

Taking Legality Seriously: What the Major Questions Doctrine Is – And Isn't

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ABSTRACT

The Major Questions Doctrine (“MQD”), a controversial recent innovation of the Roberts Court that applies stricter scrutiny to “major” actions taken by federal agencies, has faced criticism for being atextual, unprincipled, and nakedly ideological. But these critiques miss the fact that the doctrine has near-exact analogues in many other legal systems, where it is an established tool for reining in executive overreach. This Article argues that although such “majorness” tests play an important role in enforcing the rule of law, the MQD as currently formulated lacks theoretical clarity, consistency, and limits. More important, the Court itself lacks a theory of what the MQD is. This Article provides an answer to these concerns grounded in a theory of legality and proposes a revised doctrinal test for its application.

This Article shows that across legal systems, judicial majorness tests are rooted in the principle of legality, which requires that all government action be traced back to a legal authority. In an American administrative law context, discussions over legality have mainly been the domain of those who want to dismantle the regulatory state. This Article’s approach is different. It argues that legality is a principle, not a rule: a sliding scale, not a binary variable. Therefore, a test of majorness can and should both hold government to the rule of law and allow it to function efficiently. This Article proposes a revised test for MQD review with that aim in mind. First, the Article clarifies what should qualify as a major action, as opposed to routine matters or total delegations. Then, it explains that majorness can take two distinct forms: (1) actions that pose a risk to fundamental rights or the political process, or (2) actions that are exceptionally large in scale or significance but do not carry such risks. Each type warrants a different judicial response depending on the clarity or ambiguity of the statutory delegation. The Article then applies this test to a pair of case studies—the student loan debt relief case and a hypothetical executive program banning abortion pills under the Comstock Act—to illustrate its utility.

Legality is about the line between legislation and execution—a line which is fuzzy at best, but which can and should be enforced by judges. As such, this

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Article offers two novel contributions. First, it provides a better account of the MQD, offering both a critique and a constructive path forward. Second, it advances a theory of legality that better grounds executive power in the rule of law while suggesting how judicial review can place principled limits on its exercise. In the unfolding Trump era and post-Loper Bright world, both are significant.

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The legislative process h[as] become a reflexive exercise in wishful thinking. Congress concludes that too many workers are killed and maimed every year in American industry. To general applause, it enacts a law that says industrial deaths and injuries are a grave national affliction and unsafe working conditions ought to be eliminated. Then the whole mess is turned over to an agency of the executive branch with vague instructions to work out the details.

–William Greider, THE WASHINGTON POST¹

¹ William Greider, *Welcome to the Marketplace that Is Washington, Mr. President* . . ., WASH. POST, Jan. 19, 1981, at 28, <https://www.washingtonpost.com/archive/1981/01/20/welcome->

The Court is solidly, consistently, unshakably functionalist. When the basic institutions of modern administrative governance are at stake, the Court closes ranks and hurls the constitutional text into the Potomac River.

—Gary Lawson²

INTRODUCTION

“The judges are out of control.”³ In the last decade, the Supreme Court has produced seismic shifts in gun rights, religion, abortion, and elections—sometimes through irregular procedures, sometimes without explanation.⁴ One of the areas most in flux is the law of the executive branch and the administrative state. Recently, in this domain the Roberts Court has introduced a “Major Questions Doctrine” (“MQD”) under which “major” agency actions must receive a heightened form of judicial scrutiny.⁵ Since its unveiling, the MQD has been widely panned by scholars for being unfounded in the law, unbounded in scope, nakedly deregulatory in its aims, and expansionary of the Court’s power to dictate separation-of-powers arrangements from on high.⁶

to-the-marketplace-that-is-washington-mr-president/34f4dfc7-90d3-4ad7-a2bd-a5a9f313ae27/ [https://perma.cc/3PMQ-R7AX].

² Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J., 885, 891 (2005).

³ Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 635 (2023).

⁴ See generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (explaining the Court’s recent expanded use of the shadow docket to make unsigned, unexplained decisions on important topics); Quinta Jurecic, *The Supreme Court Won’t Explain Itself*, ATLANTIC (July 15, 2025), <https://www.theatlantic.com/politics/archive/2025/07/scotus-education-department/683536/> [https://perma.cc/B7PF-E6ZL] (same); Stephanie Bai, *The Power of the Supreme Court’s Shadow Docket*, ATLANTIC (July 17, 2025), <https://www.theatlantic.com/newsletters/archive/2025/07/supreme-court-education-department-shadow-docket/683588/> [https://perma.cc/Q6QF-49YL] (same). For arguments that the Supreme Court is behaving in an unseemly ideological manner, see generally JOAN BISKUPIC, *NINE BLACK ROBES: INSIDE THE SUPREME COURT’S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES* (2023) (arguing the Court has become uniquely politically polarized since the first Trump Administration); LINDA GREENHOUSE, *JUSTICE ON THE BRINK: A REQUIEM FOR THE SUPREME COURT* (2022) (arguing the Federalist Society’s influence on presidential nominations has politicized the Court).

⁵ See *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (“[I]n certain extraordinary cases . . . something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to ‘clear congressional authorization’ for the power it claims.” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))). See generally Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV’T L. & POL’Y REV. 47, 74 (2022) (analyzing the history of and test for the MQD).

⁶ See *Biden v. Nebraska*, 600 U.S. 477, 534 (2023) (Kagan, J., dissenting) (“[T]he majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts.”). For scholarship

But the MQD is neither as nefarious nor as unique as it appears to be. With near exact analogues in countries like France, Germany, Israel, India, South Africa, and the United Kingdom, where it is well established and broadly applied, it appears that “majorness” *can* be judicially enforced consistently and not *necessarily* for antiregulatory ends.⁷ And with a wave of democratic backsliding spreading across the globe, the doctrine has potential as a check against the concentration of power in the executive.⁸

criticizing the MQD, see generally Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (arguing the MQD makes the policymaking process less democratic); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (arguing the MQD has unclear reach and that its political, constitutional, and precedential justifications are unpersuasive); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (arguing the MQD’s bounds are unclear, creating subjective application with heavy deregulatory consequences); Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 B.C. L. REV. 511 (2024) (arguing that application of the MQD often depends on judges’ own politics and provides opportunities for minority rule); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022) (arguing the scope and application of the MQD are unclear); Michael B. Rappaport, *Replacing the Major Questions Doctrine with Originalist Statutory Interpretation*, 16 HARV. J.L. & PUB. POL’Y: PER CURIAM 1 (2024) (arguing the MQD is inconsistent with originalism); Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY (Sep. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/6Y8U-RRW8>] (arguing the MQD is inconsistent with textualism); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445 (2016) (arguing the MQD’s lack of clarity hinders courts’ and agencies’ ability to evaluate statutory mandates); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024) (arguing the MQD is not constitutionally and legally defensible as a matter of interpretive law); Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron, and More*, 65 WM. & MARY L. REV. 1265 (2024) (arguing the MQD is unrooted in precedent and suppresses regulatory innovation). For a survey of the literature on the MQD, see Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL. (Mar. 18, 2023), <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/> [<https://perma.cc/5VXH-4AQF>] (compiling sources). For defenders of the doctrine, at least in part, see generally Oren Tamir, *Getting Right What’s Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANSNAT’L L. 543 (2024) (arguing the MQD is lawful and consistent with textualism); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing the MQD is legitimate and consistent with democratic principles); Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN. L. REV. 817 (2024) (arguing the MQD is consistent with originalism); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024) (arguing the MQD is consistent with interpretive principles).

⁷ See *infra* Section II.D (discussing analogues of the doctrine found in Germany, France, the United Kingdom, Israel, and South Africa).

⁸ See generally, e.g., Mark A. Graber, Sanford Levinson & Mark Tushnet, *Constitutional Democracy in Crisis? Introduction, in CONSTITUTIONAL DEMOCRACY IN CRISIS?* 1 (Mark A. Graber et al. eds., 2018) (arguing that democratic backsliding is increasing in the modern day); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018) (arguing that liberal democracies are at risk in the modern world and that law can act to counter such risk); Kim

This Article argues that the MQD’s problems are not conceptual, but rather lie in its application. The doctrine itself rests on the fundamental idea that all government action must be traced back to a valid legal authority.⁹ This is the principle of *legality*, and it underpins all legal systems, including our own.¹⁰ This Article provides a theory of legality that better grounds executive power in the rule of law and demonstrates that the current version of the MQD, despite purporting to be anchored in legality, lacks clear standards and frequently disregards the text of authorizing statutes. It proposes a revised doctrinal test—rooted in legality—for applying the MQD: one that holds executive power to its mandate while also maintaining the value of effective governance.

Historian Ira Katznelson wrote that America has “a constitutional government with a legislature at its heart.”¹¹ The legality principle, despite sounding hopelessly foreign to an American lawyer, lies behind many of the core commitments of our legal system under labels like “statutory interpretation,” “due process,” and “faithful execution.”¹² Recently, legality has become a major preoccupation of “anti-administrativist”¹³ critics who argue that the regulatory state is illegal or, at minimum, overgrown and unresponsive to its statutory commands.¹⁴ These themes are expressed regularly by Justice Neil Gorsuch. “[T]he People,” he wrote in a recent concurrence, vested

Lane Scheppelle, *The Party’s Over*, in CONSTITUTIONAL DEMOCRACY IN CRISIS?, *supra* note 8, at 495 (arguing that populism is leading to democratic decline).

⁹ See, e.g., *West Virginia*, 597 U.S. at 723 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (holding that to comport with the MQD, an “agency must . . . point to ‘clear congressional authorization’ for the power it claims”).

¹⁰ See *infra* Part II, particularly Section II.C.

¹¹ IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 245 (2013).

¹² See *infra* Section II.C.

¹³ Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) [hereinafter Metzger, *1930s Redux*]; Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 5 [hereinafter Metzger, *The Roberts Court*].

¹⁴ See generally, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing administrative law is unconstitutional); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993) (arguing all delegations of legislative power are unconstitutional); RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) (arguing the regulatory state has overreached into individual liberties). For notable exceptions, see generally, e.g., JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018) (arguing administrative law is practically necessary for democratic function and does not undermine it); CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020) (arguing the administrative state is lawful); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 985 (2015) (same). For an example of increasing interest in these themes by the Court, see *Paul v. United States*, 589 U.S. 1087, 1088 (2019) (Kavanaugh, J., respecting the denial of certiorari) (arguing that Justice Gorsuch’s call for a revival of the nondelegation doctrine “may warrant further consideration in future cases”). See also DAVID A. GRAHAM, *THE PROJECT: HOW PROJECT 2025 IS RESHAPING AMERICA* 3–13 (2025) (cataloguing current critiques of the administrative state).

“‘[a]ll’ federal ‘legislative powers . . . in a Congress,’”¹⁵ which means that “‘important subjects . . . must be entirely regulated by the legislature itself,’ even if Congress may leave the Executive to act under such general provisions to fill up the details.”¹⁶ With Gorsuch, the Supreme Court has advanced the MQD as an antidote to a “particular and recurring problem” of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”¹⁷

Legality is a legitimating principle, not a categorical rule, and its application in real life can—and should—be balanced against governability and efficiency. Majorness tests aim to strike this balance by distinguishing between major and minor actions, requiring that major actions be authorized by clear statutory authorization. Put differently, majorness captures the idea that there is a meaningful, if tenuous, line between legislation and execution. The line may be hard to measure, but the entire concept of an administrative state existing under law takes for granted that it is there.¹⁸ Take a hypothetical rule made by an agency and place it along an imaginary continuum of policy significance ranging from an industry-wide rule setting air quality standards¹⁹ to a monthly order for paper clips. It is clear that the former looks more like “lawmaking” than the latter. It is similarly clear that Americans cannot live under a government in which an agency must seek clear statutory authorization from Congress every time it needs paper clips.²⁰

This Article shows, however, that as currently formulated by the Roberts Court, the MQD lacks both a convincing justification for its existence and clear limits on its application.²¹ As applied, to quote Justice Kavanaugh, majorness “has a bit of a ‘know it when you see it’ quality.”²² In practice, the Court has applied majorness as a strict binary to defeat any regulatory program it determines, in an opaque and underspecified way, to be major, often with disregard for the text of the authorizing statute.²³ Consequently, rather than defend legality, the test seems to flaunt it by regularly invalidating lawful delegations of power

¹⁵ *West Virginia v. EPA*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (quoting U.S. CONST. art. I, § 1).

¹⁶ *Id.* (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). Gorsuch explicitly links this discussion to the MQD, which he analogizes to other “clear statement” rules according to which the judiciary puts a finger on the scale in favor of well-established legal values like the nonretroactivity principle in criminal law. *Id.* at 736–37.

¹⁷ *Id.* at 724.

¹⁸ *See infra* Section II.A.

¹⁹ *See Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 462 (2001).

²⁰ *See infra* Section III.A.1 (proffering bounds of the MQD’s application).

²¹ *See infra* Part I.

²² *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

²³ *See, e.g., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 323–26, 333 (2014); *King v. Burwell*, 576 U.S. 473, 492–93, 497 (2015); *United States v. Texas*, 579 U.S. 547, 548 (2016); *Biden v. Nebraska*,

by Congress to agencies. If legality is a real concern for the Court, a majorness test is appropriate and defensible, but its formulation in the current MQD needs restructuring.

This Article proposes a revised doctrinal test under which the review of agency actions should be based on the interaction of two factors: the clarity of the delegation, or its “ambiguity,” and the scale of the action and its risk, or “majorness.”²⁴ First, this Article clarifies what should qualify as a “major” action—in between “minor” routine matters and total delegations granting an agency unbounded discretion.²⁵ The Article then posits that major actions take two distinct forms: actions that pose a risk to fundamental rights or the political process (“majorness of risk”) and actions that are exceptionally large in scale or significance but do not carry such risks (“majorness of scale”). Each type warrants a different judicial response depending on the clarity—or ambiguity—of the statutory delegation. Actions with majorness of risk should always require clear and specific congressional authorization,²⁶ but the degree of clarity required for major actions of scale is a contextual decision that should factor in, among other considerations, the institutional advantages of each branch.²⁷

This model may not—and need not—change all the results reached by the Court. However, by requiring judges to apply unified criteria in defining “ambiguity” and “majorness,” it will give the MQD greater rigor, transparency, and predictability. Arguably, such an intervention was less important under a regime of *Chevron*²⁸ deference, where broad statutory language was treated by courts as a delegation to an agency to decide the statute’s best reading.²⁹ But with *Chevron* overruled in 2024 by *Loper Bright Enterprises v. Raimondo*,³⁰ administrative review is entering a time of uncertainty.³¹ And with the executive branch making bolder and bolder assertions of power,³² judicial review of agencies is fast becoming a matter of democratic survival.

600 U.S. 477, 506 (2023); Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 117–19 (2022); West Virginia v. EPA, 597 U.S. 697, 735 (2022).

²⁴ See *infra* Part III.

²⁵ See *infra* Section III.A.1.

²⁶ See *infra* Section III.A.1.a.

²⁷ See *infra* Section III.A.1.b.

²⁸ 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

²⁹ For an invaluable account of the relationship between *Chevron* and the MQD, see Freeman & Stephenson, *supra* note 6, at 6–13. See also John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1521–29 (2014) (discussing delegations under the *Chevron* framework).

³⁰ 603 U.S. 369, 412–13 (2024).

³¹ For early takes on what the fall of *Chevron* might mean in a context of administrative review, see sources cited *infra* note 77.

³² See, e.g., David Smith, *Is Trump’s Expansion of Presidential Powers Setting the Stage for Future Oval Office Holders?*, GUARDIAN (July 6, 2025, at 8:00 ET), <https://www.theguardian.com/>

This Article offers a unique intervention that lies in its methodology. Although other works examine the MQD—or administrative law more broadly—through a comparative lens,³³ this Article uses comparison to illuminate the theoretical principle underlying the doctrine. It offers a theory of legality grounding administrative executive power in the rule of law. This theory better clarifies what the MQD is and is not, critiquing unbounded applications of it while constructing a more disciplined test that vindicates the principle of legality. This comparative approach reveals why robust applications of “majority” doctrines may be better suited to jurisdictions where legislating is relatively easy and why such doctrines should be used more sparingly in jurisdictions like the United States, where the legislative process is slow and fraught³⁴ and where these doctrines can exacerbate gridlock.

The Article proceeds as follows. In Part I, it shows how the Court’s MQD cases reflect, at their core, a preoccupation with legality. In Part II, using a comparative lens, it shows how legality underpins “majority” tests applied in other jurisdictions abroad. Part III.A presents a two-part test of legality focused on the intersection of majority and ambiguity. Part III.A.1 defines “majority,” explaining how each type of majority—triggered by potential risk to rights or the political process or solely by the scale of the action—should be treated. Part III.A.2

us-news/2025/jul/06/trump-expansion-of-presidential-powers [https://perma.cc/23WC-8JWD] (detailing such recent assertions by President Trump, including his use of the International Emergency Economic Powers Act, Pub L. No. 95-223, 91 Stat. 1625 (1977), to impose foreign tariffs, his ordering of military strikes without congressional approval, and his use of the national guard to quell peaceful protests).

³³ Oren Tamir’s work has been path defining on the MQD in particular. *See generally* Tamir, *supra* note 6 (analyzing the MQD through the lens of progressivism, as well as critiquing that view); OREN TAMIR, *THE MAJOR QUESTIONS DOCTRINES: A CASE STUDY ON THE DOMESTIC “POSSIBILITIES” OF COMPARATIVE ADMINISTRATIVE LAW* (2025) (comparing the domestic MQD to foreign MQDs). For recent work in a burgeoning field of comparative administrative law generally—a field once described as constitutional law’s “hard-working, unglamorous cousin,” see Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in *COMPARATIVE ADMINISTRATIVE LAW* 117, 117 (Susan Rose Ackerman & Peter L. Lindseth eds., 2010). *See also generally* *COMPARATIVE ADMINISTRATIVE LAW* (Peter L. Lindseth et al. eds., 3d ed. 2026) (compiling scholars’ perspectives in comparing administrative law across legal orders); SUSAN ROSE-ACKERMAN, *DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE* (2021) (exploring basic principles of public law that apply to democracies worldwide); *THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE* (Paul Craig & Adam Tomkins eds., 2006) (comparing executive power across legal systems); *THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW* (Peter Cane et al. eds., 2021) (comparing the intersection of administrative law and other areas of public law across legal orders); Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. 801 (2024) (arguing for a revival of comparative administrative law).

³⁴ Moira Warburton, *Why Congress Is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> [https://perma.cc/5MM2-AJ6Y] (detailing how recent Congresses have been relatively unproductive and exploring the reasons why).

connects these different parts together into a single doctrinal test. Part IV applies that test to two cases, one extant, one hypothetical: a federal student loan debt relief program that the Court invalidated on MQD grounds³⁵ and a hypothetical executive program banning abortion pills under the Comstock Act of 1873.³⁶ The Article concludes by pointing to the significance of its theory in a post-*Loper Bright* world and under a second Trump presidency.

Majorness is an inherently dangerous judicial test—but so, sometimes, are the exercises of power it is used to tame. With the MQD's rise, Americans grew accustomed to a steady diet of invalidated environmental programs,³⁷ but now, as massive deportation programs, crackdowns on public protest, and incursions on academic freedom of thought are on the rise, “majorness” seems a more important judicial question than ever.³⁸ By the same token, it is not too difficult to imagine that administrative action could one day be used to enforce emergency curfew orders, police the mail to ban birth control, or prosecute the political opposition. Ultimately, “majorness” itself may be a hopelessly open-ended standard, but judges will never stop trying to draw a line between authorized and unauthorized exercises of government power. And in a world where the President is bidding to remake and even weaponize whole swathes of the government, striking a balance between “efficiency” and “legality” becomes an existential question.³⁹

I. FROM “MAJOR QUESTIONS” TO LEGALITY

Perhaps no single individual has been more critical of, in her words, the “so-called major-questions doctrine” than Justice Elena Kagan.⁴⁰ Writing in the student loan debt case, Kagan alleged that the MQD is not a legal doctrine, but an expression of naked political favoritism:

³⁵ See *Biden v. Nebraska*, 600 U.S. 477, 496, 506 (2023).

³⁶ Comstock Act of 1873, ch. 258, 17 Stat. 598 (1873).

³⁷ See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 332–33 (2014).

³⁸ See David Pozen, *Regulation by Deal Comes to Higher Ed*, BALKINIZATION (July 23, 2025), <https://balkin.blogspot.com/2025/07/regulation-by-deal-comes-to-higher-ed.html> [<https://perma.cc/SFZ5-66M3>]; Kyle Cheney, ‘Arbitrary and Discriminatory’: Judge Blocks Trump’s Effort to Deter DEI Programs, POLITICO (Feb. 21, 2025, at 19:38 ET), <https://www.politico.com/news/2025/02/21/federal-judge-ruling-blocks-trump-administration-dei-funding-00205585> [<https://perma.cc/46N4-S2WC>]; Julie Sugarman, *Schools and Immigrant Students Navigate an Era of Rising Immigration Enforcement*, MIGRATION POL’Y INST. (Apr. 2025), <https://www.migrationpolicy.org/news/schools-immigrant-students-enforcement> [<https://perma.cc/G3P3-G9RP>]; Nina Lakhani, *US Intensifies Crackdown on Peaceful Protest Under Trump*, GUARDIAN (Apr. 9, 2025, at 12:00 ET), <https://www.theguardian.com/us-news/2025/apr/09/anti-protest-bills-trump> [<https://perma.cc/NRQ6-JU6F>].

³⁹ GRAHAM, *supra* note 14, at 3–13 (discussing how the conservative movement plans to use Donald Trump to further its agenda throughout the executive branch).

⁴⁰ *Biden*, 600 U.S. at 534 (Kagan, J., dissenting).

[T]he majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation’s most important, as well as most contested, policy decisions.⁴¹

The MQD has several strikes against it. It lacks a textual footing: the Administrative Procedure Act of 1946 (“APA”),⁴² the framework for all administrative review, mildly directs courts to examine “all relevant questions of law,” specifying no required level of strictness.⁴³ It lacks a rationale: Is it a statutory canon, a separation of powers principle, a prudential rule of thumb, or something else?⁴⁴ Its scope is undefined: Years ago, then Judge Kavanaugh admitted, in a much-repeated concession, “[t]o be sure, determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.”⁴⁵ The Court’s attempted origin story for the doctrine in long-established precedent rings false.⁴⁶ On top of everything, it carries a taint of partisan favoritism: To date, only Democratic administrations have seen the Supreme Court apply it against their regulatory programs.⁴⁷

⁴¹ *Id.*

⁴² Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706.

⁴³ *Id.* § 706.

⁴⁴ Different Justices have suggested different answers. See *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (Chief Justice Roberts, writing for the Court, describing the MQD as a judicial reaction to “a particular and recurring problem” of agencies “asserting power beyond what Congress could reasonably be understood to have granted”); *Biden*, 600 U.S. at 507 (Barrett, J., concurring) (describing the MQD as part of “the ordinary tools of statutory interpretation”); *Biden*, 600 U.S. at 534 (Kagan, J., dissenting) (construing the MQD as a nakedly ideological test).

⁴⁵ *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). On the difficulty of giving enforceable content to the MQD, see Walters, *supra* note 6, at 521–22 (arguing that the MQD is more unbounded than most canons).

