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Democracy, Chevron Deference, and Major Questions Anti-Deference

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DEMOCRACY, *CHEVRON* DEFERENCE, AND MAJOR QUESTIONS ANTI-DEFERENCE

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In 1984, the Supreme Court in its Chevron *opinion invoked democratic values to help justify holding that courts should defer to an agency's reasonable construction of a statute that it administers. In 2022, in* West Virginia v. EPA*, the Court invoked democratic values to help justify the major questions doctrine (MQD), which requires clear congressional authorization for agency claims of major regulatory power. Democracy, it seems, requires deference and anti-deference for agency statutory interpretations.*

Or maybe not. This Article submits that the democracy talk of Chevron *and* West Virginia *is implausible, misleading, and may have caused the law to evolve in needlessly confusing and controversial ways. Had the Court skipped its democracy talk in* Chevron*, the resulting opinion might have focused more cleanly on the best and most persuasive justification for deference in this context, agency expertise. This might have fostered a simpler, clearer approach to deference, free from* Chevron*'s epicycles and less vulnerable to attack based on abstractions from separation-of-powers principles that threaten* Chevron*'s imminent demise. Without the help of democracy talk in* West Virginia*, the Court would have found it more difficult to justify the MQD—and a world without this judicial power grab would be a better one.*

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I. INTRODUCTION

In 1984, six justices of the Supreme Court issued the *Chevron* opinion, which, subject to many later qualifications, instructs courts to defer to an agency's reasonable interpretation of a statute that it administers.[1] The Court identified both agency expertise and democratic values as justifications for this approach.[2] Nearly forty years later, in 2022's *West Virginia v. Environmental Protection Agency*, five justices discovered that the Court had been at least partially mistaken about democracy in *Chevron*.[3] Congress, it turns out, does not want courts to accept reasonable agency constructions of ambiguous text if they claim "extraordinary grants of regulatory authority."[4] Rather, Congress keeps—and should keep—such "major policy decisions [for] itself."[5] Democracy accordingly demands a "major questions doctrine" that insists on a "clear congressional authorization" to support an agency's claim for a major regulatory power.[6] Democracy wants both deference and anti-deference.

This seeming contradiction suggests the possibility that there might be something wrong with the Court's invocation of democratic

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[1] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (instructing courts to "give effect to the unambiguously expressed intent of Congress" but to defer to an agency's "permissible" (i.e., reasonable) resolution of statutory ambiguity).

[2] *See id.* at 844 (noting that courts defer to agency statutory constructions where understanding statutory policy "has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations" (quoting United States v. Shimer, 367 U.S. 374 (1961))); *see also id.* at 865 ("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 . . . .").

[3] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2587 (2022) (holding that the "major questions doctrine" requires agencies to point to "clear congressional authorization for the authority it claims").

[4] *Id.* at 2609.

[5] *Id.* (quoting United States Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

[6] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). *But see* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. 1009, 1010 (2023) (canvassing ways that the major questions doctrine fosters minority rule). For a bibliography of the explosively growing literature on the major questions doctrine, see generally Beau J. Baumann, *The Major Questions Doctrine Reading List,* YALE J. ON REG.: NOTICE & COMMENT (Mar. 18, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/LP49-M78F].

values in either *Chevron* or *West Virginia*, or both. The last of these possibilities proves to be the case. In both cases, justices invoked two principles to support the democratic bona fides of their conclusions. First, both majority opinions claim to implement the intent of that most democratic of bodies, Congress.[7] In both opinions, however, the Court obviously made up the fictional congressional intent necessary to support this conclusion.[8]

Second, both the majority in *Chevron* and Justice Gorsuch's concurrence in *West Virginia* share the premise that delegating authority to unelected officials to make values-based policy choices creates a democracy deficit that courts should minimize by shoving governing authority away from unelected officials and toward elected officials. In *Chevron*, this meant shoving authority from courts to agencies answerable to the president.[9] In *West Virginia*, this meant shoving authority from agencies (notwithstanding the connection to the president recognized by *Chevron*) to Congress.[10] This line of thinking rests on an understanding of political accountability in mass democracy that is wildly unrealistic.[11]

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[7] *Compare West Virginia*, 142 S. Ct. at 2607–08 (characterizing the major question doctrine's clear-statement rule as a function of congressional intent), *and* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (characterizing the major questions doctrine as a "common sense" interpretive tool for divining likely congressional intent), *with Chevron*, 467 U.S. at 843–44 (characterizing statutory ambiguity as an implicit congressional delegation of interpretive authority to agencies).

[8] *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 100 (2022) ("The 'major questions' doctrine . . . has no basis in the Constitution or congressional mandate."); Jack M. Beermann, Chevron *Is a Rorschach Test Ink Blot*, 32 J.L. & POL'Y 305, 311 (2017) ("*Chevron* is based on the falsehood that through statutory ambiguity Congress indicates an intent to delegate interpretive authority to agencies.").

[9] *See Chevron*, 467 U.S. at 866 ("In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

[10] *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (explaining that "by vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" (alterations in original) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed. 1961))).

