively spare use to date,[18] the major questions doctrine has significant implications for both social policy and constitutional structure. The doctrine channels constitutional power by reserving to the judiciary, rather than the executive, authority to settle questions that statutory law has left unresolved. Because the doctrine is triggered by a court's perception that the interpretive question at issue is politically salient, it authorizes judicial policymaking on precisely those issues that have the highest visibility for the American public. The doctrine therefore licenses judicial intervention in

14. *Id.*

15. 809 F.3d. 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

16. *Id.* at 181 (quoting *King*, 135 S. Ct. at 2489.

17. *Id.*

18. The major questions doctrine continues to be discussed and invoked in the lower courts. *E.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017) (denying a rehearing en banc in challenge to the FCC's "Open Internet Order," where concurring and dissenting opinions joined issue on the application of the major questions doctrine to the Order); ClearCorrect Operating, LLC v. Int'l Trade Comm'n, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring) (rejecting the International Trade Commission's interpretation of articles, under the Tariff Act of 1930, to encompass electronic transmissions of data, in part on the grounds that "[i]f Congress intended for the Commission to regulate one of the most important aspects of modern-day life, Congress surely would have said so expressly"); U.S. House of Reps. v. Burwell, 185 F. Supp. 3d 165, 188 (D.D.C. 2016) (withholding deference to the Treasury Department's interpretation of the Affordable Care Act with regard to appropriations for subsidies on the grounds that it was a major question and "[t]here was no express delegation here"); *cf.* Chamber of Commerce v. Hugler, 231 F. Supp. 3d 152, 178–79 (N.D. Tex. 2017) (discussing major questions, but refusing to apply it, instead granting summary judgment for the Department of Labor in challenge to its "fiduciary rule," and distinguishing major questions cases on the grounds that Congress had "clearly . . . assigned the DOL the power to regulate a significant portion of the American economy, which the DOL has done since the statute was enacted"). For a discussion and critique of major questions adjudication in the lower courts, see generally Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017).

intensely political disputes.

The major questions doctrine deserves close examination not only because it enlarges the judiciary's policymaking power, but also because it succinctly encapsulates a deeply entrenched ideology of administrative law and bureaucratic legitimacy. The doctrine presumes that the reasonable legislator would not have wanted a bureaucratic body to settle policy questions that were left unanswered by statutory law.[19] Administrative agencies, in this view, are treated as purely technocratic institutions, which are meant only to find the best means to achieve legislative goals.[20] The courts, by contrast, are treated as the guardians of principle and policy, who stand ready to prevent over-zealous executive officials from usurping legislative power. These assumptions are rooted in an antibureaucratic philosophy of the modern state, which is visible in significant strands of scholarly literature and in some important case law.[21] By reconstructing the rationale for the major questions doctrine, we can better understand and assess the premises of this legal and political philosophy.

The major questions doctrine is best explained as an attempt to reinforce democratic-constitutional values. In practice, however, it undermines such values by failing to respect the deliberative capacities of administrative agencies. I present a Progressive understanding of the state that recognizes agencies' democratic virtues. I then propose a modification to the major questions doctrine that would reinforce, rather than impair, agencies' discursive and participatory functions.

The jurisprudential foundation for the major questions doctrine is the constitutional principle that Congress may not delegate policymaking authority to another actor without providing an "intelligible principle" to guide and constrain the exercise of that authority.[22] This "nondelegation doctrine" protects legislative prerogatives by striking down statutes that do not adequately delimit the exercise of administrative discretion. The major questions doctrine takes a less extreme approach. Instead of simply abrogating unconstitutionally broad grants of administrative authority, the major questions doctrine requires courts to interpret regulatory statutes so as to narrow the discretion

19. Gluck & Schultz Bressman, *supra* note 5, at 990.
20. *See infra* Part III.B.
21. *See infra* Part III.
22. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

they allocate to administrative bodies. The judiciary can thus respect Congress's general legislative choice to intervene in a given policy area, but prevent administrative agencies from addressing fundamental political questions.

The broader normative justification for the major questions doctrine is to reinforce democratic legitimacy. The doctrine presumes that democracy will be enhanced if administrative agencies do not make important value choices.[23] This presumption is based upon two auxiliary premises. The first premise, which can be traced to the great scholars of the Legal Process School, is that the courts are and should be the primary interpreters of the principles and policies enacted in legislation.[24] The second assumption, which can be traced to Max Weber's sociology of law, is that bureaucracy is and should be an efficient, neutral instrument for implementing goals established by statute.[25]

I argue that these auxiliary premises are descriptively inaccurate and normatively unappealing. As a descriptive matter, they fail to account for salient features of our current institutional regime: that agencies do, in fact, often make important value choices, and that agencies' procedural mechanisms and institutional position can promote deliberative, inclusive, and rational decision-making.[26] As a normative matter, therefore, these premises fail to recognize that administrative policymaking may increase, rather than detract from, the democratic legitimacy of state action.

I present a Progressive theory of the administrative state that better captures this democracy-enhancing aspect of our administrative procedure. I call this theory Progressive because it was authored by American Progressives like John Dewey, Woodrow Wilson, and Frank Goodnow, who first advocated expansive national regulatory power in the United States.[27] Such Progressive conceptions of the American state have received renewed attention in recent years, not only from scholars who broadly support their vision of democratically authorized administrative

23. *See infra* Part I.B.
24. *See infra* Part III.A.
25. *See infra* Part III.B.
26. *See infra* Part V.
27. *See infra* Part IV.B.

regulation,[28] but also from those who trace the decline of American constitutionalism to Progressivism.[29] Legal scholarship, however, continues to operate under misapprehensions about the content and commitments of Progressivism, usually emphasizing only the Progressive concern with bureaucratic expertise.[30] This paper therefore reassesses the "original intent" of the Progressives to explain how the state can remain democratic, even when unelected bureaucrats make important policy choices.

The Progressives followed the German philosopher G.W.F. Hegel in understanding the state as an institution that guarantees individual and collective freedom through expert regulation and social-welfare provision.[31] But, unlike Hegel, they argued that administration must be informed by public opinion.[32] They believed that agencies could augment the popular legitimacy of the state by bringing the input of the affected parties to bear in crafting regulatory policy.[33] They therefore advocated for a state that would maximize both deliberative engagement and programmatic efficiency. The institutional architecture of our administrative state reflects significant aspects of the Progressive vision.[34]

This Progressive theory of administration is capacious. It incorporates aspects of the other theories that have been advanced

28. *See, e.g.*, K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*?, 94 TEX. L. REV. 1329, 1337–45 (2016) (discussing Progressive Era political and legal thought as an intellectual foundation for using administration to combat social domination and promote democratic engagement).

29. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 447–78 (2014) (identifying the American Progressives as originating our administrative law and disregarding constitutional principles of the rule of law and democratic control of policy decisions).

30. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 223–25 (1992) (discussing the development of "the Progressives' increasing admiration of the professional expert whose skill, neutrality, and impartiality formed an alternative to both the demagoguery and corruption of American democratic politics and the unmitigated self-interest of marketplace ethics").

31. *See infra* Part IV.A.

32. *See infra* Part IV.A.

33. *See infra* Part IV.B.

34. *See infra* Part IV.

to justify the administrative state, such as legislative democracy,[35] expertise,[36] interest-group pluralism,[37] civic republicanism,[38] and presidentialism.[39] But it situates and relativizes each of these theories within a general concept of the state. In the Progressive theory, the state is the institutional articulation of democratic discourse. This is a normative rather than merely descriptive concept. The structures of the state should reflect, refine, and ultimately enforce value commitments that emerge from an open and contested process of "political will-formation" in the public sphere.[40]

Administrative agencies play a pivotal role within this state. Their function is not merely to carry out an already specified political program, but rather to incorporate the perspectives of multiple actors who possess partial democratic authority. Thus, while acknowledging the President's role in overseeing administrative action, the Progressive theory insulates administrative decision-making from complete presidential control, so as to

35. *See* JAMES WILLARD HURST, DEALING WITH STATUTES 40 (1982) (arguing that legislators' broad powers allow them to make "value choices," which agencies have to carry out).

36. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23–24 (1938) ("[F]or the art of regulating an industry requires [expertise]. . . . If the administrative process is to fill the need for expertness, obviously, as regulation increases, the number of our administrative authorities must increase.").

37. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (arguing that affording participation in agency decision-making by all interested parties will create better agency decisions).

38. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) ("[H]aving administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberate decision making informed by the values of the entire polity."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985) ("[I]n its belief in a deliberative conception of democracy, [republicanism] provides a basis for evaluating administrative and legislative action that has both powerful historical roots and considerable contemporary appeal.").

39. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing that presidents should guide agency decision-making because it would promote accountability for agency decisions and create more effective agency decisions); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 471–72 (1985) (concluding that presidential control over the administrative state is the best way to solve the problem of unbounded agency discretion).

40. Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 5 (1994). The view I advance here generally aligns with Habermas's deliberative-democratic political theory, but departs from his instrumental-rational understanding of the administrative process. *See infra* Part III.B.

leave space for other voices to influence the choice of policy. Though it recognizes the importance of efficient bureaucratic performance, the Progressive theory presses a countervailing need for public participation and discursive reasoning in administrative decision-making. By encouraging rational policy development between the legislature, executive, and the public at large, the Progressive theory aims to enhance the democratic legitimacy of state action. This process of institutional deliberation can also reduce the arbitrariness of any given expression of democratic will—such as a presidential policy preferences that cannot claim a wide constituency—by bringing it into dialogue with other, conflicting understandings of public needs and values.

This theory is not "progressive" in the sense that it necessarily entails the adoption of contemporary liberal or left-wing political values. While the Progressive state is functionally suited to promote various forms of social and economic equality, it might also be deployed for certain substantively conservative policies, such as the promotion of competitive markets. But Progressivism insists that any such political agendas be authorized through a deliberative-democratic process that draws on the institutional resources of the administrative apparatus.

This Progressive understanding motivates a reformulation of the major questions doctrine. I suggest that courts should calibrate their deference to an agency's resolution of a major question to the deliberative quality of the agency's policymaking processes. Courts should assess: (1) the degree to which the agency has responded to the affected public in making its policy choice; and (2), the degree to which the agency has addressed the relevant questions of political value. Normally, use of the notice-and-comment rulemaking procedure should suffice to demonstrate significant engagement with the affected public. But use of the rulemaking procedure should be neither necessary nor sufficient for judicial deference. Even if the agency proceeds through informal rulemaking, courts must ensure that the agency's explanation of its policy choice actually addresses the political controversies its interpretation implicates. If the interpretation is not issued through rulemaking, courts should nonetheless give weight to the agency's view proportional to the deliberative credentials of the antecedent decision-making procedure.

This Article proceeds in six parts. In Part I, I trace the development of the major questions doctrine as an exception to *Chevron* deference. In Part II, I reconstruct the rationale for the doctrine, arguing that it is best understood as reinforcing the

nondelegation doctrine and, more fundamentally, deliberative democratic control over political choices. In Part III, I argue that the major questions doctrine rests on two auxiliary assumptions: first, that courts are the best interpreters of the principles and policies enacted in legislation; and, second, that agencies should serve as value-neutral, technocratic implementers of policies established definitively by courts and the legislature. In Part IV, I suggest an alternative model of administration, based on Progressive political thought, which emphasizes the discursive role agencies can play in synthesizing expressions of public opinion in the form of legislation, presidential input, and public participation. In Part V, I argue that this Progressive theory better comports with our current institutional regime than the court-centric and technocratic assumptions of the major questions doctrine. In Part VI, I deploy this alternative understanding to propose a revision to the major questions doctrine. I then demonstrate how this modified approach would apply to the major questions cases.

I. THE MAJOR QUESTIONS DOCTRINE: A DEPARTURE FROM THE TRADITIONAL REGIME OF JUDICIAL DEFERENCE

In this Part, I introduce the major questions doctrine as an exception to the general presumption that agency interpretations of statutory ambiguities are owed at least some level of weight or deference. In Section A, I outline the general administrative-law doctrine of judicial deference to agency statutory interpretation. In Section B, I introduce the major questions cases, describing how the doctrine evolved from a qualified presumption against reading marginal statutory provisions to license broad delegations into an unqualified presumption against any form of delegation concerning politically important matters.

A. THE GENERAL PRINCIPLE OF JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF STATUTORY AMBIGUITIES

The major questions doctrine is a departure from the general rule that courts will give some degree of weight or deference to agency interpretations of the statutes they are charged with administering.[41] Courts invoked this principle throughout the nineteenth century, before the proliferation of administrative

41. *See supra* note 6.

tasks had become an issue of major political and legal contention.[42] For instance, in *United States v. Moore*,[43] the Court stated: "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."[44] The rule was not absolute, but turned on a set of contextual factors, such as the continuity of agency interpretation, and whether the agency interpretation was nearly cooriginal with the organic act itself.[45]

42. *E.g.*, Boske v. Comingore, 177 U.S. 459, 470 (1900) ("[A Treasury] regulation . . . should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."); U.S. *ex rel.* Dunlap v. Black, 128 U.S. 40, 48 (1888) ("The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose"); Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515 (1840) ("[J]udgment upon the construction of a law must be given in a case in which [heads of departments] have jurisdiction, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion, or judgment. Nor can it by mandamus, act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties."); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."). For an illuminating discussion of the evolution of doctrines of judicial deference to agency statutory interpretation since the nineteenth century, see generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908 (2017). Bamzai argues that *Chevron* is a departure from nineteenth-century standards, and from the APA, because it conflates and combines the respect due to contemporaneous official interpretations, and deference under the extraordinary writs, into a general presumption that administrative interpretations of statutory ambiguities deserve judicial deference. The merits of that historical argument are beyond the scope of this paper. My only point in this Section is that prior to *Chevron*, in a variety of contexts, courts considered the agency's construction of a statute to have considerable authority, and would not invariably interpret the statute de novo.

43. 95 U.S. 760 (1877) (upholding the Secretary of the Navy's interpretation of statutory provisions fixing annual salaries for assistant-surgeons).

44. *Id.* at 763.

45. Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933) ("[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is

Judicial deference to agency statutory interpretation took on renewed prominence as the New Deal ushered in a rapid expansion of national administrative capacities.[46] The courts began to distinguish cases where Congress had allocated primary interpretive authority to the agency, rather than the judiciary, to resolve the meaning of a statutory term with significant policy implications. In *NLRB v. Hearst Publications, Inc.*,[47] the Court recognized a zone of interpretive discretion in which the National Labor Relations Board (NLRB) definition of "employee" was to be accepted by the Court if it had "a warrant in the record and a reasonable basis in law."[48] While acknowledging that "questions of statutory interpretation . . . are for the courts to resolve,"[49] the *Hearst* Court nonetheless recognized that agency interpretations might, and sometimes must, inform judicial interpretation. The authority a court would accord to the agency's position would depend on the scope of policymaking authority Congress had dedicated to the agency and the degree to which the agency demonstrated its expert judgment in its construction of the statute.[50]

This flexible regime of deference was crucial to many of the canonical cases of judicial statutory interpretation during and after the New Deal, such as *United States v. American Trucking Ass'n*[51] and *Griggs v. Duke Power*.[52] Such cases recognized that the delegation of implementing authority to an agency usually entailed the delegation of policymaking discretion, since the

indefinite and doubtful. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.").

46. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 430–38 (2007).

47. 322 U.S. 111 (1944).

48. *Id.* at 131 (internal quotations omitted).

49. *Id.* at 130–31.

50. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944); *see also* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143, 1145 (2012) (distinguishing the "weight" courts may give to agency views in determining the boundaries of the agency's interpretative discretion from the "space" in which Congress has allocated primary authority to the agency).

51. 310 U.S. 534, 549 (1940) (deferring to the opinion of the Wage & Hour Division of the Department of Labor).

52. 401 U.S. 424, 433–34 (1971) (deferring to interpretation by the EEOC).

statute would inevitably leave some of its goals underdetermined. As the Court observed in *Morton v. Ruiz*, "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[53]

In *Chevron U.S.A., Inc. v. NRDC*,[54] the Court temporarily simplified this nuanced regime with its famous two-step procedure. Generalizing the approach first developed in *Hearst*,[55] *Chevron* held that if a statutory provision is ambiguous, the courts should generally infer that the legislature has delegated the interpretive choice to the administering agency by implication.[56] In such cases, courts should defer to the interpretation of the administering agency if it is "permissible" or "reasonable."[57] The scope of *Chevron*, however, was not entirely clear.[58] Did it refer to any agency interpretation, no matter the procedural form, or did it apply only to legislative rules issued through notice-and-comment procedures? Did courts still have the responsibility to determine independently any possible interpretations of ambiguous language as a threshold inquiry?[59] Uncertainty and disagreement concerning *Chevron's* realm of application eventually led the Court to specify the forms of agency action to which it applied. *INS v. Cardoza-Fonseca*[60] and *INS v. Aguirre-Aguirre*[61] together hold that *Chevron* applies to interpretations reached in the course of binding adjudications, as well as those promulgated through rulemaking.[62] *Christensen v. Harris*

53. 415 U.S. 199, 231 (1974).

54. 467 U.S. 837 (1984).