⁴⁶ See, e.g., Sohoni, *supra* note 6, at 262 (arguing that the Court has crafted the MQD in the last few years); Freeman & Stephenson, *supra* note 6, at 18–20 (distinguishing between three types of MQDs and showing that the newest one is close kin to the nondelegation doctrine); Levin, *supra* note 6, at 905 (describing the MQD as departing from past precedent).

⁴⁷ Representing defeats for democratic administrations on major questions grounds, see *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 333 (2014); *King v. Burwell*, 576 U.S. 473, 497 (2015); *United States v. Texas*, 579 U.S. 547, 548 (2016); *Biden*, 600 U.S. at 506–07; *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 118–21 (2022); *West Virginia*, 597 U.S. at 735. Whereas the first Trump Administration lost several important battles before the Court, these narrow losses were decided on procedural grounds or in a manner not implicating the MQD. See *Dep’t of Com. v. New York*, 588 U.S. 752, 785 (2019); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17–18 (2020). One interesting exception now winding its way through the courts during the second Trump term is *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1372 (Ct. Int’l Trade 2025), *aff’d in part, vacated in part, remanded in part*, 149 F.4th 1312 (Fed. Cir. 2025), *cert. granted*, No. 25-250, 2025 WL 2601020 (Sup. Ct. 2025), in which the Court of International Trade struck down an executive program setting international tariff rates, invoking the MQD—although leaving open whether the doctrine itself directed the result.

This is a long list of faults. Yet this does not mean that the MQD has no value or that it is never a proper legal doctrine. The MQD has near exact analogues in other established administrative law regimes where it plays a valuable role. In Germany, it is known as the legality of administration, or *der Gesetzmäßigkeit der Verwaltung*.⁴⁸ In Israel, it is called the primary arrangements doctrine.⁴⁹ In the UK, it is captured by the distinction between “primary” and “secondary” legislation,⁵⁰ and in South Africa, between “plenary” law-making power (nondelegable) and “subordinate” law-making power (delegable).⁵¹

Majorness tests are ultimately about protecting the rule of law by demanding that administrative decisions be traced back to authority provided in statutes while also allowing effective government.⁵² These are not hard premises to accept, which suggests that if the MQD fails to measure up, it is because it is ill-designed, not ill-conceived. This Section shows that the MQD is, ultimately, a test of legality.

* * *

The modern American administrative state grew up many decades after our constitutional framing and in an era of robust legal pragmatism more focused on building state capacity than justifying its legality.⁵³ As a result, administration’s place under our Constitution, and the relationship between courts and agencies, has remained in some state of flux ever since.⁵⁴

In 1938, Harvard Law dean and New Dealer James Landis’s *The Administrative Process* rejected these as questions worth asking, dismissing those who “embroidered” the idea of three branches with “pontifical moral phrases” and insisting that a tripartite form of

⁴⁸ See David P. Currie, *Republication – Separation of Powers in the Federal Republic of Germany*, 9 GERMAN L.J. 2113, 2137, 2155 n.202 (2008).

⁴⁹ See HCJ 3267/97 Rubinstein v. Minister of Def., 14 IsrLR 139, 182–85 (1998).

⁵⁰ See A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 79, 88 (15th ed. 2011).

⁵¹ See *infra* note 196 and accompanying text.

⁵² See *infra* Section II.D.

⁵³ See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992) (exploring how economic considerations shaped legal decision making); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 74–94 (1973) (arguing that judges settled cases by what was socially desirable according to their personal and class beliefs); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982) (arguing the law was used to expand administrative power for state building); WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022) (arguing the law was used to justify administrative law for the sake of democracy); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2012) (discussing pragmatism and American state building).

⁵⁴ See, e.g., STEPHEN SKOWRONEK ET AL., *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 10–12, 39–56 (2021).

government was inadequate to solve modern problems.⁵⁵ Throughout the New Deal and preceding eras, judicial control of agencies was sparing and ad hoc.⁵⁶ Prior to 1946, Congress would sometimes provide for judicial review when it created an agency, but not always.⁵⁷ Judges tended to apply common law remedies against individual officer wrongdoing, not a body of “transsubstantive” law pertaining to agencies generally.⁵⁸ Most administrative law, in terms of regular procedure, was made up within the agency itself.⁵⁹ Under this system, the rule of law’s place in the administrative state was unclear.

The APA changed things by solidifying the status and nature of administrative review.⁶⁰ Its passage featured fierce debate between business interests who wanted to protect courts’ property-protecting role and reformers fearing a hostile takeover of administration by courts.⁶¹ Congress viewed the APA as striking a sensible balance between these positions.⁶² It required federal agencies to comply with a set of procedures whenever they made rules or held hearings, and ordered courts to invalidate any agency action that was procedurally irregular or otherwise arbitrary and capricious, while leaving the substance of decision making to the experts themselves.⁶³ Legislators believed that the new rules would prevent unconstrained action—not just by agencies, but also incoming presidents trying to suddenly reorient national policy.⁶⁴

For several decades, courts took their mandate rather lightly (which was arguably the APA’s intent), preferring alternative techniques to outright invalidations such as imposing additional procedural rules for agency decision making.⁶⁵ But the second half of the twentieth century saw judges expose agency decisions to greater and greater scrutiny. During the 1960s, the Warren Court rights revolution extended

⁵⁵ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (7th prtg. 1966) (1938).

⁵⁶ See, e.g., MASHAW, *supra* note 53, at 277.

⁵⁷ See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1379 (2010).

⁵⁸ *Id.* at 1365, 1400.

⁵⁹ *Id.* at 1412–13.

⁶⁰ See generally Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 *FORDHAM ENV’T L. REV.* 207 (2016) (detailing the effects of the Act); see also STEPHEN SKOWRONEK, *THE ADAPTABILITY PARADOX: POLITICAL INCLUSION AND CONSTITUTIONAL RESILIENCE* 103–05 (2025) (discussing the history behind the Act).

⁶¹ See William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 *NOTRE DAME L. REV.* 1893, 1909 (2023).

⁶² See Elias, *supra* note 60, at 208.

⁶³ 5 U.S.C. §§ 553–556, 706(2)(A).

⁶⁴ See Elias, *supra* note 60, at 212–13.

⁶⁵ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667, 1679–81 (1975).

standing and procedural rights to new classes of citizens, making it easier to challenge administrative decisions through the courts.⁶⁶ In the 1970s, as public skepticism toward government grew, so did judges' direct oversight of agency decision-making processes.⁶⁷ Out of the D.C. Circuit, a famous debate between Judges Harold Leventhal and David Bazelon interrogated whether courts could and should exercise "'hard look' review" of substantive agency decisions.⁶⁸ Could judges be trusted to accurately interpret statutes on, say, the environmental risks of the uranium fuel cycle or airborne concentrations of benzene? Would they nevertheless *have to* to ensure administration remained legal?

Yet just as the Supreme Court seemed ready to embrace hard look review, it beat a hasty retreat. The fabled *Chevron* represented the pivot. In 1983, the Court had dealt the Reagan Administration a surprise loss by blocking its attempt to reverse a Carter-era rule requiring airbags in new cars.⁶⁹ The Court concluded scathingly that the agency's analysis of airbags' safety benefits was "nonexistent."⁷⁰ But a year later, the Court appeared to reverse course by upholding another reversal of a Carter-era policy, this time with the effect of exempting certain parts of emissions-producing plants from regulation under the Clean Air Act of 1977.⁷¹ The Clean Air Act, wrote Justice Stevens, was "a lengthy, detailed, technical, complex, and comprehensive response to a major social issue," and so judges should defer to expert regulators' views of their own statutory authority.⁷²

For four decades, *Chevron* instructed courts to abide by all reasonable agency interpretations of their statutes, assuring agencies that their carefully planned regulatory programs would not be

⁶⁶ On the history of administrative review in the Warren era, see Stewart, *supra* note 65, at 1715–16; Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 537–39 (1972); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1417–43 (2000); Karen Orren, *Standing to Sue: Interest Group Conflict in the Federal Courts*, 70 AM. POL. SCI. REV. 723, 733–36 (1976); Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939, 954–59 (2006). Important cases include *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); and *Off. of Comm'n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

⁶⁷ See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 945 (2011); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORN. L. REV. 95, 139–40 (2003).

⁶⁸ See Gillian E. Metzger, *The Story of Vermont Yankee*, in *ADMINISTRATIVE LAW STORIES* 124, 126, 146 (Peter L. Strauss ed. 2006).

⁶⁹ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

⁷⁰ *Id.* at 48.

⁷¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840, 866 (1984).

⁷² *Id.* at 848, 865.

capriciously invalidated by judges.⁷³ Whether the system worked well is contested,⁷⁴ and especially after *Loper Bright*, the Supreme Court's tendency to create carveouts for agency actions that did not deserve deference strongly suggests that judges never truly relinquished interpretive control.⁷⁵ Still, for the most part, deference remained the operative rule.⁷⁶

Another pivot in the life of judicial review of agencies came with the emergence of a novel antideference cannon called the MQD.⁷⁷ The doctrine's origins are murky, as scholars and judges have different ideas about when it first appeared.⁷⁸ Regardless, it was not until 2014

⁷³ *Id.* at 842–43.

⁷⁴ Compare *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 375 (2024) (holding that *Chevron* produced an “unworkable” system), with *id.* at 449 (Kagan, J., dissenting) (arguing that *Chevron* was a wise rule). Compare William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090–91 (2008) (finding significant variation), with Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1481–82 (2018) (finding mixed results based on circuit), and Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 9 (2017) (finding that *Chevron* created more uniformity in judicial decision making).

⁷⁵ See, e.g., *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126, 160 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Scholars have called this a *Chevron* “Step Zero,” a kind of gatekeeping mechanism prior to deference. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 872–73 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

⁷⁶ See generally, e.g., *Barnhart v. Walton*, 535 U.S. 212 (2002) (applying classic *Chevron* deference).

⁷⁷ Scholars are beginning to theorize the fall of *Chevron* and what it will mean for administrative law. See generally, e.g., Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1 (2025) (hypothesizing the impacts *Loper Bright* will have across administrative law); Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REGUL. (June 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> [<https://perma.cc/7SY7-A2YG>] (providing areas of potential change in administrative law post-*Loper Bright*); Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO. MASON L. REV. 499 (2024) (hypothesizing destabilization will result from *Loper Bright*). For accounts tying *Loper Bright* to the future of the MQD, see Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, REGUL. REV. (July 1, 2024), <https://www.theregview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/> [<https://perma.cc/2V9G-JAOD>]; Michael Coenen & Seth Davis, *Does the Major Questions Doctrine Apply to the Federal Courts?*, 93 FORDHAM L. REV. 1951, 1968–70 (2025); Elena Chachko, *The Anti-Regulation Quartet and Internationally Informed Regulation*, HARV. L. REV. BLOG (Aug. 6, 2024), <https://harvardlawreview.org/blog/2024/08/the-anti-regulation-quartet-and-internationally-informed-regulation/> [<https://perma.cc/97R3-7MFR>]. This Article suggests that if *Chevron* occupied one end of a spectrum of deference, permissiveness, *Loper Bright* would hold the center, applying neither deference nor strict review, and the MQD would reflect the opposite pole, a presumption against the agency when it takes major actions.

⁷⁸ The Roberts Court has identified three pre-2014 cases as an antecedent for the MQD. See *West Virginia v. EPA*, 597 U.S. 697, 723–24, 728 (2022) (identifying *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980), *MCI Telecomms. Corp.*, 512 U.S. at 229, and *Brown*

that majorness was *arguably* the Court’s rationale for striking down an agency action, and 2021 that it unambiguously was so.⁷⁹

The MQD heralded a new approach by the Court to statutory text. In 2014’s *Utility Air Regulatory Group v. EPA*,⁸⁰ a 5–4 Court chastened the Obama Environmental Protection Agency (“EPA”) for extending its regulatory authority to millions of small polluters who produced greenhouse gases, including retail stores, offices, apartment buildings, schools, and churches.⁸¹ The Clean Air Act spoke of “air pollutant[s],” which the Court had recognized to include greenhouse gases in 2007.⁸² But Scalia’s opinion argued that this was not enough:

To be sure, Congress’s profligate use of “air pollutant” where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes “that identical words used in different parts of the same act are intended to have the same meaning.” In this respect (as in countless others), the Act is far from a *chef d’oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind “the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” . . . [T]he presumption of consistent usage “readily yields” to context, and a statutory term—even one defined in the statute—“may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.”⁸³

In other words, *Utility Air* blamed Congress for its sloppy draftsmanship and narrowed the meaning of the statute’s words in some contexts, but not others. While the Court accused the EPA of textual infidelity, it was arguably Scalia’s opinion itself that was doing the statutory rewriting.

Shortly thereafter, majorness became a rationale for denying deference to even agency decisions that seemed to have a basis in

& *Williamson*, 529 U.S. at 160, as progenitors of the MQD). Several scholars, however, have challenged this claim, arguing that the MQD in its present formulation is different in kind. According to Ron Levin, the early version of the MQD served as a kind of “Step Zero” by withdrawing certain actions from the sphere of *Chevron* deference while the more recent version is stronger, acting as a “principle that directly favor[s] challengers by setting up a presumption *against* agency power.” Levin, *supra* note 6, at 903–17; see Freeman and Stephenson, *supra* note 6, at 1–20; Tamir, *supra* note 6, at 561–66.

⁷⁹ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 333 (2014); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 759–60 (2021).

⁸⁰ 573 U.S. 302 (2014).

⁸¹ See *Util. Air*, 573 U.S. at 327–28.

⁸² See 42 U.S.C. § 7521(a)(1) (EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator’s] judgment cause[s], or contribute[s] to, air pollution . . . reasonably . . . anticipated to endanger public health or welfare.”); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

⁸³ *Util. Air*, 573 U.S. at 319–20 (first quoting *Env’t Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); and then quoting *Brown & Williamson*, 529 U.S. at 133) (citations omitted).

statute. For example, one year later in *King v. Burwell*,⁸⁴ the third major court challenge to the Affordable Care Act of 2010,⁸⁵ the Court upheld an IRS rule on ACA tax credits while pointing out that *Chevron* deference was inappropriate on account of the rule's "deep 'economic and political significance.'"⁸⁶ None of the liberal justices joining Chief Justice Roberts's opinion bothered to dispute the point. The next year, the Fifth Circuit invalidated a signature Obama immigration program exempting undocumented parents of U.S.-born children from deportation, quoting *Utility Air* to say, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"⁸⁷ With Justice Scalia having passed away in early 2016, a split 4–4 Supreme Court upheld the lower court's decision in a single sentence.⁸⁸

Five years passed before the Supreme Court spoke again on the MQD, and in the interim there were three significant developments: President Trump's remaking of the Court, an ongoing viral pandemic, and the inauguration of President Joe Biden.⁸⁹ These developments gave a new six-Justice conservative majority its chance to speak. In fall 2021, the Court struck down the Centers for Disease Control and Prevention's ("CDC") nationwide moratorium on tenant evictions, which extended an expiring moratorium issued by Congress.⁹⁰ Acting alone, the CDC had invoked a statute authorizing its director to take measures "as in his judgment are necessary" to prevent the "spread of communicable diseases."⁹¹ The Court rejected such broad language as valid authority for the CDC's action: "It strains credulity" to think that "a decades-old statute" authorizing the CDC to take measures like "fumigation and pest extermination" grants it "the sweeping authority that it asserts."⁹² Soon after, the Court toppled an Occupational Safety and Health Administration ("OSHA") vaccination mandate against

⁸⁴ 576 U.S. 473 (2015).

⁸⁵ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

⁸⁶ *King*, 576 U.S. at 486, 498 (quoting *Util. Air*, 573 U.S. at 324).

⁸⁷ *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (quoting *Util. Air*, 573 U.S. at 324).

⁸⁸ *United States v. Texas*, 579 U.S. 547 (2016).

⁸⁹ See *Fact Sheet: President-Elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises*, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/> [<https://perma.cc/R6LQ-RPBK>]; John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/74U5-HQR8>].

⁹⁰ *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021).

⁹¹ 42 U.S.C. § 264(a); see *Ala. Ass'n*, 594 U.S. at 760–61.

⁹² *Ala. Ass'n*, 594 U.S. at 760.

COVID-19 in the workplace.⁹³ That same year it invalidated a massive Obama-era environmental program that set emissions caps on power plants.⁹⁴ A year later, it overturned a massive Department of Education program that forgave student loan debt for forty million borrowers on the ground that the viral pandemic had hurt their ability to pay.⁹⁵

Finally, in 2024 in *Loper Bright Enterprises v. Raimondo*, a case concerning regulators of fishing boats, the Court overruled *Chevron* entirely.⁹⁶ “Four decades after its inception,” the majority wrote, *Chevron* had “become an impediment, rather than an aid, to accomplishing the basic judicial task of ‘say[ing] what the law is.’”⁹⁷ Summing up a legacy of increasing judicial curtailment of that landmark precedent, the Court unsparingly concluded, “all that remains of *Chevron* is a decaying husk with bold pretensions.”⁹⁸

These recent opinions have met criticism for their unfaithful treatment of statutory text.⁹⁹ But consider them from a purposive point of view instead. What danger did the Court see in the challenged agency actions? In *West Virginia v. EPA*,¹⁰⁰ Chief Justice Roberts defended the MQD as a doctrinal response to “a *particular and recurring problem*: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”¹⁰¹ In one COVID-19-related case, a concurring Justice Gorsuch wrote, “we may not shelter in place when the Constitution is under attack.”¹⁰²

⁹³ See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 595 U.S. 109, 113 (2022).

⁹⁴ See *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

⁹⁵ See *Biden v. Nebraska*, 600 U.S. 477, 483 (2023).

⁹⁶ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024); see also *id.* at 414 (Thomas, J., concurring) (“*Chevron* compels judges to abdicate their Article III ‘judicial Power.’”).

⁹⁷ *Id.* at 410 (majority opinion) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁹⁸ *Id.*

⁹⁹ See, e.g., William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1735–36 (2021); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 467–69 (2023) (discussing the majority’s failure to address text in *National Federation of Independent Business v. Occupational Safety & Health Administration*, 595 U.S. 109, 113 (2022)); Anita S. Krishnakumar, *What the New Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1117, 1117 (2024) (“[T]he major questions doctrine may be best thought of as either a new multifactor test or standard of judicial review for ‘major’ agency decisions, or as a form of naked pragmatism that uses clear statement rule rhetoric in an effort to sound more textualist than it is.”); Walters, *supra* note 6, at 470–73 (concluding that the MQD is a particularly unbounded substantive canon that threatens to destroy the limits of statutory interpretation altogether); see also *Biden*, 600 U.S. at 523–24, 533–50 (Kagan, J., dissenting) (arguing that the majority’s application of the MQD discounts the statutory text).

¹⁰⁰ 597 U.S. 697 (2022).

¹⁰¹ *Id.* at 724 (emphasis added).

¹⁰² See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 25 (2020) (Gorsuch, J., concurring).

All around, the Court saw faithless agencies stretching the limits of old statutes in a brazen attempt to set new policy for the nation when Congress had not acted. In the Court's view, the Obama EPA had "uncovered" new authority that "conveniently enabled it to enact a program that . . . 'Congress considered and rejected' multiple times."¹⁰³ During the COVID-19 pandemic, the Court reasoned, the Biden administration unlawfully relied on OSHA's long-standing authority over workplace safety to order the vaccination of some 84 million Americans.¹⁰⁴ Likewise, it concluded, the Biden Department of Education had wrenched the language of a statute providing "relief" to student borrowers affected by the September 11th terrorist attacks¹⁰⁵ into a loan forgiveness program affecting 43 million borrowers and favored by key Democratic Party constituencies.¹⁰⁶ Accused in that case by Justice Kagan of judicial overreach, the Chief Justice responded, "The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature."¹⁰⁷

Most scholars see the MQD's rise as symptomatic of the federal judiciary's rightward shift over the last ten years¹⁰⁸ and fear that the Court's wooden application of "majorness" tests to strike down vast agency programs threatens to leave pressing policy problems without a solution.¹⁰⁹

Yet the fact remains that the Court's fears of executive usurpation are some that have animated courts through the centuries—and across national lines. In *Entick v. Carrington*,¹¹⁰ a foundational English case from 1765 that invalidated an unlawful search of a home, Lord Camden's opinion explained: "[O]ne would naturally expect that the law to warrant [the search] should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there it is not law."¹¹¹ Underlying the MQD is a similar sort of concern, namely

¹⁰³ *West Virginia*, 597 U.S. at 731 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

¹⁰⁴ *See Nat'l Fed'n*, 595 U.S. at 113, 119–20.

¹⁰⁵ Higher Education Relief Opportunities For Students (HEROES) Act of 2003, Pub. L. No. 107-122, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa-1098ee).

¹⁰⁶ *See Biden v. Nebraska*, 600 U.S. 477, 500–03 (2023) ("The Secretary's assertion of administrative authority has 'conveniently enabled [him] to enact a program' that Congress has chosen not to enact itself." (quoting *West Virginia*, 597 U.S. at 731)).

¹⁰⁷ *Id.* at 503.

¹⁰⁸ *See supra* note 6 and accompanying text. On the rise of executive branch unilateralism, although ironically accounting for it as part of a conservative legal movement of which the Roberts Court is a part, see Andrea Scoseria Katz, *Separation-of-Powers Lochnerism*, 94 *FORDHAM L. REV.* 833, 859–65 (2025).

¹⁰⁹ *See, e.g., supra* notes 89–95 and accompanying text.

¹¹⁰ (1765) 19 *How. St. Tr.* 1029 (KB).

¹¹¹ *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick*, 19 *How. St. Tr.* at 1065). For an argument that *Entick* provided a crucial but "flawed" ideological foundation for the Fourth

that an agency action must be “in proportion” to its authority and thus be found “in our books.”¹¹² This is the principle of legality. But, in its current formulation, the MQD lacks proper theoretical justification and meaningful limits in its operation.

II. TAKING LEGALITY SERIOUSLY

“Legality” refers to the idea that all government actions must be grounded in the law, with a specific emphasis on rule by statute. Taking this principle to its extreme, some scholars have claimed that it rules out the modern administrative state—where agencies, not just legislatures, make rules—entirely.¹¹³ Today, this stance is widely considered an anachronism, particularly in jurisdictions with robust systems of public administration and strong judicial protection of the rule of law.¹¹⁴

Nonetheless, taking legality seriously is important. Echoes of this antiregulatory manifestation of legality are resurgent, notably among the Supreme Court’s conservative bloc.¹¹⁵ More generally, legality has potential utility for those who wish to allow the regulatory state to prosper while still protecting rights and curtailing abuses of power. This Part lays down the theoretical foundations of the legality principle, assesses its place in American administrative law, and illustrates how it can be, and has been, applied in other jurisdictions.

A. *The Theoretical Foundations of Legality*

Although the rule of law encompasses a range of principles, its core demand is that officials may only exercise power within a stable framework of established and publicly accessible norms.¹¹⁶ This imposes two sets of principles. The first concerns the *formal* qualities of the

Amendment, see Richard A. Epstein, *Entick v Carrington and Boyd v United States: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 28, 31–36 (2015).

¹¹² See *Entick*, 19 How. St. Tr. at 1065.

¹¹³ See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231, 1237–41 (1994); see also *infra* notes 160–62 and accompanying text (discussing one historical view that the administrative state is illegal).