[11] *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 1 (2016) (observing that scientific evidence indicates that, "[a]t election time, [most voters] are swayed by how they feel about 'the nature of the times,' especially the current state of the economy, and by political loyalties typically acquired in childhood"); *see also* Jud Mathews, *Minimally Democratic*

It seems plausible that legal doctrine would have evolved along better lines had the justices skipped the democracy talk supporting deference in *Chevron* and anti-deference in *West Virginia*. Had the Court done so in *Chevron*, the resulting opinion might have focused more cleanly on its best justification for deference, agency expertise,[12] which might have fostered a simpler, clearer approach than the *Chevron* doctrine, with all its epicycles.[13] Moreover, a deference doctrine keyed to the notion that a court, to determine the *best* meaning of a statute, should pay careful attention to agency expertise would not be vulnerable to the type of separation-of-powers attacks that, as of this writing, are super-charging litigation at the Supreme Court, threatening *Chevron*'s imminent demise.[14]

As for *West Virginia*, the Court is composed of people who, when they put their brilliant minds to it, can justify all sorts of things. Still, the *West Virginia* majority might have found it more difficult to justify its aggressive form of the major questions doctrine without the benefit of its appeal to democratic values—and a world without this doctrine's politicized judicial power-grab would be better.[15]

Administrative Law, 68 ADMIN. L. REV. 605, 609 (2016) (criticizing conventional theories of democracy for "expect[ing] more than is reasonable of citizens, leaders, and institutions").

[12] For exploration of the meaning and subtleties of administrative expertise, see ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 35–65 (2020).

[13] For an illustration of the epicyle problem, see, for example, Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 758–61, 774–78 (2017) (noting that the *Chevron* framework has been characterized as possessing from one to four steps and proposing a step 1.5).

[14] During the writing of this Article, the Supreme Court granted certiorari on whether to overturn the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (May 1, 2023) (No. 22-451) and *Relentless, Inc. v. Department of Commerce*, 2023 WL 6780370 (Oct. 13, 2023) (No. 22-1219). For a flavor of the charges against *Chevron*, see, Brief for Petitioners at 15–18, Loper Bright Enters., Inc. v. Raimondo, No. 22-451 (U.S. July 17, 2023), 2023 WL 4666165, at *15–18 ("As a constitutional matter, *Chevron* impermissibly transfers both Article III judicial power and Article I legislative power to Article II executive agencies, and it runs afoul of the Due Process Clause by requiring courts to systematically place a thumb on the scale against the citizenry.").

[15] *See* Lemley, *supra* note 8, at 100 (observing that the new major questions doctrine "seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn't like").

II. ADMINISTRATIVE LAW'S DEMOCRACY DEFICIT AND RESPONSES

The Vesting Clause of Article I, § 1, declares that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[16] The Supreme Court has construed this provision as barring congressional delegations of legislative authority.[17] But no modern government can function effectively if subject to a strong bar on delegations of legislative authority to subordinate rule-makers. The Supreme Court has managed this tension by permitting Congress to delegate authority to an agency to create binding policies so long as the terms of the delegation impose an "intelligible principle" that limits the agency's discretion.[18] For many decades, the Court has applied this principle in a toothless way, leaving Congress free to delegate vast policymaking powers to agencies that require political judgments to implement.[19] A majority of the justices has in recent years expressed interest in strengthening the Nondelegation Doctrine,[20] but the toothless approach, for now, remains law. To many observers, this equilibrium creates a yawning democracy deficit by allocating policymaking power to unelected officials.[21]

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[16] U.S. CONST. art. I, § 1.

[17] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (asserting that the constitutional text granting legislative authority to Congress in Article I, § 1 "permits no delegation of those powers" (citing Loving v. United States, 517 U.S. 748, 771 (1996))).

[18] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (adopting the "intelligible principle" doctrine).

[19] *See Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . ." (citations omitted)); Yakus v. United States, 321 U.S. 414, 420–26 (1944) (upholding delegation requiring "fair and equitable" prices during wartime); NBC v. United States, 319 U.S. 190, 225–26 (1943) (upholding delegation to allocate public broadcasting licenses in the "public interest").

[20] *See* Gundy v. United States, 139 S. Ct. 2116, 2131–48, 2141 (2019) (Gorsuch, J., dissenting) (disapproving of the Nondelegation Doctrine as an "intelligible principle misadventure"); *id.* at 2131 (Alito, J., concurring in the judgment) (expressing interest in revisiting the Nondelegation Doctrine); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of writ of certiorari) (indicating interest in Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine").

[21] *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (describing his concern that delegation of legislative power to the executive branch threatens "a structure designed to protect their liberties, minority rights, fair notice, and the rule of law").

Broadly speaking, administrative law has relied on two types of coping strategies to make itself feel better about the democracy deficit. The first, earlier strategy involved denying the existence of agency discretion in ways that seem extremely unpersuasive to modern observers. According to the "transmission belt" model, agencies do not undermine democratic legitimacy because they only perform tasks that a legislature commands them to perform.[22] Regardless of whether this model was ever persuasive, it could not survive contact with the expanding agency power of the New Deal era.[23] In response, some defenders of administrative governance shifted to contending that agency technocratic expertise effectively limits discretion to implement statutory delegations that on the surface appear broad and vague.[24] Agencies find the best ways to implement their statutory missions based on objective expertise rather than political judgment. Perhaps because it was no more plausible than the transmission belt model, the idea that objective expertise eliminates agency discretion fell out of favor as the twentieth century marched into its second half.[25]

Rather than wish away the existence of discretion, later commentators shifted toward a second tactic of defending the administrative rulemaking process itself as "democratic" and pushing for ways to make it more so.[26] According to the "interest representation" model, the notice-and-comment process of administrative rulemaking could be regarded as democratic insofar as it is structured to give all interested persons a proper chance to

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[22] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (describing the "transmission belt" model of administrative law).

[23] *Id.* at 1677 (observing that, after the New Deal, the problem that agency discretion posed for the traditional "transmission belt" model could no longer be "papered over by applying plausible labels").

[24] *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes,* 73 TEX. L. REV. 83, 90–91 (1994) (observing that this "model posits that agency decisions are not political because if everyone had the same knowledge and experience as the agency, all would agree that the agency's solution was best for the public interest").

