ARTICLE

ADMINISTRATIVE ANSWERS TO "MAJOR QUESTIONS": ON THE DEMOCRATIC AUTHORITY OF AGENCY STATUTORY INTERPRETATION

Blake Emerson*

*Ph.D., Yale University (Political Science); BA, Williams College; JD Candidate, Yale Law School. The author would like to thank the following persons for their feedback on earlier drafts of the Article: Bill Eskridge, Jeremy Kessler, Jerry Mashaw, Jud Mathews, Kevin Stack, and Peter Strauss.

ARTICLE

ADMINISTRATIVE ANSWERS TO "MAJOR QUESTIONS": ON THE DEMOCRATIC AUTHORITY OF AGENCY STATUTORY INTERPRETATION

Abstract: This Article critiques the legal and theoretical premises of the "major questions doctrine," and proposes a revision of the doctrine that better comports with the institutional structure and ideological origins of our administrative state. The major questions doctrine holds that courts generally should not defer to agency statutory interpretations that concern questions of "vast economic or political significance." This doctrine, most recently invoked by the Supreme Court in *King v. Burwell*, purports to enforce the constitutional norms of non-delegation and popular sovereignty. But it relies on two auxiliary political-theoretic assumptions about the proper roles of courts and agencies. First, it imports the assumption of the Legal Process School that courts are always the primary interpreters of the important value questions implicated by statutory law. Second, it imports Max Weber's assumption that administrative officials are morally-neutral technocrats, who should only implement value choices specified by statute. These assumptions do not capture important aspects of the institutional structure and ideological justification for our American administrative state. I show how the Progressive thinkers who first advocated administrative governance in the United States believed that administrators should resolve important value questions in consultation with the affected public. Our current institutions reflect this vision to a significant degree, with broad-textured statutes that leave significant norm-setting authority to agencies, while requiring that such decisions be made through participatory procedures. I propose that the major questions doctrine should be reformulated, so that an agency's resolution of a "major question" can receive full *Chevron* deference if it is promulgated through notice-and-comment rulemaking and addresses the relevant political and economic questions in the rulemaking record. If an agency's interpretation is not promulgated through rulemaking, the reviewing court should give deference to the agency's interpretation proportional to the degree of its deliberative engagement with the affected public, and its discussion of the relevant policy questions.

INTRODUCTION

The specter of the non-delegation doctrine haunts the administrative state. The non-delegation doctrine holds that Congress may not delegate its lawmaking power to an administrative agency without providing an "intelligible principle" to guide and constrain its activity.[1] While the non-delegation doctrine has not been

[1] Yakus v. U.S., 321 U.S. 414 (1944).

invoked to strike down a federal statute since the 1930s,[2] a presumption of statutory interpretation has now taken shape that aims to provide a similar check on administrative discretion. This presumption has been described as the "major questions" doctrine.[3]

The major questions doctrine is a prominent exception to the general principle of judicial deference to administrative interpretations of statutory ambiguities. Courts will normally afford agency interpretations of such ambiguities some degree of weight or deference, depending upon the level of authority Congress has delegated to the agency, the subject-matter jurisdiction and expertise of the agency, and the formality of the procedure through which such interpretations have been issued.[4] However, in a series of cases in the past three decades, the Supreme Court has held that, where the statutory ambiguity raises a question of particular "economic and political significance," it will presume that Congress did not intend the agency to resolve the issue.[5] Instead, the reviewing court resolves the ambiguity itself, without giving any weight or deference to the agency's positon.

The major questions doctrine has played a key role in recent, high profile cases. In *King v. Burwell*,[6] the Supreme Court refused to defer to the Internal Revenue Services' interpretation of the Affordable Care Act's provision of tax credits for health insurance purchased through an "Exchange established by a State."[7] The Court reasoned that this provision was "among the Act's key reforms," involving billions of dollars and affecting the health insurance coverage of millions of Americans.[8] 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.[9] "This is not a case for the IRS. It is instead our task to determine the correct reading."[10] In *Texas v. U.S.*,[11] the Fifth Circuit likewise found that the Department of Homeland Security's Deferred Action Program for Parents of Americans and Lawful Permanent Residents (DAPA) was likely unlawful in part because it "undoubtedly

---

[2] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[3] *See, e.g.* Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236-45 (2006); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From The Inside—An Empirical Study of Congressional Drafting, Delegation, and Canons: Part I*, 65 Stan. L. Rev. 901, 990-95 (2013).

[4] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); U.S. v. Mead Corp., 533 U.S. 218 (2001).

[5] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (U.S. 2000); Utility Regulatory Air Group v. EPA, 134 S.Ct. 2427, 2444 (2014); King v. Burwell, 135 S. Ct. 2480, 2496 (2015).

[6] 135 S. Ct. 2480 (2015).

[7] 26 U.S.C. § 36B(b)(2)(A) (2012).

[8] *King*, 135 S. Ct. at 2489.

[9] *Id.*

[10] *Id.*

[11] 809 F. 3d. 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271 (2016).

implicates question[s] of deep economic and political significance."[12] If Congress had wished to give DHS authority to deferral removal proceedings for over 4 million undocumented immigrants, "it surely would have done so expressly."[13]

These cases go to show that, despite its relatively spare use, the major questions doctrine is a potentially revolutionary (or reactionary) tool of statutory construction. Precisely because the major questions doctrine is triggered by a court's perception that the interpretive question at issue is politically salient, the doctrine authorizes judicial policymaking in the very cases that have the highest visibility and greatest impact for the American public. It is a recipe for judicial governance of political questions.

This Article explores and critiques the jurisprudential and normative assumptions that support the major questions doctrine. The jurisprudential foundation for the major questions doctrine is the constitutional principle of non-delegation. Both the major questions and non-delegation doctrine aim to ensure that Congress does not quit its responsibility to determine the basic principles and policies that administrative agencies will implement. To ensure democratic accountability, the Court presumes that Congress does not generally intend to leave important questions of policy to agencies. Instead, even if the statute appears to be ambiguous, the judiciary will attempt to ascertain its meaning. The major questions doctrine thus aims to reinforce democratic constitutionalism by keeping important questions of principle and policy out of the hands of administrative agencies altogether.

I argue, however, that the major questions doctrine is a poor way to institutionalize this crucial concern to preserve democratic constitutionalism in the administrative state. The major questions doctrine relies on two interrelated normative assumptions. The first assumption, which can be traced to the great scholars of the Legal Process School, is that the courts should be the primary interpreters of the principles and policies enacted in legislation.[14] The second assumption was first expressed in Max Weber's sociology of law, and has subsequently been incorporated into American administrative law scholarship: bureaucracy should be treated only as an efficient, neutral instrument for implementing goals established by statute.[15] These assumptions, however, fail to account for a salient feature of our current institutional regime: that agencies can accrue democratic authority to make value choices from their deliberations with the affected public, and from oversight by the President.

I present a "Progressive" theory of the administrative state that better captures this democracy-enhancing capacity of our administrative procedure. I call this state "Progressive" because it was imagined by American Progressives like John Dewey, Woodrow Wilson, and Frank Goodnow, who first advocated expansive national regulatory power in the United States.[16] Progressive conceptions of the American state have received renewed attention in recent

[12] *Id.* at 181 (internal quotations omitted).
[13] *Id.*
[14] *See infra* Part III.A.
[15] *See infra* Part III.B.
[16] *See infra* Part IV.B.

years, not only from scholars who broadly support the Progressive vision of active, democratically authorized, administrative regulation,[17] but also from conservatives who trace the decline of American constitutionalism to Progressivism.[18] Legal scholarship, however, continues to operate under misapprehensions about the content and commitments of Progressivism, usually emphasizing only the Progressive concern with bureaucratic "expertise."[19] This paper therefore reassesses the "original intent" of the Progressives to address the real constitutional concern the major questions doctrine purports to address: how can the state remain democratic if important decisions are made by unelected bureaucrats?

The Progressives developed a uniquely democratic conception of the administrative state. They followed the German philosopher G.W.F. Hegel in understanding the administrative state as an institution that guarantees individual freedom through regulation and social welfare provision.[20] But, unlike Hegel, they argued that administration must be accountable to public opinion. They believed that administrative agencies could augment the popular legitimacy of the state by bringing the democratic authority of the executive and the legislature together, alongside the direct input of the affected public, in crafting regulatory policy. Agencies, in their view, were not to be understood merely on Weber's terms as efficient implementers of clearly identified legislative ends, but rather as engaged participants in the specification of indeterminate public norms. As I will show, the intellectual architecture of our administrative state has realized significant aspects of the Progressive vision.[21]

The original Progressive understanding motivates a reformation of the major questions doctrine. I argue that courts should defer to reasonable agency interpretations of statutory ambiguities that implicate major questions if: (1) the agency promulgates its interpretation through notice-and-comment rulemaking; and (2) the rulemaking addresses the relevant questions of economic and political significance the court has identified. If the interpretation is not promulgated through rulemaking, the court should nonetheless give weight to the agency's view proportional to its level of engagement with the affected public, and the extent to which it addresses the relevant questions of political and economic value in its contemporaneous explanation of its interpretative choice. This approach

---

[17] *See, e.g.* K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Guilded Age: Towards A Fourth Wave of Legal Realism*? 94 TEX. L. REV. 1328, 1337-1345 (2016) (discussing Progressive Era political and legal thought as a basis for a new concern with using administration to combat social domination in law scholarship).

[18] *See, e.g.* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 447-78 (2014) (identifying the American Progressives as originating our administrative law, and indicting their disregard for constitutional principles of the rule of law and democratic control of policy decisions).

[19] *See, e.g.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY, 1870–1960 223-25 (1992).

[20] *See infra* Part IV.A.

[21] *See infra* Part V.

draws on the analysis of *U.S. v. Mead Corp*[22] to determine what level of deference should be owed on agency resolution of major questions. But the level of deference owed to the agency, in my proposal, turns on the deliberative intensity and substantive content of the agency's interpretative process, rather than, as in *Mead*, the level of delegated lawmaking authority the agency has relied upon to promulgate its interpretation.

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 non-delegation doctrine and, more fundamentally, deliberative democratic control over political choices. In Part III, I argue that the major questions rests on auxiliary assumptions that courts are the best interpreters of the principles and policies enacted in legislation, and that agencies should serve as value-neutral, technocratic implementers of policies decided 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, which relies on the Administrative Procedure Act's notice-and-comment rulemaking provisions.[23] 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 presumption against broad delegations through marginal statutory provisions into a stand-alone presumption against broad delegations 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. The presumption that agencies

[22] 533 U.S. 218 (2001).
[23] Administrative Procedure Act of 1946 §4, 5 U.S.C. § 553 (2012).

views should be given considerable weight in judicial statutory interpretation goes back to the early nineteenth century, before the proliferation of administrative tasks had become an issue of major political and legal contention.[24] For instance, in *United States v. Moore*,[25] 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. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."[26] The rule was not absolute, but turned on a set of contextual factors, such as the relative determinacy of the statutory norm in question, the continuity of agency interpretation, and whether the agency interpretation was nearly co-original with the organic act itself. Thus in *Norwegian Nitrogen Products Co. v. United States*,[27] Justice Cardozo stated that

> administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is 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.[28]

The rule of deference took solidified when the New Deal ushered in a vast expansion of national administrative capacities to complement the expansion of the constitutional limits on legislative power under the Commerce Clause.[29] The New Deal framework incorporated the existing principle that agency interpretations should be given some weight in judicial statutory interpretation, depending upon the subject-matter expertise of the agency, the consistency of its position, and the procedural formality by which the decision was issued.[30] The courts also 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*. the Court defined a space of interpretive discretion in which the Board's definition of "employee" was to be accepted by the Court if had "a warrant in the record and a reasonable basis in law."[31] Reserving the fundamental judicial duty to "say what the law is,"[32] the New Deal Court

---

[24] See, e.g. Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827).
[25] 95 U.S. 760 (1877) (internal citations omitted) (upholding the Secretary of the Navy's interpretation of statutory provisions fixing annual salaries for assistant-surgeons).
[26] *Id.* at 763.
[27] 288 U.S. 294 (1933).
[28] *Id.* at 314.
[29] *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399 (2007).
[30] Skidmore v. Swift Co., 323 U.S. 134 (1944).
[31] 322 U.S. 111, 130 (1944) (internal quotations omitted).
[32] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

nonetheless recognized that agency interpretations could guide judicial interpretation to varying degrees, depending on the scope of policy-making authority Congress intended to dedicate to the agency, and the relevance of agency practice, experience, and judgment to the ordinary judicial practice of statutory construction.[33] This flexible regime of deference was crucial to holdings in many of the canonical cases of judicial statutory interpretation, during and after the New Deal, such as *United States v. American Trucking Association*,[34] and *Griggs v. Duke Power*.[35]

In *Chevron U.S.A v. Natural Resources Defense Council, Inc.*,[36] the Court temporarily simplified this nuanced regime with its famous two-step procedure. Generalizing the approach first developed in *Hearst*,[37] *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. In such cases, courts should defer to the interpretation of the administering agency if it is "permissible" or "reasonable."[38] The scope of *Chevron*, however, was not entirely clear.[39] Did it refer to any agency interpretation, no matter in which 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 possible interpretations of ambiguous language as a threshold inquiry?[40] 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*[41] and *INS v.*

---

[33] *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) ("judicial 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") *and* Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (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).