¹¹⁴ Taking this position that the administrative state is illegal today, see generally, e.g., HAMBURGER, *supra* note 14 (arguing executive agencies unconstitutionally exercise legislative and judicial powers). For a contrary view, see generally MASHAW, *supra* note 14 (arguing administrative law is practically necessary for democratic function and does not undermine it); MASHAW, *supra* note 53 (arguing that the administrative state aligns with the text and history of the Constitution).

¹¹⁵ See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 737–38 (2022) (Gorsuch, J., concurring). Justice Gorsuch has perhaps been the most outspoken on the unconstitutionality of the modern administrative state.

¹¹⁶ See Jeremy Waldron, *The Rule of Law*, STAN. ENCYC. OF PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> [<https://perma.cc/88ZB-HYGR>]. See also generally THE CAMBRIDGE COMPANION TO THE RULE OF LAW (Jens Meierhenrich & Martin Loughlin eds., 2021) for a robust articulation of the rule of law and the controversies surrounding it.

legal norm—primarily generality, publicity, clarity, and stability—as an inherent check on *how* authority operates.¹¹⁷ The second set of principles, addressed in this Article, focuses on *where* the authority is coming from.

Legality in the latter sense means that all government actions must be grounded in lawful authority and carried out in accordance with the law.¹¹⁸ A cornerstone of the rule of law, it ensures that no public official or administrative body acts beyond the powers conferred on them by statutes or a constitution.¹¹⁹ Actions taken without such authorization—*ultra vires* acts—are deemed unlawful.¹²⁰

According to this approach, the democratic legitimacy of government power stems from the requirement that public administration operates exclusively within the framework of laws enacted by the legislature.¹²¹ Because these laws are created by elected representatives, they are seen as an expression of citizens' consent to the exercise of administrative power over them.¹²² Legality's requirement that state actions be grounded in legislation can be traced all the way back to the political theory of John Locke.¹²³ Locke underscored the necessity of governance being conducted through "establish[e]d *standing Laws*, promulgated and known to the People," as opposed to rule by "Extemporary Decrees."¹²⁴

The legality principle was more thoroughly articulated by the English constitutional theorist Albert Venn Dicey in the late nineteenth century.¹²⁵ Dicey's emphasis on the rule of law—which applies to everyone, including the government—reflected the gradual transformation of the royal prerogative into a system of legally constrained power.¹²⁶ Almost

¹¹⁷ This account of legality is most commonly associated with Lon Fuller, who developed a theory that is distinct from positivism and from natural law, but that still attributes moral value to law as a distinct mode of ordering that limits power. See LON L. FULLER, *THE MORALITY OF LAW* 46–81, 96–112 (1964); Waldron, *supra* note 116.

¹¹⁸ See Waldron, *supra* note 116.

¹¹⁹ See *id.*

¹²⁰ See Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 *CAMBRIDGE L.J.* 63, 64–65 (1998).

¹²¹ See, e.g., FULLER, *supra* note 117, at 55–64, 81–96; Waldron, *supra* note 116.

¹²² See Randy E. Barnett, *Constitutional Legitimacy*, 103 *COLUM. L. REV.* 111, 112–14 (2003); Stewart, *supra* note 65, at 1672–73.

¹²³ Stewart, *supra* note 65, at 1672–73. For foundations, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 75 (C.B. Macpherson ed., Hackett Publ'g Co., Inc. 1980) (1690) ("The [legislative power], being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.").

¹²⁴ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 353 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹²⁵ See ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 183–205 (9th ed. 1950).

¹²⁶ *Id.* at 183 ("[The] authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer

a century later, legal philosopher Joseph Raz further elaborated on the theoretical underpinnings of the legality principle, connecting it to the broader concept of the rule of law:

[T]he government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase ‘government by law and not by men.’ No sooner does one use these formulas than their obscurity becomes evident. Surely government must be both by law and by men. It is said that the rule of law means that all government action must have foundation in law, must be authorized by law.¹²⁷

Legality is so fundamental in the common law tradition that it has been described as the basis of judicial review of governmental agencies in the United Kingdom, home of the common law.¹²⁸

Legality can be understood as grounded in two overlapping political theories: liberal and democratic. Simply put, the former is more concerned with constraining power and the latter with self-rule.¹²⁹ Legality, as grounded in the liberal tradition of the rule of law, answers how legitimate public authority can exist among individuals who share the fundamental status of being *free and equal*. Mattias Kumm explains:

The only legitimate public authority over individuals imagined as sharing the civic status as free and equal was a legally constituted, constrained and guided authority. Within a liberal order even a prime minister, chancellor or president is not a ruler, but a mere holder of public office. They, like other public officials, are authorized to play a role in the making, interpretation and enforcement of the law, authorized and limited by norms defining jurisdictional, procedural, formal and substantive constraints.¹³⁰

of order . . . This royal supremacy has now passed into that sovereignty of Parliament . . .”). Dicey famously denied the legitimacy of administrative law, a body of law applying strictly to the government, on grounds that the rule of law should apply to all equally and that a distinctive body of law would give the regime uncontrolled power beyond ordinary legal rules, a conclusion that appears to have been based on a misconception of nineteenth-century French administrative law. See UWE KISCHEL, *COMPARATIVE LAW* 320–22 (2019); Jeffrey A Pojanowski, *Neoclassical Administrative Law*, 133 *HARV. L. REV.* 852, 859–60 (2020).

¹²⁷ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212 (2d ed. 2009).

¹²⁸ See Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, 55 *CAMBRIDGE L.J.* 122, 122–23 (1996).

¹²⁹ See Mattias Kumm, *The Rule of Law in the Liberal Script: Central Commitments, Variations, and Contestations*, in *THE LIBERAL SCRIPT AT THE BEGINNING OF THE 21ST CENTURY: CONCEPTIONS, COMPONENTS, AND TENSIONS* 194, 200 (Tanja A. Börzel et al. eds., 2024) (explaining the liberal theory); JEREMY WALDRON, *LAW AND DISAGREEMENT* 232–54 (1999) (explaining the democratic theory).

¹³⁰ Kumm, *supra* note 129, at 200.

At the heart of legality in the liberal tradition lies the idea of equal liberty for all individuals.¹³¹ Legality both presupposes this ideal and helps constitute it by subjecting government power to the constraints of positive law.¹³² In this sense, legality is inherently concerned with the protection of individual rights and freedoms.¹³³ According to liberal thought, the primary threat to individual rights, liberties, and well-being stems from excessive accumulation of power by the government.¹³⁴ The solution, then, is to impose structural limits on government and political power, chiefly by subordinating it to law—thereby establishing the rule of law.¹³⁵ This legality requirement safeguards rights by ensuring that any government power, including administrative action, that infringes upon individual liberties is explicitly authorized by law.¹³⁶ The burdens and costs of legislation are a vital safeguard for individual liberty, ensuring that government power cannot be wielded against individuals without legislative agreement on relatively precise terms.¹³⁷ Procedurally, this requirement ensures that administrative actions are subject to the rigors of the legislative process, particularly when rights are at stake.¹³⁸

Closely connected to the liberal rule of law rationale, legality can also be understood in separation of powers terms. In *The Spirit of the Laws*, Montesquieu famously articulated the division of government into three branches: legislative, executive, and judicial.¹³⁹ That division was essential to prevent the abuse of power.¹⁴⁰ Government must be structured so that one branch can act as a check on the others, creating a system of mutual restraint.¹⁴¹ Under this formulation, the legality principle requires the legislature to be the branch to enact general laws, to be executed by the executive branch, thus serving as a check on

¹³¹ See *id.* at 200 (noting that a core tenet of liberal legality is “persons sharing the basic status as free and equal persons”).

¹³² See *id.* at 202 (“All infringements of liberty . . . have to take the form of enacted positive law.”).

¹³³ See *id.* at 201.

¹³⁴ See CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 11–16 (4th ed. 2022); DICEY, *supra* note 125, at 201–03.

¹³⁵ See Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 *CORN. L. REV.* 430, 451 (1987).

¹³⁶ See Bruce Chen, *The Principle of Legality: Issues of Rationale and Application*, 41 *MONASH U.L. REV.* 329, 332–33 (2015); Jason N.E. Varuhas, *The Principle of Legality*, 79 *CAMBRIDGE, L.J.* 578, 590 (2020) (exploring recent development in the United Kingdom’s principle of legality).

¹³⁷ See Sunstein, *supra* note 6, at 320.

¹³⁸ See *id.* at 330; Nadine Strossen, *Delegation as a Danger to Liberty*, 20 *CARDOZO L. REV.* 861, 863–67 (1999); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 *SUP. CT. REV.* 223, 271–72.

¹³⁹ See CHARLES DE SECONDAT, *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 171–205 (Thomas Nugent trans., Batoche Books 2001) (1748).

¹⁴⁰ See James T. Brand, *Montesquieu and the Separation of Powers*, 12 *OR. L. REV.* 175, 179–80 (1933).

¹⁴¹ See *id.*

administrative power.¹⁴² This function of legality, upheld by courts, is of special importance under conditions of democratic decline.¹⁴³

A second basis for legality lies in the democratic ideal of self-government. Governmental power is legitimate only if it operates within a legal system in which every citizen consents to be governed by laws they had a role in shaping through democratic processes.¹⁴⁴ Participation, according to this approach, is an intrinsic democratic value that legality promotes, ensuring that governmental authority is grounded in laws that have been publicly debated and subjected to democratic scrutiny.¹⁴⁵ This rationale, again, goes back to Locke: “The power of the *Legislative* being derived from the People . . . can be no other, than . . . only to make *Laws*, and not to make *Legislators*”¹⁴⁶

According to this view, Congress’s role is rooted in the idea of *deliberative democracy*, in which “elected representatives make public policy through a process characterized by informed, public-spirited debate.”¹⁴⁷ This is a key feature of “Madisonian republicanism,”¹⁴⁸ which envisions legislators engaging in debate to “refine and enlarge the public views.”¹⁴⁹ The requirement of bicameralism in the legislative process is thought to further its deliberative advantages. As the Court remarked in 1983, “The division of the Congress into two distinctive

¹⁴² See Sargentich, *supra* note 135, at 449–53; 1 ןתוד באוי [YOAV DOTAN], לוקיש לע תיטופיש תרוקיב, ילהגמה תעדה [JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION] 324.

¹⁴³ See Yaniv Roznai, *Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset*, 51 VERFASSUNG UND RECHT IN ÜBERSEE 415, 417–18 (2018) (describing the Israeli courts’ application of the legality principle in Israel as “guardian of the legislative role of the Knesset” and arguing for its special importance in a time of consolidation of executive power).

¹⁴⁴ See WALDRON, *supra* note 129, at 232–54; IAN HARDEN & NORMAN LEWIS, *THE NOBLE LIE: THE BRITISH CONSTITUTION AND THE RULE OF LAW* 33 (1986). This being said, as a normative ideal, the American founding has been criticized for its lack of inclusivity; the ideal of consent to the Constitution is a theoretical construct emanating from social contract theory, not an empirical assertion. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 27 (2006); see also generally AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* (2024) (describing the history of constitutional inclusivity being based on race and class).

¹⁴⁵ See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 128–32 (1996); Sargentich, *supra* note 135, at 452–53.

¹⁴⁶ John Locke, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT*, 285, 381 (Peter Laslett ed., 2d ed. 1967) (1690).

¹⁴⁷ Victor Goldfeld, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 376 (2004).

¹⁴⁸ *Id.*; see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 47–48 (1985) (discussing Madisonian republicanism generally).

¹⁴⁹ BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 162–63 (1997) (quoting THE FEDERALIST No. 10, at 44 (James Madison) (Terence Ball ed., 2003)); see also THE FEDERALIST No. 70, at 344 (Alexander Hamilton) (Terence Ball ed., 2003) (discussing the virtues of deliberative decision-making in the legislature.).

bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”¹⁵⁰

Deliberation is thus designed as an aid to democratic representation. Interest groups often attempt to “capture” administrative agencies, influencing them to shape their decisions to favor particularistic interests.¹⁵¹ By subjecting policymaking to the formal legislative process, legality mitigates the influence of special interest groups, ideally ensuring that enacted policy aligns more closely with the broader public interest.¹⁵² Of course, legislative bodies are not immune to the influence of interest groups, but the increased public attention on elected legislators mitigates, at least in theory, this undue influence.¹⁵³ The principle of legality is thought to offer safeguards against such influence by ensuring that substantive decisions are made through the democratic process, which demands transparency, public deliberation, and accountability.¹⁵⁴ The multiple stages of legislation, including committee reviews and public debate, exposes the legislative process to greater scrutiny and makes it harder for interest groups to exert unchecked influence.¹⁵⁵ Additionally, legislators, as elected representatives, are directly accountable to voters, providing a counterbalance to the disproportionate sway of private interests.¹⁵⁶ In this way, the legality principle may not eliminate the influence of interest groups entirely, but it limits their capacity to manipulate decision making.¹⁵⁷

¹⁵⁰ *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

¹⁵¹ A classic account in positive political science is presented in E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 32–43 (1975). In economics, perhaps the leading version of the critique was presented by George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3, 3–10 (1971). For a critique from two public policy scholars, see Christopher Carrigan & Cary Coglianese, *George J. Stigler, “The Theory of Economic Regulation,”* in *THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION* 287, 291–97 (Steven J. Balla et al. eds., 2016).

¹⁵² See Goldfeld, *supra* note 147, at 377 (“Deliberation is one method by which such private pressure can be diffused—if other legislators are aware that a particular policy is intended to benefit a particular narrow interest, they may intervene. The more attention a policy proposal receives, the more its proponents must justify it to persuade other congresspersons. Greater attention to legislative proposals would also likely lead to increased accountability—after all, if legislators with a reputation of favoring private interests are routinely unable to put forth plausible public-regarding justifications for the policies they support, the electorate will likely take note of this fact at the polls.”).

¹⁵³ Some might even say this is a defining feature of legislation. See, e.g., Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 *SUP. CT. REV.* 1, 27 (“Many public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups.”).

¹⁵⁴ See Goldfeld, *supra* note 147, at 377–79.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 377.

¹⁵⁷ See *id.*

Legality thus rests on two interlocking foundations: a liberal commitment to constraining arbitrary power through law and a democratic commitment to ensuring that the laws which authorize power reflect the will and participation of the governed.

B. *Legality: A Reality Check – A Principle, Not a Doctrine*

The legality principle has always had a chimerical quality. Rooted in liberal democratic theory and developed during the late eighteenth and early nineteenth centuries, legality was originally based on the liberal assumption of a limited government.¹⁵⁸ Thinkers like John Locke, Montesquieu, and John Stuart Mill envisioned a modest state, often monarchical, with a narrow scope of responsibilities focused on managing the military, maintaining public order, collecting taxes, and performing other limited tasks such as constructing roads and minting currency.¹⁵⁹

This view of the limited classical liberal state had little to do with the modern administrative state that began to emerge in the late nineteenth and early twentieth centuries, with public bureaucracies starting to provide welfare services, education, healthcare, and social insurance, and to regulate various aspects of the economy and society.¹⁶⁰ In fact, the system's rigid principles were already fantastical by the time Dicey formulated them at the end of the nineteenth century—the very period in English history that saw the emergence of the institutions that constitute the backbone of the modern welfare state.¹⁶¹ As more and more disputes came to be decided by administrative tribunals or even ministers acting in a quasi-judicial capacity and not by ordinary courts, Dicey's sharp distinction between the rule of law and administrative law gradually faded away, if it was ever accurate.¹⁶²

¹⁵⁸ יואב דוטן [Yoav Dotan], שרחה תויקחה נורקעו מיינושאר מירדסה, [Initial Arrangements and the New Principle of Legality], 42 HEBREW U. L.J. 379, 383 (2012).

¹⁵⁹ *Id.*; see also Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYC. OF PHIL. (Oct. 6, 2020), <https://plato.stanford.edu/entries/locke-political> [<https://perma.cc/6TJB-7BG6>] (describing Locke's views on the limited role of government); Hilary Bok, *Baron de Montesquieu, Charles-Louis de Secondat*, STAN. ENCYC. OF PHIL. (Apr. 2, 2014), <https://plato.stanford.edu/entries/montesquieu> [<https://perma.cc/ERC9-S5J4>] (describing Montesquieu's views on the limited role of government); David Brink, *Mill's Moral and Political Philosophy*, STAN. ENCYC. OF PHIL. (Aug. 22, 2022), <https://plato.stanford.edu/entries/mill-moral-political> [<https://perma.cc/N2BA-V7QG>] (describing John Stuart Mill's views on the limited role of government).

¹⁶⁰ See Dotan, *supra* note 158, at 383.

¹⁶¹ See *id.* at 383–84; KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 31–32 (1969); KISCHEL, *supra* note 126, at 321–22 (critiquing A.V. Dicey specifically for perpetuating a nationalistic, anachronistic myth).

¹⁶² See Giulio Napolitano, *The Rule of Law*, in THE OXFORD HANDBOOK OF COMPARATIVE ADMINISTRATIVE LAW, *supra* note 33, at 420, 426–27.

Similarly, despite the mythos perpetuated by certain accounts,¹⁶³ in the United States a purely self-executing system of federal law with no administrative discretion never existed.¹⁶⁴ From the first, as administrative historian Jerry Mashaw and other scholars have shown, early Congresses experimented with diverse schemes for executing the laws, often granting administrators broad discretionary authority.¹⁶⁵ The modern administrative state is not a departure from the founders' vision of a limited government, but a continuation of it.¹⁶⁶

Joseph Raz warns of the risk of treating legality, and the rule of law more generally, as a formalistic binary to be strictly applied: "The undoubted value of conformity to the rule of law should not lead one to exaggerate its importance."¹⁶⁷ He further explains that "[s]ince the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values."¹⁶⁸ Consequently, legal systems must always accommodate tensions between legality and other values like efficiency.¹⁶⁹ "Conformity to the rule of law," says Raz, "is a matter of degree, and though, other things being equal, the greater the conformity the better—other things are rarely equal."¹⁷⁰

At the other end of the spectrum, it is possible for legality to become an empty shell. During the Weimar Republic, total delegation of legislative power, cloaked in the guise of legality, by Parliament to Chancellor Hitler eroded democratic governance and led to the collapse

¹⁶³ See Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 721 (2016) (reviewing DANIEL R. ERNST, *TÔCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)) ("According to Justice Clarence Thomas and Professor Philip Hamburger, for instance, the very existence of the modern administrative state is illegitimate because it departs from Founding-era conceptions of good government, which include a highly formalistic separation of powers and rigorous procedural protections for regulated parties."); see also Jeremy Kessler, *The Origins of "the Rule of Law,"* 87 LAW & CONTEMP. PROBS. 1, 7–15 (2025) (situating the origins of the rule of law in a socioeconomic context defined by a strictly structured commodity exchange).

¹⁶⁴ See MASHAW, *supra* note 53, at 312–14.

¹⁶⁵ See *id.* at 290 (detailing examples regarding the early days of the republic including the statutes establishing the Departments of War and State, the military pension system, and the management of public lands); see also Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 184–90 (2022) (detailing other examples); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332–49 (2021) (detailing other examples of flexible delegation at the founding).

¹⁶⁶ See MASHAW, *supra* note 53, at 290–93.

¹⁶⁷ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 226 (1979).

¹⁶⁸ *Id.* at 228.

¹⁶⁹ See MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 335 (2010).

¹⁷⁰ RAZ, *supra* note 167, at 228.

of constitutional democracy.¹⁷¹ Article 48 of the Weimar Constitution granted the President the authority to issue emergency decrees with the force of law, ostensibly to swiftly address crises.¹⁷² Although this delegation adhered to the formal requirements of legality—i.e., it was authorized by the constitution—its application effectively bypassed the legislative process and concentrated substantial power in the executive branch.¹⁷³ Total delegation—in which the legislature transfers almost all substantive decision making authority to the executive or administrative agencies—reduces the legislative role to merely granting broad authorizations.¹⁷⁴

The principle of legality insists that all governmental actions must have a clear legal basis, but if the legislature were free to delegate virtually unlimited authority, then the essential elements of legality—limiting arbitrary power and ensuring democratic accountability—would be eroded. The system would begin to justify itself in circular terms: Delegation is lawful because it is authorized by law, even when that authorization effectively abandons the legislature’s core responsibilities.¹⁷⁵

Returning to the foundations of legality, if the rule of law comprises requirements regarding both the *form* of authorization and its *source*, then its violations must likewise be understood along both dimensions. David Dyzenhaus argues that there are two main strategies for rulers to abuse power under the mantle of law: “Either they can explicitly state that aim, or they can delegate power to officials permitting the officials to achieve the same end, not because this end is explicitly stated in the empowering statute, but because official implementation of the statute is explicitly stated to be unreviewable by judges.”¹⁷⁶ The former strategy

¹⁷¹ See DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN, AND HERMANN HELLER IN WEIMAR* 15 (1999).

¹⁷² See *id.* at 2, 19–20.

¹⁷³ See *id.* at 17–37; CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 61–73 (1948). On the risks of total delegation more generally, see ROSSITER, *supra*, at 10 (“[Delegation of legislative power] amounts to [] a voluntary transfer of lawmaking authority from the nation’s representative assembly to the nation’s executive, a frank recognition that in many kinds of crisis (particularly economic depressions) the legislature is unequal to the task of day-to-day, emergency lawmaking, and that it must therefore hand over its functions to someone better qualified to enact arbitrary crisis laws. On its face this would not seem to be a procedure of a particularly dictatorial character. When the age-old battles fought in all constitutional countries to thrust the executive out of the field of lawmaking are recalled to mind, however, it is obvious indeed that the transfer of legislative power from Parliament to Prime Minister or Congress to President is a highly unusual and even dictatorial method of government.”).

¹⁷⁴ See ROSSITER, *supra* note 173, at 10.

¹⁷⁵ See RAZ, *supra* note 167, at 212–13 (“The problem is that now we are back with our initial puzzle. If government is, by definition, government authorized by law the rule of law seems to amount to an empty tautology, not a political ideal.”).

¹⁷⁶ DAVID DYZENHAUS, *THE LONG ARC OF LEGALITY: HOBBS, KELSEN, HART* 318 (2022). On the legal theory of populist autocrats more specifically, see generally Ofra Bloch & Natalie

constitutes a violation of the generality requirement;¹⁷⁷ the latter—which is the focus of this Article—implicates the principle of congruence between official action and the declared rule.¹⁷⁸ Such a violation can arise at the legislative level, for example through a total delegation of legislative authority to the executive branch, which is typically constrained by doctrines such as nondelegation.¹⁷⁹ But in administrative law, where the statute itself is not challenged, the relevant concern is agency overreach.¹⁸⁰ Here, doctrines such as judicial deference, statutory interpretation, and majorness seek to mediate the tension between the demands of legality and the need for effective governance.¹⁸¹

C. *Legality in American Administrative Law*

Justice Stephen Breyer once gave, jokingly, the example of a French biology teacher boarding a train and being asked to buy a separate ticket for a wicker basket of snails because the fare rules required that all “animals” be ticketed.¹⁸² For diverse reasons, American law never developed a formal legality structure, which helps explain, in part, why the term “legality” remains awkward and unidiomatic in American legal discourse, unlike in Germany, England, Israel, or France, where it is something that any first-year law student might come across.¹⁸³ But despite surface appearances, American law has several equivalents for it, especially in administrative law.¹⁸⁴

R. Davidson, *Countering Authoritarian Populists’ Legal Theory*, 26 THEORETICAL INQUIRIES L. 103 (2025).

¹⁷⁷ See Ofra Bloch, *Generality and Abusive Constitutionalism*, 85 MD. L. REV. 112, 116–17 (2025).