[25] *See* Peter L. Strauss, *Legislation That Isn't—Attending to Rulemaking's "Democracy Deficit*," 98 CAL. L. REV. 1351, 1359 (2010) ("While 'expertise' may have been the hallmark of New Deal thinking about administrative action, any thought of rationalizing administration as *simply* the exercise of expertise—as if the necessary judgments could be reached by calculation and without the intrusion of values—has vanished.").

[26] For an extensive tour of these models, see generally Mathews, *supra* note 11, at 613–34.

participate.[27] Later, a "deliberative democracy" justification came into vogue. This model contemplates that democracy should "combine accountability with a commitment to reflection and reason-giving."[28] Agency rulemaking is democratic insofar as it both gives all interested persons a chance to participate and, thanks to judicial review, requires agencies to offer reasonable and public justifications for their actions.[29]

An alternative approach to democratizing agency governance, the "political control" model, depends less on the "how" of governance and more on the "who." On this view, agency governance can be legitimized by ensuring that elected officials exercise sufficient control over it.[30] When the elected official in charge turns out to be the president, we have "presidentialism," which scholars have characterized as the dominant theory for legitimizing agency policymaking discretion over the last several decades.[31]

During her academic days, Justice Kagan made the most prominent scholarly case for this type of presidentialism in her aptly named article, *Presidential Administration*.[32] In it, she claimed: "First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."[33] Presidential control of administration thus enhances the public's understanding of governance as well as the public's ability to control it.

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[27] *See* Stewart, *supra* note 22, at 1712 (explaining the pluralist view that "[a]gency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation").

[28] Cass R. Sunstein, *The Most Knowledgeable Branch,* 164 U. PA. L. REV. 1607, 1619 (2016).

[29] *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law,* 97 IOWA L. REV. 849, 892 (2012) (arguing that "hard-look judicial review is perhaps the prime example of a well-established legal doctrine that has firmly embraced and squarely adopted the most fundamental principles of deliberative democratic theory").

[30] *Id.* at 856.

[31] *Id.* at 858.

[32] *See* Elena Kagan, *Presidential Administration,* 114 HARV. L. REV. 2245, 2331–32 (2001) (arguing that the presidential model solves issues of administration accountability and efficiency).

[33] *Id*.

For an earlier distillation of presidentialism, one might look to Justice Rehnquist's four-justice partial dissent in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co*.[34] Commenting on an agency decision during the Reagan administration to rescind a Carter-era rule, he declared:

> A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.[35]

Presidentialism accordingly suggests that an agency should be able to choose whatever reasonable policy option the president likes best because the president answers to the people.

III. USING *CHEVRON* DEFERENCE TO HELP CLOSE THE DEMOCRACY DEFICIT

The Clean Air Act Amendments of 1977 required "nonattainment" states to adopt strict permitting requirements for "new or modified stationary sources" of air pollution.[36] This requirement raised the problem of defining "stationary source." Suppose that an industrial plant in a nonattainment area has three big smokestacks pumping pollutants into the air. In August 1980, the Environmental Protection Agency (EPA) promulgated a rule providing that both the whole plant and its major components

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[34] *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (asserting that presidential administrations have legitimate political authority to shift policies within parameters set by Congress).

[35] *Id.* (footnote omitted).

[36] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

should be regarded as "stationary source[s]."[37] Under this dual definition approach, a firm would need to obtain a permit for changes that would lead either to the whole plant or to any one of its three big smokestacks significantly increasing emissions.

Not long after the Reagan administration took power, the EPA adopted a new rule that allowed nonattainment states to adopt the "bubble concept" as part of their permitting regimes.[38] This approach requires permitting only if the total amount of emissions escaping from an imaginary bubble encasing the entire plant increases.[39] The bubble concept thus allows a firm to increase emissions from some elements within a plant (e.g., one of the three big smokestacks) so long as the firm pays for this increase by reducing emissions from other elements in the plant (e.g., the other smokestacks). To justify this change, EPA explained that the dual definition approach that it had abandoned "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones."[40] Also, the new rule would simplify EPA rules by adopting a consistent definition of "source" across various programs.[41]

On judicial review, the D.C. Circuit conceded that the pertinent statutory text does "not explicitly define what Congress envisioned as a 'stationary source'" and that the legislative history was "at best contradictory."[42] It nonetheless held that circuit precedents required rejection of the bubble concept given that the purpose of

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[37] *See id.* at 857 (discussing the EPA rule, 45 Fed. Reg. 52,697 (1980), and explaining that, under dual definition, the rule required permitting for changes to entire plant or to one of its components).

[38] *See id.* at 858 (referencing adoption in 1981 rulemaking of a single "plantwide" definition of "stationary source").

[39] *See id.* at 840 (explaining that, under a bubble-style, plantwide definition of "stationary source," an "existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant").

[40] *Id.* at 858 (quoting 46 Fed. Reg. 16,280, 16,281 (March 12, 1981)).

[41] *See id.* (noting EPA's contention that simplification would reduce confusion and inconsistency).

[42] *Id.* at 841 (quoting Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723, 726 n.39 (D.C. Cir. 1982)).

the statutory program was to improve rather than merely maintain air quality in nonattainment states.[43]

The Supreme Court responded that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[44] This framing created a natural rhetorical opening for the Supreme Court to offer its famous two-step approach for judicial review of agency statutory interpretations:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[45]

The Court flagged three rationales for this approach. With engaging humility, the Court observed that judges are not "experts," whereas an agency may have "great expertise" over a regulatory scheme that is "technical and complex."[46] This observation acknowledged the common-sense point that a sensible judge trying

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[43] *See id.* at 841–42 (noting D.C. Circuit's contention in *Gorsuch*, 685 F.2d at 726, that application of bubble concept contradicted statutory purpose to improve air quality).