[34] 310 U.S. 534, 549 (1940) (deferring to opinion of Wage & Hour Division of Department of Labor)).

[35] 401 U.S. 424, 433-34 (1971) (deferring to interpretation of Equal Employment Opportunity Commission).

[36] 467 U.S. 837 (1984).

[37] 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").

[38] *Id.* at 843.

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

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

[41] 480 U.S. 421 (1987)

Aguirre-Aguirre[42] together hold that *Chevron* applies to interpretations reached in the course of binding adjudications as well as those promulgated through rulemaking. *Christensen v. Harris County*[43] and *United States v. Mead Corp*[44] indicate that *Chevron* does not, however, ordinarily extend to non-binding documents, such as opinion letters or guidance documents, that are not promulgated in the exercise of the agency's delegated lawmaking authority. Where *Chevron* does not apply, courts will nonetheless usually accord "some deference"[45] 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."[46]

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, and which has in any event not been elaborated or deployed consistently in the case law.[47] Here I want to focus on one particularly salient and theoretically interesting exception to the general principle that at least some level of deference is owed to agency interpretations of the statute it administers.

B. The Major Questions Cases: From Keeping Elephants Out of Mouse Holes to Keeping Elephants Out of Jungles

In a series of cases, the Court has not deferred to agencies' statutory interpretations where the Court considers the issue to be one of "economic or political magnitude."[48] 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.

The major questions doctrine first emerged as a distinguishable technique of statutory interpretation in *MCI Telecommunications Corp. v. AT&T Co*.[49] There, the Court rejected the Federal Communication Commission's interpretation of the filing requirements of the Communications Act of 1934. The FCC had issued a rule that interpreted its authority to "modify"[50] tariff filing

---

[42] 526 U.S. 415 (1999).
[43] 529 U.S. 576 (2000).
[44] 533 U.S. 218 (2000).
[45] Reno v. Koray, 515 U.S. 50, 61 (1995).
[46] *Skidmore* 323 U.S. 140; Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991).
[47] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory*, 96 GEO. L. J. 1083 (2008).
[48] *Brown & Williamson*, 529 U.S. at 133 (2000).
[49] 512 U.S. 218 (1994).
[50] Communications Act of 1934 §203(b)(2), 47 U.S.C. § 203(b)(2) (2012).

requirements to permit it to waive such requirements altogether for certain carriers. The late Justice Scalia, writing for the Court, first found that the agency's authority to "modify" the requirements did not encompass the authority to make a "radical or fundamental change."[51] This was presented as an ordinary textual argument, relying on dictionary definitions of "modify," rather than the importance of the interpretive question.[52] He then concluded that the broad filing waiver was indeed a fundamental change, and thus exceeded the bounds of the FCC's interpretive discretion. 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 section of the industry."[53] 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."[54]

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 through such a subtle device as permission to 'modify' rate-filing requirements. . . ."[55] This dictum inaugurates the major questions doctrine. Here, Scalia is not merely suggesting that the FCC's "major" change in filing requirements is an impermissible expansion of the plain meaning of "modify." Rather he presumes 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*.[56] In that case, the Court declined to grant *Chevron* deference to the FDA's rule interpreting the Food, Drug, and Cosmetic Act of 1938 to permit it to regulate nicotine, cigarettes, and smokeless tobacco. 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"; and that cigarettes and smokeless tobacco could therefore 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."[57] The court rejected the FDA's interpretation. Though the Court might

[51] *MCI*, 512 U.S. at 229.
[52] *Id.* at 225-29.
[53] *Id.* at 232, 231.
[54] Whitman v. Am. Trucking Associations, 531 U.S. 457, 468 (2001), *citing MCI*, 512 U.S. at 231, *and Brown & Williamson*, 429 U.S. at 159-60.
[55] *Id.* at 231.
[56] 529 U.S. 120 (2000).
[57] Food, Drug, and Cosmetic Act of 1938 §201, 21 U.S.C. §§ 321 (g), (h) (2012).

ordinarily defer to the FDA's reasonable interpretation of "drug" and "device,"[58] it reasoned that

> this is hardly an ordinary case. Contrary to its representations before Congress, the FDA has now asserted jurisdiction to regulate a significant portion of the American economy. . . . We 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.[59]

Relying on *MCI*, the Court established a presumption against *Chevron*-style implied delegation where a major question is concerned. But whereas in *MCI* the Court 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 & Williams* 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 was simply too significant to be left to the agency. Above and beyond the traditional tools of statutory construction, the major question doctrine therefore provides additional grounds for delimiting the scope of agency authority.[60] Where the Court concludes that the agency has made an important policy decision 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

---

[58] *See* Jody Freedman and Adrian Vermeule, *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 73 (2007) *and* Theodore W. Ruger, *The Story of* FDA v. Brown & Williamson*: The Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 335, 358-359 (William N. Eskridge Jr. et al., eds. 2011).

[59] *Brown & Williamson*, 512 U.S. at 159.

[60] 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' intent to regulate cigarettes rather than to ban them—to argue that Congress could not have intended for the FDA to regulate cigarettes; (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 regulated tobacco. *Id.* at 144. (3) She finally argues, separately, that the economic and political significance of regulating cigarettes indicate that Congress did not delegate this regulatory choice to the agency. 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.

deference regime. In *Utility Regulatory Air Group v. EPA*,[61] the doctrine formalized in *Brown & Williamson* supported the Court's finding that the EPA's greenhouse gas emissions standards and permitting requirements for motor vehicles impermissibly interpreted the Clean Air Act. Citing *MCI* and *Brown &Williamson*, Justice Scalia reasoned that "EPA's interpretation is . . . unreasonable because it would bring about an enormous and transformative expansion in 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."[62] As I will discuss in the next section, this language is one of the strongest formulation of the major questions doctrines, implying that it might take the form of a clear statement rule.

In *Gonzales v. Oregon*,[63] the Court deployed the major questions doctrine somewhat differently. In that case, the doctrine helped to determine the amount of weight owed to Attorney General's Interpretive Rule issued under the registration provisions of the Controlled Substances Act, which proscribed the use of certain drugs used in physician-assisted suicide. 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. 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."[64] Instead, the court treated the Interpretive Rule as a non-binding document, which would be accorded weight under *Skidmore* only to the extent that it had "power to persuade."[65] 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 Rule's persuasive force was nil.[66]

The major questions doctrine was recently deployed and expanded by the Supreme Court *King v. Burwell*.[67] There, the Court declined to defer to the Internal Revenue Services' interpretation of a key provision of the Affordable Care Act. The IRS had interpreted "Exchange established by a State"[68] to include exchanges established by the federal government, so that health care tax credits could be provided through such latter exchanges.[69] The Court, citing *Brown &*

---

[61] 134 S.Ct. 2427 (2014).
[62] Id at. 2444.
[63] 546 U.S. 243 (2006).
[64] *Id.* at 267 (internal citation omitted) (internal quotation marks omitted).
[65] *Id.* at 268.
[66] *Id*. at 269.
[67] 135 S. Ct. 2480 (2015).
[68] 26 U.S.C. 36B(b)-(c)(2012).
[69] Internal Revenue Service, Health Insurance Premium Tax Credit. Final Rule, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).

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.[70]

The court then went on to offer its own construction of the Act without any regard to the IRS' interpretation, analyzing on its overall statutory structure and "legislative plan" to conclude that the provision did in fact mean what the IRS thought.[71]

Note that there is a subtle but significant expansion of the logic in *Brown & Williamson*: the importance of the interpretive question is not presented, as in *Brown & Williamson*, merely as one reason amongst others why the statute should not be read to delegate interpretive authority to the agency. Rather, the great weight of the question appears to be a sufficient reason on its own for declining to defer. The use of the major questions doctrine in *King* is also more expansive than in previous cases, because it did not involve a change away from the agency's interpretive status quo, as had been the case with the FDA's decision to regulate tobacco products. Instead the doctrine was invoked to decline deference to 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, even before the advent of *Chevron*.[72] The Court nonetheless asserts its interpretive jurisdiction, wresting power away from the agency, only to conclude that the agency had been right all along. The disagreement is structural—"who decides?"—rather than substantive—"what is the answer?"

The most recent high-profile use of the major questions doctrine came in *Texas v. U.S.*,[73] where the 5th Circuit upheld the district court's nation-wide injunction on the Department of Homeland Security's Deferred Action Program for Parents of Americans and Lawful Permanent Residents (DAPA). The DAPA program set out general criteria for DHS immigration enforcement officials to consider in deferring removal proceedings for undocumented immigrants, and in conferring a status of "lawful presence" that would enable recipients to apply for employment eligibility and social security benefits.[74] In finding that Texas was

---

[70] 135 S. Ct. at 2488-89 (internal quotations omitted).
[71] *Id.* at 2496.
[72] *Norwegian Nitrogen Products*, 288 U.S. at 315. *See, also Mead*, 533 U.S. at 252 and FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 438–439 (1986).
[73] 809 F. 3d. 134 (5th Cir. 2015).
[74] Department of Homeland Security, Memorandum from Jeh Charles Jonhson, Director, U.S.
Citizenship and Immigration Service, for Léon Rodríguez et al. (Nov. 20, 2014),

likely to succeed on the merits of its challenge to DAPA under the Administrative Procedure Act, the court found that, beyond the procedural deficiencies of the policy, it was substantively beyond the delegated immigration enforcement authority of the Department. To support this argument, the Court relied on the major questions doctrine to reject the agencies' interpretation of the Immigration and Nationalization Act. The Court reasoned:

> 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."[75]

Congress, the court reasoned, would not have delegated such vast authority to alter immigration policy to an executive agency. Despite admittedly "broad grants of authority"[76] to the Secretary of DHS to "establish[] national immigration enforcement policies and priorities,"[77] the court concluded that the Immigration and Nationalization Act could not be construed to grant such policymaking discretion to DHS.[78]

In this judgment, the major questions doctrine takes on its full potential breadth. Despite capacious statutory terms granting enforcement policy discretion to the agency, the court finds that Congress simply could not have meant to vest the Secretary of DHS with authority to make such a major change in immigration policy without specific Congressional authorization. One might therefore say that, in its most extreme form, the major questions doctrine not only aims to keep administrative elephants from emerging from statutory mouse holes, but rather aims to take elephants out of the jungle of administrative policymaking altogether. Even when Congress explicitly grants broad discretion to agencies, the major questions doctrine may deny deference to interpretations that seem, by the court's judgment, to be politically portentous.

