ADMINISTRATIVE ANSWERS TO "MAJOR QUESTIONS": A PROGRESSIVE THEORY OF AGENCY STATUTORY INTERPRETATION

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Abstract: This Article critiques the legal and theoretical premises of the "major questions doctrine," and proposes a revision to 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 of 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 therefore propose that the major questions doctrine should be reformulated: An agency's resolution of a "major question" should receive deference if it is promulgated through a deliberative process, such as notice-and-comment rulemaking, and that process has adequately addressed the relevant political and economic questions.

INTRODUCTION

We live in an "administrative state."[1] Bureaucrats and political appointees make rules of general applicability, adjudicate individual cases, and enforce the

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

The latest doctrinal expression of this conflicted partnership between democratic constitutionalism and bureaucratic institutions is the "major questions doctrine."[5] This doctrine is a prominent exception to the general principle of judicial deference to administrative interpretations of statutory ambiguities.[6] Courts will normally afford agency interpretations of such ambiguities some degree of weight or deference, depending on the level of authority Congress has delegated to the agency and the formality of the procedure through which such interpretations have been issued.[7] However, in a series of cases in the past three decades, the Supreme Court has held that where a statutory ambiguity raises a question of great "economic and political significance," it will presume that Congress did *not* intend the agency to resolve the issue.[8] Instead, the Court will

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[1] City of Arlington, Tex. v. F.C.C., 133 S. Ct. 1863, 1879 (2013) (Robert, J., dissenting)(". . . the danger posed by the growing power of the administrative state cannot be dismissed."); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010) ("The growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state."); Fed. Mar. Comm'n v. S. Carolina State Ports Auth., 535 U.S. 743, 755 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state."). *See generally* DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (1948); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983); JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

[2] U.S. CONST. Preamble.

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

[4] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131-4 (1980); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 289-300 (2nd ed. 1979); WILLIAM SCHEUERMAN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 1-3, 211-17 (1994).

[5] *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).

[6] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984);

[7] U.S. v. Mead Corp., 533 U.S. 218 (2001).

[8] 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).

resolve the ambiguity itself, without giving any weight or deference to the agency's position.

The major questions doctrine has played a key role in recent, high profile cases. In *King v. Burwell*,[9] 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."[10] 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.[11] 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.[12] "This is not a case for the IRS. It is instead our task to determine the correct reading."[13]

In *Texas v. U.S.*,[14] 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 implicates question[s] of deep economic and political significance."[15] If Congress had wished to give DHS authority to defer removal proceedings for over four million undocumented immigrants, "it surely would have done so expressly."[16]

These cases show that, in spite of its relatively spare use to date, the major questions doctrine has serious implications for some of the most contentious legal controversies. It reserves to the judiciary, rather than the executive, the authority to settle policy questions that statutory law has left unresolved. Because the major questions doctrine is triggered by a court's perception that the interpretive question at issue is politically salient, it authorizes judicial policymaking on precisely those issues that have the highest visibility for the American public. The doctrine therefore licenses judicial intervention in intensely political disputes.

The major questions doctrine deserves close examination not only because it enlarges the judiciary's policymaking power, but also because it succinctly encapsulates a deeply entrenched ideology of administrative law and bureaucratic legitimacy. The doctrine presumes that the reasonable legislator would not have wanted a bureaucratic body to settle policy questions that were left unresolved by statute. Administrative agencies, on this view, are treated as purely technocratic institutions, which are meant only to find the best means to achieve legislative goals. The courts, by contrast, are treated as the guardians of legislative principle and policy, who stand ready to prevent over-zealous executive officials from usurping lawmaking power. These assumptions are rooted in an anti-bureaucratic

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[9] 135 S. Ct. 2480 (2015).
[10] 26 U.S.C. § 36B(b)(2)(A) (2012).
[11] *King*, 135 S. Ct. at 2489.
[12] *Id.*
[13] *Id.*
[14] 809 F. 3d. 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271 (2016).
[15] *Id.* at 181 (internal quotations omitted).
[16] *Id.*

philosophy of the modern state, which is visible in significant strands of scholarly literature and in some important case law.[17] By reconstructing the rationale for the major questions doctrine, we can better understand and assess the premises of this legal and political philosophy.

This Article therefore examines and critiques the jurisprudential and normative foundations of the major questions doctrine. I argue that while the doctrine attempts to reinforce democratic constitutional values, it in fact undermines such values by failing to respect the deliberative capacities of administrative agencies. I present a Progressive theory of the state that better captures the ability of agencies to reason with the affected public. I then propose a modification to the major questions doctrine that would reinforce agencies' democratic function.

The jurisprudential foundation for the major questions doctrine is the constitutional principle that Congress may not delegate its legislative power to another actor without providing an "intelligible principle" to guide and constrain that actor's policy choices.[18] The non-delegation doctrine protects legislative prerogatives by striking down statutes that do not adequately delimit the exercise of administrative discretion. The major questions doctrine takes a less extreme approach. Instead of simply abrogating unconstitutionally broad grants of administrative authority, the major questions doctrine requires courts to interpret regulatory statutes so as to narrow the policy discretion they allocate to administrative bodies. The judiciary can thus respect Congress' general legislative choice to intervene in a given policy area, but prevent administrative agencies from addressing fundamental political questions.

The broader normative justification for the major questions doctrine is to reinforce democratic legitimacy. The doctrine presumes that democracy will be enhanced if administrative agencies do not make important value choices. This presumption is based upon two auxiliary premises. The first premise, which can be traced to the great scholars of the Legal Process School, is that the courts are and should be the primary interpreters of the principles and policies enacted in legislation.[19] The second assumption, which can be traced to Max Weber's sociology of law, is that bureaucracy is and should be an efficient, neutral instrument for implementing goals established by statute.[20]

I argue that these auxiliary premises are descriptively inaccurate and normatively unappealing. As a descriptive matter, they fail to account for salient features of our current institutional regime: that agencies do in fact often make important value choices, and that agencies have procedural mechanisms and institutional capacities that promote deliberative, inclusive, and rational decision-making.[21] As a normative matter, therefore, these premises fail to recognize that administrative policymaking may increase, rather than detract from, the democratic legitimacy of state action.

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[17] See *infra* Part III.
[18] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
[19] See *infra* Part III.A.
[20] See *infra* Part III.B.
[21] See *infra* Part V.

I present a "Progressive" theory of the administrative state that better captures this democracy-enhancing aspect 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. [22] Progressive conceptions of the American state have received renewed attention in recent years, not only from scholars who broadly support their vision of democratically authorized administrative regulation,[23] but also from those who trace the decline of American constitutionalism to Progressivism.[24] Legal scholarship, however, continues to operate under misapprehensions about the content and commitments of Progressivism, usually emphasizing only the Progressive concern with bureaucratic "expertise."[25] This paper therefore reassesses the "original intent" of the Progressives to explain how the state can remain democratic, even when unelected bureaucrats make important policy choices.

The Progressives developed a uniquely democratic conception of the administrative state. They followed the German philosopher G.W.F. Hegel in understanding the state as an institution that guarantees individual and collective freedom through expert regulation and social welfare provision.[26] But, unlike Hegel, they argued that administration must be accountable to public opinion. They believed that agencies could augment the popular legitimacy of the state by bringing the input of the affected public to bear in crafting regulatory policy. They therefore advocated for a state that would maximize both deliberative engagement and programmatic efficiency. As I will show, the institutional architecture of our administrative state reflects significant aspects of the Progressive vision.[27]

This Progressive theory of administration is capacious. It incorporates aspects of the other theories that have been advanced to justify the administrative state, such as legislative democracy,[28] expertise,[29] interest-group pluralism,[30] civic

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[22] See *infra* Part IV.B.

[23] *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).

[24] *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).

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

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

[27] *See infra* Part IV.

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

[29] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[30] Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667 (1975).

republicanism,[31] and presidentialism.[32] But it situates and relativizes each of these theories within a general concept of the state. In the Progressive theory, the state is an institution that articulates and enforces the ethical commitments of the democratic public. Administrative agencies play a pivotal role within this state. Their function is to incorporate the perspectives of multiple actors who possess partial democratic authority. Thus, while acknowledging the President's role in overseeing administrative action, the Progressive theory insulates administrative decision-making from complete presidential control, so as to leave space for other voices to influence the choice of policy. Though it recognizes the importance of efficient bureaucratic performance, the Progressive theory presses a countervailing need for public participation and discursive reasoning in administrative decision-making. By encouraging rational policy development between the legislature, executive, and the public at large, the Progressive theory aims to enhance the democratic legitimacy of state action. This process of institutional deliberation can also reduce the arbitrariness of any given expression of democratic will—such as presidential policy preferences that cannot claim a wide constituency—by bringing it into dialogue with other and countervailing understandings of public needs and values.

