RULEMAKING AS LEGISLATING

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ABSTRACT

Federal administrative agencies make far more legally binding policy decisions than Congress. Yet the Supreme Court refuses to embrace the notion that agency rulemaking constitutes an exercise of Article I legislative power. Instead, the Court has long insisted that agency rulemaking represents an exercise of executive power so long as Congress sets forth an intelligible principle. This position, which is driven by the nondelegation doctrine’s central premise prohibiting Congress from delegating legislative power, was reaffirmed by the Court as recently as the 2012 Term.

Various judges and scholars have decried the fictional nature of the Court’s current nondelegation doctrine, and some have called for the Court to abandon the doctrine’s central premise prohibiting delegations of legislative power. These calls, however, have been narrowly focused on the constitutional contours of the nondelegation doctrine itself. Scholars, accordingly, have paid little attention to how the nondelegation doctrine has created doctrinal inconsistency that reverberates throughout administrative law. This Article aims to fill that gap. Specifically, this Article is the first to systematically explore how administrative law’s most central doctrines—including Chevron and Auer deference, arbitrary and capricious review, procedural constraints on agency rulemaking, procedural due process and the test used to define legislative rules—have been influenced by the Court’s nondelegation jurisprudence, and how these various doctrines would be impacted if the Court jettisoned the nondelegation doctrine and frankly acknowledged rulemaking as an exercise of delegated legislative power. This Article concludes that some key administrative law doctrines at least implicitly recognize that agency rules flow from delegations of legislative power, putting those doctrines in

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tension with the nondelegation doctrine. In contrast, other key administrative law doctrines refuse to view agency rulemaking through a legislative lens, aligning them with the nondelegation doctrine’s central premise. Thus, the Court would need to change some administrative law doctrines and clarify others if the Court rejected its current approach and held that Congress constitutionally can and routinely does delegate legislative power. Although these doctrinal changes would have their costs, the changes would be normatively desirable. If courts recognized that rulemaking flows from a delegation of legislative power and took more seriously the notion that agencies act as Congress’s delegate, many of administrative law’s disparate doctrines, which have long been operating under a clouded view of rulemaking, would gain a more unified, coherent lens. 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, the rules look and feel very much like congressionally enacted statutes, 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. 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. 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.” 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. 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

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1 “Legislative” rules are simply rules that carry the force and effect of law. See generally 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. at 476-77. Interpretive rules, for example, merely advise the public in a non-binding 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 generally 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.”).

3 See generally Kathryn A. Watts, From Chevron to Massachusetts: Justice Stevens’ 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.”).


6 See infra at Part I.A.
“legislative form,” such rulemaking activities “are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power.’”

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 1 of the Constitution vests the legislative power in Congress, not elsewhere. 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. 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” —then the courts declare agency rulemaking to be constitutionally permissible as an incident of executive functions.

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8 See Whitman v. American Trucking Assns., 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 ‘all legislative Powers herein granted … in a Congress of the United States.’ This text permits no delegation of those powers.”).

9 See id. at 472 (“we 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’”) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); see also infra at Part I.B.2.

10 See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 (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 Whitman, 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, 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
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.\footnote{See Thomas W. Merrill, \textit{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.").}

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.\footnote{Id. at 2109.} 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 \textit{Whitman v. American Trucking Associations, Inc.} that nothing in the Constitution precludes Congress from delegating its legislative authority and that the Court should stop “pretend[ing]” that the rulemaking authority delegated to agencies is somehow not “legislative power.”\footnote{\textit{Whitman}, 531 U.S. at 488 (Stevens, J., concurring).} Similarly, Professor Thomas Merrill has argued that the nondelегation doctrine should be replaced with an “exclusive delegation doctrine,” which would allow Congress to delegate legislative power.\footnote{See Merrill, \textit{supra} note 12.}

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 \textit{Chevron} deference, \footnote{See \textit{Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.}, 467 U.S. 837 (1984) (calling for deference to an agency’s reasonable interpretation of statutory ambiguity).} \textit{Auer} deference, \footnote{See \textit{Auer v. OPM}, 526 U.S. 462 (1999) (employing deference to an agency’s interpretation of its own regulations).} arbitrary and capricious
review, the line between legislative and non-legislative rules, procedural due process and general procedural constraints on agency rulemaking.

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 major administrative law doctrines might be altered or clarified if the Court recognized rulemaking as a constitutional exercise of delegated legislative power. Ultimately, this Article concludes that even though the nondelegation doctrine’s central premise prohibiting the delegation of legislative power has little traction in the context of the nondelegation doctrine itself, its continual appearance in the case law has confused administrative law as a whole. Some existing administrative 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

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17 See Auer v. Robbins, 519 U.S. 452 (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) (2000) (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”).


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, Thomas 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 2165-2177. His primary focus, however, was on making the constitutional case for the “exclusive delegation” doctrine and analyzing various consequentialist arguments, such as general pro- and anti-delegation arguments.
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. 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. 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. As one preliminary example, consider how Chevron might be impacted by acknowledging rulemaking as legislative action. 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.” 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.”

A very recent illustration of this ongoing confusion can be found in City of Arlington v. FCC, which the Court decided in 2013. In that case, the Court emphatically rejected the notion of a “jurisdictional” exception to

23 See infra at Part III.

24 See id.


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 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. This is because 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 and to more strictly police the bounds of that delegated power before granting deference to agencies. 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 “[b]efore 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 must 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.

\(^{29}\) Id. at 1868, 1874-75.

\(^{30}\) Id. at 1880 (Roberts, C.J., dissenting) (emphasis added).

\(^{31}\) Id. at 1877 (Roberts, C.J., dissenting).

\(^{32}\) Id. at 1873, n.4 (emphasis in original).

\(^{33}\) See infra at notes 243-247 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.”).
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.\footnote{See id.} 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.\footnote{See, e.g., 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); Enrique Armijo, Politics, Rulemaking, and Judicial Review: A Response to Professor Watts, 62 ADMIN. L. REV. 573, 582 (2010).} However, it would bring hard look review into greater harmony with other doctrines, like Chevron, that already view agency rulemaking through the lens of a legislative model.

Finally, as just one more preliminary example, consider how ongoing debate surrounding Auer deference might be resolved if the Court were to openly recognize that rulemaking constitutes an exercise of legislative power. Whereas Chevron deference calls for deference to an agency’s interpretation of a statute enacted by Congress,\footnote{See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).} Auer deference calls for courts to defer to an agency’s interpretation of its own regulations so long as the interpretation is not “plainly erroneous or inconsistent with the regulation.”\footnote{Auer v. Robbins, 519 U.S. 452, 461 (1997).} In recent years, Auer deference has come under attack.\footnote{See infra at notes 215-221 and accompanying text.} Indeed, just last Term in Decker v. Northwest Environmental Center, Chief Justice Roberts and Justice Alito indicated their willingness to reconsider Auer deference,\footnote{See Decker v. Northwest Envt’l Def. Center, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring).} and Justice Scalia argued in favor of abandoning Auer altogether.\footnote{Id. at 1339-1334 (2013) (Scalia, J., concurring in part and dissenting in part).} One of Justice Scalia’s main criticisms of Auer is that it enables agencies to both write the law (by promulgating regulations) and to interpret the law that they have written, thus violating separation of powers principles.\footnote{Id. at 1341.} If the Court abandoned the central premise of the
nondelegation doctrine and acknowledged rulemaking as an exercise of delegated legislative power, then it would become more apparent that Auer deference does indeed enable agencies to both write law and to interpret the same laws that they have written.\textsuperscript{42} Thus, resolution of ongoing debate about the propriety of Auer deference would come out in Justice Scalia’s favor.

