

## CHEVRON AND FEDERAL CRIMINAL LAW

Paul J. Larkin, Jr. ♦

### I. INTRODUCTION: THE IMPORTANCE OF WHO DECIDES

In the natural sciences, the identity of the person who utters a proposition has little, if any, importance. We know that our solar system is heliocentric, that for every action there is an equal and opposite reaction, that there is no luminiferous aether, that the speed of light is (approximately)  $3 \times 10^8$  m/s, and that  $e=mc^2$ . Those statements are true regardless of whether Albert Einstein or Alfred E. Newman said them. In fact, a proposition cannot become one of the “laws of science” unless it is irrelevant who voices it.

The “laws of man” are entirely different. They can vary from nation to nation, from era to era, from polity to polity, and even within each jurisdiction. The Colonies inherited the common law from England prior to 1776, but the state courts have modified it ever since.<sup>1</sup> England is a monarchy and parliamentary democracy with the House of Commons as sovereign.<sup>2</sup> The United States is a constitutional democracy with the Supreme Court of the United States possessing the authority to hold acts of Congress invalid.<sup>3</sup> States enjoy a “police power” that the federal government does not.<sup>4</sup> Laws

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♦ Senior Legal Research Fellow, The Heritage Foundation; M.P.P. George Washington University, 2010; J.D. Stanford Law School, 1980; B.A. Washington & Lee University, 1977. The views expressed in this article are the author’s own and should not be construed as representing any official position of The Heritage Foundation. I want to thank Rachel Barkow, John B. Malcolm, and John-Michael Seibler for invaluable comments on an earlier draft of this Article. I want to thank David Rosenberg for invaluable research assistance. Any errors are mine.

<sup>1</sup> See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005); GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 350 (2017) (“[T]he colonists believed that . . . rights included the liberties guaranteed by the common law . . . and adopted a written constitution in order to better protect those liberties.”).

<sup>2</sup> See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (2009) (1867).

<sup>3</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>4</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (noting that each state possesses “the police power, — a power which the state did not surrender when becoming a member of the Union under the Constitution,” which includes “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety”); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 192–93 (1819). Compare *The License Cases*, 46 U.S. (5 How.) 504, 523–25 (1847) (emphasizing that the states possess a general police power), with *Nat’l Fed’n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577–78 (2012) (noting that the federal government does not).

may differ across states because each one is sovereign within its own borders.<sup>5</sup> State law may often differ from federal law.<sup>6</sup> Different components of any one government may exercise different prerogatives.<sup>7</sup> Courts can overrule their own precedents (but not those of superior courts).<sup>8</sup> Finally, although Congress has “all legislative Powers,”<sup>9</sup> It may delegate to administrative agencies the authority to flesh out a statutory scheme through regulations,<sup>10</sup> and to construe statutes in a manner that can bind even the federal courts.<sup>11</sup> In sum, sometimes who adopts a rule of law is more important than what that rule provides.<sup>12</sup>

That last proposition—that in some circumstances federal agencies can undertake the role traditionally performed by the federal courts of adopting the authoritative interpretation of a federal law<sup>13</sup>—is traceable to the Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources*

<sup>5</sup> See *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877), *overruled in part* by *Shaffer v. Heitner*, 433 U.S. 186 (1977) (discussing the territorial basis for legal authority); see also *Shaffer*, 433 U.S. at 197 (“[Under *Pennoyer*,] any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) (“The foundation of jurisdiction is physical power.”).

<sup>6</sup> See, e.g., *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016); *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (“[A] State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards.”).

<sup>7</sup> For example, Congress has a prerogative over impeachment, and the President over clemency. See *Nixon v. United States*, 506 U.S. 224, 233–36 (1993) (ruling that Congress’s impeachment decisions are not subject to judicial review); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (“[The clemency] power of the President is not subject to legislative control.”); WILLIAM BLACKSTONE & ST. GEORGE TUCKER, 5 BLACKSTONE’S COMMENTARIES \*401 (1803) (“[T]he king may extend his mercy upon what terms he pleases”); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873) (“Congress cannot limit or impose restrictions upon the President’s power to pardon.”).

<sup>8</sup> See, e.g., *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (“It is this Court’s prerogative alone to overrule one of its precedents.”) (internal punctuation and citations omitted); *Am. Tradition P’ship v. Bullock*, 567 U.S. 516 (2012) (per curiam) (summarily reversing a state supreme court decision for expressly refusing to follow *Citizens United v. FEC*, 558 U.S. 310 (2010)).

<sup>9</sup> U.S. CONST. art. I, § 1; see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . . .”) (first ellipsis in original) (citation omitted).

<sup>10</sup> See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 295 n.18 (1979) (stating that “[i]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law’ and collecting cases).

<sup>11</sup> See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (ruling that a court must apply *Chevron* deference to “an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction)”).

<sup>12</sup> Especially when that who is the federal government. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause) (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>13</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

*Defense Council, Inc.*<sup>14</sup> *Chevron* adopted a new approach for the courts to use when interpreting statutes in which Congress has vested a federal agency with the responsibility to implement whatever federal program the law birthed (e.g., the Environmental Protection Agency (EPA) is charged with interpreting the details of environmental statutes). The landmark nature of the *Chevron* decision has generated scores of articles by members of the academy discussing its meaning and implications.<sup>15</sup> Even members of the federal judiciary, before and after assuming the bench, have discussed the *Chevron* doctrine in the academic literature.<sup>16</sup> In fact, so many trees have died working out the boundaries of the *Chevron* doctrine that, as Professor Michael Herz declared in 2015, “[a]t this point, it takes chutzpah to write about *Chevron*. Everyone is sick to death of *Chevron*, and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say.”<sup>17</sup>

Professor Herz may well be right about the *Chevron* doctrine when considered in the context that gave it birth: the interpretation of a *regulatory* statute adopted by a *federal administrative agency* entrusted with the responsibility for *implementing* a federal program *governing the economy* (like the federal environmental laws) or *dispensing federal funds* (like Medicare). But the potential application of the *Chevron* doctrine can arise in a myriad of other settings, and the question of whether *Chevron* applies can raise very different considerations in each one.

