March 1, 2011

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BREAKING THE GRIP OF THE ADMINISTRATIVE TRIAD: AGENCY POLICYMAKING UNDER A NECESSITY-BASED DOCTRINE

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ABSTRACT
The justification for the modern American administrative state is built on a belief that (1) limited congressional delegation, (2) cabined executive discretion, and (3) properly exercised judicial deference is akin to the system of checks and balances established by the nation’s Founders. In this Article, I propose that the time has come to rid ourselves of this legal fiction, particularly as it has developed in two well-known (and highly criticized) lines of administrative cases: the Supreme Court’s Chevron jurisprudence and the D.C. Circuit’s cases wrestling with the use (or misuse) of non-legislative rules by agencies. In its place, I propose the creation of a “Necessity Doctrine.” Unlike the Constitutional branches of government, agencies are tasked with a much narrower objective within our system: to enable the enforcement of congressional directives through application of expertise, practicality, broad stakeholder input, and inclusion of political considerations. To restore the value of administrative process, we must limit the exercise of that process to those matters that necessitate the use of these bureaucratic tools, and deny the urge to rely upon agencies as an easy surrogate to properly exercised judicial and legislative power.

INTRODUCTION
The administrative state in the modern era is a full-fledged “policymaking” arm of the government. Some seventy-five years of administrative practice has shown that the original vision for an American administrative state—where regulatory problems would be resolved through objective application of expertise and science alone1—is dead. Today, although often with some lingering reluctance,2 we can fully acknowledge that bureaucrats will more often than

*Assistant Professor of Law, University of Denver Sturm College of Law. I would like to thank Alan Chen, Roberto Corrada, and An necoos Wiersema for their insightful comments on earlier drafts of this article, and Jeffery “Toby” Weiner, Kelly Miller, April Shepherd, and Tara Buchalter for their diligent research assistance.


2 See, e.g., Randolph J. May, Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox, 62 ADMIN. L. REV. 433, 444 (2010)(Noting that while expertise remains a factor in judicial discretion to agency action, the fact is “deference was not premised principally upon expertise, but rather upon the notion that there should be political accountability for policy choices that Congress did not itself make.”).
not make the value-laden political judgments that bear on everyday American life.\(^3\)

The continued existence of such a policy wielding bureaucracy in America is not subject to doubt.\(^4\) But reliance on the administrative state comes at a steep price: a seemingly unending debate over the legitimacy of placing such enormous lawmaking power in the hands of not only the unelected, but those outside the traditional constitutional branches of government.\(^5\) With no readily available constitutional mechanism to legitimize day-to-day regulatory outcomes,\(^6\) we have resorted to tying the legitimacy of administrative policymaking to the belief that Congress can delegate discrete discretionary authority to an executive agency because the courts have the power, through judicial review, to place a check on the exercise of such authority.\(^7\) Judicial oversight of agency policymaking, however, is by definition not _de novo_, but must come with some measure of deference to the agency granted the discretion to act by Congress.\(^8\) Thus, our

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3 David S. Rubenstein, “Relative Checks”: Towards Optimal Control of Administrative Power, 51 WM. & MARY L. REV. 2169, 2176 (2010) (“The once heralded ideal of administrative objectivity is now widely regarded as myth. Administrative policymaking is now understood to be as much or more about politics as it is about expertise and science”).

4 See David Fontana, Reforming the Administrative Procedure Act: Democracy Index Rulemaking, 74 FORDHAM L. REV. 81, 100 n.118 (2005).


7 See Peter L. Strauss, Legislation That Isn’t—Attending To Rulemaking’s “Democratic Deficit,” 98 CAL. L. REV. 1351, 1359 (2010)(“The legitimacy of delegated discretionary authority [] is tied directly to the possibility of judicial review for the rationality of its exercise.”).

8 See 5 U.S.C. § 706. As the Supreme Court explained in its pivotal 1984 decision on judicial deference to agency policy-making:

The scope of review under the "arbitrary and capricious" standard is narrow, and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if
The justification of the administrative system is built on a triad of legal fiction—that (1) limited congressional delegation, (2) cabined executive discretion, and (3) properly exercised judicial deference [hereinafter, DD&D] is akin to the system of checks and balances established by the nation’s Founders to overcome our innate distrust of official power.

Now to be fair, a legal fiction, to some extent, can work. Thus, it is not all congressional delegations, all exercise of agency discretion, or all application of judicial deference that undermines the trustworthiness of administrative decision-making. Instead, in the dispirited words of Professor Richard Epstein, “[t]hat place of honor must be assigned to the substantive expansion of administrative discretion, particularly on questions of law.” To refine Epstein’s concern, what most threatens to undermine the American legal system today is judicial deference toward an agency’s discretion to define its own delegated authority when confronted with statutory ambiguity [hereinafter, “implied DD&D]. This further distortion of an existing legal fiction—a double legal fiction if you will—has occurred in two well-known (and highly criticized) lines of administrative cases: the Supreme Court’s Chevron jurisprudence and the D.C. Circuit’s cases wrestling with the use (or misuse) of non-legislative rules by agencies.

In this Article, I propose that the time has come to rid us of further reliance, at least

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9 See, e.g., Douglas S. Corran, Abandonment and Reconciliation: Addressing Political and Common Law Objections to Fetal Homicide Laws, 58 Duke L.J. 1107, 1135 (2009) ("Though a legal fiction, the regime is nevertheless workable.").


11 I will assume that most readers of this Article are familiar with both these lines of cases, and particularly the Chevron doctrine. If not, both are discussed in greater detail in Part II, infra.
exclusively, on DD&D to justify (and ceaselessly expand) administrative policymaking. For too long now, we have debated delegation, discretion, and deference in the context of administrative law, all the while sidestepping the foundational questions that must be addressed to establish the legitimacy of any governmental institution: “Why is there an administrative state?”; 12 “What is the place of the bureaucracy in the structure of democratic government?”; 13 and, by far most importantly, “What can we do to increase our assurance that the officials and employees who do the day-to-day work of government will actually provide the kind of government the American people want?” 14 The current state of administrative law does nothing to answer these questions, and instead only “appeals to our deepest constitutional unease about allocating power to the administrative state.” 15

What we need is to fashion a distinct role for the administrative process that is less repugnant to our constitutional system. It is because the current state of administrative law is just too muddled, too inconsistent, and too unclear with regard to the scope of judicial deference to agency discretion, that scholars and courts should begin to focus on what actually necessitates our need to use administrative process to make policy. Agencies are necessary, and always have been, because they are “process” experts: they have the tools available to make complex, and often fluid, regulatory decisions, that the constitutional branches cannot. These process tools include the ability to incorporate statutory mandates, to apply subject matter expertise, to develop the factual basis for regulatory action, and to involve stakeholders in the decision (both political and non-political alike). And the process need not be free of political influence, so long as it is objective in form and can render rules in a means that Americans view as trustworthy—

12 Peter H. Schuck, Foundations of Administrative Law 7 (2d ed. 2004) (Noting that this question “[i]s not merely an academic question, but has been observed to “reflect[] the deepest of anxieties of our political culture.””).
14 Id.
equal input from all stakeholders, due consideration of all desired political choices (within statutory bounds), and a mechanism for the involvement, but not control, of political officials.

I propose a reform to administrative law, and specifically to judicial review, through the creation of a “Necessity Doctrine” that focuses on process. When asked to define an agency’s obligation under a regulatory statute, the court should examine whether there is a “need” to exercise administrative power in order give Congress’s broad desires proper effect. If a court can implement a statute by resorting to traditional means of statutory interpretation and construction, then it remains duty bound to do so. But if a court finds that without agency action the statute simply is not self-executing, then administrative rulemaking is necessary. There is a difference, for instance, between an agency’s desire to define or apply specific statutory terms (which traditionally is the realm of the judicial branch), and engaging in further legislative-like process to effectuate an otherwise unenforceable statutory mandate. In the former case, courts should consider, but not defer to, an agency; in the latter, the court must require that the agency act to implement the statute through rulemaking, and should then limit its review of the rule to ensure that the agency was faithful to the statute and to the administrative process.