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 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 non-formalist 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’s most central doctrines 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 non-legislative 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.

\textsuperscript{42} Id. at 1341.
I. The Central Premise of the Nondelegation Doctrine

The central premise of the nondelegation doctrine is that Congress may not delegate legislative power.\(^{43}\) This Part briefly describes the rise of this premise as well as cracks that have developed in its foundation.

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 legislative powers—was first articulated clearly by the Supreme Court in *Wayman v. Southard*, a Marshall Court opinion decided in 1825.\(^{44}\) 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. Specifically, 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,\(^{45}\) 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.”\(^{46}\)

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 *Field v. Clark* upheld the constitutionality of a statute that allowed the President to suspend the duty-free importation of certain goods from 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.”\(^{47}\)

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\(^{43}\) See Merrill, *supra* note 12, at 2103 (referring to the notion that “the Constitution forbids Congress from delegating legislative power” as the “first postulate” of the nondelegation doctrine).

\(^{44}\) 23 U.S. 1 (1825). The nondelegation doctrine also made a brief appearance in an even earlier Marshall Court opinion. *See* The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813).

\(^{45}\) 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.”).

\(^{46}\) *Id.* at 42.

\(^{47}\) 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
reaching this conclusion, the Court stated: “[T]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”48 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.”49

As the twentieth century progressed, the Court continued to insist that Congress may not delegate legislative power.50 Most notably, in 1935 in Panama Refining Co. v. Ryan51 and A.L.A Schechter Poultry Corp. v. United States, the Court—for the first and last times ever—invalidated provisions of a federal statute on nondelegation grounds.52 In concluding in those cases that provisions of the National Industrial Recovery Act 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,’”53 and that Congress “manifestly
is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”

Although the Court has not invalidated a federal statute as an unconstitutional delegation of legislative authority since 1935, the Court has continued to repeat the mantra that Congress may not delegate legislative power. 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.” In a dissenting opinion in *Mistretta*, Justice Scalia emphasized this point, noting that what is really at stake in delegation cases is “whether there has been any delegation of legislative power” since “[s]trictly speaking, there is no acceptable delegation of legislative power.”

Other cases decided in the past few decades contain similar language. Most notably, in *Whitman v. American Trucking Associations*,

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

55 See *Whitman v. American Trucking Ass’ns*, Inc., 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).

56 The fact that Congress 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 constitutional delegation flags 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 of Am. Petroleum Inst.*, 448 U.S. 607, 659-62 (1980) (plurality opinion) (avoiding a nondelegation issue by requiring agency to make a finding of significant risk in promulgating the safety regulations at issue).


58 *Id.* at 413, 419 (Scalia, J., dissenting) (emphasis in original).

Inc., the Court emphatically reaffirmed that no delegation of legislative power is constitutionally permissible.60 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 “all legislative Powers herein granted … in a Congress of the United States.’ This text permits no delegation of those powers.” 61 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 “all legislative Powers” in Congress.62

B. Reconciling the Nondelegation Doctrine’s Central Premise with Congress’s Routine Delegation of Rulemaking Powers

Despite its longstanding pedigree in the case law,63 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 that carry the force of law just as statutes do,64 and the courts routinely rubber stamp these delegations.65

1. The Institutional Reality of Rulemaking’s Modern Role

61 Id. (emphasis added).
62 See id.; see also Merrill, supra note 12, at 2104 (noting that although “early 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”).
63 See generally 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”).
64 See infra at Part I.B.1.
65 See infra at Part I.B.2.
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. 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.”

Although many early congressional delegations of rulemaking power ran directly to the President and touched upon fairly narrowly defined topics, such as military affairs, tax, and internal government, things soon changed. 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.”

As a result of these and other broad delegations of rulemaking powers, the importance of agency regulations in our legal system is hard to overstate. Indeed, the bulk of new legal norms today are not set forth

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66 23 U.S. (10 Wheat) 1, 42-43 (1825).

67 Act of Sept. 29, 1989, ch. 24, I Stat. 95, 95; see also Act of July 22, 1790, ch. 33, I 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”).

68 See Merrill & Watts, supra note 1, at 496-98 (describing the growth of delegations of rulemaking power); see also JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES (1927) (describing the progression of Congress’s delegations).

69 Id. at 497.

70 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 beginning 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 any such rules and regulations as may be necessary” to carry out or to administer the act. Id.

in newly enacted statutes.\(^{72}\) In the 112\(^{th}\) Congress, just 238 bills were enacted into law, and in the first session of the 113\(^{th}\) Congress, just 75 bills were enacted into law.\(^{73}\) In 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.\(^{74}\)

Most important for purposes of this Article is the fact that these agency regulations, when promulgated as “legislative” rules, carry the force and effect of law.\(^{75}\) “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.”\(^{76}\) 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.\(^{77}\)

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

(putting a natural text here)
opportunity for veto. 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. 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. Thus, notice-and-comment rulemaking looks quite different from the legislative process. Nonetheless, the primary effect of both statutes and legislative regulations is the same: Both create legally binding norms and carry the force and effect of law.

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? The answer lies in what is known as the “intelligible principle” requirement.

The Supreme Court first clearly articulated what is now known as the “intelligible principle” requirement in *J.W. Hampton & Co. v. United States.* In that case, which involved a delegation to the executive branch to alter tariff rates, the Court reiterated the nondelegation doctrine’s central premise that Congress may not delegate legislative power. However, in explaining the line between unconstitutional delegations of

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78 U.S. CONSTIT., art. I, § 7 (calling for bicameralism and presentment).
80 *Id.*; see also *infra* at Part III.D (discussing the procedural constraints imposed on agency rulemaking by § 553 of the APA).
81 See generally 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.”).
82 276 U.S. 394 (1928).
83 *Id.*
84 *Id.* at 406-408.
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.”85 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.86

Although the “intelligible principle” requirement conceivably could have been read to have real teeth, the reality is that the Court has taken an extremely lenient view of what constitutes an intelligible principle.87 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.88 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 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].”89 The courts, accordingly, routinely uphold delegations authorizing agencies to regulate pursuant to very squishy commands, like regulate in the “public interest”90 or set rates that will be “generally fair and equitable.”91

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

85 Id. at 409 (emphasis added).

86 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”).


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

89 321 U.S. 414 (1944) (emphasis added).


power. This discretionary reading of legislative power focuses on the degree of discretion that the rule promulgator exercises. “Only if the promulgator has great discretion in determining the context of rules [would the Court] say that the promulgator exercises legislative power.”

This means, as Justice Scalia has put it, that “what is really at stake 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.”

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.

Given the toothless and fictional nature of the intelligible principle requirement, it is not surprising that scholars are quite unified in their disdain for the Court’s discretionary reading of legislative power. As Larry Merrill, supra note 12, at 2116.

Id.

Id.

Id.


City of Arlington, Texas 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.’”) (emphasis in original).

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, 44 Loyola Univ. Chic. 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”).
Alexander and Saikrishna Prakash have summed it up, apparently “no one regards the Constitution as actually endorsing the Supreme Court’s [doctrinal] approach to delegations.” The Court nonetheless has stubbornly stuck to its discretionary reading of the legislative power—apparently driven largely by its desire to accommodate the realities and the complexity of government. 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.” 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 yet, at the same time, allow Congress the flexibility it needs to seek assistance. In addition, the Court has been able


99 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, 847-48 (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 generally Federal Maritime Comm’n v. South Carolina State Ports Authority, 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”) (emphasis in original); 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.”) (emphasis in original).