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<sup>14</sup> 467 U.S. 837 (1984); see Paul J. Larkin, Jr., *The World After Chevron*, THE HERITAGE FOUND., LEGAL MEMORANDUM No. 186, at 4–5 (Sept. 8, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-186.pdf>. But *Chevron* has become the starting point for all recent discussions of the doctrine.

<sup>15</sup> See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007); John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457 (2014); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143 (2012); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

<sup>16</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (1989); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990).

<sup>17</sup> Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1867 (2015).

Two such scenarios involve the Justice Department. Because it prosecutes criminal cases, one issue is whether *Chevron* should apply to its interpretation of statutes defining criminal conduct, an issue that arises at the *front end* of the criminal process. Because the Justice Department is also responsible for managing the federal prison system, another question is whether the Department should be given deference regarding its interpretation of statutes authorizing it to manage offenders lawfully in its custody, an issue that arises at the *back end* of the criminal process. To put it differently, should *Chevron* deference apply when King John interprets the criminal law, even if he issues decrees setting forth his interpretation? And should *Chevron* deference apply when the Sheriff of Nottingham interprets the law governing his operation of a jail? Those issues have been the subjects of far less debate than the reach of the *Chevron* doctrine in civil and administrative contexts.

But there is one more issue, one that sits somewhat astride those two, arising from the marriage of regulatory and criminal law. Congress often enacts regulatory programs that require agencies to fill in the blanks regarding the primary conduct that they regulate, rules that can be enforced via administrative, civil, or criminal penalties. For example, Congress not only has defined the term “hazardous waste” in federal law, but also has empowered the EPA to refine and augment that statutory definition through regulations, and has authorized the federal government to enforce those regulations through a criminal prosecution.<sup>18</sup> That combination raises the question whether an agency should receive *Chevron* deference when issuing regulations that define primary conduct that can be subject to criminal prosecution.

This article analyzes those issues. Section II discusses the Supreme Court’s decision in *Chevron* and the statutory interpretation canon it adopted. The following sections analyze the three different contexts noted above: Section III examines whether *Chevron* should apply when the Justice Department interprets a statute defining a federal crime. Section IV shifts the focus to the Department’s interpretation of statutes in its capacity as a department of corrections. Section V then asks whether an agency should receive *Chevron* deference when it construes a statute that can be used as the predicate for a criminal prosecution. It turns out that there are different answers in each context.

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<sup>18</sup> See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1088–89, 1095–96 (2014); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 735–36 & nn.58–59, 743–46 (2012).

## II. CHEVRON

The issue in *Chevron* was whether the Environmental Protection Agency (EPA) could reasonably construe the term “stationary source” in the Clean Air Act Amendments of 1977<sup>19</sup> as referring to an entire plant, rather than each individual smokestack, an interpretation that had come to be known as the “bubble” concept. Unfortunately, neither the text of the act nor its legislative history clearly answered that question, which left the Supreme Court with two options: either flip a coin or devise a new tool of statutory interpretation. The Court chose Option 2.

In reviewing the EPA’s interpretation of the statute, the Supreme Court did not simply ask whether the agency’s interpretation was the correct one, an approach suggested, if not demanded, by *Marbury v. Madison*. Instead, the Court established a two-step standard for judicial review of an agency’s interpretation of a statute. The first step is to ask whether Congress has answered the specific question in dispute.<sup>20</sup> If so, its answer is dispositive.<sup>21</sup> If not, the reviewing court must ask whether the agency’s reading of the law is reasonable.<sup>22</sup> If so, the court must accept that interpretation, even if the court would have construed the statute differently.<sup>23</sup> The reason, the Court wrote, is that Congress presumably delegated to the agency, rather than to the courts, the authority to construe an ambiguous law to make it work.<sup>24</sup> And so the *Chevron* two-step statutory interpretation process, often called *Chevron* deference, was born.<sup>25</sup>

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<sup>19</sup> Pub. L. No. 95-95, 91 Stat. 685 (1977).

<sup>20</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>21</sup> *Id.* at 842–43 (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) (citation omitted).

<sup>22</sup> *Id.* at 843.

<sup>23</sup> *Id.* (“If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”) (citations omitted).

<sup>24</sup> *Id.*; see also, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (citing *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 740–741 (1996)).

<sup>25</sup> *Chevron* did not appear at first to be a major decision in administrative law, for a variety of reasons. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398 (Peter L. Strauss ed., 2006). To start with, the Court did not say that it was creating an avulsion in the law, and the setting for *Chevron* did not suggest that the Court intended to do so. Only six of the nine justices participated in that case because three were recused. *Chevron*, 467 U.S. at 866. That a third of its members were sidelined reduces the likelihood that the Court intended to make

*Chevron* was a landmark ruling in a series of Supreme Court decisions establishing the law governing judicial review of agency decisionmaking. The principal federal statute governing that subject is the Administrative Procedure Act (APA), which Congress enacted in 1945.<sup>26</sup> Since then, however, Congress has exited the stage, leaving the development of administrative law to the Supreme Court. Pre-*Chevron* decisions defined the standard of review that federal courts must apply when reviewing an agency's decisions to promulgate or rescind a regulation.<sup>27</sup> *Chevron* added the standard of review that those courts must apply when reviewing an agency's interpretation of a statute.<sup>28</sup> Moreover, the *Chevron* two-step analysis grants federal

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a tectonic shift in administrative law. Also, the Court was unanimous. Dissenting opinions tend to challenge the rationale of the majority opinion, which forces the majority to address what one or more colleagues deem flaws in its reasoning or unfortunate consequences that will follow from the Court's decision. Justice Stevens' opinion did not have to undertake any such burden in *Chevron*, perhaps because the other five justices were just happy to find some way to dispose of the case without playing the role of a referee. In addition, the Court had been interested in how agencies construe their governing statutes long before *Chevron* was decided, and the Court often had deferred to an agency's interpretation in a variety of circumstances. *See, e.g., id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.") (internal punctuation, footnote, and citation omitted). For example, the Court was likely to defer to an agency's position that was consistent, long-standing, or technical in nature. Even *Chevron* acknowledged that point. *Id.* at 844 n.14 (collecting cases in which the Court deferred to an agency's interpretation of a statute). Yet the *Chevron* decision has taken on enormous importance since 1984. One reason why is that, given the deep political disagreements in American politics today, Congress has not passed any major legislation since Obamacare in 2010, and the President has stepped forward to take up the slack, whether or not he possesses the statutory authority to do so. *See* DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW (2015); Paul J. Larkin, Jr., *A New Approach to the Texas v. United States Immigration Case: Discretion, Dispensation, Suspension, and Pardon—The Four Horsemen of Article II*, THE HERITAGE FOUND., LEGAL MEMORANDUM No. 181 (Apr. 15, 2016), <http://www.heritage.org/immigration/report/new-approach-the-texas-v-united-states-immigration-case-discretion-dispensation>.