This Progressive understanding motivates a reformulation of the major questions doctrine. I suggest that courts should calibrate their deference to an agency's resolution of a major question to the deliberative quality of the agency's policymaking processes. The Court should assess: (1) the degree to which the agency has engaged with and responded to the affected public in making its policy choice; and (2), the degree to which the agency has addressed the relevant questions of political value. Normally, use of the notice-and-comment rulemaking procedure should suffice to demonstrate significant engagement with the affected public. But use of the rulemaking procedure should be neither necessary nor sufficient for judicial deference. Even if the agency proceeds through informal rulemaking, the Court must ensure that the agency's explanation of its policy choice actually addressed the political controversies its interpretation implicates. 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 value in its contemporaneous explanation of its interpretative choice.

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

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[31] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992): 1511-1576; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

[32] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Richard J. Pierce., Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985).

questions doctrine 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 established definitively by courts and the legislature. In Part IV, I suggest an alternative model of administration, based on Progressive political thought, which emphasizes the discursive role agencies can play in synthesizing expressions of public opinion in the form of legislation, presidential input, and public participation. In Part V, I argue that this Progressive theory better comports with our current institutional regime than the court-centric and technocratic assumptions of the major questions doctrine. In Part VI, I deploy this alternative understanding to propose a revision to the major questions doctrine. I then demonstrate how this modified approach would apply to the major questions cases.

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

In this Part, I introduce the major questions doctrine as an exception to the general presumption that agency interpretations of statutory ambiguities are owed at least some level of weight or deference. In section A, I outline the general administrative law doctrine of judicial deference to agency statutory interpretation. In Section B, I introduce the major questions cases, describing how the doctrine evolved from a 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 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.[33] For instance, in *United States v. Moore*,[34] 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."[35] The rule was not absolute, but turned on a set of contextual factors,

[33] *E.g.* Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827).
[34] 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).
[35] *Id.* at 763.

such as the continuity of agency interpretation, and whether the agency interpretation was nearly co-original with the organic act itself.[36]

Judicial deference to agency statutory interpretation took on renewed prominence as the New Deal ushered in a rapid expansion of national administrative capacities.[37] The courts began to distinguish cases where Congress had allocated primary interpretive authority to the agency, rather than the judiciary, to resolve the meaning of a statutory term with significant policy implications. In *NLRB v. Hearst Publications, Inc.* the Court recognized a zone of interpretive discretion in which the Board's definition of "employee" was to be accepted by the Court if it had "a warrant in the record and a reasonable basis in law."[38] While acknowledging that "questions of statutory interpretation . . . are for the courts to resolve,"[39] the *Hearst* Court nonetheless recognized that agency interpretations might, and sometimes must, inform judicial interpretation. The weight or deference a court would accord to the agency's position would depend on the scope of policy-making authority Congress had dedicated to the agency, and the degree to which the agency demonstrated its expert judgment in its construction of the statute.[40] This flexible regime of deference was crucial to many of the canonical cases of judicial statutory interpretation, during and after the New Deal, such as *United States v. American Trucking Association*,[41] and *Griggs v. Duke Power*.[42]

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[43] the Court temporarily simplified this nuanced regime with its famous two-step procedure. Generalizing the approach first developed in *Hearst*,[44] *Chevron* held that if a

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[36] Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 314 (1933) ("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.")

[37] *See generally* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399 (2007).

[38] 322 U.S. 111, 130 (1944) (internal quotations omitted).

[39] *Id.* at 130-31.

[40] Skidmore v. Swift Co., 323 U.S. 134, 139-40 (1944), See also Peter L. Strauss, *"Deference" is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 Colum. L. Rev. 1143 (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).

[41] 310 U.S. 534, 549 (1940) (deferring to opinion of Wage & Hour Division of Department of Labor)).

[42] 401 U.S. 424, 433-34 (1971) (deferring to interpretation of Equal Employment Opportunity Commission).

[43] 467 U.S. 837 (1984).

[44] 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

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."[45] The scope of *Chevron*, however, was not entirely clear.[46] 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?[47] 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*[48] and *INS v. Aguirre-Aguirre*[49] 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*[50] and *United States v. Mead Corp*[51] indicate that *Chevron* does not, however, ordinarily extend to non-binding 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"[52] 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."[53]

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.[54] 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 an agency's interpretations of the statute it administers.

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

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responsibility reasonably to choose among the possibilities the statutory language offered").

[45] *Id.* at 843.

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

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

[48] 480 U.S. 421 (1987)

[49] 526 U.S. 415 (1999).

[50] 529 U.S. 576 (2000).

[51] 533 U.S. 218 (2000).

[52] Reno v. Koray, 515 U.S. 50, 61 (1995).

[53] *Skidmore* 323 U.S. 140; Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 257 (1991).

[54] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory*, 96 GEO. L. J. 1083 (2008).

In a series of cases, the Court has not deferred to agencies' statutory interpretations where it considers the interpretive question to be one of "economic or political magnitude."[55] In these cases, the Court presumes that Congress does not impliedly delegate to agencies the authority to resolve particularly important matters. This principle has gradually expanded over the course of the cases where it has been deployed—from a caution against reading broad powers into narrow language into a general presumption that important questions are simply inappropriate for agency resolution.

The major questions doctrine first emerged as a distinguishable technique of statutory interpretation in *MCI Telecommunications Corp. v. AT&T Co.*[56] In that case, 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"[57] tariff filing 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."[58] This was presented as an ordinary textual argument, relying on dictionary definitions of "modify," rather than the importance of the interpretive question.[59] 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."[60] 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."[61]

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. . . ."[62] This dictum inaugurates the major questions doctrine. Here, Scalia did not merely suggest that the FCC's "major" change in filing requirements is an impermissible expansion of the plain meaning of "modify." Rather, he presumed that Congress would not in any event authorize an administrative agency to make

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[55] 529 U.S. at 133 (2000).
[56] 512 U.S. 218 (1994).
[57] Communications Act of 1934 §203(b)(2), 47 U.S.C. § 203(b)(2) (2012).
[58] *MCI*, 512 U.S. at 229.
[59] *Id.* at 225-29.
[60] *Id.* at 232, 231.
[61] 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.
[62] *MCI* at 231.

decisions of major economic import without an express delegation of such authority.

This presumption became central to the holding in *FDA v. Brown & Williamson*.[63] In that case, the Court declined to grant *Chevron* deference to the Food and Drug Administration's (FDA) 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."[64] The court rejected the FDA's interpretation. Though the Court might ordinarily defer to the FDA's reasonable interpretation of "drug" and "device,"[65] 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.[66]

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 & Williamson* the terms "drug" and "device" plainly comprehend "nicotine" and "cigarettes," respectively, as a matter of English usage. The doctrine therefore morphs in *Brown & Williamson* into a general presumption against implied delegation, where the Court independently determines that the issue is simply too significant to be left to the agency. Above and beyond the traditional tools of statutory construction, the major questions doctrine therefore provides additional grounds for delimiting the scope of agency authority.[67] Where the Court concludes that the agency has made an important

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[63] 529 U.S. 120 (2000).

[64] Food, Drug, and Cosmetic Act of 1938 §201, 21 U.S.C. §§ 321 (g), (h) (2012).

[65] *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).

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

[67] 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;

policy decision with far-reaching consequences under ambiguous legislative authority, the Court will not defer, but rather take on the interpretive task itself.

Two subsequent cases confirmed that the major questions doctrine was not a fleeting aberration, but a persistent—if sparingly invoked—element of the Court's deference regime. In *Utility Regulatory Air Group v. EPA*,[68] the Court again invoked the major questions doctrine to support its conclusion 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.'"[69]

In *Gonzales v. Oregon*,[70] the Court applied the major questions doctrine somewhat differently. In that case, the doctrine helped to determine the amount of weight owed to the Attorney General's Interpretive Rule 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."[71] 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."[72] 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.[73]

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(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. 512 U.S. 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.

[68] 134 S.Ct. 2427 (2014).

[69] *Id.* at. 2444.

[70] 546 U.S. 243 (2006).

[71] *Id.* at 267 (internal citation omitted) (internal quotation marks omitted).

[72] *Id.* at 268.

[73] *Id*. at 269.