100 Mistretta v. United States, 488 U.S. 361, 372 (1989); 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”).

101 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”).
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.102

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.103 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, the Candid Approach, which has been most clearly articulated by Justice John Paul Stevens and Professor Thomas Merrill, has real appeal in that it would repudiate the unsatisfying doctrinal fiction that the Court currently uses, and it would better reflect the institutional reality of rulemaking’s modern role. Yet, despite the appeal of the Candid Approach, scholars have paid little attention to how the current nondelegation doctrine has shaped existing administrative law doctrines, or how adopting the Candid Approach in place of the nondelegation doctrine would impact administrative law as a whole.

A. Individual Justices’ Calls for a More Candid Approach


103 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.” See id. 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).
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. Justice Stevens most clearly set out these views in a concurring opinion in *Whitman v. American Trucking Associations, Inc.*, 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. The Court’s majority opinion, which was written by Justice Scalia, reiterated the nondelegation doctrine’s central premise that Congress may not delegate legislative power to agencies. 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.

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

104 See *Werhan*, supra note 88, at 45 (noting that Justice Stevens’ view that Congress may delegate legislative power is the “rare exception” to the Court’s steadfast insistence that “Congress cannot delegate its legislative power”).


106 Id. at 462-65.

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

108 Id. at 472-75.
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.”

In supporting his view that the Court should simply “admit” that agency rulemaking is indeed legislative in nature, 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.” 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. In Justice Stevens’ 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. Thus, Justice Stevens argued that the “same characterization [was] appropriate when an agency exercises rulemaking authority” pursuant to a congressional delegation. 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 the Constitution limits the authority of Congress to delegate its legislative power to others.

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 1993, Justice

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109 Id. at 488 (Stevens, J., concurring) (internal footnotes omitted).
110 Id.
111 Id. at 488-89.
112 Id.
113 Id. at 489.
114 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.
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.”

According to Justice White, “legislative power” can be and is “exercised by independent agencies and Executive departments” pursuant to congressional delegations of rulemaking authority. 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.”

B. Scholars’ Calls for a More Candid Approach

In terms of scholars, Professor Thomas Merrill has been at the forefront of arguing for abandonment of the notion that Congress may not delegate legislative powers. Like Justice Stevens, 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 society. Also like Justice Stevens, Merrill defends

116 Id.
118 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 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 was probably 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 K. DAVIS & R. PIERCE, 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. at § 2.3. However, 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”).
119 Id. at 2115-16, 2125-2127.
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. Instead of prohibiting the delegation of legislative power, 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. Furthermore, Merrill takes the position that the intelligible principle requirement should be jettisoned.

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. 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.”

From a constitutional perspective, 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—belie the notion that any

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120 Id. at 2181. Other scholars have reached similar conclusions. See, e.g., Cass 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.”).

121 Id. at 2101, 2181.

122 Id. at 2165. Merrill deviates from Justice Stevens here. See supra note 114. 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 id., this Article—consistent with Merrill’s approach—assumes that adoption of the Candid Approach would jettison the “intelligible principle” requirement.

123 Id. at 2128.

124 Id. at 2181.
one reading of the Constitution is clearly and decisively correct.\textsuperscript{125} Yet Justice Stevens and Professor Merrill have made very persuasive cases for why it would be constitutionally permissible to jettison the Court’s insistence that Congress may not delegate legislative power.\textsuperscript{126} Moreover, Justice Stevens’ 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

\textsuperscript{125} See, e.g., Posner & Vermeule, supra note 103, at 1723 (arguing that Article I’s Vesting Clause simply means that “[n]either 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”); Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated, 70 U. CHI. L. REV. 1297, 1298 (2003) (disagreeing with Posner and Vermeule’s take on the meaning of legislative power); Lawson, supra note 103, 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”).

\textsuperscript{126} This Article does not aim to rehash or to 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., Posner & Vermeule, supra note 103 (advocating a technical reading of legislative power that would merely forbid Congress from delegating its de jure legislative powers); Alexander & Prakash, supra note 103 (arguing that Posner and Vermeule’s formal approach is untenable); Merrill, supra note 12 (arguing that the Constitution can be read to embrace the exclusive delegation doctrine rather than the nondelegation doctrine); Lawson, supra note 103, at 376 (arguing that the Constitution prohibits Congress from delegating “important” policy decisions); SCHÖNBRÖD, supra note 103 (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). 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. Cf. Peter 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”).
large swaths of delegated rulemaking power. Thus, frankly acknowledging that Congress can and does delegate legislative power has real appeal—especially when viewed from a functional perspective that values acknowledging the reality of rulemaking’s modern role.

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 were to frankly acknowledge rulemaking as a form of legislating. Would key administrative law doctrines—many of which are 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.

127 The formalist approach seems unlikely to gain sway with judges because it represents a novel and extremely literal reading of the Constitution. See generally 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.”); Alexander & Prakash, supra note 103, at 1302 (arguing that the formalist approach is “normatively implausible”). In addition, a strict approach to the nondelegation doctrine, which has been proposed by Gary Lawson and David Schoenbrod, see supra note 103, 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. American Trucking Ass’n, Inc., 531 U.S. 457, 486-87 (2001) (Thomas, J., concurring) (expressing a willingness to reconsider the Court’s lax enforcement of the nondelegation doctrine).

128 As noted supra at note 22, 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 approach. See Merrill, supra note 12, at 2171-75. His conclusions on Chevron align with those reached here. See infra at notes 157-174 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 was on making the constitutional case for the “exclusive delegation” doctrine and analyzing various consequentialist arguments, such as general pro- and anti-delegation 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.
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: the test currently used to distinguish legislative from non-legislative 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.\(^{129}\) As we will learn from looking at these key doctrines, administrative law is full of tension—tension that is 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 Non-Legislative Rules

One important doctrinal test in administrative law is the test used to distinguish legislative from non-legislative rules. The line between these two types of rules is critical because only legislative rules have the force and effect of law.\(^{130}\) Furthermore, to have binding legal effect, legislative rules generally must go through the notice-and-comment process set forth in

\(^{129}\) 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 United States ex rel. Accardi v. Shaunessy, 347 U.S. 260 (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 (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).

\(^{130}\) See infra at note 1 (discussing the difference between legislative and nonlegislative rules).
Section 553 of the APA, whereas non-legislative rules are exempt from notice-and-comment requirements.\textsuperscript{131}

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.”\textsuperscript{132} Yet despite the two-prong nature of this test (which is sometimes referred to as the \textit{American Mining Congress} test), courts generally 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 Tom Merrill and I have described elsewhere, courts have shown serious “judicial indifference” towards the first part of the test.\textsuperscript{133} 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.”\textsuperscript{134}

Although this judicial indifference might seem “puzzling” at first glance,\textsuperscript{135} it is more understandable when the nondelegation doctrine is taken into account. The Supreme Court, after all, has insisted that grants of rulemaking power are not impermissibly “legislative” so long as the grants are constrained by an intelligible principle—no matter how vague the principle is.\textsuperscript{136} Courts, accordingly, seem to assume that any rulemaking

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\item See 5 U.S.C. § 553; see also Broadgate Inc. v. USCIS, 730 F. Supp. 2d 240, 243 (D.D.C. 2010) (“Notice and comment procedures are only required under APA § 533 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.”).
\item Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (emphasis added); 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 regulation at issue”) (emphasis added); Vance v. Hegstrom, 793 F.2d 1018, 1022-23 (9th Cir. 1986) (noting that interpretive rules are issued “without delegated legislative authority”).
\item Merrill & Watts, supra note 1, at 478.
\item Merrill & Watts, supra note 1, at 478 (noting that the judiciary’s indifference toward the first part of the test is “puzzling”).
\item See supra Part I.A.
\end{enumerate}
\end{footnotesize}
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.\(^{137}\) In other words, just as courts have not carefully scrutinized whether Congress has set forth a meaningful principle to guide agency discretion, courts also have not carefully scrutinized or taken seriously the question whether Congress did in fact empower the relevant agency to act with the force of law by issuing a legislative rule—choosing instead to read even very vague, general grants of rulemaking authority as a sufficient conferral of legislative rulemaking power.\(^{138}\)

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, in fact, delegated legislative power to the agency. This would help to reinforce notions of legislative supremacy—underscoring that agencies can “issue edicts that have the effect of statues only if Congress delegates to them the authority to do so.”\(^{139}\) 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.”\(^{140}\) 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—demonstrate that the courts have failed to take seriously the notion that agencies act as Congress’s true delegate and that without a delegation of legislative power from Congress to the agency, the agency would have no power to act in a binding manner.