<sup>26</sup> The Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1945) (codified as amended in scattered sections of 5 U.S.C.).

<sup>27</sup> *See, e.g.,* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (ruling that the APA "arbitrary and capricious" standard of review applies to an agency's rescission of a regulation); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978) (prohibiting the courts from imposing additional requirements on agencies or reviewing their decision-making more strictly than the APA requires); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (directing federal courts to ensure that agency decision-making complies with the "arbitrary and capricious" and "substantial evidence" standards).

<sup>28</sup> A closely related but distinct issue is the standard of review of an agency's interpretation of one of its own regulations or of some other sub-statutory form of law, such as an agency guidance manual. One of the leading cases is *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which ruled that an agency's interpretation of such forms of law (there, a contract) should be accepted if it is persuasive. *Id.* at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while

agencies broad interpretive—and therefore lawmaking—power.<sup>29</sup> Unless the courts find that Congress has answered the precise legal issue in a dispute, the agency is free to select from among a range of reasonable interpretations of the governing law and to change its reading of that law over time.<sup>30</sup>

Before *Chevron* was decided in 1984, numerous judges and scholars had written tracts on how to interpret legal instruments such as constitutions, statutes, regulations, and the like, and none of them argued that judges

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not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). A later case, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), held that, when an agency’s interpretation of its own regulation is at stake, “the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Id.* at 414. The Court has reaffirmed and applied the *Seminole Rock* standard in numerous later cases in a diverse variety of settings—when the agency acted in a formal or informal proceeding, when it interpreted a rule in the context of litigation, when its later interpretation appeared to conflict with an earlier one, and when the “agency” was a nontraditional agency. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (“[W]e concede that the Department may have interpreted these regulations differently at different times in their history . . . . But as long as interpretive changes create no unfair surprise[,] . . . . the change in interpretation alone presents no separate ground for disregarding the Department’s present interpretation.”) (citations omitted); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (reaffirming the *Seminole Rock* standard); *Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (applying the standard to the actions of the U.S. Sentencing Commission); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (applying the standard to regulations promulgated by the Forest Service); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965) (applying the standard as it pertained to the Secretary of Interior’s authority to issue oil and gas leases).

The *Seminole Rock* (or *Auer*) standard has been controversial of late. Several justices and scholars have questioned its legitimacy because it allows the agency to draft a regulation with ambiguous text, shepherd that regulation through the APA notice-and-comment process without identifying a controversial interpretation, and then obtain virtually complete deference for that interpretation in an enforcement action. *See, e.g.*, *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 615–16 (1996). The best defense of *Seminole Rock* (or *Auer*) deference is either the common sense one of “I wrote it so I know best what it means” or the same policy-oriented defense that is offered to support *Chevron*. *See* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017). *Seminole Rock* could certainly fall on its own. If *Chevron* ultimately falls, it is virtually certain that *Seminole Rock* would fall too.

<sup>29</sup> The interpretive role played by agencies is tantamount to lawmaking. In the words of Benjamin Hoadly, “whoever hath an *absolute Authority to interpret* any written or spoken Laws, . . . it is He who is truly the *Law-giver*, to all Intents and Purposes, and not the Person who first spoke or wrote them.” William Van Alstyne, *Cracks in “The New Property”*: *Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 467 (1977) (emphasis in original) (quoting Benjamin Hoadly, Bishop of Bangor, Sermon Preached before the King 12 (1717)).

<sup>30</sup> *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–86 (2005) (ruling that an agency can receive *Chevron* deference even when it rejects its own earlier interpretation).

should hand that task over to a bureaucracy in the manner that *Chevron* requires.<sup>31</sup> Of course, courts had often treated the legal views of federal agencies with respect.<sup>32</sup> But not until *Chevron* did the Supreme Court say that the task of interpreting ambiguous laws was one almost entirely for the agencies to handle.

*Chevron* has become a landmark but controversial decision. Its landmark status is confirmed by the number of cases in which it has been cited, which registers, as of August 2017, at more than 15,200. Its controversial status is confirmed by the considerable contemporary dispute over its legitimacy.<sup>33</sup> Critics of *Chevron* have offered several arguments to show why they believe

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<sup>31</sup> For a by no means exhaustive list, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196 (1967); LEARNED HAND, *THE SPIRIT OF LIBERTY* (1952); OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881); ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* (1969); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899); James M. Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* 213 (Roscoe Pound ed. 1934); James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886 (1930); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950); Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983); Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361 (1913); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401 (1968).

<sup>32</sup> See, e.g., *Udall*, 380 U.S. at 16 (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission’s application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.”) (internal punctuation and citation omitted); *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio & Mach. Workers, AFL–CIO*, 367 U.S. 396, 408 (1961) (“Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.”) (citation and internal punctuation omitted); *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 130–31 (1944) (“Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.”); Paul J. Larkin, Jr., *The World After Chevron*, THE HERITAGE FOUND., LEGAL MEMORANDUM No. 186, at 4–5 (Sept. 8, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-186.pdf>.