55. *See* Peter L. Strauss, *In Search of* Skidmore, 83 FORDHAM L. REV. 789, 792 (arguing that *Chevron* "universalized *Hearst* [by] creat[ing] a presumption that to the extent any statute conferring authority for its administration on a particular agency lacked a fixed meaning[,] . . . [t]he uncertainties were to be regarded as delegations to those agencies of a responsibility reasonably to choose among the possibilities the statutory language offered").

56. 467 U.S. at 842–43.

57. *Id.* at 843.

58. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 835 (2001).

59. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 612 (2009).

60. 480 U.S. 421, 448 (1987).

61. 526 U.S. 415, 424 (1999).

62. Cardoza-Fonseca, 480 U.S. at 448; Aguirre-Aguirre, 526 U.S. at 424.

County[63] and *United States v. Mead Corp.*[64] indicate that *Chevron* does not, however, ordinarily extend to documents that are not issued in the exercise of the agency's delegated lawmaking authority. Where *Chevron* does not apply, courts will nonetheless usually accord "some deference"[65] to the agency's interpretation, depending on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[66]

There are several other wrinkles to the Court's current framework for agency deference, which is better understood as a "continuum of deference," rather than as a set of hard-and-fast rules.[67] Here, I want to focus on one particularly salient and theoretically interesting exception—the major questions exception—to the general principle that at least some level of deference is owed to an agency's interpretations of the statute it administers.

B. THE MAJOR QUESTIONS CASES: FROM KEEPING ELEPHANTS OUT OF MOUSEHOLES TO KEEPING ELEPHANTS OUT OF THE SAVANNA

In a series of cases, the Court has declined to defer to agencies' statutory interpretations where it considers the interpretive question to be one of "economic and political magnitude."[68] In these cases, the Court presumes that Congress does not impliedly delegate to agencies the authority to resolve particularly important matters. This principle has gradually expanded over the course of the cases where it has been deployed—from a caution against reading broad powers into narrow language into a general presumption that important questions are simply inappropriate for agency resolution.

63. 529 U.S. 576, 587 (2000).

64. 533 U.S. 218, 226–27 (2001).

65. Reno v. Koray, 515 U.S. 50, 61 (1995).

66. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

67. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008).

68. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

1. Supreme Court Adoption, Application, and Expansion of the Major Questions Doctrine

The major questions doctrine first emerged as a distinguishable technique of statutory interpretation in *MCI Telecommunications Corp. v. AT&T Co.*[69] In that case, the Court rejected the Federal Communications Commission's (FCC) interpretation of the filing requirements of the Communications Act of 1934.[70] The FCC had issued a rule that interpreted its authority to modify[71] tariff filing requirements to permit it to waive such requirements altogether for certain carriers.[72] The late Justice Scalia, writing for the Court, first found that the Commissions's statutory authority to "modify" the requirements did not encompass the authority to make a "radical or fundamental change."[73] This was presented as an ordinary textual argument, relying on dictionary definitions of "modify," rather than the importance of the interpretive question.[74] He then concluded that the broad filing waiver was indeed a radical change, and thus exceeded the bounds of the FCC's interpretive discretion. In the Court's view, the waiver was "a fundamental revision of the statute," rather than an incremental adjustment, since it withdrew the Act's crucial filing requirements from "40% of a major sector of the industry."[75] If these premises are valid, this argument resolves the question decisively against the agency. If "modify" connotes a limited administrative authority, then an agency cannot make a major change in reliance upon that statutory term. As Justice Scalia memorably stated in a later case, "Congress . . . does not . . . hide elephants in mouseholes."[76]

But Justice Scalia at one point announces a broader principle, not necessary to the holding: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that

69. 512 U.S. 218 (1994).

70. *Id.* at 234.

71. Communications Act of 1934, 47 U.S.C. § 203(b)(2) (2012).

72. *In re* Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd. 8072, 8075 (Nov. 25, 1992).

73. *MCI*, 512 U.S. at 229.

74. *Id.* at 225–29.

75. *Id.* at 231.

76. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001) (citing *MCI*, 512 U.S. at 231; FDA v. Brown & Williamson Tobacco, Corp., 529 U.S. 120, 159–60 (2000)).

through such a subtle device as permission to 'modify' rate-filing requirements."[77] This dictum inaugurates the major questions doctrine. Here, Scalia did not merely suggest that the FCC's major change in filing requirements was an impermissible expansion of the plain meaning of modify. Rather, he presumed that Congress would not in any event authorize an administrative agency to make decisions of major economic import without an express delegation of such authority.

This presumption became central to the holding in *FDA v. Brown & Williamson*.[78] In that case, the Court declined to grant *Chevron* deference to a Food and Drug Administration (FDA) rule interpreting the Food, Drug, and Cosmetic Act of 1938 to permit it to regulate nicotine, cigarettes, and smokeless tobacco.[79] Specifically, the FDA maintained that nicotine could be regulated as a "drug," defined as an "article[] (other than food) intended to affect the structure or any function of the body,"[80] and that cigarettes and smokeless tobacco could each be regulated as a "device," meaning, in relevant part, "an instrument, apparatus, implement, machine, contrivance . . . intended to affect the structure or any function of the body."[81] The Court rejected the FDA's interpretation.[82] Though the it might ordinarily defer to the FDA's reasonable interpretation of the statutory definition of drug and device,[83] the Court reasoned:

> This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting of a significant portion of the American economy. . . . [W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.[84]

77. *MCI*, 512 U.S. at 231.

78. *Brown & Williamson*, 529 U.S. at 160–61.

79. *Id.* at 160.

80. Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 321(g)(1)(C) (2012); *Brown & Williamson*, 529 U.S. at 127.

81. 21 U.S.C. § 321(h); *Brown & Williamson*, 529 U.S. at 127.

82. *Brown & Williamson*, 529 U.S. at 161.

83. *See* Jody Freedman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 73; *see also* Theodore W. Ruger, *The Story of* FDA v. Brown & Williamson*: The Norm of Agency Continuity*, *in* STATUTORY INTERPRETATION STORIES 335, 358–59 (William N. Eskridge Jr. et al. eds., 2011).

84. *Brown & Williamson*, 529 U.S. at 159–60.

Relying on *MCI*, the Court established a presumption against *Chevron*-style implied delegation where a major question was concerned.[85]

In fact, however, the Court had significantly expanded the holding of *MCI*. In the latter case, the Court had found that the plain meaning of the term "modify" indicated that the FCC could not make a major amendment to the regulatory scheme under that provision. In *Brown & Williamson*, by contrast, the terms "drug" and "device" plainly comprehend nicotine and cigarettes, respectively, as a matter of English usage. The doctrine therefore morphs in *Brown & Williamson* into a general presumption against implied delegation, where the Court independently determines that the issue is simply too significant to be left to the agency. Above and beyond the traditional tools of statutory construction, the major questions doctrine therefore provides additional grounds for delimiting the scope of agency authority.[86] Where the Court concludes that the agency has made an important policy decision with far-reaching consequences under ambiguous legislative authority, the Court will not defer, but rather, take on the interpretive task itself.

Two subsequent cases confirmed that the major questions doctrine was not a fleeting aberration, but a persistent—if sparingly invoked—element of the Court's deference regime. In *Utility Air Regulatory Group v. EPA*,[87] the Court again invoked the

85. *Id.* at 160.

86. In *Brown & Williamson*, Justice O'Connor offers three separate arguments to conclude that Congress had spoken to the precise question at issue, and thus *Chevron* deference was unwarranted: (1) she first combines a "whole act" argument—the FDA would have to ban cigarettes from the market if it regulated them as a device—with a "whole code" argument—other statutes evince Congress's intent to regulate cigarettes rather than to ban them—to argue that Congress could not have intended for the FDA to regulate cigarettes, *id.* at 133–43; (2) she then argues that Congress had "acted against the backdrop of" and thus "ratified" the Agency's previous position that it did not have authority to regulate nicotine or cigarettes when it enacted other statutes regulating tobacco, *id.* at 144; and (3) she finally argues, separately, that the economic and political significance of regulating cigarettes indicates that Congress did not delegate this regulatory choice to the agency, *id.* at 159–61. The major questions argument is thus one of three independent strands that together support the Court's conclusion that Congress did not impliedly delegate interpretative discretion to the agency with regards to cigarettes. Though the major questions issue is just one prong of the *Chevron* step one analysis here, it is analytically distinct, and was thus positioned to stand on its own as grounds to withhold deference from an implementing agency.

87. 134 S. Ct. 2427 (2014).

major questions doctrine to support its conclusion that the Environmental Protection Agency's (EPA) greenhouse-gas emissions standards and permitting requirements for motor vehicles impermissibly interpreted the Clean Air Act.[88] Citing *MCI* and *Brown & Williamson*, Justice Scalia reasoned that the "EPA's interpretation is . . . unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization. . . . We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[89]

In *Gonzales v. Oregon*,[90] decided eight years earlier, the Court had applied the major questions doctrine somewhat differently. In that case, the doctrine helped to determine the amount of weight owed to the Attorney General's interpretive rule that constructed the registration provisions of the Controlled Substances Act to prohibit the prescription of certain drugs used in physician-assisted suicide.[91] Citing *Brown & Williamson*, the Court reasoned that the interpretive rule did not fall under the *Chevron* framework, because Congress would not have delegated authority over an issue of such political significance through the statute's registration provisions.[92] It explained: "The importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country . . . makes the oblique form of the claimed delegation all the more suspect."[93] Instead, the Court treated the interpretive rule as a nonbinding document, which would be accorded weight only to the extent that it had "power to persuade."[94] Because the Attorney General lacked any medical expertise relevant to the regulation of physician-assisted suicide, and because of the "apparent absence of any consultation with anyone . . . who might aid in a reasoned judgment," the Court considered the rule's persuasive force to be nil.[95]

88. *Id.* at 2444–45.

89. *Id.* at 2444.

90. 546 U.S. 243 (2006).

91. *Id.* at 250–54.

92. *Id.* at 267.

93. *Id.* at 267–68 (citing Washington v. Glucksberg, 521 U.S. 702, 735 (2006)).

94. *Id.* at 268.

95. *Id.* at 269.

The major questions doctrine was applied and expanded by the Supreme Court in *King v. Burwell*.[96] There, the Court denied deference to the IRS interpretation of a key provision of the Affordable Care Act.[97] The IRS had interpreted "Exchange established by the State"[98] to include exchanges established by the federal government, so that healthcare tax credits could be provided through such latter exchanges.[99] The Court, citing language from *Brown & Williamson*, declined to defer to the agency's interpretation of the admittedly ambiguous provision:

> 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 expressly.[100]

The Court then went on to offer its own construction of the Act without any regard to the IRS's interpretation. Analyzing the overall statutory structure and Congress's "legislative plan," it concluded independently that the provision did, in fact, mean what the IRS had thought it meant.[101]

Note that in *King*, there is a subtle yet significant expansion in the application of the major questions doctrine from *Brown & Williamson*: the IRS's interpretation was not a departure from its previous position, as had been the case in the FDA's decision to regulate tobacco products. In characterizing the FDA's decision to regulate tobacco products as an "extraordinary case[]" that did not merit *Chevron* deference, Justice O'Connor emphasized that the FDA's current claims were "[c]ontrary to its representations to Congress since 1914."[102] The fact that the agency had reversed a longstanding position made the Agency's assertion of "jurisdiction to regulate . . . a significant portion of the American economy" particularly suspect.[103] In *King*, by contrast, the major questions doctrine was invoked to decline deference to

96. 135 S. Ct. 2480 (2015).

97. *Id.* at 2488–89.

98. 26 U.S.C. § 36B(b)–(c) (2012).

99. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified as amended at 26 C.F.R. pts. 1 & 602).

100. *King*, 135 S. Ct. at 2488–89 (citing Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

101. *Id.* at 2496.

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

103. *Id.* at 123.

the "contemporaneous construction" of a recently enacted statute by an agency charged with administering it—a case where great deference would ordinarily be particularly appropriate.[104] The Court nonetheless asserted its interpretive prerogative, wresting power away from the agency, only to conclude that the agency had been right all along. The disagreement was structural—who decides?—rather than substantive—what is the answer?

2. Circuit Court Interpretation and Expansion of the Major Questions Doctrine

Another high-profile use of the major questions doctrine came in *Texas v. United States*, where the Fifth Circuit upheld the district court's nationwide injunction on DAPA.[105] The DAPA program set out general criteria for Department of Homeland Security (DHS) immigration-enforcement officials to consider in deferring removal proceedings for undocumented immigrants and in conferring a status of "lawful[] presen[ce]" that would enable recipients to apply for employment eligibility and social security benefits.[106] In concluding that Texas was likely to succeed on the merits of its challenge to DAPA under the Administrative Procedure Act (APA), the court concluded that, aside from its procedural deficiencies, the policy was substantively beyond the delegated immigration enforcement authority of the Department.[107] The court relied on the major questions doctrine to reject DHS's interpretation of the Immigration and Nationality Act (INA), reasoning that:

> DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits . . . . DAPA undoubtedly implicates "question[s] of 'deep economic and political significance' that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly."[108]

104. *See* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933); *see also* United States v. Mead Corp., 533 U.S. 218, 252 (2001) (Scalia, J., dissenting); FDIC v. Phila. Gear Corp., 476 U.S. 426, 438–39 (1986).

105. 809 F.3d. 134 (5th Cir. 2015).

106. Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep't of Homeland Sec., for León Rodríguez, Director, U.S. Citizenship and Immigration Serv., et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

107. *Texas*, 809 F.3d. at 186.

108. *Id.* at 181.

Despite admittedly "broad grants of authority"[109] to the Secretary of DHS to "establish[] national immigration enforcement policies and priorities,"[110] the court concluded that the INA could not be construed to grant such policymaking discretion to DHS.[111]

In this judgment, the major questions doctrine takes on its full potential breadth. Despite explicit statutory terms granting enforcement policy discretion, the court concluded that Congress simply could not have meant to vest the Secretary of DHS with authority to make such a major change in immigration policy. One might therefore say that, in its most extreme form, the major questions doctrine not only aims to keep administrative elephants from emerging out of statutory mouseholes, but also aims to take elephants out of the savanna of administrative policymaking altogether. Even when Congress *explicitly* grants broad policymaking discretion to agencies, the major questions doctrine may deny deference to interpretations that seem, by the court's judgment, to be politically portentous. This incarnation of the major questions doctrine remains in force, though without the benefit of a Supreme Court opinion grappling with its reasoning. The Court granted certiorari in *Texas v. United States*, but ultimately affirmed the judgment by an equally divided Court.[112]

Another in-depth discussion of the major questions doctrine came in *U.S. Telecom Ass'n v. FCC*, in which the D.C. Circuit denied rehearing en banc of an unsuccessful challenge to the FCC's Open Internet Order.[113] The Order imposed common-carrier regulations on Internet service providers in the interest of

109. *Id.* at 183.

110. 6 U.S.C. § 202(5) (2012).

111. The Fifth Circuit went on to use the major questions doctrine to find the DHS interpretation unreasonable under *Chevron* step two. Assuming arguendo that the Department's interpretation of the INA was not barred at *Chevron* step one, the court found that the interpretation was impermissible at *Chevron* step two, because it was "an unreasonable interpretation that is 'manifestly contrary'" to the Act. *Texas*, 809 F.3d. at 182. It found that the grant of enforcement policy discretion to the Secretary could not "reasonably be construed as assigning 'decisions of vast economic and political significance,' such as DAPA, to an agency." *Id.* at 183.

112. *See* United States v. Texas, 136 S. Ct. 2271 (2016).

113. 855 F.3d. 674, 382 (2017).

ensuring open and nondiscriminatory public access to the Internet.[114] The FCC relied on its statutory authority to regulate telecommunications services as common carriers.[115] In his dissent from the denial, Judge Kavanaugh argued that: "The FCC's net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful."[116] The concurrence in the denial from Judges Srinivasan and Tatel emphasized that the Supreme Court had already recognized that the meaning of telecommunications service was ambiguous, and that it was therefore left to the FCC's discretion whether to classify Internet service providers as such.[117] But, in Judge Kavanaugh's view, the net-neutrality rule, as a major rule, required an express congressional delegation of authority, and could not be supported by ambiguity in the statutory text.[118] As he admits, the conclusion that a rule is major "has a bit of a 'know it when you see it' quality."[119] Such an open-ended judgment call could doom agency action in the absence of a crystal-clear statutory mandate.

II. RECONSTRUCTING THE RATIONALE FOR THE MAJOR QUESTIONS DOCTRINE: FROM NONDELEGATION TO POPULAR SOVEREIGNTY

Why should courts presume that Congress does not delegate interpretative authority to agencies on major issues? Bracketing the question of how precisely we are to distinguish questions that are major from those that are minor or interstitial, why should we suppose that Congress would not assign such issues of economic and political magnitude to the judgment of administering agencies? Scholars have offered, and in some cases endorsed, several different rationales for the doctrine, including

114. Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8 & 20).

115. 47 U.S.C. § 153(53) (2012).

116. *U.S. Telecom*, 855 F.3d. at 418 (Kavanaugh, J., dissenting).

117. *Id.* at 383 (citing Nat'l Cable & Telecomms. Serv. v. Brand X Internet Servs., 545 U.S. 967 (2005)).

118. *Id.* at 423 (Kavanaugh J., dissenting).