\(^{137}\) Am. Mining Cong., 995 F.2d at 1109.

\(^{138}\) 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).

\(^{139}\) Id. at 590 (emphasis added).

B. Judicial Review Doctrines

In thinking about the impact that the current formulation of the nondelegation doctrine has had on administrative law as a whole (and how a move toward the Candid Approach might impact administrative law), key judicial review doctrines also must be considered. This section analyzes the impact that adoption of the Candid Approach would have on three central scope of review doctrines: *Chevron* deference,141 *Auer* deference,142 and arbitrary and capricious review.143

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.144 In *Chevron* itself, the Court justified this rule of deference by referring to notions of congressional delegation: “[I]f 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.”145 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 “gaps.”146 Thus, the *Chevron* decision led to significant debate among scholars about whether *Chevron*’s rule of mandatory deference rested notions of congressional delegation, notions of accountability grounded in quasi-separation of powers principles, or something else.147

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141 *See infra* at Part III.B.1.
142 *See infra* at Part III.B.2.
143 *See infra* at Part III.B.3.
145 *Id.* at 843–44 (emphasis added).
146 *Id.* at 865–66.
147 *See generally* Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1005 (2007) (noting that 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”).
In Christensen v. Harris County and then again in United States v. Mead Corp., 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 “force of law” and where the agency has acted pursuant to that delegation. 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 lawmaker 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 (i.e., legislative rules) generally are eligible for *Chevron* deference. In contrast, the Court explained that non-binding rules, such as “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”

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. 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-

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150 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 (providing that “interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).
151 *See Mead*, 533 U.S. at 226 (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.”).
152 *Christensen*, 529 U.S. at 587.
153 *See Bressman*, supra note 27 (describing how *Mead* has muddled judicial review).
comment rulemaking is absent, an agency interpretation might nonetheless warrant *Chevron* deference based on a grab bag of different factors, including “[t]he 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.”

Scholars have bemoaned 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.

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.”

The lower courts have responded to this lack of guidance in two main ways. First, much like with the test used to distinguish legislative

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155 See Bressman, supra note 27, at 1443 (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”).

156 *Mead*, 533 U.S. at 226 (emphasis added).
from non-legislative rules, \textsuperscript{157} courts often duck the \textit{Mead} inquiry. Sometimes they do this by glossing over the first part of \textit{Mead}’s inquiry—which asks whether Congress “delegated authority to the agency generally to make rules carrying the force of law”\textsuperscript{158}—and focusing their attention instead on whether the agency intended to act with the force of law pursuant to that delegation.\textsuperscript{159} Or more often they will simply duck the entire two-pronged \textit{Mead} inquiry by ruling that the government’s interpretation wins regardless of whether or not \textit{Chevron} is applied, thereby “pretermit[ting] the theoretical question of \textit{Chevron}’s scope.”\textsuperscript{160} This practice has become so widespread that scholars have coined a term for it: \textit{Chevron} avoidance.\textsuperscript{161}

Second, even when the lower courts do pay attention to the first part of the \textit{Mead} inquiry, they generally give the inquiry short-shrift. Usually, the 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.\textsuperscript{162} Rarely do courts analyze

\textsuperscript{157} See supra notes 131-141 and accompanying text.

\textsuperscript{158} Mead, 533 U.S. at 226.

\textsuperscript{159} See, \textit{e.g.}, Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820 (9th Cir. 2012) (focusing on how litigating positions were not developed by the agency with a lawmaking pretense in mind).

\textsuperscript{160} See, \textit{e.g.}, Durr v. Shinseki, 638 F.3d 1342, 1348 (11th Cir. 2011) (avoiding the question whether \textit{Chevron} applies because “it makes no difference” to the case); PDK Laboratories, Inc. v. U.S. Drug Enforcement Admin., 438 1184, 1197-98 (D.C. Cir. 2006) (avoiding the \textit{Mead} inquiry); Springfield, Inc. v. Buckles, 292 F.3d 813, 817-18 (D.C. Cir. 2002) (same).

\textsuperscript{161} See Adrian Vermeule, \textit{Our Schmittian Administrative Law}, 122 HARV. L. REV. 1095, 1127-29 (2009) (describing this phenomenon of \textit{Chevron} avoidance); Bressman, supra note 27, at 1464 (noting how courts engage in \textit{Chevron} avoidance). Perhaps it should more aptly be named “\textit{Mead} avoidance” as it allows courts to skip the \textit{Mead} inquiry and to proceed directly to \textit{Chevron}.

\textsuperscript{162} See, \textit{e.g.}, Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713-15 (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 \textit{Chevron} treatment); National Cable & Telecomm. Ass’n v. Brand X Internet Services, 545 U.S. 967, 980-981 (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) (internal citations omitted).
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.\textsuperscript{163}

There are many possible causes of the judiciary’s inattention to the first prong of the \textit{Mead} inquiry,\textsuperscript{164} and it is hard to say whether the nondelegation doctrine—which contradicts \textit{Mead} by providing that Congress may not delegate legislative power—is one of the causes of the judiciary’s neglect of the first prong of \textit{Mead}. However, even if the nondelegation doctrine is not the root cause of courts’ indifference toward the first prong of \textit{Mead}, it is undeniable that tension exists between \textit{Mead} and the nondelegation doctrine. After all, it would seem 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 \textit{Mead} that Congress must delegate to an agency the power to act with the “force of law” before the agency will receive \textit{Chevron} deference.\textsuperscript{165}

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 \textit{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.\textsuperscript{166} This would focus the inquiry of the first prong of \textit{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 \textit{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

\textsuperscript{163} One such rare example can be found in \textit{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. \textit{Id.} at 916-21.

\textsuperscript{164} Perhaps the most plausible explanation is that the caselaw enables courts to generally assume that agencies have rulemaking powers no matter how general and vague the rulemaking grant at issue. \textit{See} Merrill & Watts, \textit{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”).

\textsuperscript{165} \textit{Cf.} Merrill, \textit{supra} note 12, at 2172 (noting that “strict enforcement of the nondelegation doctrine would seem to cut the legs out from under \textit{Chevron}”).

\textsuperscript{166} This Article does not address how \textit{Mead} should apply in the adjudicatory realm.
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 seems 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 seem to take seriously this notion that agencies operate as delegates of Congress. They, for example, generally assume without analysis that even very vague, general rule making grants give agencies broad power to promulgate legislative rules. And, as the grab-bag of factors listed in Barnhart v. Walton illustrates, courts do not even always focus the Mead inquiry on whether the agency has the power to act with “the force of law.” Therefore, adoption of the Candid Approach would force courts to take more seriously the notion that agencies operate at the will of Congress—a general notion that the Court has recognized in theory in cases like Chrysler v. Brown but has frequently failed to take seriously when crafting and applying specific administrative law doctrines like Mead’s “force of law test” and the test used to distinguish legislative and non-legislative rules.