<sup>33</sup> Compare, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (arguing “Yes”), with, e.g., Adrian Vermeule, *No*, 93 TEXAS L. REV. 1547 (2015) (reviewing Hamburger’s book and taking the exact opposite position), and with Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 204 (2016) (responding to Vermeule’s book review).

it was wrongly decided and should be abandoned. The argument that all critics make is that, given the Constitution's text, its English and American common-law history, and the need for—and textual guarantees of—judicial independence, federal courts alone have the constitutional authority to issue a final judgment interpreting the law and applying it in a particular case.<sup>34</sup> So far, neither Congress nor the Supreme Court has overturned *Chevron*. Accordingly, there may be no near-term resolution of the debate whether *Chevron* should remain in place like *Horton*<sup>35</sup> or should ride off into the sunset like *Shane*.<sup>36</sup>

### III. CHEVRON AND THE JUSTICE DEPARTMENT: THE GOVERNMENT AS PROSECUTOR

The first question is whether the courts should afford *Chevron* deference to the Justice Department's interpretation of the federal criminal code.<sup>37</sup> The argument in favor of that proposition proceeds in three steps:

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<sup>34</sup> See Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1247–48 (1994). Other criticisms of *Chevron* include the following: (1) *Chevron* is inconsistent with the APA, which directs courts to review and set aside unlawful agency actions; (2) *Chevron* mistakenly assumed that Congress intended to vest interpretive authority in agencies when Congress, in fact, gave no thought to the matter; (3) the Court has manipulated the *Chevron* test whenever it does not like the result that *Chevron* would require by creating exceptions to its supposedly all-encompassing standard; (4) *Chevron* gives Members of Congress an unnecessary and undesirable incentive to punt the answers to important policy issues to unelected agency officials; and (5) *Chevron* encourages dishonesty by everyone involved—members of Congress, agency officials, and the federal courts—because it enables each one to deceive the public that a policy dispute never the subject of a vote on the floor of the Senate or the House is actually a legal issue. See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Cory R. Liu, *Chevron's Domain and the Rule of Law*, 20 TEX. REV. L. & POL. 391 (2016). For an entertaining example of how the *Chevron* doctrine can tie up in knots any effort to make sense of it, see Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>35</sup> DR. SEUSS, *HORTON HATCHES THE EGG* (1940).

<sup>36</sup> JACK SCHAEFER, *SHANE* (1949).

<sup>37</sup> Some members of the academy have debated the issue without reaching a consensus on how it should be resolved. Compare, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (hereinafter Kahan, *Chevron*); Sanford N. Greenberg, *Who Says It's A Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1 (1996) (both arguing in favor of applying *Chevron* deference in criminal cases) with, e.g., Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612 (1992); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757 (1991); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2115–16 (1990) (taking the opposite position); cf. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 476 (1989) (“It is surely a far more remarkable step than *Chevron* acknowledged to number among Congress's constitutional prerogatives the power to compel courts to accept and enforce another entity's view of legal meaning whenever the law is ambiguous.”) (footnote omitted); *id.* at 476 n.98

First, *Chevron* had the effect of empowering federal agencies to create a federal common law in the process of implementing federal programs. Under *Chevron*, whenever an issue arises that Congress did not answer, whether due to an unforeseen problem or to a crevice between two parts of a statute, the federal courts must leave the responsibility for filling that gap to the agency that Congress has chartered to implement a regulatory program. That is, given the administrative state, the task of filling in the blanks—the role that courts performed when the law consisted almost exclusively of judicial decisions, unlike today, when the law is principally statutes and regulations—now falls to the agencies. In “the age of statutes,”<sup>38</sup> administrative agencies have become the new common-law courts, authorized to engage in the same “molar to molecular” lawmaking that the pre–New Deal courts had long performed.<sup>39</sup> The role for the federal courts is now the subsidiary one of making sure that an agency remains within the bounds of reason. Otherwise, agencies have the power to act interstitially.

Second, the Justice Department is better qualified than the federal courts to engage in common-law decisionmaking with regard to the scope of a substantive criminal law or the existence (or applicability) of a defense to a crime. Even though the Supreme Court made clear more than 200 years ago that the federal courts lack the authority to create common-law crimes,<sup>40</sup> the courts have been effectively engaged in that endeavor for decades as they decide, for example, what constitutes “fraud.”<sup>41</sup> Congress will not legislate

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(“One way to appreciate the magnitude of the step is to imagine that Congress enacts a statute requiring the Supreme Court to defer to the view of Solicitor General whenever it encounters an unclear point of federal law. Most members of the legal community would doubtless find such legislation deeply problematic even if it contained the qualification that the Solicitor General’s position must be ‘reasonable’ to qualify for deference.”). One commentator has recently argued that jury interpretations of a criminal statute should receive *Chevron* deference. See William Ortman, *Chevron for Juries*, 36 *CARDOZO L. REV.* 1287 (2015). That theory seems impractical because of the difficulties discerning what any one jury decided and collecting those results into a coherent body of law. In any event, juries cannot receive *Chevron* deference because they have no law-making function under American law. See, e.g., *Sparf & Hansen v. United States*, 156 U.S. 51, 102 (1895); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 *J. CRIM. L. & CRIMINOLOGY* 111 (1998).

<sup>38</sup> See CALABRESI, *supra* note 31.

<sup>39</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

<sup>40</sup> See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

<sup>41</sup> See Kahan, *Chevron*, *supra* note 37, at 470: “The orthodox defense of separation of powers rests on a profoundly mistaken understanding of the nature of federal criminal law. The conventional account treats substantive criminal law as exclusively legislative in origin; there are and can be no federal common law crimes. But this view is impossible to sustain on close inspection. What forms of behavior fall within the ambit of criminal fraud statutes, what kinds of interests count as ‘property’ for purposes of federal anti-theft provisions, what types of legal and factual mistakes negate the mens rea element of various offenses—all are the products of judicial invention. Such inventiveness, moreover, does not reflect a lawless usurpation of legislative prerogative; rather, it is a response to the deliberate incompleteness of the criminal statutes that Congress enacts. For this reason, federal criminal law, as a whole, is

with the specificity necessary to identify from the text of a statute alone how to treat the myriad of cases that will arise. Someone must decide whether one form of conduct or another violates a broadly worded federal statute, so the burden of deciding those cases falls to the courts. The Supreme Court has accepted the responsibility of fleshing out federal criminal laws via the same type of case-by-case adjudication that the English courts used for centuries to define the parameters of crimes. The courts' dogged willingness to continue down that path shows that any effort to turn back the clock would be futile. Trying to keep the courts out of the law-making business would be like trying to keep water from running downstream.