Part I of this Article briefly looks at the development of the modern American administrative state and suggests that the need for a different type of legislative process prompted bureaucratic growth at the start of the 20th century. The events surrounding the New Deal in the 1930s put the political, and ultimately constitutional, spot light on administrative process. Once this occurred, agencies were forever labeled policy-makers, and scrutinized as such. Part II examines how, in recent decades, the legitimacy of the administrative state is further strained as the courts expanded the discretionary authority of agencies to make binding interpretations (both formally and informally) of regulatory statutes. The need for redefining agency power based upon necessity is observable in these cases. Part III elaborates on, and

16 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).
defends, the necessity-based judicial review doctrine by applying it to a hypothetical court case. Notably, the Necessity Doctrine I propose would solve both the seemingly eternal unease with *Chevron* and the "considerable smog" that surrounds the legislative, non-legislative rule debate. Finally, I conclude the article by arguing that the Necessity Doctrine is a genuine opportunity for us to resolve the generational legitimacy problem that has plagued the administrative state. The doctrine, unlike existing administrative jurisprudence, looks at administrative process merely as a necessary aid to the constitutional branches’ exercise of power, and not as a form of government to supplant them.

I. TAKING A STEP BACK: THE MAKING OF THE MODERN ADMINISTRATIVE STATE

A. The Progressive Era: A Model of Objective Independence

The American administrative state dates back to our nation’s founding. As Professor Mashaw has playfully stated:

> Neither Congress nor the Constitution's two executive officers could deliver the mail, collect taxes, distribute military pensions, manage the public debt, award invention patents, survey and sell public lands, or carry out the host of other functions that emerged from legislation passed in just the first few Federalist congresses. And notwithstanding the early shift in political authority, from "big government" Federalists to "small government" Jeffersonian and Jacksonian Democrats, the ratio of national civilian administrative officials to national population increased steadily throughout the antebellum period.

Even so, this early administrative state was most elementary. The Founders were not concerned with developing a theory or method of public administration, but instead “a new system of self-rule for the upper and middle classes that would prevent autocratic government [through] . . . dispersed tripartite powers.” Moreover, at the time of the Revolution, America

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17 Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L. J. 1362, 1366 (2010); see also Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567 (1992) ("The creation and operation of federal administrative agencies date from the first Congress and so, in that sense, so does federal administrative law.").

18 *Id.*

was predominately a rural economy. The federal government was not conceived to regulate a vast manufacturing-based market, but instead to deal with foreign affairs, war, and general commerce among the states. In selecting these early “administrators,” Presidents were often less concerned with fitness, competence or talent for bureaucratic office, as they were about friendships, military service, and political loyalties. Accordingly, during our early history, most administrative functions were carried out by the “aristocratic, wealthy, [and] clearly unrepresentative elite.”

By the early 1800s, however, America began to experience a manufacturing boom. This growth continued through the 18th century, being only slightly slowed by the Civil War.

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21 Although the industrial revolution was well under way in England, there were “no immediate repercussions on the colonies.” Id. at 2. For the colonies, at most it turned them into suppliers of “modest amounts of raw materials to the mother country” and into markets for English goods. Id. Manufacturing, to the extent it could be properly called so in 1776, was of products made in the household for home use. Id. at 3
22 See Kranz, supra note 19, at 10; see also LEWIS L. GOULD, AMERICA IN THE PROGRESSIVE ERA: 1890-1914 3-4 (2001)(noting that up until the last decade of the 18th century, the federal government was relatively small and “the tasks [i]t was expected to perform were [ ] minimal.”). Professor Kranz notes that in 1792, the entire federal bureaucracy consisted of “only 780 employees—mostly bookkeepers and copy clerks, a few professionals (lawyers, physicians, surgeons, surveyors, engineers, and a naval constructor), plus a small number of deputy postmasters . . . .” Kranz, supra note 19, at 10.
23 Id.
24 Id.
25 Hall, supra note 20, at 8. Between 1801 and 1846, American inventors and entrepreneurs produced nearly “100 devices, mostly of the mechanical kind,” for use in manufacturing. Id. at 13-14. Of course, it would take a “great deal more than political independence and ordinary human ingenuity to build a full-fledged American industrial system. Id. at 15. Other forces were also at work throughout the early and mid-19th century: population growth, growing American capital, and favorable changes to the legal system (such as recognition of the corporation). Id. at 15-22. All of this came together to lay the foundation from which a great industrial nation would spring. Id. at 22.
From around 1870 onward—the so-called “Gilded-Age”\textsuperscript{27}—economic development in the United States would “reach gigantic proportions and surpass the wildest dreams of even the most enthusiastic” of Americans at the time.\textsuperscript{28} The United States had become a major economic power.\textsuperscript{29} Inherent in this status, however, was that for the first time in our history, it was possible for powerful industries, like the railroads, to significantly disrupt, or at least influence, the economic and social life of entire populations.\textsuperscript{30} Under such circumstances, it is easy to understand why middle, working class Americans might no longer feel secure to place the regulation of such industries into the hands of appointed “dilettantes,” as Max Weber called them,\textsuperscript{31} particularly during a period already defined as \textit{laissez faire}.\textsuperscript{32} As one U.S. worker of the period explained it, “[w]e [would] prefer having people in office that we can spit on, rather than the caste of officials who spit on us.”\textsuperscript{33}

Enter the Progressives, a group of political reformers who shared a common belief in the ability of science, technology and disinterested expertise to solve societal problems.\textsuperscript{34} By removing appointment powers from elected officials and vesting them in independent boards and commissions, these “reformers hoped to create a ‘neutral’ civil service, which would carry out

\begin{footnotesize}
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\item[27] Mashaw, \textit{supra} note 17, at 3. This term was coined by Mark Twain and Charles Dudley Warner in the 1873 book, \textit{The Gilded Age: A Tale of Today}. \textsc{Encyclopedia of the Gilded Age and Progressive Era Vol. I} (2005)(hereinafter, “\textit{Gilded Age Encyclopedia}”).
\item[28] \textit{Id.} at 22.
\item[29] Gould, \textit{supra} note 22, at 3.
\item[30] \textit{Id.}
\item[31] \textsc{Max Weber, From Max Weber: Essays in Sociology} 110-11 (H.H. Gerth and C. Wright Mills, eds. 1958).
\item[33] Weber, \textit{supra} note 31, at 110.
\item[34] \textit{See Samuel Haber, Efficiency and Uplift Scientific Management in the Progressive Era} 1890-1920 (1964). The Progressive Era is generally considered to have begun in 1901 with the election of President Theodore Roosevelt, and reached its zenith by 1914. \textsc{Gilded Age Encyclopedia, supra} note 27, at 11.
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the policy directions of the elected officials in an impartial, competent manner . . . ”

Most importantly, Progressives intended to separate government administrators from politics. Regulation of industry would require “objective and detached” experts and problem solvers in the Weberian civil service model. For more than half a century, this view of the American administrative state as a technocracy would “spawn and nurture” the myth that “policy-making and administration were two entirely separate processes.” In the mind’s eye of a Progressive, policy was determined by the elected representations while administration neutrally executed this policy through “a small, competent, continuing corps of administrators appointed on the basis of merit.” The Great Depression and the New Deal crushed this dream.

B. The New Deal Era I: Expanding Administrative Process

During the period between 1929 and 1933, the American economy “simply fell apart”: gross national product tumbled by 31%, industrial production fell by 50%, three extensive bank panics occurred, and, most alarming, approximately one-fourth of the American civilian workforce was unemployed. The nation was blanketed by a sense of “hopelessness and ruin,” as all major sectors of the economy (agriculture, manufacturing, and service) collapsed. It is

35 Kranz, supra note 19, at 12. The first such independent commissions is often considered the Interstate Commerce Commission (ICC), which had authority to regulate the railroads and was established by Congress in 1887. See Keith Werhan, The Neoclassical Revival in Administrative Law, 44 ADMIN. L. REV. 567, 571 (1992).

36 Id.

37 Daniel A. Crane, Technocracy and Antitrust, 86 TEX. L. REV. 1159, 1162 (2008). Weber defined his “ideal” or “pure” model of a bureaucrat as one: (1) “engaged in a vocation;” (2) “set out for a career within a hierarchy;” (3) “has been appointed, not elected;” (4) “receives fixed salary based on status, rank, and seniority;” (5) “enjoys life tenure;” and (6) “has high social esteem.” Kranz, supra note 19, at 8.


39 Kranz, supra note 19, at 8.


41 Id. at 3.
easy to understand that, in such an atmosphere of crisis, our elected officials and academics would feel the need for immediate and drastic governmental interference to “preserve the remnants of the economic structure which were still intact in 1933 . . . .”