¹⁷⁸ See FULLER, *supra* note 117, at 81–96.

¹⁷⁹ See *infra* notes 258–60 for discussion on the nondelegation doctrine.

¹⁸⁰ See, e.g., William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1373–76 (2018).

¹⁸¹ See, e.g., *id.*; Alice Kaswan, *Our New Pro-Liberty Justice – And What that Means for Environmental Law*, 50 ABA TRENDS 4, 4–7 (2019) (explaining Justice Kavanaugh’s use of the doctrines to combat agency overreach).

¹⁸² Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 718 (2025).

¹⁸³ On pragmatism and the regulatory state, see generally LANDIS, *supra* note 55. On pragmatism and American education, see DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 162–72 (1991). On pragmatism in American law, see generally BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010); THOMAS C. GREY, *FORMALISM AND PRAGMATISM IN AMERICAN LAW* (2014); RICHARD A. POSNER, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004); PURCELL JR., *supra* note 53. On legality in foreign jurisdictions, see *infra* notes 213–16 and accompanying text.

¹⁸⁴ For an eloquent summary, see Stack, *supra* note 14, at 1986–89. This Article limits its scope to administrative law, but there are several areas of law in which legality plays a large role. See *id.* at 1987 (“The focus on administrative institutions allows for some principles, such as those pertaining to criminal prohibitions, to be left aside.”).

Dicey still casts a long shadow on American law. American notions of the separation of powers are particularly indebted to Diceyan ideas and thus to the idea of legality.¹⁸⁵ On this account, the separation of powers divides governmental functions among the three branches and establishes a system of checks and balances, allowing each branch to scrutinize and restrain the others in the name of legality—thereby preventing the concentration of power in any single entity, particularly the executive.¹⁸⁶ As Professor Sunstein emphasizes, in a hypothetical case where administrative bodies could rely on ambiguous and vague laws to act, the separation of powers would be compromised because neither the judicial nor the legislative branches could use the law to supervise and criticize the actions of that branch.¹⁸⁷

Legality underpins our very idea of a regulatory state. As Richard Stewart put it in his classic study of American administrative law, this model seeks to “reconcile the competing claims of governmental authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives.”¹⁸⁸ This has entailed a robust system of administrative review by courts. As Daniel Farber and Anne Connell explain, “It is the rare case where the legality of the agency’s action does not depend, at least in part, on a determination that it acted within the scope of the authority delegated by Congress—rare enough that such cases get excerpted in constitutional law casebooks.”¹⁸⁹

More concretely, legality can be both a constitutional principle, implicating the validity of the statute, and an administrative one, implicating the validity of an agency’s exercise of delegated power.¹⁹⁰ The relationship between the two sheds light on that relationship between

¹⁸⁵ Napolitano, *supra* note 162, at 426–28.

¹⁸⁶ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 227–28 (10th ed. 1979) (“The plain truth is that the power possessed by the judges of controlling the administrative conduct of the executive . . . deprives the Crown, which now means the Ministry of the day, of all discretionary authority . . . [and] confines the action of the government within the strict letter of the law.”); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 131–32 (1994); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); SCHOENBROD, *supra* note 14, at 107–18.

¹⁸⁷ Sunstein, *supra* note 6, at 318–21.

¹⁸⁸ Stewart, *supra* note 65 at 1669–70.

¹⁸⁹ Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1144 (2014).

¹⁹⁰ The legal philosopher Lon Fuller famously articulated a theory of law’s “internal morality” as a baseline test for a just legal system, and recently Professor Kevin Stack has announced a basis for evaluating the legality of administrative law. See FULLER, *supra* note 117, at 42; Kevin Stack, *Putting Lon Fuller to Work in the Trenches*, YALE J. ON REGUL. (Apr. 13, 2021), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-02/> [<https://perma.cc/5V63-TW8T>].

the MQD and another canon of law receiving recent attention: the nondelegation doctrine (“NDD”).¹⁹¹ Arising during the early twentieth century with the rise of regulation of industry, the NDD instructs that Congress may delegate broadly but may not completely “give[] up its legislative power” and must provide an “intelligible principle” for the agency’s exercise of that discretion.¹⁹² Despite its potential to stymie the growth of the regulatory state, the NDD has always remained something of a phantom, as only two NDD challenges to statutes ever succeeded—and both in 1935.¹⁹³ Despite, or due to, that fact, critics of the administrative state have insisted for years that the NDD is being violated left and right by administrative institutions.¹⁹⁴ And, although it has not been formally revived, the Roberts Court is showing a renewed interest in it.¹⁹⁵

Partly due to the long shadow of *Chevron*’s deference canon, for some time the most important area of American law to incorporate the legality principle was, in fact, statutory interpretation.¹⁹⁶ As Antonin Scalia, Bryan Garner, and Frank Easterbrook’s classic text points out, “the more the interpretive process strays outside a law’s text, the greater the interpreter’s discretion,”¹⁹⁷ a maxim which applies as much to civil servants as to federal judges.

¹⁹¹ Commenting on this relationship, see Samuel Buckberry Joyce, *Testing the Major Questions Doctrine*, 43 STAN. ENV’T L.J. 50, 52–56 (2024); Krishnakumar, *supra* note 99, at 1120–28; Levin, *supra* note 6, at 944–47; Sohoni, *supra* note 6, at 266–67.

¹⁹² See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 409 (1928); see also Andrea Scoseria Katz, *A Regime of Statutes: Building the Modern President in Gilded Age America (1873-1921)*, 2 J. AM. CONST. HIST. 737, 744–47, 778 (2024) (describing early American delegations and contemporary legal sentiment to the NDD).

¹⁹³ This is why Professor Sunstein could write in 2000 that the NDD has had only “one good year, and 211 bad ones.” Sunstein, *supra* note 6, at 322. Sunstein here argues that the NDD is not actually dead but has been transformed into “nondelegation canons” by which, in certain limited fields, the Court prohibits agencies from making certain decisions without explicit authorization from Congress. See *id.* at 330. This Article agrees that this observation is illustrative.

¹⁹⁴ See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002) (“The nondelegation principle is grounded in the more basic principle of enumerated powers. Executive officials generally cannot exercise legislative powers on their own initiative because they are not granted any such power by the Constitution. Nor can Congress confer such authority by passing vacuous statutes for officials to ‘execute,’ because those statutes will not be ‘necessary and proper’ for carrying into effect federal powers and will therefore exceed Congress’s enumerated powers under the Sweeping Clause of Article I.”); see also *West Virginia v. EPA*, 597 U.S. 697, 750 n.6 (2022) (Gorsuch, J., concurring) (canvassing scholars).

¹⁹⁵ See *West Virginia*, 597 U.S. at 749–50 (discussing the Court’s intimations of a revival); see also Coenen & Davis, *supra* note 77, at 1990–92 (rehashing the doctrine and explaining the new test for it supported by Justices Thomas, Gorsuch, and Roberts).

¹⁹⁶ See, e.g., WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 288 (2016) (“Even if Congress has delegated an agency general rulemaking or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions.”).

¹⁹⁷ Frank H. Easterbrook, *Foreword to Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts*, at xxi, xxii (2011).

Within American administrative law, there is a certain discursive asymmetry between critics' and defenders' views of the regulatory state. If one surveys major American administrative law casebooks, the bulk of them justify the existence of regulation predominantly in terms of *efficiency*.¹⁹⁸ Namely, they explain the regulatory state as a response to “externality problems or transaction costs,”¹⁹⁹ “failures inevitably produced by the business cycle,”²⁰⁰ “[i]nformation [a]symmetries,”²⁰¹ the limitations of tort law,²⁰² questions over resource allocation,²⁰³ and so forth. Meanwhile, it is mainly conservative, “anti-administrativist”²⁰⁴ scholars critical of regulation who talk about legality, mainly to allege a lack of it in administrative processes.²⁰⁵ For example, in his casebook *Federal Administrative Law*, Gary Lawson spends significant time pondering whether the legislature can delegate broad powers to an agency (his answer: no) and whether the Court has adequately policed the constitutionality of delegating statutes (again: no).²⁰⁶ It is partly because of this asymmetry that the MQD functions and is understood mostly as an antiregulatory doctrine rather than as one that both authorizes and constrains the administrative state.

D. *Majorness in Comparative Context: Administration Between Legality and Efficiency*

Legality is more than an idealization: It is a judicial doctrine that cannot and should not be applied categorically. Recall the paper clips example: A government could not function if Congress were obligated to authorize every small action an agency took down to ordering stationery.²⁰⁷ Legality is, instead, a legitimating principle that

¹⁹⁸ See, e.g., STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 37–42 (9th ed. 2022).

¹⁹⁹ *Id.* at 5.

²⁰⁰ JAMELLE C. SHARPE, *ADMINISTRATIVE LAW: A LIFECYCLE APPROACH* 5 (2d ed. 2024).

²⁰¹ See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY STATE* 33 (4th ed. 2024).

²⁰² See TODD RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, ANNE JOSEPH O'CONNELL & ELOISE PASACHOFF, *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 4–7 (13th ed. 2023).

²⁰³ See JOHN M. ROGERS, MICHAEL P. HEALY, RONALD J. KROTOSZYNSKI, JR. & KENT BARNETT, *ADMINISTRATIVE LAW* 12 (5th ed. 2021).

²⁰⁴ See Metzger, *1930s Redux*, *supra* note 13, at 33–45; Metzger, *The Roberts Court*, *supra* note 13, at 1–6.

²⁰⁵ See, e.g., Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 830–31 (2018); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 197–203 (9th ed. 2022). *But see* MASHAW, *supra* note 14, at 11–13, 163–80; Stack, *supra* note 14, at 1993–2002; Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1603–12 (2023).

²⁰⁶ See, e.g., LAWSON, *supra* note 205, at 197–203.

²⁰⁷ See *supra* notes 19–20, 167–70 and accompanying text.

inevitably stands in tension with reality—especially the reality of the modern administrative state—and must be offset by other requirements, including governability and efficiency.²⁰⁸ This reality requires flexibility and responsiveness, which is often in opposition to the legislative process.²⁰⁹ As a matter of historical record, the tasks assigned to the executive branch often involve continuous and complex balancing of conflicting interests and considerations.²¹⁰ Successfully addressing these challenges requires processes that cannot effectively be implemented through the rigid and cumbersome mechanism of primary legislation in legislative bodies.²¹¹

Different polities strike different balances between the opposing ideals of legality and efficiency in the administrative state, but several of them feature legal doctrines that require agencies to trace their actions to authorizing legislation.

One common way courts negotiate the tension is by invoking the idea discussed in Justice Gorsuch's *West Virginia* concurrence that certain “important” subjects” are reserved for legislative resolution alone.²¹² In France and Germany the constitution expresses this idea explicitly, providing a list of subjects that must be determined by statutes, not administrative regulation. The French Constitution defines these to include civil rights, especially freedom and independence of the media; national defense; felony crimes; taxation; abortion; citizenship; and others.²¹³ German courts have also developed the doctrine of the legality of administration (*Gesetzmäßigkeit der Verwaltung*), which

²⁰⁸ See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 314 (“[W]e should recognize the degree to which our administrative constitution will always be a work in progress for it encompasses competing visions of the role of administration in governance that must somehow be managed, but that cannot be resolved.”).

²⁰⁹ See generally WILLIAM E. SCHEUERMAN, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (2004) (a political theory account contrasting the designed slowness of the legislative process with executive administration).

²¹⁰ See SHARPE, *supra* note 200, at 3–5, 16; BREYER ET AL., *supra* note 198, at 35–42.

²¹¹ See Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599, 648–49 (2024).

²¹² See *West Virginia v. EPA*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring).

²¹³ 1958 CONST. art. 34 (Fr.). Several cases have expanded on this point. See, e.g., CE Ass., June 28, 2002, Rec. Lebon 23,2276 (holding that courts have the power to overrule agency actions where the agency interpretation contravenes or exceeds the scope of the statutory delegations, to ensure that core functions remain controlled by the legislature); Conseil constitutionnel [CC] [Constitutional Court] decision No. 86-224DC, Jan. 23, 1987, J.O. 924 (holding that certain essential functions, such as the power to regulate competition, could not be delegated to administrative agencies without clear legislative authorization); CE Ass., Nov. 24, 1961, 52.262, Rec. Lebon 48,841 (finding an agency action invalid for being authorized by a delegation that is overly broad and vague); CE Ass., July 3, 1996, Rec. Lebon 255 (holding that administrative actions, including those by delegated authorities, must comply with higher principles); CE Ass., Oct. 27, 1995, Rec. Lebon 372 (holding that administrative authorities with delegated powers may ensure public order and uphold human dignity, even if these are not explicitly mentioned in the delegation). In Germany, see Grundgesetz [GG] [Basic Law] art. 12(1), translation at <http://www.gesetze-im-internet.de/>

captures the idea that “[o]nly the legislature may make laws; only the executive may enforce them; [and] only judges may adjudicate.”²¹⁴ In Israel, the “primary arrangements doctrine” provides that only the legislature can make “primary” arrangements; regulation must limit itself to “secondary” arrangements of lesser scope and significance.²¹⁵ South Africa features a similar doctrine, as well.²¹⁶

Israel illustrates how this doctrine is articulated in terms of legality. The “primary arrangements doctrine” was first introduced in the 1998 case *Rubinstein v. Minister of National Security*.²¹⁷ *Rubinstein* dealt with the legality of rules issued by the Minister of Defense that extended and expanded a highly controversial arrangement that exempted ultra-Orthodox Yeshiva students from mandatory military service.²¹⁸ In 1948, the year Israel was established, Prime Minister David Ben-Gurion had exempted a fixed quota of 400 Yeshiva students per year.²¹⁹ By 1996, the exemption had become automatic and included roughly 30,000 students.²²⁰ Writing for the Court, Chief Justice Aharon Barak explained:

[W]here governmental action is enshrined in a regulation or an administrative guideline, then the general policies and basic criteria constituting the basis of the action must be established in legislation, pursuant to which the regulation was enacted or the administrative

englisch_gg/index.html [https://perma.cc/U477-DBJ2], which allows occupational freedom to be limited “by or pursuant to a law.”

²¹⁴ See Currie, *supra* note 48, at 2115; see also *The Rule of Law – Dynamics and Limits of a Common European Value*, COUNCIL OF EUR. (Sep. 20, 2019), <https://www.coe.int/en/web/dlapil/-/the-rule-of-law-dynamics-and-limits-of-a-common-european-value> [https://perma.cc/XT6A-ESGB] (further explaining legality requirements in German administrative law).

²¹⁵ See HCJ 3267/97 *Rubinstein v. Minister of Def.*, 14 IsrLR 139, 164–85 (1998).

²¹⁶ South Africa has developed a robust body of separation of powers case law covering this ground. See, e.g., Phineas M. Mojapelo, *The Doctrine of Separation of Powers (a South African Perspective)*, *ADVOCATE*, Apr. 2013, at 37, 40–41; *Int’l Trade Admin. Comm’n v. SCAW S. Afr. (Pty) Ltd.* 2010 (4) SA 618 (CC) at 25–27, 58–62 (upholding antidumping duties imposed by the Minister of Trade and Industry based on recommendations by a domestic international trade commission); *Just. All. of S. Afr. v. President of the Republic of S. Afr.* 2011 (5) SA 388 (CC) at 35–36 (invalidating a delegation to the President of South Africa of the power to extend the term of office of the Chief Justice of the Constitutional Court); *Exec. Council of the W. Cape Legislature v. President of Republic of S. Afr.* 1995 (4) SA 877 (CC) at 132–38 (invalidating an attempted exercise by the President of temporarily delegated power to amend a statute on grounds that the constitution permits Parliament to delegate subordinate regulatory authority, but not plenary regulatory authority). In several cases, the South Africa Constitutional Court stepped in to overturn a lower court decision that had invalidated an executive action, on grounds that the lower court had overstepped its boundaries and intruded on a matter of executive discretion. See, e.g., *Nat’l Treasury v. Opposition to Urban Tolling All.* 2012 (6) SA 223 (CC) at 31–35; *Nat’l Dir. of Pub. Prosecutions v. Freedom Under L.* 2014 (4) SA 298 (SCA) at 25–26; *Minister of Health v. New Clicks S. Afr. (Pty) Ltd.* 2006 (2) SA 311 (CC) at 13–19.

²¹⁷ See *Rubinstein*, 14 IsrLR at 164–65.

²¹⁸ See *id.* at 147–55.

²¹⁹ See *id.*

²²⁰ See *id.* at 150–52.

decision adopted. In more “technical language,” . . . “primary arrangements” that determine general policy and the guiding principles, must be enshrined in statute (Knesset Legislation), whereas regulations or administrative guidelines must only determine “secondary arrangements.”²²¹

Chief Justice Barak acknowledged that there is no clear line between “primary” and “secondary” arrangements:

[T]he nature of the arrangement, its social implications, and the degree of violation of individual freedom are all factors that influence the scope of the primary arrangement and degree of specification required thereof. Furthermore, the dictates of today’s reality necessitate compromising between principles and the imperatives of everyday life. In a modern democratic regime, it is difficult to fully realize the principles enshrined in primary arrangements. Quite often, compromise is required for reasons of administrative *efficiency*, in order to ensure public welfare. Even so, as a matter of principle, this does not detract from the power and the validity of the basic rule.²²²

Somewhere between an individual case-by-case exemption from the draft and a mass one applying to tens of thousands, the Court drew the line of majorness indicating a primary arrangement.²²³

The same balancing act can be found in Germany, whose constitution, the Basic Law of 1949, establishes a firm grounding for public administration, subject to clear, explicit limits.²²⁴ Article 80(1), the Basic Law’s main delegation clause, authorizes national and state executive branch officials to issue regulations (*Rechtsverordnungen*) having the force of law, but “[t]he content, purpose and scope of the authority conferred shall be specified in the law.”²²⁵

²²¹ *Id.* at 164.

²²² *Id.* at 184 (emphasis added); *see also id.* (“As we have observed, the distinction between primary and secondary arrangements cannot be precisely drawn, because it varies from issue to issue. The reality of life often necessitates a compromise between the basic rule and other considerations, primarily considerations of efficiency. Indeed, the legislature is familiar with the material, as well as with the extent of its capacity to deal with the material within the temporal confines within which it operates. It also understands the need to delegate the establishment of arrangements that require expertise and professionalism to the executive branch.”).

²²³ *See id.* at 204.

²²⁴ *See* Basic Law arts. 33–36, 44, 84–91, 108; *see also* DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 42–76 (3d ed. 2012) (discussing German constitutional law more generally).

²²⁵ Basic Law art. 80(1). In addition, the legal basis of any such authorization must appear in the regulation, and “[i]f the law provides that such authority may be further delegated, such subdelegation shall be effected by statutory instrument.” *Id.* As one commentary on the Basic Law notes, article 80 represents a “conscious response” to the Weimar practice of conferring virtually unlimited discretion on executive officials to carry out the will of the lawmaker. Currie, *supra* note 48, at 2141–42. According to this discussion, the Weimar Constitution contained no provision expressly regulating the delegation of legal authority to the executive, permitting the President to

The German Federal Constitutional Court, one of the strongest in the world by reputation, has enforced the legality principle zealously, if not rigidly.²²⁶ The seminal case was the *Price Control* decision.²²⁷ Section 2 of the Price Control Act authorized the Federal Minister for Economic Affairs to set prices by issuing individual administrative orders (*Verfügungen*) as well as regulations.²²⁸ The Court upheld the delegated authority but warned that, as a rule, the content, purpose, and extent of the delegated authority authorizing such rules had to be provided by statute: “If the authority of the executive is not sufficiently restricted, then the executive is no longer executing the law . . . but making decisions in the legislature’s place.”²²⁹

A few decades later, in a case about nuclear regulation, the German court clarified that it was the legislature’s duty to “make all crucial decisions in fundamental normative areas,” especially where basic rights were affected.²³⁰ This early statement of the “essential matters” doctrine (*Wesentlichkeitstheorie*) clarified that these would include “restraints upon fundamental rights contained in the Constitution,”²³¹ or “fundamental normative areas”²³² that are of “great significance for state and society,”²³³ and some extend the theory to “more general state actions that nevertheless can be characterized as particularly meaningful for the community.”²³⁴ In like fashion, in a case concerning the regulation of physicians’ guilds, the court emphasized that it was the responsibility of Parliament “above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests.”²³⁵

rule without parliamentary interference much of the time. *See id.* Framers of the Basic Law of 1949 concluded that the lack of a check on the executive is what allowed Hitler to legally dissolve the Reichstag. *See id.* at 2131–32. Article 80 was the framers’ reaction to this experience. *See id.*

²²⁶ Oren Tamir emphasizes that the Court has “substantially relaxed” an initially rigid approach to statutory delegations of power by the Parliament, suggesting that German courts will insist on further parliamentary specification of delegations to the executive only in “essential matters.” *See Tamir, supra* note 6, at 596–97.

²²⁷ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 12, 1958, 8 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 274, ¶¶ 325–26; *see Currie, supra* note 48, at 2137.

²²⁸ *See* 8 BVerfGE 274, ¶ 325–26.

²²⁹ *See id.*; Currie, *supra* note 48, at 2138 (quoting 8 BVerfGE 274, ¶ 325).

²³⁰ *See* BVerfG Aug. 8, 1978, 49 BVerfGE 89, ¶ 124–27.

²³¹ *Id.*

²³² *Id.*

²³³ BVerfG, 1 BvR 2649/21, Apr. 27, 2022, ¶ 125, https://www.bverfg.de/e/rs20220427_1bvr264921en [<https://perma.cc/6TGL-4JSL>] (citing BVerfG Apr. 21, 2015, 139 BVerfGE 19, ¶¶ 45–52; BVerfG Sep. 19, 2018, 150 BVerfGE 1, ¶¶ 97–194).

²³⁴ *See* Russell A. Miller, Executive Extremes: German Lessons for Our Authoritarian Era 31 (Aug. 7, 2020) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668748 [<https://perma.cc/53R5-AZB3>]).

²³⁵ *See* Currie, *supra* note 48, at 2138 (quoting BVerfG May 9, 1972, 33 BVerfGE 125, 158).

Thus, across several jurisdictions where courts perform administrative review, a two-tier framework has emerged where the judiciary has required explicit statutory authorization for *some* administrative acts that are especially fundamental or potentially infringe on rights. Notably, unlike their global counterparts, American judges have not produced a unified theory of majorness.²³⁶ Absent that, the MQD can be—and seemingly has been—applied in an unbounded manner against policies the Court dislikes.²³⁷ An analytic engagement with the legality principle and a comparative tour of other jurisdictions suggest that the MQD is best understood as a *substantive canon aimed at defending legislative primacy*.²³⁸ Similar to the NDD, the question of whether something is “major” or not turns *not* on legislative intent as Justices have recently claimed,²³⁹ but on the objective *content* and *mode* of the delegation.²⁴⁰ This purpose imposes logical limits on the MQD’s application. The following Sections develop an approach to the doctrine based on this insight.