This latest incarnation of the major question presumption remains in force, though without the benefit of a Supreme Court opinion grappling with its substance. The Court granted certiorari, but ultimately affirmed the judgment by

---

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

[75] 809 F. 3d. at 181.

[76] *Id*. at 183.

[77] 6 U.S.C. § 202 (5) (2012).

[78] The 5th Circuit went on to use the major questions doctrine to find DHS interpretation unreasonable under *Chevron* step two. Assuming *arguendo* that the agency'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 INA. Texas v. U.S, 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.

an equally divided court.[79] The next step in the evolution, or devolution, of the doctrine may have to await a full complement of Justices.

II. RECONSTRUCTING THE RATIONALE FOR THE MAJOR QUESTIONS DOCTRINE: FROM NON-DELEGATION TO POPULAR SOVEREIGNTY

In this part, I describe the legal and normative justification for the major questions doctrine. None of the cases where the major questions doctrine arises actually explain the reason for it. Why should courts presume that Congress does not delegate interpretative authority to agencies on important issues? Bracketing the question 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 issue 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 combatting agency aggrandizement,[80] supporting the under-enforced constitutional principle of non-delegation, [81] enforcing legislative supremacy, [82] and avoiding administrative interference with public deliberation.[83] In this section I will specify the doctrinal status of the major questions doctrine as a presumption that buttresses the under-enforced constitutional norm of popular sovereignty. The principles of non-delegation, legislative supremacy, and deliberation inducement that have been put forward in defense of the doctrine each protect democratic legitimacy at different levels of its institutionalization—the people's allocation of constitutional power,

---

[79] U.S. v. Texas, 136 S.Ct. 2271 (2016).

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

[81] *See* John M. Manning, *The Non-delegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224-27 (2000) *and* Jacob Loshin and Aaron Nielson, *Hiding Non-delegation in Mouseholes*, 62 ADMIN. L. REV. 19, 26-33 (2010).

[82] *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Non-Interference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN L. REV. 593 (2008) *and* 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 (2013) ("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.").

[83] *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761 (2007) ("the 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.") *and* WILLIAM N. ESKRIDGE JR. AND JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 287-9 (2010).

the special status of Congress as a democratically accountable institution, and the protection of the ongoing process of public discourse that tethers governmental action to the commitments of the public sphere. This democratic vision supposes that major value choices must be made in a transparent, accountable, inclusive, and deliberative fashion. In section A, I specify the status of the major questions doctrine as a statutory presumption that reinforces the constitutional norm of non-delegation. In section B, I relate the non-delegation doctrine to a deeper democratic norm that fundamental questions of principle and policy must be settled in a transparent and rational deliberative process that includes members of the affected public.

A. The Doctrinal Status of the Major Questions Rule: Reinforcing Non-delegation Through Statutory Interpretation

In the 1980s, the Supreme Court turned to "substantive canons" of statutory interpretation as a means of enforcing its conception of constitutional values.[84] 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,[85] allow the courts to police constitutional structural norms without taking the aggressive step of striking down unconstitutional legislation.[86] Such substantive canons encompassed administrative interpretations of statutes, such as when the court rejected the National Labor Relations Board's decision to exercise jurisdiction over certain religious schools in order to avoid constitutional conflict between the National Labor Relations Act and the First Amendment.[87]

Amongst the constitutional values the Court sought to protect with its substantive canons was the non-delegation doctrine. In *Mistretta v. United States*, where the Court upheld Congress' delegation of authority to promulgate sentencing guidelines to a judicial commission, the Court noted in a footnote that "In 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."[88] The Court cited *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*,[89] where it had rejected the Occupational Health and Safety Administration (OSHA)'s benzene exposure standards in part for failure adequately to quantify the carcinogenic risk posed by benzene. Justice Stevens reasoned in his plurality opinion that "In the absence of a clear mandate

---

[84] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275-308 (1994).
[85] See, e.g. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984); Will v. Mich Dep't of State Police 491 U.S. 58 (1989); Gregory v. Ashcroft, 501 U.S. 452 (1991).
[86] WILLIAM N. ESKRIDGE, JR. ET AL., 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).
[87] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
[88] Mistretta v. United States, 488 U.S. 361, 374 n. 7 (1989)
[89] 448 U.S. 607 (1980).

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."[90] The Court 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."[91] In his concurrence in the judgment, Justice Rehnquist would have found the statute to be an unconstitutional delegation of lawmaking power, since he read the statute not to provide adequate guidance to OSHA in developing its exposure standards.[92]

This case provides the clearest precedent for the major questions doctrine,[93] and links it definitively to the non-delegation doctrine. In *Utility Regulatory Air Group* Justice Scalia cites the plurality opinion in *American Petroleum Institute*,[94] for the proposition that "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance."[95] This reference indicates that Justice Scalia might have understood the major questions doctrine as a principle of constitutional avoidance: statutes should be construed so as not to grant agencies broad and ill-defined powers, which might trespass on the non-delegation doctrine.

The difficulty with this strong interpretation of the major questions doctrine as it stands today is that the non-delegation doctrine itself is exceedingly difficult to violate. Justice Scalia himself recently confirmed the capaciousness of permissible delegation *Whitman v. American Trucking Associations*,[96] where he held that the Clean Air Act Amendments of 1977 did not violate the non-delegation doctrine by authorizing the EPA to promulgate air quality standards "the attainment of which . . . are adequate to protect the public health" within "an adequate margin of safety."[97] Since the non-delegation doctrine has not

---

[90] *Id.* at 644.
[91] *Id* (internal citations omitted).
[92] (Rehnquist, J., concurring).
[93] I do not include *American Petroleum Institute* amongst the major questions cases described in Part I, *infra*, because it predates *Chevron*, and therefore does not analyze issues of statutory ambiguity in the way that all of the other major questions 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 *American Petroleum Institute* 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").
[94] 448 U.S. 607 (1980).
[95] 134 S.Ct. at. 2444.
[96] 531 U.S. 457 (2001).
[97] 42 U.S.C. § 7409(b)(1) (2012).

succeeded in invalidating legislation since the 1930s,[98] it seems highly unlikely that statutes granting agencies authority to decide questions of economic or political importance would actually be found unconstitutional. In cases where the statute would in fact survive a constitutional challenge, the canon of constitutional avoidance does not apply.[99]

The major questions doctrine might nonetheless be seen as a clear statement rule, which requires that Congress state its intent unambiguously if its wishes to alter, impact, or intrude upon some constitutional value. Unlike a canon of constitutional avoidance, a clear statement rule does not suppose that a certain reading of the statute would fall under a constitutional challenge. The court has enforced clear statement rules even where the scheme would pass constitutional muster if Congress made its intent clear.[100] Such rules serve as a "quasi-constitutional law," seeking to protect a set of broad constitutional values, such as federalism or non-retroactivity, by increasing the costs to Congress of intruding upon them.[101] They protect "under-enforced constitutional norms" by means of statutory interpretation.[102] Precisely because the non-delegation doctrine provides a politically explosive remedy for unconstitutional action—the invalidation of duly enacted federal legislation—courts may choose not to enforce the norm to its utmost extent. Instead, they resort to the major questions doctrine to treat ambiguous statutes *as if* they contained an "intelligible principle," and to divine this principle through particularly intensive exercises of statutory construction.

In *Utility Regulatory Air Group*, Justice Scalia suggested that the major questions doctrine might indeed have the stature of a clear statement rule: "We expect Congress to speak clearly if it wishes to assign to an agency a questions of vast economic and political significance."[103] Tellingly, however, Scalia did not state that Congress "must" unambiguously express its intent to assign major questions to agency discretion, only that the court "expects" it to. Similarly, in *MCI* such an implied delegation was described as "highly unlikely"[104]; in *Brown & Williamson* the Court was merely "confident that Congress could not have intended"[105] such an implied delegation; in *King*, the Court thought that if

---

[98] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[99] Peretz v. United States, 501 U.S. 923 (1991).

[100] *Compare* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)(Congress must speak clearly if it wishes to give state judges protection under the Age Discrimination Act) *with* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 555–56 (1985)(Congress has power under the Commerce Clause to apply labor laws to state employees). The cases are discussed in John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2026-28 (2009).

[101] William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 493 (1992).

[102] Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[103] *Utility Regulatory Air Group*, 134 S.Ct. at 2444.

[104] *MCI*, 512 U.S. at 230.

[105] *Brown & Williamson*, 529 U.S. at 160.

Congress had wished to delegate the question to the agency, it "surely would have done so expressly."

This language suggests that the major questions doctrine has not quite achieved the status of a clear statement rule. It is only a presumption that other evidence might rebut. In *Brown & Williamson*, for example, Justice O'Connor reached her conclusion that Congress had not delegated to the FCC the implied power to regulate nicotine based on several other tools of statutory construction. She turned to the structure of the act, the relation of the act to other statutory schemes, and congress' reliance upon previous agency statements to argue that FCC did not have such interpretive discretion. Had these other sources of interpretation pointed in another direction—for example, if the FCC had long insisted on its power to regulate nicotine, but had declined to do so; or if the purpose or structure of the Act allowed the incremental regulation of unsafe drugs and devices—the presumption that Congress would not have delegated this question to the agency could be rebutted. Of course, presumptions sometimes have a tendency to morph clear statement rules,[106] and the opinion in *King* suggest a stronger version of the principle might be in the offing. Should the Court wish to, it might in the future elevate the interpretive weight of the major questions canon.

B. The Constitutional Justification for the Non-Delegation Doctrine and Major Questions Presumption: Democracy-Reinforcement

In the last Part I demonstrated that the major question is a presumption of statutory interpretation that aims to reinforce the constitutional non-delegation doctrine. In this Part, I will argue that the non-delegation doctrine is itself premised not only on some formal conception of vested legislative power, but a more substantive concern with ensuring that state action is guided by democratic input and public deliberation. The major questions doctrine must therefore be understood according to this broader, democracy-reinforcing rationale for the non-delegation doctrine.

The non-delegation doctrine respects the people's allocation of constitutional power amongst the branches of government. The Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States."[107] The non-delegation doctrine aims to preserve the constitutionally vested jurisdictional rights of congress. The "constitutional rights"[108] of Congress are ultimately rooted in the "public rights"[109] of the people, who are the "the only legitimate fountain of power."[110] 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

---

[106] ESKRIDGE *supra* note ___, at 283.
[107] U.S. Const. art. I sec. 1.
[108] THE FEDERALIST NO. 51, at 349 (James Madison)(Jacob E. Cooke ed., 1961).
[109] *Id.*
[110] THE FEDERALIST NO. 46, at 315 (James Madison)(Jacob E. Cooke ed., 1961), 315.

legislative act an intelligible principle," by which the courts, Congress, and the people can determine the legality of administrative action.[111]

But the non-delegation 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 *American Petroleum Institute*, "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."[112] The connection between congressional legislation and democracy is deeply rooted and widely shared across ideological and theoretical lines in America jurisprudence. As the late Justice Scalia and Bryan Garner write, 'The sovereign will is made known to us by legislative enactment.' And it is made known in no other way."[113] Felix Frankfurter similarly described Congress as "the primary law-making agency in a democracy."[114] John Manning calls Congress the people's "most immediate agent."[115] Speaking through Congress, the people make binding claims upon one another in the form of statute.

Theories of statutory interpretation rely on a democratic conception of statutory law to justify the notion of "legislative supremacy."[116] The rule of legislative supremacy instructs courts that, in matters of statutory rather than constitutional interpretation, Congress is the master and courts are the "faithful agent."[117] Justice Breyer explains the chain of democratic legitimacy in this way: "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

---

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

[112] *Am. Petroleum Inst.*, 448 U.S. at 685 (1980) (Rehnquist, J., concurring in the judgment).

[113] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 397 (2012), *quoting* Wheeler v. Smith, 50 U.S. (9 How.) 55, 78 (1850) (McLean, J.).

[114] FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 16 (1947).

[115] John R. Manning, *The Supreme Court 2013 Term—Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014).

[116] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L. J. 282, 282 (1989) ("it is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures.")