119. *Id.*

combatting agency aggrandizement;[120] supporting the under-enforced constitutional principle of nondelegation;[121] enforcing legislative supremacy;[122] and avoiding administrative interference with public deliberation.[123] In this Part, I will argue that the major questions doctrine is an interpretive presumption that buttresses the under-enforced constitutional norm of popular sovereignty. The principles of nondelegation, legislative supremacy, and deliberation-inducement that have been put forward in defense of the doctrine each protect democratic legitimacy at different levels of institutionalization—the people's allocation of constitutional power; the special status of Congress as a democratically accountable institution; and the protection of the ongoing process of political discourse that tethers governmental action to public opinion. This democracy-reinforcing vision supposes that major value choices must be made in a transparent, accountable, inclusive, and deliberative fashion.

In Section A, I show that the major questions doctrine is a statutory presumption that reinforces the constitutional norm of nondelegation. In Section B, I relate the nondelegation doctrine to a deeper democratic norm: that fundamental questions of principle and policy must be settled in a deliberative process that includes members of the affected public.

120. *See* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004); Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1015–16 (1999); Merrill & Hickman, *supra* note 58, at 844–45.

121. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224–27; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 26–33 (2010).

122. *See* William N. Eskridge, Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WISC. L. REV. 411, 436 ("When an agency such as the FDA makes a major policy move on its own, without sufficient mooring in a congressional authorization, it undercuts the democratic legitimacy of statutes."); 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, 631 (2008).

123. *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 287–89 (2010); *see also* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007) ("[T]he Court withheld deference because the respective administrations—agency heads, key White House officials, or even the President himself—although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts.").

A. THE DOCTRINAL STATUS OF THE MAJOR QUESTIONS RULE: REINFORCING NONDELEGATION THROUGH STATUTORY INTERPRETATION

In the late 1970s and 1980s, the Supreme Court turned to substantive canons of statutory interpretation as a means of enforcing its conception of constitutional values.[124] Substantive canons, such as the requirement that Congress must make its intention absolutely clear if it wishes to alter the balance of state and federal powers,[125] allow the courts to police constitutional structural norms without taking the aggressive step of striking down unconstitutional legislation.[126] Such substantive canons encompassed administrative interpretations of statutes, such as when the Court rejected the NLRB's decision to exercise jurisdiction over certain religious schools in order to avoid conflict between the National Labor Relations Act and the First Amendment.[127]

Amongst the constitutional values the Court sought to protect with its substantive canons was the nondelegation doctrine. In *Mistretta v. United States*, where the Court upheld Congress's delegation of authority to promulgate sentencing guidelines to a judicial commission, the Court noted that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[128] The Court cited *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (*The Benzene Case*), where it had rejected the Occupational Health and Safety Administration's (OSHA) benzene exposure standards, in part, for failure to quantify adequately the carcinogenic risk posed by benzene.[129] In that case,

124. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275–308 (1994).

125. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

126. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 712–48 (5th ed. 2014) (discussing and critiquing constitutional avoidance canons and clear statement rules).

127. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 506 (1979).

128. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

129. *Id.*

Justice Stevens reasoned in his plurality opinion, "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view."[130] Stevens went on to reason that if OSHA were correct that the Act did not compel a quantification of the risk posed by benzene,

> the statute 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*. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[131]

The Benzene Case provides the clearest precedent for the major questions doctrine,[132] and links it definitively to the nondelegation doctrine. In *Utility Air Regulatory Group*,[133] Justice Scalia cites the plurality opinion in *The Benzene Case* for the proposition that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[134] This language suggests that the major questions doctrine is a clear statement rule which reinforces the nondelegation doctrine.[135]

By presuming that Congress does not intend administrative agencies to settle major questions, the Court construes statutes so as to avoid the impermissible delegation of legislative power that might occur if the agency could resolve important questions of principle and policy. Since the primary purpose of the major questions doctrine is to reinforce the nondelegation doctrine in

130. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980).

131. *Id.* at 656 (internal citations omitted).

132. I do not include *The Benzene Case* amongst the major questions cases described in Part I.A.1, *supra*, because it predates *Chevron*, and therefore does not analyze issues of statutory ambiguity in the way that all the other major questions cases do—using the doctrine to undercut the *Chevron* presumption that any statutory ambiguity should be construed as granting a degree of deference or weight to the administering agency's interpretation. On the disjunction between the approach in *The Benzene Case* and *Chevron*, see Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 311 (1988) ("If the Supreme Court had adopted the *Chevron* test before it decided *Benzene* . . . the Court probably would have resolved [the] case with a single unanimous opinion.").

133. 134 S. Ct. 2427 (2014).

134. *Id.* at 2444.

135. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946 (2017).

this way, the justification for the major questions doctrine must be sought out in the nondelegation doctrine itself.

B. THE CONSTITUTIONAL JUSTIFICATION FOR THE NONDELEGATION AND MAJOR QUESTIONS DOCTRINES: DEMOCRACY-REINFORCEMENT

The nondelegation doctrine rests on democratic-constitutional foundations. At the deepest level, the nondelegation doctrine respects the people's allocation of constitutional power amongst the branches of government. The Constitution provides, "All legislative powers herein granted shall be vested in a Congress of the United States."[136] The nondelegation doctrine aims to preserve these constitutionally vested jurisdictional rights of Congress. The "constitutional rights"[137] of Congress are ultimately rooted in "the public rights"[138] of the people, who are "the only legitimate fountain of power."[139] The authority of the people to distribute power is preserved by holding Congress to certain standards of clarity with regards to its legislative product. Congress must "lay down by legislative act an intelligible principle," by which the courts, Congress, and the people can determine the legality of administrative action.[140]

But the nondelegation doctrine does not merely aim to support the people's fundamental constitutional decision to vest legislative power in one particular body rather than another. Rather, legislation itself is thought to have special democratic credentials. As Justice Rehnquist noted in his concurrence in *The Benzene Case*, "[The nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[141] Congress's "electoral connection" to the public,[142] and its

136. U.S. CONST. art. I, § 1.

137. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

138. *Id.*

139. THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961).

140. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

141. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

142. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (discussing how congressmen connect to the public and seek to get reelected).

special investigative and deliberative competencies,[143] are thought to make it the preeminent voice of the people as a whole. This link between congressional legislation and democratic legitimacy has been widely asserted across ideological and theoretical lines in American jurisprudence.[144]

Such a legislative conception of democracy leads to the conclusion that democracy can be preserved only if Congress makes basic value choices in the people's name.[145] As James Willard Hurst argues, "A statute embodies a choice of values carrying obligations on those within its governance, backed by the force of the state."[146] By making the basic value choices that will guide policy, Congress retains normative authority over regulatory activity.

The major questions doctrine aims to protect this legislative jurisdiction over the choice of political values. It does so by assuming Congress does not leave important value choices to agencies. Justice Breyer has articulated this position most clearly. Justice Breyer arguably invented the major questions doctrine in 1986, when he claimed that "Congress is more likely to have

143. *See generally* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991) (arguing that the committee system enables Congress to develop specialized knowledge about policy problems); *see also* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY & AMERICAN NATIONAL GOVERNMENT (1994) (arguing that Congress often acts as a deliberative body).

144. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 99 (2005) ("Legislation in delegated democracy is meant to embody the people's will . . . . [A]n interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."); FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 16 (1947) (stating that Congress is "the primary law-making agency in a democracy"); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 397 (2012) ("'The sovereign will is made known to us by legislative enactment.' And it is made known in no other way." (quoting Wheeler v. Smith, 50 U.S. (9 How.) 55, 78 (1850) (McLean, J.))); John F. Manning, *The Supreme Court 2013 Term—Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014) (stating that Congress is the people's "most immediate agent").

145. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 651 (1985) (referring to "the extraordinary 'magnitude' of the value choices made by Congress in enacting the Sherman Act") (Stevens, J., dissenting); United States v. Phila. Nat'l Bank, 374 U.S. 321, 371 (1963) ("A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress . . . .").

146. JAMES WILLARD HURST, DEALING WITH STATUTES 40 (1982).

focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[147] Breyer has most recently justified the doctrine on explicitly democratic grounds. He argues that the way to avoid "conflict between democracy and administration" is to ensure that administration simply "complements" democracy "by implementing legislatively determined general policy objectives."[148] In order to determine the scope of the authority left to administrative discretion, Breyer would have us consult the standpoint of the "reasonable member of Congress."[149] Breyer asserts that such a reasonable legislator would not have wanted courts to defer to agencies on questions of "national importance" or "major importance."[150] This is a generic presumption that is not based in particular legislative text, purpose, or history. Its connection to any specific legislative intent is therefore tenuous.[151] It is rather a presumption that aims to reinforce democratic decision-making by increasing the costs to Congress of impliedly delegating significant policy questions to agencies—it must do so expressly, if at all.

The doctrine also purports to safeguard the broader process of informed and inclusive political discourse that underlies and legitimates lawmaking. Abigail Moncrieff argues that *MCI* and *Brown & Williamson* are best explained by the fact that the agency action in each case interrupted ongoing congressional deliberations over the topic at issue.[152] Lisa Bressman likewise argues that in *Brown & Williamson* and *Gonzales*, the administrative agencies in question had undermined democratic

147. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). This passage was quoted in full by Justice O'Connor in her opinion for the Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

148. Breyer, *supra* note 144, at 103.

149. *Id.* at 106–08.

150. *Id.* at 107.

151. Gluck & Schultz Bressman, *supra* note 5, find that over sixty percent of surveyed congressional staffers who draft legislation do not intend the agency to resolve major questions. *Id.* at 1003. But over thirty percent of respondents disagreed. *Id.* The respondents also noted that, even if they believed Congress had an "obligation" to address major questions, it sometimes fails to do so because legislators cannot reach an agreement on such issues. *Id.* at 1004. Moreover, these data do not tell us what elected representatives themselves intend, much less what Congress as a whole intends, if anything, with regards to a particular piece of legislation.

152. Moncrieff, *supra* note 122, at 621–32.

accountability by acting contrary to legislative preferences and short-circuiting public debate: "The Court's decisions demonstrate that no administration is entitled to disregard Congress's likely preferences or fence out popular consideration of contested issues, no matter the reason."[153] In a similar vein, William Eskridge argues that legislation has special democratic legitimacy because "[t]he imprimatur of three differently constituted electorates guarantees a variety of democratic inputs into national policy decisions."[154] According to Eskridge, it is not merely the democratic credentials of Congress itself, but also the wider deliberations that go on between the public and the political branches of government in the run-up to enactment, that give statutes their special claim to bind.[155]

The argument thus far has reconstructed the rationale behind the major questions doctrine as one of democracy-reinforcement. Interpreted in its best light, the doctrine aims to protect and to strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy. This democratic principle has constitutional, institutional, and discursive dimensions: the people's constitutional choice to vest legislative power primarily in Congress must be preserved; Congress's special institutional competencies to represent electoral constituencies and investigate social problems must be respected; and the People's ongoing engagement with the government in the form of public debate and interbranch dialogue must be fostered. To this extent, the major questions doctrine rests on sound principles of democratic constitutionalism. Note, however, that the principle of democracy-reinforcement does not explain one crucial premise of the major questions doctrine: that if legislation has left an ambiguity with respect to a major question, democratic accountability will be better served if a court, rather than the administering agency, resolves that ambiguity. In the next Part, I will explore and critique the reasons for this assumption.

153. Schultz Bressman, *supra* note 123, at 780 (footnote omitted).
154. Eskridge, *supra* note 122, at 436.
155. *See id.*, at 423.

III. WEBERIAN AND COURT-CENTRIC ASSUMPTIONS UNDERLYING THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine supposes that courts are the primary interpreters of statutory values and that administrative agencies should be limited to technocratic tasks.[156] These assumptions may have a sort of common-sense appeal for legal practitioners and scholars. But they are far from self-evident. Instead, as I will show in this Part, they are rooted in a particular and contestable ideology of the administrative state. Here I aim to unpack and critique these institutional ideologies that support the major questions doctrine. In Section A, I will describe the court-centric assumptions that support the major questions doctrine. In Section B, I will describe its reliance on Weberian conceptions of administration. In both Sections, I will suggest that these assumptions are controversial and run the risk of undermining rather than outlining the conditions of administrative legitimacy.

A. THE LEGAL PROCESS SCHOOL AND JUDICIAL SUPREMACY IN STATUTORY INTERPRETATION

In the major questions cases, the court resolves statutory ambiguities instead of deferring to the agency's interpretation. The doctrine therefore rests on the assumption that courts have superior institutional competence relative to agencies in identifying the important value choices Congress has made. This assumption has its roots in some of the classic thinkers of the Legal Process School. Lon Fuller, for example, believed that "there is reason to prefer that form of government which controls moral attitudes less abstract than mere respect for the will of the state, and that means, I believe, preeminently government by judges."[157] Ronald Dworkin likewise maintained that judges have the primary responsibility to interpret the basic purposes expressed in statute, and to identify the principles and policies those laws embody.[158] He paid scarcely any attention to the role of agencies in fleshing out statutory meaning, not even considering the possibility that they could resolve questions of principle

156. *See supra* notes 147–51 and accompanying text.

157. LON L. FULLER, THE LAW IN QUEST OF ITSELF 135 (1940).

158. *See* RONALD DWORKIN, LAW'S EMPIRE 313–54 (1986) (arguing that judges should interpret statutes in a way that promotes the integrity of law, fairness, democratic values, and their own views of justice and policy).

in the exercise of their discretion. John Hart Ely similarly argued for a revival of the nondelegation doctrine on the grounds that democratic accountability could only be preserved if Congress retained its responsibility for making the basic normative decisions in the form of statutory law.[159]

The major questions cases are therefore best understood as a way to reassert the primacy of courts over agencies as the interpretive agents of Congress. As Professor Abbe Gluck has observed, *King* is only the latest case in which the Court has returned to the confident purposive spirit of the Legal Process School, and sought to reinvigorate an interpretive partnership between Congress and the courts in regulatory law: "This Court seems to want the big questions for itself."[160]

On first blush, this court-centric vision of statutory interpretation seems nonproblematic. *Marbury v. Madison*, after all, established that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[161] But recall that *Marbury* also drew a distinction between administrative actions that were "only politically examinable," and those that were subject to a nondiscretionary statutory duty, and could thus be compelled by a writ of mandamus.[162] Administrative law articulates this distinction between legal obligation and political discretion in its details. It aims to determine precisely how statutes allocate interpretive authority between agencies and courts, acknowledging that some questions of statutory interpretation involve political or empirical questions, which executive agencies, rather than courts, ought to decide in the first instance.[163] *Chevron*'s deference regime rests on the premise that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[164] It reinforces the separation of

159. ELY, *supra* note 4, at 132–33.

160. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 65 (2015).

161. 5 U.S. (1 Cranch) 137, 177 (1803).

162. *Id.* at 166.

163. *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) ("[J]udicial review of administrative action contains a question of the allocation of law-making competence in every case . . . . The court's interpretational task is . . . to determine the boundaries of delegated authority.").

164. Chevron U.S.A., Inc. v. NDRC, 467 U.S. 837, 866 (1984).

powers by instructing judges not to intrude into political controversies that are the proper province of the legislature and executive, rather than the judiciary.[165]

The major questions doctrine is controversial because it wrests interpretive authority away from the agency in precisely those cases that the court recognizes have "economic and political,"[166] rather than simply legal, significance. It arises when the statutory meaning is acknowledged to be ambiguous, and thus any subsequent judicial construction of the statutory requirements must rely upon some policy considerations that are not purely matters of law. In *King*, for example, after refusing to defer to the IRS, Chief Justice Roberts was put in the awkward position of departing from his textualist colleagues to argue that an "Exchange established by a State" must encompass a federal exchange, because a contrary reading "could well push a State's individual insurance market into a death spiral."[167] As the late Justice Scalia observed, this aspect of the Court's argument necessarily involved policy judgments about the "extrinsic circumstances" in which the law would operate.[168] He further noted: "This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice . . . ."[169] By asserting judicial authority to resolve matters of economic and political significance, the major questions doctrine puts courts, rather than agencies, in the front-line position of determining how to make statutory schemes workable. The judiciary, therefore, asserts supremacy over politically-accountable administrative actors in resolving legal questions that must be answered, at least in part, by consideration of policy.

The question this poses is whether the least democratically accountable branch of government ought to take on such a political role. The answer depends on how we conceptualize the proper role of agencies. For if the judiciary does not resolve ambiguities in the legislature's policy, the executive surely will.

165. *See* Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 289 (2011).

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

167. King v. Burwell, 135 S. Ct. 2480, 2493 (2015).

168. *Id.* at 2503 (Scalia, J., dissenting) (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)).

169. *Id.* at 2505 (Scalia, J., dissenting).