III. FROM LEGALITY BACK TO THE MAJOR QUESTIONS DOCTRINE

The MQD is best understood as a substantive canon that seeks to submit administration to the rule of law.²⁴¹ Legality requires every government action to be traced to legislative authorization, but it is not a doctrine that can be rigidly applied.²⁴² Rather, it should be treated as a principle that must always be balanced against other goals, primarily efficiency.²⁴³ This is where majorness tests should come in, as a way to balance the potential risks and benefits of agency actions against the clarity of the legislative authorization.

Yet the current application of the MQD is nothing like that. As used by the Roberts Court, the doctrine has become a command to judges to ignore the rules of ordinary statutory interpretation and strike down agency actions simply because the resulting programs are large.²⁴⁴

²³⁶ See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (providing a vague explanation of where the MQD, and thus the majorness test, comes from).

²³⁷ See *id.* at 419–22; see also *supra* note 47 for a discussion of Democratic administration defeats under the MQD, which the Court has not applied against a Republican administration.

²³⁸ Discussing this point, compare, for example, Walters, *supra* note 6, at 490 (defending the assertion), with Krishnakumar, *supra* note 99, at 1150–54 (arguing against the assertion).

²³⁹ See *Biden v. Nebraska*, 600 U.S. 477, 510–11 (2023) (Barrett, J., concurring) (disputing that the MQD is a “clear statement” rule).

²⁴⁰ See, e.g., *supra* notes 40–47 and accompanying text.

²⁴¹ See *supra* Part II.

²⁴² See *supra* notes 207–11 and accompanying text.

²⁴³ See *supra* notes 167–70 and accompanying text.

²⁴⁴ See *Deacon & Litman*, *supra* note 6, at 1088; Krishnakumar, *supra* note 99, at 1159–62; see also *infra* Section IV.A (applying this Article’s test to the student loan case).

In other words, the Court employs the rhetoric of legality while simultaneously overlooking—or ignoring—its most fundamental aspect: Legality is a question of degree, not a binary. It is a first principle that must be balanced against other considerations and ideals, primarily efficiency and effective government.²⁴⁵

A. *The MQD Revised – Between Majorness and Ambiguity*

If the MQD really is a safeguard of the rule of law and not a rhetorical tool for dismantling policies judges oppose, then it should not operate as a binary test determined solely by the majorness of a question. Instead, this Article presents a reframed MQD as a structured, transparent, and context-sensitive approach instead of a blunt antiregulatory instrument. This approach is illustrated by the following chart:

TABLE 1: MAJORNESSTEST

		Scope of Authority ("Majorness")			
		Total Delegation	Major		Minor
			Majorness of Risk	Majorness of Scale	
Mode of Delegation ("Ambi- guity")	Clear	(1a) Clear abdication of legislative power The Goodness & Niceness Comm'n.	(2ai) Potential risk and clear TikTok ban (<i>TikTok v. Garland</i>)	(2aii) Broad and clear EPA air quality standards (<i>Whitman Trucking</i>)	(3a) Narrow and clear Paper clips
	Ambig- uous	(1b) Ambiguous abdication of legislative power The Weimar Republic	(2bi) Potential risk and ambiguous Abortion pill ban (hypothetical Comstock Act enforcement)	(2bii) Broad and ambiguous Student loan debt relief (<i>Biden</i>)	(3b) Narrow and ambig- uous Paper clips
		Lawful ■	Unlawful ■	Requires contextual analysis ■	

This new model replaces the MQD's binary logic—classifying actions as either major or not major—with a matrix that cross tabulates two dimensions: (1) the *scale* of the action, or how "major" the question is in terms of breadth and stakes, and (2) the *mode* of delegation, or how clear or ambiguous the statutory authorization is. Within *scale*, it identifies three main zones: total delegations, which are unlawful per se;

²⁴⁵ See *supra* Section II.D for a discussion of how other countries with more explicitly developed principles of legality apply this balance.

minor actions, which are lawful per se; and a broad middle category of major actions, whose lawfulness depends on both the clarity of statutory authority and whether the action infringes on individual rights or the political process.

Before expanding on majorness, the focus of this Article, the vertical axis of the table (the mode of delegation or “ambiguity”) needs clarification. This concept refers to the specificity with which Congress grants authority to an administrative body. Although easily understandable, this factor is not self-evident to apply.²⁴⁶ Illustrating the difficulty, the Court has disagreed over whether open-ended language is “broad,” an unambiguous delegation, or “vague,” an ambiguous one.²⁴⁷

In assessing the “gap” between a statute’s text and an agency action, judges should consider factors like the statute’s *age*, the clarity of its *language*, and its *germaneness* to the proposed action.²⁴⁸ Similarly, judges have taken an action’s newness and the extent to which it is a departure from prior practice as indicators of a lack of authority.²⁴⁹ Scholars have highlighted the temporal problem that arises when agencies and courts advance a radical new interpretation of an old statute,²⁵⁰ and, as a judicial matter, judges should require stricter scrutiny for an

²⁴⁶ The Supreme Court’s warring “textualisms,” its internal divide over how and whether to apply the “history and tradition” modality, and its frequent clashes over whether considerations of efficacy and deference are appropriate for judicial cognizance, speak to a Court in a methodological crisis. For sources criticizing the Court’s methodological frameworks and pointing out internal divisions, see, e.g., Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 279–90 (2020); Eskridge, Jr. & Nourse, *supra* note 99, at 1768–77; Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 216 (2022).

²⁴⁷ Compare *West Virginia v. EPA*, 597 U.S. 697, 721–23 (2022) (finding open-ended statutory language a vague, ambiguous delegation), with *Biden v. Nebraska*, 600 U.S. 477, 533–34 (2023) (Kagan, J., dissenting) (finding open-ended statutory language a broad, unambiguous delegation). Endorsing this distinction, see also Wurman, *supra* note 6, at 942–47.

²⁴⁸ In his *West Virginia* concurrence, Justice Gorsuch suggested a similar list of criteria for defining “ambiguity” in this context, and this Article finds his framework helpful. *West Virginia*, 597 U.S. at 746–48 (Gorsuch, J., concurring) (suggesting as relevant factors for defining ambiguity, the relied-on text’s overall place in a statutory scheme; the age and focus of the statute in relation to the problem the agency seeks to address; the agency’s past interpretations of the statute; and any possible mismatch between the agency’s challenged action and its expertise). On the age of legal texts and their interpretation, see generally Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547 (2018); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020).

²⁴⁹ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–56 (2000); *Biden*, 600 U.S. at 501–02.

²⁵⁰ Two thoughtful takes on the problem of time lags and statutory interpretation are Adler & Walker, *supra* note 248, at 1937 (suggesting that Congress should revive the practice of regular reauthorization of statutes that govern federal regulatory action); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 4 (2014) (arguing that agencies “may in fact be the most appropriate ‘statutory updaters’ in our separation of powers system, because they are more nimble than Congress, more accountable than courts, and more expert than both in responding to changing conditions”).

agency program when its authorizing statute is very old. One example, discussed at length in Part IV, is the revival of birth control bans under the Comstock Act of 1873.²⁵¹

This Article's aim is not to define an exhaustive list or provide a new theory of textual ambiguity, which has been done before.²⁵² It merely suggests that a defined framework can help add transparency to the effort.

For simplicity's sake, this chart breaks ambiguity into two results, but of course, statutory interpretation admits of a host of gradations on a spectrum of ambiguity. For the purpose of this MQD analysis, when a court cannot agree whether the text is ambiguous or not, the appropriate move is to treat the delegation as though it were, in fact, ambiguous, which raises the corresponding level of scrutiny.²⁵³

1. *Scope of Authority (“Majoriness”)*

To understand what majoriness is, it is helpful to understand what it is not. First, it is not about total delegations. Total delegations are a blank check, a complete abdication of legislative authority to the executive, either in a specific field or all together. By erasing the separation between the legislator and the executive, such delegations threaten to dismantle legality entirely, both as a manifestation of law-bound governance and of the separation of powers.²⁵⁴ Regardless of whether their authorization is ambiguous or clear, total delegations are always prohibited.²⁵⁵ A worst-case example is the fate of Germany's Weimar Republic (1919–1932), where a gridlocked Parliament, perpetually unable to act, legislated away its powers to Chancellor Adolf Hitler, eventually permanently.²⁵⁶ In an American context, a hypothetical is supplied by Gary Lawson, who gives the example of Congress

²⁵¹ See *infra* Part IV.B.

²⁵² See, e.g., Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. 1, 19–30 (2024); Brian G. Slocum, *Replacing the Flawed Chevron Standard*, 60 WM. & MARY L. REV. 195, 218–29 (2018).

²⁵³ Calling for more empirical work in statutory interpretation, especially in defining “ordinary meaning,” see Tobia et al., *supra* note 246, at 213–14. Leading casebooks on statutory interpretation include WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* (2012); LINDA D. JELLUM, *THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES* (2d ed. 2021); CALEB NELSON, *STATUTORY INTERPRETATION* (2d ed. 2024).

²⁵⁴ See Sunstein, *supra* note 6, at 318–21.

²⁵⁵ See *supra* Table 1 at (1a), (1b). The Weimar Enabling Act of 1933 authorized the executive to draw up the budget, sign treaties, and issue laws without any input from Parliament whatsoever. See *Gesetz zur Behebung der Not von Volk und Reich [Ermächtigungsgesetz]* [Law to Remedy the Distress of the People and the Reich], Mar. 24, 1933, REICHSGESETZBLATT [RGBL] at 141, §§ 1, 4 (Ger.). This is a vague delegation.

²⁵⁶ See IVAN ERMAKOFF, *RULING ONESELF OUT: A THEORY OF COLLECTIVE ABDICATIONS* 17–20 (2008).

creating the “Goodness and Niceness Commission” and giving it power “to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.”²⁵⁷

The ban on total delegations (the left hand column of Table 1) corresponds descriptively to the NDD.²⁵⁸ Although the latter doctrine acts on statutes, not regulations, it is underscored by a similar logic to the MQD: Both doctrines make legality turn on a substantive judgment about a delegation’s content and scale.²⁵⁹ By the same token, a reformed MQD test can help keep the NDD in its proper place by showing that the ban does *not* apply to all broad delegations, just total ones.²⁶⁰

The MQD is also not about minor actions. These actions should always be permitted regardless of the mode of delegation, clear or ambiguous.²⁶¹ Minor actions typically involve routine, technical, or narrowly focused regulatory decisions that fall within an agency’s established area of expertise, where the economic or social impact is limited. The paradigmatic example here would be the monthly paper clips order.²⁶² Prosecutorial discretion in setting enforcement priorities under a given statute is another example.²⁶³ The manner and timing by which individuals appearing in immigration court are required to pay fees to the government would be another.²⁶⁴ Minor delegations are generally unproblematic and do not require clear authorization,²⁶⁵ but of course, telling apart major and minor delegations is not always easy.

“Major” actions—that is, neither minor nor total delegations—require greater nuance. Major actions can be of two types: those that entail risk to rights or the political process and those that do not but are still of extraordinarily broad scale and influence. Both types are applications of the legality principle, but each requires a different

²⁵⁷ Lawson, *supra* note 113, at 1239.

²⁵⁸ Thus far, a kinship between the NDD and the MQD on separation of powers grounds has been hinted at by one wing of the Supreme Court, but this rationale has not commanded a majority. See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (arguing that the two are both “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”).

²⁵⁹ See *supra* Section II.C; Manning, *supra* note 138, at 237–46.

²⁶⁰ See, e.g., Manning, *supra* note 138, at 237–46 (reviewing the doctrine’s limited application, especially in light of the intelligible principle test).

²⁶¹ See *supra* Table 1 at (3a), (3b).

²⁶² See *supra* notes 19–20 and accompanying text.

²⁶³ See, e.g., *United States v. Texas*, 599 U.S. 670, 674 (2023) (holding that states have no standing to challenge prosecutorial discretion exercised by the executive branch in immigration enforcement).

²⁶⁴ EXEC. OFF. FOR IMMIGR. REV., U.S. DEP’T OF JUST., IMMIGRATION COURT PRACTICE MANUAL § 3.4 (2024), <https://www.justice.gov/eoir/reference-materials/ic/chapter-3/4> [https://perma.cc/VYZ5-T9UT]. The Authors would like to thank Katie Meyer for this example.

²⁶⁵ See Dotan, *supra* note 158, at 382–85.

treatment under the MQD. Major questions that *infringe on rights or the political process* will always require explicit and clear authorization.²⁶⁶ Those that do not but are still major due to their scale alone are permissible when the delegation is clear²⁶⁷ and *may* also be permissible even when the authorizing legislation is ambiguous²⁶⁸ depending on context and institutional factors.

Legality rests on two distinct but complementary and interconnected theoretical bases: the liberal and the democratic.²⁶⁹ Certain commonalities in how majorness is defined across national jurisdictions demonstrate that although there is no single, clear line separating legislation from execution and no uniform definition of majorness, different articulations of the concept consistently correspond to one or both foundational principles of legality.²⁷⁰ The first, rooted in classical liberal thought, sees legality as a safeguard against arbitrary power.²⁷¹ Resting on this foundation is the concept of majorness of risk, requiring that any infringement on individual rights or democratic institutions be grounded in clear legislative authorization.²⁷² This framework emphasizes the burdens of lawmaking as essential protection for liberty, ensuring that the exercise of state power is constrained by formal processes.²⁷³ The second foundation of majorness draws on democratic self-rule, viewing the legislature as the most legitimate site of collective decision-making.²⁷⁴ On this account, majorness of scale aims to ensure that significant policy decisions—especially those with wide social and economic impact—are made through public deliberation by elected representatives, thus promoting democratic accountability and mitigating the risks of bureaucratic capture or executive overreach.²⁷⁵

In U.S. case law, the MQD has thus far focused exclusively on majorness of scale—intervening only in “extraordinary cases” involving questions of “vast economic and political significance”²⁷⁶—while neglecting majorness of risk. In the Sections that follow, this Article elaborates on both dimensions through a comparative lens and proposes how a more integrated approach, attentive to the mode of delegation, could inform the MQD’s application in the American context.

²⁶⁶ See *supra* Table 1 at (2a_{ii}), (2b_{ii}).

²⁶⁷ See *supra* Table 1 at (2a_i).

²⁶⁸ See *supra* Table 1 at (2b_i).

²⁶⁹ See *supra* notes 129–56 and accompanying text.

²⁷⁰ See *supra* Section II.D.

²⁷¹ See *supra* notes 129–38 and accompanying text.

²⁷² See *supra* Table 1 at (2a_{ii}).

²⁷³ See *supra* notes 129–38 and accompanying text.

²⁷⁴ See *supra* notes 139–56 and accompanying text.

²⁷⁵ See *id.*

²⁷⁶ See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 716, 721 (2022).

a. Majorness of Risk

The most critical point of difference between the American MQD and foreign formulations is that other jurisdictions make rights involvement an automatic indicator of majorness.²⁷⁷ Justice Barak made the point explicitly, explaining that because human rights “form the central tenet of democracy,” these may only be infringed according to clear legislative authorization:

[T]he violation of human rights, even when it promotes the values of the state, is for a worthy purpose and does not exceed that which is necessary, must be prescribed by a law specifying the primary arrangements. Indeed, one cannot be satisfied with the formal delegation of legislative authority to the executive branch.²⁷⁸

Time and again, foreign courts have connected “majorness” to rights infringements.²⁷⁹ For example, in 2010, the Israeli court prohibited the government from using police roadblocks set up for operational purposes as sites for tax collection, stressing that when administrative actions have the potential to harm individual rights, “the authorization for [such] action must be clear, detailed and explicit in primary legislation.”²⁸⁰ In India, the Supreme Court determined that asking citizens to share their biometric data for an identification was a violation of privacy, necessitating an authorizing statute.²⁸¹ In Germany, the Federal Constitutional Court held, in a major 1978 opinion on the licensing and operation of nuclear reactors, that “the legislature is obligated . . . to make all crucial decisions in fundamental normative areas, especially in those cases where basic rights become subject to governmental regulation.”²⁸²

²⁷⁷ See DOTAN, *supra* note 142, at 406 (Israeli perspective); see also *supra* note 213 and accompanying text (German perspective).

²⁷⁸ HCJ 3267/97 Rubinstein v. Minister of Def., 14 IsrLR 139, 179–80 (1998).

²⁷⁹ On Israel, see generally HCJ 1437/02 Ass’n for C.R. in Isr. v. Minister of Pub. Sec., 58(2) IsrSC 746 (2004) (holding that prison wardens blocking prisoners’ confidential lawyer conversations violates their right to counsel, and such administrative authority must be explicitly granted by legislation as it infringes on fundamental rights); HCJ 7625/06 Rogachova v. The Ministry of Interior, [2016] IsrLR 39 (holding the Minister of Interior’s refusal to acknowledge the petitioner’s unorthodox conversion to Judaism must be explicitly authorized by legislation, as this decision impaired the petitioner’s fundamental, constitutional right to return to Israel); HCJ 7803/06 Abu Arfa v. Minister of Interior, Nevo Legal Database (Sep. 13, 2017) (Isr.) (holding the Minister’s decision to revoke the petitioners’ residency in Israel because they were elected to the Palestinian Parliament as representatives of a party affiliated with Hamas, is a primary arrangement as it infringed on their fundamental right to settle in Israel as native residents of East Jerusalem and must therefore be authorized in a statute).

²⁸⁰ HCJ 6824/07 Manaa v. Isr. Tax Auth., 17(2) IsrSC 479, 479–80 (2012).

²⁸¹ See *Puttaswamy v. Union Of India*, [2018] 8 SCR 1, 192–93 (India).

²⁸² BVerfG Aug. 8, 1978, 49 BVerfGE 89, ¶ 126–27 (Ger); see also Basic Law art. 80 (the German constitutional provision authorizing delegations).

In both Israel and Germany, any action with the potential to infringe on individual rights is considered major.²⁸³ This does not make such actions illegal per se, but they require clear and specific authorization.²⁸⁴ Moreover, when an actual infringement of rights is involved, courts apply their version of the MQD more strictly in proportion: The more severe the infringement, the greater the degree of explicitness required in the statute,²⁸⁵ and vice versa.²⁸⁶

In contrast, the U.S. Supreme Court has not considered rights infringement as a factor in evaluating the constitutionality of agency action, relying instead on “economic and political significance”²⁸⁷ seemingly to the exclusion of all other factors.²⁸⁸ This Article’s model supports treating rights infringement as an indicator of majorness per se, although this does carry its own risks. There remains the basic question of which rights trigger majorness review. Rooted in rule of law commitments and liberal-democratic political theory, this Article proposes a relatively disciplined conception of rights—focusing primarily on classical liberal rights such as autonomy and speech, and core democratic rights like voting. This minimalist approach is not only principled but also strategic: Rights can be—and have been—weaponized. As the critical legal studies movement teaches, rights discourse can entrench existing hierarchies under the guise of neutrality and universality.²⁸⁹ The American experience with economic rights—especially freedom of contract, as seen in *Lochner v. New York*²⁹⁰—demonstrates how courts have used rights based reasoning to obstruct redistributive and regulatory efforts.²⁹¹ Although liberal rights, including property, can also be weaponized, their potential for misuse does not negate the need for protection—both as applied to substantive constitutional review and

²⁸³ See *supra* notes 225 (Germany), 279 (Israel).

²⁸⁴ See *supra* notes 280–82 and accompanying text.

²⁸⁵ See DOTAN, *supra* note 142, at 407. Also of note is India, which applies a proportionality standard and balancing to executive actions that infringe on rights. See Gautam Bhatia, *India’s Executive Response to COVID-19*, REGUL. REV. (May 4, 2020), <https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/> [<https://perma.cc/7ELP-R93D>]; *Puttaswamy*, 8 SCR at 192–94 (establishing biometric privacy as a right under law).

²⁸⁶ See H CJ 4491/13 Acad. Ctr. for L. & Bus. v. Gov’t of Isr., 67(1) IsrSC 177, 216 (2014) (“[I]t is possible to satisfy the requirement [with a] more relaxed form of explicit authorization when it comes to establishing an initial arrangement that [does not] involve[] a violation of fundamental rights.”).

²⁸⁷ *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

²⁸⁸ See Levin, *supra* note 6, at 930–34.

²⁸⁹ For a classic critique of rights, see generally Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002).

²⁹⁰ 198 U.S. 45 (1905).

²⁹¹ See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877–79 (1987).

in the requirement of explicit authorization to infringe upon rights, which lies at the heart of the rule of law and the prevention of arbitrary power.²⁹²

Thus, majorness of risk of potential infringement on rights should require clear and specific legislative authorization. But where the action is based on clear and specific authorization in a statute, taking legality seriously as the MQD's animating logic also requires courts to authorize the action despite this risk.²⁹³ Consider the recent ban on social media giant TikTok as an example. In winter 2024, Congress passed the Protecting Americans from Foreign Adversary Controlled Applications Act,²⁹⁴ which prohibits TikTok's operations in the United States unless it undergoes a qualified divestiture from its parent company, ByteDance.²⁹⁵ In *TikTok v. Garland*,²⁹⁶ the Supreme Court upheld the statute against a First Amendment challenge and did not discuss questions of majorness.²⁹⁷ Since then, President Trump has delayed enforcement of the ban three times.²⁹⁸ But imagine a hypothetical challenge to the Department of Justice's actions carrying out the ban.²⁹⁹ Although major in its risk to rights, the executive branch's actions in enforcing it would rest on clear and very specific authorization. After all, the statute expressly names TikTok and ByteDance, established the conditions under which the ban applies, and set forth detailed criteria for exemption.³⁰⁰ Therefore, under this Article's approach, the enforcement would be lawful despite its majorness of risk. Now, what if the ban had occurred under an *ambiguous* statute?³⁰¹ This Article suggests

²⁹² See *supra* notes 129–38 and accompanying text.

²⁹³ See *supra* Table 1 at (2ai).

²⁹⁴ Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H, 138 Stat. 955 (2024).

²⁹⁵ See *id.* § 2, 138 Stat. at 955–59.

²⁹⁶ 604 U.S. 56 (2025).

²⁹⁷ See *id.* at 80.

²⁹⁸ See Alan Z. Rozenstein, *The TikTok Ban that Wasn't*, BROOKINGS (June 20, 2025), <https://www.brookings.edu/articles/the-tiktok-ban-that-wasnt/> [<https://perma.cc/2YXZ-FBV8>]. This action itself raises the question of whether the President may decline to enforce a statute by invoking his national security powers. Compare *id.* (casting the enforcement delays as an executive subversion of the law), with Charlotte Scott, *Legality of Trump Postponing Enforcement of TikTok Ban*, SPECTRUM NEWS (Apr. 18, 2025, at 14:53 ET), <https://spectrumnews1.com/wi/milwaukee/news/2025/04/18/trump-tiktok-china-tariffs-> [<https://perma.cc/3QMP-JW8F>] (explaining the potential inherent foreign affairs and national security authority the executive may have to delay enforcement).

²⁹⁹ The Act directs the Attorney General to investigate violations of the bill and enforce the bill's provisions. § 2(d)(2), 138 Stat. at 957. Entities that violate the Act are subject to civil penalties based on the number of users. *Id.* § 2(d)(1), 138 Stat. at 957.