[44] *Id.* at 842.

[45] *Id.* at 842–43 (footnotes omitted).

[46] *Id.* at 865; *see also id.* at 844 (explaining that the Court applies deference where "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations").

to determine how to construe a complex, technical statute should take advantage of agency expertise.[47]

The Court also indicated that deference serves democratic values in two ways. First, Congress, the fount of democratic legitimacy, has implicitly delegated to agencies authority to choose among reasonable interpretations of statutes that they administer.[48] To support this conclusion, the Court indicated that resolving ambiguity in an agency's enabling act goes beyond strictly legal considerations into the domain of policy.[49] Congress has charged agencies, not courts, with the task of policymaking. It follows that, to respect congressional intent, courts must defer to agency resolutions of statutory ambiguity.[50]

Consistent with the presidentialist version of the political control model, the Court added that deference enhances democratic legitimacy because the president, unlike judges, is elected and "directly accountable to the people."[51] Neatly tracking Justice Rehnquist's partial dissent in *State Farm*, Justice Stevens explained:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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

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[47] *Cf.* Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 754 (2002) (contending that expertise provides the best rationale for judicial deference to agency statutory constructions).

[48] *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."); *see also* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (emphasizing that the applicability of *Chevron* turns on congressional intent).

[49] *See Chevron*, 467 U.S. at 844 (characterizing agency statutory construction as sometimes requiring "reconciling conflicting policies" (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

[50] *See id.* at 844 ("In such a case [of implicit delegation], a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[51] *Id.* at 865; *see also id.* at 866 ("In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

> 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.[52]

Democracy demands *Chevron* deference to agency statutory interpretations both because Congress commands it and because presidents are answerable to the people.

IV. USING MAJOR QUESTIONS ANTI-DEFERENCE TO CLOSE THE DEMOCRACY DEFICIT

In 2022's *West Virginia v. Environmental Protection Agency*, the Court realized that sometimes democracy, rather than supporting judicial deference to agency statutory interpretations, instead can require anti-deference.[53] The Court's occasion for confirming this discovery involved a challenge to the Clean Power Plan (CPP), which the EPA had adopted during the Obama administration to curb carbon dioxide emissions from existing power plants pursuant to § 111(d) of the Clean Air Act.[54] As part of this exercise, the EPA had to establish a "standard of performance" for emissions that "reflects the degree of emission limitation achievable through the application of the best *system* of emission reduction which . . . the [EPA] Administrator determines has been adequately demonstrated."[55]

The EPA adopted a "best system of emission reduction" (BSER) that contemplated not just technical improvements at individual plants but also "generation shifting" among plants.[56] In other words, the rule contemplated that the "best system" would require power generation to shift from dirtier to cleaner plants.

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[52] *Id.* at 865–66; *cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (seizing on the presidentialist justification for *Chevron*).

[53] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[54] *See id.* at 2602 (explaining that the EPA adopted the Clean Power Plan to address carbon emissions from existing coal and gas plants).

[55] *Id.* at 2601 (alteration in original) (emphasis added) (quoting 42 U.S.C. § 7411(a)(1)).

[56] *Id.* at 2603

The Supreme Court held that this BSER exceeded EPA's authority because the term "system," properly understood, did not encompass the CPP's generation-shifting model.[57] Reaching this conclusion presented a challenge as it is far from obvious why the broad term "system" should be read this way. Indeed, Chief Justice Roberts's majority opinion conceded that, "[a]s a matter of 'definitional possibilities,' . . . generation shifting can be described as a 'system.'"[58] Given just this much, one might think that EPA's statutory construction of "system" should prevail as reasonable under *Chevron* or might even survive de novo review.

The Chief Justice explained that these standards of review did not apply because the major questions doctrine "teaches that there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer" regulatory authority on an agency.[59] In such cases, a reviewing court should not apply *Chevron* deference, nor should a court apply a de novo approach to determine the best available statutory construction. Rather, a reviewing court should affirm the agency's assertion of power only if it is supported by a "clear congressional authorization."[60] Applying this principle, the Chief Justice concluded that the term "system" did not provide clear authorization for EPA to require generation shifting because, "shorn of all context, the word is an empty vessel" that did not come "close to the sort of clear authorization required by our precedents."[61]

The Chief Justice justified this clear-statement version of the "major questions doctrine" by taking a two-page tour of a half-dozen

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[57] *See id.* at 2615–16 ("[T]he only interpretive question before us, and the only one we answer, is more narrow: whether the [BSER] identified by EPA in the [CPP] was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.").

[58] *Id.* at 2614 (citing FCC v. AT&T Inc., 562 U.S. 397, 407 (2011)).

[59] *Id.* at 2608 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–160 (2000)).

[60] *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[61] *Id.* at 2614.

precedents.[62] In three, the Court had, applying *Chevron*, rejected agency statutory constructions as inconsistent with clear congressional intent or otherwise unreasonable.[63] In each of these three, the Court's core rationale was that adopting the agency's interpretation would make a hash of Congress's overall statutory scheme,[64] but the Court did also include broad language indicating that it does not expect Congress to use oblique language to make fundamental changes.[65] In a fourth case, the crux of the Court's analysis was that *Chevron* deference should not apply to an interpretive rule adopted by the Attorney General that construed "legitimate medical purpose" to criminalize physician-assisted suicide on the ground that medical judgments were not the Attorney General's business.[66] In the fifth and sixth precedents, both issued per curiam in emergency circumstances, the Court flatly asserted that a clear-statement rule applies to agency assertions of major

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[62] *Id.* at 2608–09. For a fuller accounting of the sculpting of the major questions doctrine, see generally Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron *and More*, 65 WM. & M. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4383132.