But the governmental response would ultimately have longer-lasting implications for America. It may likely be that the New Deal reforms are the reason the nation has not experienced an economic downturn of the same magnitude in the 80 years since. More to the point for our purpose, in placing so much emphasis on the administrative process, the New Deal reshaped our essential form of government.

The New Deal “was a complex phenomenon.” At its base, however, is the final abandonment of Adam Smith’s basic argument “that the less government is involved, the better this will be for society.” New Dealers would instead embrace a new form of economic philosophy, the Keynesian model of government macro-management to sustain aggregate demand in the economy. Their plan was clear, through fiscal and monetary policy, the government would “provide a measure of order to a seemingly chaotic economy, correct the system’s central mal-adjustments, [and] spur the return of good times.”

As was the case with the Progressives, it was immediately clear to New Dealers that such regulatory initiatives would require institutions heavy on expertise and specialization. But the

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42 Id.

43 THEODORE ROSENOF, DOGMA, DEPRESSION, AND THE NEW DEAL 7 (1975).

44 JOHN PHILIP JONES, KEYNES’S VISION: WHY THE GREAT DEPRESSION DID NOT RETURN 99 (2008). According to Adam Smith, the government’s role should be minimized and “confined to three (later four) basic tasks”: (1) provide legal protection for private property and enforce contracts; (2) maintain national defense and public safety; (3) mitigate the worst effects of poverty; (4) to control the worst of economic abuses by maintaining healthy competition among businesses (anti-trust role). Id. at 99-100.

45 Id. at 100-101. John Maynard Keynes “defines his position precisely.” “At a macro level, the problems of competitive capitalism are not self-correcting; unemployment is not eliminated by the natural forces of the market. When this happens, . . . the government must step in and take measures to correct the situation.” Id. at 100.

46 Rosenof, supra note 43, at 8.
New Dealers’ vision of administrative process was even grander, and more expansive. As James Landis explained in one of his lectures on administrative process at Harvard in 1938:

So much in the way of hope for the regulation of enterprise, for the realization of claims to a better livelihood has, since the turn of the century, been made to rest upon the administrative process. To arm it with the means to effectuate those hopes is but to preserve the current of American living. To leave it powerless to achieve its purpose is to imperil too greatly the things we have learned to hold dear.\(^{47}\)

As Professor Louis Jaffe would later note, Landis “had assigned a role of preponderant importance to the administrative process and indicated that his mood was one of exuberant optimism.”\(^{48}\) That optimism was not wasted, for in the years preceding his famous lectures “the New Deal had enacted and put into vigorous operation the most thorough program of reform in our history.”\(^{49}\)

The administrative state fashioned during the New Deal is undoubtedly the grandest structural addition to our legal system since ratification of the U.S. Constitution. The question is, did New Dealers at the time imagine their proposal as a reform to, or a challenge of, the existing constitutional system? This is hard to answer. On one hand, Landis claimed that the administrative process “is not, as some suppose, simply an extension of executive power . . . . It presents an assemblage of rights normally exercisable by government as a whole.”\(^{50}\) This could be an acknowledgement that, as many at the time believed, the administrative state as posited by Landis would be a usurpation of constitutional power by an unchecked, unlawful “fourth branch” of government.\(^{51}\) But Landis and his colleagues may simply have been responding to those

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\(^{47}\) LANDIS, supra note 32, at 122.


\(^{49}\) Id.

\(^{50}\) LANDIS, supra, at 15.

concerned about increasing presidential power at the expense of Congress and the judiciary. And there was no shortage of those who held such a belief, including as Landis put it, “a goodly portion of the American legal establishment.”

On the other hand, it seems possible that the envisioned administrative state by Landis would not be one of “policymaker” in the sense we view the use of agency discretion today, but as a regulatory planner. Again, as Professor Louis Jaffe recalled:

Landis was encouraged in the possibilities of planning by his experience on the SEC. That Commission did not always wait for problems to arise in the form of a case or controversy; it looked ahead and prepared itself by investigation and study. But this is not planning the policies of an industry; it is planning the regulation of an industry. To do that is clearly feasible and without question one of the most valuable and constructive functions of which the administrative state is capable.

Landis, it seems, was merely interested in expanding administrative process to meet the growing economic challenges to American life. Those who opposed such reforms (or simply the administrative state), found it to their advantage to underscore publically, and quite correctly, at 346 (1st Sess. 1970)(“They constitute a headless ‘fourth branch’ of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence on the basic theory of the American Constitution that there should be three . . . and only three.”).

52 In truth, some New Dealers, starting with President Roosevelt, saw in the administrative state the potential for unfettered executive policymaking. See, e.g., Daniel J. Gifford, The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy, 59 ADMIN. L. REV. 783, 791 (2007); Gary Lawson, 33 HARV. J.L. & PUB. POL’Y 55, 56 (2010)(“The architects of the modern administrative state fully understood the constitutional obstacles in their path . . . [and took] a dismissive attitude toward the Constitution’s separation of powers . . ..”). Those in the presidential administration understood that those who were raising the question of constitutional legitimacy were motivated, for the most part, only because they had the most to retain under the existing system, and the most to lose in the New Deal. For Roosevelt, these were the “fat cats” (Robert Harrison, The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography, 2 LAW & HIST. REV. 165, 174 (1984)), who had found themselves a staunch ally against the New Deal proposals in the Supreme Court, and it was the President’s mission to “end this unholy alliance of business/commercial interests and the legal establishment.” Id. 170-71.


54 Jaffe, supra note 48, at 322.
that the reformers could not have their cake and eat it too: the New Deal certainly expanded agency expertise and specialization, but it also required agencies to be full-fledged policymakers. As Justice Kagan explains it:

Whereas questions of what and how to regulate seemed to [James] Landis matters of fact and science, they appeared to his distracters . . . to involve value choices and political judgment, thus throwing into question the [constitutional] legitimacy of bureaucratic power.\(^{55}\)

In the end, it was for the Supreme Court to decide whether the focus of administrative law in America would be on process or policy.

C. The New Deal Era II: Agencies as Policymakers

The actions the Supreme Court took between 1935 and 1937 in response to New Deal legislation would, however intentional or not, set the course for modern administrative law in the United States. The significance is not that the Court affixed the concept of policymaking on agency process during this time. Instead, the controversy surrounding the administrative today stems entirely from the Court’s ready desire to associate, and then endorse, agency policymaking with the type of constitutional legislative action ordained to Congress. In just over two years of administrative jurisprudence, the Court would bind the legitimacy of administrative process to an understanding of constitutional separation-of-powers principles. In the face of constitutional challenge, administrative policymaking should prevail, not because of efficiency or expertise, but “because the administrative process sufficiently balance[s] the constitutional branches of government [and is] far more important to the function of government and preservation of political order [than preservation of an] outdated vision of ‘separate’ powers.”\(^{56}\) Delegations of legislative authority (and, thus, DD&D) as it turns are seen as both necessary and tolerable.\(^{57}\)


\(^{57}\) For argument that *Chevron* is constitutionally mandated, see generally Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Non-Delegation Doctrine*,
So how did this occur? Well, from the earliest days of the New Deal, the Supreme Court took a disapproving stance toward increased federal regulation of the economy. The Court was accordingly sympathetic to the cries of the legal community over the emergence of the administrative state as a power sharing, political institution, and eager to exercise its authority over the New Deal. Indeed, in 1935 the Court initially landed what, at the time, appeared to be a fatal blow to the New Deal vision of the administrative state. In two cases that term—Panama Refining Co. v. Ryan and Schechter Poultry Corp. v. United States—the Court unleashed the previously never exercised “non-delegation” doctrine to strike down two congressional attempts to transfer administrative authority under the National Industrial Recovery Act.