The major questions doctrine was applied and expanded by the Supreme Court in *King v. Burwell*.[74] 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"[75] to include exchanges established by the federal government, so that health care tax credits could be provided through such latter exchanges.[76] The Court, citing *Brown & Williamson*, declined to defer to the agency's interpretation of the admittedly ambiguous provision:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[77]

The Court then went on to offer its own construction of the Act without any regard to the IRS' interpretation. Analyzing the overall statutory structure and Congress' "legislative plan," it concluded independently that the provision did in fact mean what the IRS had thought it meant.[78]

Note that in *King*, there is a subtle yet significant expansion in the scope of the major questions doctrine from *Brown & Williamson*: The agency's interpretation was not a departure from its previous position, as had been the case in 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.[79] 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.*,[80] where the Fifth Circuit upheld the district court's nationwide 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

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[74] 135 S. Ct. 2480 (2015).
[75] 26 U.S.C. 36B(b)-(c)(2012).
[76] Internal Revenue Service, Health Insurance Premium Tax Credit. Final Rule, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).
[77] 135 S. Ct. at 2488-89 (internal quotations omitted).
[78] *Id.* at 2496.
[79] *Norwegian Nitrogen Products*, 288 U.S. at 315; *Mead*, 533 U.S. at 252; FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 438–439 (1986).
[80] 809 F. 3d. 134 (5th Cir. 2015).

conferring a status of "lawful presence" that would enable recipients to apply for employment eligibility and social security benefits.[81] In concluding that Texas was likely to succeed on the merits of its challenge to DAPA under the Administrative Procedure Act, the court concluded that, beyond its procedural deficiencies, the policy was substantively beyond the delegated immigration enforcement authority of the Department. The court relied on the major questions doctrine to reject the agencies' interpretation of the Immigration and Nationalization Act, reasoning that

> DAPA would make 4.3 million otherwise removable aliens eligible for lawful presence, employment authorization, and associated benefits . . . . DAPA undoubtedly implicates question[s] of deep economic and political significance that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly."[82]

Despite admittedly "broad grants of authority"[83] to the Secretary of DHS to "establish[] national immigration enforcement policies and priorities,"[84] the court concluded that the Immigration and Nationalization Act could not be construed to grant such policymaking discretion to DHS.[85]

In this judgment, the major questions doctrine takes on its full potential breadth. Despite statutory terms granting enforcement policy discretion to the agency, the court concluded that Congress simply could not have meant to vest the Secretary of DHS with authority to make such a major change in immigration policy 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 out of statutory mouse holes, but also aims to take elephants out of the jungle of administrative policymaking altogether. Even when Congress *explicitly* grants broad policymaking discretion to agencies, the major questions doctrine may deny deference to interpretations that seem, by the court's judgment, to be politically portentous.

This latest incarnation of the major questions presumption remains in force, though without the benefit of a Supreme Court opinion grappling with its

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[81] Department of Homeland Security, Memorandum from Jeh Charles Jonhson, Director, U.S. Citizenship and Immigration Service, for Léon Rodríguez et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf

[82] 809 F. 3d. at 181.

[83] *Id*. at 183.

[84] 6 U.S.C. § 202 (5) (2012).

[85] 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.

reasoning. The Court granted certiorari, but ultimately affirmed the judgment by an equally divided court.[86] The next step in the evolution, or devolution, of the doctrine will likely have to await a full complement of Justices.

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

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 major 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 issues of economic and political magnitude to the judgment of administering agencies? Scholars have offered, and in some cases endorsed, several different rationales for the doctrine, including combatting agency aggrandizement,[87] supporting the under-enforced constitutional principle of non-delegation, [88] enforcing legislative supremacy, [89] and avoiding administrative interference with public deliberation.[90] In this Part, I will argue that the major questions doctrine is 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 institutionalization—the people's allocation of constitutional power, the special

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

[87] *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.

[88] *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).

[89] *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.").

[90] *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).

status of Congress as a democratically accountable institution, and the protection of the ongoing process of political discourse that tethers governmental action to public opinion. This democracy-reinforcing vision supposes that major value choices must be made in a transparent, accountable, inclusive, and deliberative fashion. In section A, I show that the major questions doctrine is 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 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 late 1970s and 1980s, the Supreme Court turned to "substantive canons" of statutory interpretation as a means of enforcing its conception of constitutional values.[91] 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,[92] allow the courts to police constitutional structural norms without taking the aggressive step of striking down unconstitutional legislation.[93] 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 conflict between the National Labor Relations Act and the First Amendment.[94]

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 that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[95] The Court cited *Industrial Union Dept. AFL-CIO v. American Petroleum Institute (The Benzene Case)*,[96] where it had rejected the Occupational Health and Safety Administration (OSHA) benzene exposure standards in part for failure to quantify adequately the carcinogenic risk posed by benzene. In that case, Justice Stevens reasoned in his plurality opinion, "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress

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[91] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 275-308 (1994).
[92] 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).
[93] 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).
[94] NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
[95] Mistretta v. United States, 488 U.S. 361, 374 n. 7 (1989)
[96] 448 U.S. 607 (1980).

intended to give the Secretary the unprecedented power over American industry that would result from the Government's view."[97] Stevens went on to reason that if OSHA were correct that the Act did not compel a quantification of the risk posed by benzene, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States*, and *Panama Refining Co. v. Ryan*. A construction of the statute that avoids this kind of open-ended grant should certainly be favored."[98]

The Benzene Case provides the clearest precedent for the major questions doctrine,[99] and links it definitively to the non-delegation doctrine. In *Utility Regulatory Air Group* Justice Scalia cites the plurality opinion in *American Petroleum Institute*[100] 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."[101] This language suggests that the major questions doctrine is a presumption of statutory interpretation, which reinforces the non-delegation doctrine. By presuming that Congress does not intend administrative agencies to settle major questions, the Court construes statutes so as to avoid the impermissible delegation of legislative power that might occur if the agency could resolve important questions of principle and policy. Since the purpose of the major questions doctrine is to reinforce the non-delegation doctrine in this way, the justification for the major questions must be sought out in the non-delegation doctrine itself.

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

The non-delegation doctrine respects the people's allocation of constitutional power amongst the branches of government. The Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States."[102] The non-delegation doctrine aims to preserve the constitutionally vested jurisdictional rights of Congress. The "constitutional

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[97] *Id.* at 644.
[98] *Id* (internal citations omitted).
[99] I do not include *The Benzene Case* 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 *The Benzene Case* and *Chevron*, see Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions* 41 VAND. L. REV. 301, 311 (1988) ("If the Supreme Court had adopted the *Chevron* test before it decided *Benzene* . . . the Court probably would have resolved [the] case with a single unanimous opinion").
[100] 448 U.S. 607 (1980).
[101] 134 S.Ct. at. 2444.
[102] U.S. Const. art. I sec. 1.

rights"[103] of Congress are ultimately rooted in the "public rights"[104] of the people, who are the "the only legitimate fountain of power."[105] The authority of the people to distribute power is preserved by holding Congress to certain standards of clarity with regards to its legislative product. Congress must "lay down by legislative act an intelligible principle," by which the courts, Congress, and the people can determine the legality of administrative action.[106]

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 *The Benzene Case*, "the nondelegation doctrine ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."[107] Congress' "electoral connection" to the public,[108] and its special investigative and deliberative competencies, [109] are thought to make it the preeminent voice of the people as a whole. This link between congressional legislation and democratic legitimacy has been widely asserted across ideological and theoretical lines in American jurisprudence.[110]

Such a legislative conception of democracy leads to the conclusion that democracy can be preserved only if Congress makes basic "value choices" in the people's name.[111] As James Willard Hurst argues, "A statute embodies a choice

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[103] THE FEDERALIST NO. 51, at 349 (James Madison)(Jacob E. Cooke ed., 1961).
[104] *Id.*
[105] THE FEDERALIST NO. 46, at 315 (James Madison)(Jacob E. Cooke ed., 1961).
[106] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
[107] *Am. Petroleum Inst.*, 448 U.S. at 685 (1980) (Rehnquist, J., concurring in the judgment).
[108] DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).
[109] *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991) *and* DAVID ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED ADMINISTRATIVE STATE (2002) *and* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 39 (1998).
[110] 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.) ("'The sovereign will is made known to us by legislative enactment.' And it is made known in no other way."); FELIX FRANKFURTER, SOME REFLECTIONS ON THE READING OF STATUTES 16 (1947) (Congress is "the primary law-making agency in a democracy."); John R. Manning, *The Supreme Court 2013 Term—Forward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5 (2014) (Congress is the people's "most immediate agent"); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 95 (2008) ("Legislation in delegated democracy is meant to embody the people's will . . . . [A]n interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose.")
[111] *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

of values carrying obligations on those within its governance, backed by the force of the state."[112] By making the basic value choices that will guide policy, Congress retains normative authority over regulatory activity.

The major questions doctrine aims to uphold these democratic responsibilities by assuming Congress does not leave important value choices to agencies. Justice Breyer arguably invented the major questions doctrine in 1986, when he claimed 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."[113] The major questions doctrine purports to allocate to an agency only those questions that a reasonable legislator would want to delegate. This is a generic presumption that is not based in particular legislative text, purpose, or history. Its connection to any specific legislative intent is therefore tenuous.[114] 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.

The doctrine also functions to safeguard the broader process of informed and inclusive political discourse that underlies and legitimates lawmaking. Abigail Moncrieff argues that *MCI* and *Brown & Williamson* are best explained by the fact that the agency action in each case interrupted ongoing Congressional deliberations over the topic at issue.[115] Lisa Bressman likewise 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

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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").