Third, the only question therefore is *who* should have that interpretive, law-making responsibility, not whether someone should. In particular, the question is whether *Chevron* signals the belief that executive departments should have the responsibility to clarify ambiguous laws even when they carry a criminal penalty. As Professor Dan Kahan once concluded, "Federal criminal law would be better by any conceivable measure" if the courts afford the same definitive law-expositing status to written, published, *ex ante* Justice Department interpretations of federal criminal statutes that *Chevron* directs the federal courts to afford to every other federal agency.<sup>42</sup>

On its face, that is a reasonable argument. Nonetheless, the Supreme Court has twice recently—albeit only implicitly—stated that the Justice Department's interpretation of a criminal law is not entitled to *Chevron* deference. As the Supreme Court explained in *Abramski v. United States*, "[w]e think ATF's old position" on the interpretation of a firearms statute is "no more relevant than its current one—which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly (as the ATF used to in construing [that statute]), a court has an obligation to correct its error."<sup>43</sup> The reason is that "criminal laws are for courts, not for the government, to construe."<sup>44</sup> The Court made the same point four months earlier that year in *United States v. Apel*, albeit in an even more oblique manner, stating only that "we have never held that the Government's reading of a criminal statute is entitled to any deference."<sup>45</sup> The Court did not cite *Chevron* in either *Abramski* or *Apel*,

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best conceptualized as a regime of delegated common law-making." (footnotes omitted). Professor Kahan lays out that argument in detail at Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (hereinafter Kahan, *Lenity*).

<sup>42</sup> Kahan, *Chevron*, *supra* note 37, at 469.

<sup>43</sup> 134 S. Ct. 2259, 2274 (2014).

<sup>44</sup> *Id.*

<sup>45</sup> 134 S. Ct. 1144, 1151 (2014). As if to prove that subtlety is a virtue, immediately after the statement quoted in the text the majority opinion in *Apel* cited Justice Antonin Scalia's concurring opinion in

but it seems quite likely that the Court had *Chevron* in mind. Those decisions strongly imply that *Chevron* plays no role when the government prosecutes a criminal case.

That conclusion is an eminently sensible one. In fact, history indicates that it is the only reasonable conclusion.

The Judiciary Act of 1789<sup>46</sup> created an Office of the United States Attorney for each judicial district<sup>47</sup> as well as the Office of the Attorney General.<sup>48</sup> The act did not vest the U.S. Attorneys or the Attorney General with law-making or law-interpreting authority of any type, let alone any authority to issue formal rules, regulations, or opinions binding on the public. Instead, Congress gave U.S. Attorneys the responsibility to “prosecute . . . all delinquents for crimes and offenses” on behalf of the United States in their respective districts,<sup>49</sup> and gave the Attorney General the duty “to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned,” as well as the duty “to give his advice and opinion upon questions of law” sought by the President or heads of departments.<sup>50</sup>

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*Crandon v. United States*, 494 U.S. 152 (1990), which made it quite clear that the Justice Department cannot receive *Chevron* deference for its interpretation of a substantive criminal law. *See id.* at 177 (Scalia, J., concurring in the judgment) (“[T]he vast body of *administrative* interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”) (emphasis in original).

<sup>46</sup> Ch. 20, 1 Stat. 73 (1789).

<sup>47</sup> *See id.* § 35, 1 Stat. at 92.

<sup>48</sup> *See id.* § 35, 1 Stat. at 93.

<sup>49</sup> *See id.* § 35, 1 Stat. at 92 (“And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden.”).

<sup>50</sup> *See id.* § 35, 1 Stat. at 93 (“[T]here shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments . . .”).

Congress created the Justice Department in 1870,<sup>51</sup> but did not materially revise the responsibilities given to the Attorney General (and his lieutenants) set forth in the first Judiciary Act.<sup>52</sup> The legislation stated that Justice Department lawyers “shall, for and on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court of the United States” and other federal courts.<sup>53</sup> In other words, Justice Department officials were to be lawyers, not judges. In fact, Congress did address the specific issue of the Attorney General’s power to issue regulations and gave him the authority only to adopt rules and regulations necessary for the governance of the department, not for the purpose of issuing interpretations of federal criminal law that would have the same binding effect as the judgment of a court.<sup>54</sup> Since then, Congress has never explicitly given the Attorney General law-defining power.<sup>55</sup>

To be sure, the legislation creating the Office of the Attorney General and the Justice Department did not literally say that only the courts possess law-making power. But that is the most sensible interpretation of its text. Unless the courts adopt the *Dick and Jane*<sup>56</sup> approach to reading statutes, no more is necessary. The Framers were familiar with the development of the common law by the English courts,<sup>57</sup> and they presumably intended that courts would be the arbiters of legal disputes, especially when the government brings a criminal prosecution. We also learned from *Marbury*, which was decided only fourteen years after Judiciary Act of 1789 became law, that “[i]t is emphatically the province and duty of the judicial department to say

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<sup>51</sup> See Act to Establish the Department of Justice (Act of June 22, 1870), § 1, ch. 150, 16 Stat. 162 (1870) (stating that “there shall be, and is hereby, established an executive department of the government of the United States, to be called the Department of Justice, of which the Attorney-General shall be the head. His duties, salary, and tenure of office shall remain as now fixed by law, except so far as they may be modified by this act”); *id.* § 2 (creating the Office of the Solicitor General); §§ 3–18, 16 Stat. at 162–64 (discussing, inter alia, the Attorney General’s authority to direct the Solicitor General and other assistants to give their advice on questions of law or to represent the United States in court).

<sup>52</sup> Ch. 20, 1 Stat. 73 (1789).

<sup>53</sup> Act of June 22, 1870, § 14, 16 Stat. at 164; see also *id.* § 16 (“*And be it further enacted*, That the Attorney-General shall have supervision of the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, who shall make report to him of their proceedings, and also of all other attorneys and counsel[]ors employed in any cases or business in which the United States may be concerned.”) (emphasis in original).

<sup>54</sup> Act of June 22, 1870, § 8, 16 Stat. at 163 (“*And be it further enacted*, That the Attorney-General is hereby empowered to make all necessary rules and regulations for the government of said Department of Justice, and for the management and distribution of its business.”) (emphasis in original).

<sup>55</sup> 28 U.S.C. §§ 503, 506, 509–19 (2012) (identifying the office and powers of the Attorney General). The Attorney General may provide the President and others with his interpretation of federal law, but his interpretations lack the same binding effect as an opinion by a court. There is one potential exception that is discussed below. See *infra* notes 61 & 103.