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. Thus, fewer agency rules would receive Chevron deference, and many rules would presumably be eligible only for Skidmore deference. Nonetheless, Congress could change this state of affairs since Congress is the body

167 See supra notes 162–163 and accompanying text.
169 See supra note 154 and accompanying text.
170 441 U.S. 281, 302 (1979) (“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 the limitations which that body imposes”).
171 See supra note 140 and accompanying text.
“entitled to signal whether an agency can exercise primary interpretive authority in a given instance.”

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, the Supreme Court resolved this issue last Term in *City of Arlington v. FCC*. Writing for the Court, Justice Scalia emphatically rejected the notion of a jurisdictional exception to *Chevron* deference. Justice Scalia reasoned for the Court that the distinction between “jurisdictional” and “nonjurisdictional” issues in the agency context is “illusory.” As he saw it, there is no difference at all between an agency’s exceeding the scope of its authority (its jurisdiction) and exceeding authorized application of authority that it unquestionably has.

Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented. Central to Chief Justice Roberts’ 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. Indeed, Chief Justice

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

174 *Compare Miss.* Power & Light v. Miss. Ex. Rel. Moore, 487 U.S. 354, 381-82 (1988) (Scalia, J., concurring) (“It is plain that giving deference to an administrative interpretation of statutory jurisdiction or authority or both is 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 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).


176 *Id.* at 1868, 1874-75.

177 *Id.* at 1868, 1870.

178 *Id.* at 1869.

179 *Id.* at 1879 (Roberts, C.J., dissenting).

180 *Id.*
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.”\textsuperscript{181}

According to Chief Justice Roberts, the vast powers exercised by agencies and the binding nature of legislative regulations counsel that before a court grants \textit{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.”\textsuperscript{182} After all, as Chief Justice Roberts put it, the courts give \textit{Chevron} deference to permissible agency interpretations precisely “because Congress has delegated to the agency the authority to interpret those ambiguities ‘with the force of law.’”\textsuperscript{183}

Certainly, Chief Justice Roberts’ dissent in \textit{City of Arlington} does not openly embrace the Candid Approach as Justice Stevens did in \textit{American Trucking}. Yet Chief Justice Roberts does admit that agencies routinely exercise lawmaking power. Specifically, Chief Justice Roberts wrote:

\begin{quote}
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 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 administrative agencies.\textsuperscript{184}
\end{quote}

The majority responded to this portion of the dissent by asserting that the dissent “overstates when it claims that agencies exercise ‘legislative

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 1880.

\textsuperscript{183} Id.

\textsuperscript{184} Id. at 1886 (emphasis added).
power.” The Court acknowledged that “[a]gencies make rules” that take “legislative” forms. 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.’”

This back and forth between the majority and the dissent about the proper constitutional characterization of rulemaking nicely illustrates how adoption of the Candid Approach likely would have altered the Court’s resolution of City of Arlington. Although Chief Justice Roberts does not go so far as to state that Congress constitutionally can delegate legislative power (the way Justice Stevens did in his concurring opinion in American Trucking), his frank recognition of the fact that Congress does delegate lawmaking power to agencies leads him logically to the conclusion that the courts must carefully police the boundaries of Congress’s delegations. As the Chief 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. Thus, were the Court operating under the Candid Approach, Chief Justice Roberts’ dissent in City of Arlington would win the day, and courts’ focus would be on judicial policing of the boundaries of what Congress intended to delegate.

c. Preemptive Agency Interpretations

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185 Id. at 1873, n.4.
186 Id. (emphasis in original).
187 See Part II.A. (discussing Justice Stevens’s opinion in American Trucking).
188 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.
189 Id. at 1880 (Roberts, J., dissenting).
190 Several years before City of Arlington was decided, Thomas 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.”).
Yet another area of recent debate concerning *Chevron* deference that would likely be clarified by the Candid Approach is the question of whether courts should give *Chevron* deference to agencies’ interpretations of the preemptive reach of statutes and regulations.\(^{191}\) 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.\(^{192}\) 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 preempted state law, we have also recognized that “a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”\(^{193}\)

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


\(^{192}\) See, e.g., Louisiana 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’’); New York v. Fed. Energy Regulatory Comm’n, 535 U.S. 1, 8 (2001) (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).

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 non-deference,” 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.”

This area of 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 expressly delegated to the agency preemptive rulemaking power and the agency intended to act pursuant to that delegation.

Congress, after all, can use its legislative powers to enact laws that preempt state laws, and Congress can delegate to agencies the authority to make legally binding rules that preempt state law. 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.

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195 Id. at 668 (2011).

196 Cf. Merrill, supra note 191, at 771 (“the 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 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.

197 U.S. CONSTIT., art. VI, cl. 2.


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.200

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.”201 As David 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.”202 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 central premise is that Congress may not delegate legislative powers.203

d. Overriding Stare Decisis

200 Id. at 577 (“agencies 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”).


203 Rubenstein is one of the few scholars who has noticed and articulated this conflict between the nondelegation doctrine and agency preemption. See David Rubenstein, The Paradox of Administrative Preemption, 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. at 2.
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 Association v. Brand X Internet Services*, 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 Ninth Circuit thought that the FCC’s interpretation was foreclosed by a prior Ninth Circuit precedent, which had adopted a conflicting interpretation. 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*. 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. Instead, judicial precedents interpreting ambiguity in agency-administered statutes merely serve as “provisional precedent” subject to subsequent override by agencies.

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* could be explained on the ground that

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204 545 U.S. 967 (2005).

205 Id. at 982.

206 Id. at 982-83.

207 Id. at 983 (“whether 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.”).

Congress itself can override judicial interpretations of statutes by rewriting the statute, \(^{209}\) 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**. \(^{210}\) Whereas **Chevron deference** calls for deference to an agency’s interpretation of a statute enacted by Congress, \(^{211}\) **Auer deference** calls for courts to defer to an agency’s interpretation of its own regulations. \(^{212}\) 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.” \(^{213}\)

Although the Court has applied **Auer** deference in recent cases, \(^{214}\) disquiet surrounding **Auer** deference has been mounting in recent years. \(^{215}\)

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\(^{210}\) See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (an agency’s interpretations of its own regulations is controlling unless “plainly erroneous or inconsistent with the regulation”).


\(^{213}\) Id.

\(^{214}\) See, e.g., Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1337 (2013) (deferring to the EPA’s interpretation under **Auer** deference).

Just last Term in Decker v. Northwest Environmental Center, for example, Chief Justice Roberts and Justice Alito indicated their willingness to reconsider Auer deference in an appropriate case, and Justice Scalia argued in favor of abandoning Auer altogether even though he himself authored the Court’s unanimous opinion in Auer. The main thrust of Justice Scalia’s newfound distaste for Auer deference seems to be that, in his view, Auer deference lacks any principled justification.

According to Justice Scalia, one major 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. This difference renders Auer unconstitutional, Justice Scalia has argued, because Auer places the power to write the law (i.e., to promulgate regulations) and the power to interpret the law (i.e., to interpret regulations) in the same hands, thereby violating “fundamental separation of powers principles.”

Professor John Manning has made a similar separation of powers argument, arguing that “Seminole Rock [now referred to as Auer deference] 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.” Central to Manning’s analysis is his view that “agencies engage in ‘lawmaking’ when they exercise rulemaking authority.”

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217 Id. at 1339-1334 (Scalia, J., concurring in part and dissenting in part).

218 Id. at 1338 (Scalia, J., dissenting). 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, 2266 (2011) (Scalia, J., concurring).

219 Decker, 133 S. Ct. at 1341 (Scalia, J., concurring in part and dissenting in part). This principle could potentially raise flags for courts given that they, in some instances, could be argued to be both making law and interpreting the same law. See generally Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405 (2008) (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.

