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Rulemaking as Legislating

KATHRYN A. WATTS*

The central premise of the nondelegation doctrine prohibits Congress from delegating its Article I legislative powers. Yet Congress routinely delegates to agencies the power to promulgate legislative rules—rules that carry the force and effect of law just as statutes do. Given this tension between the nondelegation doctrine and the modern regulatory state, some scholars have attacked the nondelegation doctrine as fictional. Little scholarly attention, however, has been given to considering how the central premise of the nondelegation doctrine coheres with—or fails to cohere with—administrative law as a whole. This Article takes up that task, exploring what might happen to administrative law if the Supreme Court jettisoned the central premise of the nondelegation doctrine and frankly admitted that agency rulemaking constitutes an exercise of delegated legislative power. Specifically, this Article analyzes administrative law’s most central doctrines—including the test used to define legislative rules, Chevron and Auer deference, arbitrary and capricious review, procedural due process, and procedural constraints on agency rulemaking—and considers whether these doctrines stand in opposition to or work harmoniously with the nondelegation doctrine. Ultimately, this Article concludes that some key administrative law doctrines operate under the assumption that agency rules flow from delegations of legislative power, putting those doctrines in direct tension with the current nondelegation doctrine. In contrast, other key administrative law doctrines—consistent with the nondelegation doctrine—refuse to view agency rulemaking through a legislative lens. Thus, if the Court held that Congress constitutionally can and routinely does delegate legislative power, some central administrative law doctrines would need to be modified. Although these doctrinal changes would have their costs, this Article ultimately asserts that the changes would be normatively desirable. Many of administrative law’s disparate doctrines would gain a more unified, coherent lens centered around legislative supremacy and congressional delegation, forcing courts to take more seriously the notion that agencies act as Congress’s delegate. In addition, the Court would free itself of the longstanding doctrinal fiction that legislative rules constitute the exercise of executive power.

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INTRODUCTION

When administrative agencies promulgate legislative rules,¹ the rules look and feel much like congressionally enacted statutes,² providing binding legal norms that govern nearly everything ranging from the quality of the air we breathe to the safety of the products we buy.³ Legislative agency regulations, for example, can bind courts and officers of the federal government, preempt state law, grant rights, and impose obligations enforceable by civil or criminal penalties.⁴ Yet despite the legally binding nature of legislative regulations, longstanding Supreme Court precedent refuses to embrace the notion that rulemaking constitutes an exercise of Article I “legislative Powers.”⁵ Instead, the Court insists that Congress cannot delegate its legislative powers and that rulemaking activities by administrative agencies must constitute exercises of the “executive Power” found in Article II of the Constitution.⁶ The Court’s most recent pronouncement to this effect came in 2013 in *City of Arlington v. FCC* when the Court noted that although agency rulemaking takes a “legislative form,” such rulemaking activities “are exercises of—indeed, under our constitu-

1. “Legislative” rules are simply rules that carry the force and effect of law. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 476–77 (2002) (“Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute.”). Legislative rules are distinguishable from “nonlegislative” rules, such as interpretive rules and policy statements, which lack the force and effect of law. *Id.* Interpretive rules, for example, merely advise the public in a nonbinding fashion about how the agency interprets a statute or regulation that it administers, and policy statements advise the public about how the agency intends to exercise some discretionary power. *Id.*

2. See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 11 (6th ed. 2013) (“When an agency engages in rulemaking, it does something that looks very much like a legislature passing a law.” (emphasis omitted)).

3. See Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens’s Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1023 (2010) (“Administrative agencies in the United States play a wide-reaching, pervasive role in regulating matters that impact public health, safety, welfare, and security.”).

4. See *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

5. U.S. CONST. art. I, § 1 (vesting “[a]ll legislative Powers herein granted . . . in a Congress of the United States”).

6. See *infra* section I.A.

tional structure they *must be* exercises of—the ‘executive Power.’”⁷

As the Court’s opinion in *City of Arlington* suggests, constitutional concerns help to explain the Court’s stubborn adherence to its longstanding view that rulemaking constitutes an incident of executive rather than legislative power. Specifically, the nondelegation doctrine insists that Congress may not delegate legislative power because Article I, Section One of the Constitution vests the legislative power in Congress, not elsewhere.⁸ In its modern form, the nondelegation doctrine also provides that there is no forbidden delegation of legislative power so long as Congress provides some kind of an “intelligible principle” to guide the agency in its execution of the law.⁹ In other words, if Congress sets forth some kind of a guiding principle—even a hopelessly vague standard like, say, regulate “in the public interest”¹⁰—then the courts declare agency rulemaking to be constitutionally permissible as an incident of executive functions.¹¹ It is through this reading of legislative powers that the Court is able to insist that Congress may not delegate legislative powers and, at the same time, routinely rubber stamp wide-ranging delegations of rulemaking power to agencies.¹²

Given the toothless nature of the intelligible principle requirement, it is not surprising that the nondelegation doctrine has been said to have “remarkably little traction” today.¹³ Nor is it surprising that some have urged abandonment of the nondelegation doctrine’s central premise that Congress may not delegate legislative power. For example, in 2001, Justice Stevens, joined by Justice Souter, argued in a concurring opinion in *Whitman v. American Trucking Ass’ns, Inc.* that nothing in the Constitution precludes Congress from delegating its

7. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (quoting U.S. CONST. art. I, § 1).

8. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . .” (alterations in original)).

9. See *id.* (“[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (second alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))); see also *infra* section I.B.2.

10. See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to the Federal Communications Commission to regulate broadcasting to further the “public interest, convenience or necessity”); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 576–77 (1939) (upholding delegation to the Secretary of Agriculture to regulate milk prices in the “public interest”).

11. See *American Trucking*, 531 U.S. at 472 (explaining that the text of the Constitution permits “no delegation” of legislative powers but does permit executive actors to make policy decisions in the context of executing or applying the law set down by Congress); see also Travis H. Mallen, Note, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 432 (2005) (noting that the sole test for impermissible delegations—the “intelligible principle” test—“advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not involve too much discretion”).

12. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2181 (2004) (“Courts have been able to reconcile the orthodox understanding with institutional reality only by adopting a peculiar definition of ‘legislative power’ as the exercise of unconstrained discretion.”).

13. *Id.* at 2109.

legislative authority and that the Court should stop “pretend[ing]” that the rulemaking authority delegated to agencies is somehow not “legislative power.”¹⁴ Similarly, Professor Thomas W. Merrill has argued that the nondelegation doctrine should be replaced with an “exclusive delegation doctrine,” which would allow Congress to delegate legislative power.¹⁵

Notably, these sorts of calls for change have been quite focused on the constitutional contours of the nondelegation doctrine itself. As a result, little scholarly attention has been given to broader analysis of how administrative law as a whole has been clouded by the Court’s longstanding insistence that Congress may not delegate legislative power and how abandoning this oft-repeated (but ineffectual) mantra might impact many of administrative law’s most central doctrines outside of the nondelegation doctrine itself. The implicated doctrines span administrative law and include *Chevron* deference,¹⁶ *Auer* deference,¹⁷ arbitrary and capricious review,¹⁸ the line between legislative and nonlegislative rules,¹⁹ procedural due process,²⁰ and general procedural constraints on agency rulemaking.²¹

This Article aims to fill this gap. Specifically, this Article is the first to systematically explore how the central premise of the nondelegation doctrine has influenced administrative law as a whole, and how many significant administrative law doctrines might be altered or clarified if the Court recognized rulemaking as a constitutional exercise of delegated legislative power.²² Ultimately, this Article concludes that even though the nondelegation doctrine’s central premise prohibiting the delegation of legislative power has little bite in the context of the nondelegation doctrine itself, its continual appearance in the case law has confused administrative law as a whole. Some existing administra-

14. 531 U.S. at 488 (Stevens, J., concurring).

15. See Merrill, *supra* note 12.

16. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (calling for deference to an agency’s reasonable interpretation of statutory ambiguity).

17. See *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997) (providing for deference to an agency’s interpretation of its own regulations so long as the interpretation is not plainly erroneous or inconsistent with the regulation).

18. See 5 U.S.C. § 706(2)(A) (2012) (calling on courts to review agency action to ensure that it is not arbitrary or capricious).

19. See *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983) (“A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.”).

20. U.S. CONST. amend. V (providing that no person shall be deprived of life, liberty, or property “without due process of law”).

21. See 5 U.S.C. § 553 (2012) (spelling out procedures that govern notice-and-comment rulemaking).

22. I am aware of no scholarly works that have systematically analyzed how the nondelegation doctrine has shaped administrative law as a whole or how it aligns with administrative law as a whole. In his work advocating for an exclusive delegation doctrine, Professor Thomas W. Merrill addressed some doctrinal implications of his proposal, looking not only at the nondelegation itself but also at: how courts determine whether Congress has delegated legislative power to an agency; *Chevron* deference; subdelegation; and inherent presidential powers. See Merrill, *supra* note 12, at 2165–77. His primary focus, however, was on making the constitutional case for the exclusive delegation doctrine and analyzing various consequentialist arguments, such as general prodelegation and antidelegation arguments.

tive law doctrines at least implicitly embrace the legislative role of agencies, putting them in direct tension with the nondelegation doctrine. These include *Chevron* deference, procedural due process, and the test used to define legislative rules. In contrast, consistent with the nondelegation doctrine's prohibition on the delegation of legislative powers, other major doctrines fail to view rulemaking as legislative in nature. These include hard look review, procedural review, and *Auer* deference.

If the Court jettisoned the nondelegation doctrine (and its attendant "intelligible principle" requirement) and adopted what this Article will refer to as the "Candid Approach" to delegation—thereby recognizing that Congress constitutionally can and routinely does delegate legislative power—then some existing doctrines would be solidified, whereas other doctrines would need to be changed. Those that would be solidified include: the test courts have articulated to distinguish legislative from nonlegislative rules; *Chevron*'s delegatory rationale; *Chevron*'s ability to trump *stare decisis*; and the general inapplicability of procedural due process in the rulemaking context.²³ Those administrative law doctrines that would need to be altered include: the Court's refusal to carve out a jurisdictional exception to *Chevron* deference; *Auer* deference; arbitrary and capricious review; and the judiciary's reading of procedural constraints imposed on notice-and-comment rulemaking.²⁴

As one preliminary example, consider how *Chevron* might be impacted by acknowledging rulemaking as legislative action.²⁵ In opinions such as *United States v. Mead Corp.*, the Court has explained that *Chevron* deference rests on a presumption of Congress's delegatory intent: courts must defer to reasonable agency interpretations of statutory ambiguities when Congress has delegated power to the agency to act with the "force of law."²⁶ Thus, *Chevron* at least implicitly already recognizes that agency rulemaking constitutes an exercise of delegated legislative power. This puts *Chevron* in tension with the nondelegation doctrine, helping to explain confusion that has surrounded what it means for an agency to act with the "force of law."²⁷

A recent illustration of this ongoing confusion can be found in *City of Arlington v. FCC*, which the Court decided in 2013.²⁸ In that case, the Court emphatically rejected the notion of a "jurisdictional" exception to *Chevron* deference; such an exception would have meant that courts would refuse to apply *Chevron* deference to an agency's interpretation of a statutory ambiguity

23. See *infra* Part III.

24. See *infra* Part III.

25. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

26. 533 U.S. 218, 226–27 (2001).

27. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005) (describing the confusion that has flowed from the force of law test set forth in *Mead*).

28. 133 S. Ct. 1863 (2013).

that concerns the scope of the agency's jurisdiction.²⁹ The Court's decision likely would have come out the other way if the Court's nondelegation jurisprudence openly acknowledged rulemaking as an exercise of legislative power. Viewing agencies as the recipients of delegated legislative power would highlight the need for courts to take more seriously the notion that agencies act as Congress's delegate. In dissent, Chief Justice Roberts, who was joined by Justices Kennedy and Alito, seemed to recognize the importance of paying close attention to what Congress has delegated, arguing that "before a court may grant [*Chevron*] deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—*has in fact delegated to the agency lawmaking power* over the ambiguity at issue."³⁰ Key to the Chief's dissent was his view that agencies "as a practical matter . . . exercise legislative power, by promulgating regulations with the force of law."³¹ The majority, in contrast, responded by repeating the mantra that agencies do not and constitutionally cannot exercise "legislative power" and that rulemaking activities must constitute "exercises of . . . 'executive Power.'"³²

As another initial example, consider how "hard look" review—a variant of arbitrary and capricious review—might be impacted if the Court frankly acknowledged rulemaking as an exercise of legislative authority. Courts applying hard look review currently treat agencies not as "subordinate" or "adjunct" legislatures but rather as if the agencies were courts searching for "right" answers that are grounded in technocratic facts and science, not political or policy-driven terms.³³ If rulemaking were openly acknowledged to be an exercise of delegated legislative power, then it might well make sense for hard look review to become less technocratic in its focus. With open acceptance of the notion that agencies engaged in rulemaking are acting like subordinate legislatures, it would seem to follow that agencies ought to be able to consider any factors, such as changing political sentiments and policy considerations, that Congress did not preclude the agency from considering.³⁴ Admittedly, a change along these lines would prove quite controversial, as evidenced by prior scholarly opposition to proposals calling for hard look review to become less technocratic in its focus.³⁵ However, it would bring hard look review into greater harmony

29. *Id.* at 1868, 1874–75.

30. *Id.* at 1880 (Roberts, C.J., dissenting) (emphasis added).

31. *Id.* at 1877.

32. *Id.* at 1873 n.4 (majority opinion).

33. See *infra* notes 239–43 and accompanying text; see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 5 (2009) (noting that under arbitrary and capricious review, agencies must "explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms").

34. See Watts, *supra* note 33.

35. See, e.g., Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 *ADMIN. L. REV.* 573, 582 (2010); Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 *WASH. U. L. REV.* 141 (2012); Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 *IOWA L. REV.* 849 (2012).

with other doctrines, like *Chevron*, that already view agency rulemaking through the lens of a legislative model.

In exploring these and other doctrinal ramifications that would likely ensue if the Supreme Court frankly acknowledged that rulemaking constitutes an exercise of legislative power, this Article proceeds in four parts. Part I describes what will be referred to here as the central premise of the nondelegation doctrine—namely, that Congress may not delegate legislative power—and how the Court has tried to reconcile that premise with the reality that Congress routinely delegates broad rulemaking powers to agencies. Part II then considers calls made by individual Justices and scholars, including Justice John Paul Stevens and Professor Thomas W. Merrill, for the Court to abandon the nondelegation doctrine's central premise and to frankly acknowledge that rulemaking constitutes a constitutional exercise of delegated legislative power. Part II asserts that although these calls for a candid and nonformalist approach to delegation are appealing, the discourse to date has focused primarily on the constitutional parameters of the nondelegation doctrine itself and, as a result, has given little attention to what might happen to administrative law as a whole if the Court discarded the central premise behind the nondelegation doctrine. Part III, which represents the heart of this Article, analyzes and explores how administrative law's most central doctrines—including the test used to distinguish legislative from nonlegislative rules, *Chevron* and *Auer* deference, arbitrary and capricious review, procedural due process, and the judiciary's reading of statutory constraints imposed on rulemaking—have been shaped by the current nondelegation doctrine and how they might be impacted if the Court frankly acknowledged rulemaking to be legislative in nature. Finally, Part IV concludes by arguing as a normative matter that administrative law as a whole would be better off if the nondelegation doctrine's central premise were discarded and the Court frankly recognized rulemaking as an exercise of delegated legislative power. Such a change would highlight the need for courts to take more seriously the notion that agencies act as Congress's delegate. In addition, such a change would better reflect the institutional reality of rulemaking and would bring greater coherence to many of administrative law's disparate doctrines, helping to reinforce that rulemaking at its heart flows from a delegation of legislative power from Congress to the Executive.

I. THE CENTRAL PREMISE OF THE NONDELEGATION DOCTRINE

The central premise of the nondelegation doctrine is that Congress may not delegate its Article I legislative powers.³⁶ This Part briefly describes the rise of this premise as well as cracks that have developed in its foundation.

36. See Merrill, *supra* note 12, at 2103, 2109 (referring to the notion that “the Constitution forbids Congress from delegating legislative power” as the “first postulate” of the nondelegation doctrine).

A. THE COURT'S INSISTENCE THAT CONGRESS MAY NOT DELEGATE LEGISLATIVE POWER

The central premise of the nondelegation doctrine—that Congress may not delegate its Article I legislative powers—was first articulated clearly by the Supreme Court in *Wayman v. Southard*, a Marshall Court opinion decided in 1825.³⁷ Although *Wayman* did not result in the invalidation of a statute on nondelegation doctrine grounds, the case planted the early seeds for the Court's insistence that Congress may not delegate legislative power. In *Wayman*, the Marshall Court recognized that Congress may give some discretion to the judicial and executive departments to fill up the details of legislative acts,³⁸ but the Court stressed in dicta that Congress cannot “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”³⁹

In the late nineteenth and early twentieth centuries, the modern contours of the nondelegation doctrine continued to develop. For example, in 1892, the Court in *Marshall Field & Co. v. Clark* upheld the constitutionality of a statute that allowed the President to suspend the duty-free importation of certain goods from other countries, noting that the President was not “making . . . law” but rather was “the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”⁴⁰ In reaching this conclusion, the Court stated: “That [C]ongress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”⁴¹ Similarly, in 1911, the Court in *United States v. Grimaud* noted that although Congress can give those who are to act under statutes the power to “fill up the details” of statutes, Congress may not “confer legislative power.”⁴²

37. 23 U.S. (10 Wheat.) 1 (1825). The nondelegation doctrine also made a brief appearance in an even earlier Marshall Court opinion. See *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813).

38. See *Wayman*, 23 U.S. at 46 (“The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”).

39. *Id.* at 42.