Notably, the delegations at issue in Panama Refining and Schechter Poultry were exactly the type of broad-scale regulation of private economic conduct that the New Deal reformers wanted to establish in the new administrative system. So much was at stake for both sides. Panama Refining involved the grant of discretionary power under section 9(c) of the Act for the Secretary of Interior to recommend to the President to place regulatory limits, or in some cases prohibit altogether, the transportation of certain petroleum products among the states over certain

59 In all likelihood, as Landis suggested, opposition to the regulatory reforms of the 1930s most likely stemmed from “a basic antipathy of the philosophy of the New Deal,” from “resentment of the legal profession to giving [such] responsibility” to those not trained in the law, and to general unfamiliarity with the nature of the administrative process, more than was it intended to be an actual defense of the constitution. Landis, supra note 53, at 19.
61 See ALFRED C. AMAN, JR. AND WILLIAM T. MAYTON, ADMINISTRATIVE LAW 17 (2d ed. 2001)
permitted amounts.\textsuperscript{63} While the facts of the case focused primarily on the President’s authority under the Act, the Court took special pain to point out that if Congress could authorize such discretion by the President, there would be nothing preventing similar delegations of authorities to other officials and agencies.\textsuperscript{64} 	extit{Schechter Poultry},\textsuperscript{65} however, involved the grant of authority to the Administrator for Industrial Recovery to establish a Live Poultry Code to ensure “fair competition” among producers.\textsuperscript{66} In striking down the legislation in both cases, the Court strongly noted that “[t]he question of whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute.”\textsuperscript{67} Such “sweeping delegation” of legislative authority, the Court determined, finds no support in the law.\textsuperscript{68}

Shortly after his landslide reelection bid in 1936, Roosevelt responded to the Court’s decisions in 	extit{Panama Refining} and 	extit{Schechter Poultry} by announcing his well-known “court-packing” plan in February 1937.\textsuperscript{69} Although the court-packing plan had failed to gain passage in the Senate, events at the Court itself transpired to make the plan superfluous.\textsuperscript{70} Most notably, Chief Justice Hughes and Justice Roberts executed their famous “switch in time that saved

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\item[63] Id. at 405, 410
\item[64] Id. at 420-21.
\item[65] 295 U.S. 495 (1935).
\item[66] Id. at 519- 527.
\item[67] 293 U.S. at 420.
\item[68] 295 U.S. at 539.
\item[69] Michael Comiskey, \textit{Can A President Pack – Or Draft – The Supreme Court? FDR And The Court In The Great Depression And World War II}, 57 ALB. L. REV. 1043, 1046 (1994). The actual name of the plan was the Judiciary Reorganization Bill of 1937. \textit{SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. 75-711, at 31 (1937).} Under this bill, it was the President’s intent to increase the number of Supreme Court Justices from 9 to 15. Comiskey, \textit{supra}, at 1046. With Roosevelt’s selection of these new justices, he was certain that the Court would no longer pose a problem to implementation of the New Deal. \textit{Id.}
\item[70] \textit{Id.}
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nine” by reversing first their position on the constitutionality of New Deal legislation in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*. In fact, the Court would uphold New Deal measures in each of the eighteen cases between December 1936 and May 1937. In doing so, the Court set the foundation for all future DD&D administrative law decisions. Speaking some 40 years later, Judge Harold Leventhal would explain that:

> Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegations—because there is a court to review to assure that agency exercises its delegated power within statutory limits . . . ."

For much of this time, however, DD&D was premised on the notion that Congress would need to make its willingness to delegate express, and when it did, agency policymaking in accordance with such express delegation was entitled to deference. Agencies today are political policymakers; but that such authority should grow to include IMPLIED DD&D is certainly problematic.

**II. IMPLIED DD&D**

IMPLIED DD&D—the presumption that statutory ambiguity or silence implies delegated authority—is developed in two distinct lines of administrative cases: the Supreme Court’s

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71 See id.
72 301 U.S. 1 (1937).
74 See Mistretta v. United States, 488 U.S. 361, 373 (1989)(“So long as Congress ‘shall lay down by legislative act an intelligible principle to which a person or body authorized to [exercise the delegated authority] is directed to conform, such legislation is not a forbidden delegation of legislative power.’”).
75 It is generally accepted that at the time *Chevron* was decided, it was not the intent of the Court to fundamentally reshape administrative law doctrine. But as one scholar recently put it, “*Chevron* is the most famous Supreme Court decision in the history of administrative law,” which is proven by its status of the field’s most analyzed, and criticized, doctrine. Jack M.
Chevron jurisprudence and the D.C. Circuit Court of Appeals’ non-legislative rules cases. After providing a general background of the law in these areas, I suggest that by vesting in the agency such extensive authority to make policy without express delegation to do so by Congress, there is justifiable concern that the courts are crafting a version of the DD&D that will just about allow an agency to act, or not act, as it sees fit. The result has been a decade-long counter-revolution attacking IMPLIED DD&D that has sowed the seeds of a necessity-based doctrine of administrative policymaking power.

A. Finding IMPLIED DD&D: Chevron and Non-legislative Rule.

1. The Chevron Doctrine.

*Chevron U.S.A., Inc. v. NRDC* involved a challenge to the U.S. Environmental Protection Agency’s (“EPA”) regulations to implement provisions of the Federal Clean Air Act for “new or modified major sources” of air pollution located in areas of the country that suffer from unhealthy air quality conditions. Under this program, often referred to as New Source Review, the source is required to obtain a permit and install stringent air pollution controls. After a lengthy rulemaking, EPA chose to adopt a “plantwide,” or “bubble,” definition of the term “stationary source.” As the Court explains it:

> Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.

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See JoAnne Sweeny, *Filling the Gaps: The Scope of Administrative Agencies’ Power to Enact Regulations*, 27 WHITTIER L. REV. 621, 623 (2006) (Agencies are increasingly seen as occupying “a domain where [they are] free to craft [] rules and regulations in a congressionally-created vacuum of ambiguity.”).


Id. at 840.

Id.

Id. The alternative, which was preferred by environmental groups, was to have each piece of emitting equipment in the plant treated as a separate stationary source, which would presumably
Finding that Congress had not defined the term “stationary source” in the statute, and that the legislative history was devoid of any discussion of the bubble concept, the Supreme Court went about the task of examining whether EPA’s regulation was a “reasonable construction” of the term. This in itself is not remarkable. The Supreme Court had long treated interpretations offered by “expert” agencies as rather “persuasive authority” as to Congress’s presumed use of statutory terms. For nearly half a century before Chevron, courts, under the so-called Skidmore doctrine, had looked “to var[ing] circumstances,” such as “the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position,” in deciding whether to afford deference to the agency’s interpretation. But up until Chevron, the ultimate power to decide questions of statutory interpretation was presumed to rest solely within the realm of the judiciary, at least if one were to believe the Court’s 1804 decision in Marbury v. Madison. Chevron changed that presumption, making it clear that where a statute is found ambiguous, the reviewing court is now obligated to “approve any reasonable or require a more stringent regulation of the plant overall. Id. at 859.

81 Id. at 851.
82 Id. at 843-66.
83 See, e.g., Addison v. Holly Hill Fruit Products, 322 U.S. 607, 614 (1944)(finding the agency’s interpretation to be persuasive authority but ultimately declining to accept it); Mitchell v. Budd, 350 U.S. 473, 480 (1956)(finding that the Administrator made a “reasoned definition” of the term ‘area of production’ found in the Fair Labor Standards Act); Udall v. Tellman, 380 U.S. 1, 16 (1965)(noting that “[w]hen faced with a problem of statutory construction, th[e] Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration”).
85 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); Fed. Election Comm’n v. Democratic Senatorial Campaign Comm., 454 US 27, 32 (1981) (The “courts are the final authorities on issues of statutory construction.”). As Professor Sunstein has described it, the Chevron test creates “a kind of counter Marbury for the administrative state.” Cass R. Sunstein, Chevron Step Zero, 92 VA. L. REV. 187, 189 (2006).
permissible construction” that the agency provides.86

Chevron is a dramatic development in administrative law—the creation of an “across the board presumption” that Congress has delegated statutory interpretation authority to agencies.87 Building from the notion of an agency as a policymaking institution, in Chevron the Court now tells us that policymaking and legal interpretation of statutory ambiguities are now “so intertwined” as to prevent the assignment of one to the agency and the other to the court.88 Certainly, Congress has the first right to define statutory terms, and in that sense statutory interpretation is a legislative function. But Chevron goes further, and makes the assumption that where Congress has not so legislated, it intends that the agency fill this legislative role and become the primary interpreter of statutes.89 In this light, Chevron again invokes the Constitution’s separation of powers doctrine as a means to ensure that policymaking remains in the hands of the more politically accountable branches of government,90 and to “guard against judicial displacement of [such] political judgments.”91

Chevron also reveals serious complications with IMPLIED DD&D. First, it is doubtful today, given the sheer size of the administrative state and the enormous number of regulatory decisions made each year, that it is possible to make a blanket assumption that agencies are somehow politically accountable because of their placement in the executive branch.92