[63] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 318–20 (2014) (rejecting the EPA's interpretation of "air pollutant" in PSD and Title V permitting programs as including greenhouse gases); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–59 (2000) (rejecting the FDA's asserted jurisdiction to regulate tobacco products as "drugs"); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229–32 (1994) (rejecting the FCC's assertion that its authority to "modify" statutory requirements allowed it to eliminate tariff filing requirement).

[64] *See Util. Air*, 573 U.S. at 322 (explaining that adoption of EPA's interpretation would radically expand the number of entities subject to permitting requirements, contrary to congressional intent); *Brown & Williamson*, 529 U.S. at 136–43 (explaining that if FDA had jurisdiction to regulate tobacco products, it would have to either ban them or determine that they are "safe"); *MCI*, 512 U.S. at 229 (explaining that the tariff requirement that FCC had made optional was "the heart of the common-carrier section of the Communications Act").

[65] *See Util. Air*, 573 U.S. at 324 (declaring that the "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization"); *Brown & Williamson,* 529 U.S. at 160–61 (stating that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *MCI*, 512 U.S. at 229 (stating that FCC's decision to make tariff-filing optional could count as a "modification" only if it made "less than radical or fundamental change").

[66] *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (finding that the rule was "both beyond [the Attorney General's] expertise and incongruous with the statutory purposes and design" because it "place[d] extensive reliance on medical judgments . . . in concluding that assisted suicide is not a 'legitimate medical purpose'").

new regulatory authority but offered no explanation other than a few unexplained citations.[67]

After completing his two-page tour, the Chief Justice asserted that these half-dozen precedents composed an "identifiable body of law" reflecting a "practical understanding of legislative intent" that "make[s] us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[68] In other words, the Court's precedents demonstrate that Congress must want the courts to apply an anti-deference rule to those questions of regulatory authority that the courts decide are major.

Apparently thinking that a fuller explanation might be warranted, Justice Gorsuch penned a concurring opinion that tied the major questions doctrine to democratic values, separation-of-powers, and rule of law.[69] He explained that the Court has developed clear-statement rules that provide penumbras (not his word) of protection for constitutional principles.[70] These rules assume that Congress generally "means for its laws to operate in

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[67] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam))); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'" (quoting *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160))).

[68] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air*, 573 U.S. at 302); *see also id.* ("Congress intends to make major policy decisions itself, not leave those decisions to agencies." (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))); *accord* Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (characterizing the major questions doctrine as growing out of "commonsense principles of communication" and an expectation that Congress speaks "clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" (quoting *Util. Air*, 573 U.S. at 324)).

[69] *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (contending that the major questions doctrine protects against intrusions on values of "self-government, equality, fair notice, federalism, and the separation of powers"); *see also* Nat'l Fed'n Indep. Bus. v. OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) ("Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives.").

[70] *See West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (asserting that "these clear-statement rules help courts 'act as faithful agents of the Constitution'" (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010))).

congruence with the Constitution rather than test its bounds."[71] Accordingly, a court should avoid adopting a statutory construction that tests constitutional bounds, unless a clear statement of congressional intent requires it.

According to Justice Gorsuch, the major questions doctrine provides a penumbra of protection for the values served by the Vesting Clause of Article I.[72] Properly understood, this provision requires that "important subjects . . . must be entirely regulated by the legislature itself," which may, however, delegate to executive authorities clean-up duty to "fill up the details."[73] This allocation of power "is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'"[74] It ensures that power is "derived from the people" and exercised by persons "kept in dependence on the people."[75] Justice Gorsuch conceded that some people, notably including President Woodrow Wilson, have disdained rather than valued popular sovereignty, but he also explained that Wilson was an awful racist.[76]

Justice Gorsuch granted that lawmaking dependent on the people is very difficult to accomplish under our constitutional design, but this difficulty is good because it protects individual

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[71] *Id.*

[72] *Id.* at 2619 ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine."). *But compare Biden*, 143 S. Ct. at 2376–78 (Barrett, J., concurring) (contending that the major questions doctrine should not be regarded as a "strong-form substantive canon" that "overprotects" the nondelegation principle; the major questions doctrine instead relies on common sense and context to identify likely congressional meaning).

[73] *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

[74] *Id.* (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[75] *Id.* (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton. Rossiter ed., 1961)).

[76] *See id.* at 2617 & n.1 (observing that "some have questioned" whether the people are better fit to govern than "largely unaccountable" bureaucrats; noting in particular that Woodrow Wilson, regarded "popular sovereignty" as an embarrassment, praised white supremacist governance, and despised African-Americans and immigrants).

liberty, forces consensus, and contributes to stability.[77] Permitting Congress to evade this difficulty by delegating legislative power would enable agencies to "churn out new laws more or less at whim," undermining liberty, stability, social consensus, minority influence, and state authority while at the same time wildly empowering presidents and special interests.[78] Left to its own unsupervised devices, Congress might create such a terrible state of affairs because delegations enable it to "reduc[e] the degree to which [it] will be held accountable for unpopular actions."[79] The clear-statement rule of the major questions doctrine thus protects us from Congress democratically abjuring democracy in favor of an expertocratic executive tyranny.[80]

In sum, democracy demands anti-deference because that is what Congress wants, and the courts must serve as Congress's faithful agents.[81] Also, according to Justice Gorsuch (joined at times by Justices Alito and Thomas), democracy demands anti-deference because Congress should make the big policy decisions to ensure accountability to the people.[82] Anti-deference closes the democracy gap by making Congress do its job.