40. 143 U.S. 649, 692–93 (1892). The statute at issue in *Field* provides a good example of a contingent delegation where the President was empowered to act upon ascertaining the occurrence of something specific. See Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1174–75 (2009) (“While these contingency format delegations are no longer the standard form of delegations to agencies, Congress still regularly employs them when it delegates power directly to the President.”).

41. *Field*, 143 U.S. at 692.

42. 220 U.S. 506, 517 (1911) (internal quotation mark omitted); see also *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904) (upholding the constitutionality of a delegation to the Secretary of Treasury to set standards of quality for tea importation because the statute did not, “in any real sense, invest administrative officials with the power of legislation”).

As the twentieth century progressed, the Court continued to insist that Congress may not delegate legislative power.⁴³ Most notably, in 1935 in *Panama Refining Co. v. Ryan*⁴⁴ and *A.L.A. Schechter Poultry Corp. v. United States*,⁴⁵ the Court—for the first and last times ever—invalidated provisions of a federal statute on nondelegation grounds. Those cases involved provisions of the National Industrial Recovery Act (NIRA) that granted the President broad powers to regulate industry during the Great Depression.⁴⁶ In concluding that provisions of NIRA had impermissibly delegated legislative power, the Court reiterated that “[t]he Constitution provides that ‘All legislative Powers herein granted shall be vested in a Congress of the United States,’”⁴⁷ and that Congress “manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”⁴⁸

Although the Court has not invalidated a federal statute as an unconstitutional delegation of legislative authority since 1935,⁴⁹ the Court has continued to repeat the mantra that Congress may not delegate legislative power.⁵⁰ For example, in *Mistretta v. United States*, the Court noted in 1989 that it has “long . . . insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution,’ mandate that Congress generally cannot delegate its legislative power to another Branch.”⁵¹ In a dissenting opinion in *Mistretta*, Justice Scalia emphasized this point, noting that what is really at

43. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407 (1928) (“The true distinction . . . is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” (quoting *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 88 (1852)) (internal quotation marks omitted)); *id.* at 408 (“The Congress may not delegate its purely legislative power to a commission” (quoting *Interstate Commerce Comm’n v. Goodrich Transit Co.*, 224 U.S. 194, 214 (1912)) (internal quotation marks omitted)).

44. 293 U.S. 388 (1935).

45. 295 U.S. 495 (1935).

46. See *id.* at 521; see also *Panama Refining*, 293 U.S. at 406.

47. *Panama Refining*, 293 U.S. at 421 (quoting U.S. CONST. art. I, § 1); see also *Schechter Poultry*, 295 U.S. at 529.

48. *Panama Refining*, 293 U.S. at 421; see also *Schechter Poultry*, 295 U.S. at 529.

49. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (noting that *Panama Refining* and *Schechter Poultry* represent the only times that the Court has found the nondelegation doctrine to be violated in the Court’s history).

50. That the Court has not invalidated any statutes on nondelegation grounds since 1935 should not be taken to mean that the nondelegation doctrine is completely dead. To the contrary, the doctrine often surfaces in a meaningful way through the guise of the canon of constitutional avoidance. Specifically, the canon of constitutional avoidance enables courts to avoid striking down statutes that might otherwise raise delegation issues by adopting narrow constructions of statutes. See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 455 (2008) (noting how courts will adopt narrow constructions of statutes to “corral[] what might otherwise be a constitutionally excessive delegation of power”); see also *Indus. Union Dep’t. v. Am. Petroleum Inst.*, 448 U.S. 607, 659–62 (1980) (plurality opinion) (avoiding a nondelegation issue by requiring the agency to make a finding of significant risk in promulgating the safety regulations at issue).

51. 488 U.S. 361, 371–72 (1989) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

stake in delegation cases is “whether there has been *any* delegation of legislative power” because “[s]trictly speaking, there is *no* acceptable delegation of legislative power.”⁵²

Other cases decided in the past few decades contain similar language.⁵³ Most notably, in *Whitman v. American Trucking Ass’ns, Inc.*, the Court emphatically reaffirmed that no delegation of legislative power is constitutionally permissible.⁵⁴ The Court stated: “In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits *no* delegation of those powers”⁵⁵ By relying upon the text of Article I here, the Court highlighted something that earlier cases had begun to make explicit: the central premise of the nondelegation doctrine has its roots in the text of Article I of the Constitution, which vests “[a]ll legislative Powers” in Congress.⁵⁶

B. RECONCILING THE NONDELEGATION DOCTRINE’S CENTRAL PREMISE WITH CONGRESS’S ROUTINE DELEGATION OF RULEMAKING POWERS

Despite its longstanding pedigree in the case law,⁵⁷ the reality is that the nondelegation doctrine’s central premise prohibiting the delegation of legislative power has little connection to the real world. As this section describes, Congress routinely delegates broad legislative rulemaking power to agencies, empowering agencies to promulgate rules. These rules, in turn, create legally binding norms and carry the force and effect of law just as statutes do.⁵⁸ Furthermore, even though the legislative process used to enact statutes looks quite different from the notice-and-comment rulemaking process used to create legally binding regulations, the courts routinely approve of these delegations of legislative power to agencies.⁵⁹

52. *Id.* at 419 (Scalia, J., dissenting).

53. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 758 (1996) (noting that the “lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity”) (citation omitted); *Touby v. United States*, 500 U.S. 160, 165 (1991) (explaining “that Congress may not constitutionally delegate its legislative power to another branch of Government”).

54. 531 U.S. at 472.

55. *Id.* (alterations in original) (emphasis added).

56. *See id.*; *see also* Merrill, *supra* note 12, at 2104 (noting that although “[e]arly judicial decisions were vague about the constitutional source of the nondelegation doctrine,” the Court in more recent cases has begun to “confidently . . . assert that the [nondelegation] doctrine derives from Article I, Section 1”).

57. *See* JACK M. BEERMANN, *INSIDE ADMINISTRATIVE LAW: WHAT MATTERS AND WHY* 23 (2011) (noting that the principle that authority delegated to the executive branch must be “executive in nature” and not legislative was articulated in the Court’s early cases and “has not changed over time”).

58. *See infra* section I.B.1.

59. *See infra* section I.B.2.

1. The Institutional Reality of Rulemaking's Modern Role

Even before the Supreme Court began to plant the seeds for the nondelegation doctrine in cases like *Wayman v. Southard*, Congress began delegating rulemaking powers to the executive branch.⁶⁰ Indeed, congressional delegations of rulemaking authority began in the very first Congress. For example, the twenty-fourth statute enacted in 1789 provided that the government would continue to pay previously granted pensions “under such regulations as the President of the United States may direct.”⁶¹

Although many early congressional delegations of rulemaking power ran directly to the President and touched upon fairly narrowly defined topics, such as military, tax, and internal government affairs, things soon changed.⁶² As Congress began to legislate over a wider range of activities in the late nineteenth and early twentieth centuries, Congress created an alphabet soup of new regulatory agencies and “became increasingly willing to transfer rulemaking authority to the agencies it was creating.”⁶³

As a result of these and other broad delegations of rulemaking powers,⁶⁴ the importance of agency regulations in our legal system is hard to overstate.⁶⁵ Indeed, the bulk of new legal norms today are not set forth in newly enacted statutes.⁶⁶ In the 112th Congress, just 284 bills were enacted into law, and in the first session of the 113th Congress, just 72 bills were enacted into law.⁶⁷ In

60. 23 U.S. (10 Wheat.) 1, 42–43 (1825).

61. Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95; *see also* Act of July 22, 1790, ch. 33, 1 Stat. 137, 137 (providing that licenses for trade with American Indians were to be “governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe”).

62. *See* Merrill & Watts, *supra* note 1, at 495–98 (describing the growth of delegations of rulemaking power). *See generally* JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) (describing the progression of Congress’s delegations).

63. Merrill & Watts, *supra* note 1, at 497.

64. Many agencies’ broad rulemaking discretion has been heightened by catchall delegations of general rulemaking power, which the courts have (perhaps erroneously) interpreted to grant substantive rulemaking authority to agencies. *See* Merrill & Watts, *supra* note 1, at 471–73 (describing how courts in the 1960s began to routinely construe general rulemaking grants to authorize legislative rules and questioning whether this liberal interpretation of rulemaking grants is correct as a historical matter). These general rulemaking grants often instruct agencies to “make such rules and regulations . . . as may be necessary” to carry out or to administer the act. *Id.* at 471 (quoting Longshoremen’s & Harbor Workers’ Compensation Act, ch. 509, § 39(a), 44 Stat. 1424, 1442 (1927) (codified as amended at 33 U.S.C. § 939(a) (2012))) (internal quotation marks omitted).

65. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 355 (2012) (“The age of statutes has given way to an era of regulations . . .”); *see also* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 13–21 (4th ed. 2011) (demonstrating how the level of production of regulations far exceeded that of statutes beginning in the 1970s).

66. *See* *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”).

67. *See* *Advanced Search*, CONGRESS.GOV, <https://www.congress.gov/advanced-search> (set search parameters as “Search in: Legislation: Congress: is: 112 (2011–2012)” and “Search in: Legislation: Status of Legislation: is: Became Law”) (last visited Jan. 27, 2015); *id.* (set search parameters as

contrast, in 2011 alone, more than 3,800 new rules were published in the Federal Register, and in 2012, more than 3,700 rules were published.⁶⁸

Most important for purposes of this Article is that these agency regulations, when promulgated as “legislative” rules, carry the force and effect of law just as statutes do.⁶⁹ “Legislative” rules have been defined by courts as those rules that carry the force and effect of law because Congress “delegated legislative power to the agency and . . . the agency intended to exercise that power in promulgating the rule.”⁷⁰ Such legislative rules can bind courts and officers of the federal government, preempt state law, or require the states to take certain actions, grant rights, and impose obligations enforceable by civil or criminal penalties.⁷¹

Notably, legislative rules carry this legally binding effect even though the process used to create them differs significantly from the process used to enact statutes into law. To be enacted into law, statutes must obtain approval from both Houses and must be presented to the President with an opportunity for veto.⁷² In contrast, legislative regulations made by agencies (subject to certain defined exceptions) become legally binding after going through what is known as “notice-and-comment” rulemaking.⁷³ Notice-and-comment rulemaking requires agencies to issue a notice of proposed rulemaking to the public, to solicit comments from interested persons, and then to publish the final rule accompanied by what is known as a “statement of . . . basis and purpose,” which provides the agency’s reasons for adopting the rule and responds to significant comments received.⁷⁴ Thus, notice-and-comment rulemaking looks quite different from the legislative process. Nonetheless, the primary effect of statutes and legislative regulations is the same: Both create legally binding norms and carry the force and effect of law.

“Search in: Legislation: Congress: is: 113 (2013–2014)” and “Search in: Legislation: Latest Action: is before: 01/01/2014” and “Search in: Legislation: Status of Legislation: is: Became Law”) (last visited Jan. 27, 2015).

68. See *Federal Register Documents Pages Annual Percentage Change 1976-2013*, FEDERAL REGISTER, <https://www.federalregister.gov/uploads/2014/04/OFR-STATISTICS-CHARTS-ALL1-1-1-2013.pdf> (last visited Jan. 27, 2015).

69. See *supra* note 1 and accompanying text.

70. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); see also *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983) (“A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.”). In contrast, “nonlegislative” rules, which include interpretive rules and policy statements, lack the force and effect of law; they merely serve an advisory function. See *Merrill & Watts, supra* note 1, at 476–77.

71. See *Chadha*, 462 U.S. at 985–86 (White, J., dissenting).

72. U.S. CONST. art. I, § 7, cl. 2 (calling for bicameralism and presentment).

73. 5 U.S.C. § 553 (2012).

74. *Id.*; see also *infra* section III.D (discussing the procedural constraints imposed on agency rulemaking by Section 553 of the APA).

2. The Toothless “Intelligible Principle” Requirement

So how is it that the Court continues to insist pursuant to the nondelegation doctrine’s central premise that Congress may not delegate legislative power while, at the same time, Congress routinely delegates broad rulemaking powers to federal agencies and enables agencies to promulgate legislative rules on wide-ranging subjects that carry the force and effect of law?⁷⁵ The answer lies in what is known as the intelligible principle requirement—a requirement that might sound substantial but, in reality, is quite toothless.

The Supreme Court first clearly articulated what is now known as the intelligible principle requirement in *J.W. Hampton, Jr., & Co. v. United States*.⁷⁶ In that case, which involved a delegation to the executive branch to alter tariff rates,⁷⁷ the Court reiterated the nondelegation doctrine’s central premise that Congress may not delegate legislative power.⁷⁸ However, in explaining the line between unconstitutional delegations of *legislative* authority and constitutional delegations of discretionary authority to be exercised in the *execution* of the law, the Court used this now ubiquitous language: “If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁷⁹ Thus, after *J.W. Hampton*, the question in delegation cases became whether Congress had set forth a sufficiently intelligible principle in the statute such that the delegation of discretionary authority to the executive could be deemed a delegation of executive power rather than an unconstitutional delegation of legislative power.⁸⁰

Although the intelligible principle requirement conceivably could have evolved over time into a stringent requirement with teeth, the reality is that the Court has taken an extremely lenient view of what constitutes an intelligible principle.⁸¹ Rather than stressing the necessity of serious standards to guide agencies and to constrain their delegated discretion, the Court seems to look only at whether there is a complete lack of an intelligible principle.⁸² As the Court put it in *Yakus v. United States*: “Only if we could say that there is an *absence of standards* for the guidance of the Administrator’s action, so that it would be

75. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW* 7 (2d ed. 2012) (noting that the nondelegation doctrine, which “purports to prohibit Congress from delegating to agencies the power to make legally-binding policy decisions,” fits “awkwardly in a legal system in which agencies make far more legally-binding policy decisions than Congress”).

76. 276 U.S. 394 (1928).

77. *Id.* at 400.

78. *Id.* at 406–08.

79. *Id.* at 409 (emphases added).

80. Cf. Mallen, *supra* note 11, at 432 (noting that the sole test for impermissible delegations—the “intelligible principle” test—“advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not involve too much discretion”).

81. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 27 (2011).

82. See KEITH WERHAN, *PRINCIPLES OF ADMINISTRATIVE LAW* 59 (2008).

impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding [Congress's] choice of means for effecting [public policy].”⁸³ The courts, accordingly, routinely uphold delegations authorizing agencies to regulate pursuant to squishy commands, like regulate in the “public interest”⁸⁴ or set rates that will be “generally fair and equitable.”⁸⁵

Through its layering of the intelligible principle requirement on top of the central premise of the nondelegation doctrine, the Supreme Court has adopted a “discretionary interpretation” of the meaning of legislative power.⁸⁶ This discretionary reading of legislative power focuses on the degree of discretion that the rule promulgator exercises.⁸⁷ “Only if the promulgator has great discretion in determining the content of rules [would the Court] say that the promulgator exercises legislative power.”⁸⁸ This means, as Justice Scalia has put it, that “what is really at issue is whether there has been *any* delegation of legislative power, which occurs (rarely) when Congress authorizes the exercise of executive or judicial power without adequate standards.”⁸⁹ So long as rulemaking grants to agencies are accompanied by some kind of an intelligible principle (even a tremendously vague one), then the Court declares that the agencies are not exercising legislative power but rather are carrying out an executive function.⁹⁰

Given the toothless nature of the intelligible principle requirement,⁹¹ it is not surprising that scholars are quite unified in their disdain for the Court’s discretionary reading of legislative power. As Larry Alexander and Saikrishna Prakash have summed it up, apparently “no one regards the Constitution as actually

83. 321 U.S. 414, 426 (1944) (emphases added).

84. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

85. *Yakus*, 321 U.S. at 420.

86. *Merrill*, *supra* note 12, at 2116.

87. *Id.*

88. *Id.*

89. *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting); *see also* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001). Justice Scalia admits that “[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” *Id.* at 475 (quoting *Mistretta*, 488 U.S. at 417) (internal quotation marks omitted). However, he insists that this lawmaking power exists “only as an incident of executive function[.]” not as an exercise of legislative powers. *See* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 95 (2009).

90. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873, n.4 (2013) (“Agencies make rules (‘Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions’) . . . and have done so since the beginning of the Republic. . . . [B]ut they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”).

91. *See* Mallen, *supra* note 11, at 432 (calling the intelligible principle requirement fictitious); *see also* Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 157 (2012) (“It is, perhaps, a fiction to say that agencies are enforcing congressionally made law.”); Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 774 n.57 (2008) (noting that the Court has “fictionalized Congress’s grants of authority as something other than legislative power in order to maintain that they do not violate separation of powers”).

endorsing the Supreme Court's [doctrinal] approach to delegations."⁹² The Court nonetheless has stubbornly stuck to its discretionary reading of the legislative power—seemingly driven by its desire to accommodate the realities and the complexities of government.⁹³ The Court itself has fessed up to these practical concerns, explaining that its “jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁹⁴ By gravitating toward the discretionary reading of legislative power, the Court has been able to continue to insist that Congress may not delegate legislative power and, at the same time, allow Congress the flexibility it needs to seek assistance.⁹⁵ In addition, the Court has been able to avoid “second-guess[ing] Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law”—a task that the Court has “almost never felt qualified” to do.⁹⁶

This compromise that the Court struck—a pragmatic compromise that tries to accommodate the realities of modern rulemaking with the Court's longstanding insistence that Congress may not delegate its legislative powers—is not the only possible way of handling delegation issues in our country. To the contrary, as the next Part of this Article describes, one alternative approach would be for the Court to jettison the central premise of the nondelegation doctrine entirely, thereby freeing the Court to frankly admit that agencies can and routinely do exercise delegated legislative power.

92. Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1043 (2007).