[117] John F. Manning, *Deriving Rules of Statutory Interpretation From the Constitution*, 101 COLUM. L. REV. 1648, 1649 ("the original understanding of 'the judicial Power,' viewed in its broader structural context, fits more tightly with the faithful agent theory of statutory interpretation than with the English tradition of equitable interpretation."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."); Frank B. Cross, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 3 (2009) ("courts should view themselves as agents who do the bidding of Congress in their interpretations of congressional statutes").

to implement the public's will and is therefore consistent with the Constitution's democratic purpose."[118] The people speak through Congress, and the courts, in discerning legislative meaning, determine what rules, principles, and purpose the people have prescribed for themselves. Legislation enacted by Congress is thus usually understood to be the most proximate expression of democratic will, short of the foundational act of constitution-making.

The constitutional text does not get us all that way to this identification of democracy with legislation, however. The people, through the Constitution, vest "legislative powers" in Congress, but the text does not equate legislative power with the sovereign will of the people.[119] Rather, the tight link between democracy and legislation relies upon a set of assumptions about the special demands of modern governance and institutional competence of Congress. First, Congress's institutional capacities investigation, inquiry, and subject-matter specialization, enable it to think holistically and purposefully about social problems, rather than respond reactively to isolated individual claims brought before the court.[120] "It is largely for this reason," Justice Brandeis remarked in *International News Service v. Associated Press*, "that in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasingly frequency."[121] Congress is functionally suited to the kind of informed governmental intervention which, at least since the Progressive Era, the national public has increasingly expected of its government.[122]

Second, the "electoral connection" between Congress and the people encourages representatives to behave in a way that will enable them to retain office.[123] This means they will vote for bills that their constituency thinks are wise, would benefit from, or would endorse if enacted. When legislation garners sufficient votes in both houses to be presented to the President for veto or signature, there is good reason to believe that the bill is a proximate reflection of the needs, interests, and values accepted by a majority of the people themselves. The difficulty of clearing legislation through the veto gates in a bi-cameral legislatureincrease the likelihood that legislation will be deliberately considered before it is enacted, exposed to public critique and input, and refined to respect the broad interests of the public as a whole, rather than any particular faction. [124]

---

[118] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 95 (2008).

[119] U.S. CONST. Art. I, sec. 1.

[120] *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991) *and* DAVID ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED ADMINISTRATIVE STATE (2002).

[121] 248 U.S. 215 (1918) (Brandeis, J., dissenting)

[122] ROBERT HARRISON, CONGRESS, PROGRESSIVE REFORM, AND THE NEW AMERICAN STATE 44 (2004) (discussing the public clamor for regulatory and social legislation in the Progressive Era).

[123] DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

[124] KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 39 (1998) ("when gridlock does not occur, winning coalitions are large because of the omniprescence of supermajority pivots").

This leads to the conclusion that democratic legitimacy is reinforced when Congress makes basic "value choices" in the people's name.[125] As James Willard Hurst argues, "A statue embodies a choice of values carrying obligations on those within its governance, backed by the force of the state."[126] By making the basic value choices that will guide policy, Congress retains normative authority over regulatory activity. The people, acting through Congress as their primary institutional agent, thereby retain a claim to self-determined governance. This vision associates legislation with the clear enunciation of certain public values which the law is meant to further or enforce.

The major questions doctrine aims to reinforce Congress' democratic responsibilities by assuming it does not leave important value choices to agencies. Justice Breyer arguably invented the major questions doctrine in 1986 when he argued that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[127] Framed simply as a matter of legislative intent, the major questions doctrine purports to allocate only those questions to an agency that a reasonable legislator would want to delegate. But the major questions doctrine lays down a generic presumption that is not based in particular legislative text, purpose, or history. Its connection to any specific legislative intent is therefore tenuous.[128] It is rather a presumption that aims to reinforce democratic decision-making by increasing the costs to Congress of impliedly delegating significant policy questions—it must do so expressly, if at all.

Justice Breyer has most recently justified the principle on explicitly democratic grounds. He first distinguishes sharply between "democratic" and "administrative" decisionmaking: "To achieve our democratically chosen ends in a modern populous society requires some amount of administration, involving

---

[125] *See, e.g.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 651 (1985) (referring to the "the extraordinary 'magnitude' of the value choices made by Congress in enacting the Sherman Act."); United States v. Philadelphia Nat. 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"); Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978) ("the purpose of the analysis is . . . not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry..")

[126] JAMES WILLARD HURST, DEALING WITH STATUTES 40 (1982).

[127] Stephen J. 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 *Brown & Williamson*, 529 U.S. at 159.

[128] *Gluck & Bressman*, *supra* note ___, find that over 60 percent of surveyed Congressional staffers who draft legislation do not intend the agency to resolve major questions. *Id*. at 1003. But over 30 percent of respondents disagreed. *Id*. But the respondents also noted that, even if they believed Congress had an "obligation" to address major questions, it sometimes fails to do so because it cannot reach an agreement. *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.

administrative, not democratic, decisionmaking."[129] The way to avoid "conflict between democracy and administration" is to ensure that administration simply "compliments" democracy "by implementing legislatively determined policy objectives."[130] Democracy on this account means fidelity to policy objectives which Congress has laid down.

By presuming that the reasonable legislator would not want to delegate this responsibility, the doctrine encourages Congress to speak with clarity in legislation about the basic value commitments it enacts. It cannot do so through ambiguous statutory language, which, under *Chevron*, would usually constitute an implied delegation. In the event Congress has not explained itself in the ordinary and plain meaning of the relevant provisions, the doctrine instructs judges not to defer to the agency, but rather to look far and wide to discern such purposes—in the broader structure of the Act as well legislative history and other relevant statutes that may bear on the question.

In an age where the more extreme forms of textualism encourage a narrow focus on the ordinary meaning of isolated provisions, this interpretive instruction pushes the courts back to a more pragmatic, multifaceted, and holistic approach to statutory construction. Thus, *Brown & Williamson*, Justice O'Connor took an unusually broad approach to statutory interpretation, which swept in decades worth of post-enactment legislative history and testimony in Congressional hearings. *King v. Burwell* also illustrates this expansive move, though in far less extreme fashion, as Justice Roberts looked to the "broader structure of the act, the "statutory scheme," and the consequences of alternative constructions to determine the meaning of the tax credit provision.[131] He acknowledge that "reliance on context and structure statutory interpretation is a subtle business,

---

[129] Breyer, *supra* note ___, at 98.

[130] *Id.* at 99.

[131] 135 S.Ct. at 2492, 2489. Looking to the overall structure of the act is a universally acknowledged technique of statutory interpretation. But Justice Scalia's dissenting opinion in *King* highlights how far the majority opinion strays from the rigors of textualism. Justice Scalia begins: "Words no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.'" *Id*. at 2497 (Scalia, J., dissenting). He acknowledges that statutory context matters, but concludes that the context does not provide sufficient evidence to negate the ordinary meaning of the provision at issue. More importantly, he disagrees with Justice Roberts' crucial reliance upon the practical consequences that would result from only allowing tax subsidies for individuals enrolled on exchanges established by states. "The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements 'would destabilize the individual insurance market.' If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says." *Id.* at 2503 (Scalia, J., dissenting). Indeed, the Court's turn to the economic consequences to resolve the interpretive issue evinces unusual hermeneutic flexibility from a Justice who did not find in the Commerce Clause congressional power to levy penalties on individuals who failed to purchase health insurance. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587-92 (2012).

calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself."[132] But the major questions doctrine had led him down this supposedly treacherous path, for fear of the worse alternative that an agency might resolve a question of great political moment. He concluded his analysis by emphasizing that "In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—to say what the law is. That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done."[133] Democratic principles, on this view, require courts to seek out legislative intent with special intensity when they confront especially important economic and political issues, over which the pre-eminent democratic body ought to retain control. In this case, the major questions doctrine provides a basis on which courts should extend their gaze to the broader legal horizon, rather than simply defer to the agency when they confront ambiguity in a particular provision.

This impulse to broaden the interpretive horizon, however, suggests that more may be at stake than simple fidelity to the value choices Congress has already made in the form of statutes. The doctrine may also function to safeguard and reinforce the broader process of informed and inclusive political discourse that underlies and legitimates lawmaking. Some scholars have proposed that the doctrine makes the most sense in terms of some version of this deliberation-reinforcing norm. 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.[134] Lisa Bressman similarly argues that in *Brown & Williamson* and *Gonzales* the administrative agencies in question had undermined democratic 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."[135] Here, the emphasis is not on legislation, per se, but upon a broader process of institutional and public debate over the issues the agency purported to resolve. William Eskridge argues in a similar vein that legislation has special democratic legitimacy because "the imprimatur of three differently constituted electorates guarantees a variety of democratic inputs into national policy decisions."[136] According to Eskridge, it is not merely the democratic credentials of Congress itself but the broader 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. The integrity of the deliberative connection between the public and its government must be preserved by preventing agencies from making significant decisions without clear Congress authority. Describing this proposal for "deliberation-inducing judicial review,"

---

[132] *King*, 135 S.Ct. at 2495-96 (internal quotations omitted).
[133] *Id.* at 2496 (internal quotations omitted).
[134] Moncrieff, supra note ___, at 621-32.
[135] Bressman, supra note ___, at 780.
[136] Eskridge, supra note ___, at 436.

Eskridge and John Ferejohn argue that "judges should not defer and should be skeptical of agency norm entrepreneurship that pushes superstatutory evolution into significant collision with other fundamental norms, *unless* Congress after deliberation and public feedback has authorized such entrepreneurship."[137]

The argument thus far has reconstructed the rationale behind the major questions doctrine as one of democracy reinforcement. It aims to protect and to strengthen the connection between the people and governmental action by presuming that democratically enacted laws settle major questions of policy. This democratic principle has constitutional, institutional, and deliberative 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 deliberative engagement with the government in the form of public debate and inter-branch dialogue must be fostered. To this extent, the major questions doctrine rests on sounds principles of democratic constitutionalism. In the next section, however, I will argue that the particular way the doctrine implements these principles rests on auxiliary assumptions about the comparative institutional competencies of courts and agencies.

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

In this part, I delve deeper into the political theory that foregrounds the major questions doctrine. The doctrine supposes that courts are the primary interpreters of statutory values and that administrative agencies should be limited to technocratic tasks. 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 at best controversial. In section IV, I will lay the groundwork for a more comprehensive critique of these assumptions by offering an alternative Progressive theory of the administrative state.