<sup>56</sup> *Dick and Jane* was a series of basal readers used in the 1950s and 1960s.

<sup>57</sup> See Larkin, *supra* note 1.

what the law is” and that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>58</sup> So it is fair to say that the Framers and members of the First Congress intended the federal courts to define the law in the process of adjudicating cases.<sup>59</sup> The Attorney General, the U.S. Attorneys, and whatever assistants they appoint are members of the bar, not members of a tribunal. They can ask a court to “say what the law is,” but they cannot utter those statements on their own.

Congress may empower federal agencies to promulgate regulations the violation of which is a crime,<sup>60</sup> and there are even instances in which the Attorney General may perform a traditional administrative rulemaking function.<sup>61</sup> But, as Justices Antonin Scalia and Clarence Thomas once noted<sup>62</sup> it is one thing to allow an executive agency to act like “a sort of junior-varsity Congress”<sup>63</sup> by issuing regulations with the force and effect of law, and another to permit an agency to act like “a sort of junior-varsity Supreme Court” by vesting in that agency the authority to adopt authoritative interpretations of statutes potentially binding on the federal courts.<sup>64</sup> Granting the government the power to construe the criminal law stretches too far the presumption on which the Court relied in *Chevron*: that Congress intended executive agencies to develop a federal common law to govern the programs they administer.

But there is more. In *United States v. Mead Corp.*,<sup>65</sup> the Supreme Court explained that a factor strongly militating against affording *Chevron* deference to agency decisionmaking is the agency’s use of a decentralized decisionmaking process, one that results in thousands of relevant decisions each

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<sup>58</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>59</sup> Confirmation can be seen in the Supreme Court’s later decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). “The record of history,” as Justice Antonin Scalia explained, “shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.” *Id.* at 218–19 (emphasis in original); *see id.* at 219–25 (collecting authorities); *see also* *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (defining the Article III “judicial power” as “the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction.”); JUSTICE SAMUEL MILLER, ON THE CONSTITUTION 314 (1891) (similarly defining this power as “the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision”).

<sup>60</sup> *See United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>61</sup> The Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242, 1243 (codified as amended at 21 U.S.C. §§ 801–904 (2012)), authorizes the Attorney General to list controlled substances. *See* 21 U.S.C. § 811 (2012).

<sup>62</sup> *Whitman v. United States*, 135 S. Ct. 352 (2014) (opinion of Scalia & Thomas, JJ., respecting the denial of certiorari).

<sup>63</sup> *See Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

<sup>64</sup> *Whitman*, 135 S. Ct. at 353 (opinion of Scalia & Thomas, JJ., respecting the denial of certiorari).

<sup>65</sup> 533 U.S. 218 (2001).

year.<sup>66</sup> *Mead Corp.* is directly on point here. There are 93 U.S. Attorneys<sup>67</sup> and more than 5,500 assistant attorneys<sup>68</sup> spread across the United States and its territories. Aside from certain exceptional cases (such as the prosecution of a major terrorist), each office makes its own charging decisions without the need for prior approval from the Attorney General or other senior Justice Department officials. And those offices make thousands of charging decisions each year. In 2015, the Justice Department filed 54,928 criminal cases and ended 56,138 in the U.S. District Courts.<sup>69</sup> There were 52,659 cases in the U.S. District Courts and 56,221 cases in the U.S. Magistrate Courts that resulted in a plea or finding of guilt.<sup>70</sup> The massive number of decentralized decisions made by Justice Department lawyers, coupled with the absence of any statutory provision contemplating that Justice Department officials can define criminal conduct, undercuts the argument that its charging decisions should receive *Chevron* deference.

Equally important to the limitations on the Justice Department's law-making power is the fact that the First Congress gave the authority to interpret federal law to the federal courts. The Judiciary Act of 1789 implemented Article III of the Constitution, which created the Supreme Court of the United States, defined its original and appellate jurisdiction, and empowered Congress to establish a system of lower federal courts.<sup>71</sup> The Act provided that the Supreme Court of the United States would consist of a Chief

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<sup>66</sup> In *Mead*, the Supreme Court held that Customs' officials tariff classifications are not entitled to *Chevron* deference for several reasons: the tariff statutes contained no provision indicating that Congress intended Customs officials to make clarification rulings having the force of law; those laws did not contain any express congressional authorization to engage regarding classification rulemaking; and the number of classification rulings that Customs made annually—"46 different Customs offices issue 10,000 to 15,000 of them each year"—belied any reasonable belief that Congress intended them to have legal effect. *Id.* at 229–33.

<sup>67</sup> *United States Attorneys' Mission Statement*, U.S. DEP'T OF JUST. (SEPT. 22, 2016), <http://www.justice.gov/usao/about/mission.html> (last visited May 3, 2017).

<sup>68</sup> U.S. DEP'T OF JUST., U.S. ATTORNEYS (U.S.A.) FY 2017 BUDGET REQUEST, <https://www.justice.gov/jmd/file/822056/download> (last visited May 3, 2017).

<sup>69</sup> U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2015, at 4 Tbl. 1, <https://www.justice.gov/usao/file/831856/download>.

<sup>70</sup> *Id.* at 7 Tbl. 2A & 10 Tbl. 2B.

<sup>71</sup> See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

Justice and five associate justices,<sup>72</sup> with the lower federal judiciary consisting of district and circuit courts.<sup>73</sup> District courts had exclusive jurisdiction over “all crimes and offenses” cognizable under federal law, all admiralty or maritime cases, and all suits against foreign consuls, with concurrent jurisdiction over other cases.<sup>74</sup> Circuit courts had jurisdiction over “all suits of a civil nature at common law or in equity” where the United States or an alien was a party or where the parties were from different states.<sup>75</sup> Justices and judges had the individual responsibility to “administer justice” impartially.<sup>76</sup> That assignment is precisely what courts had been doing long before 1789.