93. Another example of the Court's pragmatism can be seen in its willingness to routinely allow Congress to delegate what looks like “judicial” power to agencies. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 847 (1986) (noting that “the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III” rather than by doctrinaire reliance on formal categories). Although this Article does not address delegations of judicial power to agencies, it is worth noting that there are similarities in the Court's approach to delegations of judicial and legislative power. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 773–74 (2002) (Breyer, J., dissenting) (noting that however much rulemaking and adjudicating “might resemble the activities of a legislature or court,” those powers do not fall “within the scope of Article I or Article III of the Constitution”); *id.* at 774 (“The terms ‘quasi legislative’ and ‘quasi adjudicative’ indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court.”).

94. *Mistretta*, 488 U.S. at 372; *see also* *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution . . .”).

95. *See* Merrill, *supra* note 12, at 2116 (noting that the discretionary definition of legislative power has enabled the Court “to defeat consistently claims that Congress has impermissibly delegated such powers”).

96. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)) (internal quotation marks omitted).

II. THE “CANDID APPROACH” AS AN ALTERNATIVE TO THE CURRENT NONDELEGATION DOCTRINE

Unsatisfied with the Court’s current treatment of the nondelegation doctrine, scholars have advocated for various alternative approaches.⁹⁷ One significant alternative that has emerged recently is what this Article will refer to as the “Candid Approach” to delegations. This approach would call on courts to jettison the nondelegation doctrine’s central premise and to frankly admit that Congress constitutionally can and routinely does delegate legislative power to agencies. As this Part describes, to date, the Candid Approach has been most clearly articulated by Justice John Paul Stevens and Professor Thomas W. Merrill.

A. INDIVIDUAL JUSTICES’ CALLS FOR A MORE CANDID APPROACH

Justice John Paul Stevens stands as the most prominent example of an individual Justice who has argued in favor of discarding the Court’s insistence that Congress cannot delegate legislative power and frankly acknowledging that rulemaking constitutes an exercise of legislative power.⁹⁸ Justice Stevens most clearly set out these views in a concurring opinion in *Whitman v. American Trucking Assn’s, Inc.*,⁹⁹ the Court’s most recent nondelegation doctrine case of note.

American Trucking involved the question of whether Section 109(b)(1) of the Clean Air Act (CAA), which gives the EPA the power to set National Ambient Air Quality Standards (NAAQS) that are “requisite to protect the public health” with “an adequate margin of safety,” violated the Constitution’s prohibition on the delegation of legislative authority.¹⁰⁰ The Court’s majority opinion, written by Justice Scalia, reiterated the nondelegation doctrine’s central premise that

97. For example, one proposed alternative, which has been referred to as the “formalist” or the “naïve” approach, would continue to embrace the nondelegation doctrine’s central premise that Congress may not delegate legislative power, yet would discard the Court’s discretionary reading of legislative power. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725 (2002). Those who advocate the formalist approach equate the legislative power only with the literal “authority to vote on federal statutes [and] to exercise other *de jure* powers of federal legislators.” *Id.* at 1723. A different competing proposal agrees with the nondelegation doctrine’s central premise prohibiting the delegation of legislative power, but adopts a functional definition of legislative power. Those who advocate this strict approach to the nondelegation doctrine argue that Congress routinely violates the Constitution by delegating legislative power to agencies. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 155–64 (1993); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 379–80 (2002).

98. See WERHAN, *supra* note 82, at 45 & n.11 (noting that Justice Stevens’s view that Congress may delegate legislative power is the “rare exception” to the Court’s steadfast insistence that “Congress cannot delegate its legislative power”).

99. 531 U.S. at 487–90 (Stevens, J., concurring).

100. *Id.* at 465 (majority opinion) (quoting 42 U.S.C. § 7409(b)(1) (2012)) (internal quotation marks omitted).

Congress may not delegate legislative power to agencies.¹⁰¹ Ultimately, however, the Court held that no such delegation of legislative power had occurred because the Act included an “intelligible principle” to guide the EPA—namely, an instruction that the NAAQS be set at a level that is “requisite” to protect public health.¹⁰²

In a separate concurring opinion, Justice Stevens, joined by Justice Souter, agreed with the majority that Section 109 of the CAA did not constitute an unconstitutional delegation of legislative power. He, however, disagreed with the reasoning that the Court had used to reach its conclusion. Specifically, Justice Stevens wrote:

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is “legislative” but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not “legislative power.” Despite the fact that there is language in our opinions that supports the Court’s articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is “legislative power.”¹⁰³

In supporting his view that the Court should simply “admit” that agency rulemaking is indeed legislative in nature,¹⁰⁴ Justice Stevens argued that “[t]he proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it.”¹⁰⁵ Here, he gravitated toward a functional definition of legislative power, asserting that the “legislative power” means the power to make binding rules of conduct for the future.¹⁰⁶ In Justice Stevens’s mind, “everyone would agree that [the NAAQS were] the product of an exercise of ‘legislative power’” if Congress instead of the EPA had promulgated the rules.¹⁰⁷ Thus, Justice Stevens argued that the “same characterization [was] appropriate when an agency exercises rulemaking authority” pursuant to a congressional delegation.¹⁰⁸ According to Justice Stevens, characterizing agency rules in this way would be constitutionally permissible and fully consistent with the text of Article I because nothing in

101. *Id.* at 472 (noting that the text of the Constitution permits “no delegation” of legislative powers).

102. *Id.* at 472–75.

103. *Id.* at 488 (Stevens, J., concurring) (footnote omitted).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 489.

108. *Id.*

the Constitution limits the authority of Congress to delegate its legislative power to others.¹⁰⁹

Although *American Trucking* is the most notable example of a case in which an individual justice has called for more honesty in the Court's nondelegation jurisprudence, it is not the only example. In 1983, Justice White articulated a decidedly functional view of rulemaking in *INS v. Chadha*, stating that "[t]here is no question but that agency rulemaking," which results in rules that have the force of law, "is lawmaking in any functional or realistic sense of the term."¹¹⁰ According to Justice White, "legislative power" can be and is "exercised by independent agencies and Executive departments" pursuant to congressional delegations of rulemaking authority.¹¹¹ In addition, in 1986, Justice Stevens foreshadowed some of what he later wrote in *American Trucking* when he asserted in *Bowsher v. Synar* that "[d]espite the statement in Article I of the Constitution that 'All legislative Powers herein granted shall be vested in a Congress of the United States,' . . . independent agencies do indeed exercise legislative powers."¹¹²

B. SCHOLARS' CALLS FOR A MORE CANDID APPROACH

Professor Thomas W. Merrill has been at the forefront of scholars arguing for abandonment of the notion that Congress may not delegate legislative powers.¹¹³ Like Justice Stevens, Professor Merrill has argued for a functional definition of legislative power, which would treat legislative rules as an exercise of legislative power because they create binding rules for the governance of

109. *Id.* After calling for a rejection of the nondelegation doctrine's central premise, Justice Stevens did not suggest abandoning the intelligible principle requirement. Instead, he asserted that Congress can delegate legislative power so long as the delegations provide a "sufficiently intelligible principle." *Id.* at 490. This seems an odd position to take. If rulemaking were viewed as a constitutional delegation of legislative power, it would seem that there would be no reason to maintain the intelligible principle requirement (other than perhaps a desire to respect *stare decisis*). The intelligible principle requirement, after all, operates to justify the fiction that rulemaking is an exercise of executive rather than legislative power so long as the delegation is sufficiently constrained.

110. 462 U.S. 919, 986 (1983) (White, J., dissenting).

111. *Id.* at 985.

112. 478 U.S. 714, 752 (1986) (Stevens, J., concurring).

113. See Merrill, *supra* note 12, at 2101 (arguing in favor of rejecting the nondelegation doctrine's basic premise that Congress may not delegate legislative power). Besides Professor Merrill, other scholars have suggested that Congress does routinely delegate legislative power to agencies and that the Court got it wrong when it interpreted the Constitution to prohibit the delegation of legislative power. For example, the leading administrative law treatise states that "[t]he Court probably was mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power." 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6 (4th ed. 2002). The same treatise also notes: "If legislative power means the power to make rules of conduct that bind everyone based on resolution of major policy issues, scores of agencies exercise legislative power routinely by promulgating what are candidly called 'legislative rules.'" *Id.* § 2.3. However, Professor Merrill's work sets forth by far the most detailed and perhaps the only express scholarly argument in favor of abandoning the Court's central premise that Congress may not delegate legislative power to agencies. See Merrill, *supra* note 12, at 2140–41 (noting that no one else "has expressly argued for exclusive delegation").

society.¹¹⁴ Also like Justice Stevens, Professor Merrill defends the constitutionality of Congress's routine delegation of legislative rulemaking power to agencies by arguing that the Constitution does not prohibit Congress from delegating its legislative power to others.¹¹⁵ Instead of prohibiting the delegation of legislative power, Professor Merrill argues that the Constitution should be read to include an "exclusive delegation doctrine," which vests in Congress the exclusive power to delegate to executive and judicial officers the power to act with the force of law.¹¹⁶ Furthermore, Professor Merrill takes the position that the intelligible principle requirement should be jettisoned.¹¹⁷

Professor Merrill is frank that the various arguments he relies upon—including arguments drawn from the structure of Article I, originalist sources, and considerations of precedent—do not "indubitably prove" that his approach is correct as a constitutional matter.¹¹⁸ Yet he argues that his approach is supportable as a matter of constitutional law and would best "preserve[] the vital understanding that Congress is the source of most governmental power, while accommodating a system of government capable of dealing with problems of a magnitude and complexity far beyond anything imaginable when the document was ratified."¹¹⁹

From a constitutional perspective, Professor Merrill seems correct that his proposed exclusive delegation approach is not the only possible reading of the Constitution. Indeed, even a quick look at the scholarly commentary—which includes differing views from respected scholars on the original meaning of Article I, Section One's Vesting Clause and how the term legislative power should be interpreted—belies the notion that any one reading of the Constitution is clearly and decisively correct.¹²⁰ Yet Justice Stevens and Professor

114. Merrill, *supra* note 12, at 2115–16, 2125–27.

115. *Id.* at 2181. Other scholars have reached similar conclusions. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("The Constitution does grant legislative power to Congress, but it does not in terms forbid delegations of that power, and I have been unable to find any indication, in the founding era, that such delegations were originally thought to be banned." (footnote omitted)).

116. Merrill, *supra* note 12, at 2101, 2181.

117. *Id.* at 2165. Professor Merrill deviates from Justice Stevens here. *See supra* note 109. Because it would seem that there would be no reason to keep the intelligible principle requirement alive if the Court accepted the notion that Congress can constitutionally delegate legislative power, *see* Merrill, *supra* note 12, at 2165, this Article—consistent with Professor Merrill's approach—assumes that adoption of the Candid Approach would jettison the intelligible principle requirement.

118. Merrill, *supra* note 12, at 2127.

119. *Id.* at 2181.

120. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298–99 (2003) (disagreeing with Posner and Vermeule's take on the meaning of legislative power); Lawson, *supra* note 97, at 376 (arguing that the Constitution does include a prohibition on the delegation of legislative power, which means that "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them" (quoting Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994)) (internal quotation marks omitted)); Posner & Vermeule, *supra* note 97, at 1723 (arguing that Article I's Vesting Clause simply means that "[n]either

Merrill have made persuasive cases for why it would be constitutionally permissible to jettison the Court's insistence that Congress may not delegate legislative power.¹²¹ Moreover, Justice Stevens's and Professor Merrill's approaches seem more likely to gain traction in the courts than some other approaches that have been proposed, such as approaches that would call upon the courts to invalidate large swaths of delegated rulemaking power.¹²² Thus, frankly acknowledging that Congress can and does delegate legislative power has real appeal—especially when viewed from a functional perspective that acknowledges the reality of rulemaking's modern role instead of threatening to unhinge the modern rulemaking enterprise.¹²³

Nonetheless, little scholarly attention has been given to analyzing how the Court's current approach to the nondelegation doctrine may have influenced administrative law as a whole, or what might happen to many of administrative law's most central doctrines if the Court were to abandon the nondelegation doctrine's central premise and frankly acknowledge rulemaking as a form of legislating.¹²⁴ Would key administrative law doctrines—many of which are

Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators”).

121. This Article does not aim to rehash or resolve ongoing debates about what the “best” reading of the Constitution is as an original matter. That subject has been thoroughly debated by others, and it has not yielded one clearly “correct” answer. *See, e.g.*, SCHOENBROD, *supra* note 97 (arguing that the Constitution prohibits the delegation of legislative power and thus requires Congress to set forth rules of conduct rather than merely goals in statutes); Alexander & Prakash, *supra* note 120, at 1298–99 (arguing that Posner and Vermeule's formal approach is untenable); Lawson, *supra* note 97, at 376 (arguing that the Constitution prohibits Congress from delegating “important” policy decisions); Merrill, *supra* note 12 (arguing that the Constitution can be read to embrace the exclusive delegation doctrine rather than the nondelegation doctrine); Posner & Vermeule, *supra* note 97 (advocating a technical reading of legislative power that would merely forbid Congress from delegating its *de jure* legislative powers). Rather, this Article—accepting the approach advocated by Justice Stevens and Professor Merrill as one plausible constitutional answer—looks beyond the constitutional parameters of the nondelegation doctrine itself and analyzes the doctrinal implications that the Candid Approach would have on broader administrative law principles. In an area like this one where the “correct” constitutional meaning as an original matter is murky at best, that task seems critical.

122. The formalist approach seems unlikely to gain sway with judges because it represents a novel and extremely literal reading of the Constitution. *See* Alexander & Prakash, *supra* note 120, at 1302 (arguing that the formalist approach is “normative[ly] implausib[le]”); Merrill, *supra* note 12, at 2125 (arguing that the formalist approach is “idiosyncratic” and that it is likely to be “rejected if presented to the courts”). In addition, a strict approach to the nondelegation doctrine, which has been proposed by Gary Lawson and David Schoenbrod, *see supra* note 97, threatens to cause major upheaval in the modern administrative state by invalidating large swaths of rulemaking powers that have long been delegated to agencies—something that most judges are unlikely to have the appetite for. *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring) (expressing a willingness to reconsider the Court's lax enforcement of the nondelegation doctrine).

123. *Cf.* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1598–99 (2008) (arguing against a constitutional interpretation that “would unhinge too much of our constitutional tradition and understanding” and arguing for the need to “look for other ways of addressing contemporary constitutional issues, that do not threaten so dramatically to disrupt our ongoing enterprise”).

124. As noted *supra* at note 22, Professor Merrill did briefly address some doctrinal implications in his work proposing the exclusive delegation doctrine. Most notable and relevant for purposes of this Article was his discussion of how *Chevron* deference might be impacted by the exclusive delegation

built on top of each other like a house of cards—become more cohesive as a whole? Or would the whole house of cards simply come toppling down? The next Part of this Article aims to fill this scholarly gap by exploring these important but previously overlooked questions.

III. EXPLORING THE DOCTRINAL RAMIFICATIONS OF RECOGNIZING RULEMAKING AS LEGISLATING RATHER THAN EXECUTING

This Part considers the impact that the Candid Approach would have on many of administrative law's most central doctrines: the test currently used to distinguish legislative from nonlegislative rules; *Chevron* deference; *Auer* deference; arbitrary and capricious review; procedural due process; and the judiciary's reading of statutory constraints imposed on notice-and-comment rulemaking.¹²⁵ As we will learn from looking at these key doctrines, administrative law is full of tension—fueled by the Court's insistence, on the one hand, that Congress may not delegate legislative power, and the Court's willingness, on the other hand, to uphold Congress's routine delegations of broad legislative rulemaking powers to agencies. This tension suggests that some key doctrines would be solidified and clarified if the Court rejected the nondelegation doctrine and adopted the Candid Approach in its place. Meanwhile, other doctrines would need to be altered.

A. DISTINGUISHING LEGISLATIVE FROM NONLEGISLATIVE RULES

One important doctrinal test in administrative law is the test used to distinguish legislative from nonlegislative rules. The line between these two types of rules is critical because only legislative rules have the force and effect of law.¹²⁶

approach. See Merrill, *supra* note 12, at 2171–75. His conclusions on *Chevron* align with those reached here. See *infra* notes 152–69 and accompanying text (discussing *Chevron* and its “force of law” test). However, his primary focus was not on systematically exploring the doctrinal ramifications of the exclusive delegation doctrine for administrative law as a whole, but rather it was on making the constitutional case for the exclusive delegation doctrine and analyzing various consequentialist arguments, such as general prodelegation and antidelegation arguments. Indeed, consistent with the constitutional focus of his work, many of the doctrinal implications that he did briefly discuss (such as his discussion of the nondelegation doctrine itself, subdelegation, and inherent presidential powers) had constitutional roots.

125. Administrative law is a notoriously complex subject full of different doctrines. Thus, other administrative law doctrines not explored here might also be solidified, altered, or clarified if the Candid Approach were adopted by the Court. These other doctrines might include the so-called *Accardi* principle, named after *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954), which provides that agencies must follow their own rules. See Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 600–03 (2006) (arguing that “the *Accardi* principle applies only if the agency has been delegated authority to make legislative rules by Congress”). In addition, another area of doctrinal impact could be the retroactive effect of regulations. Cf. *Prater v. U.S. Parole Comm’n*, 802 F.2d 948, 953–54 (7th Cir. 1986) (noting that the “rule against *ex post facto* laws applies to statutory changes and also (we may assume) to changes in administrative regulations *that represent an exercise of delegated legislative authority*” because “[t]he legislature should not be allowed to do indirectly what it is forbidden to do directly” (emphasis added)).