A. The Legal Process School and Judicial Supremacy in Statutory Interpretation

When courts presume that Congress has not delegated interpretive authority to agencies to settle major question, they then determine for themselves how to resolve the statutory ambiguity. Thus, in *Brown & Williamson*, the Court decided based on its own reading of the statute, without any deference to the FDA, that the Food, Drug, and Cosmetic Act did not permit the Agency to regulate tobacco products. In *King v. Burwell*, the Court declined to defer to the IRS' interpretation of the tax subsidy provision of the ACA, and instead reached the same conclusion as the IRS based on its own reading of the statute. Chief Justice Roberts made this structural power-play clear. Despite the provision's

[137] ESKRIDGE & FEREJOHN, supra note ___, at 289.

acknowledged ambiguities, he asserted that "This is not a case for the IRS. Instead it is our task to determine the correct reading."[138]

The doctrine therefore rests on the assumption that courts have a superior institutional competence over agencies in identifying the implicit 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 a 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."[139] 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.[140] 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 in the exercise of their discretion. This, he thought, was a task for Hercules. John Hart Ely similarly argued for a revival of the non-delegation 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 statutes.[141]

As we have seen, the major questions doctrine implements this concern about delegation in an altered form, presuming that Congress would not have quit its deliberative-democratic duties by implication. The major questions cases are therefore best understood as a way to reassert the primacy of courts over agency as the primary 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, cabined the deferential posture of *Chevron*, and sought to reinvigorate an interpretive partnership between Congress and the Courts, rather than Congress and the Executive, in regulatory law: "This Court seems to want the big questions for itself."[142]

On first blush, this deeply rooted court-centric assumption seems non-problematic. *Marbury*, after all, established that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[143] But recall that *Marbury* also drew a distinction between administrative actions that were "only politically examinable," and those that were subject to a non-discretionary, statutory duty, and could thus be compelled by a writ of mandamus.[144] Administrative law aims to determine precisely how statutes allocate interpretive authority between agencies and courts, acknowledging that some questions of statutory interpretation involve political questions which agencies, rather than courts, ought to decide in the first instance.[145] *Chevron's* deference regime rest on

---

[138] *King*, 135 S.Ct. at 2489.
[139] LON FULLER, THE LAW IN QUEST OF ITSELF 135 (1940).
[140] RONALD DWORKIN, LAW'S EMPIRE, 313-54 (1986).
[141] ELY, *supra* note ___, 132 (1980).
[142] Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress' Plan in the Era of Unorthodox Lawmaking* 129 HARV. L. REV. 62, 65 (2015).
[143] 5 U.S. (1 Cranch.) 137, 177 (1803).
[144] *Id*. at 166.
[145] Monaghan, *supra* note ___.

the premise that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[146]

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" rather than simply "legal" significance. It arises in cases where the statutory text is acknowledged to be ambiguous, and thus any construction of the Act will 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 "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."[147] As Justice Scalia observed, this aspect of the Court's argument necessarily involved policy judgments about the "extrinsic circumstances" in which the law would operate.[148] "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."[149] By asserting judicial prerogatives to resolve matters of economic and political significance, the major question puts courts, rather than agencies, in the front line position of determining how to make statutory schemes workable. The court therefore asserts supremacy over politically-accountable administrative actors in resolving legal questions that must be answered at least in part by consideration of policy.

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 an 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 statute to the facts of particular cases.[150] Bureaucracy was a form of "domination through knowledge," which implemented the law through a system of hierarchical command and technocratic competency.[151] Bureaucracy, he argued, 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

---

[146] *Chevron*, 467 U.S. at 866.
[147] *King*, 135 S. Ct. at 2493.
[148] *Id*. at 2503 (Scalia, J., dissenting).
[149] *Id.* at 2505 (Scalia, J., dissenting0.
[150] MAX WEBER, ECONOMY AND SOCIETY 220 (Guenther Roth & Claus Wittich eds., 1968).
[151] *Id*. at 225

beings."[152] 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 pre-given ends.[153] This descriptive view of bureaucracy led to Weber's sharp normative distinction between the vocation of political officials and the vocation of administrative officials. Political officials were responsible for making decisive value choices in a world of moral and ethical pluralism; these value choices would be embodied in statutory law; bureaucrats then should only engage in "impartial administration," serving as the neutral, obedient, efficient instruments for realizing the value choices made by democratically accountable representatives.[154]

This view of administration has had lasting influence in political and legal theory. Jürgen Habermas, the foremost proponent of deliberative democratic theory, famously argued that "*there can be no administrative production of meaning*."[155] Administration was a purely technical, instrumental enterprise, which always risked sapping the social life-world of its reservoirs of cultural meaning and ethical commitments. Political discourse, on his view, is exclusively something that takes place 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, he argued that "The norms fed into the administration bind the pursuit of collective goals to pre-given premises and keep administrative activity within the horizon of purposive rationality."[156] Relying on Ely's theory of democracy-reinforcing judicial review, Habermas argued that the role of the judiciary is then to safeguard this non-administrative process of democratic will-formation from bureaucratic usurpation.[157]

American legal scholars and jurists also often rely explicitly upon Weberian premises. As Professor Louis Jaffe noted, the seminal administrative law scholarship of Ernst Freund and James Landis relied upon Weberian theories of legislatively authorized, expert administration.[158] Professor 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.[159] Professor Jerry Mashaw likewise adopts Weber's view that administration is fundamentally a matter of "exercising power on the

---

[152] *Id.* at 223.
[153] *Id*. at 26, 226.
[154] Max Weber, *Politics as a Vocation* in MAX WEBER, ESSAYS IN SOCIOLOGY 77, 95(H.H. Girth & C. Wright Mills, trans., eds., 1946).
[155] JÜRGEN HABERMAS, LEGITIMATION CRISIS 70 (Thomas McCarthy trans., 1975).
[156] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF DEMOCRACY 192 (William Rehg., trans. 1996).
[157] *Id*. at 194-286.
[158] Louis L. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1186, 1187 (1973).
[159] Edward L. Rubin, *It's Time to Make the Administrative Procedure Act Administrative* 89 Cornell L. J. 95, 157 (2003).

basis of knowledge."[160] Using Weber's precise phraseology, Mashaw argues that "[a]gency implementing action is an instrumentally rational exercise," in the sense that agencies must interpret the goal established by the statute and then find the best "instruments" to achieve those purposes.[161]

This view of bureaucracy is evident in some Supreme Court cases striking down agency action as "arbitrary" and "capricious" under the APA.[162] For example, in *State Farm*,[163] 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."[164] In *Michigan v. EPA*,[165] it struck down the Environmental Protection Agency'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."[166] 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. As Professor Kevin Stack has demonstrated, this conception of administrative reason as "means-ends rationality" is anchored in the legal process school's purposivist approach to statutory interpretation.[167] The agency's reasoning process, in this view, must be completely confined to achieving the goals provided for in its organic act. There is thus a deep affinity between the legal process school's traditional court centric emphasis,[168] and the Weberian conception of administration. If agencies are restricted to purely instrumental reasoning, rather than value-based consideration of questions of political significance, courts have the exclusive responsibility to determine the value choices established by statute, and to ensure that administrative action remains within the horizon of those legislative choices.

Weberian conceptions also provide a powerful basis for criticism of the practices and procedures of American administrative agencies, and the judicial review thereof. For example, Justice William Brennan relied on Weber's account of bureaucracy to defend the due process revolution in *Goldberg v. Kelly*[169] as a necessary judicial response to our "bureaucratic state's" failure to respond to "the

---

[160] JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 26 (1983).

[161] 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)

[162] 5 U.S.C. 706(2)(A) (2012).

[163] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

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

[165] Michigan v. E.P.A., 135 S. Ct. 2699 (2015)

[166] Id. at 2706.

[167] Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 878-79(2015).

[168] *See supra* Part III.B.

[169] 397 U.S. 254 (1970).

human realities at stake" in administrative action.[170] 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.[171] Most recently, Professor Jacob Gerson and Jeannie Suk[172] have relied on Weber's description of bureaucracy as form of technocratic-legal rationality to criticize the Department of Education's enforcement of Title IX,[173] which has required extensive reporting requirements and adjudicative procedures within universities to address sexual assault and harassment.[174] Because campus sex is concerned with "emotion" and "passion," they claim that our Weberian, morally neutral federal bureaucracy lacks the institutional competency to address these sensitive and ethically charged issues.[175] They suggest that "there is a democratic deficit underneath the sex bureaucracy," because Congress would not be likely today to pass legislation specifically endorsing the Department's interpretation of Title IX.[176]

This Weberian view of bureaucracy is an implicit premise of the major questions doctrine. As Gerson and Suk's argument suggest, the Weberian view rejects any suggestion that agencies could legitimately make value-laden decisions without explicit Congressional authorization of the specific values chosen. It is presumptively inappropriate for a bureaucracy to make such policy judgments. This presumption flows readily from a Weberian conception of bureaucracy. 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 "vast economic and political significance." 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.

Some of the scholars cited above might be skeptical of the non-deferential posture of the major questions doctrine, doubting, for example, whether there is any justiciable way to distinguish a "major" from a "minor" question of statutory interpretation. 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, there are indeed strong reasons to presume that Congress would not have left such choices to agencies. When our prototype of "administration" is

---

[170] William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law"*, 10 CARDOZO L. REV. 3, 19, 20 (1988).
[171] Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1278, 1282 (1984).
[172] Jacob Gerson and Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. (forthcoming August 2016).
[173] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).
[174] Office for Civil Rights, U.S. Dep't of Educ., Sexual Harassment Guidance, 62 Fed. Reg. 12034 (Mar. 13, 1997).
[175] Gerson and Suk *supra* note ___.
[176] *Id*.

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.

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.[177] It treats 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.[178] If the Weberian diagnosis of bureaucracy is correct, and the Weberian prescription 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 is genuinely responsive to public feedback, ethical values, or private autonomy.

There is reason to doubt, however, whether the Weberian account is indeed accurate or desirable. 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.[179] 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.[180] The discursive aspect of administrative practice has not gone altogether unnoticed by legal scholars. Professor Henry Richardson, for example, argues that, even though agencies must pursue the policies enacted in statute, 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

---

[177] See JAMES O. FREEMAN, 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").

[178] See JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1986) (criticizing the economistic bent of administrative due process jurisprudence from a Kantian perspective) and RAINER FORST, THE RIGHT TO JUSTIFICATION (Jeffrey Flynn trans. 2011) (arguing that democracy requires at a minimum that coercive action be justified to the persons it affects in a way they can understand).

[179] *See infra* Part VI for a more extensive defense of this claim.

[180] On the distinction between instrumental and deliberative reason, see JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION 301-404 (Thomas McCarthy trans., 1985).

affected public.[181] Professors William Eskridge and Ferejohn embrace Richardson's conception of administrative reason, and explicitly recognize that agencies have a central role to play in deliberation over the public purposes advanced in statutes.[182] 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.[183] They give the example of the Equal Employment Opportunity Commission's guidelines on pregnancy discrimination, which were motivated by Commission staff's interpretation of Title VII's purpose, the constitutional value of equal protection, and broader public norms.[184] After endorsing this deliberative exercise, however, they later suggest that the Court had sound, if contestable, reasons to reject EEOC's interpretation in *General Electric Co. v. Gilbert*[185] and force Congress to explicitly decide whether discrimination on the basis of pregnancy was a proscribed form of discrimination.

> Judges should not defer and should be skeptical of agency norm entrepreneurship that pushes superstatutory evolution into significant collision with other fundamental norms, unless Congress after deliberation and public feedback has authorized such entrepreneurship. This antideference precept helps explain why the Court in the pregnancy cases was unwilling to go along with the EEOC's expansion of Title VII to include a huge new area of employment rules.[186]

By saying that the anti-deference principle "explains" rather than "justifies" the Court's ruling, the authors signal their ambivalence about a judicial decision which overrode an agency interpretation which they believe to have been correct. The argument is torn between respecting the deliberative competencies of agencies in deliberating over fundamental norms, and an anxiety about normative developments that have not been unambiguously authorized by Congress. They retain faith that courts can ensure the integrity of the deliberative process by requiring Congress explicitly to resolve important political questions rather than delegate those choices to agencies.

The major questions doctrine thus rests on a particular political theory of our administrative state: the legislature bears primary responsibility for making the value choices that animate governmental action; the judiciary then must ensure that the legislature retains that responsibility by presuming that Congress does not delegate that task to agencies. Accounts like Richardson's, Eskridge and Ferejohn's, however, suggest the reemergence of an alternative theory that I argue

---

[181] HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 214-30 (2003).
[182] ESKRIDGE & FEREJOHN, *supra* note ___, at 77.
[183] *Id*. at 17.
[184] *Id.* at 31-33.
[185] 429 U.S. 125 (1976).
[186] ESKRIDGE &FEREJOHN, *supra* note ___, at 288.

better comports with our institutions and the ideological origins of our administrative state. The next section explores that theory as the basis for a reformation of the major questions doctrine.

IV. THE PROGRESSIVE THEORY OF THE ADMINISTRATIVE STATE

This section gives an alternative account of our administrative state which is based on the American Progressives original understanding of the state they wanted to create. In Part A, I describe the contested theoretical origins of Progressive political thought. In Part B, I describe the Progressive theory. In Part C, I trace the influence of the Progressive theory on the early development of the American administrative state.