220 Manning, supra note 215, at 654.

221 Id.
If the Candid Approach were adopted, then Manning and Scalia’s consolidation-of-power concerns would be even easier to understand.\footnote{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 law-maker and law-interpreter are the same entity.} This is because—if rulemaking were openly acknowledged to be an exercise of legislative power—then it would become much more apparent that Auer deference does indeed enable agencies to both write law and to interpret those same laws, thereby violating separation of powers principles requiring “that the power to write a law and the power to interpret it cannot rest in the same hands.”\footnote{Id. at 1341.}

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 resemble binding legislative rules created through the notice-and-comment process.\footnote{Cf. Watts, supra note 147, 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 Medical Center, Inc. v. Sebelius, 424 Fed. Appx. 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).} In Auer itself, for example, the Court deferred to Secretary of Labor’s non-binding interpretation of its own regulation set forth in an amicus curiae brief,\footnote{Auer v. Robbins, 519 U.S. 452, 462 (1997).} and in a recent opinion from 2013, the Court deferred to the EPA’s non-binding interpretations of its regulations that it set forth in an amicus curiae brief when it entered the case.\footnote{Decker v. Northwest Environmental Defense Center, 133 S. Ct. 1326, 1337 (2013) (deferring to the EPA’s interpretation set forth in an amicus brief).} 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,\(^{227}\) then courts would need to give more attention to whether courts should treat agency interpretations of regulations set forth in non-binding formats as binding on the courts under *Auer*.\(^ {228}\) 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, since those formats lack the force of law and are not binding.\(^ {229}\)

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.\(^ {230}\) For example, in *Keys v. Barnhart*,\(^ {231}\) Judge Posner noted

\(^{227}\) See supra Part III.B.1 accompanying text (discussing how the Court’s *Chevron* jurisprudence has embraced a delegatory rationale).

\(^{228}\) 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”).

\(^{229}\) 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 non-binding deference to agency interpretations of their own regulations.

\(^{230}\) See, e.g., *Joseph v. Holder*, 579 F.3d 827, 833-34 (7th Cir. 2009); see also *Keys v. Barnhart*, 347 F.3d 990 (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 Oral Arg. Tr. at 3-13, 43, *Chase Bank USA v. McCoy* (No. 09-329), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-329.pdf (last visited 1/5/2011). 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 *Mead*, “[w]e [have] never really addressed the possible conflict between *Auer* and *Christensen* and *Mead.*” *Id.*

\(^{231}\) 347 F.3d 990 (7th Cir. 2003).
without definitively deciding the matter that “[p]robably there is little left of Auer” after United States v. Mead Corp.’s adoption of the “force of law” test. 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.” According to Judge Posner, Mead’s “force of law” test calls into question many applications of Auer because “[i]t 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.”

Although most lower court judges have continued to apply Auer deference after Mead, 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. At most, such informal interpretations should be entitled to claim some kind of non-binding deference based on the persuasive value of the interpretations.

### 3. Arbitrary and Capricious Review

Arbitrary and capricious review, which can be found in Section 706(2)(A) of the APA, stands as yet another major scope of review doctrine. Two different strains of arbitrary and capricious review might be impacted if the Court were to adopt the Candid Approach and repudiate the nondelegation doctrine: (a) hard look review; and (b) a more deferential

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232 Id. at 993-94 (citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).
233 Id. at 993 (emphasis added).
234 Id. at 993-94.
235 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).
236 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).
238 See infra at Part III.B.3.a.
version of arbitrary and capricious review that is used to review agency denials of rulemaking petitions.\footnote{See infra at Part 
III.B.3.b.} Both are considered here.

\textbf{a. Hard Look Review}

Hard look review is used by courts to ensure that agencies have engaged in reasoned decisionmaking. 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.\footnote{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 generally Matthew Warren, Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit, GEO. L.J. 2599 (2002).}

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.”\footnote{See Watts, supra note 33, at 15 & nn. 45-47; see also Pac. States Box & Basket Co. v. White 296 U.S. 176, 186 (1935) (noting that where a 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”).} However, courts applying hard look review today do not treat rulemaking agencies as “subordinate legislatures” subject only to mere rationality review.\footnote{See Watts, supra note 33, at 15-16.} 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 terms.\footnote{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”).} 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 Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.,\textsuperscript{245} solidified this expert-driven model of agency decision making by making clear that agencies must justify their rules using technocratic terms.\textsuperscript{246} Agencies may not resort to political or policy-driven terms as Congress might when it passes a law through the legislative process.\textsuperscript{247}

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 and, as such, 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.\textsuperscript{248} 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.\textsuperscript{249} Judicial preferences as to

\textsuperscript{245} 463 U.S. 29, 43 (1983).

\textsuperscript{246} See 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.”).

\textsuperscript{247} See id.; see also JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 226 (1990) (“the 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”); CHRISTOPHER EDLEY, 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 decision making”); Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2380-81 (2001) (describing how State Farm demands that agencies ground decisions “in neutral, expertise-laden terms to the fullest extent possible”).

\textsuperscript{248} Cf. SHAPIRO, supra note 244, 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.”).

\textsuperscript{249} 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
which factors agencies should consider would not be relevant. 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), which expressly directs the Secretary of the Interior to determine whether or not a species qualifies as endangered or threatened based “solely on the basis of the best scientific and commercial data available.”

to assure that the agency exercises the delegated power within statutory limits”) (emphasis added).

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251 An interesting subsidiary 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 actual reasons given by agencies when they made their decisions as opposed to post hoc rationalizations. See generally SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) (“an 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”). As Kevin Stack has argued, the Chenery rule against post-hoc rationalizations rests largely on nondelegation concerns. See Kevin M. Stack, The Constitutional Foundations of Chenery, 116 YALE L.J. 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.”). 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. However, I am not sure that rejection of the nondelegation doctrine would necessarily lead to or should 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 more easily evade Congress’s instructions.


253 Id. § 1533(b)(1)(A).
However, in the run-of-the-mill scenario where Congress does not foreclose an agency from considering specified factors, 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 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—just as Congress is free to resort to a variety of factors when enacting statutes.

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. According to some scholars, courts may well 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. In other words, courts may well feel guilty

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

255 For example, statutes creating independent agencies that are insulated from direct presidential control (as opposed to executive agencies that are subject to the control of the President) might well be read to indicate Congress’s intent to foreclose certain factors, like Presidential preferences, from the agency’s decisional calculus.

256 See American 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.”).

about the toothless nature of the “intelligible principle” requirement and the judiciary’s overall lack of enforcement of the nondelegation doctrine, 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 under enforcing the nondelegation doctrine since delegations of legislative power would no longer be impermissible. Courts, accordingly, could focus their inquiry on whether the agency stayed within the bounds of Congress’s delegated authority—underscoring that Congress’s intent (not the courts’ preferences) are what matters in policing the propriety and boundaries of agency action. 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 and follow the instructions set forth by Congress.

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: “Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.” In apparent 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.”

445 (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.”).