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

[113] 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. Justice Breyer has most recently justified the doctrine on explicitly democratic grounds. "To achieve our democratically chosen ends in a modern populous society requires some amount of administration, involving administrative, not democratic, decisionmaking." Breyer, *supra* note ___, at 98. The way to avoid "conflict between democracy and administration" is to ensure that administration simply "complements" democracy "by implementing legislatively determined policy objectives." *Id.* at 99.

[114] *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*. 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.

[115] Moncrieff, supra note ___, at 621-32.

reason."[116] In a similar vein, William Eskridge argues that legislation has special democratic legitimacy because "the imprimatur of three differently constituted electorates guarantees a variety of democratic inputs into national policy decisions."[117] According to Eskridge, it is not merely the democratic credentials of Congress itself, but also the wider deliberations that go on between the public and the political branches of government in the run-up to enactment, that give statutes their special claim to bind.

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 sound principles of democratic constitutionalism. Note, however, that the principle of democracy-reinforcement does not explain one crucial premise of the major questions doctrine: that if legislation has left an ambiguity with respect to a major question, democratic accountability will be better served if a court, rather than the administering agency, resolves that ambiguity. In the next section, I will explore and critique the reasons for this assumption.

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

The major questions doctrine supposes that courts are the primary interpreters of statutory values and that administrative agencies should be limited to technocratic tasks. 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.

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

In the major questions cases, the court resolves statutory ambiguities, instead of deferring to the agency's interpretation. The doctrine therefore rests on the assumption that courts have a superior institutional competence over agencies in identifying the important value choices Congress has made. This assumption has its roots in some of the classic thinkers of the Legal Process School. Lon

[116] Bressman, supra note ___, at 780.
[117] Eskridge, supra note ___, at 436.

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."[118] 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.[119] 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. 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.[120]

The major questions cases are therefore best understood as a way to reassert the primacy of courts over agencies as the interpretive agents of Congress. As Professor Abbe Gluck has observed, *King* is only the latest case in which the Court has returned to the confident purposive spirit of the Legal Process School, and sought to reinvigorate an interpretive partnership between Congress and the Courts in regulatory law: "This Court seems to want the big questions for itself."[121]

On first blush, this court-centric vision of statutory interpretation seems non-problematic. *Marbury v. Madison*, after all, established that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[122] 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.[123] Administrative law aims to determine precisely how statutes allocate interpretive authority between agencies and courts, acknowledging that some questions of statutory interpretation involve political or empirical questions which agencies, rather than courts, ought to decide in the first instance.[124] *Chevron's* deference regime rests on the premise that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[125] It reinforces the separation of powers by instructing judges not to intrude into political controversies that are the proper province of the Legislature and Executive, rather than the Judiciary.[126]

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[118] LON FULLER, THE LAW IN QUEST OF ITSELF 135 (1940).
[119] RONALD DWORKIN, LAW'S EMPIRE, 313-54 (1986).
[120] ELY, *supra* note ___, 132 (1980).
[121] Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress' Plan in the Era of Unorthodox Lawmaking* 129 HARV. L. REV. 62, 65 (2015).
[122] 5 U.S. (1 Cranch.) 137, 177 (1803).
[123] *Id*. at 166.
[124] 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")
[125] *Chevron*, 467 U.S. at 866.
[126] Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 289 (2011).

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."[127] As the late Justice Scalia observed, this aspect of the Court's argument necessarily involved policy judgments about the "extrinsic circumstances" in which the law would operate.[128] "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."[129] By asserting judicial authority to resolve matters of economic and political significance, the major questions doctrine puts courts, rather than agencies, in the front-line position of determining how to make statutory schemes workable. The 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 a normative institutional assumption that administrative agencies have a purely technical task to perform, and should not answer questions of significant political value. This view is rooted in Max Weber's seminal theory of bureaucracy and legal authority. According to Weber, the "bureaucratic administrative staff" is the "purest type of exercise of legal authority," because in a system of perfect bureaucratic hierarchy and accountability, public officials neutrally and efficiently apply the abstract norms of a statute to the facts of particular cases.[130] Bureaucracy is a form of "domination through knowledge," which implements the law through a system of hierarchical command and technocratic competency.[131] Weber argues that bureaucracy is "capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings."[132] While regulatory laws might advance certain "substantive" values, the state bureaucracy would employ a purely "instrumental" or "purposive"

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[127] *King*, 135 S. Ct. at 2493.
[128] *Id*. at 2503 (Scalia, J., dissenting).
[129] *Id.* at 2505 (Scalia, J., dissenting0.
[130] MAX WEBER, ECONOMY AND SOCIETY 220 (Guenther Roth & Claus Wittich eds., 1968).
[131] *Id*. at 225
[132] *Id.* at 223.

conception of rationality (*zweckrational*), attempting to find the best formal means to achieve those pre-given ends.[133]

This descriptive view of bureaucracy led to Weber's sharp normative distinction between the vocation of political officials and the vocation of administrative officials. In a world of moral and ethical pluralism, political officials were responsible for making decisive value choices, which would then be embodied in statutory law. Bureaucrats, then, should only engage in "impartial administration" of these laws, serving as the neutral, obedient, efficient instruments for realizing the value choices previously made by democratically accountable representatives.[134]

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*."[135] Administration, in his view, is a purely technical enterprise, which always risks sapping civil society of its reservoirs of cultural meaning and ethical commitments. Bureaucracy is deeply dangerous to democratic politics, because it proceeds through formal rules, hierarchies of command, and specialized knowledge, rather than through debate between free and equal citizens. Political discourse is something that takes place exclusively within the public sphere and in the relationship between the public sphere and the legislative process. In *Between Facts and Norms*, which synthesized American and German constitutional theory, Habermas argued that "[t]he norms fed into the administration bind the pursuit of collective goals to pre-given premises and keep administrative activity within the horizon of purposive rationality."[136]

American legal scholars and jurists also often rely explicitly upon Weberian premises. As Louis Jaffe noted, the seminal administrative law scholarship of Ernst Freund and James Landis relied upon Weberian theories of legislatively authorized, expert administration.[137] 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.[138] Jerry Mashaw likewise adopts Weber's view that administration is fundamentally a matter of "exercising power on the basis of knowledge."[139] Using Weber's phraseology, Mashaw argues that "[a]gency implementing action is an instrumentally rational exercise," in the sense that agencies must interpret

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[133] *Id*. at 26, 226.

[134] Max Weber, *Politics as a Vocation* in MAX WEBER, ESSAYS IN SOCIOLOGY 77, 95(H.H. Girth & C. Wright Mills, trans., eds., 1946).

[135] JÜRGEN HABERMAS, LEGITIMATION CRISIS 70 (Thomas McCarthy trans., 1975).

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

[137] Louis L. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1186, 1187 (1973).

[138] Edward L. Rubin, *It's Time to Make the Administrative Procedure Act Administrative* 89 Cornell L. J. 95, 157 (2003).

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

the goals established by the statute and then find the best "instruments" to achieve those purposes.[140]

This conception of bureaucracy is evident in some Supreme Court cases striking down agency action as "arbitrary" or "capricious" under the Administrative Procedure Act.[141] For example, in *State Farm*,[142] 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."[143] In *Michigan v. EPA*,[144] the Court rejected 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."[145] 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 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.[146] 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 court-centric emphasis,[147] and the Weberian conception of administration. If agencies are restricted to purely instrumental reasoning, rather than value-based consideration of questions of political significance, they should not be able to settle any major policy questions left open by statutory ambiguities. This is instead a job for the courts.

Weberian conceptions of bureaucracy also provide a powerful basis for diagnosing American administrative agencies' alleged failure to deal adequately with ethical values. For example, Justice William Brennan relied on Weber's account of bureaucracy to defend the due process revolution in *Goldberg v. Kelly*[148] as a necessary judicial response to our "bureaucratic state's" failure to respond to "the human realities at stake" in administrative action.[149] Professor Gerald Frug indicts "the ideology of bureaucracy" in American administrative law, citing Weber's conception of bureaucracy to guide his critique of the

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[140] 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)

[141] 5 U.S.C. 706(2)(A) (2012).

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

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

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

[145] Id. at 2706.

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

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

[148] 397 U.S. 254 (1970).

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

"deceptive" judicial effort to justify illegitimate assertions of state power.[150] Most recently, Jacob Gerson and Jeannie Suk[151] have relied on Weber's description of bureaucracy to criticize the Department of Education's interpretation of Title IX,[152] which has imposed extensive reporting requirements and adjudicative procedures on universities to address sexual assault and harassment.[153] Because sex implicates "emotion" and "desire," they claim that a Weberian, morally neutral federal bureaucracy lacks the institutional competency to address these sensitive and ethically charged issues.[154] 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.[155]

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. 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 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.

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[150] Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1278, 1282 (1984).
[151] Jacob Gerson & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016).
[152] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2012).
[153] Office for Civil Rights, U.S. Dep't of Educ., Sexual Harassment Guidance, 62 Fed. Reg. 12034 (Mar. 13, 1997).
[154] Gerson and Suk *supra* note ___, at 885.
[155] *Id*. at 947.