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[77] *See id.* at 2618 (noting that the framers deliberately designed lawmaking to be difficult to encourage widespread support and stability).

[78] *Id.*

[79] Nat'l Fed'n Indep. Bus. v. OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (first alteration in original) (quoting R. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017)).

[80] *See* Beau J. Baumann, *Americana Administrative Law,* 111 GEO. L.J. 465, 470 (2023) (characterizing Justice Gorsuch's approach as "*[s]pare the rod and spoil the Congress!*").

[81] *See West Virginia*, 142 S. Ct. at 2609 (attributing the major questions doctrine to "a practical understanding of legislative intent").

[82] *See id.* at 2617 (Gorsuch, J., concurring; joined by Alito, J.) ("[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" (alterations in original) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961))); *Nat'l Fed. Indep. Bus.*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring; joined by Alito and Thomas, JJ.) (explaining that the nondelegation doctrine and major questions doctrine "[b]oth are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands").

V. DEMOCRACY DOESN'T DEMAND DEFERENCE OR ANTI-DEFERENCE

Neither of the two democracy stories that the Court or its justices told to justify *Chevron* deference and the major questions doctrine's anti-deference are remotely persuasive. The notion that the Court is merely carrying out congressional intent in applying these doctrines rests on obvious fictions. The notion that these doctrines meaningfully further democratic accountability of elected representatives to the people rests on a wildly unrealistic vision of the operation of mass democracy.

The fictional nature of *Chevron*'s congressional intent story seems almost too obvious to mention.[83] Recall that, in *Chevron*, the Court characterized ambiguity in an agency's enabling act as an "implicit" delegation by Congress to the agency to resolve that ambiguity reasonably.[84] The Court could just as easily have characterized resolution of such ambiguity as part of the classic judicial obligation to "say what the law is."[85] Alternatively, as many observers have noted, the Court might have looked to the Administrative Procedure Act's command to reviewing courts "to decide all relevant questions of law" as a signal that Congress wants courts, not agencies, to resolve ambiguity in agency enabling acts.[86] Rather than base *Chevron* deference on actual congressional intent (whatever that may mean), the Court instead decided that it generally makes good sense for courts to accept agencies' reasonable

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[83] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (characterizing *Chevron* deference as "rooted in a legal presumption of congressional intent"); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 S. CT. REV 201, 212 (noting that the "*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretative authority").

[84] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (characterizing statutory ambiguity as an implicit delegation of authority to an agency to make the policy decisions necessary to resolve that ambiguity).

[85] *See* Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (declaring that *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[86] *See Mead*, 533 U.S. at 241 n.2 (Scalia, J., dissenting) ("Title 5 U.S.C. § 706 provides that, in reviewing agency action, the court shall 'decide all relevant questions of law'—which would seem to mean that all statutory ambiguities are to be resolved judicially.").

interpretations of their enabling acts, and the Court attributed this good sense to Congress.

Chief Justice Roberts's contention that his supercharged major questions doctrine reflects a "practical understanding of legislative intent" is even less persuasive.[87] Putting the possibility of *Chevron* deference to one side, one might suppose that, as a general rule, Congress intends for courts to adopt the best, most persuasive construction of an agency enabling act after applying all the classic tools of statutory construction.[88] Applying this approach, one might expect courts to reject surprising claims of extraordinary regulatory authority that are difficult to tease out of statutory text or that would undermine the overall logic of a statutory scheme.[89] The major questions doctrine, by contrast, attributes to Congress an intent to grant to the courts free-ranging power: (a) to determine which questions of regulatory authority are "major"; and (b) to determine which delegations of authority are "clear" enough to pass muster.[90]

In considering whether Congress might "want" courts to exercise such power, one should bear in mind the potential power of a fully armed and operational clear-statement rule. Consider, for example, that courts, which tend to think that judicial review of agency action is good, require a clear statement of congressional intent to justify overcoming the presumption that agency action is subject to judicial review.[91] Professor Levin has observed that courts apply this clear-statement rule with extreme strictness in cases that raise issues

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[87] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

[88] *Cf. id.* at 2633 (Kagan, J., dissenting) ("We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind."). *But cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (characterizing the major questions doctrine as a common-sense tool for determining the "best interpretation of the text").

[89] *See West Virginia*, 142 S. Ct. at 2635 (Kagan, J., dissenting) (explaining that, in cases relied upon by the majority, "an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure").

[90] *See* Beermann, *supra* note 62 (manuscript at 35) (observing that the Court has not spelled out what it means for a question to be "major" or a delegation to be "clear").

[91] Abbott Lab'ys v. Gardner, 387 U.S. 136, 1441 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review [of agency action]." (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962))).

that courts regard as systemically important—e.g., the presumption is "practically irrebuttable" as applied to constitutional grievances and stronger as applied to administrative rules than to adjudications.[92] This ingrained practice suggests we should expect courts to apply a very strict clear-statement rule to questions that they have, by hypothesis, determined are "major" or "extraordinary."

The upshot is that Chief Justice Roberts's majority opinion in *West Virginia* attributes to Congress an intent to grant veto power to the courts over any agency claim of regulatory authority that a court deems to be a big deal. He does not explain why Congress would want courts to have such power.[93]

Justice Gorsuch's concurrence, on the other hand, does offer a justification for concluding that Congress would *not* want courts to have this power. Recall that, for Justice Gorsuch, a primary benefit of the major questions doctrine is that it prevents Congress from irresponsibly doing what it *wants* to do—delegate power to agencies to evade responsibility.[94] Insofar as the major questions doctrine defies rather than implements this desire, one might say it is anti-democratic—empowering life-tenured oligarchs to set aside enactments of the democratic branch.[95] As discussed above, Justice Gorsuch justified this anti-democratic move by invoking a higher-level democratic principle—i.e., democracy requires that policy

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[92] *See* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 739–40 (1990) (explaining the developing "common law of preclusion," which shows that the Court more frequently precludes certain issues involving agency decisions).