5 U.S.C. § 553(e).

See Senate Comm. on the Judiciary, 79th Cong., 1st Sess. (Comm. Print 1945), reprinted in Administrative Procedure Act, Legislative History, S. Doc. No. 248,
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.\footnote{5 U.S.C. § 555(e) (“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.”).} After initial debate about whether such denials of rulemaking petitions should be subject to judicial review at all,\footnote{This debate was fueled by the Supreme Court’s decision in \textit{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.} 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.\footnote{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 4–5 (D.C. Cir. 1987); WWHT, Inc. v. FCC, 656 F.2d 807, 816–17 (D.C. Cir. 1981).} In \textit{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.”\footnote{Massachusetts v. EPA, 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.’”).} 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, \textit{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.\footnote{See Kathryn A. Watts & Amy J. Wildermuth, \textit{Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming}, 102 NW. U. L. REV. 1029 (2008) (“The Court’s actual review of the EPA’s reasons for declining to regulate...”).} There, the Court...
acknowledged that the EPA had provided a “laundry list” of reasons for declining to regulate.266 Yet the Court quickly dismissed all of these considerations, declaring that they were “divorced from the statutory text.”267 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.”268 However, the statute “sa[id] nothing at all about the reasons for which the Administrator may defer making a judgment.”269

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 non-reviewable decision not to legislate. Congress enjoys great discretion in deciding whether to legislate; we “never say that Congress has a duty to pass a law or indeed any laws at all.”270 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.271 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 or not make a rule … [would look] like a purely discretionary one.”272

… was meticulous and probing—a far cry from what one would expect of ‘highly deferential’ review.”).

266 Massachusetts, 549 U.S. at 533.
267 Id. at 552.
268 Id. at 549 (Scalia, J., dissenting).
269 Id. at 552.
270 Cf. SHAPIRO, supra note 244, at 117-18.
271 Id.
272 Id.
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.” 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. Instead, the courts have determined that your recourse is to the political process.

The Court explained this rule in a pair of cases decided at the beginning of the twentieth century—Londoner v. Denver and Bi-Metallic Investment Co. v. State Board of Equalization. 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. 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 property in Denver by 40 percent. Bi-Metallic explained that “[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.” 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.”

In an attempt to simplify matters, scholars have developed a shorthand formulation for this Londoner-Bi-Metallic distinction: “while the Due Process Clause may apply to an agency adjudicative decision, it rarely applies to an agency rulemaking proceeding because agency rules rarely

273 PIERCE, ADMINISTRATIVE LAW, supra note 81, at 28.
274 Id.
275 Id.
276 210 U.S. 373 (1908).
277 239 U.S. 441 (1915).
278 Londoner, 210 U.S. at 385.
279 Bi-Metallic, 239 U.S. at 445.
280 Id.
single out an individual for adverse treatment, but instead apply to an entire class of individuals.” In other words, due process generally is required in adjudications, which often involve retroactivity and specificity, but not in rulemaking proceedings, which are often general and prospective in nature.

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.

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

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281 *PIERCE, ADMINISTRATIVE LAW*, supra note 81, at 28 (emphasis added).

282 See *EDLEY*, supra note 247, at 40-41 (noting that the key distinction is that due process attaches in adjudication, which requires the development of facts peculiar to an individual, but is not required in rulemaking, which turns on general facts).

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

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 Fourteenth Amendment was violated unless every person affected had been allowed an
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. 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. Congress, for example, creates agencies and controls their budgets. In addition, Congress influences agency policymaking via oversight hearings, as well as via more informal communications with agency decisionmakers. Similarly, the President plays a “unique role in overseeing agency action.” 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).


See Watts, supra note 33, at 35-37 (describing how executive and independent agencies are subjected to significant oversight by Congress and the President); see also Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2384 (2001) (“Presidential administration . . . advances political accountability by subjecting the bureaucracy to the control mechanism most open to public examination and most responsive to public opinion.”); FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1815 (2009) (“independent 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.”).

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.”).

See id. at 70 (explaining that Congress can informally supervise agencies through a variety of forms).

Watts, supra note 33, at 35.

See U.S. CONST., art. II, § 2, cl. 2 (spelling out 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).
can also direct agency decisions via informal mechanisms like jawboning as well as more formal mechanisms such as executive orders. 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 their relationship with Congress and the President. 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 via the rulemaking process.

D. General Procedural Constraints Imposed on Agency Rulemaking

Yet another central area of administrative law involves general procedural constraints imposed on notice-and-comment rulemaking by Section 553 of the APA. The literal text of Section 553 of the APA imposes fairly minimal procedural constraints on agency rulemaking. 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.” 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. Through these fairly flexible and minimal procedures, Section 553 of the APA contemplated a legislative-like process for notice-and-comment

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292 See generally Watts, supra note 33, at 34-39 (describing the rise in the political control model of agency decisionmaking).


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

295 Id. at § 553(c).
rulemaking—not an adjudicatory process accompanied by a trial-type hearing.\footnote{The APA does call for more formal, trial-type proceedings for what is known as “formal” rulemaking. \textit{See} 5 U.S.C. §§ 553(c), 556 & 557. Formal rulemaking, however, is quite rare today. \textit{See} Edward Rubin, \textit{It’s Time to Make the Administrative Procedure Act Administrative}, 89 CORN. 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.”).}

The reality, however, is that 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 onto the top of the fairly minimal textual requirements found in Section 553 of the APA.\footnote{\textit{See} American 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 incrementally expanded those APA procedural requirements well beyond what the text provides”); Jack M. Beermann & Gary Lawson, \textit{Reprocessing Vermont Yankee}, 75 GEO. WASH. L. REV. 858, 857 (2007) (“in 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”).}

For example, even though Section 553 allows agencies to issue a notice that merely includes a “description of the subjects and issues involved,”\footnote{5 U.S.C. § 553(b)(3).} judicial precedents now require agencies to disclose technical data and studies on which the agency relied in formulating rules in order to enable meaningful comment.\footnote{\textit{See} Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 392-93 (D.C. Cir. 1973); \textit{see also} Chamber of Commerce v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006); Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n, 673 F.2d 525, 530-31 & n. 6 (D.C. Cir. 1982).}

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.”\footnote{LAWSON, supra note 2, at 318.} 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.”\footnote{\textit{Id.}}
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.”

In Vermont Yankee, the Court took the D.C. Circuit to task for requiring the Nuclear Regulatory Commission (NRC) to employ procedures in notice-and-comment rulemaking, including discovery and cross-examination, when no organic state, regulation or constitutional provision required those procedures. 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.” 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.

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. Some, for example, have insisted that the judiciary’s procedural innovations are not consistent

303 See Beermann & Lawson, supra note 297, at 858.
304 Vermont Yankee, 435 U.S. at 549.
305 See Beermann & Lawson, supra note 297, at 858 (“with 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.”).
306 See American 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 (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”).
with the text of Section 553. 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. 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.

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 under enforcement 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 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. 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.

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307 See American 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) (“Many 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 257-258 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”).
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 non-legislative 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 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 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 pro-delegation and anti-delegation arguments, such as arguments that turn on notions of political accountability, expertise and deliberation. While such considerations are very important to broad theoretical debates about whether delegations to agencies are a good or bad thing, they have been thoroughly discussed elsewhere.\footnote{See, e.g., Jerry L. Mashaw, \textit{Greedy, 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, \textit{supra} note 12, at 2139-2158 (discussing various pro- and anti-delegation policies, such as expertise, deliberation and accountability).}

Nor is the point here to rehash varying positions on what the “best” reading of the Constitution is as an original matter.\footnote{See \textit{supra} note 126 and accompanying text.} 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 clearly 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 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 was 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

313 See supra note 109-110 and accompanying text.

314 See supra notes 244 & 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.
Thus, in addition to freeing the courts of a longstanding fiction, another major benefit of adopting the Candid Approach would be that it would help to bring greater doctrinal coherence to administrative law. If the Supreme Court were to jettison its Current approach to the nondelegation doctrine and were to 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.\(^\text{316}\) Such clarity would be normatively preferable to our current patchwork of disparate administrative law doctrines,\(^\text{317}\) 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.

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.\(^\text{318}\) 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

\(^{316}\) See supra Parts III.B.1 & III.B.2.