86 Beerman, supra note 75, at 781.
87 Sunstein, supra note 85, at 195.
89 See Beerman, supra note 75, at 825.
90 Chevron, 467 U.S. at 865-66; see also May, supra note 2, at 435 (the Chevron doctrine is “rooted in the Supreme Court’s understanding of fundamental Separation-of-powers principles, which dictate that when Congress leaves gaps in a statute, it is for the politically accountable branches, not unelected judges, to make policy by doing the gap filling”).
91 Sunstein, supra note 85, at 189.
92 It is simply perplexing how the Court could even conceive of presidential control over the bureaucracy given the plain historical view on the subject by those most likely to understand the presidential relationship with federal agencies—past presidents. As President Truman, for example, once remarked on President Eisenhower’s election to succeed him, “He’ll sit hear . . .
Obviously, agencies are not directly accountable to the people; more importantly, there is no evidence that the President (or his political appointees) regularly supervise agencies, or that the President is often held politically accountable for administrative decisions.\textsuperscript{93} Moreover, by extending this rationale to agency statutory interpretation, the Court wrongly discounts the judicial function and the judge’s faithfulness to her constitutional duty. It is easy, as Professor Beerman recently pointed out, to set up a straw man argument by pitting “life-tenured” judges with individual preferences against the possibility of a politically accountable agency official.\textsuperscript{94} But “in the real world . . . the choice is nowhere that clear;” instead we must account for the fact that judges are “at least trying to be faithful agents of the legislature,”\textsuperscript{95} and in good faith attempt to apply the statute in the way Congress may want.\textsuperscript{96}

Second, and more importantly, because \textit{Chevron’s} DD&D rational is implied—it only operates where the statute is ambiguous or silent—it is likely over-inclusive. Even if we were to assume that some interpretive issues would be intertwined with agency policymaking, such will

\textsuperscript{93}Beerman, \textit{supra} note 75, at 803.
\textsuperscript{94}\textit{Id.} at 799.
\textsuperscript{95}\textit{Id.}
\textsuperscript{96}\textit{Id.} at 801. Nor is it evident that directly involving the President in agency policymaking is remotely desirable. In the past, Presidential involvement has been found to circumvent, not adhere, to statutory obligations imposed by Congress. \textit{See, e.g.}, Massachusetts v. EPA, 549 U.S. 497, 533-34 (2007); Christine Klein, \textit{The Environmental Deficit: Applying Lessons from the Economic Recession}, 51 ARIZ. L. REV. 651, 665 (2009)(discussing a Congressional finding “the risks posed by climate change were deliberately understated [by EPA] through the editing of scientific reports by non-scientists in the White House” to avoid compliance with the Clean Air Act)(citing US. House of Representatives, Comm. On Oversight & Gov’t Reform, Interference with Climate Change Science Under the Bush Administration (Dec. 2007)). A similar recent example can be found in the White House’s interference with decisions by the U.S. Fish and Wildlife in implementing the Endangered Species Act, 16 U.S.C. § 1531, \textit{et. seq.}. U.S. Department of the Interior, Office of Inspector General, Investigative Report: The Endangered Species Act and the Conflict Between Science and Policy (Dec. 10, 2008).
not always be the case.97 Sometimes interpretations are secondary, and while they might assist an agency in implementing policy, they do not necessarily prevent an agency from implementing its overall statutory mandate. Certainly, even in *Chevron*, the EPA could have implemented the new source provisions of the Act if the Court had rejected the “plantwide” definition of stationary source. In fact, the real policy question facing EPA in that case was whether, if the Court accepted its proffered interpretation of the term, the bubble concept would be the best means of meeting the Clean Air Act goal of cleaner air and public health protection. The question, therefore, is why should we assume that Congress intended to leave both decisions in the hands of the agency?98 As Justice Kagan has pointed out, it is equally valid to assume that Congress, living in a *Marbury* world, would have “contemplated [] some division of substantive lawmaking authority from interpretive authority” once it chose not define a term.99

2. Non-Legislative Rules

It has been said that “[t]here is perhaps no more vexing conundrum in the field of administrative law than the problem of defining a workable solution between legislative and non-legislative rules.”100 Professor Franklin explains the problem this way:

A federal agency issues some sort of pronouncement—a guidance, a circular, an advisory—without using notice and comment; parties who believe they are adversely affected by the new pronouncement go to court, perhaps before it has even been enforced against anyone; the challengers argue that the pronouncement is in fact a legislative rule and is therefore procedurally invalid for failure to undergo notice and comment.101

The term “legislative rule” is simply used to define any rule or agency decision that

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97 See Gifford, *supra* note 52, at 799.
98 See *id.* at 799-800.
100 David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 278, 278 (2010). Professor Franklin likely did not intended to diminish the scholarly standing of the *Chevron* doctrine, which has similarly been described as “one of the most persistently intriguing puzzles . . .” Farina, *supra* note 15, at 452.
101 Franklin, *supra* note 100, at 278.
underwent traditional notice and comment rulemaking under Section 553 of the APA; a non-legislative rule is one that did not.\textsuperscript{102} The implication of an agency taking the later approach is substantial. Non-legislative rules raise serious fairness and notice concerns among private parties, particularly when they feel obligated to alter their legal position in light of seemingly “mandatory or rigid” regulatory language.\textsuperscript{103} And the problem is apparently growing as agencies increasingly seek to avoid cumbersome notice and comment rulemaking procedures.\textsuperscript{104}

At first blush, it is not exactly clear that DD&D, particularly IMPLIED DD&D, is behind the confusion that prevails in the legislative/non-legislative jurisprudence. However, to the extent that non-legislative rules are being issued to resolve particular ambiguity in a statute, which they most clearly are,\textsuperscript{105} it would seem reasonable to conclude that the agency is engaged in some degree of policymaking. Thus, \textit{Chevron} and the non-legislative rule cases present us with the very same problem—why, and when, should we assume that an implied delegation has been made to make policy, whether by legislative or non-legislative means?

\textbf{B. Eschewing IMPLIED DD&D: Mead and American Mining.}

The rise of IMPLIED DD&D since \textit{Chevron} rekindles uncertainty as to whether any agency should be allowed to wield so much policymaking authority. This, in turn, has produced

\begin{itemize}
\item \textsuperscript{103} Anthony, supra note 102, at p. 3-4; Tom J. Boer, \textit{Does Confusion Reign At The Intersection Of Environmental And Administrative Law?: Review Of Interpretive Rules And Policy Statements Under Judicial Review Provisions Such As Rcra Section 7006(A)(1)}, 26 B.C. ENVTL. AFF. L. REV. 519, 528 (1999).
\item \textsuperscript{104} See Franklin, supra note 100, at 283-84; Sam Kalen, \textit{The Transformation Of Modern Administrative Law: Changing Administrations And Environmental Guidance Documents}, 35 ECOLOGY L. Q. 657, 689 (2008).
\end{itemize}
significant disagreement among scholars and Supreme Court Justices alike over whether some doctrinal control should be fashioned, not only to check agency use of their authority, but most importantly, to abolish a broad, assumed delegation of authority by Congress. In the context of *Chevron*, this has lead to the so-called “step-zero” cases, which began with *United States v. Mead Corp.*

In *Mead*, the Supreme Court considered whether the U.S. Customs Service decision to redefine the statutory term “diaries” for purposes of establishing tariffs to include the Mead Corporation's popular, but imported “day planners” (three-ring binders with specific pages for notes of daily schedules, phone numbers and addresses, and ready-made calendars). This interpretation was not made by the agency through notice and comment rulemaking, but instead was set forth in a “ruling letter” used by the agency as a general, and efficient, means to set tariff classification for particular imports. Confronted with a seemingly typical *Chevron* problem, a majority of the Court declined to engage in the compulsory—or so it was believed—two-step test. Instead, Justice Breyer, writing for the majority, declared that before an agency is

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106 The frustration over the implied permissive delegation doctrine, particularly as manifested in *Chevron*, is probably best summed-up by Professor Beerman’s observation that “as a legal doctrine, it has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity.” Beerman, *supra* note 75, at 782.


109 533 U.S. at 224-25.

110 *Id.* at 222-23.