126. See *supra* note 1 (discussing the difference between legislative and nonlegislative rules).

Furthermore, to have binding legal effect, legislative rules usually must go through the notice-and-comment process set forth in Section 553 of the Administrative Procedure Act (APA), whereas nonlegislative rules are exempt from notice-and-comment requirements.¹²⁷

In determining which rules are legislative rules for purposes of the APA's notice-and-comment requirements, the courts of appeals—particularly the D.C. Circuit—have held that (1) Congress must have “*delegated legislative power* to the agency”; and (2) the agency must have “intended to exercise that power in promulgating the rule.”¹²⁸ Yet despite the two-prong nature of this test (which is sometimes referred to as the *American Mining Congress* test), courts usually have ignored the first part of the inquiry when determining whether a particular rule is legislative and thus subject to Section 553's notice-and-comment process. Indeed, as Professor Thomas W. Merrill and I have described elsewhere, courts have shown serious “judicial indifference” towards the first part of the test.¹²⁹ In effect, “courts have assumed agencies have the power to act with the force of law, and have asked [only] whether the agency, in its discretion, has exercised this power.”¹³⁰

This judicial indifference is a bit “puzzling.”¹³¹ However, it may be somewhat more understandable when the nondelegation doctrine is taken into account. After all, if courts squarely asked the question of whether an agency has been delegated legislative power sufficient to pass the first prong of the *American Mining Congress* test, then they would be squarely confronted with the nondelegation doctrine's admonition that Congress may not delegate legislative power. Instead of squarely asking whether Congress has affirmatively delegated legislative power to an agency, courts simply seem to assume that any rulemaking grant (no matter how general) that passes muster under the toothless nondelegation doctrine is sufficient to grant delegated rulemaking power to the agency and to pass the first prong of the *American Mining Congress* test.¹³² In other words, courts simply do not take seriously the question of whether

127. See 5 U.S.C. § 553 (2012); see also *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 243 (D.D.C. 2010) (“Notice and comment procedures are only required under APA [§ 553] for legislative rules with the force and effect of law; ‘interpretive rules, general statements of policy, or rules of agency organization procedure, or practice’ are exempted.” (quoting 5 U.S.C. §553(b)(A))).

128. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (emphasis added); see also *Vance v. Hegstrom*, 793 F.2d 1018, 1022–23 (9th Cir. 1986) (noting that interpretive rules are issued “without delegated legislative power”); *Am. Postal Workers Union v. U.S. Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983) (“A rule can be legislative only if *Congress has delegated legislative power* to the agency and if the agency intended to use that power in promulgating the rule at issue.” (emphasis added)).

129. Merrill & Watts, *supra* note 1, at 478.

130. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 827–28 (2002).

131. Merrill & Watts, *supra* note 1, at 478 (noting that the judiciary's indifference toward the first part of the test is “puzzling”).

132. See *Am. Mining Cong.*, 995 F.2d at 1109.

Congress did in fact empower the relevant agency to act with the force of law by issuing a legislative rule—choosing to read even vague, general grants of rulemaking authority as a sufficient conferral of legislative rulemaking power.¹³³ Whether intentional or not, this helps to mask what otherwise would likely be a direct conflict between the first prong of *American Mining Congress* test, which requires a delegation of legislative power to an agency, and the nondelegation doctrine's central premise, which prohibits delegations of legislative power.

If the Candid Approach to delegation were adopted by courts and the central premise of the nondelegation doctrine were discarded, then it would be harder for courts to continue to gloss over whether Congress actually has delegated legislative power to an agency. Instead, adoption of the Candid Approach would highlight the need for careful judicial scrutiny of whether Congress had in fact delegated such power. This would help to reinforce notions of legislative supremacy—underscoring that “[a]gencies can issue edicts that have the effect of statutes *only* if Congress delegates to them the authority to do so.”¹³⁴ At least in theory, the Court already has bought into this general principle of legislative supremacy. For instance, in *Chrysler Corp. v. Brown*, the Court stated: “The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”¹³⁵ Yet in reality, the judiciary's application of so many administrative law doctrines—such as its inattention to the first prong of the *American Mining Congress* test—demonstrates that the courts have failed to take seriously the notion that agencies act as Congress's true delegate. Without a delegation of legislative power from Congress to the agency, the agency would have no power to act in a binding manner.

B. JUDICIAL REVIEW DOCTRINES

Key judicial review doctrines also form part of the body of administrative law that is intertwined with the nondelegation doctrine's current formulation. This section analyzes the impact that adoption of the Candid Approach would have on three central scope of review doctrines: *Chevron* deference;¹³⁶ *Auer* deference;¹³⁷ and arbitrary and capricious review.¹³⁸

133. See Merrill & Watts, *supra* note 1, at 473 (noting that courts generally assume that “facially ambiguous rulemaking grants always include the authority to adopt rules having the force of law”). *But see* *Chrysler Corp. v. Brown*, 441 U.S. 281, 303–09 (1979) (holding that a broad “housekeeping” grant was not sufficient to provide the Office of Federal Contract Compliance Programs with the authority to promulgate the regulation at issue).

134. Merrill & Watts, *supra* note 1, at 590 (emphasis added).

135. 441 U.S. at 302.

136. See *infra* section III.B.1.

137. See *infra* section III.B.2.

138. See *infra* section III.B.3.

1. *Chevron* Deference

Chevron deference—named after the Court’s landmark 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—calls upon courts to defer to agencies’ reasonable interpretations of ambiguity in the statutes that they administer.¹³⁹ In *Chevron* itself, the Court justified this rule of deference by referring to notions of congressional delegation: “If Congress has explicitly left a gap for the agency to fill, there is an *express delegation of authority* to the agency to elucidate a specific provision of the statute by regulation.”¹⁴⁰ However, the Court also relied upon general principles of expertise and accountability, noting that politically accountable agencies are better suited than courts to choose between competing policies when filling statutory “gap[s].”¹⁴¹ Thus, the *Chevron* decision led to significant debate among scholars about whether *Chevron*’s rule of mandatory deference rested on notions of congressional delegation, notions of accountability grounded in quasi-separation of powers principles, or something else.¹⁴²

In *Christensen v. Harris County*¹⁴³ and then again in *United States v. Mead Corp.*,¹⁴⁴ the Supreme Court weighed in on the issue, clarifying that *Chevron* does indeed rest on notions of congressional delegation. Specifically, in *Mead*, the Court explained that courts must defer to reasonable agency interpretations of statutory ambiguities where Congress has delegated power to the agency to act with the “force of law” and where the agency has acted pursuant to that delegation.¹⁴⁵ Agencies interpreting statutory ambiguities, in other words, are awarded significant deference precisely because they are assumed to be acting with the force of law pursuant to a congressional delegation of lawmaking power. Although the Court in *Christensen* and *Mead* did not precisely define which agency interpretations should be deemed to be interpretations that carry the force of law, the cases did make clear that the fruits of notice-and-comment rulemaking (that is, legislative rules) usually are eligible for *Chevron* deference.¹⁴⁶ In contrast, the Court explained that nonbinding rules, such as “interpretations contained in policy statements, agency manuals, and enforcement

139. 467 U.S. 837, 844 (1984).

140. *Id.* at 843–44 (emphasis added).

141. *Id.* at 865–66.

142. See Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1005 (2007) (“Some scholars saw *Chevron* as resting on ‘quasi-separation of powers’ principles, including notions of accountability, legislative supremacy, and competence, whereas others read *Chevron* as resting on notions of Congress’s delegatory intent.”).

143. 529 U.S. 576, 587 (2000).

144. 533 U.S. 218, 226–27 (2001).

145. *Id.* (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”); see also *Christensen*, 529 U.S. at 587.

146. See *Mead*, 533 U.S. at 227 (noting that a delegation of authority to act with the force of law “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent”).

guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”¹⁴⁷

Despite the superficial clarity of *Mead*'s force of law test, the reality is that *Mead* has not always been followed by the courts, and it has been bemoaned for creating significant uncertainty and confusion.¹⁴⁸ Just one year after *Mead* was handed down, for instance, the Court muddled matters in *Barnhart v. Walton* when it stressed that even where notice-and-comment rulemaking is absent, an agency interpretation might nonetheless warrant *Chevron* deference based on a grab bag of different factors, including “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.”¹⁴⁹ Scholars have decried the confusion that this all-things-considered approach to *Chevron* has engendered, and they have pointed out that *Mead*'s force of law test has led to perpetual chaos and confusion in the lower courts.¹⁵⁰

This confusion surrounding *Mead* and *Chevron*'s delegatory rationale can be seen in four recent debates involving the reach and parameters of *Chevron* deference—debates that might well have been much easier to resolve if the Court had been operating under the Candid Approach in place of the current nondelegation doctrine. These debates involve questions concerning: (a) what it means for Congress to give agencies the power to act with the “force of law”; (b) whether *Chevron* should apply to agency interpretations of their own jurisdiction; (c) whether *Chevron* should apply to agency interpretations involving preemption of state law; and (d) whether *Chevron* should apply to an agency construction that overrides a judicial precedent.

a. The Meaning of the “Force of Law.” One of the biggest debates that *Mead*'s force of law test has prompted involves what it means for Congress to have delegated to an agency the power to act with the force of law. *Mead* itself helped to fuel this confusion by explaining only that a delegation of authority to act with the force of law “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”¹⁵¹

147. *Christensen*, 529 U.S. at 587.

148. See generally Bressman, *supra* note 27 (describing how *Mead* has muddled judicial review).

149. 535 U.S. 212, 222 (2002).

150. See Bressman, *supra* note 27, at 1445–46 (describing the confusion that has flowed from the “force of law” test set forth in *Mead*); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 719–20 (2002) (asserting that that *Mead* has caused “chaos” by helping to create “a cumbersome, unworkable regime under which courts must draw increasingly fine distinctions using impossibly vague standards”).

151. *Mead*, 533 U.S. at 227 (emphasis added).

The lower courts have responded to this lack of guidance in two main ways. First, as with the test used to distinguish legislative from nonlegislative rules,¹⁵² courts often duck the *Mead* inquiry. Sometimes they do this by glossing over the first part of *Mead*'s inquiry—which asks whether Congress “delegated authority to the agency generally to make rules carrying the force of law”¹⁵³—and focusing their attention instead on whether the *agency* intended to act with the force of law pursuant to that delegation.¹⁵⁴ Or more often they will simply duck the entire two-pronged *Mead* inquiry by ruling that the government's interpretation wins regardless of whether *Chevron* is applied, thereby “pretermitt[ing] the theoretical question of *Chevron*'s scope.”¹⁵⁵ This practice has become so widespread that scholars have coined a term for it: *Chevron* avoidance.¹⁵⁶

Second, even when the lower courts do pay attention to the first part of the *Mead* inquiry, they generally give the inquiry short shrift. Usually, courts simply point in a fairly cursory manner to some general rulemaking grant, simply assuming that the rulemaking grant gives the agency the power to act with the force of law.¹⁵⁷ Rarely do courts analyze the specific rulemaking grant at issue to determine if Congress actually intended to give the agency the power to act with the force of law over the particular issue.¹⁵⁸

There are many possible causes of the judiciary's inattention to the first prong of the *Mead* inquiry,¹⁵⁹ and it is hard to say whether the nondelegation doctrine—which contradicts *Mead* by providing that Congress may not delegate legislative

152. See *supra* notes 127–36 and accompanying text.

153. *Mead*, 533 U.S. at 226–27.

154. See, e.g., *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826–27 (9th Cir. 2012) (focusing on how litigating positions were not developed by the agency with a lawmaking pretense in mind).

155. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–29 (2009); see also, e.g., *Durr v. Shinseki*, 638 F.3d 1342, 1348 (11th Cir. 2011) (avoiding the question whether *Chevron* applies because it “makes no difference” to the case); *PDK Labs., Inc. v. DEA*, 438 F.3d 1184, 1197–98 (D.C. Cir. 2006) (avoiding the *Mead* inquiry); *Springfield, Inc. v. Buckles*, 292 F.3d 813, 817–18 (D.C. Cir. 2002) (same).

156. See Bressman, *supra* note 27, at 1464 (noting how courts engage in *Chevron* avoidance); Vermeule, *supra* note 155, at 1127–29 (describing the phenomenon of *Chevron* avoidance). Perhaps it should more aptly be named “*Mead* avoidance” as it allows courts to skip the *Mead* inquiry and proceed directly to *Chevron*.

157. See, e.g., *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011) (holding that a general rulemaking grant authorizing Treasury to “prescribe all needful rules and regulations for the enforcement of the Internal Revenue Code” was sufficient to serve as an indicator of a congressional delegation meriting *Chevron* treatment (quoting 26 U.S.C. § 7805(a) (2006))); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005) (concluding in a cursory fashion that the FCC has “the authority to promulgate binding legal rules” because Congress has delegated to the Commission the authority to “execute and enforce” the Communications Act and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act (quoting 47 U.S.C. §§ 151, 201(b) (2000)) (internal quotation marks omitted)).

158. One such rare example can be found in *Gonzales v. Oregon*, 546 U.S. 243 (2006). There, the Court carefully parsed various rulemaking grants before determining that the rulemaking grants did not delegate to the Attorney General the power to promulgate the regulation at issue. *Id.* at 259–66.

159. Perhaps the most plausible explanation is that the case law enables courts to generally assume that agencies have rulemaking powers no matter how general and vague the rulemaking grant at issue.

power—is one of the causes of the judiciary’s neglect of *Mead*’s first prong. However, even if the nondelegation doctrine is not the root cause of courts’ indifference toward the first prong of *Mead*, it is undeniable that tension exists between *Mead* and the nondelegation doctrine. After all, it would be quite difficult—almost comical—for courts to insist with a straight face that Congress may not delegate legislative power to agencies, and yet also to insist pursuant to *Mead* that Congress must delegate to an agency the power to act with the force of law before the agency will receive *Chevron* deference.¹⁶⁰

If the Supreme Court frankly admitted in the delegation context that Congress can and routinely does delegate legislative power to agencies, then the first prong of *Mead* might be reformulated—at least in the rulemaking context—to ask whether Congress has given the agency the power to promulgate legally binding, legislative rules on the question at issue.¹⁶¹ This would focus the inquiry of the first prong of *Mead* on whether Congress empowered the agency to issue legislative rules rather than on the more amorphous force of law inquiry. Then the second prong of *Mead* would focus on whether the agency did, in fact, demonstrate its intention to invoke the legislative power delegated to it by Congress by, for example, using requisite procedures to promulgate the rule.

Admittedly, asking whether Congress has delegated legislative power to an agency (à la the Candid Approach) might at first blush seem essentially the same as asking whether Congress has given the agency the power to act with the force of law (à la the current *Mead* formulation). After all, the evidence that courts would look to when determining both inquiries would likely be similar, involving things like the language and history of the delegation. Nonetheless, the distinction is worth making because it would highlight that legislative power flows from Congress and that, as a result of legislative supremacy, courts must carefully police whether Congress has in fact delegated primary interpretive authority to an agency in a given instance. When applying *Mead*’s current force of law formulation, courts do not take seriously this notion that agencies operate as delegates of Congress. They, for example, generally assume without analysis that even vague, general rulemaking grants give agencies broad power to promulgate legislative rules.¹⁶² And, as the grab bag of factors listed in *Barnhart v. Walton* illustrates,¹⁶³ courts do not even always focus the *Mead* inquiry on whether the agency has the power to act with the force of law.¹⁶⁴ Therefore, adoption of the Candid Approach would force courts to take more seriously the

See Merrill & Watts, *supra* note 1, at 473 (noting the general assumption that “took hold that facially ambiguous rulemaking grants always include the authority to adopt rules having the force of law”).

160. Cf. Merrill, *supra* note 12, at 2172 (noting that “strict enforcement of the nondelegation doctrine would seem to cut the legs out from under *Chevron*”).

161. This Article does not address how *Mead* should apply in the adjudicatory realm.

162. See *supra* notes 157–58 and accompanying text.

163. 535 U.S. 212, 222 (2002).

164. See *supra* text accompanying note 149.

notion that agencies operate at the will of Congress. The Court has recognized this general notion in theory in cases like *Chrysler Corp. v. Brown*,¹⁶⁵ but has frequently failed to take it seriously when crafting and applying specific administrative law doctrines like *Mead*'s force of law test and the test used to distinguish legislative and nonlegislative rules.¹⁶⁶

Of course, elevating courts' scrutiny of whether Congress has indeed delegated legislative power to an agency (and has chosen an agency to serve as the primary interpreter of statutory ambiguity) would likely limit the universe of rules that would be eligible for *Chevron* deference. This is because more rules would be found to lack the force of law and to be nonlegislative rules. Thus, fewer agency rules would receive *Chevron* deference, and many rules would presumably be eligible only for *Skidmore* deference.¹⁶⁷ Nonetheless, Congress could change this state of affairs because Congress is the body "entitled to signal whether an agency can exercise primary interpretive authority in a given instance."¹⁶⁸

b. Jurisdictional Questions. Yet another area of the Court's *Chevron* jurisprudence that likely would be clarified by adoption of the Candid Approach is the question of whether *Chevron* should apply to agency interpretations of their own "jurisdiction"—meaning the scope of their authority. After many years of debate among scholars and the courts about whether *Chevron* deference should apply to jurisdictional questions,¹⁶⁹ the Supreme Court resolved this issue recently in *City of Arlington v. FCC*.¹⁷⁰ Writing for the Court, Justice Scalia emphatically rejected the notion of a jurisdictional exception to *Chevron* deference.¹⁷¹ Justice Scalia reasoned for the Court that the distinction between "jurisdictional" and "nonjurisdictional" issues in the agency context is "illusory."¹⁷² As he saw it, there is no difference at all between an agency's exceeding the scope of its authority (its jurisdiction) and exceeding the authorized application of authority that it unquestionably has.¹⁷³

165. 441 U.S. 281, 302 (1979) ("[T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

166. See *supra* text accompanying note 135.

167. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

168. *Merrill & Watts*, *supra* note 1, at 591.

169. *Compare* *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring) ("[I]t is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate."), *with id.* at 386–87 (Brennan, J., dissenting) ("[T]his Court has never deferred to an agency's interpretation of a statute designed to confine the scope of its jurisdiction."). See generally Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009) (discussing debate over whether courts should deny *Chevron* deference to questions of agency jurisdiction).

170. 133 S. Ct. 1863 (2013).

171. *Id.* at 1868, 1874–75.