[93] On the implausibility of attributing the major questions doctrine to congressional intent, see Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 54–59, 57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4348024 ("The bottom line is that Congress's preferences in this rapidly evolving domain are also likely to be rapidly evolving and politically situated, making it quite difficult to accept at face value any claim about congressional preferences or background assumptions.").

[94] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (arguing that allowing "Congress to divest its legislative power to the Executive Branch" would frustrate the purposes of lawmaking as established by the Constitution).

[95] *See* Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine,* 2022 SUP. CT. REV. 1, 22 ("The most obvious and important way in which the new MQD undermines democratic accountability is the extent to which it empowers unelected judges to decide significant public policy issues, likely in ways that are influenced, consciously or subconsciously, by the judges' policy preferences.").

decisions be made by elected officials whom the people can later hold to account.[96]

Ironically, whereas Justice Gorsuch relied on a political accountability story to justify anti-deference in *West Virginia*, the *Chevron* Court relied on a similar political accountability story to justify deference. Again, Justice Stevens explained, "[w]hile 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 . . . policy choices" necessary to resolve ambiguity in agency enabling acts.[97] The animating idea behind this assertion is that shifting the policymaking power embedded in resolving statutory ambiguity from unelected judges to agencies answerable to the president shrinks the democratic deficit by enhancing political accountability.

Neither of these political accountability stories seem to take account of how mass democracy in the United States works (or doesn't). Some obvious problems with the notion that voters hold elected officials responsible for policy decisions relate to peculiarities of American political structures. Congresspersons holding severely gerrymandered seats automatically win general elections; presidents in a second term will never need to run in another election, etc. The broader problem, however, is that both the Gorsuch and the *Chevron* stories require voters with superhuman abilities to obtain and assess policy information as well as the ability and will to hold political actors responsible for these policy decisions. Worsening matters, the Gorsuch story adds the twist that the same voters who possess extraordinary abilities to make judgments regarding congressional policy also cannot figure out when Congress has tried to evade political accountability by

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[96] *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) ("[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" (alterations in original) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed. 1961))); *cf.* Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 425 (2023) (summarizing literature on congressional incentives to delegate; concluding that, "[t]aking a step back, the basic claim being made throughout this literature is that we end up with a democratic accountability deficit because of the perverse incentives to delegate").

[97] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

punting authority to agencies.[98] In real life, voters do not determine how to vote based on policy reviews; instead, "[a]t election time, [voters] are swayed by how they feel about 'the nature of the times,' especially the current state of the economy, and by political loyalties typically acquired in childhood."[99] Political affiliation and voting is not a matter of people reasoning from policy to politics; rather, it is more a function of social identity.[100] Mass democracy cannot be, except in the very coarsest way, a means for the general electorate to exercise policy control over elected representatives.

VI. MAYBE THE LAW WOULD HAVE TURNED OUT BETTER WITHOUT THE DEMOCRACY TALK

It is certainly possible, perhaps even probable, that the justices' dubious invocations of democracy to justify deference in *Chevron* and anti-deference in *West Virginia* have not had any material effects or done any real harm. Still, there are reasons to think this democracy talk has helped steer legal doctrine along suboptimal paths. A few very brief suggestions (or assertions, anyway) along these lines follow.

The implicit delegation and political accountability justifications for *Chevron* deference shifted the nominal task of judicial review from choosing the best statutory construction to determining whether an agency's statutory construction falls within a zone of reasonability.[101] Whether this ostensible shift to rationality review has changed many outcomes in significant cases is uncertain.[102]

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[98] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1746 (2002) (observing that citizens able to sanction politicians for policy choices should be able to sanction them for delegating policy authority to agencies).

[99] ACHEN & BARTELS, *supra* note 11, at 1; *see also id.* at 16 (concluding that "election outcomes are mostly just erratic reflections of the current balance of partisan loyalties in a given political system").

[100] *See id.* at 307 ("[V]oters choose political parties, first and foremost, in order to align themselves with the appropriate coalition of social groups.").

[101] *See Chevron*, 467 U.S. at 844 (stating that "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency").

[102] *Compare* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (finding a 77.4% affirmance rate under *Chevron* and a 56.0% rate under *Skidmore*), *with* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 OHIO ST. L.J. 611, 627 (2020) (observing that "[e]ven empirical studies finding a significant *Chevron*

What is certain is that this shift has injected grand, abstract concerns over separation of powers and rule of law into the discourse. Justice Thomas, who in the past has authored opinions aggressively expanding the reach of *Chevron* deference,[103] later castigated it for "wrest[ing]" from the courts the ultimate authority to "say what the law is."[104] Justice Gorsuch has insisted that *Chevron* has enabled "executive bureaucracies to swallow huge amounts of core judicial and legislative power."[105] Not coincidentally, these types of arguments figure prominently in briefing in consolidated cases scheduled for the Supreme Court's 2023 Term which present the question of whether the *Chevron* doctrine, a fundamental element of administrative law for forty years, should be overruled outright.[106]

Relatedly, the idea that *Chevron*'s form of rationality review is potent stuff has magnified the perceived importance of determining how, exactly, to apply the doctrine and identify which agency statutory interpretations should be regarded as worthy of its favorable treatment.[107] The process of answering these questions has turned a simple, intuitive idea—defer to reasonable statutory constructions—into a remarkably complex doctrine.

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impact signal at most a correlative relationship" and that "whether or to what extent *Chevron* drives case outcomes is unsettled").