³⁰⁰ However, the fact that the statute “names names,” so to speak, might raise the problem of generality. See DYZENHAUS, *supra* note 176, at 318; Bloch, *supra* note 177, at 115. But in any case, the agency action here is clearly authorized.

³⁰¹ See *supra* Table 1 at (2bi).

a sliding scale approach: The greater an action's potential for infringing on rights and the more fundamental the rights are, the clearer the delegation must be for the action to be lawful. Therefore, as will be discussed in Section IV.B, actions that violate fundamental rights and which rest on ambiguous legislation should not be upheld.³⁰²

Consistent with John Hart Ely's stated concerns, another dimension of majorness of risk is based on the Court's role of "keep[ing] the machinery of democratic government running as it should,"³⁰³ requiring scrutiny of executive action that threatens the democratic order in some general way. The past several decades of global politics have been marked by a trend of democratic backsliding in which regimes governed by what Kim Lane Scheppele calls "legalistic autocrat[s]" employ technically legal mechanisms to erode institutional checks and balances to strengthen the executive.³⁰⁴ These actors strategically weaken the judiciary, the media, and other democratic guardrails, all while maintaining the outward appearance of legality and democratic process to preserve legitimacy.³⁰⁵

In response, courts around the world have begun developing new constitutional doctrines aimed at safeguarding democratic "core principles" or the "basic structure" of constitutional governance.³⁰⁶ Majorness can likewise be a check on executive power by requiring that, when infringing rights or when regulating important matters, the executive operates according to clear authorization. Majorness is thus an especially important test in conditions of democratic backsliding and executive overreach. As Justice Rubinstein noted in a recent case,

In practice the principle of separation of powers is not implemented hermetically, and not for practical reasons However, the core of the principles . . . is strong and exists, otherwise the government, which is in practice the strongest of the authorities in everyday terms, would be allowed to do as it pleases, and democracy would have nothing to do with it.³⁰⁷

Majorness tests could act more explicitly in defense of the political process. In cases where an agency or the President acts in a way that risks democratic institutions or the political process, they would require clear and specific authorization in a statute. An example would be an

³⁰² See *infra* Section IV.B.

³⁰³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980).

³⁰⁴ See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 581–82 (2018).

³⁰⁵ See *id.* at 549–50.

³⁰⁶ See, e.g., Manuel José Cepeda Espinosa & David Landau, *A Broad Read of Ely: Political Process Theory for Fragile Democracies*, 19 INT'L J. CONST. L. 548, 556 (2021); Stephen Gardbaum, *Comparative Political Process Theory II*, 14 GLOB. CONSTITUTIONALISM 219, 234, 236 n.88 (2025).

³⁰⁷ HCJ 4374/15 *Movement for Quality Gov't v. Prime Minister*, Nevo Legal Database, ¶ 127 (Mar. 27, 2016) (Isr.).

executive order defunding another branch of government, such as the executive branch refusing to spend apportioned funds to pay judges' salaries. Such an act would risk the dismantling of the judiciary and would thus require absolutely clear and specific authorization. Similar application of majorness have been found in systems with problems of executive overreach, such as South Africa and India.³⁰⁸ For instance, in India the Court held that it would violate constitutional principles for the executive to invoke emergency government to extend power over state governments, or to issue and reissue executive orders indefinitely in order to bypass the legislative process.³⁰⁹ Analogous provisions of U.S. constitutional law prevent the executive from making permanent institutional changes during a state of emergency; majorness can capture and protect this dimension of the political process as well.³¹⁰

Majorness of risk, especially in the latter of sense of democratic institutions, is a risky test itself. Any judicial doctrine that turns on the defense of constitutional structure or values leave enormous discretion for judges.³¹¹ For instance, Justice Gorsuch suggests that majorness review should apply to actions affecting the constitutional structure of federalism: While colorable as a constitutional ideal, the proviso is largely undefended and unexplained.³¹²

³⁰⁸ See *supra* note 216 (discussing South Africa); *infra* note 309 (discussing India); see also *Puttaswamy v. Union Of India*, [2018] 8 SCR 1, 192–94 (India) (striking down a law that severely infringed on the right to privacy as it was passed without clear constitutional authorization).

³⁰⁹ See *S.R. Bommai v. Union of India*, [1994] 2 SCR 644, 948–50 (India); *P.C. Wadhwa v. Union of India*, [1964] 4 SCR 598, 600, 629 (India). For additional executive power cases involving questions of legality, see, e.g., *Rustom Cavasjee Cooper v. Union of India*, [1970] 3 SCR 530, 532–34 (India) (holding that a presidential ordinance nationalizing banks could be challenged and declaring the act authorizing the President's use of authority invalid); *A.K. Roy v. Union of India* [1982] 2 SCR 272, 300–01 (India) (examining the circumstances under which ordinances can be promulgated by the President and Governor and highlighting the need for a valid justification when issuing an ordinance, particularly one that affects fundamental rights such as freedom of movement).

³¹⁰ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952). For more on regulation of emergency legal powers, see generally William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257 (2006).

³¹¹ See Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L. J. CONST. L. 339, 357 (2013); Chintan Chandrachud, *Constitutional Interpretation*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 73, 92–93 (Sujit Choudhry et al. eds., 2016).

³¹² From the perspective of protecting constitutional values and structures, it seems odd that Gorsuch gives no attention to an executive branch action that “intrud[es] into an area” belonging to Congress, suggesting that he places greater weight on states' rights than protecting the powers of the legislature. *West Virginia v. EPA*, 597 U.S. 697, 744 (2022) (Gorsuch, J., concurring) (arguing that majorness should lie where a regulatory action “intrude[s] into an area that is the particular domain of state law,” while conceding that his “list of triggers may not be exclusive”).

b. Majorness of Scale: Who Should Act?

Legality, as this Article has shown, is grounded in two distinct yet complementary traditions, the liberal and the democratic.³¹³ Majorness of risk is based on the former tradition, as a check against arbitrary power. Majorness of scale is based on the democratic principle of self-rule, requiring that fundamental questions of public life be decided by the legislature. As then-Judge Stephen Breyer explained in a much-cited 1986 article, “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.”³¹⁴ Different national jurisdictions have employed various criteria as they attempt to distinguish between “major,” “primary,” or “essential” arrangements that should be set by the legislature, versus “interstitial” minor decisions.³¹⁵

In several jurisdictions, majorness of scale is defined to mean actions that trench upon certain areas of policy. In Germany, these are called “fundamental normative areas.”³¹⁶ In France, these areas are defined in the constitution itself to include territorial organization, national defense, election law, the definition of felonies, environmental protection, taxation, labor and employment law, revenue and spending, regulation of the economy, and the rights of citizenship and reproductive autonomy.³¹⁷ For example, the French Constitutional Council held parliamentary oversight was necessary to authorize agency action in a sensitive policy area like bioethics.³¹⁸ In Germany, regulation of freedom of assembly, military deployments, and the budget, among others, have been held to require authorization in statute.³¹⁹

Another consideration under majorness is the size and scale of the action. Under the formulation of “deep ‘economic and political significance,’”³²⁰ this has been the most consistently applied criterion in the United States.³²¹ In Israel’s *Yeshiva* case, involving an exemption from military conscription for the Orthodox, the court defined the

³¹³ See *supra* notes 129–56 and accompanying text.

³¹⁴ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

³¹⁵ See *supra* Section II.D.

³¹⁶ See BVerfG Aug. 8, 1978, 49 BVerfGE 89, ¶ 126–27 (Ger.).

³¹⁷ See 1958 CONST. 34 (Fr.).

³¹⁸ See CC decision No. 2004-498DC, July 29, 2004, J.O. 14,077 (Fr.).

³¹⁹ See generally BVerfG May 14, 1985, 69 BVerfGE 315 (Ger.) (assembly); BVerfG July 12, 1994, 90 BVerfGE 286 (Ger.) (military deployments); BVerfG May 25, 1977, 45 BVerfGE 1 (Ger.) (budget).

³²⁰ See *King v. Burwell*, 576 U.S. 473, 486 (2015).

³²¹ See Levin, *supra* note 6, at 933–34. As Levin discusses, although the Court has also gestured at the idea that an agency acting “outside its ‘particular domain’” or invoking a “long-extant” statute in a new way would also trigger majorness, it failed to consider these factors in *Biden*

scope of primary arrangements as the “nature of the arrangement, its social implications, and the degree of violation of individual freedom,”³²² referring both to its immense political significance and its effect upon 30,000 individuals.³²³

Controversy has been held to be an indicator of majorness,³²⁴ but this criterion proves highly problematic. If reliance solely on economic cost is inadequate as a test for majorness, controversy-as-majorness presents an even more flawed standard because it is inherently manipulable. Although controversy has theoretical appeal as a criterion of majorness because it connects to principles of democracy and self-rule, as Justice Kagan has noted, controversy may actually be a reason for courts to defer to agency interpretations, at least until the legislature has had occasion to speak again.³²⁵

Under our approach, large-scale policies with vast economic and political significance are permissible, but they need to be authorized by Congress.³²⁶ A paradigmatic example of a major but unambiguous delegation which does not infringe on individual rights is the EPA’s revision of national ambient air quality standards for ozone and particulate matter under the Clean Air Act.³²⁷ Section 109 of the Clean Air Act gives the EPA authority to set national air quality standards at the level that, in the administrator’s judgment, is “requisite to protect the public health.”³²⁸ In *Whitman v. American Trucking Ass’ns*,³²⁹ the Court decided the EPA’s revised air quality standards were lawful, emphasizing that the Clean Air Act’s language was “absolute,” leaving no reason to doubt Congress’s intent to delegate.³³⁰ Importantly, *Whitman* was not

v. Nebraska, a fact the dissent pointed out. *See id.* (quoting *Biden v. Nebraska*, 600 U.S. 477, 546 (2023) (Kagan, J., dissenting)).

³²² *See* HCJ 3267/97 Rubinstein v. Minister of Def., 14 IsrLR 139, 184 (1998).

³²³ *See id.* at 151–52. Scope is different from the idea of political controversy, which is rarely used as a test of majorness in other jurisdictions. Controversy was hazarded as a criterion for invalidating President Biden’s student loan debt relief program, but this Article agrees with Justice Kagan that political disagreement is a manipulable notion and, if anything, “provides yet more reason for the Court to adhere to its properly limited role.” *Biden*, 600 U.S. at 548 (Kagan, J., dissenting).

³²⁴ *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (stating that administrative action regarding an issue that is “important, conspicuous, and controversial” must still be addressed by legislation, implying importance does not count against majorness (quoting *id.* at 190 (Breyer, J., dissenting))); *Biden*, 600 U.S. at 503 (implying majorness from the “sharp debates generated by the Secretary’s extraordinary program” compared to the unanimous passage of the HEROES Act).

³²⁵ *See Biden*, 600 U.S. at 547–48 (Kagan, J., dissenting).

³²⁶ *See supra* Table 1 at (2bii).

³²⁷ 42 U.S.C. §§ 7401–7671q.

³²⁸ *Id.* § 7409(b).

³²⁹ 531 U.S. 457 (2001).

³³⁰ *See id.* at 465 (quoting DAVID P. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS 4–15 (1981)).

about fundamental rights—the challengers did not allege that the EPA standards infringed on their rights, and the Court did not even discuss this point as an alleged infirmity of the regulation.³³¹

How should judges treat a case where the challenged action is major, does not infringe on rights, and yet is ambiguously delegated?³³² This is the most difficult category to parse. In these cases, because statutory text is unclear but the risk to individual liberties is not prominent, the tension between legality (rule by statutes) and effectiveness (the ability for government to act) comes into play most acutely. In other jurisdictions, majorness or legality tests function as an invitation to the legislator to clarify its instructions.³³³ In the United States, where the legislative process is more cumbersome, such majorness tests risk operating in a countermajoritarian way.³³⁴ As a result, judges should grant weight to efficiency by taking into account which branch is best suited to act in context. Courts ought to weigh factors like the need for expertise, the existence of an emergency, and whether political gridlock makes legislation unlikely in the event a program is struck down.

As mentioned, outside the United States, perhaps the most surprising feature of majorness tests is the relative *lack* of controversy surrounding their place in their respective nation's legal tradition.³³⁵ Germany's version of the doctrine is widely accepted as a theoretical emanation of the principle of the rule of law and a defense against unlawful concentration of powers in the executive branch, in light of Germany's tragic past.³³⁶ France's majorness test is rooted in article 34 of its constitution.³³⁷ The British version is rooted in centuries of common law protections, notably of privacy.³³⁸ As for Israel's primary arrangements doctrine, it holds almost a canonical status in that nation's public law, even among its critics.³³⁹

³³¹ See *id.* at 462.

³³² See *supra* Table 1 at (2aii).

³³³ See *supra* Section II.D.

³³⁴ For a critique of the ways in which the current application of the MQD undermines democratic accountability, see generally Freeman & Stephenson, *supra* note 6, at 20–46.

³³⁵ This does not mean, however, that these doctrines are free of controversy in their application. The substantive majorness inquiry is full of subjectivity. On the other hand, American courts do not approach this problem *de novo* because statutory interpretation itself is a cottage industry in American law.

³³⁶ See KOMMERS & MILLER, *supra* note 224, at 175; Currie, *supra* note 48, at 2115.

³³⁷ See 1958 CONST. 34 (Fr.).

³³⁸ See *supra* note 111 and accompanying text; *Entick v. Carrington* (1765) 19 How. St. Tr. 1029, 1036 (KB).

³³⁹ Scholars Yoav Dotan and Gison Sapir are two scholars very critical of the Supreme Court of Israel and its overreach, and yet both not only accept but also support the development of the primary arrangements doctrine as a rule of statutory interpretation. See Dotan, *supra* note 158, at 446–47; Gison Sapir, *Primary Arrangements*, 46 *Iyunei Mishpat* 5, 32–35 (2010) (Isr.). Similarly, justices who often articulate the problematic nature of the balancing doctrine seem to accept the

It may be that these reputational differences have to do with global courts' delicacy in applying the doctrine, but there is also more to it than that. Institutional context matters, and one of the American MQD's greatest vulnerabilities is the rising perception that its use is profoundly countermajoritarian, elevating the Supreme Court above the political branches as the nation's supreme policymaker.³⁴⁰

Look to Israel one more time to illustrate the point. One critical difference between Israel and the United States, despite the similarity of their majorness doctrines, is their form of government. In Israel, legislation is easily forthcoming because as a parliamentary system, the government controls the Knesset.³⁴¹ Thus, in practically all the substantial cases of actions struck down on “primary arrangements” grounds, the Knesset went back and legislated the authority in question. For instance, shortly after the Court struck down the broad exemption from the draft for ultra-Orthodox Yeshiva students,³⁴² the Knesset convened a special committee to address the issue and prepared a bill that was later enacted as a five-year temporary provision.³⁴³ On another occasion, the Knesset passed a law granting the government authority to designate “National Priority Areas” for tax exemptions and subsidies³⁴⁴ following a supreme court decision striking down such designations as requiring explicit legislative authorization.³⁴⁵ Likewise, following adverse decisions by the Court, the Knesset reauthorized

doctrine with no hesitation. *See, e.g.*, H CJ 4491/13 Acad. Ctr. of L. & Bus. v. Gov't of Isr., 67 IsrSC 177, 243–44 (2014) (Judge Gibran); H CJ 2109/20 Meir v. Prime Minister, [2018–2020] IsrLR 311, 338 (2021) (Justice Sohlberg); *see also* Tamir, *supra* note 6, at 602 (“[T]oday, there’s no real objection in Israel to the primary arrangements doctrine.”).

³⁴⁰ *See* Blake Emerson, *The Binary Executive*, 132 *YALE L.J.F.* 756, 772–73, 777 (2022).

³⁴¹ The Knesset, Israel’s unicameral and unitary Parliament, serves as the country’s legislative body. Due to the coalition’s built-in majority in the Knesset and the fact that the government is formed from coalition members, the coalition—and, by extension, the government—effectively controls the legislative process. *See* Asher Maoz, *The System of Government in Israel*, 8 *Tel Aviv U. Stud. L.* 9, 19–20 (1988) (Isr.). This dominance allows the coalition and government to secure the passage of any law they support and block any legislation they oppose. Some scholars have even referred to the Knesset as a “rubber stamp” for the government. *See id.*

³⁴² *See* H CJ 3267/97 Rubinstein v. Minister of Def., 14 IsrLR 139, 203–04 (1998).

³⁴³ *See* The Law on Deferring Service for Yeshiva Students Whose Torah Is Their Art, 5762–2002, SH 1862 521 (Isr.) https://fs.knesset.gov.il/15/law/15_lsr_300544.pdf [<https://perma.cc/8HZ5-32UQ>].

³⁴⁴ *See* Economic Efficiency Law (Legislative Amendments for the Implementation of the Economic Plan for the Years 2009 and 2010), 5769–2009, SH 2203 157, 261–64 (Isr.), https://fs.knesset.gov.il/18/law/18_lsr_301061.pdf [<https://perma.cc/DAR9-RNR9>]. On this case and the national priority areas more generally, *see* generally Ofra Bloch, *National Priority Regions (1971–2022): Redistribution, Development and Settlement*, 24 *THEORETICAL INQUIRIES L.* 267 (2023).

³⁴⁵ *See* H CJ 11163/03 Supreme Monitoring Comm. for Arab Affs. in Isr. v. Prime Minister, [2006] (1) IsrLR 105, 132.

financial aid for Yeshiva students,³⁴⁶ detention of unlawful combatants,³⁴⁷ and revocation of permanent resident status under certain conditions.³⁴⁸

One case in which the Knesset did *not* respond with authorizing legislation was an early controversy over the use of torture by the Shin Bet, Israel's security forces.³⁴⁹ The Court, applying the rights principle, held that if the Knesset wanted Shin Bet to have authority to use physical means in interrogation, it would have to grant them specific authority.³⁵⁰ The Israeli legislature did not act, which, in context, may reflect the positive value of the publicity and accountability that legislation creates and, comparatively, that administrative action skirts to some degree.³⁵¹ This example is the exception that proves the rule—and confirms the value of the rights principle, or, as titled in this Article, majorness of risk. For over thirty years, the primary arrangements doctrine has been used not as a tool to paralyze statutory production or to dismantle the Israeli administrative state, but as an invitation for the legislature to speak. In practice, such cases have stimulated interbranch dialogue, not gridlock.³⁵²

³⁴⁶ See Financial Assistance Law for Encouraging Torah Learners and Needy Students, 5777–2016, SH 2593 320 (Isr.), https://fs.knesset.gov.il/20/law/20_Isr_366878.pdf [<https://perma.cc/PM7T-6WNS>]. This law established clear conditions for providing financial assistance to Yeshiva students and other students. This legislation was a response to the court's ruling that allocating scholarships exclusively to Kollel students required substantive primary legislation, as it concerned public resource allocation and discrimination which fall under the legislative authority of the Knesset. See H CJ 616/11 Isr. Students' Union v. Gov't of Isr., 66(3) IsrSC 819, 822 (2014).

³⁴⁷ See The Imprisonment of Unlawful Combatants Law, 5762–2002, SH 1834 192 (Isr.). This law authorized the detention of enemy forces not entitled to prisoner of war status. *Id.* This legislation followed the court's ruling that holding individuals as bargaining chips without posing a security threat constituted a primary arrangement requiring explicit legislative authorization. See CrimA 7048/97 Plonim v. Minister of Def., [2000] IsrLR 84, 101 (2000).

³⁴⁸ See Entry into Israel Law, 5712–1952, SH 111 354, 355–56 (Isr.), https://fs.knesset.gov.il/2/law/2_Isr_211754.PDF [<https://perma.cc/JP7H-R729>]. This statute was amended in 2018, explicitly granting the Minister of Interior authority to revoke permanent residency permits and detailing the revocation mechanism, conditions, and exceptions. This followed the court's decision, which ruled that such authority required explicit legislative authorization, as it involved fundamental questions that must be addressed by the Knesset. See H CJ 7803/06 Abu Arfa v. Minister of Interior, Nevo Legal Database (Sep. 13, 2017) (Isr.).

³⁴⁹ See H CJ 5100/94 Pub. Comm. Against Torture in Isr. v. Prime Minister, [1998-9] IsrLR 567, 584–85.

³⁵⁰ See *id.*

³⁵¹ See *supra* Section II.A (reviewing the advantages of legislation, including publicity and accountability).

³⁵² A large comparative literature argues that such a dialogic approach to judicial review can help mitigate the countermajoritarian difficulty. These scholars focus on jurisdictions where reviewing courts may point out a constitutional incompatibility to the legislature without invalidating the statute full stop. The scholars argue that arrangement serves the values of republicanism by casting courts in advisory, dialogic roles. See *generally* ROSALIND DIXON, *RESPONSIVE JUDICIAL REVIEW* (2023) (exploring the courts' role in democracy protection); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL*

The situation could hardly be more different in the United States, where legislation is deliberately made difficult by the constitutional system of separated powers.³⁵³ Additionally, the rollout of the MQD has coincided with one of the worst stretches of legislative gridlock in the last fifty years.³⁵⁴ Political commentators have documented a collapse in Congress's productivity,³⁵⁵ which may owe to factors including the ideological sorting of America's two political parties, the rising anti-government strain in the Republican Party, changes in campaign finance, primary elections, new media technologies, and population sorting.³⁵⁶ Rising unilateralism by the President has been both cause and consequence, arising to fill the void left by Congress's dysfunction but also fostering a reliance on the White House to solve problems that legislators once would have.³⁵⁷ In *this* institutional context, the MQD acts as a thumb on the scale for paralysis and inactivity, arguably worsening the deepening issues of trust in government the United States already faces.³⁵⁸

LAW (2008) (reviewing the benefits of different forms of judicial review across judicial contexts); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L. J. CONST. L. 167 (2010) (vouching for a new model of constitutionalism of reallocating powers between courts and legislatures to protect rights).

³⁵³ See Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1852 n.143 (2020).

³⁵⁴ A classic work of political science arguing along these lines is Juan Linz's *The Failure of Presidential Democracy*. THE FAILURE OF PRESIDENTIAL DEMOCRACY (Juan J. Linz & Arturo Valenzuela eds., 1994). Identifying the last few years as a peak of polarization over the last fifty years of American history, see Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/5UGR-NQP2>].

³⁵⁵ See, e.g., Kate Plummer, *Has the 119th Congress Been One of the Least Productive Ever?*, NEWSWEEK (July 23, 2025, at 5:00 ET), <https://www.newsweek.com/donald-trump-least-productive-congress-laws-2102819> [<https://perma.cc/6MD8-RQVN>]; Alex J. Rouhandeh, *As Chaos Mounts in Congress, Are House Republicans Throwing in the Towel?*, NEWSWEEK (Feb. 16, 2024, at 16:17 ET), <https://www.newsweek.com/chaos-mounts-congress-are-house-republicans-throwing-towel-1870788> [<https://perma.cc/V4E5-3R6E>].

³⁵⁶ See EZRA KLEIN, *WHY WE'RE POLARIZED* 10–17, 31–42, 176–91, 214–49 (2020); Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J.F. 149, 156–61 (2019); Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 341–58 (2020); Nolan McCarty, *The Policy Effects of Political Polarization* (explicitly and statistically attributing political polarization to a reduction in legislative productivity), in *THE TRANSFORMATION OF AMERICAN POLITICS* 223, 232–40 (Paul Pierson & Theda Skocpol eds., 2007).