172. *Id.* at 1868–70.

173. *Id.* at 1869–70.

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented.¹⁷⁴ Central to Chief Justice Roberts's dissent was his view that agencies—although they fit most comfortably within the Executive branch—as a “practical matter” do exercise “legislative” power when they promulgate regulations that carry the force of law.¹⁷⁵ Indeed, Chief Justice Roberts went so far as to assert that “the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, ‘in the public interest’—can perhaps be excused for thinking that it is the agency really doing the legislating.”¹⁷⁶

According to Chief Justice Roberts, the vast powers exercised by agencies and the binding nature of legislative regulations counsel that before a court grants *Chevron* deference to an agency, the court must “on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact *delegated to the agency lawmaking power* over the ambiguity at issue.”¹⁷⁷ After all, the courts give *Chevron* deference to permissible agency interpretations, as Chief Justice Roberts put it, precisely “*because* Congress has delegated to the agency the authority to interpret those ambiguities ‘with the force of law.’”¹⁷⁸

Chief Justice Roberts's dissent in *City of Arlington* does not openly embrace the Candid Approach.¹⁷⁹ Yet Chief Justice Roberts does admit that agencies routinely exercise lawmaking power. Specifically, Chief Justice Roberts wrote:

An agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy *from a delegation of lawmaking power from Congress to the Executive*. Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. In the present context, that means ensuring that the Legislative Branch *has in fact delegated lawmaking power to an agency* within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.¹⁸⁰

174. *Id.* at 1877 (Roberts, C.J., dissenting).

175. *Id.* at 1878–79.

176. *Id.* at 1879.

177. *Id.* at 1880 (emphasis added).

178. *Id.*

179. *See supra* section II.A.

180. *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting) (emphases added) (citation omitted).

The majority responded to this portion of the dissent by asserting that the dissent “overstates when it claims that agencies exercise ‘legislative power.’”¹⁸¹ The Court acknowledged that “[a]gencies make rules” that “take ‘legislative’” forms.¹⁸² But—consistent with the nondelegation doctrine’s longstanding central premise—the Court stressed that rulemaking activities are “exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”¹⁸³

Chief Justice Roberts, in *City of Arlington*, does not go so far as to state that Congress *constitutionally* can delegate legislative power—the approach Justice Stevens took in his concurring opinion in *American Trucking*.¹⁸⁴ Indeed, *City of Arlington* was not even a nondelegation case but rather a case focused on the niceties of the *Chevron* doctrine. Yet Chief Justice Roberts’s frank recognition of the fact that Congress does delegate lawmaking power to agencies led him to stress that the courts must carefully police the boundaries of Congress’s delegations.¹⁸⁵ As the Chief Justice put it, it would make no sense for the courts to defer to an agency on what the law is unless the legislative branch has indeed delegated lawmaking power to the agency.¹⁸⁶

Even though *City of Arlington* was not about the nondelegation doctrine per se, it nicely illustrates how adoption of the Candid Approach likely would have altered the Court’s resolution of *City of Arlington*. Were the Court operating under the Candid Approach, Chief Justice Roberts’s dissent in *City of Arlington* would win the day, and courts’ focus would be on policing the boundaries of what Congress intended to delegate.¹⁸⁷ No longer could the courts afford to continue to ignore whether Congress did indeed delegate legislative power to the agency sufficient to justify giving the agency *Chevron* deference. Rather, the question of congressional delegation would be brought front and center.

c. Preemptive Agency Interpretations. The propriety of giving *Chevron* deference to agencies’ preemptive determinations presents another area that the

181. *Id.* at 1873 n.4 (majority opinion).

182. *Id.*

183. *Id.*

184. See *supra* section II.A (discussing Justice Stevens’s opinion in *American Trucking*).

185. Chief Justice Roberts, in other words, seems to say that if Congress is allowed to delegate away vast powers to agencies, then courts must be strict about providing a judicial check to ensure that agencies stay within the bounds of their delegated authority.

186. *City of Arlington*, 133 S. Ct. at 1880 (Roberts, C.J., dissenting).

187. Several years before *City of Arlington* was decided, Thomas W. Merrill reached a similar conclusion about the impact that his proposed exclusive delegation doctrine would have on debate about the existence of a jurisdictional exception to *Chevron*. See Merrill, *supra* note 12, at 2173–74 (“The logic of the exclusive delegation doctrine suggests that courts should not give *Chevron* deference to agencies with respect to questions that implicate the scope of the agency’s jurisdiction. If agencies have no inherent authority to act with the force of law, but are dependent on a delegation from Congress for such authority, then it is important that courts enforce the limits of the delegation.”).

Candid Approach might impact.¹⁸⁸ In what would seem to be a contravention of the nondelegation doctrine's central premise, the Supreme Court has accepted the notion that agencies may preempt state law when acting pursuant to a congressional delegation of authority.¹⁸⁹ For example, in *City of New York v. FCC*, the Court explained:

The Supremacy Clause of the Constitution gives force to [administrative preemption] by stating that “the Laws of the United States which shall be made in Pursuance” of the Constitution “shall be the supreme Law of the Land.” *The phrase “Laws of the United States” encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.* For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, we have also recognized that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation”¹⁹⁰

The Court's embrace of this notion that the “Laws” of the United States do include agency regulations promulgated pursuant to congressional delegations of power has led to questions about whether and when courts should defer to agency interpretations about the preemptive reach of statutes and regulations. And not surprisingly, the courts are all over the map on this issue.¹⁹¹ In an attempt to bring more order to this chaotic state of affairs, scholars have proposed many different approaches, such as “universal deference” and “universal nondeference,” but, as one scholar has noted, the Supreme Court “continues to apply deference haphazardly from case to case with no clearly articulated reason for its variation.”¹⁹²

This doctrinal confusion likely would be clarified if the Candid Approach were adopted and if agency rulemaking was frankly admitted to constitute an exercise of legislative power. Specifically, the logic of the Candid Approach would force courts to take more seriously the notion that agencies operate as delegates of Congress, suggesting that agencies should receive *Chevron* deference for their preemptive interpretations when and only when Congress has

188. See generally William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

189. See, e.g., *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 18 (2002) (noting that courts must “interpret the statute to determine whether Congress has given [the agency] the power to act as it has” before allowing a regulation to intrude into areas traditionally regulated by the states); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (holding that “a federal agency acting within the scope of its congressionally delegated authority may [preempt] state regulation”).

190. 486 U.S. 57, 63–64 (1988) (emphasis added) (citations omitted).

191. Cf. Gregory M. Dickinson, *Calibrating Chevron for Preemption*, 63 ADMIN. L. REV. 667, 680 (2011) (“The Court’s treatment of *Chevron*’s applicability to questions of federal preemption is notoriously convoluted.”).

192. *Id.* at 669.

expressly delegated to the agency preemptive rulemaking power and the agency intended to act pursuant to that delegation.¹⁹³ Congress, after all, can use its legislative powers to enact laws that preempt state laws,¹⁹⁴ and Congress can delegate to agencies the authority to make legally binding rules that preempt state law.¹⁹⁵ Thus, because *Chevron* rests on notions of congressional delegation, an agency may be entitled to receive *Chevron* deference for its preemptive interpretation only where the agency interpretation is set forth in a legally binding format, such as a legislative rule, that Congress has authorized the agency to make. Reasoning along these lines would not only bring greater clarity to the question of when *Chevron* deference applies to preemptive interpretations, but it also would align with at least one recent Supreme Court decision, *Wyeth v. Levine*.¹⁹⁶ In that case, Justice Stevens, writing for a five-Justice majority, observed that conclusions about preemptive effect are for the courts to make absent an express “delegation” of preemptive authority to the agency.¹⁹⁷

Furthermore, adoption of the Candid Approach also would help to better justify the threshold notion that the phrase “Laws of the United States” found in the Supremacy Clause “encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization.”¹⁹⁸ As David S. Rubenstein recently noted, the Supreme Court has “offered virtually no explanation of why it treats administrative regulations like statutes for purposes of the Supremacy Clause.”¹⁹⁹ Part of the reason for why an explanation has not been forthcoming may well be the current nondelegation doctrine. After all, it would require an extremely strained reading of the Constitution for the Court to explain with a straight face why, on the one hand, the “Laws of the United States” should include agency regulations in the preemption context when, on the other hand, the nondelegation doctrine’s

193. Cf. Merrill, *supra* note 188, at 771 (“[T]he *Chevron* standard should apply to agency opinions about preemption in only one circumstance: where Congress has expressly delegated authority to the agency to preempt and the agency has exercised this delegated authority. *Chevron* is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law.”). As Professor Merrill has explained, an “express” delegation of preemptive authority is necessary to overcome the “default” position “that courts have the final word about whether state law is displaced.” *Id.* at 767.

194. U.S. CONST. art. VI, cl. 2.

195. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986).

196. 555 U.S. 555 (2009).

197. *Id.* at 577 (“[A]gencies have no special authority to pronounce on pre-emption absent delegation by Congress.”); see also Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 15 (2011) (reading *Wyeth* as insisting “that conclusions of preemptive effect are ultimately for the courts to make in their independent judgment, at least absent an express delegation to an agency of preemptive authority”).

198. *City of New York v. FCC*, 486 U.S. 57, 63 (1988). Some scholars have expressed discomfort with this notion. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1458 (2001) (arguing that the Supremacy Clause recognizes “only three forms of federal law as ‘the supreme Law of the Land’: the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States”).

199. David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1153–54 (2012).

central premise is that Congress may not delegate legislative powers.²⁰⁰

d. Overriding Stare Decisis. A final recent *Chevron* debate involved the question of whether *Chevron* deference should apply to agency interpretations of statutory ambiguity that override judicial precedents. In other words, can *Chevron* deference trump stare decisis? Although the Supreme Court resolved the issue in 2005 in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,²⁰¹ the issue may well have been much easier to resolve had the Court been operating under the Candid Approach instead of the current nondelegation doctrine.

In *Brand X*, the Ninth Circuit declined to apply *Chevron* deference to an interpretation of the Communications Act issued by the FCC because the court thought that the FCC's interpretation was foreclosed by a prior Ninth Circuit precedent, which had adopted a conflicting interpretation.²⁰² The Supreme Court ultimately held that the Ninth Circuit was incorrect and that *Chevron* deference can indeed trump stare decisis. Writing for the Court, Justice Thomas justified allowing *Chevron* deference to trump stare decisis by relying on the congressional intent rationale that underpins *Chevron*.²⁰³ In essence, his argument was that Congress gives agencies, not courts, the power to resolve ambiguities in statutes implemented by agencies. Thus, agencies should not be foreclosed from exercising interpretive power delegated to them by Congress simply because a court happened to decide the matter first.²⁰⁴ Instead, judicial precedents interpreting ambiguity in agency-administered statutes merely serve as "provisional precedent" subject to subsequent override by agencies.²⁰⁵

If the Court rejected the nondelegation doctrine's central premise and frankly acknowledged rulemaking as an exercise of legislative power, nothing about *Brand X*'s ultimate rule allowing *Chevron* to trump stare decisis would need to change. Rather, the logic of the Candid Approach would make it even easier to explain *Brand X*'s rule that *Chevron* trumps stare decisis. Simply put, *Brand X*

200. Rubenstein is one of the few scholars who has noticed and articulated this conflict between the nondelegation doctrine and agency preemption. See David S. Rubenstein, *The Paradox of Administrative Preemption*, HARV. J.L. & PUB. POL'Y (forthcoming) (manuscript at 7), available at <http://ssrn.com/abstract=2379627> (noting that if agency action qualifies as "Law" that can preempt state law, then it should be void under the modern nondelegation doctrine). In his draft article, Rubenstein quite appropriately asks: "So, how is it that agency action *is* Law for federalism purposes, yet simultaneously is *not* Law for separation-of-powers purposes? Of more concern, why is this structural contradiction possible?" *Id.* (manuscript at 3).

201. 545 U.S. 967 (2005).

202. *Id.* at 982.

203. *Id.* at 982–83.

204. *Id.* at 983 ("[W]hether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur."):

205. See Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272 (2002) (coining the phrase "provisional precedent" in the *Chevron* context).

could be explained on the ground that Congress itself can override judicial interpretations of statutes by rewriting the statute,²⁰⁶ and hence agencies—acting as subordinate legislatures pursuant to delegations from Congress—should be able to do so, too.

2. *Auer* Deference

Another central scope of review doctrine in administrative law is *Auer* deference—sometimes referred to as *Seminole Rock* deference.²⁰⁷ Whereas *Chevron* deference calls for deference to an agency’s interpretation of a statute enacted by Congress,²⁰⁸ *Auer* deference calls for courts to defer to an agency’s interpretation of its own regulations.²⁰⁹ Specifically, pursuant to *Auer*, the courts defer to an agency’s interpretation of its own regulations when the agency interpretation is not “plainly erroneous or inconsistent with the regulation.”²¹⁰

Although the Court has applied *Auer* deference in recent cases,²¹¹ disquiet surrounding *Auer* deference has been mounting.²¹² Just last Term in *Decker v. Northwest Environmental Defense Center*, for example, Chief Justice Roberts and Justice Alito indicated their willingness to reconsider *Auer* deference in an appropriate case,²¹³ and Justice Scalia argued in favor of abandoning *Auer* altogether even though he himself authored the Court’s unanimous opinion in *Auer*.²¹⁴ The main thrust of Justice Scalia’s newfound distaste for *Auer* defer-

206. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332–33 (1991) (discussing various examples of Congress overriding statutory interpretations issued by the Court).

207. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency’s interpretations of its own regulations are controlling unless “plainly erroneous or inconsistent with the regulation”). *Seminole Rock* deference was applied in the case of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and the term “*Auer* deference” is now used interchangeably with the term “*Seminole Rock* deference.”

208. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

209. *Auer*, 519 U.S. at 461.

210. *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)) (internal quotation marks omitted).

211. See, e.g., *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (deferring to the EPA’s interpretation under *Auer* deference).

212. See, e.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“[W]hile I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity.”); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (arguing against *Seminole Rock* deference and in favor of a “standard that imposes an independent judicial check on the agency’s determination of regulatory meaning”); Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 ENVTL. L. 849, 879 (2013) (arguing that courts should “get rid of *Auer*’s approach” and replace it with an approach that takes into account “[w]here, how, and in what form an agency offers an interpretation”); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011) (exploring how the courts might limit *Seminole Rock*’s domain even while leaving the core of the deference doctrine intact).

213. See 133 S. Ct. at 1338–39 (Roberts, C.J., concurring).

214. *Id.* at 1339–44 (Scalia, J., concurring in part and dissenting in part).

ence seems to be that, in his view, *Auer* deference lacks any principled justification.²¹⁵

According to Justice Scalia, one significant problem with *Auer* is that it allows agencies to interpret ambiguities in regulations written by the *agencies* themselves, whereas *Chevron* merely allows agencies to interpret laws that *Congress* has written.²¹⁶ This difference renders *Auer* unconstitutional, Justice Scalia argued, because *Auer* places the power to write the law (to promulgate regulations) and the power to interpret the law (to interpret regulations) in the same hands, thereby violating a “fundamental principle of separation of powers.”²¹⁷

Professor John F. Manning has made a similar separation of powers argument, arguing that “*Seminole Rock* adopts a questionable approach to the allocation of power in the modern administrative state” because it “contradicts the constitutional premise that lawmaking and law-exposition must be distinct.”²¹⁸ Central to Manning’s analysis is his view that “agencies engage in ‘lawmaking’ when they exercise rulemaking authority.”²¹⁹

If the Candid Approach were adopted, then Manning and Scalia’s consolidation-of-power concerns would be even easier to understand.²²⁰ This is because—if rulemaking were openly acknowledged to be an exercise of legislative power—it would become much more apparent that *Auer* deference does indeed enable agencies to both write law and to interpret those same laws. This, in turn, could possibly violate separation of powers principles requiring “that the power to write a law and the power to interpret it cannot rest in the same hands.”²²¹

Moreover, even if it is unnecessary to characterize rulemaking as legislating in order to see that *Auer* raises a consolidation-of-power problem, characterization of rulemaking as legislating pursuant to the Candid Approach would demonstrate a need to cut back on the reach and scope of *Auer* deference. Currently, agencies often ask for and receive *Auer* deference for interpretations that are set forth in informal formats, such as amicus briefs, that in no way

215. *Id.* at 1338. Much of Justice Scalia’s opinion in *Decker* echoed views that he had previously articulated in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring).

216. *Decker*, 133 S. Ct. at 1340 (Scalia, J., concurring in part and dissenting in part).

217. *Id.* at 1341. This principle could potentially raise flags for courts given that they, in some instances, arguably make law and interpret the same law. See generally Lemos, *supra* note 50 (arguing that courts, just like agencies, are frequently the recipients of delegated lawmaking powers). This Article, however, does not address delegations of lawmaking power to courts.

218. Manning, *supra* note 212, at 654.

219. *Id.*

220. Admittedly, Manning and Scalia’s concerns do not hinge on characterizing rulemaking as “legislating.” Indeed, Manning and Scalia’s consolidation-of-power concerns would seem to have force outside the rulemaking context. For example, in the context of applying *Auer* deference to interpretations set forth in adjudications, the same concerns about the lack of separation between rule-creator and rule-interpreter could arise. Nonetheless, the point made here is that characterizing rulemaking as legislating helps to highlight—at least in the rulemaking context—how the lawmaker and law-interpreter are the same entity.