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.[156] It understands administration as categorically incapable of fulfilling a basic requirement of democratic constitutionalism: that laws and policies must be justified to those they bind in ways that are genuinely responsive to their dignity, needs, and interests.[157] If the Weberian diagnosis of bureaucracy is correct, and the Weberian prescriptions for administrative reason are appropriate, there is little hope that bureaucracy will ever be capable of satisfying our desire for a form of government that 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.[158] 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.[159] The discursive aspect of administrative practice has not gone altogether unnoticed by legal scholars. Mark Seidenfield's "civic republican" theory of the administrative state emphasizes that bureaucratic institutions are capable of high-quality deliberation over how best to pursue the common good.[160] Henry Richardson likewise 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 affected public.[161] William Eskridge and John Ferejohn embrace Richardson's conception of administrative reason, and explicitly recognize that agencies have a central role to play in deliberation over

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[156] 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").

[157] *See generally* 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).

[158] *See infra* Part IV for an extensive defense of this claim.

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

[160] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

[161] HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY 214-30 (2003).

the public purposes advanced in statutes.[162] 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.[163]

The major questions doctrine thus rests on a particular, and controversial, political theory of our administrative state: the legislature bears primary responsibility for making the value choices that animate governmental action; and the judiciary must ensure that the legislature retains that responsibility by presuming that Congress does not delegate that task to agencies. Accounts like that of Richardson's, Eskridge and Ferejohn's, however, suggest the reemergence of an alternative theory: one that I argue better comports with our institutions and the ideological origins of our administrative state. The next 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 section A, I describe the theoretical origins of Progressive political thought. In section B, I describe the Progressive theory. In section C, I trace the influence of the Progressive theory on the 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.[164] But the original Progressive vision has long been distorted by legal scholars into a technocratic vision of administrative expertise.[165] Progressive political thought has begun to receive

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[162] WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 77 (2010).

[163] *Id*. at 17.

[164] *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).

[165] *See, e.g.* Martin Shapiro, *On Predicting the Future of Administrative Law*, 6 AMERICAN ENTERPRISE INSTITUTE JOURNAL ON GOVERNMENT AND SOCIETY 18 (1982)

renewed attention from legal scholars aiming to reinvigorate an administrative state that will reduce social and economic inequality by democratic means.[166] At the same time, conservative critics of the administrative state routinely link our bureaucratic government to the philosophy of the American progressives, and their adoption of German conceptions of the state.[167] According to scholars like Philip Hamburger, the Progressives introduced dangerous, Germanic conceptions of the state to American law, and thus undermined Anglo-American constitutionalism. They argue that, 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 German state theorists, they sought to make administration democratically accountable.[168] 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.[169] 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 three sources 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.[170] Hegel had identified, almost a century before Weber, the importance of administrative bodies which were functionally differentiated, hierarchically

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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).

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

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

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

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

[170] *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).

organized, and staffed by expert officials.[171] But unlike Weber, who understood the state to be a "monopoly on the legitimate means of violence,"[172] Hegel understood the state as an embodiment of "concrete freedom."[173] By this he meant that the state 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 the interests of preserving public freedom.[174] But Hegel insisted that administration was not merely a matter of efficient bureaucratic performance. Rather, administration was tasked with "upholding legality and the universal interests," and resolving conflicts between social groups by reference to "the higher viewpoints and ordinances of the state."[175] To accomplish this task, administrative bodies and their officials not only needed expertise, but also "*direct education in ethics and in thought*."[176]

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 values and social understandings to flesh out their concrete content.[177] Hegel's theory,

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

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

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

[174] 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.).

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

[176] *Id.* at § 296.

[177] *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).

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.[178] It was in this respect that the American Progressives departed from their German forbearer.

B. The Progressives' Democratic Theory of the Administrative State

The American Progressives embraced Hegel's idea of an administrative state in which appointed public officials would use their expertise and ethical judgment to preserve the public interest, and to control the excesses of private law, commodity exchange, and industrial organization.[179] They thus emphasized the need for social legislation to authorize the provision of goods and services, and to protect the public against monopoly.[180] 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.[181]

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.[182] 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

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[178] Hegel, *supra* note ___, at §§ 318, 279.
[179] *See* Emerson, supra note ___ *and* HAMBURGER, supra note ___.
[180] Rahman, supra note ___, at 1337-45.
[181] JOHN DEWEY & JAMES H. TUFTS, ETHICS 472 (1908).
[182] 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."); Novak *supra* note __, at 48-50 (describing Dewey's critique of Hegel's concept of the state).

wisdom, the permanent truths of political progress."[183] 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."[184] In his campaign for President, Wilson likewise argued that it was the "necessity of the hour to open all the processes of politics and public business—open them to wide public view; to make them accessible to every force that moves, every opinion that prevails in the thought of the people; to give society command of its own economic life again, not by revolutionary measures but by a steady application of the principle that the people have a right to look into such matters and control them . . . ."[185]

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 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."[186] 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."[187]

Dewey defined the state as a "public articulated."[188] 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."[189] 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. As 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."[190] This democratic notion of the state gave administrative

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[183] 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).
[184] Wilson, *supra* note ___, at 217.
[185] WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 86 (1961 [1913]).
[186] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1954 ed., 1929), 206.
[187] Dewey, *supra* note ___, at 208.
[188] Dewey, *supra* note ___, at 67.
[189] *Id.*
[190] Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 13 (2006).

agencies a central role to play in the deliberative process, rather than placing them completely outside of politics as an efficient instrument for realizing democratic will. 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."[191] 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, who was influenced by Hegelian conceptions of administration,[192] 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 the executive authority."[193] But the Progressives did not believe that administrative action was completely determined by the statutory authority under which it acted. As Wilson argued, "[t]he scope of administration is . . . largely defined and 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*."[194] 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.[195] 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

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[191] JOHN DEWEY, INDIVIDUALISM OLD AND NEW 54-6 (1999 ed. 1930).

[192] Christian Rosser, *Examining Frank Goodnow's Hegelian Heritage: A Contribution to Understanding Progressive Administrative Theory*, 45 ADMIN. & SOC'Y 1063 (2013).

[193] FRANK GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 24 (1900).

[194] 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).

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

efficient administration, that should not be permitted to extend beyond the limits necessary in order that the legitimate purpose of its existence be fulfilled."[196] The President, in other words, ought not to stifle 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 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."[197] 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.[198]

In this Progressive understanding of the state, judicial review would take a fairly restrained form.[199] 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 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.[200]

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 proposal for administrative proceedings that would bring public opinion to bear on administrative deliberations. Such procedures would be both more efficient and more democratic than judicial adjudication. Administrative, rather than judicial, institutions would be the primary venue for interpreting public purposes left ambiguous by legislative enactment.

C. The Influence of the Progressive Theory Through the New Deal

This democratic theory of administration corresponded to developments in legal scholarship and administrative practice during the Progressive Era and through the New Deal. Under the influence of German conceptions of the state,

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[196] Goodnow, *supra* note ___, at 38.
[197] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1921 ed., 1908), 68.
[198] *Id.* at 76.
[199] Kramer, *supra* note ___, at 216.
[200] FRANK GOODNOW, SOCIAL REFORM AND THE CONSTITUTION (1911). 231.

constitutional lawyers such as W.W. Willoughby began to conceive of the national government as the ultimate source of law, understanding legislation as the primary expression of the will of the state.[201] In keeping with the Progressives' revolt against legal formalism,[202] Roscoe Pound assailed the *Lochner* Court's "mechanical jurisprudence,"[203] which had challenged the early development of administrative institutions in the United States. Pound embraced instead a Hegelian-inspired "sociological jurisprudence" that would be responsive to the cultural context, historical development, political purpose, and practical effects of law rather than categorical conceptions of natural right.[204] 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.[205] 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."[206] The Federal Trade Commission invited industry representatives to comment on trade practices, which complaints had alleged to be unfair.[207] Progressive administrators under Woodrow Wilson sought to protect freedom of conscience during WWI through "individualized participation in the administrative state."[208]

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.[209] Statutory programs advancing democratic goals were "conditioned upon rules and regulations emanating from enforcing authorities."[210] Recognizing that broad statutory delegations left important details to the policy judgment of agencies, he

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[201] WILLIAM NOVAK, LAW AND THE CREATION OF THE MODERN AMERICAN STATE, IN LOOKING BACK AT LAW'S CENTURY 249, 266-69 (Austin Sarat et al. eds, 2002); WESTEL WOODBURY WILLOUGHBY, AN EXAMINATION OF THE NATURE OF THE STATE: AN INTRODUCTION TO THE STUDY OF THE AMERICAN STATE 180 (1896).

[202] 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 Wendell Holmes legal realism and Hegel's "evolutionary" conception of rationality).