A cornerstone of English common law was the principle that “the supreme authority in political society was not that of the ruler, but that of the law,”<sup>77</sup> a principle known as the rule of law.<sup>78</sup> Article 39 of Magna Carta embodied that principle by providing that the government may not deprive someone of life, liberty, or property except according to the “law of the land.”<sup>79</sup> The doctrine of judicial independence arose to protect that right. The doctrine provides that judges should have the final say on the resolution of legal issues; that judges should resolve disputed legal issues by relying on precedent and reason; and that judges should be independent of the Crown.<sup>80</sup> That last aspect of the doctrine is particularly important in criminal prosecutions. The Crown had a monopoly in that regard, and the penalty for felonies was death.<sup>81</sup> Judicial independence was a life-or-death matter.

<sup>72</sup> Judiciary Act of 1789, § 1, ch. 20, 1 Stat. 73, 73 (1789).

<sup>73</sup> *Id.* §§ 2–5, 1 Stat. at 73–75.

<sup>74</sup> *Id.* § 9, 1 Stat. at 76–77.

<sup>75</sup> *Id.* § 11, 1 Stat. at 78.

<sup>76</sup> *Id.* § 8, 1 Stat. at 76 (quoting the oath of office such judges were required to take).

<sup>77</sup> A.J. CARLYLE, *POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES* 53 (1963).

<sup>78</sup> *See, e.g.*, Larkin, *supra* note 1, at 330–43.

<sup>79</sup> J.C. HOLT, *MAGNA CARTA* 461 (2d ed. 1992) (reprinting Article 39: “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.”).

<sup>80</sup> *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 483–84 (2011) (“Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain ‘made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.’ The Declaration of Independence ¶ 11. The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the ‘[c]lear heads . . . and honest hearts’ deemed ‘essential to good judges.’”) (citations omitted); Larkin, *supra* note 1, at 330–32.

<sup>81</sup> *See* Douglas Hay, *Property, Authority and the Criminal Law*, in DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 17, 18 (1975) (“[T]he number of capital statutes [in England] grew from about 50 to over 200 between the years 1688 and 1820.”).

But the Crown did not give up without a fight. In the Middle Ages, kings tried to exercise indirect influence over judges by letters sent to them, but Parliament responded by requiring judges to swear to decide cases according to the law when they received any such letter from the king.<sup>82</sup> In 1701, after defeating the Stuart kings' attempts to subvert judicial independence, Parliament passed the Act of Settlement, which (inter alia) guaranteed judges independence by providing that their commission would remain valid *quamdiu se bene gesserint* ("during good behavior").<sup>83</sup> The tenure and salary protections supplied by the Act of Settlement of 1701 have continued in England to the present day.

In America, the Framers' generation knew the importance of judicial independence and saw it as being one of the rights that the Colonists brought with them from England.<sup>84</sup> Not surprisingly, the Framers were troubled by the Crown's refusal to preserve independence by manipulating the salaries judges received. One count of the indictment found in the Declaration of Independence of 1776 was that "[King George III] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>85</sup> To prevent the reoccurrence of that effort by the new federal government, Article III of the Constitution guarantees that federal judges will receive the tenure and salary protections afforded English judges by the Act of Settlement of 1701.<sup>86</sup> The Framers included those protections because they believed that only by protecting judges against removal or impoverishment would magistrates stand between an abusive government and private parties.<sup>87</sup>

It is difficult to believe that the Framers would not have been troubled by the proposition that the president can assume some of the responsibility placed on a judge—that of deciding what the law is—by dictating what the proper rule of law will be for a particular subject. The Framers were familiar with Magna Carta, which specified that "the law of the land" was to be the

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<sup>82</sup> See HAMBURGER, *supra* note 33, at 144; HOLT, *supra* note 79, at 461.

<sup>83</sup> The Act of Settlement of 1701, 12 & 13 Will. 3 c. 2, § III ("That after the said limitation shall take effect as aforesaid[,] judges commissions be made Quam diu se bene Gesserint, and their Salaries ascertained and established[;] but upon the Address of both Houses of Parliament it may be lawful to remove them."). The act formalized the tradition of judicial independence that predated the eighteenth century. HAMBURGER, *supra* note 33, at 144–46.

<sup>84</sup> The Colonists believed that they were entitled by their charters and the English common law to all of the rights enjoyed by their countrymen in England. See, e.g., Larkin, *supra* note 1, at 342–43.

<sup>85</sup> THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

<sup>86</sup> U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.").

<sup>87</sup> See Stern, 564 U.S. at 483–84 (quoted *supra* note 80); SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1607–1787 (2011).

rule of decision in any criminal case. The barons forced King John to sign that charter at Runnymede because he considered himself above the law and refused to comply with the English legal traditions. The barons certainly would not have agreed to allow King John to define “the law of the land” as he saw fit, nor would they have seen it as appropriate for a minister under the crown’s thumb to have that power. The Framers of the American Constitution also would not have found that result acceptable. After all, they created a president with *less* “executive Power” than King George possessed,<sup>88</sup> powers that were expressly defined by Article II.<sup>89</sup> The power to resolve “Cases” and “Controversies” was not among them. Instead, the Framers vested that authority, the “judicial Power,” in the federal courts by Article III,<sup>90</sup> as Chief Justice John Marshall made clear in *Marbury v. Madison*.<sup>91</sup> The text of and relationship between Articles II and III strongly suggest that the Framers intended for the courts alone to have any law-interpretation function in a criminal case, not the party seeking to deprive someone of life, liberty, or property.<sup>92</sup>

One final point. It has been settled law since the Supreme Court’s 1812 decision in *Hudson & Goodwin* that only Congress has federal criminal law-making authority. The federal courts cannot create federal offenses in a common-law-like manner. Atop that, the federal court’s authority to interpret federal criminal statute is limited by the Rule of Lenity. William Blackstone wrote in 1765 that “penal statutes must be construed strictly,”<sup>93</sup> and Chief Justice John Marshall adopted that rule of strict construction in *United States v. Willberger*<sup>94</sup> just eight years after the Court decided *Hudson & Goodwin*. The Rule of Lenity requires that, just as a tie goes to the runner in baseball,<sup>95</sup> a tie goes to the defendant in a criminal prosecution—that is,

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<sup>88</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (ruling that the president, acting through the Secretary of Commerce, cannot order the seizure and continued operation of American steel mills even during wartime); cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (denying the government an injunction against the publication of stolen military analyses during wartime).