221. *Decker*, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part).

resemble binding legislative rules created through the notice-and-comment process.²²² In *Auer* itself, for example, the Court deferred to the Secretary of Labor's nonbinding interpretation of the agency's own regulation set forth in an amicus curiae brief,²²³ and in a recent opinion from 2013, the Court deferred to the EPA's nonbinding interpretations of its regulations that it set forth in an amicus brief when it entered the case.²²⁴ Yet if the Court frankly acknowledged in the *Auer* context (like it has done in the *Chevron* context) that agencies' powers to issue binding rules stem from a congressional delegation of authority to act with the force of law,²²⁵ then courts would need to give more attention to whether they should treat agency interpretations of regulations set forth in nonbinding formats as binding on the courts under *Auer*.²²⁶ If courts addressed this question while conceptualizing agency regulations as a form of delegated legislative power, then courts might well feel less compelled to grant *Auer* deference to agency interpretations of regulations that appear in informal formats, like amicus briefs, interpretive rules, and policy statements, because those formats lack the force of law and are not binding.²²⁷

A few lower court judges have already hinted that this result may be required by the Court's embrace of the force of law test in the *Chevron* context.²²⁸ For

222. Cf. Watts, *supra* note 142, at 1034 (noting that "amicus briefs present the informal views of the agency and thus do not require the agency to go through notice-and-comment rulemaking or other time consuming procedures"); see also *Covenant Med. Ctr., Inc. v. Sebelius*, 424 F. App'x 434, 437 (6th Cir. 2011) (noting that *Auer* deference may be given to agency interpretations of their regulations even if those interpretations did not go through the notice-and-comment rulemaking process and thus do not carry the force of law).

223. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

224. *Decker*, 133 S. Ct. at 1336–37 (deferring to the EPA's interpretation set forth in an amicus brief).

225. See *supra* section III.B.1 (discussing how the Court's *Chevron* jurisprudence has embraced a delegatory rationale).

226. Cf. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 900 (2001) (arguing that in light of the delegatory rationale underpinning *Chevron*, *Seminole Rock* deference should apply only to interpretations that are "themselves embodied in legislative rules or binding adjudications").

227. This, of course, does not necessarily mean that courts would grant no deference to agency interpretations of regulations. Even if Congress did not intend informal interpretations to bind the courts, and hence *Auer* deference were deemed inapplicable to informal agency interpretations, the courts might nonetheless decide that it makes sense to grant some kind of nonbinding deference to agency interpretations of their own regulations.

228. See, e.g., *Joseph v. Holder*, 579 F.3d 827, 833–34 (7th Cir. 2009); see also *Keys v. Barnhart*, 347 F.3d 990, 993–94 (7th Cir. 2003). In addition, during an oral argument before the Supreme Court in December 2010, Justice Elena Kagan asked various questions about what kind of deference, if any, was owed to the Federal Reserve Board's views expressed in amicus briefs interpreting the meaning of its own regulation. See Transcript of Oral Argument at 3–13, 43, *Chase Bank USA v. McCoy*, 562 U.S. 195 (2011) (No. 09-329), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-329.pdf. Specifically, Justice Kagan inquired about whether *Christensen v. Harris County*, 529 U.S. 576 (2000), or *United States v. Mead Corp.*, 533 U.S. 218 (2001), compel the conclusion that *Auer* deference should be limited to interpretations of ambiguous regulations issued in more formal pronouncements and withheld from more informal interpretations, such as those set forth in amicus briefs. She noted that although the Court had applied *Auer* deference to informal views post-*Christensen* and

example, in *Keys v. Barnhart*,²²⁹ Judge Posner noted without definitively deciding the matter that “[p]robably there is little left of *Auer*” after *Mead*’s adoption of the force of law test.²³⁰ Judge Posner explained that the Court’s decision in *Mead* made clear that “[t]he theory of *Chevron* is that Congress delegates to agencies the power to make law to fill gaps in statutes.”²³¹ According to Judge Posner, *Mead*’s force of law test calls into question many applications of *Auer* because:

It is odd to think of agencies as making law by means of statements made in briefs, since agency briefs, at least below the Supreme Court level, normally are not reviewed by the members of the agency itself; and it is odd to think of Congress delegating lawmaking power to unreviewed staff decisions.²³²

Although most lower court judges have continued to apply *Auer* deference after *Mead*,²³³ adoption of the Candid Approach would favor Judge Posner’s approach. Specifically, the logic of the Candid Approach would suggest that informal agency interpretations of their own regulations—interpretations that lack the force of law—should not bind the courts pursuant to *Auer* deference.²³⁴ At most, such informal interpretations should be entitled to claim some kind of nonbinding deference based on their persuasive value.²³⁵

3. Arbitrary and Capricious Review

Arbitrary and capricious review, which can be found in Section 706(2)(A) of the APA,²³⁶ stands as yet another scope of review doctrine. Arbitrary and capricious review is used by courts to review the reasons supporting an agency’s decision. Two different strains of arbitrary and capricious review might be impacted if the Court were to adopt the Candid Approach and repudiate the

Mead, “[w]e [have] never really addressed the possible conflict between *Auer* and *Christensen* and *Mead*.” *Id.* at 5 (emphasis added).

229. 347 F.3d 990 (7th Cir. 2003).

230. *Id.* at 993–94.

231. *Id.* at 993 (emphasis added) (citing *Mead*, 533 U.S. at 226–27).

232. *Id.* at 993–94.

233. See *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 & n.1 (9th Cir. 2006) (noting that the Ninth Circuit and many other circuits have continued to apply *Auer* deference even to an agency’s informal interpretation of an ambiguous regulation).

234. As an analogy, consider “Sense of Congress” resolutions passed by one or both Houses of Congress. Although these resolutions might indicate the sense of Congress as to the meaning of statutory provisions enacted by Congress, they are not legally binding. See, e.g., *Yang v. Cal. Dep’t of Soc. Servs.*, 183 F.3d 953, 959 (9th Cir. 1999) (“[T]he courts rely on the sense of Congress provisions to buttress interpretations of other mandatory provisions and do not interpret them as creating any rights or duties by themselves.”); see also *id.* at 958 n.3 (“Several Supreme Court cases indirectly support the principle that sense of Congress resolutions do not have the force of law.”).

235. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (noting that deference may be given to an agency interpretation that lacks authoritative effect based on the persuasive power of the agency’s interpretation).

236. See 5 U.S.C. § 706(2)(A) (2012).

nondelegation doctrine: (a) hard look review;²³⁷ and (b) a more deferential version of arbitrary and capricious review that is used to review agency denials of rulemaking petitions.²³⁸ Both are considered here.

a. Hard Look Review. Hard look review is used by courts to ensure that agencies have engaged in reasoned decisionmaking.²³⁹ To survive hard look review, agencies must demonstrate that they have taken a hard look at the relevant issues by supporting their rules with adequate justifications and reasons.²⁴⁰

Prior to the passage of the Administrative Procedure Act in 1946, “the Supreme Court likened agencies to legislatures for purposes of judicial review and indicated that only very minimal judicial review—akin to mere rationality review—would be applied.”²⁴¹ However, courts applying hard look review today do not treat rulemaking agencies as “subordinate legislatures” subject only to mere rationality review.²⁴² Rather, courts view rulemaking through an adjudicatory lens, insisting that agencies—much like courts—must search for a right answer that is grounded in the law, facts, and evidence, not political or policy-driven explanations.²⁴³ In this sense, the courts have put agency rulemaking into an adjudicatory rather than a legislative model. The Court’s seminal hard look case, *Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,²⁴⁴ solidified this expert-driven model of agency decisionmaking by making clear that agencies must justify their rules using technocratic terms.²⁴⁵ Agencies may not resort to political or policy-driven terms as Congress might when it passes a law through the

237. See *infra* section III.B.3.a.

238. See *infra* section III.B.3.b.

239. See 5 U.S.C. § 706(2)(A) (providing for judicial review under the arbitrary and capricious standard). The D.C. Circuit developed the term hard look review as a judicial gloss on the meaning of the APA’s general arbitrary and capricious test. See Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599 (2002).

240. See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing and applying the arbitrary and capricious standard).

241. *Watts*, *supra* note 33, at 15 & nn.45–47 (footnote omitted); see also *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) (“[W]here the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to orders of administrative bodies.”).

242. See *Watts*, *supra* note 33, at 15–16.

243. See MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* 171 (1988) (arguing that judges incorrectly treat agencies engaged in rulemaking as if the agencies are “bodies engaged in a true science of synoptic public administration” and asserting that judges instead should treat agencies as “subordinate legislatures making a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments”).

244. 463 U.S. 29 (1983).

245. *Id.* at 43; see also *Watts*, *supra* note 33, at 5 (noting that under arbitrary and capricious review, agencies must “explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms”).

legislative process.²⁴⁶

An open judicial admission that agency rulemaking does indeed constitute an exercise of legislative power would make it much more apparent that agencies engaged in rulemaking are acting like subordinate legislatures. As such, they ought to be able to consider any factors, such as changing political sentiments and policy considerations, that Congress did not preclude the agency from considering.²⁴⁷ Thus, if agency rulemaking were openly acknowledged to be an exercise of delegated legislative power, hard look review might well become less technocratic in its focus. In essence, the spotlight would be put on which factors Congress—in delegating rulemaking power to the agency in the first place—intended the agency to be able to take into account and which factors Congress intended to preclude the agency from considering.²⁴⁸ Courts would likely find it harder to impose their own judicial preferences as to which factors agencies should consider.²⁴⁹ Instead, the focus would be on whether agencies stayed within the bounds of what Congress intended the agency to consider.

Congress could, of course, prohibit an agency from considering specific factors when delegating rulemaking power to an agency. This, for example, is exactly what Congress did in the Endangered Species Act (ESA),²⁵⁰ which expressly directs the Secretary of the Interior to determine whether a species qualifies as endangered or threatened “solely on the basis of the best scientific and commercial data available.”²⁵¹ However, in the run-of-the mill scenario where Congress does not foreclose an agency from considering specified factors,²⁵² a legislative model of rulemaking would suggest that Congress intended to leave the agency free to consider a variety of decisional factors, just as Congress itself might consider a variety of decisional factors when enacting a

246. *See id.*; *see also* CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 183 (1990) (noting that *State Farm* “entails a conception of politics as distinguishable from and in opposition to the required rationality of agency [decisionmaking]”); JERRY L. MASHAW & DAVID L. HAREST, *THE STRUGGLE FOR AUTO SAFETY* 226 (1990) (“[T]he submerged yet powerful message in the Supreme Court’s decision in *State Farm* [was] that the political directions of a particular administration are inadequate to justify regulatory policy.”); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2381 (2001) (describing how *State Farm* demands that agencies ground decisions “in neutral, expertise-laden terms to the fullest extent possible”).

247. *Cf.* SHAPIRO, *supra* note 243, at 171 (“Agencies ought to be allowed to act and to admit that they act as subordinate legislatures making a good deal of law within broad congressional constraints and in the face of considerable uncertainty about facts and diverse and changing political sentiments.”).

248. *Cf.* *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (“Congress has been willing to *delegate its legislative powers broadly* and courts have upheld such delegation because there is court review to assure that the agency exercises the delegated power *within statutory limits . . .*” (emphases added) (footnote omitted)).

249. *Cf.* Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 *ALA. L. REV.* 689, 711 (2006) (noting that critics of the current formulation of hard look review argue that it enables “the courts to intrude into agency action much more than they could ever intrude into the workings of Congress”).

250. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2012).

251. *Id.* § 1533(b)(1)(A) (emphasis added).

252. *See* Watts, *supra* note 33, at 47 & n.205 (noting that most statutory schemes fail to clearly delineate permissible from impermissible decisional factors).

statute. For example, barring a showing of contrary congressional intent, agencies engaged in rulemaking might be allowed to consider political sentiments and policy considerations when promulgating rules.

Besides becoming less technocratic in its focus, hard look review also might become less onerous if the Court rejected the nondelegation doctrine's central premise. As it currently stands, hard look review is quite searching, requiring agencies to give detailed, lengthy justifications for their rules.²⁵³ According to some scholars, courts may have ratcheted up hard look review—and turned it into the searching judicial review doctrine that it is today—in order to deal with the judiciary's anemic enforcement of the nondelegation doctrine.²⁵⁴ In other words, courts might feel guilty about the toothless nature of the intelligible principle requirement and the judiciary's overall lack of enforcement of the nondelegation doctrine,²⁵⁵ and so they may have looked outside the Constitution to doctrines like hard look review for alternative means of keeping agency rulemaking in check.

If the nondelegation doctrine's central premise were rejected, and if the Court expressly accepted the notion that Congress can delegate legislative power, then there would no longer be a need for guilt about underenforcing the nondelegation doctrine, because delegations of legislative power would no longer be impermissible. This would not necessarily eliminate searching or intrusive judicial review. But it would refocus judicial review around Congress's intent—pushing courts to ensure that unelected agencies stay within the bounds of the powers delegated to them by Congress.

An interesting related question that would likely arise would be whether courts—when deciding whether an agency relied upon decisional factors that Congress allowed the agency to consider—would continue to look only to the

253. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (noting that courts have grown “‘narrow’ § 706 arbitrary-and-capricious review into a far more demanding test” and that “[a]pplication of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious”).

254. See Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 324–25 (2013) (“[H]ard-look review is recognized as a counter-balance to broad delegations of authority, helping offset constitutional legitimacy concerns by acting as a check on discretion.”); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 444–45 (2000) (“Judicial review under the hard look doctrine is the price we pay for delegating highly complex important public policy decisions to unelected administrative agencies.”); Richard W. Murphy, *The Limits of Legislative Control over the “Hard-Look,”* 56 ADMIN. L. REV. 1125, 1139 (2004) (“The hard-look gloss’s requirement that agencies offer rational explanations for their significant policy decisions has no doubt helped courts to stomach the vast delegations of discretionary power that are the hallmark of the modern administrative state.”).

255. See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2056 (2011) (noting that hard look review “likely reflect[s] courts’ constitutional unease with broad delegations of power to administrative agencies”).

actual reasons given by agencies when they made their decisions as opposed to post hoc rationalizations.²⁵⁶ As Kevin M. Stack has argued, the *Chenery* rule against post hoc rationalizations rests largely on nondelegation concerns.²⁵⁷ If the nondelegation doctrine were eliminated in favor of the Candid Approach, then perhaps the argument could be made that *Chenery*'s rule against post hoc rationalizations should fall given that it has roots in the nondelegation doctrine. However, rejection of the nondelegation doctrine should not necessarily lead to the demise of *Chenery*'s rule against post hoc rationalizations. This is because under the Candid Approach, courts would be obliged to carefully scrutinize whether the agency acted pursuant to a delegation of power from Congress and whether the agency considered factors that Congress intended the agency to consider. Allowing agencies to come up with reasons for their actions after the fact would seem to allow agencies to easily evade Congress's instructions, thus undercutting the notion that agencies act as Congress's delegates.

b. Review of Denials of Rulemaking Petitions. Another variant of arbitrary and capricious review that might also be impacted by a rejection of the nondelegation doctrine's central premise would be a kind of deferential arbitrariness review applied to denials of rulemaking petitions. Section 553(e) of the APA gives interested persons the right to petition agencies to engage in rulemaking, providing: "Each agency shall give any interested person the right to petition for the issuance, amendment, or repeal of a rule."²⁵⁸ In tension with the modern version of the nondelegation doctrine, legislative history surrounding this provision suggests that it was included in the APA because the right to petition Congress is written into the Constitution itself, and Congress wanted to ensure that the right to petition was not evaded "where Congress has *delegated legislative powers to administrative agencies.*"²⁵⁹

If an agency receives a petition asking it to initiate rulemaking proceedings but ultimately decides to deny the petition, Section 555(e) of the APA requires the agency to give prompt notice of the denial, explaining the grounds for the denial.²⁶⁰ After initial debate about whether such denials of rulemaking peti-

256. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

257. See Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 952 (2007) (arguing that *Chenery*'s rule against post hoc rationalizations enforces the "neglected arm of the nondelegation doctrine, which . . . holds that a delegation is constitutionally valid only if it requires the agency exercising the delegated authority to state the grounds for its invocation of power under the statute").

258. 5 U.S.C. § 553(e) (2012).

259. See S. COMM. ON THE JUDICIARY, 79TH CONG., *LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT*, at 359 (1946) (emphasis added); see also *id.* at 21 ("Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen."); *id.* at 78, 260.

260. 5 U.S.C. § 555(e) (2012) ("Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.").

tions should be subject to judicial review at all,²⁶¹ the D.C. Circuit and then later the Supreme Court resolved this issue in favor of the reviewability of denials of rulemaking petitions. Accordingly, under current doctrine, denials of rulemaking petitions may be reviewed by the courts under what the courts have labeled a highly deferential, narrow version of arbitrary and capricious review.²⁶² In *Massachusetts v. EPA*, the Supreme Court explained that only “highly deferential” review is appropriate because an agency should have “broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”²⁶³

Despite the highly deferential verbal standard that the courts have articulated, the reality is that judicial review of denials of rulemaking petitions has not always been highly deferential. Indeed, *Massachusetts* stands as a prime example of a case in which the Court engaged in rigorous, searching review of the EPA’s refusal to regulate emissions from new motor vehicles that lead to global warming.²⁶⁴ There, the Court acknowledged that the EPA had provided a “laundry list” of reasons for declining to regulate.²⁶⁵ Yet the Court quickly dismissed all of these considerations, declaring that they were “divorced from the statutory text.”²⁶⁶ As Justice Scalia pointed out in dissent, this was a bit odd because the relevant statutory text provided only that the Administrator of the EPA “shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²⁶⁷ However, the statute “sa[id] *nothing at all* about the reasons for which the Administrator may *defer* making a judgment”²⁶⁸

261. This debate was fueled by the Supreme Court’s decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), which held that an agency’s decision not to initiate an enforcement proceeding generally is not subject to judicial review.

262. See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910–11 (D.C. Cir. 2004); *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989); *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987); *WWHT, Inc. v. FCC*, 656 F.2d 807, 816–17 (D.C. Cir. 1981).

263. 549 U.S. 497, 527–28 (2007) (“Refusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’” (quoting *Nat’l Customs Brokers*, 883 F.2d at 96)).