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

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

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

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

[207] GERALD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE PROCEDURE 79-80 (1924)

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

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

[210] *Id*. at 614.

emphasized that these "details are of the essence; they give meaning and content to the vague contours."[211] The surest protection for democratic constitutionalism in the administrative state would not be to retain detailed legislative control, but instead to govern administration through a professional civil service, a "spirited bar," and "easy access to public scrutiny."[212] 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[213] and more radical forms of democratic planning in agriculture,[214] aimed to involve the affected public in administrative deliberation over planning.[215] 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." [216] The Administrative Procedure Act of 1946 codified the Progressive innovation of public participation with its notice-and-comment rulemaking provisions, which required agencies to receive and respond to comments when they proposed binding substantive rules.[217]

The Progressive theory that lay the foundation for the New Deal has been obscured because of subsequent political and intellectual developments. In the

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[211] *Id.*

[212] *Id.* at 618. While Frankfurter believed that "the final determination of large policy must be made by direct representatives of the public, and not by the experts," his recognition above that the "details" of implementation were "of the essence," indicates that he understood important value choices to lie with agencies, subsidiary to the choice of the "final" or ultimate end by the legislature. FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 160 (1930). He thus insisted that bureaucratic "expertise is indispensable" for the "task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding." *Id.* at 161.

[213] DAVID. E. LILIENTHAL, TVA: DEMOCRACY ON THE MARCH 204 (1944) (quoting Dewey to describe the ideology of participation at the Tennessee Valley Authority).

[214] 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").

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

[216] WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 122 (1941).

[217] Administrative Procedure Act, Pub. L. No. 79-404, §4, 60 Stat. 237 (1946) (codified as amended in 5 U.S.C. §553 (2012)). On examples of public participation in agency prior-making that influenced the APA, see ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 103-5 (1941).

wake of war with Nazi Germany and then the Cold War with Soviet Union, the threat of totalitarian government undermined the legitimacy of the much less coercive and much more participatory form of administrative government in the United States.[218] The Progressive ideal of an administrative state that would act on the basis of public deliberation was then supplanted with theories of interest-group pluralism, which treated administration as a bargaining process between private interests.[219] The subsequent rise of cost-benefit analysis as a hegemonic framework for policy reasoning displaced the Progressive notion that the state might further values other than market efficiency, such as equality and positive liberty.[220]

We have therefore largely lost sight of the original Progressive intent that animated the project of American state-building. To be sure, the Progressives' emphasis on deliberative administrative action persists in "civic republican" theories of the administrative state.[221] Like the Progressives, contemporary civic republicans argue that administrative agencies are uniquely situated to conduct value-oriented policy discourse. But civic republicanism has not retained the Progressives' complementary concern with administrative autonomy from judicial control. The Progressives did not merely want to foster public participation in administrative agencies. Participation was a means to furnishing the legal and material requisites for a democratic society. Civic republicanism has lost sight of the way in which such "output legitimacy" can complement the procedural legitimacy that arises from reasoned public discourse.[222]

There are trade-offs between these two aspects of Progressivism: Soliciting and responding to public comments in a comprehensive, reasoned fashion takes time and resources that could otherwise be spent on the delivery of the relevant services.[223] As the intensity of judicial review of agency reasoning increases, so too do these costs.[224] For this reason, the Progressive state must

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

[219] THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 40 (2d ed. 1979) ("American pluralists had no explicit and systematic view of the state. They simply assumed it away.")

[220] *See generally* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

[221] Seidenfeld *supra* note ___; Glen Staszweski, *Statutory Interpretation as Contestatory Democracy*, 55 WILLIAM & MARY L. REV. 221, 253-61 (2013).

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

[223] Thomas O. McGarity, *Some Thoughts of "Deossifying" the Rulemaking Process*, 41 Duke L. J. 1385, 1397 (1992).

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

balance the need to maximize deliberation against the need to maximize efficient bureaucratic performance. Because civic republicans and deliberative democrats stress rational discourse above all else, they do not adequately attend to this countervailing concern with bureaucratic autonomy. As a consequence, some civic republicans, like Cass Sunstein, argue for stringent judicial review of administrative action to ensure deliberative and participatory administrative action.[225] This approach does not take seriously the costs that such intensive review incurs for bureaucratic efficiency, nor the risk that the political inclinations of reviewing courts may improperly influence or limit the exercise of administrative discretion. The Progressives, by contrast, were skeptical of judicial control of administration, because they believed that courts would unduly constrain the exercise of public power in order to protect private interests.

I am suggesting here that we should give this original understanding of the administrative state a second look. The Progressives conceived of agencies as engaging the democratic public in three ways: 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 ethically charged political questions, but they aimed to ensure that they would do so in a rational and inclusive fashion. At the same time, they recognized that the extent of public participation would need to be balanced against the requirements of efficient state action. They were skeptical that the courts were the best forum in which to ensure the democratic integrity of government, and thus sought to enhance the democratic credentials of the administrative process itself.

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 that agencies resolve important value questions, while still respecting public participation and presidential oversight as sources of democratic legitimacy. In our current administrative state, agencies do indeed frequently make decisions that implicate important political, constitutional, and ethical values. But we also have procedures that ensure that the agency deliberates with the affected public when it settles such major questions. In section A, I note numerous instances where agencies address questions of economic and political significance, which suggests that the major questions doctrine conflicts with a significant aspect of administrative practice. In section B, I argue that the President provides additional democratic authority to agency statutory interpretation, which can bolster agencies' claims to address major questions. In section C, I argue that public input in the rulemaking process provides further democratic support for administrative interpretations, especially

[225] Cass Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 61-64, 74-75 (1985).

compared with a realistic assessment of the democratic credentials of Congress and the courts.

A. The Agency Practice of Value-Oriented Statutory Interpretation

The Progressives anticipated that administrative agencies would not only identify efficient means to achieve statutory ends, but also engage in 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.[226] The Department of Transportation's approval of highway routes implicated the relative importance of park conservation, racial equity, and local economic development.[227] The Supreme Court's development of the theory of disparate impact discrimination relied upon the interpretations of the Equal Employment Opportunity Commission,[228] which were grounded in the Commission's considered position that discrimination included not only intentional bigotry, but also a "condition of pervasive exclusion."[229] Decisions by the Internal Revenue Service on tax exemptions,[230] and Federal Communications Commission's decisions on rate increases,[231] have interpreted constitutional norms of equal protection and statutory norms of gender and racial equality.

It would be too much to say that questions of political value arise in every administrative action. But nor are such instances anomalous. Scholarship on "administrative constitutionalism" identifies numerous cases where agencies explicitly interpret constitutional norms, implicitly interpret constitutional norms through statutory interpretation, implement statutes that have come to assume a quasi-constitutional status, or develop news understandings of foundational public norms in the course of performing their statutory duties.[232] When agency interpretations concern constitutional norms, or more broadly address social

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

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

[228] *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").

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

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

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

[232] *See generally* Gilliam Metzger, *Administrative Constitutionalism*, 91 Tex L. Rev. 1897 (2012).

problems that have drawn intense public interest, they plainly address questions of deep economic and political significance. In doing so, they mediate between the legal and the political process. As Jerry Mashaw argues, agencies routinely take into account "political struggles and political context" in their interpretation of statutes, since "agency use of this 'political' material is a part of maintaining their democratic legitimacy. It is precisely their job as agents of past congresses and sitting politicians to synthesize the past with the present."[233] Administrative policymaking is therefore not a technocratic exercise in statutory gap-filling, but a politically-engaged effort to shape the meaning of underdetermined legal norms.

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. If rigorously implemented, the doctrine would prevent agencies from playing the important role they have to-date in advancing our understanding of the abstract legal commitments established by statute.

B. Presidential Oversight of Agency Statutory Interpretation

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

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[234]

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

Chevron's emphasis on Presidential input has been complemented by the growth of regulatory review in the Office of Information and Regulatory Affairs. Though this process began during the Reagan Administration as an anti-regulatory, technocratic effort to restrict administrative output,[235] it has evolved since then into a much more sensitive process. Under the Obama Administration,

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[233] Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 519 (2005).
[234] *Chevron*, 467 U.S. at 865-66.
[235] Executive Order 12,291, Federal Regulation, 46 Fed. Reg. 13193 (Feb. 17, 1981).

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.[236] Since executive agencies are required to submit any regulation that has an economic impact of $100 million or more to OIRA for review,[237] as well as any guidance document with a similar effect,[238] 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,[239]and consequently will benefit from the democratic credentials of his office. The practice of presidential control in this respect furthers the Progressive ambition of guiding administration according to the President's distillation of public opinion.

The Progressive theory of the state does not, however, identify democratic legitimacy with presidential control of administration. Recall that Goodnow and Wilson argued that the President should guide administration according to his understanding of public opinion, but give significant policy autonomy to agency heads and administrative judgment.[240] Unlike contemporary proponents of the unitary executive, [241] the Progressives did not maintain that the President should dictate how administrative agencies would implement the laws.[242] Instead, the Progressives sought to constrain presidential influence with statutory guidance, administrative autonomy, and public participation. Nor does the Progressive theory assent to Kathryn Watts' argument that the president's policy preferences can justify agency decisions, if only they are stated in a public-regarding, rather than purely partisan, way.[243] Rather, the Progressive theory aligns with Kevin Stack's qualification: if an agency to which Congress has delegated rulemaking authority wishes a court to credit the President's position in determining the democratic credentials of its statutory interpretations, this input must be presented in a way that is consonant with the statute's purposes.[244] This approach ensures

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[236] Executive Order 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[237] Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993).