B. THE WEBERIAN ASSUMPTIONS OF THE MAJOR QUESTIONS DOCTRINE

Alongside the court-centric assumptions of the Legal Process School, the major questions doctrine rests on a normative-institutional assumption that administrative agencies have a purely technical task to perform, and should not answer questions of significant political value. This view is rooted in Max Weber's seminal theory of bureaucracy and legal authority. According to Weber, the "bureaucratic administrative staff" is the "purest type of exercise of legal authority," because in a system of perfect bureaucratic hierarchy and accountability, public officials neutrally and efficiently apply the abstract norms of a statute to the facts of particular cases.[170] Bureaucracy is a form of "domination through knowledge," which implements the law through a system of hierarchical command and technocratic competency.[171] Weber argues that bureaucracy is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings."[172] While regulatory laws might advance certain "substantive" values, the state bureaucracy would employ a purely "instrumental" or "purposive" conception of rationality (*zweckrational*), attempting to find the best formal means to achieve those legislative ends.[173]

This descriptive view of bureaucracy led to Weber's sharp normative distinction between the vocation of political officials and the vocation of administrative officials. In a world of moral and ethical pluralism, the political official had to "take a stand, to be passionate," and to assume "exclusive personal responsibility for what he does."[174] The civil servant, by contrast, should "execute conscientiously the order of the superior authorities, exactly as if the order agreed with his own conviction."[175] He would exhibit "a spirit of formalistic impersonality" in implementing

170. MAX WEBER, ECONOMY AND SOCIETY 220 (Guenther Roth & Claus Wittich eds., 1968).

171. *Id.* at 225.

172. *Id.* at 223.

173. *Id.* at 26, 226.

174. MAX WEBER, *Politics as a Vocation*, *in* ESSAYS IN SOCIOLOGY 77, 95 (H.H. Gerth & C. Wright Mills eds., trans., 1946).

175. *Id.*

the law, and thereby attain "the highest degree of efficiency" in achieving its ends.[176]

This view of administration has had lasting influence in political and legal theory. Jürgen Habermas, one of the foremost proponents of deliberative democratic theory, famously argued that "*there is no administrative production of meaning*."[177] Administration, in his view, is a purely technical enterprise, which always risks sapping civil society of its reservoirs of cultural meaning and ethical commitment.[178] Bureaucracy is deeply dangerous to democratic politics, because it proceeds through formal rules, hierarchies of command, and specialized knowledge, rather than through debate between free and equal citizens. Political discourse is something that takes place exclusively within the public sphere and in the relationship between the public sphere and the legislative process. In *Between Facts and Norms*, which synthesized American and German constitutional theory, Habermas argued that "[t]he norms fed into the administration bind the pursuit of collective goals to pregiven premises and keep administrative activity within the horizon of purposive rationality."[179]

American legal scholars and jurists also often rely explicitly upon Weberian premises. As Louis Jaffe noted, the seminal administrative law scholarship of Ernst Freund and James Landis shared Weberian theories of legislatively authorized, expert administration.[180] Edward Rubin deploys Weber's theory of bureaucracy to argue that administrative law should focus exclusively on the "instrumental rationality" of administrative action, rather than on public participation.[181] Jerry Mashaw likewise adopts Weber's view that administration is fundamentally a matter of "exercising power on the basis of knowledge."[182] Using

176. WEBER, *supra* note 170, at 223, 225.

177. JÜRGEN HABERMAS, LEGITIMATION CRISIS 70 (Thomas McCarthy trans., 1975).

178. *Id.* at 72.

179. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 192 (William Rehg trans., 1996).

180. *See* Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186, 1187 (1973).

181. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 159–60 (2003) (considering Weber in the principle of instrumental rationality).

182. JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26, 195 (1983).

Weber's phraseology, Mashaw argues that "[a]gency implementing action is an instrumentally rational exercise," in the sense that agencies must interpret the goals established by the statute and then find the best "instruments" to achieve those purposes.[183]

This conception of bureaucracy is evident in some Supreme Court cases striking down agency action as arbitrary or capricious under the APA.[184] For example, in *State Farm*,[185] the Court struck down the National Highway Traffic Safety Administration's rescission of a passive restraint rule for failure to draw a "rational connection between the facts found and the choice made."[186] In *Michigan v. EPA*,[187] the Court rejected the EPA's decision to regulate pollution from power plants because of its failure to perform a cost-benefit analysis to assess whether such regulation was "appropriate and necessary."[188] In these cases, reasoned administrative decision-making is equated with Weberian instrumental rationality. The agency's sole task is to find the most efficient, cost-effective means to achieve the ends established by statute, weighing technological feasibility as well as economic effects.[189]

As Kevin Stack has demonstrated, this conception of administrative reason as "means-ends rationality" is echoed in the Legal Process School's purposivist approach to statutory interpretation.[190] The agency's reasoning process, in this view, must be

183. Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007).

184. 5 U.S.C. § 706(2)(A) (2012).

185. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

186. *Id.* at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

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

188. *Id.* at 2706–07 ("Read naturally . . . the phrase 'appropriate and necessary' requires at least some attention to cost.").

189. *See, e.g.*, *supra* notes 183–88 (summarizing analytical steps agencies must make when interpreting statutes).

190. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 877–79 (2015) ("[T]he purposive account suggests that the basic question of judicial review should be whether the agency's action furthers the statute's purposes within allowable means.").

completely confined to achieving the goals provided for in its organic act.[191] There is thus a deep affinity between the Legal Process School's court-centric emphasis,[192] and the Weberian conception of administration. If agencies are restricted to purely instrumental reasoning, rather than value-based consideration of questions of political significance, they should not be able to settle any major policy questions left open by statutory ambiguities.[193] This is instead a job for the courts.[194]

Weberian conceptions of bureaucracy also provide a powerful basis for diagnosing American administrative agencies' alleged failure to deal adequately with ethical values. For example, Justice William Brennan relied on Weber's account of bureaucracy to defend the due process revolution in *Goldberg v. Kelly*[195] as a necessary judicial response to our "bureaucratic state's" failure to respond to "[the] human realities at stake" in administrative action.[196] Professor Gerald Frug indicts "the ideology of bureaucracy" in American administrative law, citing Weber's conception of bureaucracy to guide his critique of the "deceptive" judicial effort to justify illegitimate assertions of state power.[197] Most recently, Jacob Gerson and Jeannie Suk[198] have relied on Weber's description of bureaucracy to criticize the Department of Education's (DOE) interpretation of Title IX,[199] which has imposed extensive reporting requirements and adjudicative procedures on universities to address sexual assault and harassment.[200] Because sex implicates "emotion" and "desire,"

191. *Id.* at 879.

192. *See supra* Part III.B.

193. *See supra* Part III.A.

194. *See supra* note 158 and accompanying text.

195. 397 U.S. 254 (1970).

196. William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 10 CARDOZO L. REV. 3, 19–20 (1988).

197. *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1278, 1297–1305 (1984) (describing the links between Weber "formal" view of bureaucracy and the nondelegation doctrine as well).

198. *See* Jacob Gerson & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 884–86 (2016) ("[T]he sex bureaucracy is unfortunately counterproductive to the goal of actually addressing the harms of rape, sexual assault, and sexual harassment.").

199. *See* Title IX of the Education Amendments (Title IX) of 1972, 20 U.S.C. § 1681–1688 (2012) (covering the prohibition of discrimination on the basis of sex in educational institutions and enforcement provisions).

200. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12040, 12044

they suggest that a Weberian, morally blinkered federal bureaucracy lacks the institutional competency to address these sensitive and ethically charged issues.[201] They imply that "there is a democratic deficit underneath the sex bureaucracy," because Congress would not be likely today to pass legislation specifically endorsing the DOE interpretation of Title IX.[202]

This Weberian view of bureaucracy is an implicit premise of the major questions doctrine.[203] As Gerson and Suk's argument shows, the Weberian view forecloses agencies from making value-laden decisions.[204] It is presumptively inappropriate for a bureaucracy to make such policy judgments.[205] If we follow Weber in treating administrative agencies as limited to instrumental rationality, then we must presume that Congress does not permit agencies to make value choices—much less value choices concerning matters of "such economic and political significance."[206] Instead, they must simply find the appropriate means to achieve the value choices Congress has already endorsed, as those values have been interpreted by the judiciary.[207]

Some of the scholars cited above might be skeptical of the nondeferential posture of the major questions doctrine, doubting, perhaps, whether there is any justiciable way to distinguish a major from a minor question of statutory interpretation.[208]

(Mar. 13, 1997) ("Procedures adopted by schools will vary considerably in detail, specificity, and components . . . .").

201. *See* Gerson & Suk, *supra* note 198, at 947 ("What does it mean when an institution designed to eliminate 'from official business love, hatred, and all purely personal, irrational and emotional elements' regulates '[t]he behavior of a human being in sexual matters, [which] is often a prototype for the whole of his other modes of reaction to life?' In part, this is a question about institutional match. Is the federal bureaucracy the right political institution to be regulating ordinary sex?") (quoting Max Weber, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 215–16 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) and SIGMUND FREUND, SEXUALITY AND THE PSYCHOLOGY OF LOVE 25 (1963)).

202. *Id.*

203. *See supra* Part III.B.

204. *See* Gerson & Suk, *supra* note 198, at 886.

205. *See supra* notes 137, 147–48 and accompanying text.

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

207. *Id.* at 161 (stating that administrative action "must always be grounded in a valid grant of authority from Congress").

208. *See, e.g.*, Frug, *supra* note 197, at 1301–04 (drawing on principles based on the nondelegation doctrine, "one of the critical ingredients of policymaking authority is the ability to decide how much to decide oneself and how much to let others decide as problems develop").

But the incorporation of Weberian motifs in administrative law scholarship complicates the effort to carve out a space for any non-trivial value choices within administrative action. Once one adopts Weber's description of bureaucracy as an efficient instrument of policies and principles established by the legislature,[209] there are indeed strong reasons to presume that Congress would not have left such choices to agencies. When our prototype of administration is a hierarchical organization composed of technically sophisticated but perhaps under-socialized experts, it is very unappealing to suppose that such characters and institutions might resolve and interpret our political commitments, rather than merely find the most technologically feasible and cost-effective means to bring them about. The influence of this strand of Weberian political theory has therefore buttressed a strong presumption that norm-setting is a matter for legislatures and courts, but not for agencies.[210]

As the critical assessments of Brennan, Frug, and Gerson and Suk suggest, the broader implications of the Weberian conception of administration are normatively troubling. The Weberian view treats administration as an inherently alienating, morally-vacant, and purely technocratic aspect of modern governance, which undermines the legitimacy of the regulatory state.[211] It understands administration as categorically incapable of fulfilling a basic requirement of democratic constitutionalism: that laws and policies must be justified to those they bind in ways that are genuinely responsive to their dignity, needs, and interests.[212] If the Weberian diagnosis of bureaucracy is correct, and the Weberian prescriptions for administrative reason are appropriate, there is little hope that bureaucracy will ever be capable of satisfying our desire for a form of government that

209. WEBER, *supra* note 170, at 220–26.

210. *See supra* Part III.B.

211. *See* JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 43 (1978) (discussing the tendency of Weberian bureaucracy to "fracture the integrity of the individual and destroy a society's sense of community").

212. *See generally* RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (Jeffrey Flynn trans., Columbia Univ. Press 2012) (arguing that democracy requires at a minimum that coercive action be justified to the persons it affects in a way they can understand); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 100–01, 172–253 (1986) (arguing for an approach to administrative due process that respects human dignity and liberal-constitutional forms, rather than mere Weberian instrumental rationality).

is adequately responsive to public feedback, ethical values, or private autonomy.[213]

There is reason to doubt, however, whether the Weberian account is indeed an accurate account of, or desirable standard for, the administrative process of the United States. Weber's vision of a purely technocratic, formally rational administrative state conflicts with an important feature of our institutional regime—the fact that agencies often do engage in forms of deliberative, rather than instrumental, reasoning.[214] Whereas instrumental rationality attempts to find the best means to achieve a given end, deliberative reason engages multiple actors in filling out the content of abstract norms to which all parties assent.[215] The discursive aspect of administrative practice has not gone altogether unnoticed by legal scholars. Mark Seidenfeld's civic republican theory of the administrative state emphasizes that bureaucratic institutions are capable of high-quality deliberation over how best to pursue the common good.[216] Henry Richardson likewise argues that, even though agencies must pursue the policies enacted in statutes, this process must be (and sometimes is) characterized by deliberative, rather than purely instrumental reason, as agencies specify statutory norms in value-oriented dialogue with the affected public.[217] William Eskridge and John Ferejohn embrace Richardson's conception of administrative reason, and explicitly recognize that agencies have a central role

213. *See* MASHAW, *supra* note 212, at 252 (In the domain of administrative due process, "[t]he personal domination of the coercive caseworker has been replaced by general rules susceptible to political control. From a liberal perspective that is an unambiguous gain. But if what was really wanted was individualized attention based on consensus values *and* freed from the risks of arbitrary personal domination, the transformation to formalism may seem a hollow victory").

214. *See infra* Part IV for an extensive defense of this claim.

215. On the distinction between instrumental and deliberative reason, see 2 JÜRGEN HABERMAS, A THEORY OF COMMUNICATIVE ACTION 301–31 (Thomas McCarthy trans., 1987) (discussing the "distance between expert cultures and the broader public" in active civic engagement).

216. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1547–49 (1992) ("The court should not interfere with the agency's use of its expertise and political awareness to reach a decision [it] truly believes is good policy.").

217. HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 214–30 (2002) ("Ends that are broadly agreed upon in the legislature will get variously interpreted . . . with different substantive concerns and different contexts of operation.").

to play in deliberation over the public purposes advanced in statutes.[218] They make clear that administrative deliberation is not always simply a matter of finding the best means to implement a clearly defined norm, but may also involve practical reasoning over fundamental public values.[219]

The major questions doctrine thus rests on a particular and controversial political theory of our administrative state: the legislature bears primary responsibility for making the value choices that animate governmental action; and the judiciary must ensure that the legislature retains that responsibility by presuming that Congress does not delegate that task to agencies.[220] Accounts like that of Richardson's, and Eskridge and Ferejohn's, however, suggest the reemergence of an alternative theory: one that I argue better comports with our institutions and the ideological origins of our administrative state. The next Part explores that theory as the basis for a reformation of the major questions doctrine.

IV. THE PROGRESSIVE THEORY OF THE ADMINISTRATIVE STATE

This Part gives an alternative account of our administrative process based on the Progressives' original understanding of the state they wanted to create. In Section A, I describe the theoretical origins of Progressive political thought. In Section B, I describe the Progressive theory. In Section C, I trace the influence of the Progressive theory on the welfare and regulatory state that emerged during the New Deal.

A. THE CONTESTED ORIGINS OF PROGRESSIVE POLITICAL THOUGHT: HEGEL AND THE ETHICAL IDEA OF THE STATE

It is widely recognized that the American Progressives were the founding fathers and mothers of our administrative state.[221]

218. ESKRIDGE & FEREJOHN, *supra* note 123, at 77–78 (2010).

219. *Id.* at 31–32 (describing "administrative constitutionalism" as "the primary means by which governmental actors *deliberate* about how to respond to social movement demands or needs," attending to "higher-level normative considerations," such as statutory purpose, constitutional rights, and "public norms").

220. *See supra* Part III.B.

221. *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR 213–53 (1955) (describing the influence of Progressive thought and politics on New Deal reforms); SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL 21–

But the original Progressive vision has long been distorted by legal scholars into a technocratic vision of administrative expertise.[222] The time has come to reassess this strand of American intellectual history. Progressive political thought has begun to receive renewed attention from scholars aiming to reinvigorate an administrative state that will reduce social and economic inequality by democratic means.[223] At the same time, conservative critics of the administrative state routinely link our bureaucratic government to the philosophy of the American Progressives, and their adoption of German conceptions of the state.[224] According to Philip Hamburger, for example, the Progressives introduced dangerous, Germanic conceptions of the state to American law, and thus undermined Anglo-American constitutionalism.[225] He argues that Americans "imbibed" from German civilian legal

51 (1993) (describing the influence of Progressivism on the New Deal); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 35 (2014) (discussing Progressive conceptions of the democratic public and administration as a basis for contemporary First Amendment jurisprudence); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920, at 288 (1982) ("The Progressive state-building sequence has been extended and elaborated over the course of this century, but the path of institutional development and the terms of the contest for state control have not been fundamentally altered. . . . The three great institutional struggles of Franklin Roosevelt's second term are especially telling in light of the Progressive experience.").

222. *See, e.g.*, Martin Shapiro, *On Predicting the Future of Administrative Law*, AM. ENTERPRISE INST. J. GOV'T & SOC'Y, May/June 1982, at 18, 19 ("Progressive doctrine of concentrated power in the hands of technocrats had clearly become the dominant political theory by the end of [the 1920s] . . . ."); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 404–05 (2002) ("Progressive scholars combined a cynical view of politics and politicians with a kind of myopic faith in the ability of 'scientific' administration to cleanse policymaking . . . ."); Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1571 (2011) (describing the Progressive view as holding that "experts should lead in making policy through modern administrative agencies.").

223. *See, e.g.*, Rahman, *supra* note 28, at 1350–51 (drawing on the history of the Progressive Era to argue that "[r]egulatory agencies, though often understood in technocratic, expertise-oriented terms, might similarly become spaces for democratic action, participation, and accountability").

224. *See* HAMBURGER, *supra* note 29, at 453; RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 225–30 (2005) (discussing the Hegelian origins of Woodrow Wilson's theory of administration); JEAN M. YARBROUGH, THEODORE ROOSEVELT AND AMERICAN POLITICAL TRADITION 19–24, 44–46 (2012) (discussing Roosevelt's political thought and Hegel's theory of the state).