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.[187] But the original Progressive vision has long been distorted by legal scholars into a technocratic vision of administrative expertise.[188] Progressive political thought has begun to receive renewed attention from legal scholars aiming to reinvigorate an administrative state that will reduce social and economic inequality by democratic means.[189] At the same time, conservative critics of the administrative state routinely link it to the philosophy of the American progressives, and their adoption of German conceptions of the state.[190] According to scholars like Philip Hamburger, the

---

[187] *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR 213-53 (1956) (describing the influence of Progressive thought and politics on New Deal reforms) *and* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 (1981) (describing the state-building enterprise of the Progressive era as inaugurating our contemporary administrative state) *and* 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) *and* SIDNEY M. MILKIS, THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL 21-51 (1993) (describing the influence of Progressivism on the New Deal).

[188] *See, e.g.* Martin Shapiro, *On Predicting the Future of Administrative Law*, 6 AMERICAN ENTERPRISE INSTITUTE JOURNAL ON GOVERNMENT AND SOCIETY 18 (1982) *and* David B. Spence, "A Public Choice Progressivism, Continued," 87 *Cornell L. Rev.* 398 (2002) *and* Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 Duke L. J. 1565 (2011).

[189] See, e.g. Rahman *supra* note ___.

[190] HAMBURGER, *supra* note ___; JEAN M. YARBROUGH, THEODORE ROOSEVELT AND AMERICAN POLITICAL THOUGHT 19-24, 44-46 (2012) (discussing Roosevelt's political thought and Hegel's theory of the state); RONALD J. PESTRITTO, WOODROW WILSON

Progressives introduced dangerous, Germanic conceptions of the state to American law and thus undermined Anglo-American constitutionalism. By following German public law in supposing that administrators could develop binding rules, the Progressives undermined democratic values and the rule of law.

Such scholarship misunderstands the Progressive conception of democratic constitutionalism. The Progressives were indeed influenced by German conceptions of administrative power, but, unlike their German cousins, they sought to make administration democratically accountable.[191] 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.[192] 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 questions of political value would be fleshed out in dialogue between administrators, elected representatives, and the public at large. Administrative agencies would synthesize and operationalize three different instantiation of public opinion: legislation, presidential policy preference, and direct involvement by affected parties.

It is true that American Progressives were influenced by German theories of administration, but their inspiration was not Weber, but G.W.F. Hegel.[193] Hegel had identified, almost a century before Weber, the importance of administrative bodies which were functionally differentiated, hierarchically organized, and staffed by expert officials.[194] But unlike Weber, who understood the state to be a "monopoly on the legitimate means of violence,"[195] Hegel understood the state as an embodiment of "concrete freedom,"[196] meaning that it institutionalized the Enlightenment ideals of individual and collective self-determination. 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, he argued that an administrative state was essential to mitigate poverty, social antagonism, and market failures in

---

AND THE ROOTS OF MODERN LIBERALISM (2005) (discussing the Hegelian origins of Woodrow Wilson's theory of administration).

[191] Blake Emerson, *The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought*, 77 REV. POL. 545 (2015)

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

[193] *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 (Jack Rabin & James S. Brown eds., 1984).

[194] *See* Michal W. Jackson, *Bureaucracy in Hegel's Political Theory*, 18 ADMIN. & SOC. REV. 139 (1986).

[195] Weber, *supra* note ____, at 78.

[196] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 260 (Allen Wood ed., H.B. Nisbet, trans. 1999)

the interests of preserving public freedom.[197] But Hegel insisted that administration was not merely a matter efficient bureaucratic performance. Rather administration was tasked with "upholding legality and the universal interests," and to resolve conflicts between social groups by reference to "the higher viewpoints and ordinances of the state."[198] To accomplish this task, administrative bodies and their officials not only needed expertise, but also "*direct education in ethics and in thought*."[199]

Bureaucratic reason was for Hegel a form of substantive, rather than purely instrumental, reason. That is to say, he supposed that when administrators interpreted abstract legal norms, they would draw on broader public norms and social understandings to flesh out their concrete content.[200] 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.[201] It was in this respect that the American Progressives departed from their German forebearers.

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 to control the excesses of private law,

---

[197] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §§ 236-45 (ALLEN WOOD ED., H.B. NISBET, TRANS. 1999) (describing the inequalities and antagonisms of market-driven "civil society" and the role of law, administration, and regulation in redressing them). On the political background on Hegel's political philosophy, *see* REINHART KOSELLECK, PREUßEN ZWISCHEN REFORM UND REVOLUTION: ALLEGEMEINES LANDRECHT, VERWALTUNG, UND SOZIALE BEWEGUNG VON 1791 BIS 1848 263 (3d ed. 1989)(1967) (Ger.) (arguing that Hegel "had not only sketched the picture that the Prussian civil servants had of themselves, but rather the real situation itself") (author's trans.) *and* Gertrude Lübbe-Wolff, *Hegels Staatsrecht als Stellungsnahme im Ersten Preussischen Verfassungskampf*, 35 ZEITSCHRIFT FÜR PHILOSOPHISCHE FORSCHUNG 476, 476 (1981) (Ger.) (interpreting the *Philosophy of Right* in part as "Hegel's constitutional plan" during the first constitutional struggle in Prussia in the early 1820s) (author's trans.).

[198] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT §289 (Allen Wood ed., H.B. Nisbet, trans. 1999).

[199] *Id.* at § 296.

[200] *See* Carl K. Shaw, *Hegel's Theory of Modern Bureaucracy*, 4 AM. POL. SCI. REV. 381, 383 (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."), *and* Robert Brandom, *Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Content and Structure of Conceptual Norms*, 7 EUR. J. PHIL. 164, 172-8 (1999) (arguing that on Hegel's theory legal norms develop through their "administration" by acknowledged authorities within a discursive community of equal persons).

[201] Hegel, *supra* note ___, at §§ 318, 279.

commodity exchange, and industrial organization.[202] They thus emphasized the need for social legislation to provide goods and services and to protect the public against monopoly.[203] The overall thrust of this project was succinctly articulated by John Dewey and James Tufts:

> it 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.[204]

Dewey, alongside other Progressives like Woodrow Wilson, and Frank Goodnow, therefore followed Hegel in arguing for administrative institutions that would provide the material and social requisites for individual freedom on the broadest possible scale.

Unlike Hegel, however, these Progressives were profoundly committed to democratic principles.[205] In his seminal essay on "The Study of Administration," which inaugurated the American field of public administration at the very advent of our administrative state 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 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."[206] But Wilson emphasized that, when administration tackled such "greater principles" it must be guided by public deliberation: "administration in the United States must remain sensitive at all points 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 election and constant public counsel, as to find arbitrariness or class spirit out of the question."[207]

The Progressives 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 stressed that "[I]n the absence of an

---

[202] *See* Emerson, supra note ____, *and* HAMBURGER, supra note ___.
[203] Rahman, supra note ___, at 1337-45.
[204] JOHN DEWEY & JAMES H. TUFTS, ETHICS 472 (1908).
[205] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (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 lawmaking and policy makers accountable to the people.")
[206] Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 199, 201 (1887) (quoting Hegel and Stein, respectively, though the quotation from Stein is not attributed). *See also* Fritz Sager & Christian Rosser, Fritz Sager & Christian Rosser, *Weber, Wilson, and Hegel: Theories of Modern Bureaucracy*, 69 PUB. ADMIN. REV. 1136 (2009).
[207] Wilson, *supra* note ___, at 217.

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."[208] 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."[209]

Dewey defined the state as a "public articulated."[210] The "public" was brought into being by the externalities caused by economic activity. But without an institutional forum in which to express its problems, the public was "unorganized and formless."[211] In the state, the public was institutionally embodied and empowered by political institutions. Administrative agencies were then not merely the best technical means for realizing clearly identified purposes, but were part and parcel of the process by which such purposes were identified and elaborated. As Professor Elizabeth Anderson explains, "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."[212] This democratic notion of the state gave administrative agencies a central role to play in the deliberative process, rather than placing them outside of politics as an efficient instrument for realizing democratic will. Dewey thus argued 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 center of political struggle."[213] Administrative agencies would not merely be means for implementing the results of political struggles waged in other camera, but would provide additional fora 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, and who was influenced by Hegelian conceptions of administration,[214] distinguished between legislation as the expression of democratic will, and execution as the deed which carried out this will. 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 executive authority."[215] But the Progressives did not believe

---

[208] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1954 ed., 1929), 206.
[209] Dewey, *supra* note ___, at 208.
[210] Dewey, *supra* note ___, at 67.
[211] *Id.*
[212] Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 13 (2006).
[213] JOHN DEWEY, INDIVIDUALISM OLD AND NEW 54-6 (1999 ed. 1930).
[214] Christian Rosser, *Examining Frank Goodnow's Hegelian Heritage: A Contribution to Understanding Progressive Administrative Theory*, 45 ADMIN. & SOC'Y 1063 (2013).
[215] FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 24 (1900).

that administrative action was completely determined by the statutory authority under which it acted. As Wilson argued, "The scope of administration is . . . largely defined and limited . . . to 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*."[216] While agencies were bound by law, they 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 advocated.[217] 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 that "while . . . in the interest of securing the execution of state will, politics should have a control over administration, in the interest of both popular government and efficient administration, that should not be permitted to extend beyond the limits necessary in order that the legitimate purpose of its existence be fulfilled."[218] The President, in other words, ought not to stifle out other sources of democratic input by prescribing in full the course of administration to the exclusion of other inputs from the public and the judgment of administrators. Wilson likewise argued that the President could serve as a "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 judgments alike of party and of men."[219] He would therefore steer administration by bringing his rhetorical distillation of public opinion to bear on administrative activity, but he would delegate to his cabinet and the agencies substantial authority to determine the contents of public policy in consultation with affected groups.

In this Progressive understanding of the state, judicial review would take a fairly restrained form.[220] Frank Goodnow argued that the courts in the early twentieth century imperiled administrative efficiency with their de novo review of questions of law and fact. He hoped that:

> When we develop an administrative procedure which is reasonably regardful of rights, e.g. notice and a hearing to the person affected by the administrative determination, it may well be that the courts will change

---

[216] Woodrow Wilson, *Notes for Lectures on Administration at the Johns Hopkins*, in THE PAPERS OF WOODROW WILSON, VOL. 7 1890-1892, 128, 128-9 (Arthur Link ed., 1969).

[217] Stephen Skowronek, *Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2087 (2009).

[218] Goodnow, *supra* note ___, at 38.

[219] Wilson, *Constitutional Government in the United States* (1921 ed., 1908), 76.

[220] Kramer, *supra* note ___, at 216.

> 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 procedures of administrative authorities.[221]

Goodnow therefore believed that internal administrative procedures, rather than external judicial review, could serve to protect private rights and guarantee conformity with law. This suggestion dovetailed with Wilson and Dewey's suggestion for administrative proceedings which would bring to bear public opinion into administrative deliberations. 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. In keeping with the Progressives' revolt against legal formalism, [222] Roscoe Pound assailed the *Lochner* Court's "mechanical jurisprudence,"[223] which had imperiled the early development of administrative institutions in the United States. Pound embraced instead a Hegelian-inspired "sociological jurisprudence"[224] that would be responsive to the cultural context, historical development, political purpose, and practical effects of law rather than categorical conceptions of natural law and inflexible constitutional boundaries. Judicial doctrines of administrative power moved away from a formalist conception of the separation of powers to a functionalist conception, in which administrative agencies might engage in "quasi-legislative" activities. [225] Administrative agencies like the Forest Service began to include the public in the administrative process "to reach out for the more timid and modest opinion, and for the sifting of the bolder and more aggressive type." [226] Progressive administrators under Woodrow Wilson sought to protect freedom of conscience during WWI through "individualized participation in the administrative state."[227]

---

[221] FRANK GOODNOW, SOCIAL REFORM AND THE CONSTITUTION (1911). 231.