³⁵⁷ Echoing this worry and tracing rising presidential power, see William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 PRESIDENTIAL STUD. Q. 145, 158–64 (2023); SKOWRONEK ET AL., *supra* note 54, at 39–56 (describing the rise of the unitary executive theory more generally); PETER M. SHANE, *DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* 3–32 (2022) (same).

³⁵⁸ For arguments that the MQD is profoundly undemocratic, see Deacon & Litman, *supra* note 6, at 1060–64; Walters, *supra* note 6, at 538–40.

One solution is that where a delegation is ambiguous and does not infringe rights, the Court should consider whether an institutional risk calculus supports allowing the government action to stand unchecked. This means considering whether deference to executive action is warranted by the need for effective government, weighed against potential rule of law dangers. Under what conditions might this be so? Elsewhere, in borderline cases courts have deferred to the executive branch in cases where the policy realm at issue is one calling for particular expertise, where the larger political situation is one in which emergency action is demanded, and, finally, where the legislature is gridlocked and likely cannot act to reenact a statute.³⁵⁹ This is not a closed list, and none of these factors are rigid binaries, so there will be judicial discretion in balancing.

The Israeli legal scholar Yoav Dotan convincingly accounts for majorness tests as a way for courts to establish and monitor a division of labor between the legislative and executive branches based on the *comparative advantages* of each.³⁶⁰ The legislator's advantage is that they directly represent the public. Accordingly, when an arrangement involves a significant matter with vast consequences, it is appropriate for it to be resolved by the legislature rather than administrative authorities, whose level of democratic representation is lower.³⁶¹ On the other hand, when dealing with issues that involve professional, technological, scientific, or logistical complexities, agencies are the ones with an institutional advantage.³⁶² An articulation of Dotan's functionalist approach came in a recent case where the Israeli Supreme Court classified a regulation of natural gas production as major, but found that the government was authorized to set such a policy, considering, among other considerations, the logistical and professional complexities:

³⁵⁹ See, e.g., *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (on particular expertise, holding that where an agency “is making predictions, within its area of special expertise, at the frontiers of science . . . a reviewing court must generally be at its most deferential”); *Trump v. Hawaii*, 585 U.S. 667, 686, 702 (2018) (on emergency action, holding that statutorily, “a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere,” and, later on, noting that constitutionally, “the admission and exclusion of foreign nationals” by the political branches is “largely immune from judicial control”); cf. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (on where Congress cannot be expected to timely enact a statute, holding that although purported statutory authority did not directly authorize the presidential action at issue, it likewise did not evince congressional disapproval and thus invited broad presidential discretion under the circumstances).

³⁶⁰ See Dotan, *supra* note 158, at 384–85.

³⁶¹ See *id.* at 384.

³⁶² See *id.*

[W]hen the arrangement embodies [d]eterminations that require professional expertise, then it is sufficient that the initial arrangement be determined in legislation. First, it must have a high level of abstraction When we are dealing with an arrangement that is of a professional nature – even if on a broad scale – it is right that it should be the professional body entrusted with the matter that determines the arrangement, despite the possible harm to the public’s democratic participation in the process.³⁶³

The Israeli court’s reasoning is strikingly similar to that of *Chevron*, whose doctrine of deference turned on similar considerations of technical complexity.³⁶⁴ Indeed, critics of the MQD, like Justice Kagan, have argued that the doctrine devalues technical expertise in government and demands too much of judges when they interpret complex statutes.³⁶⁵ For instance, Kagan writes,

[A]gencies often know things about a statute’s subject matter that courts could not hope to. The point is especially stark when the statute is of a “scientific or technical nature” Or take the . . . case, involving the Endangered Species Act. Deciding when one squirrel population is “distinct” from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn’t the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term “distinct” means? One idea behind the *Chevron* presumption is that Congress—the same Congress that charged the Service with implementing the Act—would answer that question with a resounding “yes.”³⁶⁶

Kagan’s argument for deference to agencies in such cases is two-fold. One, judges lack the relevant subject matter expertise to accurately

³⁶³ HCJ 4374/15 Movement for Quality Gov’t v. Prime Minister, Nevo Legal Database, at 136 (Mar. 27, 2016) (Isr.).

³⁶⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 848, 865–66 (1984).

³⁶⁵ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 460 (2024) (Kagan, J., dissenting) (arguing that answering questions of the correct interpretation between “two equally feasible understandings” of an ambiguous but technical statute “does not mainly demand the interpretive skills courts possess,” but rather “demands one or more of: subject-matter expertise, long engagement with a regulatory scheme, and policy choice,” in which agencies, not courts, have special competence).

³⁶⁶ *Id.* at 456 (citations omitted).

interpret statutes, and two, Congress would as a result *wish* to vest agency experts with interpretive discretion.³⁶⁷ This is true, too, in the emergency scenario where government requires swift, coordinated action. Dissenting in the student loan case, Justice Kagan chastised the majority for applying “heightened-specificity requirements” that “thwart[] Congress’s efforts to ensure adequate responses to unforeseen events.”³⁶⁸

Balancing legality and effective government also counsels deference in a separate scenario: where Congress itself is gridlocked and the only available instructions to a court and agency are those contained in an older statute. Such analysis has already been built into certain “realist” theories of the separation of powers and judicial review. Pointing out that America’s presidential system functions differently under conditions of party unified and party divided control—under the former, government is productive and statutory output high; under the latter, the norm is interbranch rivalry and legislative inertia—Richard Pildes and Darryl Levinson’s seminal article, *Separation of Parties, Not Powers*, argues that judicial review’s countermajoritarian thrust can be mitigated if courts defer more readily to statutes (1) passed by a divided government, and (2) at times when the government is divided.³⁶⁹ “Whether government is unified or divided,” they write, “conditions the ability of political institutions to respond to judicial decisions holding legislation or other governmental action unconstitutional.”³⁷⁰

Applying a similar analysis based on the problem of gridlock, Professor Oren Tamir proposes a few judicial fixes to make the MQD process “softer.”³⁷¹ One would be for the Court to “suspend” any declaration of invalidity for a certain period of time to allow the agency to implement changes to the rule and to give Congress, perhaps,

³⁶⁷ See *id.*

³⁶⁸ See *Biden v. Nebraska*, 600 U.S. 477, 523 (2023).

³⁶⁹ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2365–66 (2006); see also *id.* at 2314 (arguing that the “invisibility of political parties” has produced “judicial decisions . . . that float entirely free of any functional justification grounded in the actual workings of separation of powers”). For other scholars working in this mode, see generally Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMPAR. L. 613 (2014) (under a comparative approach, arguing that judicial review has grown in order to protect separation of powers); David Froomkin & Ian Shapiro, *The New Authoritarianism in Public Choice*, 71 POL. STUD. 776 (2021) (arguing for more checks on executive power); CHARLES R. BEITZ, *FOR THE PEOPLE? DEMOCRATIC REPRESENTATION IN AMERICA* (Henry E. Brady ed., 2024) (discussing how legislative gridlocks shift power to the executive).

³⁷⁰ Levinson & Pildes, *supra* note 369, at 2365.

³⁷¹ See Tamir, *supra* note 6, at 608–10.

a chance to step in.³⁷² Alternatively, he proposes that the Court could consider a judicial procedure allowing an agency to return, after an adverse decision, to the Court to ask it to unfreeze the action where Congress does not speak clearly on the issue for some time following a judicial decision.³⁷³ Professor Tamir also advises the Court to apply the doctrine to curb undue agency *inaction* to counter any perceived deregulatory bias.³⁷⁴ All the same, he concludes, the MQD is best used as a “once-in-a-blue-moon” canon.³⁷⁵

A different, potentially valuable antigridlock solution has been proposed by Professor Chris Walker, who suggests that Congress could legislate itself a fast track process for review of major questions decisions.³⁷⁶ Comparing his proposal to the Congressional Review Act,³⁷⁷ Professor Walker proposes that where a federal court invalidates a desired agency regulation on MQD grounds, Congress could use an accelerated process to bypass the Senate filibuster and amend the agency’s governing statute to specifically authorize the invalidated act.³⁷⁸ As Walker argues, this fast-track proposal would have several virtues. It would “counteract the new major questions doctrine’s asymmetric deregulatory effects,” “encourage courts to engage more seriously in ordinary statutory interpretation,” and leave “decisions of statutory clarity and unconstitutionality (such as an overly broad statutory delegation) to the ordinary legislative process and the court of public opinion.”³⁷⁹

As discussed in Part II, to insist on legality as an absolute value risks government paralysis, an outcome that—in an era of evaporating public faith in democratic government—is not only undesirable, but potentially destructive of the constitutional order altogether.³⁸⁰

³⁷² See *id.* at 609.

³⁷³ See *id.*

³⁷⁴ See *id.* at 617.

³⁷⁵ See *id.* at 613.

³⁷⁶ See Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL’Y 773, 776–77 (2022).

³⁷⁷ Congressional Review Act, Pub. L. No. 104-121, 110 Stat. 868 (1996).

³⁷⁸ See Walker, *supra* note 376, at 779–83.

³⁷⁹ *Id.* at 776, 786.

³⁸⁰ This reminds of Lincoln’s famous rhetorical question, “Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?” Abraham Lincoln, *July 4, 1861: July 4th Message to Congress*, MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress> [<https://perma.cc/YR78-5TGC>] (last visited Oct. 28, 2025). Discussing the tenets of effective government and how it should be balanced against other values, see Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 186–87.

A contextual approach more realistically vindicates legislative supremacy by balancing legality against effective government. Making administrative review over difficult cases turn on institutional context achieves two further objectives. First, it mitigates the countermajoritarian challenges, encouraging courts to avoid exacerbating the problem of gridlock by their actions.³⁸¹ Second, it helps defend the primacy of legislative rules in a real sense. The MQD has been criticized for posing as a friend to Congress even while it simplistically assumes that, where the meaning of its handiwork is in doubt, Congress prefers that an agency be barred from acting.³⁸² For this reason, when a statute's meaning is in doubt, judicial respect for rule of law values counsels a factual review of the political conditions under which the legislature can truly *speak*.

Ultimately, this Article believes that there are good legal reasons for a court to worry about the sufficiency of a delegation, but not to privilege government inactivity over activity as a rule. The Supreme Court believes that in the face of congressional inaction it is defending the integrity of the law as best it can.³⁸³ But to privilege inactivity over executive responsiveness, especially in times of crisis, should require more than legislative silence or inertia; it requires a good reason, grounded in context, to conclude that the executive is acting extralegally. To invalidate an agency action, the Court should make a strong textual case for the insufficiency of a delegation as ambiguous, point to a rights violation, or, in the extreme case, argue that the type of authority itself is wrongfully delegated—majorness or total delegation. Refashioned in this way, the MQD could allow the Court to be a principled arbiter of legality while being transparent about the values it champions.

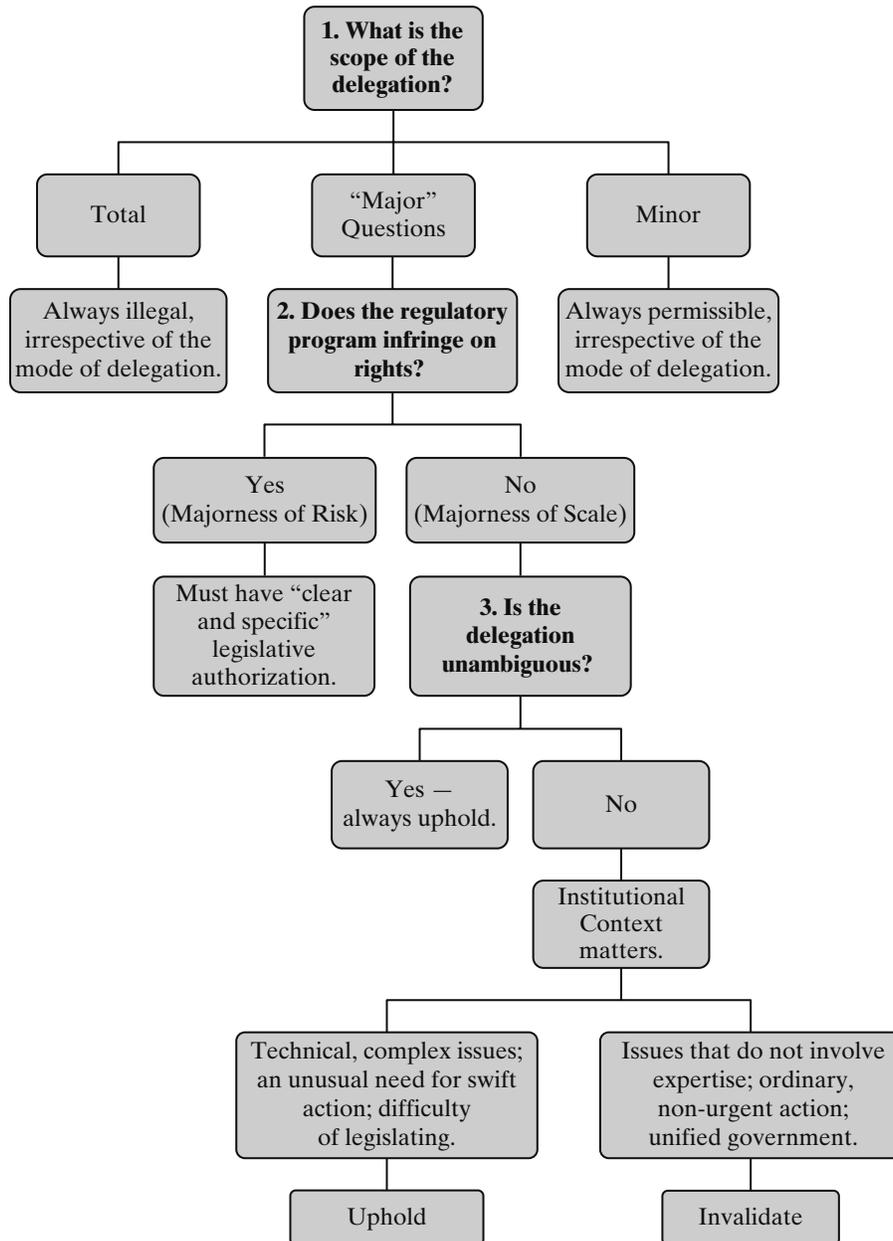
³⁸¹ See Levinson & Pildes, *supra* note 369, at 2342–43 (pointing out how variable party control affects legislative output); *see also id.* at 2364–66 (pointing out how varying conditions of party control should affect the stringency of review).

³⁸² Criticizing it as such, see Baumann, *supra* note 99, at 467–69. Several scholars have argued for a more “realistic” treatment of Congress’s intent and manner of legislating. *See e.g., id.* at 472–77; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1933–34 (2017) (arguing that the MQD “has no basis in law”); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 799–801 (2014); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1633–82 (2020); Beermann, *supra* note 6, at 1301–06; Levin, *supra* note 6, at 940–43.

³⁸³ The Court occasionally shows an awareness that Congress is hardly reauthorizing statutes or delegations with frequency. *See, e.g.,* West Virginia v. EPA, 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring) (“Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident.”).

2. Putting the Pieces Together

FIGURE 1. A TEST OF LEGALITY – ADMINISTRATIVE REVIEW



The above decision tree illustrates the application of this Article’s model. There is still no clear line between execution and legislation; this test, like other judicial tests, can be abused. But this is no reason to

stop trying to structure doctrines in a way that requires consistency and transparency about the values they uphold.

At step one, a judge reviewing a given agency action must ask whether the delegation of authority is *total*, in which case it is illegal, or *partial*, where there can be both “major” and “minor” delegations. Minor delegations are always uncontroversial and should be upheld. If the action is major, however, the analysis continues. Step two distinguishes between major actions that do and do not infringe on *rights*. If they infringe on rights, they require clear and specific legislative authorization to be permissible. If they do not, the judge proceeds to step three. At this stage, the question is whether the statute clearly delegates authority. If the delegation is *unambiguous*, the agency program should be upheld, irrespective of its breadth.

The most difficult cases are those in which the actions are major, do not infringe on rights, and are rooted in an ambiguous delegation. In such cases, the judge must look to contextual factors to determine whether deference is appropriate. Factors favoring deference include policy areas requiring expertise; political situations requiring swift agency action; and conditions of gridlock in Congress implying that a new authorizing statute could not be passed where the agency action is invalidated. This is not a closed list. Of course, agency actions can also be challenged on ordinary grounds, including for being “arbitrary and capricious” or where the authorizing statute is unconstitutional *per se*.

The next Section provides two examples of this decision-making process in practice.

IV. APPLICATION – THE LEGALITY PRINCIPLE IN CONTEXT

This Part applies the test to two “hard cases” of major policy programs enacted through regulatory means. One is the Biden student loan debt forgiveness program enacted by the Department of Education in 2022 and invalidated by the Supreme Court the next year.³⁸⁴ The other is a hypothetical invocation of the authority of the Comstock Act of 1873 to enact a national abortion ban.

A. *Example 1: The Federal Student Loan Debt Controversy*

If hard cases make bad law, then perhaps the story of the Biden Administration’s short-lived student loan debt forgiveness plan will tell very little—though hopefully not. The controversy arose against the backdrop of the COVID-19 pandemic and involved the somewhat

³⁸⁴ See *Biden v. Nebraska*, 600 U.S. 477, 482–83, 505–06 (2023).

separate issue of student loan debt, an entrenched policy problem in America, where outstanding debt reached some \$1.6 trillion in 2023.³⁸⁵

In April 2020, the White House declared a national emergency relating to COVID-19, and several months later the Department of Education, acting pursuant its statutory authority under the Higher Education Relief Opportunities for Students Act (“HEROES Act”)³⁸⁶ to “waive or modify” the terms of federal loan repayments in emergencies, announced a temporary suspension of mandatory loan repayments.³⁸⁷ In August 2022, the Biden Administration Department of Education announced that it was issuing “‘waivers and modifications’ . . . to reduce and eliminate student debts directly.”³⁸⁸ In total, the program canceled around \$430 billion of federal student loan balances, affecting some 43 million borrowers.³⁸⁹

A group of states challenged the program as unauthorized.³⁹⁰ The majority agreed, finding it “highly unlikely that Congress” had authorized such a sweeping loan cancellation program “through such a subtle device as permission to ‘modify.’”³⁹¹ Quoting the late Justice Scalia, the Court quipped that the Secretary’s plan had “‘modified’ the [terms of the HEROES Act] only in the same sense that ‘the French Revolution “modified” the status of the French nobility’—it ha[d] abolished them and supplanted them with a new regime entirely.”³⁹²

According to this Article’s test, the program was properly classified by the Court as major—given its sheer price tag, it would be difficult to find otherwise. But much as it displeased creditors, it did not implicate fundamental rights. Was the delegation to the Department of Education ambiguous? Two statutes authorized the Secretary to “waive or modify any statutory or regulatory provision” applicable to federal student loans “as the Secretary deems necessary” so as to ensure that “affected individuals” are not “placed in a worse position financially” in relation to loan repayments “in connection with a national emergency.”³⁹³

Despite the majority’s contention otherwise, it is difficult to deny that the language of the statutes provided authority for a program, however broad, constructed in the way the Department of Education did.³⁹⁴ The

³⁸⁵ See *id.* at 482–83.

³⁸⁶ HEROES Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa-1098ee).

³⁸⁷ See *Biden*, 600 U.S. at 486–87; 20 U.S.C. § 1098bb(a)(1).

³⁸⁸ *Biden*, 600 U.S. at 487.

³⁸⁹ See *id.* at 483.

³⁹⁰ See *id.*

³⁹¹ *Id.* at 496 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).

³⁹² *Id.* (citing *MCI Telecomms.*, 512 U.S. at 228).

³⁹³ See 20 U.S.C. §§ 1098bb(a)(1)–(2)(A), 1098ee(2)(C)–(D).

³⁹⁴ See *id.* One more illustrative point: The Act’s full title is the “Higher Education Relief Opportunities for Students Act of 2003.” *Id.* § 1098aa(a).

program followed the statutory framework to the letter: COVID-19 was a “national emergency declared by the President”³⁹⁵ as the statute required and student loan debtholders were plausibly “affected individuals” who had been “placed in a worse position financially” in relation to loan repayments due to the economic shutdown.³⁹⁶ The whole meaning of the Act in context supported this broad reading.³⁹⁷

At the same time, could it truly be of *no* relevance that the executive branch, in one fell swoop, had crafted a plan affecting 43 million Americans and \$430 billion in debt nationwide?³⁹⁸ The HEROES Act *was* a perhaps troublingly open-ended statute written in the sweeping language typical of the post 9/11 moment, when Congress routinely endeavored to provide the executive with broad authority to respond to emergencies.³⁹⁹ But this fact, without more, does not entitle a court to invalidate an agency program on sheer “majority” grounds alone.

For the sake of argument, suppose the authorization *were* ambiguous.⁴⁰⁰ Recall that a six-Justice majority of the Court found the program to lack “clear congressional authorization” in light of the fact that the authorizing Congresses had not contemplated a like situation.⁴⁰¹ Given *this* sort of a delegation—major, ambiguous, and not infringing on rights—the Court must look to institutional context. Did the statute delegate authority over a highly technical matter requiring subject matter expertise? Did it constitute a delegation in an emergency, where action was critical? Was Congress gridlocked at the time and unable to act?

This is an extremely close call, under any test. The COVID-19 pandemic was a national emergency, declared in March 2020 by President Trump and extended through the time the loan forgiveness program was passed.⁴⁰² The loan forgiveness program did not infringe upon individual rights and liberties, and in a true emergency deference is preferable to judicial overreach.⁴⁰³ Moreover, by the time the decision came down in June 2023 the Biden Administration had lost its narrow majority in both houses of Congress in the November 2022 midterms, so the program

³⁹⁵ *Id.* § 1098ee(4); *Biden*, 600 U.S. at 486.

³⁹⁶ *See* 20 U.S.C. §§ 1098bb(a)(2)(A), 1098ee(2)(C)–(D).

³⁹⁷ *See Biden*, 600 U.S. at 534 (Kagan, J., dissenting).

³⁹⁸ The Court could have been representing another global jurisdiction when it provided, “[a] decision of such magnitude and consequence’ on a matter of ‘earnest and profound debate across the country’ must ‘res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.’” *Id.* at 504 (quoting *West Virginia v. EPA*, 597 U.S. 697, 735 (2022)).

³⁹⁹ *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614, 1638–39, 1649 (2009) (construing the post-9/11 constitutional regime as one of broad legislative delegations).

⁴⁰⁰ *See supra* Table 1 at (2bii).

⁴⁰¹ *See Biden*, 600 U.S. at 504–06.

⁴⁰² *See id.* at 486–87.

⁴⁰³ *See* note 368 and accompanying text.

could not be reauthorized, and indeed was not.⁴⁰⁴ On the other hand, the program enacted a response to a permanent and ongoing policy problem that had little to do with the emergency itself. The authorizing statutes, although plain in their language, arguably contemplated a very different and less encompassing form of relief, and perhaps it can even be said that they were unmanageably open ended in their delegation.

The Court could have been justified in either result; although in context, while the pandemic continued to rage, with no contrary legislative directions forthcoming and no threat to individual rights and constitutionalism, the Court should probably have let the Administration's program alone. Going forward, however, most important is how the Court reaches its result.