225. *See* HAMBURGER, *supra* note 29, at 447–67 ("German ideas thus paved the way for the administrative reduction of rights.").

theory "an academic idealization of administrative power and a corresponding contempt for many of the formalities of constitutional law."[226]

Such scholarship misunderstands the Progressive conception of democratic constitutionalism. The Progressives were indeed influenced by German conceptions of administrative power; but, unlike German state theorists, they sought to make administration democratically responsive.[227] Here, I will briefly summarize the Progressives' reception of German state theory, and their democratization of the original German conception. Progressivism, of course, was a vast and complicated political movement, which defies a completely comprehensive account.[228] My reconstruction will single out a set of authors who together present a coherent and appealing vision that captures much of what is valuable about our current administrative structures. John Dewey, Woodrow Wilson, and Frank Goodnow envisioned an administrative state in which political values would be fleshed out in dialogue between administrators, elected representatives, and the public at large.[229] Administrative agencies would synthesize three sources of public opinion: legislation, presidential policy preference, and direct involvement by affected parties.[230]

It is true that American Progressives were influenced by German theories of administration. But their inspiration was not primarily Weber, but rather G.W.F. Hegel.[231] Hegel had identified, almost a century before Weber, the importance of administrative bodies that were functionally differentiated, hierarchically organized, and staffed by expert officials.[232] But unlike

226. *Id.* at 447.

227. *See* Blake Emerson, *The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought*, 77 REV. POL. 545, 547 (2015) (stating that the Progressives "envision[ed] a state thoroughly permeated by public deliberation and participation").

228. *See* Daniel T. Rogers, *In Search of Progressivism*, 10 REV. AM. HIST. 113 (1982) (discussing complexities and contradictions of Progressive movement).

229. *See infra* Part IV.B.

230. *See infra* Part IV.B.

231. *See* Robert D. Miewald, *The Origins of Wilson's Thought: The German Tradition and the Organic State*, *in* POLITICS AND ADMINISTRATION: WOODROW WILSON AND AMERICAN PUBLIC ADMINISTRATION 17, 23–26 (Jack Rabin & James S. Brown eds., 1984).

232. *See* M. W. Jackson, *Bureaucracy in Hegel's Political Theory*, 18 ADMIN. & SOC. 139, 145–46 (1986) ("By implication, Hegel recognized a hierarchy within the bureaucracy.").

Weber, who understood the state to be a "monopoly of the legitimate use of physical force,"[233] Hegel understood the state as an embodiment of "concrete freedom."[234] By this, he meant that the state institutionalized the Enlightenment ideals of individual and collective self-determination.[235] This ethical understanding of the state motivated his conception of administration in particular. Drawing on the experience of liberalizing Prussian social reform in the early nineteenth century,[236] he argued that an administrative state was essential to mitigate poverty, social antagonism, and market failures, in the interests of preserving public freedom.[237]

But Hegel insisted that administration was not merely a matter of efficient bureaucratic performance. Rather, administration was tasked with "*upholding . . . legality* and the *universal interest of the state*," while resolving conflicts between social groups by reference to "the higher viewpoints and ordinances of the state."[238] To accomplish this task, administrative bodies and their officials not only needed expertise, but also "direct *education in ethics and in thought*."[239]

Bureaucratic reason was, for Hegel, a reflective, rather than purely instrumental, form of reason. That is to say, he supposed that when administrators interpreted abstract legal norms, they

233. WEBER, *supra* note 174, at 78.

234. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 260 (Allen Wood ed., H. B. Nisbet, trans. 1991).

235. *See id.* ("The principle of modern states has enormous strength and depth because it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity . . . .").

236. HEGEL, *supra* note 234, at x-xi ("In relation to the Prussian state of 1820 [Hegel] represented the tendency toward moderate, liberalizing reform . . . .").

237. *Id.* at §§ 236–45 (describing the inequalities and antagonisms of market-driven "civil society" and the role of law, administration, and regulation in redressing them). For the political background on Hegel's political philosophy, see REINHART KOSELLECK, PREUßEN ZWISCHEN REFORM UND REVOLUTION: ALLGEMEINES LANDRECHT, VERWALTUNG, UND SOZIALE BEWEGUNG VON 1791 BIS 1848, at 263 (3d ed. 1989) (1967) (Ger.) (author's translation) (arguing that Hegel "had not only sketched the picture that the Prussian civil servants had of themselves, but rather the real situation itself"); Gertrude Lübbe-Wolff, Hegels Staatsrecht als Stellungnahme im Ersten Preussischen Verfassungskampf, 35 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 476, 476 (1981) (Ger.) (author's translation) (interpreting the *Philosophy of Right* in part as "Hegel's constitutional plan" during the first constitutional struggle in Prussia in the early 1820s).

238. HEGEL, *supra* note 234, § 289.

239. *Id.* at § 296.

would draw on broader public values and social understandings to flesh out their concrete content.[240] Hegel's theory, however, was not democratic. Though he endorsed representative government within the structure of a constitutional monarchy, he believed public opinion was often misguided and ignorant, and so sought to guarantee the public welfare by insulating bureaucratic decision-making from its influence.[241] It was in this respect that the American Progressives departed from their German forbearer.

B. THE PROGRESSIVES' DEMOCRATIC THEORY OF THE ADMINISTRATIVE STATE

The American Progressives embraced Hegel's idea of an administrative state in which appointed public officials would use their expertise and ethical judgment to preserve the public interest and control the excesses of private law, commodity exchange, and industrial organization.[242] They thus emphasized the need for social legislation to authorize the provision of goods and services and to protect the public against monopoly.[243] The overall thrust of this project was succinctly articulated by John Dewey and James Tufts:

> [I]t is certain that the country has reached a state of development, in which . . . individual achievements and possibilities require new civic and political agencies if they are to be maintained as realities. Individualism means inequity, harshness, and retrogression to barbarism . . . unless it is a *generalized* individualism: an individualism which takes into account the real good and effective—not merely formal—freedom of *every* social member.[244]

Dewey therefore followed Hegel in arguing for administrative institutions that would provide the material and social requisites for individual freedom on the broadest possible scale.

240. *See* Carl K. Shaw, *Hegel's Theory of Modern Bureaucracy*, 86 AM. POL. SCI. REV. 381, 385 (1992) (arguing that for Hegel, bureaucratic reasoning is "a dialectical process in which the universal and the particular encounter each other and become related by means of human deliberation"); *see also* Robert Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms*, 7 EUR. J. PHIL. 164, 172–78 (1999) (arguing that on Hegel's theory legal norms develop through their "administration" by acknowledged authorities within a discursive community of equal persons).

241. HEGEL, *supra* note 234, §§ 318, 279.

242. *See* Emerson, *supra* note 227; *see also* HAMBURGER, *supra* note 29, at 447–51.

243. Rahman, *supra* note 28.

244. JOHN DEWEY & JAMES H. TUFTS, ETHICS 472 (1908).

Unlike Hegel, however, the Progressives were profoundly committed to democratic principles.[245] In his seminal 1887 essay *The Study of Administration*, which inaugurated the American field of public administration in 1887, Woodrow Wilson cited Hegel and the Hegelian public law scholar Lorenz von Stein to argue that administration "is raised very far above the dull level of mere technical detail by the fact that through its greater principles it is directly connected with the lasting maxims of political wisdom, the permanent truths of political progress."[246] Wilson emphasized that when administration tackled such "greater principles," it must be guided by public deliberation:

> [A]dministration in the United States must be at all points sensitive to public opinion. . . . The ideal for us is a civil service cultured and self-sufficient enough to act with sense and vigor, and yet so intimately connected with popular thought, by means of elections and constant public counsel, as to find arbitrariness or class spirit quite out of the question.[247]

Wilson, like Hegel, thus prized the ideal of a cultured and independent civil service that would act in the interest of the people as a whole. But he sought to relativize administrative autonomy to various forms of popular political influence. Electoral accountability was only one dimension of such influence. A more pervasive, "constant public council" would ensure that the professional civil service remained in-tune with the concerns of those they regulated, rather than being motivated their own self-interest or other inappropriate criteria. This vision of administration carried over into President Wilson's political vision, as well as his academic writings. In his presidential campaign, Wilson argued:

> [It was the] necessity of the hour to open up all the processes of politics and of public business,—open them wide to public view; to make them accessible to every force that moves, every opinion that prevails in the thought of the people; to give society command of its own economic life again, not by revolutionary measures, but by a steady application of

245. *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 215 (2005) ("Progressives . . . mounted a sustained effort to reconstruct the nation's constitutions, root and branch—not merely to legitimate the new administrative state, but even more to make lawmakers and policy makers accountable to the people.").

246. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 199, 210 (1887) (quoting Hegel and Stein, respectively, though the quotation from Stein is not attributed); *see* Fritz Sager & Christian Rosser, *Weber, Wilson, and Hegel: Theories of Modern Bureaucracy*, 69 PUB. ADMIN. REV. 1136 (2009) (outlining the influence of Hegel's public administration theory on Wilson).

247. Wilson, *supra* note 246, at 216.

> the principle that the people have a right to look into such matters and control them . . . .[248]

Progressives like Wilson therefore presumed agencies would implement the laws in ways that touched on great principles of law and politics, but insisted they do so in dialogue with affected persons. Dewey similarly stressed that "in the absence of an articulate voice on the part of the masses, . . . the wise cease to be wise," because it is impossible for administrative experts "to secure a monopoly of such knowledge as must be used for the regulation of common affairs."[249] Thus,

> [n]o government by experts in which the masses do not have a chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in a way which forces the administrative specialist to take account of the needs.[250]

This democratic vision of administration was part and parcel of a reconceptualization of the state itself. Dewey defined the state as a "public articulated."[251] The public emerged from externalities caused by economic activity. But without a forum in which to express its problems, the public was "unorganized and formless."[252] In the state, the diffuse public became institutionally embodied and empowered by political institutions. Administrative agencies were then not merely the best technical means for realizing clearly identified purposes, but were also part and parcel of the process by which such purposes were identified.[253]

This democratic notion of the state gave administrative agencies a central role to play in the deliberative process, rather than placing them completely outside of politics as an efficient instrument for realizing democratic will.[254] Dewey thus argued

248. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 86 (1913).

249. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 206 (Alan Swallow 1954) (1927).

250. *Id.*

251. *Id.* at 67.

252. *Id.*

253. Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 13 (2006) ("Dewey took democratic decision-making to be the joint exercise of practical intelligence by citizens at large, in interaction with their representatives and other state officials. It is cooperative social experimentation.").

254. MELVIN ROGERS, THE UNDISCOVERED DEWEY: RELIGION, MORALITY, AND THE ETHOS OF DEMOCRACY 22 (2009) ("[Dewey holds] a view of the public sphere that is internally differentiated. This differentiation accounts for the

on the eve of the New Deal that "The problem of social control of industry and the use of governmental agencies for constructive social ends will become the avowed centre of political struggle."[255] Administrative agencies would not merely be means for implementing the results of political struggles waged in other settings, but would provide additional processes in which to reach provisional settlements over common policy goals.

Legislation had an important but not exclusive role in guiding administrative agencies. The Progressives acknowledged the special representative competency of Congress, and thus understood the scope of agency action to be framed by legislative enactment. Frank Goodnow, who was also influenced by Hegelian conceptions of administration, distinguished between legislation as the expression of democratic will and execution as the deed which carried out this will.[256] He concluded that "popular government requires that it is the executing authority which shall be subordinated to the expressing authority, since the latter in the nature of things can be made much more representative of the people than can the executing authority."[257] As the "body representative of public opinion," the legislature had to serve as "the regulator of administration."[258]

But the Progressives did not believe that administrative action was completely determined by the statutory authority under which it acted. As Wilson argued, "*[t]he scope of Administration* is . . . largely defined and regulated and always limited . . . by the laws, to which it is of course subject; but *serving the State*, *not the law-making body* in the State, and *possessing a life not resident in statutes*."[259] While agencies were bound by law, they

smooth substantive inclusion of the demands of specific publics into the administrative apparatus of the state, even as it defends publics that emerge in a more oppositional relationship to state power.").

255. JOHN DEWEY, INDIVIDUALISM OLD AND NEW 55–56 (Prometheus Books 1999) (1930).

256. *See* Christian Rosser, *Examining Frank J. Goodnow's Hegelian Heritage: A Contribution to Understanding Progressive Administrative Theory*, 45 ADMIN. & SOC'Y 1063 (2012) (discussing the influence of Hegel's political philosophy on Goodnow's understanding of administration).

257. FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 24 (1900).

258. FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 42, 371 (1905).

259. Woodrow Wilson, Notes for Lectures on Administration at the Johns Hopkins (originally written Jan. 26, 1891; revised Jan. 31–Feb. 1, 1894), *in*

served the broader democratic purposes of the state structure as a whole, which might be expressed in forms other than statutory enactment. Public participation in the administrative process provided another source of democratic input into administrative activity, which would enable administrators to interpret the ambiguous provisions of law by reference to the self-understandings of the democratic public itself.

Another source of democratic input was the President. The Progressives were eager to deploy the democratic mandate of the President to energize and to guide the administrative state they envisioned.[260] But they did not believe the President should dictate the outcome of administrative proceedings or exercise full and pervasive control over the administrative apparatus. Goodnow stated:

> While . . . in the interest of securing the execution of the state will, politics should have a control over administration, in the interest both of popular government and efficient administration, that control should not be permitted to extend beyond the limits necessary in order that the legitimate purpose of its existence be fulfilled.[261]

In Goodnow's view, the political views of the President and his appointees legitimately entered into the broad determination of administrative policy.[262] But complete political control of the administrative apparatus would undermine the impartiality and efficiency of administrative decision-making.[263]

Wilson likewise argued that the President could serve as a "spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and of men."[264] He would therefore steer administration by bringing his understanding of public opinion to bear on administrative activity. But Wilson insisted that, "as legal executive, his constitutional aspect, the

7 THE PAPERS OF WOODROW WILSON, 1890–1892, at 112, 128–29 (Arthur Link ed., 1969).

260. *See, e.g.*, Stephen Skowronek, *The Conservation Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2087 (2009) ("Only the presidency had the national vision to articulate the public's evolving interests, the political wherewithal to act upon them with dispatch.").

261. GOODNOW, *supra* note 257, at 38.

262. *Id.* at 91.

263. *Id.* at 39.

264. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 68 (1908).

President cannot be thought of alone."[265] He would delegate to his cabinet and the agencies substantial authority to specify the contents of public policy in consultation with affected groups.[266]

In this Progressive understanding of the state, judicial review would take a fairly restrained form.[267] Frank Goodnow argued that "efficient administrative action . . . is often impaired either by the necessity of judicial process or by the extensive judicial control over administrative action."[268] Acknowledging that this intensive control had been justified by the "informality of existing administrative procedure," he hoped that:

> When we develop an administrative procedure which is reasonably regardful of private rights, e.g. gives notice and a hearing to the person affected by the administrative determination, it may well be that the courts will change their attitude and come to the conclusion that the changed and complex conditions of modern life . . . should have an effect both on the constitutional rights of individuals and on the powers and procedure of administrative authorities.[269]

Goodnow therefore believed that internal administrative procedures, rather than external judicial review, could adequately protect private rights and guarantee conformity with law. This suggestion dovetailed with Wilson's and Dewey's proposals for administrative proceedings that would bring public opinion to bear on administrative deliberations. Such procedures would be both more efficient and more democratic than judicial adjudication. Administrative, rather than judicial, institutions would be the primary venue for interpreting public purposes left ambiguous by legislative enactment.

C. THE INFLUENCE OF THE PROGRESSIVE THEORY THROUGH THE NEW DEAL

This democratic theory of administration corresponded to developments in legal scholarship and administrative practice during the Progressive Era and through the New Deal. Under the influence of German conceptions of the state, constitutional lawyers such as W.W. Willoughby began to conceive of the national government as the ultimate source of law, understanding

265. *Id.* at 66.
266. *Id.* at 76.
267. KRAMER, *supra* note 245, at 216.
268. *See* FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 230 (1911).
269. *Id.* at 230–31.

legislation as the primary expression of the will of the state.[270] In keeping with the Progressives' revolt against legal formalism, Roscoe Pound assailed the *Lochner* Court's "mechanical jurisprudence," which had challenged the early development of social welfare regulation in the United States.[271] Pound embraced instead a Hegelian-inspired "sociological jurisprudence" that would be responsive to the cultural context, historical development, political purpose, and practical effects of law rather than categorical conceptions of natural right.[272] All of these developments untethered law from judicial common law and related it more closely both to the legislature and the popular understandings it was meant to capture.

Administrative practice at the same time began to develop participatory procedures. Agencies like the Forest Service began to include the public in the administrative process "to reach out for the more timid and modest opinions, and for the sifting of the bolder and more aggressive types."[273] The Federal Trade Commission (FTC) invited industry representatives to comment on trade practices, which complaints had alleged to be unfair.[274] Progressive administrators under Woodrow Wilson sought to protect freedom of conscience during World War I through "individualized involvement in the administrative state."[275]

The Progressives' theory of administration served as the ideological ferment for the New Deal. In 1927, Felix Frankfurter relied on the "pioneer scholarship" of Goodnow to argue that ad-

270. *See* William Novak, *The Legal Origins of the Modern American State*, *in* LOOKING BACK AT LAW'S CENTURY 249, 266–69 (Austin Sarat et al. eds., 2002); WESTEL WOODBURY WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE: A STUDY IN POLITICAL THEORY 302–03 (1911).

271. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); *see also* Lochner v. New York, 198 U.S. 45 (1905) (striking down state limitations on hours worked as inconsistent with the Due Process Clause of the Fourteenth Amendment); Morton G. White, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, 8 J. HIST. IDEAS, 131, 132 (1947) (describing the connection between Dewey's pragmatism, Oliver Wendell Holmes's legal realism, and Hegel's "evolutionary" conception of rationality).

272. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911).

273. JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 199 (1927).

274. GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 79–80 (1924).

275. Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1084, 1090–91 (2014).

ministrative law was of crucial importance to democratic governance and individual liberty.[276] Statutory programs advancing democratic goals were "conditioned upon rules and regulations emanating from enforcing authorities."[277] Recognizing that broad statutory delegations left important details to the policy judgment of agencies, he emphasized that these "'details' are of the essence; they give meaning and content to vague contours."[278] In Frankfurter's view, the surest protection for democratic constitutionalism in the administrative state would not be to retain detailed legislative control, but instead to govern administration through a professional civil service, a "spirited bar," and "easy access to public scrutiny."[279] Frankfurter thus presumed that agencies would deal with essential questions of economic and political significance, and sought to ensure democratic control through a combination of bureaucratic professionalism, adversarial legalism, and public input.

The vast expansion of administrative capacities during the New Deal would follow in this Progressive tradition. Under the influence of Dewey's conception of democratic administration, agencies like the Tennessee Valley Authority[280] and more radical forms of democratic planning in agriculture,[281] aimed to involve the affected public in administrative deliberation over

276. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 616 (1927).

277. *Id.* at 614.

278. *Id.*

279. *Id.* at 618. While Frankfurter believed that "the final determinations of large policy must be made by the direct representatives of the public, and not by the experts," his recognition above that the "details" of implementation were "of the essence," indicates that he understood important value choices to lie with agencies, subsidiary to the choice of the "final" or ultimate end by the legislature. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 160 (1930). He thus insisted that bureaucratic "expertise is indispensable" for the "task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding." *Id.* at 161. "Expertise" of this kind could not be merely technical, but would include a deliberative capacity to transform interest group conflict into a joint perception of common interest.

280. DAVID E. LILIENTHAL, TVA—DEMOCRACY ON THE MARCH 201 (1944) (quoting Dewey to describe the ideology of participation at the Tennessee Valley Authority).

281. JESS GILBERT, PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL 2 (2015) (describing a "cooperative planning initiative" at the Department of Agriculture, in which "citizens, scientists, and bureaucrats joined together in discussion-based education and action research").

planning.[282] New Deal administrative-law scholars like Walter Gellhorn argued that such Progressive forms of participatory administration served to "democratize our governmental processes," by giving "the interests and individuals immediately affected an opportunity to shape the course of regulation."[283] The APA codified the Progressive innovation of public participation with its notice-and-comment rulemaking provisions, which required agencies to receive and respond to comments when they proposed substantive rules.[284]

The Progressive theory that lay the foundation for the New Deal has been obscured because of subsequent political and intellectual developments. In the wake of war with Nazi Germany and in the midst of the Cold War with the Soviet Union, the threat of totalitarian government undermined the legitimacy of administrative government in the United States.[285] The Progressive ideal of an administrative state that would act on the basis of public deliberation was then supplanted with theories of interest-group pluralism, which treated administration as a bargaining process between private interests.[286] The subsequent rise of cost-benefit analysis as a hegemonic framework for policy reasoning displaced the Progressive notion that the state might further values other than market efficiency, such as equality and positive liberty.[287]

282. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 20, 35, 44, 171 (1966) (describing the influence of Dewey and Progressive ideals of democratic planning during the New Deal).

283. WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 122 (1941).

284. Administrative Procedure Act, Pub. L. No. 79-404, § 4, 60 Stat. 237, 238–39 (1946) (codified as amended at 5 U.S.C. § 553 (2012)). For examples of public participation in agency rulemaking that influenced the APA, see ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 103–05 (1941).

285. Jeremy K. Kessler, *The Political Economy of "Constitutional Political Economy*,*"* 94 TEX. L. REV. 1527, 1546–53 (2016); Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II 185, 188–90 (Daniel R. Ernst & Victor Jew eds., 2002).

286. DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM 183–228 (2006); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 40 (2d ed. 1979) ("American pluralists had no explicit and systematic view of the state. They simply assumed it away.").

287. *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991) (examining regulatory analysis and its role in the decision-making process).

We have therefore largely lost sight of the original Progressive intent that animated the project of American state-building. To be sure, the Progressives' emphasis on deliberative administrative action persists in civic-republican theories of the administrative state.[288] Like the Progressives, contemporary civic republicans argue that administrative agencies are uniquely situated to conduct value-oriented policy discourse.[289] But civic republicanism has not retained the Progressives' complementary concern with administrative autonomy from judicial control. The Progressives did not merely want to foster public participation in administrative agencies. Participation was a means to furnish the legal and material requisites for a democratic society. Civic-republican theories often ignore the possibility that "output legitimacy" can complement the procedural legitimacy that arises from reasoned public discourse.[290]

There are trade-offs between these two aspects of Progressivism. Soliciting and responding to public comments in a comprehensive, reasoned fashion takes time and resources that could otherwise be spent on the delivery of the relevant services.[291] As the intensity of judicial review of agency reasoning increases, so too do these costs.[292] For this reason, the Progressive state must balance the need to maximize deliberation against the need to maximize efficient bureaucratic performance. Civic republicans do not adequately attend to this countervailing concern with bureaucratic autonomy. Cass Sunstein, for example, has argued for stringent judicial review of administrative action to ensure agencies act rationally and in the public interests.[293] This approach does not take seriously the costs that such intensive review incurs for bureaucratic efficiency, nor the risk that the political inclinations of reviewing courts may im-

288. Seidenfeld, *supra* note 216.

289. Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 253–61 (2013).

290. FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6 (1999) (distinguishing ex ante "input legitimacy," achieved by involving the public in policy formation, from ex post "output legitimacy," achieved by "effectively promot[ing] the common welfare of the constituency in question").

291. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1397 (1992).

292. Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).

293. Sunstein, *supra* note 38, at 61–64, 74–75.

properly influence or limit the exercise of administrative discretion. The Progressives, by contrast, were wary of judicial overreach, because they believed that courts would unduly constrain the exercise of public power in order to protect private interests.[294]

I am suggesting here that we should give this original understanding of the administrative state a second look. The Progressives conceived of agencies as engaging the democratic public in three ways: (1) through the implementation of democratically enacted law; (2) through the input of the President; and (3) through deliberation with the affected public.[295] They presumed that agencies would tackle ethically charged political questions, but they aimed to ensure that they would do so in a rational and inclusive fashion. At the same time, they recognized that the extent of public participation would need to be balanced against the requirements of efficient state action.[296] They were skeptical that the courts were the best forum in which to ensure the democratic integrity of government, and thus sought to enhance the democratic credentials of the administrative process itself.[297]

V. SUPERIORITY OF THE PROGRESSIVE THEORY TO THE WEBERIAN, COURT-CENTRIC THEORY

In this Part, I argue that the Progressive theory of the state maps onto important aspects of our current institutional structure better than the Weberian, court-centric theory that supports the major questions doctrine. Despite the fact that the Progressive understanding of the state has largely faded from memory, its institutional legacy of remains. The Progressive theory acknowledges that agencies resolve important value questions, while still respecting public participation and presidential oversight as sources of democratic legitimacy. In our current administrative state, agencies do indeed frequently make decisions that implicate important political, constitutional, and ethical values. But we also have procedures that ensure that the agency deliberates with the affected public when it settles such major

294. Brian Z. Tamanaha, *The Progressive Struggle with the Courts: A Problematic Asymmetry*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 65, 67–74 (Stephen Skowronek et al. eds., 2016).

295. *See supra* Part IV.B.

296. *See supra* Part IV.B.

297. *See supra* Part IV.B.

questions. In Section A, I note numerous instances where agencies address questions of economic and political significance, which suggests that the major questions doctrine conflicts with a significant aspect of administrative practice. In Section B, I argue that the President provides additional democratic authority to agency statutory interpretation, which can bolster agencies' claims to address major questions. In Section C, I argue that public input in the rulemaking process provides further democratic support for administrative interpretations, especially compared with a realistic assessment of the democratic credentials of Congress and the courts.

A. THE AGENCY PRACTICE OF VALUE-ORIENTED STATUTORY INTERPRETATION

The Progressives anticipated that administrative agencies would not only identify efficient means to achieve statutory ends, but also engage in a deeper normative inquiry about the meaning of those statutory ends in light of broader public norms. Our current institutions reflect this vision. In the post–New Deal context, where Congress routinely delegates broad rulemaking power to administrative agencies, agencies will often engage with fraught and profound questions of public philosophy when they interpret and implement the law. To note a few famous examples: the National Highway and Traffic Safety Administration's travails with passive restraint requirements for auto safety were bound up with deeply rooted American sensibilities about motor vehicles as embodiments of individual autonomy.[298] The Department of Transportation's (DOT) approval of highway routes implicated the relative importance of park conservation, racial equity, and local economic development.[299] The Supreme Court's development of the theory of disparate-impact discrimination relied upon the interpretations of the Equal Employment Opportunity Commission (EEOC),[300] which were grounded in the EEOC's considered position that discrimination included not

298. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 111–13 (1990).

299. Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1281 (1992).

300. Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1970) (giving "great deference" to the EEOC's conclusion that professionally developed ability tests must be "job-related").

only intentional bigotry, but also a "condition of pervasive exclusion."[301] Decisions by the IRS on tax exemptions,[302] and the FCC decisions on rate increases,[303] have interpreted constitutional norms of equal protection and statutory norms of gender and racial equality.

It would be too much to say that questions of political value arise in every administrative action. But nor are such instances anomalous. Scholarship on administrative constitutionalism identifies numerous cases where agencies explicitly interpret constitutional norms, implicitly interpret constitutional norms through statutory interpretation, implement statutes that have come to assume a quasi-constitutional status, or develop new understandings of foundational public norms in the course of performing their statutory duties.[304] When agency interpretations concern constitutional norms, or more broadly address social problems that have drawn intense public interest, they plainly address questions of deep economic and political significance. In doing so, they mediate between the legal and the political process. As Jerry Mashaw argues, agencies routinely take into account "political struggles and political context" in their interpretation of statutes, since "agency use of this 'political' material is a part of maintaining their democratic legitimacy. It is precisely their job as agents of past congresses and sitting politicians to synthesize the past with the present."[305] Administrative policymaking is therefore not a technocratic exercise in statutory gapfilling, but a politically engaged effort to shape the meaning of underdetermined legal norms.

The major questions doctrine's presumption that Congress does not intend agencies to make such decisions thus flies in the face of a common aspect of agency practice. If rigorously implemented, the doctrine would prevent agencies from playing the

301. EEOC, "THEY HAVE THE POWER—WE HAVE THE PEOPLE": THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN HOUSTON, TEXAS, 1970, at i (1970).

302. Bob Jones Univ. v. United States, 461 U.S. 574, 602–05 (1982).

303. Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 837–44 (2010).

304. *See generally* Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (discussing examples of administrative constitutionalism and analyzing the legitimacy of the practice).

305. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 513 (2005).

important role they have played to-date in advancing our understanding of the abstract legal commitments established by statute.

B. PRESIDENTIAL OVERSIGHT OF AGENCY STATUTORY INTERPRETATION

The Progressives argued that the President has authority as a spokesperson for public opinion to guide administrative implementation of statutory mandates.[306] At the same time, the Progressives did not advocate direct presidential control over administrative decision-making, aiming to separate the administration of the law from short-term partisan policy preferences.[307] Our case law and institutional arrangements reflect this vision to a significant degree. In *Chevron*, the Court explicitly acknowledged that the President has an important, constitutionally authorized role to play in shaping administrative action:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[308]

This aspect of the reasoning in *Chevron* mirrors the Progressives' conception of the important role the President plays in guiding administrative discretion according to his interpretation of public opinion.

Chevron's emphasis on presidential input has been complemented by the growth of regulatory review in the Office of Information and Regulatory Affairs (OIRA). Though this process began during the Reagan Administration as an antiregulatory effort to restrict administrative output,[309] it has evolved since then into a more sensitive process. Under the Obama Administration, the public values the President endorsed—such as "equity, human dignity, fairness, and distributive impacts"—can be invoked by agencies to justify their regulatory course of action.[310]

306. *See supra* notes 260–64 and accompanying text.

307. *Id.*

308. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 865–66 (1984).

309. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted as amended in 5 U.S.C. § 601 at 431–34 (1982).

310. Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 at 101–02 (2012).

Since executive agencies are required to submit any regulation that has an economic impact of $100,000,000 or more to OIRA for review,[311] as well as any guidance document with a similar effect,[312] most agency interpretations that a court could plausibly construe as implicating a major question must be approved by the White House. This means that most administrative answers to major questions will have the imprimatur of presidential approval,[313] and consequently will benefit from the democratic credentials of the office. The practice of presidential control in this respect furthers the Progressive ambition of guiding administration according to the President's distillation of public opinion.

The Trump Administration has retained the basic regulatory review framework developed under the Clinton and Obama Administrations.[314] Other aspects of its regulatory review process, however, fundamentally conflict with the ideals of the Progressive state. Executive Order 13,771 requires administrative agencies to rescind two rules for every one they promulgate.[315] It also requires that "the total incremental cost of all new regulations . . . be no greater than zero."[316] The Executive Order in this way commands aggressive deregulation, failing even to take into account the benefits of regulations. Furthermore, it undermines rational deliberation with affected parties over the extent and nature of regulation. If an agency is subject to a strict, numerical mandate to repeal more rules than they promulgate, and to create no additional economic costs, they are unlikely to engage in a substantive debate over the merits of current and proposed policies. Executive Order 13,771 is thus a product of the

311. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 at 638–42 (2000).

312. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2009/m09-13.pdf.

313. Independent agencies are not covered by regulatory review. Exec. Order No. 12,866, § 3(b), 3 C.F.R. 638, 641 (1994), reprinted as amended in 5 U.S.C. § 601 at 639 (2000).

314. Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (ordering the "implementation of regulatory reform initiatives" including Executive Order 12866 and Executive Order 13563).

315. Exec. Order No. 13,771, § 2, 82 Fed. Reg. 9339 (Jan. 30, 2017).

316. *Id.* at § 2(b).

Trump Administration's attempt to "deconstruct[] . . . the administrative state."[317] It aims to supplant pluralistic and reasoned argumentation over the means and ends of administrative action with a single and overriding drive to reduce the quantity and cost of federal rules. Whether that project succeeds may depend, in part, on whether courts, lawyers, scholars, and the public at large adequately recognize and defend the democratic conception of administration advanced and institutionalized by the Progressives.

The Progressive theory of the state did not identify democratic legitimacy with presidential control of administration. Recall that Wilson argued that the President should guide administration according to his understanding of public opinion, but give significant policy autonomy to agency heads and administrative judgment.[318] Unlike contemporary proponents of the unitary executive,[319] the Progressives did not maintain that the President should dictate how administrative agencies would implement the laws.[320] Instead, the Progressives sought to constrain presidential influence with statutory guidance, administrative autonomy, and public participation. The Progressive theory therefore would not go as far as Kathryn Watts in asserting that the President may dictate the course of administrative action based on articulated policy preferences.[321] Rather, given its respect for the legislature as the preeminent representative of public opinion,[322] the Progressive theory better comports with Kevin Stack's understanding of presidential administration: if an agency to which Congress has delegated rulemaking authority wishes a court to credit the President's position in determining the democratic credentials of its statutory interpretations, this input must be presented in a way that is consonant with the

317. Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html.

318. *See supra* Part IV.B.

319. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994); Christopher S. Yoo, et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 730–31 (2005).

320. *See* Skowronek, *supra* note 260, at 2087–92.

321. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 57–60 (2009).

322. *See supra* notes 256–59 and accompanying text.

statute's purposes.[323] This approach ensures the deliberative integrity of administrative policymaking by anchoring all input—from the President, political appointees, congressional committees, civil servants, and members of the public—to the common reference point of statutory goals. More extreme forms of executive control risk displacing reasoned, participatory discourse about the meaning of the law with the mere assertions of the "will of the President," exercising "authority without law."[324]

This Progressive vision comports to a large degree with the law and organizational structure of the executive branch. As Peter Strauss has argued, the President is best understood as an "overseer" of administration, rather than a "decider" of administrative policy.[325] The President and his agents may legitimately influence administrative policymaking through contacts with agency officials.[326] But the President has no independent and inherent lawmaking power.[327] Legislation may delegate quasi-legislative function to his office,[328] but frequently will instead delegate such powers directly to another executive official or administrative body.[329] In these cases, because the regulatory power is vested in another actor, there is a strong case to be made that the President's policy preference does not have binding authority upon that actor.[330]

323. *See* Stack, *supra* note 190, at 925–27.

324. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

325. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

326. *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 408 (D.C. Cir. 1981) ("[W]e do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power."). But the President may not generally interfere in adjudicative proceedings affecting the rights of private parties, Myers v. United States, 272 U.S. 52, 135 (1926), or intervene ex parte where administrative policymaking is to be made through methods of formal adjudication, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1540 (9th Cir. 1993).

327. *Youngstown*, 343 U.S. at 587.

328. *Id.* at 635–37 (Jackson, J., concurring).

329. *See, e.g.*, 42 U.S.C. §7409(a) (2012) ("The Administrator [of the EPA] . . . shall by regulation promulgate . . . proposed national primary and secondary ambient air quality standards . . . .").

330. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465–72 (1987); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 201 (1986); *see Myers*, 272 U.S. at 135 ("[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer

As a practical matter, the President can exert great pressure on agency heads who serve at his pleasure. And such appointees are, in any event, likely to share the President's political perspective on many issues. But because the President may incur political costs for removing an administrative leader for failure to implement his preferred policy, and must, for most leadership posts, secure Senate confirmation,[331] his control even over executive departments is not absolute.[332] When it comes to "independent" commissions, such as the SEC or the FCC, whose commissioners can only be removed for cause, his control is more attenuated.[333] Perhaps more importantly, civil-service protections prevent political appointees from simply dictating policy outcomes that run afoul of tenured officials' conception of their legal obligations and rational public policy.[334] As Jon Michaels argues, administrative agencies are not unitary, purely hierarchical actors working at the behest of their political leadership; rather, they institutionalize an internal separation of powers between political officials, civil servants, and civil-society groups.[335]

The Progressive theory of presidential influence thus comports with significant aspects of current administrative law and executive practice. The President is a powerful spokesperson for public opinion, who can legitimately influence the administrative process. At the same time, both the Progressive theory and current constitutional and statutory law insulate administration from total, pervasive, and direct presidential control. The major questions doctrine eschews this moderate position, ignoring presidential influence altogether. For example, in *Brown & Williamson*, it did not matter to the Court that the President had

as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (finding that the President does not have power to instruct an executive official not to perform a statutory duty). For the contrary argument, see Kagan, *supra* note 39, at 2320–31.

331. *See* U.S. CONST. art. II, § 2.

332. *See* Strauss & Sunstein, *supra* note 330, at 200.

333. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 607 (1935) ("[T]he duties and function of the Federal Trade Commission are inconsistent with an unrestricted power of removal in the President.").

334. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586 (1984).

335. *See* Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 238–39 (2016).

taken public ownership of the Agency's decision to regulate tobacco.[336] Rather, in the major questions cases, the Court narrows its focus to legislative control alone, while ignoring the possibility that administrative agencies might draw deliberative democratic authority from presidential input.

C. AGENCY DELIBERATION WITH THE AFFECTED PUBLIC

The Progressives' theory of administration goes well beyond presidential accountability. More importantly, it maintains that the public at large must be involved in the administrative process to ensure its democratic legitimacy. Our current institutions reflect this to a significant degree, though problems remain. The notice-and-comment rulemaking procedure codified by the APA institutionalizes the Progressive concern for public participation in agency policymaking. In this rulemaking process, agencies must publish any proposed rule in the Federal Register, and then "give interested persons an opportunity to participate in the rule making" through written submissions.[337] As Kenneth Culp Davis described:

> [This process is] one of the greatest inventions of modern government. . . . Affected parties who know facts that the agency may not know or who have ideas or understanding that the agency may not share have opportunity by quick and easy means to transmit the facts, ideas, or understandings to the agency at the crucial time when the agency's positions are still fluid. The procedure is both democratic and efficient.[338]

The claim here is that notice-and-comment rulemaking can parallel the legislative process "in microcosm" by creating a deliberative process between agency officials and the affected public.[339] As the Court recognized in *Mead*, notice-and-comment procedures tend to "foster . . . fairness and deliberation."[340] Courts then police this process to ensure that agencies draw reasonable conclusions from the comments they receive, address all signifi-

336. *See, e.g.*, Kagan, *supra* note 330, at 2283 (describing how the FDA collaborated with the White House to prepare a final rule on tobacco regulation).

337. 5 U.S.C. § 553(c) (2012).

338. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 142 (3d ed. 1972).

339. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975).

340. United States v. Mead Corp., 121 S. Ct. 2164, 2178 (2001).

cant comments, and ensure that all major policy choices are sufficiently "ventilated."[341] This democratic function of notice-and-comment rulemaking was succinctly summarized by Judge McGowan of the D.C. Circuit in *Weyerhaeuser Co. v. Costle*: "[I]f the Agency, in carrying out its essentially legislative task, has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have negate[d] the dangers of arbitrariness and irrationality in the formulation of rules."[342] Notice-and-comment rulemaking is therefore capable of institutionalizing the American Progressives' core concern of developing a participatory administrative process. The procedure may help to engage the affected public in grappling with questions of political value that have not been unambiguously settled by legislative enactment.

To be sure, the notice-and-comment procedure is not an ideal deliberative process. The comment period itself may be a kind of "Kabuki theater," in the sense that it is "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues,"[343] such as informal consultations. Even though notice-and-comment is stylized, however, the underlying dynamics of deliberative engagement are no less real. The default participation requirements for rulemaking in the APA formalize, and render judicially reviewable, a broader process of stakeholder engagement in our administrative state.[344] This process has become even more widely accessible with the advent of e-rulemaking, which allows anyone with

341. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 53–57 (1983) (holding that the National Highway Traffic Safety Administration did not adequately explain why it rescinded a former safety requirement); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d. 330, 338 (D.C. Cir. 1968) ("[T]he 'concise general statement of basis and purpose' . . . will enable us to see what major issues of policy were ventilated by the informal proceedings . . . ."); *see also* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) ("It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.").

342. 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) (internal quotations omitted).

343. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992).

344. *See* generally William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009) (describing the evolution and deepening of public participation in administration); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. &

an Internet connection to submit a comment on proposed rules.[345] American administrative law requires a much higher level of judicially reviewable public participation in rulemaking than other liberal democracies, such as the United Kingdom, Germany, and the European Union as a whole.[346]

The major questions doctrine does not even acknowledge that agencies engage in this uniquely American deliberative-democratic process. With its exclusive emphasis on legislation as a source of democratic accountability, the major questions doctrine denies these aspects of the rulemaking process entirely. In doing so, the Court blinds itself to sources of popular input that may legitimate an administrative agency's economically or politically significant policy choice. The problem with the doctrine is therefore not merely that it undermines "expertise" and "accountability," as Cass Sunstein argues,[347] but that it discounts and short-circuits rational public deliberation between administrative officials and the public at large.

It might be argued that, because of significant inequalities of participation and influence in the administrative process,[348] participatory rulemaking does not add any democratic legitimacy to administrative interpretations of statutes. But the democratic credentials of the administrative process must be understood in *comparison* to the other institutions that might resolve

THEORY 245 (1998) (finding varying levels of public interest engagement in rulemaking).

345. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 355 (2004).

346. *See, e.g.*, Catherine Donnelly, *Participation and Expertise: Judicial Attitudes in Comparative Perspective*, *in* COMPARATIVE ADMINISTRATIVE LAW 370, 370–74 (Susan Rose-Ackerman, Peter L. Lindseth, & Blake Emerson, eds., 2d ed. 2017) (finding a much stronger emphasis on public participation in U.S. administrative law than in the United Kingdom and European Union); SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES 10 (1995) (comparing the United States' relatively participatory rulemaking process to Germany's corporatist and largely unreviewable rulemaking procedure).

347. Sunstein, *supra* note 5, at 243.

348. *See, e.g.*, Wendy Warner, et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 141 (2011) ("[A]t least some publicly important rules . . . may be influenced heavily by regulated parties, with little to no counterpressure from the public interest."); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) (finding that business commenters have important influence over the content of final rules).

major questions. Inequality of influence is, unfortunately, endemic to our entire political process, including Congress.[349] If significant degrees of inequality of public influence were completely fatal to democratic legitimacy, Congress would have no democratic authority to legislate. The major questions doctrine would therefore not serve a democratic function by incentivizing Congress to resolve major policy disputes.

Moreover, the major questions doctrine gives the *judiciary* the primary responsibility to settle major questions if the statutory text is ambiguous. Especially in a context where Congress is not likely to correct the judiciary's interpretation of a major ambiguity,[350] the doctrine functions to empower the courts, rather than Congress. Courts, however, are facially less well-suited than Congress to promote democratic forms of participation. Their constitutional function is to adjudicate cases and controversies, and protect the rights of individuals and minorities, rather than to settle polycentric policy-disputes.[351] Limits on standing to challenge administrative action also create inequalities of judicial access between regulated parties and public-interest organizations, since public-interest organizations have more difficulty showing a concrete and particularized injury

349. *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 259 (2008) (finding that Senators are twice as responsive to the opinions of high-income constituents as middle-income constituents, and not at all responsive to the opinions of low-income constituents); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564, 564 (2014) ("[E]conomic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.").

350. Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015) ("[T]he modern Congress has increasingly dis-empowered itself. It consistently fails to update or revise old statutes even when those enactments are manifestly outdated or, as actually administered, have assumed contours that the original Congress never contemplated and the current Congress would not countenance . . . .").

351. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (arguing that judicial adjudication is best suited for resolving binary disputes between rights holders rather than "polycentric" policy questions, involving multiple considerations and parties, which are best settled by democratic decision procedures or administrative management); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFF. U. L. REV. 881, 894 (1983) ("[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority . . . .").

than does the regulated community.[352] Because the major questions doctrine merely empowers the judiciary, rather than Congress or agencies, to resolve major questions, it does not promote a comparatively more democratic form of policymaking than would exist absent the doctrine's constraint on administrative discretion.

Worse still, the major questions doctrine exacerbates inequalities in rulemaking rather than redressing them. Because the doctrine generally forbids agencies from making decisions of great economic and political significance, it encourages agencies to explain themselves in technocratic terms, even if significant questions of value are at issue. If agencies know that courts will decline to defer to them if they detect agency consideration of important questions of political value, they will invariably explain their interpretations of statutory ambiguities in a way that makes them appear purely technical. Inequalities of influence are at their height when rulemaking concerns such apparently technical, rather than normative, questions, because regulated groups tend to have the most nuts-and-bolts information about the relevant subject matter.[353] The technocratic method of review established by *State Farm* already encourages agencies to explain themselves in value-neutral, quasi-scientific policy discourse, which is difficult for the lay public to access, participate in, and influence.[354] The major questions doctrine doubles down on this trend by barring agencies from engaging in anything more than interstitial gap-filling between clearly established statutory norms. The doctrine, thus, is likely to increase inequalities in the rulemaking process, shifting it into a technocratic rather than value-oriented form of policy discourse. This retreat

352. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577–78 (1992) (limiting standing for persons and groups who are not the object of the challenged government action, and finding "citizen suit" statutory standing as insufficient to confer Article III standing). Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 221 (1992) ("The need to show an injury will complicate [suits by environmental organizations], and some occasions will arise where no plaintiff can be found. Moreover, regulatory cases will arise in which the insistence on an actual injury, as understood in *Lujan*, will bar action altogether.").

353. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1379 (2010) (noting that regulated industries have more access to technical information, and so can exercise undue influence over agency process relative to public interest stakeholders).

354. Jerry L. Mashaw, *Small Things like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORD. L. REV. 17, 29 (2001) (describing the form of reason-giving courts expect of agencies as "too cramped" and "too narrow," and thus sometimes failing "to respect our humanity").

into technocracy will further imperil democratic transparency, because important value choices will be kept from public view, and dressed up in the supposedly neutral language of expertise. The citizenry will then find itself alienated from the discourse in which its interests are supposedly expressed and advanced.

D. THE MAJOR QUESTIONS DOCTRINE AS AN OBSTACLE TO EFFICIENT PURSUIT OF THE PUBLIC INTEREST

The previous Sections have shown that the major questions doctrine imperils democratic legitimacy by ignoring public participation in, and presidential oversight of, the administrative process. This doctrine also undermines democracy in the more basic sense that it can stymie efficient bureaucratic performance. Recall that the Progressives were motivated to build and legitimate an administrative state because they wanted to furnish the requisites for public freedom, as understood by the people themselves.[355] They believed that administrative agencies had the institutional capacity to bring governmental power to bear efficiently and on a massive scale to further social emancipation.[356] By contrast, the major questions doctrine shows the perils of privileging judicial control without due regard for this practical need of speedy administrative resolution of social problems. In *Brown & Williamson*, the FDA, with its tobacco and cigarette regulations, was attempting to mitigate a public health crisis which caused the deaths of roughly 400,000 Americans every year.[357] The Court acknowledged the force of this concern, but nonetheless struck down the rule as outside of the Agency's statutory authority.[358] In this instance, the laudable concern with ensuring that the public effectively deliberates over the commitments that guide state action delayed an urgent intervention into a serious public health issue. Cases like this suggest that the major questions exception has not struck an appropriate balance between deliberative integrity and efficient protection of the public interest.

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The Progressive conception of the state thus comports with salient and normatively significant aspects of our current state

355. *See* Wood, *supra* note 236.

356. *See* Anderson, *supra* note 253.

357. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 127–28 (2000).

358. *Id.* at 161.

structure in a way that the major questions doctrine and its attending political theory do not. Agencies engage with conventional sources of statutory interpretation, alongside a wider set of politically sensitive tools that serve the same underlying purpose: to articulate public opinion in the form of political action. Unless courts respect the wide ambit of agencies' deliberative and interpretive competencies, they are liable to frustrate, rather than bolster, the democratic credentials of the state as a whole.

VI. REFORMING MAJOR QUESTIONS

The major questions doctrine rests on the important constitutional principle that basic value choices should be subject to public input, scrutiny, and critique. But it then imports other auxiliary assumptions to conclude that the best way to enforce such a deliberative process is for courts to presume that Congress would not delegate such questions to agencies. The doctrine assumes that the judiciary is the preeminent interpreter of Congress's choices of principle and policy, and that agencies should be restricted to the purely instrumental task of implementing these clearly established goals. I have argued that this vision of the administrative state is neither descriptively accurate nor normatively appealing. I turned to the American Progressives' democratic conception of administration to argue that agencies can play an important role in public deliberation about value choices. Legislation, in this view, is not the sole legal repository in which public value choices are to be found. Statutes are only one important part of a discursive process that specifies content of public purposes.

Chevron acknowledged that many foundational questions of policy are simply not determined by statute, and thus must be fleshed out with the input of the president, administrators, and the affected public. The major questions doctrine shuts out these noncongressional and nonstatutory sources of public input and accountability, and forces agencies into a purely technocratic mode of explanation that belies the normative character of many of their determinations. We therefore need a better doctrine—one that recognizes the important interest in reinforcing democratic governance in administrative law but does not trade on inflated notions of judicial competence and deflated conceptions of administrative agencies' ethical and participatory capacities. In Section A, I describe my innovation. In Section B, I apply it to

several of the major questions cases: *Brown & Williamson*, *Gonzales*, *King*, and *Texas v. United States*.

A. A PROPOSAL TO REFORM THE MAJOR QUESTIONS DOCTRINE

My proposal is this: major questions should be resolved by agencies only through interpretive procedures that are responsive to public input on the questions at issue. When a court reviews an agency interpretation of a statutory ambiguity that raises questions of vast economic and political significance, it should defer to the agency's interpretation *only if*: (1) it was promulgated through notice-and-comment rulemaking, or another procedure of comparable deliberative intensity; and (2) the relevant questions of economic and political significance the court identifies have been properly "ventilated" in the deliberative process that precedes the promulgation of the interpretation.[359] The rule thus follows *United States v. Mead Corp.* in treating a congressional grant of rulemaking authority as a "good indication" that Congress intended to leave the interpretive question to the agency.[360] As Jon Michaels observes, *Mead* instructs courts "to accord less deference to unilaterally arrived-at agency interpretations than to those interpretations that reflect the robust participation of agency leaders, civil servants, and members of the public."[361] But my proposed approach does not, like *Mead*, treat the agencies' power to set binding norms as the touchstone for assessing the level of deference owed. Even if an agency does not have or use rulemaking authority, its opinion on major questions within its subject-matter jurisdiction should be accorded great weight if its official interpretation meets the above criteria of discursive rationality and value ventilation. Conversely, an agency would not receive *Chevron* deference—even if it did have and use such rulemaking authority—if it did not use procedures meeting these same criteria.

Such a standard would require agencies to state explicitly what major questions were at issue, thus heightening the transparency of public decision-making. It would encourage agencies always to consider what significant public norms might be involved in their rulemaking, lest a reviewing court deem that the issue was in fact one of major significance and fault the agency

359. *See supra* note 341 and accompanying text.
360. 533 U.S. 218, 228–30 (2001).
361. Michaels, *supra* note 335, at 273.

for failing to address the relevant political questions. It would also encourage agencies to make significant shifts in policy through the rulemaking procedure rather than through interpretive rules or other guidance documents, which can be promulgated without public input.[362] Such interpretations, even if promulgated in furtherance of the agencies' delegated lawmaking authority, would not necessarily qualify for deference if the courts found that a major question was at play. Only if agencies documented a process of extensive public input over the relevant value questions would *Chevron* deference apply. This approach would allow agencies to resolve important policy questions, but would insist that they do so in a deliberative, inclusive, and transparent fashion. In this way, value-oriented public discourse would be reinforced better than it currently is under the major questions doctrine's court-centric, technocracy-forcing approach.