111 In *Chevron*, the Court announced its now well-known two-part test:

   First, as always, is the question of whether Congress has directly spoken to the precise question at issue. [Second, i]f the intent of Congress is clear, that is the end of the matter; [] the court . . . must give effect to the unambiguously expressed intent of Congress. If, however, the court determines . . . [that] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

530 U.S. at 467-77.
entitled to receive *Chevron* deference, a court must first find that the agency was empowered by Congress to act with the force of law.\footnote{533 U.S. at 229 ("'Congress would expect the agency to be able to speak with the force of law.'" in implementing a statute. That is to say, when Congress empowers an agency to compel public compliance with a statute, is it not always empowering the agency to "speak with the force of law?"); see also David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 146 (2010).} Finding no such indication in the *Mead* case, the Court held that the agency interpretation would have to earn its “persuasive power” under *Skidmore*.\footnote{See 553 U.S. at 235.}

*Mead* set off widespread discussion about when an agency was empowered to act with “the force of law.”\footnote{Gifford, *supra* note 52, at p. 804.} After *Mead*, the presumption of *IMPLIED DD&D* was no longer valid; before deferring to agency statutory interpretations, a court must first-off determine whether there is some indication that Congress “intends to confer lawmaking authority” on the agency.\footnote{Beerman, *supra* note 75, at 825; see also Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002).} The problem with *Mead*, however, is that it does not provide any real test for making this determination, instead reciting only a laundry list of factors from prior cases.\footnote{Id.} Because *Mead* seems to invite Courts to apply different, quite undefined considerations in each case to evaluate the “intent” of Congress, it has remained open to criticism by those on the Court, like Justice Scalia, as well as by prominent scholars like Professors Sunstein and Merrill, who prefer the clear and simple rule offered by *Chevron*.\footnote{Gifford, *supra* note 52, at 803-08; Sunstein, *supra* note 85, at 192.} Indeed, *Mead* has become the central location of an intense and longstanding disagreement (and confusion) in the Court today.\footnote{See Michael F. Perry, *Avoiding Mead: The Problem with Unanimity in Long Island Care at Home, LTD. v. Coke*, 127 S.Ct. 2339 (2007), 31 HARV. J.L. & PUB. POL’Y 1183 (2008); see also Gifford, *supra* note 52, at 805 ("Although Mead purported to delineate the boundaries of Chevron’s application, it spoke in unclear language and, as a result, has generated it own uncertainty."). Professor Sunstein has two trilogies of post-*Mead* Supreme Courts cases that illustrate the confusion in this area. The first suggests that a case-by-case analysis of several factors ought to be used to determine whether *Chevron* is the governing framework. Sunstein,}
the Rehnquist Court, only one test for applying *Chevron* could be agreed upon: when it appeared
an agency was authorized to act by Congress through notice and comment rulemaking, and the
agency did so, then its interpretations made as part of rulemaking were entitled to deference;
otherwise the Court would default to the *Skidmore* analysis of various persuasive factors to
determine whether the agency’s proffered interpretation should be accepted by the Court.\(^{119}\) And
so far opinions from the Roberts Court suggest that there is little immediate hope of further
clarification.\(^{120}\)

The muddy state of the *Chevron* seems transparent when compared to the non-legislative
rule dilemma. In this area, lower courts (we have no Supreme Court decision) have resorted to
focusing exclusively on the intent of the agency (and not that of Congress) to determine if a rule
is legislative or not.\(^{121}\) Professors Manning, Funk, and Elliott have gone so far as to address a

\(^{supra}\) note 85, at 193. The second suggests the possibility that deference will be reduced, or
nonexistent, if “a fundamental issue is involved, one that goes to the heart of the regulatory
scheme at issue.” *Id.*

\(^{119}\) See Lyn Entrikin Goering, *Tailoring Deference to Variety with A Wink and A Nod to
Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency

\(^{120}\) Perry, *supra* note 118, at 1183. For an analysis of the early Roberts Court’s decisions, see
Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review

\(^{121}\) Over the years, the courts have used various tests for determining whether a rule is an
interpretive rule. See William Funk, *When is a “Rule” a Regulation? Marking a Clear Line
Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 662 (2002). These
tests include the “agency label” test (how does the agency characterize the rule?), the
“substantial impact” test (does the rule have a practical impact on the regulated community?),
and the “legal effects” test (does the agency treat the rule as having the force and effect of law?).
Franklin, *supra* note 100, at 286-89. Courts also frequently simply seek to “avoid the quagmire
of having to distinguish between ‘legislative rules’ and other documents” altogether by invoking
ripeness and final agency action doctrines. Kalen, *supra* note 104, at 659. For instance, the
Tenth Circuit, in Public Service Co. of Colorado v. EPA, 225 F.3d 1144, 1147-49 (10th Cir.
2000), concluded that two EPA opinion letters were not final and subject to judicial review
because the impact of the letters was neither direct nor immediate. *Id.* Similarly, in San Diego
v. Whitman, 242 F.3d 1097, 1102 (9th Cir. 2001), the Ninth Circuit held that EPA’s letter to the
City of San Diego, regarding the applicability of the Ocean Pollution Reduction Act of 1994 to
the City’s wastewater treatment plant, was not a final agency action subject to judicial review.
*Id.*
single “simple solution” to the problem by requiring courts to ask only whether the agency engaged in notice and comment rulemaking; if so the court should treat the agency action as legally binding policymaking. In focusing on the agency’s perception of its policymaking authority, however, courts (and scholars) are making decisions about DD&D with no regard for views and intent of Congress on the matter.

One court has seemingly understood the problem with IMPLIED DD&D in the legislative/non-legislative rule context—American Mining Congress v. Mine Safety & Health Administration. In this case, the court was tasked to determine whether specific “Program Policy Letters,” which are occasionally issued by the Mine Safety and Health Administration to “coordinate and convey agency policies, guidelines, and interpretations to agency employees and interested parties,” were “legislative” in nature and, thus required to undergo notice and comment rulemaking. After discussing the considerable confusion in this area of the law, the court ultimately determined, not surprisingly, that where a disputed rule has “the force of law,” it is binding, and therefore, legislative in nature. But the court would do more; it proceeded to find that “such force [of] law” can only exist “if Congress has delegated legislative power to the agency and the agency intended to exercise that power in promulgating the rule.” The court suggested that the delegation is not simply an implied one, but instead can be found where, in the absence of agency policymaking, “there would not be an adequate legislative basis” to enforce or implement the statute. We will return to this inquiry below, but for the moment what is

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122 See Franklin, supra note 100, at 279.
123 995 F.2d 1106 (D.D.C. Cir. 1993). Judge Stephen F. Williams, a former administrative law professor, wrote the opinion on behalf of the court.
124 995 F.2d at 1107-08.
125 Id. at 1108-09.
126 Id. at 1109.
127 Judge Williams summarized his position as follows:

Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect”, which in turn is best ascertained by asking (1) whether in the absence
important is that the court in American Mining, like Mead, eschewed the notion of IMPLIED DD&D. These cases tell us that Congress must be found to have conferred authority (to act with “the force of law”) and that we need a better means to conclude when it has done so.

C. Reading Between the Lines of Mead and American Mining: Toward A Necessity-Based Doctrine For Administrative Process.

Mead and American Mining did not resolve the respective questions of administrative law facing those courts, and neither could quiet concern over unfettered agency discretion in policymaking. Even so, together these cases are an important step toward articulating a new doctrine of judicial deference to agency policymaking that does not rely on delegation, whether express or implied. A close reading of each case suggests that such doctrine is based on the necessity for agency process.

Mead unequivocally expresses its concern over entrusting statutory interpretation to agency decisionmakers as a matter of degree—of whether or not one could find some Congressional intent to delegate such policymaking authority. In the words of the Court:

This Court in Chevron recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.”

of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Id. at 1112. Taken as a whole, this passage (particularly questions 2-4) seems to suggest that, again, it is agency intent that is most important in this area of law. But scholars have tended to discount all but the first question of the analysis. See, e.g., Anthony, supra note 102, at 17 (“The court's inquiry numbered 1, which is the basic one to which the others are peripheral . . . ”). I will do so as well. While question 1 focuses on the express intent of Congress, questions 2-4 are better fitted to determine when the agency intended to exercise its expressed delegation. In other words, question one must always be answered.