B. Example 2: The Comstock Act

Enacted in 1873, the Comstock Act criminalizes the mailing of “obscene Literature and Articles of immoral Use” in the U.S. mails.⁴⁰⁵ Section 1461 of the Act declares that “[e]very article or thing designed, adapted, or intended for producing abortion,” and “[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion,” is “nonmailable matter” that “shall not be conveyed . . . from any post office or by any letter carrier.”⁴⁰⁶

Throughout the past century, the judiciary, Congress, and the United States Postal Service (“USPS”)—which is responsible for enforcing the Comstock Act's restrictions on the mailing of prohibited materials—have all established a consensus on the narrow scope of section 1461:

Beginning early in the twentieth century, federal courts construed the provisions not to prohibit all mailing or other conveyance of items that can be used to prevent or terminate pregnancy. By the middle of the century, the well-established, consensus interpretation was that none of the Comstock Act provisions, including section 1461, prohibits a sender from conveying such items *where the sender does not intend that they be used unlawfully*. USPS accepted that construction and informed Congress of it.⁴⁰⁷

⁴⁰⁴ As discussed at *supra* notes 341–49, jurisdictions like Israel have used their version of the MQD as a spur for legislation. Instead, in the United States, partisan gridlock has prevented any such constructive use of the MQD. Cf. EDWARD C. LIU & SEAN M. STIFF, CONG. RSCH. SERV., LSB10997, SUPREME COURT INVALIDATES STUDENT LOAN CANCELLATION POLICY UNDER THE HEROES ACT (2023) (noting that following the Supreme Court's decision, the Biden Administration sought an alternative rulemaking process rather than attempt legislative authorization).

⁴⁰⁵ Comstock Act, ch. 258, § 2, 17 Stat. 598 (1873).

⁴⁰⁶ 18 U.S.C. § 1461; Application of the Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortions, 46 Op. O.L.C. (Dec. 23, 2022) (slip op. at 1).

⁴⁰⁷ *Application of the Comstock Act*, slip op. at 5 (emphasis added); see also Ebba Brunnstrom, Note, *Abortion and the Mails: Challenging the Applicability of the Comstock Act Laws Post-Dobbs*,

Although the Comstock Act has not been enforced for nearly a century, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,⁴⁰⁸ antiabortion groups seized on the Act as a potential tool for enforcing a nationwide abortion ban.⁴⁰⁹ These groups argued that it provides a clear and enforceable mechanism to prevent the mailing of abortion related items, including medications like mifepristone and misoprostol.⁴¹⁰ Seeking to weaponize a long-dormant statute to curtail abortion access across all states, this strategy has already surfaced in litigation challenging the Food and Drug Administration's ("FDA") approval of mifepristone, with antiabortion litigants claiming that the agency violated the Comstock Act by permitting the drug's mailing.⁴¹¹ The challenge itself was rejected on standing grounds, but Justices Samuel Alito and Clarence Thomas repeatedly invoked the Comstock Act during oral arguments.⁴¹² Finally, Project 2025—a high-profile strategy plan the second Trump Administration has been closely linked to—outlines how to transform the Comstock Act into a nationwide abortion ban.⁴¹³

For its part, the Biden Administration responded with a Department of Justice slip opinion stating that the Comstock Act “does not prohibit the mailing, or the delivery or receipt by mail, of mifepristone or misoprostol where the sender lacks the intent that the recipient of

55 COLUM. HUM. RTS. L. REV. 1, 4 n.6 (2024) (“There have been no prosecutions under the abortion-related articles provision of the law, which is the only part of the statute unrelated to speech that remains on the books. There have been very few nonobscenity prosecutions under 18 U.S.C. § 1461 and related statutes since the mid-1900s.”).

⁴⁰⁸ 597 U.S. 215 (2022).

⁴⁰⁹ See Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 YALE L.J. 1068, 1158 n.481 (2025) (describing these claims as “revivalist”); I. Glenn Cohen, Eli Y. Adashi & Mary Ziegler, *The New Threat to Abortion Access in the United States – The Comstock Act*, 330 J. AM. MED. ASS'N 405, 405 (2023).

⁴¹⁰ Siegel & Ziegler, *supra* note 409, at 1156–62.

⁴¹¹ See *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 251 n.8 (5th Cir. 2023), *rev'd*, 602 U.S. 367 (2024). The four antichoice medical associations challenged the FDA's approval of mifepristone—the medical abortion pill. *Id.* at 222. Among other claims, they alleged that the FDA should have rejected the initial approval of mifepristone because it violated the Comstock Act, which they claimed “prohibits the use of postal ‘mails’ to convey or deliver chemical abortion drugs.” See *FDA v. Alliance for Hippocratic Medicine*, 138 HARV. L. REV. 295, 296 (2024).

⁴¹² See Tierney Sneed, *Supreme Court Abortion Case Brings 19th Century Chastity Law to the Forefront*, CNN (Mar. 29, 2024, at 5:00 ET), <https://www.cnn.com/2024/03/29/politics/comstock-act-alito-thomas-abortion/index.html> [<https://perma.cc/F8WZ-4ELH>]. For example, Justice Alito suggested, referring to the Comstock Act, that “[t]his is a prominent provision. It’s not some obscure subsection of a complicated, obscure law.” Dan Diamond, *Alito and Thomas Kept Bringing Up Comstock. That Scared Abortion Rights Supporters*, WASH. POST (Mar. 26, 2024), <https://www.washingtonpost.com/health/2024/03/26/comstock-act-supreme-court-abortion-pill/> [<https://perma.cc/4763-3DLT>].

⁴¹³ MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 458–59, 499 n.16, 562 (Paul Dans & Steven Groves eds., 2023).

the drugs will use them unlawfully.”⁴¹⁴ To support its conclusion, the Department of Justice referenced federal appeals court decisions from the 1930s involving the mailing of condoms, other contraceptive-related items, and information about contraception.⁴¹⁵ In those cases, the courts determined that such items had lawful uses under state law and that the Comstock Act did not prohibit their mailing if the sender did not intend for them to be used illegally.⁴¹⁶

Under a second Trump Administration, the possibility of Comstock’s revival lingers.⁴¹⁷ The Administration could go as far as directing federal agencies such as the FDA and USPS to aggressively enforce the Comstock Act.⁴¹⁸ This could involve criminalizing the distribution of abortion pills, targeting pharmacies or manufacturers, or restricting access to abortion related materials in every state. Alternatively, a more restrained approach could focus solely on FDA policies, such as reinstating the requirement that pharmacies dispense mifepristone only in person.⁴¹⁹

Several constitutional challenges to the Comstock Act could arise as well, including claims that it violates due process or the principle of equality, on its face as well as in the manner its enforcement.⁴²⁰ Returning to Table 1 presented in the previous Section,⁴²¹ the remainder of this Section considers a hypothetical in which, following a directive

⁴¹⁴ Application of the Comstock Act to the Mailing of Prescription Drugs that Can Be Used for Abortions, 46 Op. O.L.C. (Dec. 23, 2022) (slip op. at 1–2).

⁴¹⁵ See *id.* at 5–11.

⁴¹⁶ See *id.*

⁴¹⁷ See Brunnstrom, *supra* note 407, at 3, 5, 18.

⁴¹⁸ Although most federal crimes fall under the jurisdiction of the Department of Justice and its agencies, the USPS holds partial authority to enforce certain laws. See *About*, U.S. POSTAL INSPECTION SERV., <https://www.uspis.gov/about> [<https://perma.cc/96XW-57GD>] (last visited Nov. 17, 2025).

⁴¹⁹ See Mabel Felix, Laurie Sobel & Alina Salganicoff, *The Comstock Act: Implications for Abortion Care Nationwide*, KFF (Apr. 15, 2024), <https://www.kff.org/womens-health-policy/issue-brief/the-comstock-act-implications-for-abortion-care-nationwide/> [<https://perma.cc/8SQS-LP42>] (“Although many of the arguments presented by anti-abortion advocates focus on the mailing and distribution of mifepristone, a literal interpretation of the Comstock Act would implicate more than just this medication.”); *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA, <https://www.fda.gov/drugs/postmarket-drug-safety/information-patients-and-providers/questions-and-answers-mifeprex> [<https://perma.cc/PHQ2-AWH2>] (last visited Dec. 13, 2025).

⁴²⁰ See Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1107 (2023) (arguing that “there is a reasonable argument that a federal abortion ban would violate the Fifth Amendment Due Process Clause,” including consideration of a “revived Comstock Act”); Danny Y. Li, *The Comstock Act’s Equal Protection Problem*, MICH. L. REV. ONLINE 42, 45 (Jan. 2025), <https://michiganlawreview.org/the-comstock-acts-equal-protection-problem/> [<https://perma.cc/3VDN-4BCQ>] (“The Comstock Act is unconstitutional because it violates the Fifth Amendment’s equal protection guarantee.”).

⁴²¹ See *supra* Table 1.

from the new Trump Administration, the USPS starts enforcing the Comstock Act and prohibits sending abortion pills in the mail, or a slightly softened version in which the FDA stops providing abortion pills by mail. This policy involves a major question. It has vast economic and political consequences, significantly departs from prior practices and historical norms, and, finally, implicates fundamental rights including reproductive autonomy, health, and equality.⁴²²

As a major question that involves infringements on rights, the policy has majorness of risk, so the only way it could be permissible is if the statute—in this case the relevant Comstock Act provision—is specific, clear, and unambiguous.⁴²³

Comstock revivalists argue that the Act can be interpreted as effectively prohibiting all abortion procedures, not just those involving medications delivered by mail.⁴²⁴ Although the Comstock Act does not explicitly ban abortion, the revivalists argue that as a matter of *plain text* it prohibits the shipment or receipt of any abortion related items, and any abortion procedure would involve the use of something sent through the mail.⁴²⁵ But Reva Siegel and Mary Ziegler show that Comstock revivalists wish to enforce it in a way it has never been enforced before.⁴²⁶ In fact, they show that the text of the statute “contains no categorical ban on mailing materials for terminating pregnancy.”⁴²⁷ When the Comstock Act was enacted, “procuring of abortion” was considered a crime.⁴²⁸ Terminating a pregnancy could be unlawful depending upon on allegations of intent, with an exception for abortions performed to save a life—a determination left to the doctor’s discretion.⁴²⁹ “The statute’s

⁴²² Despite *Dobbs* holding that there is no constitutional right to abortion under the Due Process Clause, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 302 (2022), the hypothetical ban still involves other peripheral rights, including the rights to health care and autonomy. Additionally, many state constitutions continue to protect abortion. See Susan Frelich Appleton & Laura A. Rosenbury, *Reflections on “Personal Responsibility” After COVID and Dobbs: Doubling Down on Privacy*, 72 WASH. U. J.L. & POL’Y. 129, 130–32, 149–52, 157 (2023) (contextualizing *Dobbs* in a larger framework of privacy and personal responsibility).

⁴²³ See *supra* Section III.A.2.

⁴²⁴ See Siegel & Ziegler, *supra* note 409, at 1160–64; Mark Lee Dickson, *Edgewood in New Mexico Considers First ‘Sanctuary City for the Unborn’ Ordinance Since Passage of HB7*, LIVE ACTION (Apr. 7, 2023, at 7:40 ET), <https://www.liveaction.org/news/edgewood-new-mexico-sanctuary-city-hb7> [<https://perma.cc/75LM-QF6J>].

⁴²⁵ Such an argument was accepted by Judge Kacsmaryk in his April 7, 2023, opinion: “Here, the plain text of the Comstock Act controls The statute plainly does *not* require intent on the part of the seller that the drugs be used unlawfully.” See *All. for Hippocratic Med. v. FDA.*, 668 F. Supp. 3d 507, 540–41 (N.D. Tex. 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *rev’d*, 602 U.S. 367 (2024). For a detailed description of this claim, see Siegel & Ziegler, *supra* note 409, at 1160–64.

⁴²⁶ See Siegel & Ziegler, *supra* note 409, at 1164–69.

⁴²⁷ *Id.* at 1077.

⁴²⁸ See *id.*

⁴²⁹ See *id.*

postal provisions had *two* scienter requirements: requiring that a sender (1) knowingly mail items with (2) the awareness that they would be used unlawfully.⁴³⁰ Siegel and Zigler conclude that

the statute’s application to the mailing of articles for “abortion” is *not* plain and absolute, contrary to what revivalists have repeatedly suggested. Following the statute’s language over time, we read the statute’s reference first to “procuring of abortion” and then to “producing abortion” as phrases that refer to criminal terminations—that is, they recognize the existence of lawful and unlawful terminations, even if the line between the two is ambiguous over time, as well as across and within states.⁴³¹

The turn to the statute’s history to clarify meaning is warranted by the ambiguity of the term “abortion” standing alone. The meaning of “abortion” today is not plain; it remains contested and, as groups *opposed* to abortion emphasize, entangled with questions of health.⁴³²

Under the legality-oriented test, when evaluating such an enforcement policy, the infringement on rights becomes paramount. Any reinterpretation of the Comstock Act that undermines reproductive rights, health, and equality by restricting access to abortion medication required for legal abortions, including pregnancy terminations necessary for health reasons, would immediately be categorized as a major rights-infringing action.⁴³³ Such policies require clear and specific authorization to be permissible.⁴³⁴ The 150-year-old “zombie law” is in no sense “clear and specific.” And therefore, a revivalist enforcement of the Act as a federal ban on abortion pills and medical equipment required for legal abortions is impermissible. Indeed, such an assertion of authority, using Justice Scalia’s words from an early MQD case, “would

⁴³⁰ *Id.*

⁴³¹ *Id.* at 1165–66.

⁴³² Demonstrating further that abortion itself is ambiguous, see *id.* at 1165–67 (“Many opponents of abortion maintain, for example, that there is no need for life or health exceptions to abortion bans because lifesaving procedures are not, by definition, abortions In the less than two years since the *Dobbs* decision, thirteen states hostile to abortion have already changed the definition of ‘abortion’ in their state codes. There is potentially a further ambiguity: many abortion opponents view emergency contraceptives—and perhaps even the birth-control pill—as abortifacients.”).

⁴³³ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), removed the constitutional protections for abortion. See *id.* at 302. Despite that, abortion is only completely banned in twelve states. See *After Roe Fell: U.S. Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/KG9W-6AMF>] (last visited Jan. 28, 2025). For an argument of how the Comstock Act violates the Fifth Amendment’s equal protection, see generally Li, *supra* note 420; see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (examining equal protection challenges to abortion restrictions).

⁴³⁴ See *supra* Section III.A.1.a.

render the statute ‘unrecognizable to the Congress that designed’ it.”⁴³⁵ Americans oppose abortion bans, and nearly nine in ten Americans support abortion access for difficult circumstances.⁴³⁶ This Article’s test stops an administration from imposing one through a back door.

CONCLUSION

The MQD’s stated purpose is to stop the government from “rewrit[ing]” old laws to fashion itself authority for “sweeping and unprecedented” actions “that Congress has chosen not to enact itself.”⁴³⁷ It has yet to be fully seen how the MQD will meet the moment in a second Trump administration, but the situation is unprecedented. No president in American history has ever used power in such a way as to call to mind immediately the MQD’s concerns. To list just some examples, under a law allowing the President to set tariffs during a national emergency, President Trump imposed a ten percent tariff on all countries, with heightened rates on many, sparking fears of a global trade war and economic retaliation from trading partners.⁴³⁸ The Administration fired, furloughed, or placed on leave the bulk of United States Agency for International Development staff, effectively dismantling America’s foreign aid apparatus and abandoning ongoing humanitarian missions worldwide without authorization from Congress.⁴³⁹ The President suspended security clearances and terminated government contracts with law firms he viewed as political enemies, including those that had assisted special counsel investigations, prompting accusations of weaponizing federal power against perceived opponents.⁴⁴⁰ The Administration has also targeted private universities, leveraging the

⁴³⁵ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“[I]n EPA’s assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute ‘unrecognizable to the Congress that designed’ it.”).

⁴³⁶ See, e.g., Julie Wernau, *Support for Abortion Access Is Near Record*, *WSJ-NORC Poll Finds*, WALL ST. J. (Nov. 20, 2023, at 9:00 ET), <https://www.wsj.com/politics/policy/support-for-abortion-access-is-near-record-wsjnorc-poll-finds-6021c712> [<https://perma.cc/22KU-YCQV>].

⁴³⁷ *Biden v. Nebraska*, 600 U.S. 477, 494, 502–04 (2023).

⁴³⁸ See Alexandra Hutzler, *Trump Rolls Out Sweeping Tariffs as He Deems Deficits a ‘National Emergency’*, ABC NEWS (Apr. 2, 2025, at 18:32 ET), <https://abcnews.go.com/Politics/trumps-liberation-day-arrives-gambles-big-risky-tariff/story?id=120382209> [<https://perma.cc/VNY5-MSMP>]; Madeleine Ngo, *What to Know About the Emergency Law Trump Used to Impose Tariffs*, N.Y. TIMES (Aug. 29, 2025), <https://www.nytimes.com/2025/02/02/us/politics/trump-tariffs-ieepa.html> [<https://perma.cc/G3EA-BD8E>].

⁴³⁹ See Missy Ryan & John Hudson, *USAID Announces Sweeping Moves to Sideline Remaining Staff*, WASH. POST (Feb. 5, 2025), <https://www.washingtonpost.com/national-security/2025/02/04/usaid-trump-foreign-aid/> [<https://perma.cc/4JBX-EBCH>].

⁴⁴⁰ See *Trump Signs Executive Order Yanking Security Clearances of Lawyers from Perkins Coie*, CBS NEWS (Mar. 7, 2025, at 2:50 ET), <https://www.cbsnews.com/news/trump-targets-law-firm-perkins-coie-2016-russia-investigation/> [<https://perma.cc/H4GL-2ERA>].

threat to freeze federal funding in exchange for wholesale restructuring of curriculum at universities like Columbia and Harvard, while also expanding immigration enforcement to target foreign nationals, including students, researchers, and legal residents.⁴⁴¹ The President, with the Court's—at least temporary—blessing, has also fired more than 1,000 workers of the Department of Education, restructuring it in practice, if not dismantling it altogether.⁴⁴²

Decades ago, the main reason that the NDD fell out of favor was the difficulty of drawing lines between delegations that were permissible and impermissible.⁴⁴³ As Professor Sunstein explains, “The distinction between ‘executive’ and ‘legislative’ power cannot depend on anything qualitative; the issue is a quantitative one. The real question is: How much executive discretion is too much to count as ‘executive’? No metric is easily available to answer that question.”⁴⁴⁴

And yet, it seems that courts around the world will not stop trying to draw this line.⁴⁴⁵ Perhaps with authoritarianism flourishing around the world, this is not a bad thing.⁴⁴⁶ To date, most scholars have greeted the MQD with dismay and denied that *this* Court can be trusted with

⁴⁴¹ See *supra* note 38 and accompanying text.

⁴⁴² On May 22, 2025, U.S. District Court Judge Myong J. Joun issued a preliminary injunction on the action, noting that “[a] department without enough employees to perform statutorily mandated functions is not a department at all.” *New York v. McMahon*, 748 F. Supp. 3d 311, 344 (D. Mass. 2025). The Supreme Court lifted the injunction and allowed the President to resume his disassembling of the department. *McMahon v. New York*, 145 S.Ct. 2643 (2025) (mem.); see Amy Howe, *Supreme Court Clears the Way for Trump Administration to Massively Reduce the Size of the Department of Education*, SCOTUSBLOG (July 14, 2025), <https://www.scotusblog.com/2025/07/supreme-court-clears-the-way-for-trump-administration-to-massively-reduce-the-size-of-the-department-of-education/> [<https://perma.cc/P4FK-V5GC>]. In her dissent, Justice Sotomayor noted that “the threat to our Constitution’s separation of powers is grave.” *McMahon*, 145 S.Ct. at 2644 (Sotomayor, J., dissenting); see also Abbie VanSickle, *Supreme Court Clears the Way for Trump’s Cuts to the Education Department*, N.Y. TIMES (July 14, 2025), <https://www.nytimes.com/2025/07/14/us/politics/supreme-court-education-department.html> [<https://perma.cc/78FZ-A972>] (discussing the firings generally). For an analysis of how major deregulation can happen through determinations and defunding, see generally Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

⁴⁴³ See Stewart, *supra* note 65, at 1679; LAWSON *supra* note 194, at 196 (“As Chief Justice Marshall and James Madison recognized . . . the line that separates the legislative power from the executive and judicial powers may be difficult to draw.”).

⁴⁴⁴ Sunstein, *supra* note 6, at 326–27.

⁴⁴⁵ See *supra* Section II.D. For an example of an American court trying to draw that line, see *Biden v. Nebraska*, 600 U.S. 477, 500–01 (2023) (warning that “[t]he dissent’s interpretation of the HEROES Act would grant unlimited power to the Secretary, not only to modify or waive certain provisions but to . . . ‘alter [provisions] to the extent [he] think[s] appropriate,’ up to and including ‘the most substantial kind of change’ imaginable”).

⁴⁴⁶ Comparing Germany’s robust legality review to the practically defunct NDD, see, e.g., Currie, *supra* note 48, at 2140 (“[I]t is difficult to escape the conclusion that we have lost something significant that the Germans have worked hard to maintain. For over the years the Constitutional Court has devoted itself diligently to the task of assuring that major policy decisions respecting the content of the law are made by the representative and popularly elected legislature, as they should

such a power. But this is the wrong way to look at the question. Whether one trusts in the Court or not, Chief Justice Roberts and his successors will most likely continue to scrutinize executive actions for majorness, just as many of their international counterparts have.

What can and should be done, however, is to ask the Court to show its work and to hold it accountable when it diverges from the theory it claims to be applying. More than ever, the MQD needs guardrails. In 2024, the Court overturned *Chevron* and, with it, a rule that had provided stability in federal agency action for forty years.⁴⁴⁷ Today, with ninety-four judicial districts freed to apply their own standard of administrative review, no one can really be sure what administrative review will look like in a post-*Loper Bright* world. This Article's test, in fact, need not be limited to major questions as such. By providing courts with a heuristic for how to divide cases of administrative action into categories based on their scope and the mode of their delegation, it allows judges to *prioritize* areas of review, applying strict review only where it really matters, and offering deference in others.

This Article hopes that its attempt to take legality seriously might provide a way to give a dangerous doctrine some needed content and structure. Here, it has tried to provide a better grounding for the test by offering a fuller definition of majorness, a more realistic treatment of statutory ambiguity, and a context-specific rule of application that can best preserve Congress's regulatory authority in this space. Its proposed test makes the MQD more principled. This is important assuming the Court is operating in good faith, and perhaps even more so if not. Recall Justice Gorsuch's warning, following John Locke, that fair laws are unlikely to result from "a ruling class of largely unaccountable 'ministers.'"⁴⁴⁸ Locke himself meant that the king's ministers, not judges, were acting in an unconstrained way, but the most important part of his observation is "unaccountable."⁴⁴⁹ It is impossible for the Supreme Court to act as champion of the rule of law without submitting to its own constraints.

be in a republican democracy—a task with which our Supreme Court has not seriously concerned itself since 1936.”).

⁴⁴⁷ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024).

⁴⁴⁸ *West Virginia v. EPA*, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST No. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

⁴⁴⁹ *Id.*