[238] 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.

[239] Independent agencies are not covered by regulatory review. Executive Order 12,866 §3(b).

[240] *See supra* Part IV.B.

[241] See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 Iowa L. Rev. 601 (2005).

[242] *See* Skowronek *supra* note ___, at 2087-92.

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

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

the deliberative integrity of administrative policymaking by anchoring all input—from the President, political appointees, congressional committees, civil servants, and members of the public—to the common reference point of statutory goals. More extreme forms of executive control risk displacing reasoned, participatory discourse about the meaning of the law with the mere assertions of "presidential will," exercising "authority without law."[245]

This Progressive vision comports to a large degree with the current structure of the executive branch. As Peter Strauss has argued, the President is best understood as an "overseer" of administration, rather than a "decider" of administrative policy.[246] The President and his agents may legitimately influence administrative policy-making through contacts with agency officials.[247] But the President has no independent and inherent lawmaking power.[248] Legislation may delegate quasi-legislative function to his office,[249] but frequently will instead delegate such powers directly to another executive official or administrative body.[250] In these cases, because the regulatory power is vested in another actor, there is a strong case to be made that the President's policy preference does not have binding authority upon that actor.[251] As a practical matter, the President can exert great pressure on agency heads who serve at his pleasure. And such appointees are in any event likely to share the President's political perspective on many issues. But because the President may incur political costs for removing an administrative leader for failure to implement his preferred policy, and must for

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

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

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

[248] *Youngstown*, 343 U.S. at 587.

[249] *Youngstown*, 343 U.S. at 635-37 (Jackson, J., concurring).

[250] *E.g.*, 42 U.S.C. §7409 (2012) ("The Administrator [of the Environmental Protection Agency] . . . shall by regulation promulgate . . . proposed national primary and secondary ambient air quality standards . . . .").

[251] Peter Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 201 (1986); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465-72 (1987). *See* Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (The President does not have power to instruct an executive official not to perform a statutory duty); *Myers*, 272 U.S. at 135 ("[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance"). For the contrary argument, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2320-31 (2001).

most leadership posts secure Senate confirmation,[252] his control even over executive departments is not absolute.[253] When it comes to "independent" commissions, such as the Security and Exchange Commission or Federal Communications Commission, whose commissioners can only be removed "for cause," his control is more attenuated.[254] Perhaps more importantly, civil service protections prevent political appointees from simply dictating policy outcomes that run afoul of tenured officials' conception of their legal obligations and rational public policy.[255] As Jon Michaels argues, administrative agencies are not unitary, purely hierarchical actors working at the behest of their political leadership; rather, they institutionalize an internal separation of powers between political officials, civil servants, and civil society groups.[256]

The Progressive theory thus comports with significant aspects of current administrative law and executive practice. The President is a powerful spokesperson for public opinion, who can legitimately influence the administrative process. At the same time, both the Progressive theory and current constitutional and statutory law insulate administration from total, pervasive, and direct presidential control. The major questions doctrine eschews this moderate position, ignoring presidential influence altogether. For example, in *Brown & Williamson*, it did not matter to the Court that the President had taken public ownership of the Agency's decision to regulate tobacco.[257] In the major questions cases, the Court narrows its focus to legislative control alone, while ignoring the possibility that administrative agencies might draw deliberative democratic authority from presidential input.

C. Agency Deliberation with the Affected Public

The Progressives' theory of administration goes well beyond presidential accountability. More importantly, it maintains that the public at large must be involved in the administrative process to ensure its democratic legitimacy. Our current institutions reflect this to a significant degree, though problems remain. The notice-and-comment rulemaking procedure codified by the Administrative Procedure Act institutionalizes the Progressive concern for public participation in agency policymaking. In this "informal rulemaking" process, agencies must publish any proposed rule in the Federal Register, and then "give interested persons an opportunity to participate in the rule making" through written submissions.[258] Kenneth Culp Davis observed that this process is

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[252] U.S. CONST. art 2., sec. 2.
[253] Strauss & Sunstein *supra* note ____, at 200.
[254] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Kagan supra note ___, at 2327.
[255] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586 (1984)
[256] Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 238-39 (2016).
[257] Kagan *supra* note ____, at 2283.
[258] 5 U.S.C. § 553(c) (2012).

> 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.[259]

The claim here is that notice-and-comment rulemaking can parallel the legislative process "in microcosm," by creating a deliberative process between agency officials and the affected public.[260] As the Court recognized in *Mead*, notice-and-comment procedures tend to "foster the fairness and deliberation."[261] 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."[262] This 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."[263] Notice-and-comment rulemaking is therefore capable of institutionalizing the American Progressives' core concern of developing a participatory administrative process, which engages the affected public in grappling with questions of political value that have not been unambiguously settled by legislative enactment.

To be sure, the notice-and-comment procedure is not an ideal deliberative process. The comment period itself may be a kind of "Kabuki theater," in the sense that it is "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues,"[264] such as hearings and informal consultations. Even though notice-and-comment is stylized, however, the underlying dynamics of deliberative engagement are no less real. The default participation requirements for rulemaking in the APA formalize, and render judicially reviewable, a broader process of stakeholder engagement in our administrative state.[265] This process has become even more

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[259] KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 142 (3rd ed. 1972)
[260] Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1712 (1975)
[261] *Id.* at 230.
[262] 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).
[263] 590 F.2d 1011, 1027 (D.C. Cir. 1978) (internal quotations omitted).
[264] E. Donald Elliot, *Reinventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992).
[265] See William Funk, *Public Participation and Transparency in Administrative Law*, 61 ADMIN. L. REV. 171 (2009) (describing the evolution and deepening of public

widely accessible with the advent of e-rulemaking, which allows anyone with an Internet connection to submit a comment on proposed rules.[266] American administrative law requires a much higher level of public participation in rulemaking than other liberal democracies, such as the United Kingdom, Germany, and the European Union as a whole.[267] Because of its success in complementing electoral legitimacy with deliberative and procedural legitimacy, scholars like Daniel Esty have proposed adopting such mechanisms on a global scale, in treaty-based organizations like the World Trade Organization.[268]

The major questions doctrine does not even acknowledge that agencies engage in this uniquely American deliberative-democratic process. With its exclusive emphasis on legislation as a source of democratic accountability, the major questions doctrine denies these aspects of the rulemaking process entirely. In doing so, the Court blinds itself to sources of popular input that may legitimate an administrative agency's economically and politically significant policy choice. The problem with the doctrine is therefore not merely that it undermines "expertise" and "accountability," as Cass Sunstein argues,[269] but that it discounts and short-circuits rational public deliberation between administrative officials and the public at large.

It might be argued that, because of significant inequalities of participation and influence in the administrative process,[270] participatory rulemaking does not add any democratic legitimacy to administrative interpretations of statutes. But the democratic credentials of the administrative process must be understood in *comparison* to the other institutions that might resolve major questions. Inequality of influence is, unfortunately, endemic to our entire political process,

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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).

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

[267] 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).

[268] Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L. J. 1490, 1520-1533 (2006).

[269] Sunstein *supra* note ___, at 243.

[270] *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).

including Congress.[271] If significant degrees of inequality of public influence were completely fatal to democratic legitimacy, Congress would have no democratic authority to legislate. The major questions doctrine would therefore not serve a democratic function by incentivizing Congress to resolve major policy disputes.

Moreover, the major questions doctrine gives the judiciary the primary responsibility to settle major questions if the statutory text is ambiguous. Especially in a context where Congress is not likely to correct the judiciary's interpretation of a "major" ambiguity,[272] the doctrine functions to empower the courts, rather than Congress. Courts, however, are facially less well suited than Congress to promote democratic forms of participation. Their constitutional function is to adjudicate cases and controversies, and protect the rights of individuals and minorities, rather than to settle polycentric policy-disputes.[273] 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 injury than does the regulated community.[274] Because the major questions doctrine merely empowers the judiciary, rather than Congress or agencies, to resolve major questions, it does not promote a comparatively more democratic form of policymaking than would exist absent the doctrine's constraint on administrative discretion.

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[271] 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 opinions of high-income constituents as low-income constituents, and not at all responsive to the opinions of low income constituents); Martin Gilens and Benjamin 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").

[272] 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 . . . .")

[273] 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).

[274] 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).