[222] Morton G. White, *The Revolt Against Formalism in the Social Thought of the Twentieth Century*, 8 J. HIST. IDEAS, 131, 132 (1947) (describing the connection between Dewey's pragmatism and Oliver Wendel Holmes legal realism and Hegel's "evolutionary" conception of rationality).

[223] Roscoe Pound, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

[224] Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I: Schools of Jurists and Methods of Jurisprudence*, 24 Harv. L. Rev. 591 (1911).

[225] *See, e.g.* Erie R. Co. v. Bd. of Pub. Util. Comm'rs, 254 U.S. 394, 413 (1921).

[226] JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 199 (1927).

[227] Jeremy Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1084, 1090-91 (2014).

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 administrative law was of crucial importance to democratic governance and individual liberty.[228] Statutory programs advancing democratic goals were "conditioned upon rules and regulations emanating from enforcing authorities."[229] 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 the vague contours."[230] The surest protection for democratic constitutionalism in the administrative state would not be to retain extensive legislative control, but instead to govern administration through a professional civil service, a "spirited bar," and "easy access to public scrutiny."[231] 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,[232] and more radical forms of democratic planning in agriculture[233] aimed to involve the affected public in administrative deliberation over planning. New Deal administrative law scholars like Walter Gellhorn argued that such Progressive forms of participatory administration served to "democratize our governmental processes," by bringing "the interests and individuals immediately affected an opportunity to shape the course of regulation."[234] The Administrative Procedure Act of 1946 codified the Progressive innovation of public participation in executive policymaking with its notice-and-comment rulemaking provisions, which require agencies to receive and respond to comments when they proposed binding substantive rules.[235]

The Progressive theory that lay the foundation for the New Deal has been obscured because of the subsequent growth of anti-statism,[236] the equation of

---

[228] Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 616 (1927).
[229] *Id*. at 614.
[230] *Id*.
[231] *Id.* at 618.
[232] DAVID. E. LILIENTHAL, TVA: DEMOCRACY ON THE MARCH 204 (1944) (quoting Dewey to describe the ideology of participation at the Tennessee Valley Authority).
[233] Jess Gilbert, *Planning Democracy: Agrarian Intellectuals and the Intended New Deal* 2 (New
Haven: Yale University Press, 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").
[234] WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 122 (1941).
[235] 5 U.S.C. § 553 (2012).
[236] *See* IRA KATZNELSON, DESOLATION AND ENLIGHTENMENT: POLITICAL KNOWLEDGE AFTER TOTAL WAR, TOTALITARIANISM, AND THE HOLOCAUST (2003).

democracy with interest-group bargaining,[237] and, later, the rise of economic rationality as a hegemonic framework for policy analysis.[238] We have therefore lost sight of the original Progressive intent that animated the project of American state-building. I am suggesting here that we should give this original understanding a second look. The Progressives conceived administrative agencies as engaging the democratic public in three ways: through the implementation of democratically enacted law, through the input of the President, and through deliberation with the affected public. They presumed that agencies would tackle important, ethically charged political questions, but they aimed to ensure that they would do so in a rational and inclusive fashion. They were skeptical that the courts were the best forum in which to ensure the democratic integrity of state action, and thus sought to enhance the democratic credentials of the administrative process itself.

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. This is because the Progressive theory acknowledges the fact that agencies resolve important value questions, but respects 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 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 the 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

---

[237] *See* THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

[238] *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991) and Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

The Progressives anticipated that administrative agencies would not only identify efficient means to achieve statutory ends, but also engage into 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.[239] The Department of Transportation's approval of highway routes implicated the relative importance of park conservation, racial equity, and local economic development.[240] The The Supreme Court's development of the novel theory of disparate impact discrimination relied upon the interpretations of the Equal Employment Opportunity Commission,[241] which were grounded in the Commission's considered position that discrimination included not only intentional bigotry but a "condition of pervasive exclusion."[242] Decisions by the Internal Revenue Service on tax exemptions,[243] and Federal Communications Commission's decisions on rate increases,[244] have implicated constitutional norms of equal protection and statutory norms of material 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 news understandings of foundational public norms in the course of performing their statutory duties.[245] When agency interpretations implicate constitutional norms, or more broadly attempt to shift the conceptual frame by which to determine whether private conduct is lawful or unlawful, they plainly address questions of deep economic and political significance. The major questions presumption that Congress does not intend agencies to make such decisions thus flies in the face of a common aspect of agency practice, which Congress has nowhere generally rejected. If rigorously

---

[239] JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

[240] Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

[241] *Griggs*, 401 U.S. at 433 (giving "great deference" to the E.E.O.C's conclusion that professionally developed ability tests must be "job related").

[242] EQUAL EMP. OPPORTUNITY COMM., "THEY HAVE THE POWER – WE HAVE THE PEOPLE": THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN HOUSTON, TEXAS, 1970 i (1970).

[243] Bob Jones Univ. v. U.S., 461 U.S. 574 (1983)

[244] Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010).

[245] See Gilliam Metzger, *Administrative Constitutionalism*, Tex L. Rev.

implemented, it might prevent agencies from playing the important role they have historically in advancing our understanding of the abstract political commitments established by statute.

B. Presidential Oversight of Administrative Statutory Interpretation

The Progressives argued that the President had special authority as a spokesman for public opinion to guide administrative implementation of statutory mandates. Our case law and institutional structure reflects this vision. In *Chevron*, the Court explicitly acknowledged that the President had 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."[246]

This aspect of the reasoning in *Chevron* realizes the Progressives' conception of the important role the President plays in guiding administrative discretion according to her or 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. Though this process began during the Reagan Administration as an anti-regulatory, technocratic effort to restrict administrative output,[247] it has evolved since then into a much more sensitive process in which the public values the President endorses—such as "equity, human dignity, fairness, and distributive impacts"—can be invoked by agencies to justify their regulatory course of action.[248] Since agencies are required to submit any regulation that has an economic impact of $100 million or more to OIRA for review,[249] as well as any Guidance document with a similar effect,[250] most agency interpretations that a court could plausibly construe as implicating as "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, and consequently will benefit from the democratic credentials of his office. The

---

[246] *Chevron*, 467 U.S. at 865-66.
[247] Executive Order 12,291, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 17, 1981).
[248] Executive Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).
[249] Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[250] Peter Orzag, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies. Guidance for Regulatory Review (March 4, 2009), https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

practice of Presidential control thus has largely realized the Progressive ambition of guiding administration according to the President's distillation of public opinion.

The Progressive theory of administration does not go so far as some presidentialist theories of administration in privileging presidential political control over statutory control,[251] or in supposing that any of the president's policy preferences could justify agency decisions if stated in a public-regarding rather than purely partisan way.[252] Recall that Goodnow and Wilson's Progressive vision of the President was as a relatively passive Chief Executive, who would guide administration according to public opinion, but give significant policy autonomy to agency heads and administrative judgment.[253] This vision comports much more with Professor Peter Strauss' understanding of the president as an "overseer" of administration, rather than a "decider" of administrative policy.[254] Unless legislation directly confers authority to the President, rather than to a secretary of an executive department or an independent administrative body, the President's policy preference should have only influence, rather than binding authority, on the administrative decision-maker. Moreover, if an agency wishes a court to take the President's input seriously in determining the democratic credentials of its statutory interpretations, this input must be presented in a way that is consonant with the statute's purposes.[255] Any more extreme form of presidential administration would turn administrative agency's delegated lawmaking authority into opportunity for arbitrary assertions of presidential will.

The Progressive theory acknowledges that agencies are engaged participants in a process of inter-branch deliberation between the Executive and the Legislature over the meaning of the laws that goes well beyond the Congressional lawmaking process and legislative enactment. It therefore accommodates Jerry Mashaw's finding that agencies are more willing than courts to 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."[256]

The President's constitutionally vested, judicially recognized, and administratively institutionalized power to bring her understanding of public values to bear on agency decisions falls away in the major questions cases

---

[251] Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541, 549–50 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, The Unitary Executive in the Modern Era, 1945–2004, 90 IOWA L. REV. 601, 730 (2005).

[252] Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009).

[253] *See supra* Part V.B.

[254] Peter L. Strauss, *Overseer or "The Decider"?: The President In Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[255] Stack, *supra* note ___, at 925-27.

[256] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 519 (2005).

entirely. For example, in *Brown & Williamson*, it did not matter to the Court, that the President had taken public ownership of the Agency's decision to regulate tobacco. In the major questions cases, the court narrows its focus to statutory meaning alone, while ignoring the possibility that administrative agencies might draw deliberative democratic authority from the input of the President.

C. Agency Deliberation with the Affected Public

The Progressives argued that the public must be involved in the administrative process to ensure its democratic legitimacy. Our current institutions reflect this to a significant degree. Notice-and-comment rulemaking has often been defended according to its ability to reinforce the deliberative democratic legitimacy of administrative action. Kenneth Culp Davis, for instance, observed that

> one of the greatest inventions of modern government. . . . Affected parties who know facts that the agency may not know or who have ideas or understandings 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.[257]

The notion 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.[258] Courts then police this process by ensuring that agencies draw reasonable conclusions from the comments they receive, address all significant comments, and ensure that all major policy choices are sufficiently "ventilated."[259] The democratic function of notice-and-comment rulemaking was succinctly summarized by Judge McGowan of the D.C. Circuit in *Weyerhaeuser Co. v. Costle*: "if 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."[260] Notice-and-comment rulemaking thus is capable of institutionalizing the American Progressives' core concern with developing a participatory administrative process that engages the affected public in grappling with questions of political value that have not been unambiguously settled by legislative enactment.

---

[257] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 142 (3rd ed. 1972)
[258] Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1712 (1975)
[259] Motor Vehicle Association v. State Farm, 463 U.S. 29 (1984); Automotive Parts and Accessories Association v. Boyd, 407 F.2d. 330, 338 (D.C. Cir. 1968); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2nd Cir. 1977).
[260] 590 F.2d 1011, 1027 (D.C. Cir. 1978) (internal quotations omitted).

To be sure, the notice and comment process 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,"[261] such as hearings and informal consultations. Stylized or not, 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 broad process of stakeholder engagement in our administrative state.[262] This process has become even more widely accessible with the advent of e-rulemaking.[263] 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.[264] 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 question questions doctrine denies these aspects of the rulemaking process entirely.

It might be argued that, because of significant inequalities of participation and influence in the administrative process,[265] participatory rulemaking does not in fact 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 major questions. Inequality of influence is, unfortunately, endemic to our entire political process, including Congress.[266] If significant degrees of inequality of public influence

---

[261] E. Donald Elliot, *Reinventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992).

[262] See William Funk, *Public Participation and Transparency in Administrative Law*, 61 ADMIN. L. REV. 171 (2009) (describing the evolution and deepening of public participation in administration); Marissa Martino Golden, I*nterest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998) (finding significant levels of public interest engagement in rulemaking).

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

[264] See, e.g. SUSAN ROSE-ACKERMAN CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES 10 (1995)(comparing U.S.'s relatively participatory rulemaking process to Germany's corporatist and largely unreviewable rulemaking procedure); Catherine Donnelly, *Participation and Expertise: Judicial Attitudes in Comparative Perspective*, in COMPARATIVE ADMINISTRATIVE LAW 357-72 (Susan Rose-Ackerman and Peter L. Lindseth, eds. 2010) (finding a much stronger emphasis on public participation in U.S. administrative law than in the United Kingdom and European Union).

[265] *See, e.g.* Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006) *and* Wendy Warner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of the EPA's Air Toxic Emissions Standards*, 63 Admin. L. Rev. 99 (2011).

[266] See, e.g. LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GUILDED AGE 259 (2008) (finding that Senators are twice as responsive to the

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,[267] the doctrine functions to empower the courts, rather than Congress. Courts are not well geared to democratic forms of participation, because their primary function is to adjudicate cases and controversies, and protect the rights of individuals and minorities, rather than to settle polycentric policy-disputes. [268] 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 difficult showing a concrete and particularized harm to a legally protected interest than does the regulated community.[269] Because major questions doctrine merely empowers the judiciary, rather than Congress or agencies, to resolve major questions, it therefore 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 economic and political significance, it

---

opinions of high-income constituents as low-income constituents, and not at all responsive to the opinions of low income constituents); Martin Gilens and Benjim I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. POL. 564 (2014) (observational study concluding that "economic 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").