While the meaning of Mead continues to be debated, American Mining was completely abandoned by the D.C. Circuit in 1998 and has since disappeared from many administrative law casebooks.
Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.129

Of course, the Court was certainly cognizant that the complexities of the legislative process means that Congress could rarely provide express authorization to an agency to define ambiguous terms or fill gaps.130 But even more importantly, the Court was equally aware in *Mead* that the very nature of legislative process—fragmented as it is with committees and hundreds of individual views—leaves very little hope of ever successfully gleaning satisfactory proof of Congress’s desire that an agency “speak with the force of law.”131 *Mead* has, as Scalia predicted, provided no workable means to address the fiction of implied delegation,132 and it is not surprising that subsequent opinions among lower courts, in deciding whether to give deference, focus principally on whether the agency utilized notice and comment rulemaking.133

Even so, more is at work in *Mead*. It is not just “delegation” of lawmaking authority that the Court was searching for, but an indication that Congress “contemplates administrative action . . . tending to foster the fairness and deliberation that should underlie a pronouncement of such force of law.”134 Except for the formality of the rulemaking process the Court seemed to be

129 533 U.S. at 229 (citations omitted).
131 Sunstein, *supra* note 85, at 203 (“In the end, Scalia agreed with Judge Breyer on yet another point: Any account of congressional instruction reflects ‘merely a fictional, presumed intent.’”)(citations omitted).
132 533 U.S. at 239, 245 (Scalia, J. dissenting).
133 Lower courts have similarly failed to improve upon the understanding of the *Chevron/Mead* relationship. As Professor Lisa Schultz Bressman explains it: “Years have passed since Mead was decided, and we still lack a clear answer to the question when an agency is entitled to *Chevron* deference for procedures other than notice and comment rulemaking . . . . Lower courts adopt inconsistent approaches. Many find ways to avoid the question altogether. Others use Mead in ways broader than the Court intended.” Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005).
134 533 U.S. at 230.
looking for in *Mead*, this search seems no different than *Skidmore’s* offer to find persuasive administrative interpretations made “in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.”  

In both cases, the Court is ultimately looking for reasons to find that Congress believed administrative process, not legislative process, was necessary to perfect a given policy. As Professor Shane has suggested:

> I would ask, echoing Chevron, whether, in interpreting the statute in question, the agency was required to apply its expert judgment and public policy acumen in order to ‘accommodate . . . manifestly competing interests,’ and reconcile potentially conflicting values and goals. If that is what is at stake, then courts should defer; if not, then not. This is not because, in cases of genuine administrative policy[ ]making, administrators are anticipated lawmakers. Rather, it is because they are hired to make policy.  

A similar test can be found more expressly proposed in *American Mining*. Recall that Judge Williams had suggested that where it can be inferred that an agency was empowered by Congress to speak with the “force of law,” then the agency pronouncement on the subject was legislative and required notice and comment rulemaking.  

Williams, however, went further, telling us the focus of a court should be on whether the agency “needs” to exercise its “legislative” power because otherwise there would be an inadequate “legislative basis” for the agency to enforce the law.  

This rule effectively sheds reliance on congressional intent, but unfortunately continues to speak of agency power as a form of delegated legislative power. A better rule, I suggest, is to determine whether, in light of the ambiguity, there is a need for the use of *administrative process* in order for a congressional statute to be given effect. With this said, it is time to turn to Part III and a proposed “necessity-based” doctrine for judicial deference to agency policymaking.

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137 *Supra* notes 123 to 127 and accompanying text.  
138 995 F.2d at 1112.
III. NECESSITY-BASED JUDICIAL REVIEW OF AGENCY POLICY MAKING

A. (Re)defining Administrative Power

The complexities of modern society make administrative agencies too valuable to do without. Unquestionably, this societal value rests in an agency’s authority to make law. But such value is diminished when agency authority to make law is not only undefined, but is allowed to function as an illicit alternative to the kind of political lawmaking intended to be checked by the Constitution. As the framers of the modern administrative state understood:

An administrative agency, [unlike a legislature,] is not ordinarily a representative body. Its function is not to ascertain and register its will. . . . [I]ts members are not subject to direct political controls as are legislators. It investigates and makes discretionary choices within its field of specialization. The reason for its existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect.

More, of course, can be done within agency process itself to better assure that the use of administrative power is seen as trustworthy. In this regard, there is a growing body of administrative process scholarship proposing specific changes to bring administrative process into harmony with our democratic ideals. These proposals often seek to increase public input into policy formation as a means to broaden both the agency perspective and range of possible regulatory alternatives. Reform, however, will continue to wither on the vine in a world where the courts sanction an unchecked, undemocratic, and highly political administrative apparatus, as IMPLIED DD&D surely does. The time has come, therefore, for the Supreme Court to revisit its view of the administrative state, and recognize the value of a more limited, and more defined,

139 Strauss, supra note 7, at 1353-54.
140 Id.
142 For examples of some of these proposals, see, e.g., John S. Applegate, Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking, 73 Ind. L.J. 903, 921-26 (1998); Fontana, supra note 4, at 88-89; Nou, supra note 5, at 606.
administrative lawmaking authority.

Agencies are “bureaucracies of public administration,”¹⁴³ and the power that they exercise, while certainly similar in some regards to the exercise of judicial and legislative power, is distinct from that conceived by the Constitution. Unlike the courts, agencies do not interpret their statutory obligations with strict, objective attention to the text, structure, and history of a particular piece of legislation.¹⁴⁴ Nor are they equipped to handle the politic-laden legislative function of Congress, as no true political checks are incorporated into the agency rulemaking structure. Agencies are tasked with a much narrower objective within our system: to enable the enforcement of congressional directives through application of expertise, practicality, broad stakeholder input, and inclusion of political considerations.¹⁴⁵ Agencies have the “expert judgment and public policy acumen,”¹⁴⁶ the means to collect and digest volumes of information,¹⁴⁷ and the necessary flexibility to respond to changing circumstances as needed to ensure effective policy-making and implementation.¹⁴⁸ To restore the value of administrative process, we must limit the exercise of that process to those matters that necessitate the use of bureaucratic tools, and deny the urge to rely upon agencies as an easy surrogate to properly exercised judicial and legislative power.

B. The Necessity-Based Doctrine In Action.

Let’s imagine that Congress has adopted the following statute:

(a) The EPA Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances such elements, compounds,

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¹⁴⁴ Id.
¹⁴⁵ See id. at 691.
¹⁴⁶ Shane, supra note 136, at 32.
¹⁴⁷ See, e.g., Rubenstein, supra note 3, at 2183.
mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall establish the quantity of any hazardous substance the release of which shall be reported pursuant to section (b) below.

(b) Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section (a) above shall immediately notify the National Response Center. ¹⁴⁹

Further picture the following enforcement action under section (b) in a United States District Court:

A member of the U.S. Fertilizer Institute is accused of “releasing” 200 pounds of fertilizer containing hazardous radionuclides¹⁵⁰ into the Platte River near Denver, Colorado and failing to report that release to the National Response Center under section B of the statute. The United States EPA has filed a civil enforcement action in federal court seeking penalties and injunctive relief. Before the release occurred, EPA had promulgated a rule pursuant to notice and comment rulemaking listing radionuclides as a hazardous substance. EPA had also issued a “policy interpretation document” (PID) establishing a reportable quantity (RQ) for radionuclides of 10 pounds in any given year. The PID further explained that a release is defined to include the keeping of hazardous material in a manner that could result in the material escaping into the environment. As an example of such a release, EPA explained that the storage of a hazardous material in unsuitable, damaged, or otherwise unstable containers, would constitute a release. EPA explained in the PID that this interpretation of release under section (b) is consistent with similar provisions in environmental law that seeks to prevent pollution from occurring in the first instance. In this case, the defendant was found to have caused a release by keeping fertilizers containing radionuclides in rusty 55-gallon drums within 10 yards of the Platte River. The defendant, of course, challenges the reasonableness of EPA’s interpretation of the term release under *Chevron*, and claims that the PID is a legislative rule.¹⁵¹

Under the current doctrine of DD&D, resolution of this seemingly straightforward

¹⁴⁹ This language is based upon Sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), often referred to as Superfund. 42 U.S.C. §§ 9602 and 9603.