[103] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (per Thomas, J.) (holding that an agency statutory construction entitled to *Chevron* deference can effectively overrule a judicial precedent provided the judicial precedent did not hold that its construction "follow[ed] from the unambiguous terms of the statute").

[104] Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[105] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[106] *See, e.g.*, Brief for Petitioners at 15–18, Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. July 17, 2023), 2023 WL 4666165, at *15–18 (charging that the *Chevron* doctrine transfers Article I legislative power and Article III judicial power to executive agencies and violates due process); Brief for Petitioners at 14, Relentless, Inc. v. Dep't of Commerce, No. 22-1219 (U.S. Nov. 20, 2023), 2023 WL 8237503, at *14 (similarly contending that "*Chevron* contravenes Article III of the Constitution, the Fifth Amendment's guarantee of due process of law, and the APA").

[107] *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 954–63 (2021) (detailing evolution of *Chevron* step-zero's threshold tests for determining applicability).

Suppose that the Court in *Chevron* had not relied on democracy justifications but had instead simply explained that, to justify displacing an expert agency's statutory construction, a court must give a reasoned explanation detailing why its preferred construction is demonstrably *better* than the agency's. Review by a generalist of an expert's judgment naturally tends to call forth a self-defining form of practical deference. For instance, at the risk of projecting personal experience, most people who seek medical advice from a doctor are not following some version of the *Chevron* test—i.e., they do not follow the doctor's advice merely because they have decided it sounds reasonable. Rather, a person who has obtained medical advice will try to determine their best course of action—which will include determining whether it is *better* to follow the doctor's expert advice or not. In making this judgment, a rational person will listen to the doctor's explanation and assess it as best they can. A careful, technical, detailed explanation will tend to elicit more trust and practical deference than a sloppy explanation offered by a drunk doctor smoking a cigarette. This approach transposes easily enough to judicial review. Applying it to *Chevron* itself, a reviewing court, after paying careful attention to EPA's expert explanation for changing course regarding the bubble concept, would need to determine whether to follow the agency's statutory construction or instead follow a different, demonstrably better construction.

Persons too deeply immersed in administrative law scope-of-review doctrines will have recognized that the preceding paragraph describes a variation on what courts generally call "*Skidmore* deference" but which Professor Strauss has explained would be better called "*Skidmore* weight."[108] *Skidmore* instructs courts to give "weight" to an agency statutory interpretation according to "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."[109] This formulation naturally raises the problem of determining how much weight a given agency statutory

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[108] Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145–46 (2012).

[109] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *But see* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting) (mocking *Skidmore* as "a trifling statement of the obvious").

interpretation should enjoy. This weighing problem mostly dissolves, however, if one recognizes that a court, to give a reasoned explanation for displacing an agency statutory interpretation, should have to explain why the court's interpretation is *better* than the agency's.[110] On this approach, the weight of an agency explanation should be a function of how hard it is for a reviewing court to improve upon it.[111] The more "expert" the agency explanation, the greater the burden on a court to engage this expertise and demonstrate that it has found a better statutory interpretation. This self-executing model for judicial deference keeps focus on the core justification for administrative governance, agency competence,[112] while also avoiding the grand controversies and scholastic debates generated by the notion that *Chevron* transfers to agencies the fundamental power to "say what the law is."[113]

As for the major questions doctrine, excising the democracy talk from the opinions in *West Virginia* would tend to highlight this doctrine's nature as a judicial power grab.[114] Congress surely does not "want" a malleable clear-statement rule granting courts authority to invalidate statutory delegations that courts deem "major." Nor, contra Justice Gorsuch's pieties, does invalidating delegations enhance political accountability to the people. Stripping out these justifications does still leave us with Justice Gorsuch's

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[110] *See generally* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 7 (2017) (making an extended case for replacing *Chevron* with the doctrine: "A court reviewing an agency's construction of a statute that it administers should adopt the best available construction. As a corollary, to justify rejecting an agency's construction, a court must explain why its construction and supporting analysis are *better* than the agency's").

[111] *See* Krotoszynski, *supra* note 47, at 754 ("If expertise . . . undergirds judicial deference to administrative interpretations of ambiguous statutory texts, judicial review will have to rely upon a sliding scale of deference, depending on the indicia of expertise associated with a particular agency decision.").

[112] *Cf.* Elizabeth Fisher & Sidney Shapiro, *Disagreement About* Chevron*: Is Administrative Law the "Law of Public Administration"?*, 70 DUKE L.J. ONLINE 111, 129–33 (2021) (explaining how judicial review of agency statutory interpretations should focus on agency competence).

[113] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[114] *See* Lemley, *supra* note 8, at 100 (characterizing the major questions doctrine as "the most recent and most significant example of the Court taking power from administrative agencies").

other justification for a clear-statement rule, which is that delegations make it too easy for Congress, with the help of agencies, to govern.[115] This conclusion does not reflect some deep discovery about the optimal ease of adopting laws to regulate a complex modern society. One can say with confidence, however, that it neatly reflects the preferences of persons hostile to the administrative state. Eliminating specious democratic justifications would not have stopped the justices from adopting their new major questions doctrine, but at least it would have required them to be a bit more forthright about their reasons—and there may be something to be said for that.

VII. CONCLUSION

The Supreme Court told us in *Chevron* that democracy supports deference; it told us in *West Virginia* that democracy requires anti-deference. These claims, in addition to being in tension with each other, are untrue. One might discount them as pious flourishes, but it is plausible to think that they have done real damage to the development of administrative law.

[115] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (arguing that, while "lawmaking under our Constitution can be difficult" without agency delegations, "the framers deliberately sought" to make it so).