264. See Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 Nw. U. L. REV. 1029, 1041 (2008) (“The Court’s actual review of the EPA’s reasons for declining to regulate . . . was meticulous and probing—a far cry from what one would expect of ‘highly deferential’ review.”).

265. *Massachusetts*, 549 U.S. at 533; cf. Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”*: *When Agencies Defer Decisions*, 103 GEO. L.J. 157, 172–89 (2014) (discussing examples of agencies’ decisions not to act now, such as the EPA’s decision not to regulate greenhouse gases).

266. *Massachusetts*, 549 U.S. at 532.

267. *Id.* at 549 (Scalia, J., dissenting) (emphasis added) (quoting 42 U.S.C. § 7521(a)(1) (2012)) (internal quotation marks omitted).

268. *Id.* at 552.

If the nondelegation doctrine's central premise were abandoned and the Candid Approach were adopted, then agency denials of rulemaking petitions would likely warrant only truly deferential review (not the kind of searching review applied in *Massachusetts*), or perhaps even no judicial review at all. The logic of the Candid Approach would suggest that denials of rulemaking petitions are analogous to Congress's own discretionary and nonreviewable decision not to legislate. Congress enjoys great discretion in deciding whether to legislate; we "never say that Congress has a duty to pass a particular law or indeed any laws at all."²⁶⁹ Thus, if we were operating under the assumption that Congress can and does routinely delegate legislative power to agencies, then we would need to conclude that "an agency exercising Congress's delegated law-making powers" has no such duty either, unless Congress has specified such a duty in delegating power to the agency.²⁷⁰ Martin Shapiro has quite aptly pointed this out, noting that if rulemaking were viewed "as quasi-legislative, that is as like law making by Congress, [then] the decision of an agency to make a rule or not make a rule [would look] like a purely discretionary one."²⁷¹

C. PROCEDURAL DUE PROCESS

Moving beyond judicial review doctrines, procedural due process stands as yet another central doctrine in administrative law. Longstanding precedent establishes that procedural due process is required when an agency takes action that "harms you as an individual based on characteristics unique to you or your conduct."²⁷² However, where an agency takes action that applies to more than a few people and hurts you simply as part of a general group or class of individuals, then well-established case law makes clear that procedural due process does not apply.²⁷³ Instead, the courts have determined that your recourse is to the political process.²⁷⁴

The Court explained this rule in a pair of cases decided at the beginning of the twentieth century—*Londoner v. City & County of Denver*²⁷⁵ and *Bi-Metallic Investment Co. v. State Board of Equalization*.²⁷⁶ In *Londoner*, the Court held that procedural due process attached to the City of Denver's taxation of property owners for street paving because a relatively small number of persons were affected, and the city's method of taxation was particularized to each property owner.²⁷⁷ In contrast, in *Bi-Metallic*, the Court held that procedural due process did not attach to a board's order increasing the valuation of all

269. Cf. SHAPIRO, *supra* note 243, at 117–18.

270. *Id.* at 118.

271. *Id.* at 117.

272. PIERCE, *supra* note 75, at 28.

273. *Id.*

274. *Id.*

275. 210 U.S. 373 (1908).

276. 239 U.S. 441 (1915).

277. *Londoner*, 210 U.S. at 385.

property in Denver by forty percent.²⁷⁸ *Bi-Metallic* explained that “[w]here a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.”²⁷⁹ The Court distinguished *Londoner* on the ground that in *Londoner*, “[a] relatively small number of persons was concerned, who were exceptionally affected, . . . upon individual grounds”²⁸⁰

In an attempt to simplify matters, scholars have developed a short-hand formulation for this *Londoner–Bi-Metallic* distinction: “[W]hile the Due Process Clause may apply to an agency *adjudicative* decision, it rarely applies to an agency *rulemaking* proceeding because agency rules rarely single out an individual for adverse treatment, but instead apply to an entire class of individuals.”²⁸¹ In other words, due process usually is required in adjudications, which often involve retroactivity and specificity, but not in rulemaking proceedings, which are often general and prospective in nature.²⁸²

At least implicitly, the holdings of *Londoner* and *Bi-Metallic* embrace a legislative model of rulemaking. Specifically, the *Londoner–Bi-Metallic* distinction appears grounded in the notion that agencies—like Congress—need not provide procedural due process to all who may be impacted by rules carrying the force of law because protection from arbitrary legislative action comes via the political process. The Supreme Court itself emphasized this point in *Bi-Metallic* when it stated:

General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.²⁸³

To the extent that this line of reasoning embraces the notion that agencies act like legislatures when promulgating rules, it is in tension with the nondelegation doctrine’s central premise prohibiting the delegation of legislative power. Yet it nicely aligns with the Candid Approach to delegation. Indeed, adoption of the Candid Approach would help to solidify and better explain why agencies usually need not provide procedural due process when engaged in the rulemaking process. The Candid Approach would do this by highlighting that agencies are acting in a legislative mode when promulgating rules pursuant to delegations of legislative authority from Congress and hence they—just like Con-

278. *Bi-Metallic*, 239 U.S. at 446.

279. *Id.* at 445.

280. *Id.* at 446.

281. PIERCE, *supra* note 75, at 28 (emphases added).

282. See EDLEY, *supra* note 246, at 40–41 (noting that the key distinction is that due process attaches in adjudication, which requires the development of facts particular to an individual, but is not required in rulemaking, which turns on general facts).

283. *Bi-Metallic*, 239 U.S. at 445.

gress—do not need to provide procedural due process when promulgating binding rules that carry future effect.²⁸⁴ Rather, the political process provides the main mechanism for protection.

One significant problem, of course, with viewing the political process as a sufficient check on agency action is that agency heads, unlike members of Congress, are not elected by the people.²⁸⁵ Nonetheless, even though the heads of agencies are not directly accountable to the people, both independent agency and executive agency heads are subject to varying degrees of political control by the President, Congress, or both.²⁸⁶ Congress, for example, creates agencies and controls their budgets.²⁸⁷ In addition, Congress influences agency policymaking via oversight hearings, as well as via more informal communications with agency decision makers.²⁸⁸ Similarly, the President plays a “unique role . . . in overseeing agency action.”²⁸⁹ The President, for example, has the power to appoint and remove certain agency officials (although independent agency heads are insulated from the President’s at-will removal powers).²⁹⁰ The President can also direct agency decisions via informal mechanisms like jawboning, as well as more formal mechanisms such as executive orders.²⁹¹ Indeed, in recent years, many have come to see the legitimacy of the administrative state as hinging on the notion that agencies are politically accountable because of

284. *Cf. id.* (“If the result in this case had been reached, as it might have been by [the State rather than by the Board], no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted [sic] by the state Constitution with the power.”).

285. *Cf. Peter L. Strauss, Legislation That Isn’t—Attending to Rulemaking’s “Democracy Deficit,”* 98 CALIF. L. REV. 1351, 1351 (2010) (noting the enduring problem for a democracy of justifying “the legitimacy of permitting unelected officials [such as administrative agencies] to create binding legal texts”).

286. *See* Watts, *supra* note 33, at 35–37 (describing how executive and independent agencies are subject to significant oversight by Congress and the President); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 523 (2009) (“[I]ndependent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”); Kagan, *supra* note 246, at 2384 (“Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”).

287. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006) (“The power of the purse is among Congress’s most potent weapons in its effort to control the execution of the laws.”).

288. *See id.* at 70 (explaining that Congress can informally supervise agencies through various forms).

289. Watts, *supra* note 33, at 35.

290. *See* U.S. CONST. art. II, § 2, cl. 2 (enumerating the President’s appointment powers); Morrison v. Olson, 487 U.S. 654 (1988) (discussing the President’s appointment and removal powers); *see also* Watts, *supra* note 33, at 35–37 (discussing how the President does not enjoy removal power over independent agency heads but does enjoy other means of pressuring independent agencies).

291. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1261 (2006) (describing how Reagan “tapped the Office of Management and Budget (OMB) to review agency rulemaking and help streamline the administrative state”). *See generally* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (discussing interaction between the White House and federal agencies).

their relationship with Congress and the President.²⁹² Thus, although agencies are not as politically accountable as Congress, they are still subject to significant political control. This helps support the notion that the political process provides protection when legally binding rules are formulated—whether those rules are formulated by Congress through the regular legislative process or by agencies through the rulemaking process.

D. GENERAL PROCEDURAL CONSTRAINTS IMPOSED ON AGENCY RULEMAKING

General procedural constraints imposed on notice-and-comment rulemaking by Section 553 of the APA stand as yet one more area of administrative law that is impacted by the nondelegation doctrine. The literal text of Section 553 imposes fairly minimal procedural constraints on agency rulemaking.²⁹³ Before an agency issues a legislative rule, the APA requires that an agency provide public notice, which must merely include “the terms or substance of the proposed rule *or* a description of the subjects and issues involved.”²⁹⁴ And after issuing the notice and allowing time for interested persons to comment, Section 553 requires that the agency issue a “concise general statement” of the rule’s “basis and purpose” along with the final rule.²⁹⁵ Through these fairly flexible and minimal procedures, Section 553 of the APA contemplated a legislative-like process for notice-and-comment rulemaking—not an adjudicatory process accompanied by a trial-type hearing.²⁹⁶

The reality, however, is that the text of the APA tells just part of the story. For the rest of the story, one must look to numerous judicial decisions that have added various layers of judicial gloss on top of the fairly minimal textual requirements found in Section 553.²⁹⁷ For example, even though Section 553 allows agencies to issue a notice that merely includes a “description of the subjects and issues involved,”²⁹⁸ judicial precedents now require agencies to disclose technical data and studies on which the agency relied in formulating

292. See generally Watts, *supra* note 33, at 33–39 (describing the rise in the political control model of agency decisionmaking).

293. See 5 U.S.C. § 553 (2012).

294. *Id.* § 553(b)(3) (emphasis added).

295. *Id.* § 553(c).

296. The APA does call for more formal, trial-type proceedings for what is known as formal rulemaking. See 5 U.S.C. §§ 553(c), 556, 557. Formal rulemaking, however, is quite rare today. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003) (“Because the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so.”).

297. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (noting that “[c]ourts have incrementally expanded those APA procedural requirements well beyond what the text provides”); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 (2007) (“[I]n the 1960s and 1970s, the lower federal courts essentially rewrote the APA’s notice-and-comment rulemaking provisions to require extensive procedural machinery, including elaborate notices of proposed rulemaking that disclose to the public all relevant evidence possessed by the agency . . .”).

298. 5 U.S.C. § 553(b)(3).

rules in order to enable meaningful comment.²⁹⁹ Similarly, even though Section 553 merely requires that agencies issue a “concise general” statement of basis and purpose (SOBP) with their final rules, courts now require agencies to respond in their SOBPs in “detail to every significant comment made by private parties participating in the rulemaking.”³⁰⁰ SOBPs, accordingly, are voluminous today, consuming “tens of tiny-typed pages in the *Federal Register* and hundreds, or even thousands, of pages of supporting documents.”³⁰¹

Notably, courts have persisted in applying this judicial gloss on top of the meaning of Section 553 despite the Supreme Court’s admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* that courts should not “engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress.”³⁰² In *Vermont Yankee*, the Court took the D.C. Circuit to task for requiring the Nuclear Regulatory Commission (NRC) “to employ procedures such as discovery and cross-examination in a notice-and-comment rulemaking when no organic statute, regulation, or constitutional provision required [those procedures].”³⁰³ The Court warned that lower courts should “not stray beyond the judicial province . . . to impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”³⁰⁴ Yet the lower courts have not listened. Instead, courts persist in requiring agencies to issue detailed notices of proposed rulemaking and lengthy statements of basis and purpose, and *Vermont Yankee’s* impact has been limited to the specific issue before the Court—meaning only that courts do not feel free to require agencies to use oral hearings or cross-examination in notice-and-comment rulemakings.³⁰⁵

Seizing upon *Vermont Yankee’s* reasoning, many scholars and judges have expressed discomfort with the gloss that the judiciary has placed on Section 553’s procedural requirements.³⁰⁶ Some, for example, have insisted that the judiciary’s procedural innovations are not consistent with the text of Section

299. See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392–93 (D.C. Cir. 1973); see also *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006); *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530–31 & n.6 (D.C. Cir. 1982).

300. LAWSON, *supra* note 2, at 318.

301. *Id.*

302. 435 U.S. 519, 525 (1978).

303. Beermann & Lawson, *supra* note 297, at 858.

304. *Vermont Yankee*, 435 U.S. at 549.

305. See Beermann & Lawson, *supra* note 297, at 858 (“[W]ith respect to the issue squarely decided by the Court [in *Vermont Yankee*], the case has had a major doctrinal impact: federal courts today do not feel free to require agencies to use oral hearings and cross-examination in informal rulemakings or adjudications without grounding in positive law.” (footnote omitted)).

306. See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 245–48 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (expressing concern about how the courts have “incrementally expanded [the APA’s] procedural requirements well beyond what the text provides”); Beermann & Lawson, *supra* note 297, at 882–83 (arguing that there are a variety of contemporary administrative law doctrines relating to Section 553 rulemaking that are violations of the principle that “courts should not impose procedural requirements on federal agencies without at least an arguable grounding in positive law”).

553.³⁰⁷ Nonetheless, the courts have persisted in ratcheting up the procedural constraints imposed by Section 553—likely because of concerns that agencies are prone to industry capture and need to be kept in check by courts.³⁰⁸ It may also be that courts have intensified their review of the procedures used by agencies in rulemaking proceedings because of a constitutional guilt complex that has arisen as a result of the judiciary's hands-off approach to the nondelegation doctrine.³⁰⁹

The Candid Approach would change matters. First, if the nondelegation doctrine ceased to exist and the courts read the Constitution to allow Congress to delegate legislative power, then courts would no longer need to compensate for their underenforcement of the nondelegation doctrine by ratcheting up the procedural constraints imposed on notice-and-comment rulemaking. Second, if regulatory agencies were expressly acknowledged to be exercising legislative power delegated to them by Congress, then courts might more willingly heed the main message of *Vermont Yankee*, interpreting the APA in a way that honors Congress's rather than courts' preferences about what procedural hoops agencies must jump through when exercising delegated legislative powers. Third, as Jack M. Beermann and Gary Lawson have explained, many of the procedural innovations that courts have engrafted onto the notice-and-comment rulemaking process apply a judicial model to rulemaking, requiring agencies to act much like courts would rather than as legislatures would.³¹⁰ If agency rulemaking were frankly acknowledged to be an exercise of delegated legislative power, then it might no longer be possible for courts to continue to push rulemaking into an adjudicatory model.

In sum, rejecting the current nondelegation doctrine and acknowledging that Congress can and does delegate legislative power to administrative agencies would help to solidify several existing administrative law doctrines. These doctrines include: the test courts have articulated to distinguish legislative from nonlegislative rules; the force of law test that *Mead* articulated in the *Chevron* context; *Brand X*'s rule allowing *Chevron* deference to trump stare decisis; and the general inapplicability of procedural due process in the rulemaking context. It also would help to bring closure to the ongoing debate about whether *Chevron* should apply to preemptive interpretations issued by agencies. A number of other existing doctrines, however, would need to be tweaked at a minimum or jettisoned entirely. These doctrines include: *City of Arlington's*

307. See *Am. Radio Relay League*, 524 F.3d at 245–48 (Kavanaugh, J., concurring in part and dissenting in part) (arguing that the judicial obstacles that courts have created for the rulemaking process stray from the text of the APA).

308. See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1039–44 (1997) (“[M]any federal judges became convinced that agencies were prone to capture and related defects and—more importantly—that they were in a position to do something about it.”).

309. See *supra* notes 254–55 and accompanying text (describing the constitutional guilt complex that underenforcement of the nondelegation doctrine seems to have created).

310. Beermann & Lawson, *supra* note 297, at 901 (arguing that “courts have imposed concepts developed in adjudicatory proceedings on the legislative rulemaking process”).

holding that no jurisdictional exception to *Chevron* deference exists; *Auer* deference; hard look review; and judicial review of general procedural constraints imposed on agency rulemaking.

IV. TOWARD THE FUTURE: EMBRACING THE CANDID APPROACH TO DELEGATION

Now that we have a sense of how the nondelegation doctrine has clouded many of administrative law's most central doctrines, it is possible to assess whether the Supreme Court ought to abandon the nondelegation doctrine's central premise, thereby freeing the courts to admit that Congress can and routinely does delegate legislative power to agencies. This Part takes up that normative inquiry. The point here is not to rehash general prodelegation and antidelegation arguments, such as arguments that turn on notions of political accountability, expertise, and deliberation. Although such considerations are important to broad theoretical debates about whether delegations to agencies are a good or bad thing, they have been thoroughly discussed elsewhere.³¹¹ Nor is the point here to rehash varying positions on what the "best" reading of the Constitution is as an original matter.³¹² Rather, this Part approaches the normative inquiry of whether the Court ought to reject the nondelegation doctrine's central premise from the perspective of doctrinal coherence—asking whether administrative law doctrine as a whole would be better or worse off if the Court freed itself of the doctrinal fiction currently surrounding the nondelegation doctrine and frankly admitted that Congress can and does delegate legislative power. Ultimately, this Part concludes that administrative law would be better off, although such a change would not come without its costs.

A. THE MAIN BENEFITS

Recognizing rulemaking as a constitutional exercise of legislative power would have several beneficial effects on administrative law doctrine. For one thing, openly acknowledging that rulemaking can and does constitute an exercise of legislative power would free courts from the unsatisfying doctrinal fiction that currently surrounds the nondelegation doctrine. No longer would courts have to "pretend," as Justice Stevens put it, that rulemaking does not constitute an exercise of legislative power when the agency's discretion is constrained by some kind of a guiding principle—no matter how vague.³¹³ Instead, the courts could align their treatment of congressional delegations with the institutional reality of rulemaking's modern role, recognizing that Congress

311. See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152 (1997) (arguing that delegations to agencies may actually improve accountability because delegations may serve as a "device for improving the responsiveness of government to the desires of the general electorate"); Merrill, *supra* note 12, at 2139–58 (discussing various pro and antidelegation policies, such as expertise, deliberation, and accountability).