¹⁵¹ These facts are *very* loosely based on an industry challenge to the EPA rulemaking in *Fertilizer Institute v. EPA*, 935 F.2d 1303 (D.C. Cir. 1991), which was used as an example of necessary legislative power in *American Mining, American Mining*, 995 F.2d at 1110.
enforcement action is likely to be far messier than necessary. Instead of focusing on the substantive issue in the case and the overall rationality of EPA’s enforcement action, no doubt an inordinate amount of judicial resources will be spent arguing over extricating from the statute whether Congress intended EPA to act “with the force of law.”\footnote{See Beerman, supra note 75, at 836.} Has Congress sanctioned EPA to expand upon the term “release?”\footnote{Note that if under Mead the answer is yes, Congress intended the agency to interpret the statute and that such interpretation have the force of law, then under American Mining, the interpretation is legislative and must go through notice and comment rulemaking.} Does the statute envision EPA promulgating the RQ as a legislative or non-legislative rule? At the end of the day, the court will undoubtedly find that EPA’s failure to use notice and comment rulemaking in issuing the PID is the deciding factor (thus sort of ignoring Congress’s intent altogether), and either throw out the PID altogether or take on the task itself (as in Mead) to determine if the PID is a persuasive interpretation of the statute.\footnote{See, e.g., Zaring, supra note 112, at 137(Arguing the outcome of judicial review does not depend on which standard is ultimately applied, but at the end of the day the “reasonableness of the agency’s action.”).}

In either event, the court’s reliance on DD&D does nothing to lessen the perception of an arbitrary, undemocratic, and quite unconstitutional agency process. No one will ever really know what Congress intended, and because the permissible DD&D is so unclear as to the range of acceptable agency discretion, EPA’s PID looks like rogue lawmaking no matter what the outcome of the case.

So how does the above case proceed under a necessity-based doctrine? The only critical question the court needs to ask is whether an administrative process is needed to provide “an adequate basis for [the] enforcement action or other agency action to confer benefits or ensure the performance of duties” under the statute.\footnote{American Mining, 995 F.2d at 1112.} Starting with the promulgation of the RQ, the answer to this question is surely a resounding “yes.” Absent an administrative determination, section (b) will simply be unenforceable. More importantly, making a determination of a
specific quantity of an indeterminate number of hazardous substances, the releases of which must be reported by an unspecified number of individuals and businesses, seems to ideally call for a mix of expertise and fact-finding that only the administrative process can provide.

The promulgation of the interpretation of the term “release” can appear to be a tougher problem. But what does the task really call for? While agency process certainly can produce an interpretation of the term, if looked at closely it seems doubtful that such process is required to assure the enforceability of the statute. Certainly the court, relying on traditional means of statutory interpretation,\(^{156}\) can ascertain the meaning of an unspecialized legislative term within a context of an enforcement action. And contrary to the contention behind IMPLIED DD&D, it is not a sufficient justification to defer statutory interpretation to the agency merely because some level of policy-making is inevitable in picking between competing, reasonable interpretations. Statutory interpretation, by nature, “require[s] the exercise of judicial discretion—prudent choices within legal bounds.”\(^{157}\) We would not want, for example, a judge to defer to a prosecutor’s proffered definition of a term in a criminal statute. Instead, a court must consider the will of the legislature, and examine all proffered views on the matter to select the most satisfactory interpretation. As Professor Foy also explains: “if the conventional methods of statutory interpretation are indeterminate, the judge may allow a personal sense of justice, equity, practically, or sound public policy to determine the outcome.”\(^{158}\) This is the responsible way to

\(^{156}\) Statutory interpretation “turns on ‘the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” Nken v. Holder, 129 S.Ct. 1749, 1756 (2009(citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). Indeed, Scalia, has argued: “One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for Chevron deference exists.” Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 516-17. Scalia, of course, simply wants to have his cake and eat it to, as he is an ardent supporter of Chevron. Mead, 533 U.S. at 240 (Scalia, J., dissenting)


\(^{158}\) Id. at 299.
decide such cases.\textsuperscript{159}

C. \textbf{NECESSITY-BASED JUDICIAL REVIEW \& ADMINISTRATIVE LEGITIMACY.}

There will be times that a Necessity Doctrine will be difficult to apply. A good example of a grey area under the doctrine can arguably be found in \textit{Long Island Care at Home, LTD. v. Coke}.\textsuperscript{160} That case involved the Fair Labor Standards Act, which “codified worker protections such as minimum wage and overtime pay.”\textsuperscript{161} In 1974, Congress brought most domestic service employees under the umbrella of the Act, but exempted workers who provide “companionship services” to individuals who cannot care for themselves.\textsuperscript{162} Congress left the scope of this exemption ambiguous, and the Department of Labor sought to define “domestic service employment” and “companionship services” through the promulgation of regulations.\textsuperscript{163} One can easily imagine disagreement among courts over whether such terms require application of administrative process to define.

There are twilight areas for many legal doctrines, but many tests that “are imprecise at the margins are workable ones.”\textsuperscript{164} At the end of the day, it does not necessarily matter whether the court defers to the agency in \textit{Coke} or not. What is important is that a court’s decision to defer reflects a deeper understanding of why administrative process—and not action by a constitutional branch of government—is necessary to implement congressional intent. As social psychologists tell us, the extent to which a process is seen as “procedurally just” will ultimately be a significant factor in the public’s willingness to accept a policy as legitimate.\textsuperscript{165} This is no doubt one of the reasons our constitutional system of checks and balances has served us so

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} 127 S.Ct. 2339 (2007).
\textsuperscript{161} Perry, \textit{supra} note 118, at 1183.
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} Gifford, \textit{supra} note 52, at 820.
The Necessity Doctrine fulfills this same need by removing agency policymaking from the fictitious realm of constitutionally legitimate legislative authority. Agency process is transformed under the Necessity Doctrine into a governmental tool, with a defined process, that is available to the other branches of government to effectuate sound policymaking that can once again attend to modern economic and social problems.

**CONCLUSION**

Nearly thirty years of IMPLIED DD&D has provided no solution to the most perplexing dilemma of the modern administrative state: how to balance the societal value of agency process with the potential for unchecked lawmaking. The actions of the courts have only made this dilemma worse. Today there is a very strong sense that agency decision-making is even more susceptible to political manipulation by all branches of government then it was at the time of the New Deal. The Court has fashioned a doctrine that seeming provides a “privacy screen” to shield presidential assertion of authority over agency action. At the same time the Court’s view of DD&D is sufficiently malleable to allow it to impose its own political will on an agency.

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166 As Mark Fitzloff, an executive creative director at Wieden+Kennedy, a New York-based marketing firm, astutely explained: “Not to get melodramatic, but [when] you read about the beauty of checks and balances, how those three branches work well together, [] you can’t help but admire the incredible foresight [of the Founders]. Its really moving to read the actual text of the Constitution.” Forum, *A Super Bowl Spot for Uncle Sam: Can Madison Avenue Make Us Love Our Government*, Harper’s, Feb. 2011, at 31, 33.

167 See Strauss, *supra* Note 7, at 1362.

168 A good example of this can be found in the Court’s decision in Massachusetts v. EPA, 549 U.S. 497 (2007). As Professor Cass has noted about the decision:

> The majority opinion in Mass. v. EPA reads like a faculty discussion paper or political position paper, intended for only a like-minded crowd. There is no sense of real openness to the EPA’s analysis—questioning the clarity of global warming science or the immediate need to do anything and everything possible to combat it (even at the risk of impairing efforts at a better solution) is received by the majority as an obvious departure from common sense.

The time to abandon IMPLIED DD&D has long come. The barrier to doing so has been the need to find a suitable replacement. The Necessity Doctrine fills this need aptly, providing a workable means to define the appropriate scope of congressional delegation, agency discretion, and judicial dereference. As Judge Williams found in the context of non-legislative rules, “if the dividing line is the necessity for agency []action, then a rule supplying that action will be legislative . . . [but] an interpretation that spells out the scope of an agency’s or regulated entity’s preexisting duty . . . will [only] be interpretive.” Conversely, the Necessity Doctrine also resolves the Court’s disagreement over *Chevron*—where a rule is only interpretive, there is no reason to abrogate judicial power and under *Marbury* the court is duty bound to resolve the statutory ambiguity. Where a rule is legislative, then the court’s task, under the Administrative Procedure Act,\(^{169}\) is to determine if the agency has fulfilled its statutory duty, has remained faithful to the law, has followed the proper procedural requirements, and that its decision is adequately supported in the administrative record. More importantly, by so distinguishing the administrative process, and preserving the judicial role, the necessity-based test works to lessen the damming view that agency expertise and objectivity, so important to the original intent behind the administrative state, now takes “second-billing to political considerations in contexts where agency policy impacts the distribution of resources between competing economic interests.”\(^{170}\)