[267] Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015) (finding that "the 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 . . . .")

[268] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFF. U. L. REV. 881, 894 (1983) (noting that the role of judiciary is an "undemocratic one," which "protects individuals and minorities against impositions of the majority."); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that judicial adjudication is best suited for resolving binary disputes between rights holders than "polycentric" policy questions, involving multiple considerations and parties, which are best settled by democratic decision procedures or administrative management).

[269] Lujan v. Defenders of Wildlife, 504 U.S. 555 (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).

incentivizes 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 the 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.[270] 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.[271] 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 further into a technocratic rather than value-oriented form of policy discourse. This retreat 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.

D. Major Questions as an Obstacle to Efficient Pursuit of the Public Interest

The major questions doctrine does not acknowledge the substantive importance of efficient bureaucratic performance in a democratic state. Recall that the Progressives were motivated to build and legitimate an administrative state because they wanted to furnish the requisites for public freedom, as such requirements were understood by the democratic public. They believed that administrative agencies had the institutional capacity to bring public power to bear efficiently and on a massive scale to further social emancipation. The major questions doctrine shows the perils of privileging legislative control without due regard for this practical need of speedy administrative resolution of social problems. In *Brown & Williamson*, the FDA was attempting with its tobacco and cigarette regulations to mitigate a public health crisis which caused the death of 400 thousand Americans every year.[272] The court acknowledged the force of this concern, but nonetheless struck down the rule as outside of the agency's statutory authority. The laudable interest in ensuring that the public effectively deliberates over the commitments that guide state action in this instance delayed an urgent intervention into a serious public health issue. The balance between deliberative

---

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

[271] Jerry Mashaw, *Small Things Like Reasons Are Put in a Jar*, 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").

[272] *Brown & Williamson*, 529 U.S. at 128.

integrity and efficient protection of the public interest therefore has not been struck with the major questions exception to agency deference.

The Progressive conception of the state thus comports with salient and normatively significant aspects of our current state structure in a way that the major questions doctrine and its attending political theory does 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 to bolster the democratic credentials of the state as a whole.

VI. REFORMING MAJOR QUESTIONS

The major questions doctrine rests in part 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' choices of principle and policies, and that agencies should be restricted to the purely instrumental task of implementing these definitively established goals. I have suggested that this vision of the administrative state is neither descriptively accurate nor normatively appealing. I repaired to the American Progressive's 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 one important part of a process of inter-branch dialogue and public discourse over the content of public purposes. *Chevron* acknowledged that many important 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 non-Congressional and non-statutory 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 which recognizes the important interest in reinforcing deliberative democratic governance in administrative law, but which does not trade on dubiously inflated notions of judicial competence and deflated conceptions of administrative agencies' ethical capacities. In section A, I describe my innovation. In section B, I apply it to several of the major questions cases: *Brown & Williamson*, *Gonzalez*, *King*, and *Texas v. U.S.*

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 important 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 other procedure of comparable deliberative intensity, and (2) the relevant questions of economic and political significance the court identifies have been properly "ventilated" and addressed in the course of the rulemaking.[273] The rule thus follows *Mead* in treating a Congressional grant of notice-and-comment authority as a "good indication" that Congress intended to leave the interpretive question to the agency.[274] As the Court recognized in *Mead*, notice-and-comment procedures tend to "foster the fairness and deliberation."[275] But my proposed approach does not treat such a grant of lawmaking authority as necessary or sufficient for the courts to give serious consideration to the interpretative perspective of an agency. Even if an agency doesn't have rulemaking authority, its opinion on major questions might be accorded great weight if its official interpretation met the above criteria of discursive rationality and value ventilation. Conversely, an agency would not receive *Chevron* deference, even if it did have such lawmaking authority, if it did not use procedures which met these same criteria.

Such a requirement would require both courts and agencies to explicitly state what major questions were at issue, thus heightening the transparency of public decision-making. It would encourage agencies to cover their bases by always considering 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 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. 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 interpretations documented a process of extensive public input over the relevant value questions comparable to a rulemaking proceeding would *Chevron* deference apply. This approach would allow the possibility that agencies could resolve important policy questions, but would insist that they do some in a deliberative, inclusive, and transparent fashion. In this way, public deliberation would be reinforced better than it currently is under the major question doctrine's court-centric, technocracy-forcing approach.

This approach is a marginal 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 also to other agency interpretations made in furtherance of their power to make binding decisions with the force of law.[276] In some cases, therefore, an

[273] Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d. 330, 338 (D.C. Cir. 1968).
[274] *Mead*, 533 U.S. at 229.
[275] *Id.* at 230.
[276] *Id.* at 231.

interpretive rule or opinion may receive *Chevron* deference.[277] In addition, an agency's interpretation of its own regulations is given even more than *Chevron* deference—"controlling weight unless it is plainly erroneous or inconsistent with the regulation."[278] This allows agencies to conduct a great deal of important policy work without the deliberative benefits of the notice-and-comment procedure. My proposal, by contrast, would require that any agency interpretation which raises a question of economic or political significance must be 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, and agency deliberation which rationally responds to all relevant input it receives. 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 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. 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."[279] This interpretive rule therefore lacked any of the trappings of informal rulemaking, and concerned an issue subject to intensive, contemporaneous, and ethically significant 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 the fact that policy shifts through administrative action are an essential feature of life within our regulatory state, which would be very costly if not impossible to prevent entirely. But it attempts nonetheless 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- and will-formation. At the same time, it does not trespass the basic principle of administrative law that agencies are generally free to choose which procedures to use within their delegated authority.[280] Instead, it calibrates the level of deference owed to the

---

[277] NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–257, (1995).

[278] Auer v. Robbins, 519 U.S. 452, 461, (1997), *quoting* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[279] *Gonzales*, 546 U.S. at 269.

[280] Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947) ("the 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").

agency according to the deliberative intensity of the procedure it elects to use to reach its interpretive conclusion.

The legal justification for this approach is similar to that of the major questions doctrine, as applied to the Administrative Procedure Act 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 procedural constraints. The under-enforced norm of non-delegation is protected by ensuring that procedural safeguards are in place to bound and inform the exercise of agency discretion. But this presumption cannot go so far as to undermine textual distinctions drawn by the Act. By granting an exemption from notice-and-comment procedures for "interpretative rules and statements of policy," Congress indicated that rules with greater binding effect should be promulgated with more robust procedural protections.[281] At the same time, by not defining which rules are "substantive" and which are "interpretive," the Act provides agencies with a degree of flexibility in exercising their delegated powers.[282] Courts can best balance the twin purposes of procedural protection and regulatory flexibility by only requiring that rules be treated as "substantive" when they raise questions which the court determines to have deep economic and political significance.

Under my proposed revision of the major questions doctrine, judicial deference to agencies' resolution of major questions would require not only the use of deliberative decision-making procedures, but also that the relevant economic or political questions had been ventilated and rationally addressed by the agency on the record. In other words, the agency's "concise statement of basis and purpose"[283] would have to discuss the major questions at issue, taking into account any relevant concerns raised by commenters. This requirement is not 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."[284] 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 go to show that they 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.

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

---

[281] 5 U.S.C. § 553(d) (2012).

[282] Davis, *supra* note ___, 126-27 (describing the distinction between legislative and interpretive rules as a continuum, rather than as an either-or proposition).

[283] 5 U.S.C. § 553 (c).

[284] Industrial Union Dept. v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

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 *Brown & Williamson*, one question of political significance was: how should the agency balance competing consideration of the public health risk caused by smoking and public values of individual responsibility and choice? Responding to public comments on this topic, the final rule engaged with the question head on:

> 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.[285]

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,[286] the allocation of regulatory responsibilities between the state and federal government,[287] and the commercial rights of retailers.[288] The agency also referenced the President Clinton's Wilsonian engagement with the public over the subject matter of the rule, focusing on public comments addressed directly to him by a coalition of medical associations,[289] remarks to the press explaining the regulatory plan,[290] and the input of the Ad Hoc Committee of the President's Cancer Panel.[291] The rule is thus a good example of an agency embracing the Progressive conception 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 presidential 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 as this is that it is likely that most if not all relevant issues will in fact be raised by commenters, and therefore the agency will have a legal responsibility to address them. The courts should nonetheless retain the responsibility to scrutinize the record to ensure that important value choices and implications, as well as economic effects, have not escaped the agency's notice. The focus of judicial review of such major

---

[285] 61 Fed. Reg. 44,418 (Aug. 28, 1995).
[286] Id. at 44,421.
[287] Id. at 44,430.
[288] Id. at 44,434.
[289] Id. at 44,418.
[290] Id. at 44,419.
[291] Id. at 44,463.

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 any reference to the agency's deliberative engagement with the President and the affected public.

King v. Burwell offers a starkly different case. There, the IRS had promulgated a regulation which curtly responded to some commenters' argument that the language of the Affordable Care Act limits health care tax credits to those who enrolled on State Exchanges. In a single paragraph, the IRS simply asserted, without offering an argument, that the statutory language supported the interpretation that tax credits were also available on federal and other exchanges, and that the legislative history "does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."[292] It concluded that the Services' proposed interpretation "is consistent with the language, purpose, and structure . . . of the Affordable Care Act as a whole."[293]

These statements are conclusory. The IRS did not actually offer an argument on the major issue the Court subsequently addressed, namely whether the purpose or statutory scheme required the availability of tax credits on federal as well as state exchanges. Given that the IRS did not engage in a substantive discussion of the policy questions implicated by one of the "Act's key reforms,"[294] it was reasonable 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 Act in light of its overall structure and its legislative history; had it acknowledge background concerns economic liberty and dual sovereignty that arguably animated the *King* litigation; in that case the court ought to have deferred to the agencies interpretation. But the IRS' 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,"[295] 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. U.S.*, the Obama administration promulgated its deferred action policy, not through rulemaking, but through an enforcement memorandum.[296] The agency did not document any kind of robust public consultation process that would have indicated deliberative democratic engagement over the policy shift. DHS' failure to record any comparable deliberative process undermined its democratic authority to undertake a significant policy shift without explicit Congressional authorization. This does

---

[292] INTERNAL REVENUE SERVICE, HEALTH INSURANCE PREMIUM TAX CREDIT. FINAL RULE, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).
[293] *Id.*
[294] *King*, 135 S.Ct. at 2489.
[295] *Id.*
[296] Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3–4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

not mean that the Fifth Circuit was correct that the agency's interpretation of the law was invalid. It simply means a reviewing court would have no good reason to *defer* to the agency's interpretation of the Act under these circumstances. Under the approach I am advancing here, it does not matter whether such a major policy decision is categorized by the agency as "guidance," 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 document a value-oriented process of public engagement to qualify for deference.

VI. CONCLUSION

Major questions will continue to surface regularly in administrative activity. For example, administrative agencies have recently promulgated statutory interpretations that require elaborate planning by local housing authorities to affirmatively further fair housing,[297] and that allow the regulation of the Internet as a public utility.[298] Courts can without difficulty find questions of deep economic and political significance in such areas. When they do so, they should take care to observe the basic deliberative principles that legitimate administrative activity in our Progressive administrative state. They should not reflexively assume that the implication of such value choices precludes deference to the agency, and permits the court to determine the issue de novo without any solicitude for administrative judgment. 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. In this way, courts can respect the institutional competence of agencies as participants in the articulation of democratic purposes, without abdicating their responsibility to ensure that We, the people retain authorship over the rules that bind us.

[297] Department of Housing and Urban Development, Affirmatively Further Fair Housing, Final Rule, 80 Fed. Reg. 42349 (2015).
[298] Federal Communications Commission, Protecting and Promoting the Open Internet, Final Rule, 80 Fed. Reg. 19738, 19746 (April 13, 2015).