\(^{317}\) The law is admittedly untidy and cannot always be coherent at the general level. See generally Joseph Sax, 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.” Jack M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 YALE L.J. 105, 115-16 (1993).

\(^{318}\) See supra Part III.B.3 (describing the searching nature of hard look review); see also supra Part III.D (describing the fairly onerous judicial gloss that courts have placed on top of § 553’s minimal notice-and-comment requirements).
mechanism for checking agency action than the judicial process would.\footnote{See supra Part 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. Nat. 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.").}

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 since 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.\footnote{Cf. Murphy, supra note 257 (discussing whether Congress could constitutionally eliminate hard look review).}

\section*{B. The Main Costs}

Of course, these benefits would not come without costs, and the main costs here would be borne by \textit{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: \textit{Auer} deference;\footnote{See supra Part III.B.2 (discussing Auer deference).} \textit{City of Arlington}’s rule applying \textit{Chevron} to jurisdictional questions;\footnote{See supra Part III.B.1.b. (discussing the question of whether \textit{Chevron} should apply to jurisdictional questions).} arbitrary and capricious review;\footnote{See supra Part III.B.1.3 (discussing arbitrary and capricious review).} and the judiciary’s reading
of statutory constraints imposed on notice-and-comment rulemaking.\textsuperscript{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: \textit{Auer} deference; \textit{City of Arlington}'s rule rejecting a jurisdictional exception to \textit{Chevron}; and judicial review of denials of rulemaking petitions. First, consider \textit{Auer} deference.\textsuperscript{325} Despite the fact that \textit{Auer} deference has longstanding roots (going back, for example, to the Court’s 1945 decision in \textit{Bowles v. Seminole Rock}),\textsuperscript{326} the doctrine has come under attack recently. As has already been mentioned, scholars have criticized the doctrine,\textsuperscript{327} two justices recently expressed their willingness to revisit the doctrine, and one justice recently argued in favor of jettisoning it entirely.\textsuperscript{328} In addition, some recent cases have chipped away at \textit{Auer}’s core,\textsuperscript{329} demonstrating what appears to be an overarching sense of uneasiness with the doctrine. Thus, either jettisoning \textit{Auer} deference—or altering it so that agencies could only claim \textit{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 \textit{Auer}).

   Second, it also seems unlikely that massive shock waves would come from overruling \textit{City of Arlington}'s recent holding rejecting a

\textsuperscript{324} \textit{See supra} Part IILD (discussing procedural constraints placed on agency rulemaking by § 553 of the APA).

\textsuperscript{325} \textit{See} \textit{Auer v. Robbins}, 519 U.S. 452 (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); \textit{see also supra} Part III.B.2 (discussing \textit{Auer} deference).

\textsuperscript{326} \textit{See} \textit{Bowles v. Seminole Rock & Sand Co.}, 325 U.S. 410, 414 (1945) (an agency’s interpretations of its own regulations is controlling unless “plainly erroneous or inconsistent with the regulation”).

\textsuperscript{327} \textit{See supra} at note 215 and accompanying text.


\textsuperscript{329} \textit{See, e.g.}, \textit{Gonzales v. Oregon}, 546 U.S. 243, 257 (2006) (holding that \textit{Auer} is inapplicable where a regulation agency merely parrots the statute); \textit{Christopher v. SmithKline Beecham Corp.}, 132 S. Ct. 2156, 2168 (2012) (declining to afford an agency interpretation of its regulation \textit{Auer} deference where it creates a risk of “unfair surprise”).
jurisdictional exception to *Chevron*. *City of Arlington*, after all, was a split 5-1-3 decision,\(^\text{330}\) 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.\(^\text{331}\) These concerns, however, could be mitigated by articulating the issue not in terms of whether there should be some vague, hard-to-define “jurisdictional” exception to *Chevron* but rather, as Chief Justice Roberts did in his dissent, in terms of whether Congress has delegated to the agency interpretive authority over the question at issue.\(^\text{332}\) 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.\(^\text{333}\)

Third, altering how the courts review denials of rulemaking petitions also seems unlikely to lead to 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.\(^\text{334}\) This is because denials of rulemaking petitions would seem akin to Congress’s own discretionary and non-reviewable decision not to legislate. While 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 to review and that should be subject only to a highly deferential review. Only in highly charged, political cases like


\(^{331}\) *Id.* at 1868, 1870 (arguing that the distinction between jurisdictional and non-jurisdictional questions is “illusory”).

\(^{332}\) *See id.* at 1877 (“Courts defer to an agency 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 an agency.”) (Roberts, C.J., dissenting).

\(^{333}\) *Id.* at 1880.

\(^{334}\) *See supra* Part III.B.3.b (discussing judicial review of denials of rulemaking petitions).
Massachusetts v. EPA have the courts tended to deviate from this highly deferential review.  

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 should allow them to consider any factors, such as changing political sentiments and policy considerations, that Congress did not preclude the agency from considering. 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. However, such an approach to hard look review would not mean that rulemaking would become wholly political or that it would routinely be reduced to “blood-sport” politics where anything goes. 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.

335 See id.; 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).

336 See supra Part III.B.3.a (discussing hard look review).

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

338 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”).

339 See Watts, supra note 33.
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.* 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. 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 that they respond to every significant comment they receive. Change along these lines would likely be extraordinary controversial because the judicial gloss that courts have placed on top of Section 553’s notice-and-comment requirements define 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 to 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, constitutional objections would likely ring quite loudly. As was previously mentioned, when it comes to the constitutionality of delegations of rulemaking power to agencies, there is no scholarly consensus as to the best or the correct reading of the Constitution, and this Article does not attempt to resolve this ongoing debate. Regardless, it is clear that

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341 See *supra* Part III.D (discussing judicial review of agencies’ procedures).

342 Repudiation of the nondelegation would also eliminate the need for courts to employ the doctrine of constitutional avoidance in delegation cases. See *supra* note 56 (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 *id*. This change also might prove controversial as constitutional concerns would no longer push courts to construe statutes narrowly. Nonetheless, courts could still choose to construe statutes narrowly so as to ensure that agencies—as agents of Congress—stay within the bounds of their delegated power.

343 See *supra* note 126 and accompanying text.
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. 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 a the Candid Approach’s functional reading of legislative power that includes agency regulations. 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, but to stress that the courts already have proceeded part way 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; defining legislative rules as those that carry the force and effect of law because Congress “delegated legislative power to the agency”; ruling that procedural due process generally does not attach in rulemaking proceedings where agencies are setting rules of general applicability much like legislatures do; and otherwise implicitly accepting the general notion that Congress routinely hands away lawmaking power. Hence, rejecting the

344 See *Schoenbrod* supra note 103 (arguing that the Constitution does prohibit the delegation of legislative power); see also Lawson, *supra* note 103 (same).

345 See Posner & Vermeule, *supra* note 103, at 1725 (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”).

346 See *supra* note 126 and accompanying text.


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

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

350 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 Congress and subject to limitations which that body imposes”).
current nondelegation doctrine and moving toward the Candid Approach would not cause major 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 Posner and Adrian Vermeule recently articulated when they argued that the legislative power in Article I includes only Congress’s *de jure* powers to enact statutes. 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 Associations, 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.’”

**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

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351 See Posner & Vermeule, *supra* note 103, at 1725 (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”).

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 major 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 bring a unifying lens to administrative law’s current patchwork of disparate doctrines governing agency rulemaking, thus allowing courts to shape central doctrines governing rulemaking in a more cohesive manner around the central notion that agency rulemaking flows from delegated legislative power. In addition, recognizing rulemaking as an exercise of delegated legislative power would better align the courts’ delegation jurisprudence with the institutional reality of rulemaking’s modern role. Courts, accordingly, would be freed of 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.