Worse still, the major questions doctrine exacerbates inequalities in rulemaking rather than redressing them. Because the doctrine generally forbids agencies from making decisions of great economic and political significance, it 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 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.[275] 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.[276] The major questions doctrine doubles down on this trend by barring agencies from engaging in anything more than interstitial gap-filling between clearly established statutory norms. The doctrine thus is likely to increase inequalities in the rulemaking process, shifting it into a technocratic rather than value-oriented form of policy discourse. This retreat 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 understood by the people themselves. They believed that administrative agencies had the institutional capacity to bring governmental power to bear efficiently and on a massive scale to further social emancipation. By contrast, the major questions doctrine shows the perils of privileging judicial control without due regard for this practical need of speedy administrative resolution of social problems. In *Brown & Williamson*, with its tobacco and cigarette regulations, the FDA was attempting to mitigate a public health crisis which caused the deaths of roughly 400 thousand Americans every year.[277] The Court acknowledged the force of this concern, but nonetheless struck down the rule as outside of the

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[275] 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).

[276] 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").

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

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

VI. REFORMING MAJOR QUESTIONS

The major questions doctrine rests on the important constitutional principle that basic value choices should be subject to public input, scrutiny and critique. But it then imports other auxiliary assumptions, to conclude that the best way to enforce such a deliberative process is for courts to presume that Congress would not delegate such questions to agencies. The doctrine assumes that the judiciary is the preeminent interpreter of Congress' choices of principle and policy, 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 turned 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 discursive process that specifies 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 inflated notions of judicial competence and deflated conceptions of administrative agencies' ethical and participatory capacities. In section A, I describe my innovation. In section B, I apply it to several of the major questions cases: *Brown & Williamson*, *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 another 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 deliberative process that precedes the promulgation of the interpretation.[278] The rule thus follows *U.S. v. Mead Corp.* in treating a Congressional grant of informal rulemaking authority as a "good indication" that Congress intended to leave the interpretive question to the agency.[279] As Michaels observes, *Mead* instructs courts "to accord less deference to unilaterally arrived-at agency interpretations than to those interpretations that reflect the robust participation of agency leaders, civil servants, and members of the public."[280] But my proposed approach does not, like *Mead*, treat a grant of lawmaking authority as necessary or sufficient for the courts to give serious consideration to the interpretive position of an agency. Even if an agency doesn't have or use rulemaking authority, its opinion on major questions within its subject-matter jurisdiction should 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 meeting these same criteria.

Such a standard would require agencies to state explicitly what major questions were at issue, thus heightening the transparency of public decision-making. It would encourage agencies always to consider what significant public norms might be involved in their rulemaking, lest a reviewing court deem that the issue was in fact one of major significance, and fault the agency 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.[281] Such interpretations, even if promulgated in furtherance of the agencies' delegated lawmaking authority, would not necessarily qualify for deference if the courts found that a major question was at play. Only if agencies documented a process of extensive public input over the relevant value questions would *Chevron* deference apply. This approach would allow agencies to resolve important policy questions, but would insist that they do so in a deliberative, inclusive, and transparent fashion. In this way, value-oriented public discourse would be reinforced better than it currently is under the major questions doctrine's court-centric, technocracy-forcing approach.

This proposal is a marginal, but nonetheless significant modification of the jurisprudence on agency statutory interpretation. *Chevron* deference applies not

[278] Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d. 330, 338 (D.C. Cir. 1968).
[279] 533 U.S. 218, 229 (2001).
[280] Michaels *supra* note ___, at 273.
[281] 5 U.S.C. §553 (b)(3)(A) (2012).

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.[282] In some cases, therefore, an interpretive rule or opinion may receive *Chevron* deference.[283] 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."[284] 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 only grant deference to agency interpretations raising a question of economic or political significance if promulgated through notice-and-comment rulemaking procedures, or a process with comparable deliberative features, including: unrestricted access by any and all parties to the decision-making process, agency deliberation which rationally responds to all relevant input it receives, and full documentation of how the agency reached its conclusion in light of that deliberation. If an agency's interpretive rule raises a significant value question, the interpretation would need to engage with and respond to public comments on that question in order to be given significant weight by a court.

For example, the Attorney General's classification of drugs used in physician-assisted suicide in *Gonzales* would not have been owed deference, because it was not promulgated through rulemaking or any comparable procedure. 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."[285] 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

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[282] *Id.* at 231.
[283] NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256–257, (1995).
[284] Auer v. Robbins, 519 U.S. 452, 461, (1997), *quoting* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).
[285] *Gonzales*, 546 U.S. at 269.

delegated authority.[286] Instead of mandating the use of certain procedures, it calibrates the level of deference owed to the 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 deliberative engagement with the affected public. 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.[287] 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.[288] One way to balance the twin purposes of procedural protection and regulatory flexibility is to deny deference to interpretive rules concerning major questions, unless the agency has elected to promulgate such interpretations through a deliberative and participatory procedure.

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 would also require that the relevant economic or political questions had been ventilated and rationally addressed by the agency on the record. Such an approach would adapt *Chevron*'s step-two into a requirement for deliberative rationality: an agency's interpretation of an ambiguous provision implicating a major question would be "reasonable," only if it was well-justified in terms of the purposes of the statute and the input of affected parties.[289] In other words, the agency's "concise statement of basis and

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[286] 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").

[287] 5 U.S.C. § 553(d) (2012).

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

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

purpose"[290] 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."[291] In the context of major questions cases, courts should ensure that the agency's argumentation is not purely technical, but actually raises and addresses these questions in its final rule. If the agency fails to do so, this will show that the agency has not made use of the deliberation-reinforcing capacities of notice-and-comment rulemaking, and thus cannot claim deference for its preferred interpretation of the law.

B. Applying the Approach to the Major Questions Cases

Consider how this aspect of the test would play out in some of the major questions cases discussed in Part I. Since the courts do not always specify the economic and political questions at issue, but only allude to the import of the challenged interpretation, I will attempt to offer a best guess. In *Brown & Williamson*, one question of political significance was: how should the agency balance competing consideration of the public health risk caused by smoking, on the one hand, and public values of individual responsibility and choice, on the other? Responding to public comments on this topic, the Final Rule addressed this 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.[292]

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,[293] the allocation of regulatory responsibilities between the state and federal government,[294] and the commercial rights of retailers.[295]

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[290] 5 U.S.C. § 553 (c).
[291] Industrial Union Dept. v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).
[292] 61 Fed. Reg. 44,418 (Aug. 28, 1995).
[293] *Id.* at 44,421.
[294] *Id.* at 44,430.
[295] *Id.* at 44,434.

The agency also referenced President Clinton's Wilsonian engagement with the public over the subject matter of the Rule. It considered public comments addressed directly to him by a coalition of medical associations,[296] remarks to the press explaining the regulatory plan,[297] and the input of the Ad Hoc Committee of the President's Cancer Panel.[298] 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 is that it is likely that commentators will raise most, if not all, relevant issues, and therefore the agency will have a legal responsibility to address them. The 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 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' arguments 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 exchanges, and that the legislative history "does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges."[299] It concluded that the Services' proposed interpretation "is consistent with the language, purpose, and structure . . . of the Affordable Care Act as a whole."[300]

These statements are conclusory. The IRS did not actually offer an argument on the major issue the Court subsequently addressed, namely whether the statutory purpose or scheme required the availability of tax credits on federal as well as state exchanges. Given that the IRS did not engage in a substantive discussion of the policy questions implicated by one of the "Act's key reforms,"[301] it was reasonable for the Court not to defer to the agency's

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[296] *Id.* at 44,418.
[297] *Id.* at 44,419.
[298] *Id.* at 44,463.
[299] INTERNAL REVENUE SERVICE, HEALTH INSURANCE PREMIUM TAX CREDIT. FINAL RULE, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012).
[300] *Id.*
[301] *King*, 135 S.Ct. at 2489.

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 of economic liberty and dual sovereignty that had arguably animated the *King* litigation; in that case the Court ought to have deferred to the agency's 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,"[302] 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.[303] 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 procedure undermined its democratic authority to undertake a significant policy shift without explicit Congressional authorization. This does not mean that the Fifth Circuit was correct that the agency's interpretation of the law was invalid. It simply means that 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 an "enforcement memorandum," a "rule," or a "general statement of policy." If an administrative policy is promulgated under any of these headings, and a court determines that the policy shift implicates a question of deep economic and political significance, the agency must have documented a value-oriented process of public engagement for its interpretations of statutory ambiguities to qualify for judicial deference.

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 promote fair housing,[304] and that allow the regulation of the Internet as a common carrier.[305] Judges can find questions of deep economic and political

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[302] *Id.*

[303] 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.

[304] Department of Housing and Urban Development, Affirmatively Further Fair Housing, Final Rule, 80 Fed. Reg. 42349 (2015).

[305] Federal Communications Commission, Protecting and Promoting the Open Internet, Final Rule, 80 Fed. Reg. 19738, 19746 (April 13, 2015).

significance in such regulations without much difficulty. 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 them 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 to interpret public purposes, without abdicating their responsibility to ensure that We the people retain authorship over the rules that bind us.