This proposal is a workable but nonetheless significant modification of the jurisprudence on agency statutory interpretation. *Chevron* deference applies not only to agency interpretations promulgated through rulemaking or adjudication, but sometimes also to other agency interpretations in the exercise of their delegated powers.[363] In some cases, therefore, an opinion letter issued without notice-and-comment receives *Chevron* deference.[364] In addition, an agency's interpretation of its own regulations is ordinarily given even more than *Chevron* deference—"controlling weight unless it is plainly erroneous or inconsistent with the regulation."[365] This allows agencies to change policy without the deliberative benefits of the notice-and-comment procedure.[366] My proposal, by contrast, would only grant deference

362. 5 U.S.C. § 553 (b)(3)(A) (2012).

363. United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–257, 263 (1995)) ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

364. *See NationsBank*, 513 U.S. at 256–57.

365. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

366. "*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing interpretations to create the intended new law without observance of notice and comment procedures.'" Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (quoting Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. J. 1, 11–12 (1996)).

to agency interpretations raising a question of economic or political significance if promulgated through notice-and-comment rulemaking procedures, or a process with comparable deliberative features, including: unrestricted access by any and all parties to the decision-making process; agency deliberation which rationally responds to all relevant input it receives; and full documentation of how the agency reached its conclusion in light of that deliberation. If an agency's interpretive rule raises a significant value question, the interpretation would need to engage with and respond to public comments on that question in order to be given significant weight by a court.

For example, the Attorney General's classification of drugs used in physician-assisted suicide in *Gonzales* would not have been owed deference, because it was not promulgated through rulemaking or any comparable procedure.[367] As the Court noted, in the case of the interpretive rule on medications used in assisted suicide, there was an "apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment."[368] This interpretive rule therefore lacked any of the trappings of informal rulemaking, and concerned an issue subject to intensive, contemporaneous, and ethically charged public debate. Courts should presume that Congress did not intend an agency to resolve such an important issue *without* extensive and politically substantive public input in the administrative process.

The policy reason for this doctrinal adjustment would be to encourage agencies to make use of rulemaking when they make significant policy shifts. This approach acknowledges that it would be very costly, if not impossible, to prevent agencies from determining important questions of policy altogether. The time Congress would spend in settling every policy question in one domain would be paid for by inattention to other areas that require legislative attention.[369] Nor do courts have the time, institutional resources, or expertise to settle all of the problems left unresolved by the statutory framework.[370] It seems necessary,

367. Gonzales v. Oregon, 546 U.S. 243, 258–59 (2005).

368. *Id.* at 269.

369. ESKRIDGE, *supra* note 126, at 936 ("[F]rom an efficiency standpoint, Congress lacks the time to resolve innumerable first-order implementation questions . . . .").

370. *See* Sierra Club v. Costle, 657 F.2d. 298, 410 (D.C. Cir. 1981) ("We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably

therefore, to allow agencies a legitimate role in settling politically significant questions. My proposed revision to the major questions doctrine attempts to ensure that these major administrative decisions are accompanied by sufficient public deliberation, consultation, and reasoned decision-making. It makes use of our existing procedural repertoire to ensure that administrative action remains firmly tethered to an ongoing process of public opinion-formation and will-formation. At the same time, it does not violate the basic principle of administrative law that agencies are generally free to choose which powers to use among those that Congress has granted them.[371] Instead of mandating the use of certain procedures, my approach calibrates the level of deference owed to the agency according to the deliberative intensity of the process it elects to use to reach its interpretive conclusion.

The legal justification for this approach is similar to that of the major questions doctrine, but applied to the APA itself. Courts should interpret the APA in light of a presumption that Congress would not allow agencies to make major shifts in policy without significant deliberative engagement with the affected public. The legislative history of the APA supports this construction. As the Report of the Senate Judiciary Committee stated in describing the Act's rulemaking provisions, "matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures"[372] than rudimentary notice-and-comment. Congress thus sought to protect the under-enforced norm of nondelegation by ensuring that agencies make their procedures adequate to the political significance of the question presented. While courts may not require agencies to use more elaborate procedures than those required

give its thousands of pages. We have adopted a simple and straight-forward standard of review, probed the agency's rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise—and more.").

371. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

372. S. REP. NO. 79-752, at 15 (1945).

by the Act,[373] they might nonetheless calibrate the level of deference to the deliberative credentials of the rulemaking proceeding. If an agency not only goes through the rudimentary motions of notice-and-comment, but gives a particularly thorough explanation of its policy choice that engages with the political controversies it has engendered, the courts ought to respect the agency's interpretation of legislative ambiguities.

A similar approach might apply to other agency statements of policy. Though Congress sought to heighten procedural protections for significant matters, it also gave agencies the flexibility to use other policymaking tools besides rulemaking and adjudication. When issuing "interpretative rules" or "general statements of policy" agencies are not obliged to go through notice-and-comment.[374] But this does not mean that such guidance documents should always be promulgated without some form of public participation and reasoned explanation. The Senate Report on the APA suggested that an agency might "undertake public procedures" where it was "useful to them or helpful to the public."[375] Similarly, in 2007, the Office of Management and Budget required executive agencies to solicit "public comment" on "significant guidance documents," defined as guidance with annual economic impacts of $100,000,000 or more or other major legal, policy, or budgetary effects.[376] This legislative history and executive directive provide a framework for analyzing guidance documents raising major economic or political questions. The twin purposes of procedural protection and regulatory flexibility could be balanced by withholding deference to guidance that concerns a major question, unless the agency has elected to promulgate such interpretations through a sufficiently deliberative and participatory procedure. In this way, courts might disentangle the question of the document's "binding effect" from its legitimacy as a product of reasoned and participatory governance.[377]

373. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) ("[G]enerally speaking [the notice-and-comment] section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.").

374. 5 U.S.C. § 553(d) (2012).

375. S. REP. NO. 79-752, at 14 (1945).

376. Office of Mgmt. & Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439–40 (2007).

377. Gen. Elec. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002) (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the*

Under my proposed revision of the major questions doctrine, judicial deference to an agency's resolution of a major question would require not only the use of deliberative decision-making procedures, but would also require that the relevant economic or political questions had been rationally addressed by the agency on the record. Such an approach would adapt *Chevron*'s step two into a requirement for deliberative rationality: an agency's interpretation of an ambiguous provision implicating a major question would be reasonable only if it was well-justified in terms of the purposes of the statute and the input of affected parties.[378] In other words, a regulation's "concise general statement of . . . basis and purpose"[379] would have to discuss the major questions at issue, taking into account any relevant concerns raised by commenters. This requirement would not be a modification of current administrative law doctrine, but merely a straightforward application of the existing rules to major questions. When, in informal rulemaking, an administrative decision-maker "is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found persuasive."[380] In the context of major questions cases, courts should ensure that the agency's argumentation is not purely technical, but actually raises and addresses these questions in its final rule. If the agency fails to do so, this will show that the agency has not made use of the deliberation-reinforcing capacities of notice-and-comment rulemaking, and thus cannot claim deference for its preferred interpretation of the law.

Like—Should Federal Agencies Use Them To Bind the Public?, 41 DUKE L.J. 1311, 1355 (1992)).

378. Mark Seidenfeld proposes that *Chevron* step two should generally be treated in this way, demanding greater judicial scrutiny of the deliberative integrity of the agency's decision-making process. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 125–30 (1994). I would not urge that step two of *Chevron* should always require intensive review. Such an approach would create additional obstacles to efficient bureaucratic performance. When it comes to ordinary administrative interpretations without significant political consequences, the Progressive theory would require that state autonomy be valued above deliberative democratic engagement. When it comes to major questions, however, deliberative democratic legitimacy has greater importance, because profound and divisive value questions are at play. In these cases, courts should increase their scrutiny of the agency's reasoning process.

379. 5 U.S.C. § 553(c) (2012).

380. Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 476 (D.C. Cir. 1974).

B. APPLYING THE APPROACH TO THE MAJOR QUESTIONS CASES

Consider how this aspect of the test would play out in some of the major questions cases discussed in Part I. Since the courts do not always specify the economic and political questions at issue, but only allude to the import of the challenged interpretation, I will attempt to offer a best guess. In the tobacco regulations at issue in *Brown & Williamson*, one question of political significance was arguably: how should the agency balance competing consideration of the public health risk caused by smoking, on the one hand, and public values of individual responsibility and choice, on the other?[381] Responding to public comments on this topic, the final rule addressed this question head on:

> [The] FDA believes that adults should continue to have the freedom to choose whether or not they will use tobacco products. However, because nicotine is addictive, the choice of continuing to smoke, or use smokeless tobacco, may not be truly voluntary. Because abundant evidence shows that nicotine is addictive and that children are not equipped to make a mature choice about using tobacco products, the agency believes children under age 18 must be protected from this addictive substance.[382]

In the FDA's 223-page final rule, responding to over 700,000 comments, the agency addressed other important political questions such as the relationship between parents, children, and federal regulation,[383] the allocation of regulatory responsibilities between the state and federal government,[384] and the commercial rights of retailers.[385]

The agency also referenced President Clinton's Wilsonian engagement with the public over the subject matter of the rule.[386] It considered public comments addressed directly to him by a coalition of medical associations,[387] remarks to the press explaining the regulatory plan,[388] and the input of the Ad Hoc Committee of the President's Cancer Panel.[389] The rule is thus a good example of an agency embracing the Progressive conception

381. 529 U.S. 120, 148 (2000).

382. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 61 Fed. Reg. 44,418 (Aug. 28, 1995).

383. *Id.* at 44,421.

384. *Id.* at 44,430.

385. *Id.* at 44,434.

386. *See supra* notes 264–67 and accompanying text.

387. 61 Fed. Reg. at 44,418.

388. *Id.* at 44,419.

389. *Id.* at 44,463.

of the administrative state. The agency deliberated over the public norms implicated by the rule, responded in rational fashion to a great volume of public comments, and referenced the President's supervisory authority without becoming a mere instrument of his will.

A court might, of course, find that other important issues of economic and political significance were not addressed in the rulemaking. Or it might find that traditional principles of statutory construction barred the agency's interpretation, irrespective of the fact that major questions were involved. But the great virtue of using a notice-and-comment rulemaking on such a high-profile issue is that it is likely that commentators will raise most, if not all, relevant issues, and therefore the agency will have a legal responsibility to address them. The focus of judicial review of such major regulatory cases should be on ensuring that the agency forthrightly engaged with the relevant policy questions, rather than presuming that the court is competent to resolve these questions without according institutional respect to the agency's deliberative engagement with the President and the affected public.

King v. Burwell offers a starkly different case.[390] There, the IRS had promulgated a regulation which curtly responded to some commenters' arguments that the language of the Affordable Care Act limits health care tax credits to those who enrolled on State Exchanges.[391] In a single paragraph, the IRS simply asserted that the statutory language supported the interpretation that tax credits were also available on federal exchanges, and that the legislative history "does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."[392] The IRS concluded that its proposed interpretation was "consistent with the language, purpose, and structure of . . . the Affordable Care Act as a whole."[393]

These statements are conclusory. The IRS did not actually offer an argument on the major issue the Court subsequently addressed, namely whether the statutory purpose or scheme required the availability of tax credits on federal as well as state exchanges. Given that the IRS did not engage in a substantive

390. King v. Burwell, 135 S. Ct. 2480 (2015).

391. *Id.* at 2487.

392. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (codified as amended at 26 C.F.R. pts. 1 & 602 (2015)).

393. *Id.*

discussion of the policy questions implicated by one of the "Act's key reforms,"[394] it was appropriate for the Court not to defer to the agency's interpretation of the statutory ambiguity. Had the IRS considered the policy implications of reserving subsidies for state exchanges alone; had it offered a detailed discussion of the purpose of the ACA in light of its overall structure and its legislative history; had it acknowledged background concerns of economic liberty and federalism that had arguably animated the *King* litigation; in that case, the Court ought to have deferred to the IRS's interpretation. But the rule has much more the quality of an interstitial exercise in gap-filling than an engagement over disputed issues of policy. In other words, the meaning of this provision might have indeed become "a case for the IRS,"[395] but the IRS did not in fact demonstrate, on the record, the degree of deliberative attention that would have merited judicial deference to its resolution of the major question.

Similarly, in *Texas v. United States*, the Obama Administration promulgated the DAPA program not through rulemaking but through an enforcement memorandum.[396] The agency did not document any kind of robust public consultation process that would have indicated deliberative-democratic engagement over the shift in immigration policy. DHS's failure to record any such procedure undermined its democratic authority to undertake a significant policy shift without explicit congressional authorization. This does not mean that the Fifth Circuit was correct that the Department's interpretation of the law was invalid. It simply means that a reviewing court would have no good reason to *defer* to DHS's interpretation of the INA under these circumstances.

This approach might also help to adjudicate the dispute between dissenting and concurring opinions in *United Telecomm*. Recall that Judge Kavanaugh and Judge Brown argued in dissent that the Open Internet Order was unlawful because there was no express statutory authority for the regulation of Internet service providers as common carriers.[397] The concurrence argued that the statute was ambiguous and permitted the FCC's interpretation.[398] In addition, the concurrence gestured at the extraordinary level of engagement with the Commission's process,

394. *King*, 135 S. Ct. at 2489.
395. *Id.*
396. Memorandum from Johnson, *supra* note 106, at 3–4.
397. *See supra* notes 116–19 and accompanying text.
398. *Id.*

noting that "[t]he FCC received the views of some four million commenters before adopting the rule."[399] In the approach I have proposed, the extraordinary number of public comments would provide evidence that issues of great political moment were implicated by the order. The court could therefore grant Judge Kavanaugh's point that the interpretation at issue was a major one—implicating considerable economic issues as well as public interests like open and equal access to means of political communication and debate—but then evaluate the quality of the rulemaking record to see if these kinds of concerns had been discussed with reasonable discernment by the FCC. The court would not consider whether the Commission's discussion of the values implicated was, by the court's own lights, right or wrong, but only whether it had engaged with any serious moral and economic arguments raised in the rulemaking in a more than rote and perfunctory manner.

Under the approach I am advancing here, it does not matter whether such a major policy decision is categorized by the agency as an enforcement memorandum, a rule, or a general statement of policy. If an administrative policy is promulgated under any of these headings, and a court determines that the policy shift implicates a question of deep economic and political significance, the agency must have documented a value-oriented process of public engagement for its interpretations of statutory ambiguities to qualify for judicial deference.

CONCLUSION

Major questions will continue to surface regularly in administrative activity. Under the Trump Administration, administrative agencies are working with vigor to reverse many of the policies implemented under the previous Administration. For example, agencies under the Trump Administration have rescinded the Obama Administration's deferred action programs for undocumented immigrants,[400] proposed to rescind the 2015

399. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017).

400. Elaine C. Duke, Acting Secretary of the Department of Homeland Security, Memorandum on Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," (Sept. 5, 2017), https://dhs.gov/news/2017/09/05/memorandum-rescission-daca.

Clean Water Rule,[401] and reevaluated rules regulating for-profit educational institutions[402] and campus sexual assault and harassment.[403] Judges can find, and indeed have found,[404] questions of deep economic and political significance in such regulatory actions without much difficulty. When they do so, they should take care to observe the basic deliberative principles that legitimate administrative activity in our Progressive state. They should not reflexively assume that the implication of such value choices precludes deference to the agency, and permits the court itself to determine the issue de novo without any solicitude for administrative judgment. Nor, however, should they end their inquiry at the finding of a statutory ambiguity and a delegation of lawmaking authority to an administrative agency. Instead, courts should only defer to the agency if the agency has reached its interpretation through an open, inclusive, and rational discussion of the policy choices at issue. They should not defer to hastily drafted and nonconsultative declarations that have failed to engage the considered judgment of the persons they affect or respond to their concerns in a reasoned fashion. In this way, courts can respect the institutional competence of agencies to interpret

401. Dep't of Def., Envtl. Prot. Agency, Definition of "Waters of the United States"—Recodification of Pre-existing Rules, Proposed Rule (June 27, 2017), https://www.epa.gov/sites/production/files/2017-06/documents/wotus_prepublication_version.pdf.

402. Dep't of Educ., Press Release, Secretary DeVos Announces Regulatory Reset To Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017), https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions.

403. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017) (rescinding Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011 and Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf; Dep't of Educ., Press Release, Dep't of Educ. Issues New Interim Guidance on Campus Sexual Misconduct, (Sept. 22, 2017), https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

404. *See, e.g.*, Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1050 (N.D. Cal. 2018) (granting a preliminary injunction against the Trump Administration's rescission of Deferred Action for Childhood Arrivals program). In finding that the rescission was not "committed to agency discretion by law," and therefore unreviewable, the court noted: "the agency has ended a program which has existed for five years affecting 689,800 enrollees. Importantly, *major policy decisions are quite different from day-to-day agency nonenforcement decisions*." *Id.* at 1029–30 (internal quotations omitted) (emphasis added).

public purposes, without abdicating their responsibility to ensure that We the People retain authorship over the rules that bind us.