312. See *supra* note 121 and accompanying text.

313. See *supra* note 103–05 and accompanying text.

routinely gives agencies the legislative power necessary to make broad, wide-ranging rules that carry the force of law.

If the impact of the doctrinal fiction that currently surrounds the nondelegation doctrine were limited to the contours of the nondelegation doctrine itself, then perhaps we could justify continuing to swallow the fiction in that one area. Yet, as Part III has already demonstrated, the nondelegation doctrine's central premise has created doctrinal inconsistency that reverberates throughout administrative law doctrine as a whole. As a result, some central administrative law doctrines, including hard look review and review of rulemaking procedures, try to force agencies into an adjudicatory model of agency decisionmaking and fail to view agency rulemaking through a legislative lens.³¹⁴ This is entirely consistent with the nondelegation doctrine's central premise that Congress may not delegate legislative power. Yet it is in tension with other key administrative law doctrines, including *Chevron* deference, procedural due process, and the test used to define legislative rules, that at least implicitly recognize that agency rulemaking flows from a delegation of power to agencies to act with the force of law.³¹⁵

Thus, in addition to freeing the courts of a longstanding fiction, another significant benefit of adopting the Candid Approach would be to help bring greater doctrinal coherence to administrative law. If the Supreme Court were to jettison its current approach to the nondelegation doctrine and frankly acknowledge that Congress can and does delegate legislative power to agencies, then the courts would gain a unifying lens through which to justify different doctrines governing rulemaking—a lens that would recognize that agency rulemaking at its heart stems from a delegation of legislative power from Congress to agencies. With an open acknowledgement that rulemaking constitutes an exercise of delegated legislative power, the courts could strive to unify administrative law's disparate doctrines governing rulemaking around this central premise. This would help to bring greater coherence and clarity to administrative law as a whole, and it would help to clear up much of the muddiness that has recently plagued numerous administrative law doctrines, such as *Mead's* force of law test and *Auer* deference.³¹⁶ Such clarity would be normatively preferable to our current patchwork of disparate administrative law doctrines,³¹⁷ which vacillate between, on the one hand, acknowledging that rulemaking stems from a delegation of legislative power and, on the other hand, refusing to admit that rulemaking is legislative in nature.

314. See *supra* notes 243, 310 and accompanying text (describing how both hard look review and procedural review apply a judicial rather than a legislative model to rulemaking).

315. See *supra* Part III.

316. See *supra* sections III.B.1, III.B.2.

317. The law is admittedly untidy and cannot always be coherent at the general level. See generally Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 310 (1992) ("The reality of politics leaves the law untidy."). However, the value of achieving coherence within specific doctrinal areas of the law has been recognized. See *id.* In essence, legal coherence simply means that there is coherence in "legal justification." J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 115–16 (1993).

Furthermore, highlighting the legislative nature of agency rules would help to better clarify the judiciary's role in controlling and checking agency rulemaking. Right now, many administrative law doctrines, such as hard look review and judicial review of agency procedures, reflect the federal courts' sense that it is their duty to be hands-on and searching when it comes to checking agency rulemaking.³¹⁸ Yet other doctrines, such as *Chevron* and procedural due process in the rulemaking realm, reflect the judiciary's sense that courts should be deferential and hands-off when reviewing agency rules because the political process provides a better mechanism for checking agency action than the judicial process does.³¹⁹ The logic of the Candid Approach would help to resolve this tension by suggesting that *Congress* generally should have the power to choose what strings should be attached to agencies' delegated powers because Congress serves as the source of agencies' delegated legislative power in the first place. It would not be the *courts'* role to force certain procedures on agencies, unless some positive source of law, such as a statute or the Constitution, required the courts to do so.³²⁰

B. THE MAIN COSTS

Of course, these benefits would not come without costs, and the main costs here would be borne by stare decisis. Specifically, as Part III has already demonstrated, if the Candid Approach were to replace the nondelegation doctrine, many existing doctrines would be solidified. However, at least four central administrative law doctrines—in addition to the nondelegation doctrine itself—would need to be changed: *Auer* deference;³²¹ *City of Arlington's* rule applying *Chevron* to jurisdictional questions;³²² arbitrary and capricious review;³²³ and the judiciary's reading of statutory constraints imposed on notice-and-comment

318. See *supra* section III.B.3 (describing the searching nature of hard look review); see also *supra* section III.D (describing the fairly onerous judicial gloss that courts have placed on top of Section 553's minimal notice-and-comment requirements).

319. See *supra* section III.C (discussing how courts have held that due process generally does not apply to agency rulemaking and that the proper recourse is instead through the political process); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

320. Cf. *Murphy*, *supra* note 254 (discussing whether Congress could constitutionally eliminate hard look review).

321. See *supra* section III.B.2 (discussing *Auer* deference).

322. See *supra* section III.B.1.b (discussing the question of whether *Chevron* should apply to jurisdictional questions).

323. See *supra* section III.B.3 (discussing arbitrary and capricious review).

rulemaking.³²⁴ Some of these doctrines could be altered or discarded at little cost. However, other changes would likely prove extremely controversial.

1. Less Controversial Changes

Less controversial alterations would include changes to: *Auer* deference; *City of Arlington*'s rule rejecting a jurisdictional exception to *Chevron*; and judicial review of denials of rulemaking petitions. First, consider *Auer* deference.³²⁵ Despite the fact that *Auer* deference has longstanding roots (going back, for example, to the Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*),³²⁶ the doctrine has come under attack recently. As has already been mentioned, scholars have criticized the doctrine,³²⁷ two Justices recently expressed their willingness to revisit the doctrine,³²⁸ and one Justice recently argued in favor of jettisoning it entirely.³²⁹ In addition, some recent cases have chipped away at *Auer*'s core,³³⁰ demonstrating what appears to be an overarching sense of uneasiness with the doctrine. Thus, either jettisoning *Auer* deference—or altering it so that agencies could only claim *Auer* deference for interpretations of their regulations that are set forth in a legally binding format—would not send huge shock waves through administrative law, even though it likely would raise some objections (particularly from federal agencies that benefit from *Auer*).

Second, it also seems unlikely that massive shock waves would come from overruling *City of Arlington*'s recent holding rejecting a jurisdictional exception to *Chevron*. *City of Arlington*, after all, was a split 5–1–3 decision,³³¹ and it is a brand new decision that has not yet become entrenched in the administrative law world. Echoing Justice Scalia's opinion in *City of Arlington*, the main objection to overruling *City of Arlington* would likely be that jurisdictional questions are difficult, if not impossible, to define and that embrace of a jurisdictional exception to *Chevron* might well swallow *Chevron*'s general rule of deference.³³² These concerns, however, could be mitigated by articulating the

324. See *supra* section III.D (discussing procedural constraints placed on agency rulemaking by Section 553 of the APA).

325. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (providing for deference to an agency's interpretation of its own regulations so long as the interpretation is not plainly erroneous or inconsistent with the regulation); see also *supra* section III.B.2 (discussing *Auer* deference).

326. See 325 U.S. 410, 414 (1945) (holding that an agency's interpretations of its own regulations are controlling unless "plainly erroneous or inconsistent with the regulation").

327. See *supra* note 212 and accompanying text.

328. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring).

329. See *id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

330. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (declining to afford an agency interpretation of its regulation *Auer* deference where it creates a risk of "unfair surprise"); *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (holding that *Auer* is inapplicable where a regulation agency merely parrots the statute).

331. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

332. *Id.* at 1868–70 (arguing that the distinction between jurisdictional and nonjurisdictional questions is "illusory").

issue not in terms of whether there should be some vague, hard-to-define “jurisdictional” exception to *Chevron* but rather, as Chief Justice Roberts framed it in his dissent, in terms of whether Congress has delegated to the agency interpretive authority over the question at issue.³³³ Under this view, only if a court can determine that Congress “in fact delegated to the agency lawmaking power over the ambiguity at issue” should the courts grant *Chevron* deference.³³⁴

Third, altering how the courts review denials of rulemaking petitions also seems unlikely to yield massive controversy. As Part III explained, if the nondelegation doctrine’s central premise were to be abandoned and the Candid Approach were adopted, then agency denials of rulemaking petitions would likely warrant only truly deferential review (not the kind of searching review applied in *Massachusetts*), or perhaps even no judicial review at all.³³⁵ This is because denials of rulemaking petitions would seem akin to Congress’s own discretionary and nonreviewable decision not to legislate. Whereas this change might at first blush seem radical, the reality is that the change probably would simply help to reinforce courts’ existing sense that denials of rulemaking involve resource allocation decisions that are ill-suited for review and that should be subject only to a highly deferential review. Only in highly charged, political cases like *Massachusetts* have the courts tended to deviate from this highly deferential review.³³⁶

2. More Controversial Changes

More controversial doctrinal alterations would include: hard look review; the judiciary’s take on procedural constraints imposed on rulemaking; and, of course, the nondelegation doctrine itself. First, with respect to hard look review, Part III has already explained that the logic of the Candid Approach would suggest that courts should view agencies as subordinate legislatures and allow them to consider any factors, such as changing political sentiments and policy considerations, that Congress did not preclude the agency from considering.³³⁷ There is no doubt that a change along these lines would prove extremely controversial—as evidenced by prior scholarly opposition to proposals calling for hard look review to become less technocratic in its focus.³³⁸ However, such an approach to hard look review would not mean that rulemaking would

333. *See id.* at 1877 (Roberts, C.J., dissenting) (“Courts defer to an agency’s interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. . . . [T]he question whether an agency enjoys that authority must be decided by a court, without deference to the agency.”).

334. *Id.* at 1880.

335. *See supra* section III.B.3.b (discussing judicial review of denials of rulemaking petitions).

336. *See supra* section III.B.3.b; *see also* *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (carefully scrutinizing the EPA’s denial of a rulemaking petition involving greenhouse gases that lead to global warming).

337. *See supra* section III.B.3.a (discussing hard look review).

338. *See supra* note 35 and accompanying text (noting scholars’ opposition to proposals to give politics an accepted place in agency rulemaking).

become wholly political or that it would routinely be reduced to “blood sport” politics, where anything goes.³³⁹ Rather, the ball would simply be placed in *Congress’s* court. As the source of agencies’ legislative power, Congress would be free to statutorily specify factors that it did or did not want agencies taking into consideration. Furthermore, consistent with views I have articulated elsewhere, such a change might well be normatively desirable because, among other things, it would enable political factors that currently hide behind technocratic facades to come out into the open in rulemaking proceedings, thereby enabling greater transparency and monitoring of agency rulemaking.³⁴⁰

Second, with respect to courts’ review of rulemaking procedures, Part III explained that the logic of the Candid Approach would likely push courts to listen to the main message of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*³⁴¹ and to interpret the APA in a way that honors *Congress’s* rather than *courts’* preferences about what procedural hoops agencies must go through when exercising delegated legislative powers.³⁴² This, in turn, might mean the overruling of many doctrines that have shaped the face of notice-and-comment rulemaking as we know it today, including the requirement that agencies disclose studies and data that they have relied upon and the requirement that they respond to every significant comment they receive. Change along these lines would likely be extraordinarily controversial because the judicial gloss that courts have placed on top of Section 553’s notice-and-comment requirements defines the backbone of rulemaking today. Nonetheless, these objections could be mitigated somewhat by emphasizing that the logic of the Candid Approach simply suggests that the ball should be placed in *Congress’s* court when it comes to setting procedural hoops for agencies to jump through. As the delegator of legislative power, Congress would be free to attach certain strings to its delegation of legislative power—such as requirements that agencies respond to all comments received or that they disclose all studies and data relied upon. In the end, all that would be wiped away would be the judicial gloss that courts have added to the top of Section 553.

Finally, with respect to repudiating the nondelegation doctrine itself,³⁴³ constitutional objections would likely ring quite loudly. As previously mentioned,

339. Cf. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1671 (2012) (asserting that high-stakes rulemaking has become a “‘blood sport’ in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies”).

340. See Watts, *supra* note 33.

341. 435 U.S. 519, 525 (1978).

342. See *supra* section III.D (discussing judicial review of agencies’ procedures).

343. Repudiation of the nondelegation doctrine would also eliminate the need for courts to employ the doctrine of constitutional avoidance in delegation cases. See *supra* note 50 (discussing the doctrine of constitutional avoidance). This is because the doctrine of constitutional avoidance currently enables courts to construe statutes narrowly so as to avoid raising constitutional red flags like the nondelegation doctrine. See *supra* note 50. This change also might prove controversial as constitutional concerns would no longer push courts to construe statutes narrowly. Nonetheless, courts could still choose to

when it comes to the constitutionality of delegations of rulemaking power to agencies, there is no scholarly consensus as to the best or correct reading of the Constitution, and this Article does not attempt to resolve this ongoing debate.³⁴⁴ Regardless, it is clear that originalists like Gary Lawson and David Schoenbrod, who have advocated a strict approach to the nondelegation doctrine, would object to the Court discarding its longstanding view that the Constitution prohibits the delegation of legislative power.³⁴⁵ In addition, those who have espoused a highly formal reading of the Constitution that defines legislative power to include only Congress's de jure power to pass statutes would object to the Candid Approach's functional reading of legislative power that includes agency regulations.³⁴⁶ Furthermore, some might well object to overturning the nondelegation doctrine on the simple ground that, even if it is flawed, it represents longstanding precedent that should not be disturbed.

One possible response to these kinds of constitutional objections would be to acknowledge that the constitutional text in this area can plausibly be read in different ways,³⁴⁷ but to stress that the courts already have proceeded partway down the path toward repudiating the nondelegation doctrine. The courts have done this outside of the context of the nondelegation doctrine itself in many different ways, such as by: embracing the force of law test used in the *Chevron* context;³⁴⁸ defining legislative rules as those that carry the force and effect of law because Congress "delegated legislative power to the agency";³⁴⁹ ruling that procedural due process usually does not attach in rulemaking proceedings where agencies are setting rules of general applicability much like legislatures do;³⁵⁰ and otherwise implicitly accepting the general notion that Congress routinely hands away lawmaking power.³⁵¹ Hence, rejecting the current nondelegation doctrine and moving toward the Candid Approach would not cause significant upheaval in the administrative state the way a strict originalist reading of the Constitution might. Nor would it require the adoption of a brand new theory like the one Eric A. Posner and Adrian Vermeule recently articulated

construe statutes narrowly so as to ensure that agencies—as agents of Congress—stay within the bounds of their delegated power.

344. See *supra* note 121 and accompanying text.

345. See SCHOENBROD, *supra* note 97, at 155–64 (arguing that the Constitution does prohibit the delegation of legislative power); see also Lawson, *supra* note 97, at 379–80 (same).

346. See Posner & Vermeule, *supra* note 97, at 1723 (arguing that the legislative power includes only the literal "authority to vote on federal statutes [and] to exercise other *de jure* powers of federal legislators").

347. See *supra* note 121 and accompanying text.

348. See *supra* section III.B.1.a; see also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

349. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993); see also *supra* section III.A.

350. See *supra* section III.C (discussing procedural due process in the rulemaking context).

351. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

when they argued that the legislative power in Article I includes only Congress's de jure powers to enact statutes.³⁵² To the contrary, the Candid Approach would actually reflect a view of rulemaking that is already at least implicitly embraced in some of the Court's jurisprudence and various administrative law doctrines. Justice Stevens seemed to recognize as much in his concurring opinion in *Whitman v. American Trucking Ass'ns, Inc.*, when he noted that it would be "more faithful to what we have *actually* done in delegation cases to admit that agency rulemaking authority is 'legislative power.'"³⁵³

CONCLUSION

Scholars have identified many failings with the Court's current treatment of the nondelegation doctrine. However, due to their focus on the constitutional parameters of the nondelegation doctrine itself, scholars have paid little attention to how the central premise of the nondelegation doctrine reverberates throughout administrative law as a whole. This Article has tried to fill that gap. Specifically, this Article has demonstrated how the Supreme Court's current approach to the nondelegation doctrine—which insists that Congress may not delegate legislative powers to agencies—has created a lack of coherence throughout administrative law that extends far beyond the nondelegation doctrine itself. For example, some central administrative law doctrines, including hard look review, procedural review, and *Auer* deference, fail to view agency rulemaking through a legislative lens as an exercise of lawmaking authority. This is consistent with the nondelegation doctrine's central premise that Congress may not delegate legislative power. Yet it is in tension with other key administrative law doctrines—including *Chevron* deference, procedural due process, and the test used to define legislative rules—that at least implicitly recognize that agency rulemaking flows from a delegation of legislative power to agencies.

Rather than continuing to swallow this doctrinal incoherence, this Article has argued that administrative law as a whole would be better off if the Court rejected its current approach to the nondelegation doctrine and instead frankly acknowledged that courts constitutionally can and routinely do delegate legislative power to agencies. Rewriting the Court's delegation jurisprudence in this way certainly would require some significant doctrinal changes—some of which would cause greater shock waves than others. Ultimately, however, these doctrinal changes would be worth the cost. For one thing, frankly acknowledging that Congress can and does delegate legislative power would help to shape central doctrines governing rulemaking in a more cohesive manner around the central notion that agency rulemaking flows from delegated legislative power. This, in turn, would help to push courts to take more seriously the notion that agencies act as delegates of Congress and at the will of Congress. In addition, recogniz-

352. *See supra* note 346.

353. 531 U.S. 457, 488 (2001) (Stevens, J., concurring) (emphasis added).

ing rulemaking as an exercise of delegated legislative power would better align delegation jurisprudence with the institutional reality of rulemaking's modern role. Courts, accordingly, would be freed of the longstanding and much-maligned doctrinal fiction that pretends that rulemaking is executive rather than legislative in nature so long as it does not involve too much discretion.