<sup>89</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>90</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>91</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Inexplicably, *Chevron* never even cited *Marbury*, let alone attempt to reconcile its new statutory interpretation principle with the one set forth in the latter decision.

<sup>92</sup> Cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (stating that history shows the importance of granting federal courts the authority to enter final judgments deciding cases; quoted *supra* note 59).

<sup>93</sup> WILLIAM BLACKSTONE & ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES \* 88 (1803).

<sup>94</sup> 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>95</sup> OFFICIAL BASEBALL RULES § 5.09(a)(10) (2016 ed.) (“Retiring the Batter: A batter is out when: \* \* \* \* (10) After . . . he hits a fair ball, he or first base is tagged *before* he touches first base[.]”) (emphasis added).

an intractably ambiguous provision or a term of debatable meaning in a criminal statute must be construed in the defendant's favor.<sup>96</sup> *Hudson & Goodwin* and *Wiltberger* are still good law today. Given that long-standing tradition in Anglo-American criminal law, we would expect Congress to be quite clear if it attempted to authorize the Justice Department to issue binding interpretations of federal criminal statutes.<sup>97</sup> Congress, however, has done nothing of the kind.

If *Hudson & Goodwin* eschewed any role for the federal courts in the definition of federal crimes, it is hardly reasonable to give that role to the Executive Branch. Whatever advantage the Justice Department may enjoy over the federal courts by virtue of its experience in the enforcement of criminal statutes, and whatever the benefits there may be from the nationwide uniformity that the Justice Department can provide by exercising law-interpreting power—the factors used to justify giving the Department *Chevron* deference<sup>98</sup>—those factors are clearly outweighed by a benefit that only the federal courts can provide: neutrality. The Framers gave federal judges tenure and salary protections precisely so that they would not feel beholden to the other branches, could be impartial adjudicators, and, when necessary, would protect the public from the government without concern about retaliation. The Justice Department cannot fill those roles today any more than King John or the Sheriff of Nottingham could have done so centuries ago. Affording *Chevron* deference to the Justice Department's interpretations of the federal criminal code would likely lead to more of what we have witnessed over the last two decades: unduly expansive interpretations of federal criminal statutes that, as the

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<sup>96</sup> See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Bass*, 404 U.S. 336, 347–49 (1971) (collecting cases). The rule has been described as a “junior version of the vagueness doctrine.” HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 95 (1968). “The rationale for the rule is three-fold: The government ought not to hold someone accountable for acts not clearly outlawed, or subject him to punishment not clearly defined; Congress, not the courts, should define the criminal law and should do so with precision; and ‘the weight of inertia’ should rest on the executive, which is best positioned to persuade Congress to draft criminal statutes clearly.” Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 770 (2013).

<sup>97</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (ruling that Congress cannot be presumed to have delegated to an agency the authority to decide “a question of deep ‘economic and political significance’” regarding the interpretation of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at scattered sections of the U.S. Code)); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (ruling that, given congressional special treatment of tobacco, Congress did not intend to allow the FDA to regulate it); *MCI Telecomm’ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) (same, that the Congress did not allow the Federal Communications Commission to exempt non-dominant telephone carriers from filing tariffs because doing so “is effectively the introduction of a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established”).

<sup>98</sup> See Kahan, *Chevron*, *supra* note 37; Greenberg, *supra* note 37.

Supreme Court has made clear, often greatly exceed any reasonable interpretation of the statute's text.<sup>99</sup>

#### IV. CHEVRON AND THE JUSTICE DEPARTMENT: THE GOVERNMENT AS WARDEN

The Department's responsibilities as warden are materially different from its responsibilities as prosecutor. Federal law commits every offender sentenced to a term of imprisonment to the custody of the Federal Bureau of Prisons (BOP),<sup>100</sup> a component of the Justice Department, headed by a Director appointed by the Attorney General.<sup>101</sup> The Attorney General and BOP Director are responsible for (among other things) the management and regulation of federal prisons; the safekeeping, feeding, medical care, instruction, and discipline of federal prisoners; the creation of prerelease planning procedures that help offenders obtain federal and state benefits after their release (for example, Social Security cards, Social Security benefits, and veterans' benefits); the establishment of re-entry procedures that offer released offenders information regarding employment, health and nutrition, literacy and educational opportunities, and community resources; and so forth.<sup>102</sup> In other words, the Attorney General and BOP Director must act

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<sup>99</sup> See *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (rejecting the government's argument that setting up a meeting, talking to another official, or organizing an event or agreeing to do so, without more, violated the federal bribery act); *Yates v. United States*, 135 S. Ct. 1074 (2015) (same, that a fish can be a "tangible object" for purposes of the Sarbanes-Oxley Act); *Sekhar v. United States*, 133 S. Ct. 2720 (2013) (same, that attempting to compel a person to recommend that his employer approve an investment does not constitute the "obtaining of property from another" under the federal extortion act); *Skilling v. United States*, 561 U.S. 358 (2010) (same, that the "denial of honest services" can constitute fraud); *Cleveland v. United States*, 531 U.S. 12 (2000) (same, that a business license is an item of "property" for purposes of fraud); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) (same, that no connection between an official's receipt of something of value and a specific official act is necessary to establish a violation of federal gratuity statute); see also *McNally v. United States*, 483 U.S. 350, 360 (1987) (declining to "construe [a federal mail fraud statute] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials . . .").

<sup>100</sup> See 18 U.S.C. § 3621(a) (2012).

<sup>101</sup> See 18 U.S.C. § 4041 (2012); see also *id.* § 4001 (2012) ("(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress. [¶] (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations. [¶] (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.").

<sup>102</sup> See 18 U.S.C. § 4042(a) (2012); see also, e.g., *id.* §§ 4043–44 (authorizing BOP to acceptance of gifts); *id.* § 4045 (same, to conduct autopsies); *id.* § 4046 (same, with respect to placement in a "shock incarceration program"); 4047 (same, to prepare prison impact assessments); *id.* § 4048(b)(1) (same, to

(to use the vernacular) as hoteliers, chefs, discipliners, and teachers for all federal prisoners.

The Attorney General and BOP Director are entitled to *Chevron* deference when they promulgate regulations implementing those responsibilities. *Chevron* assumes that Congress intends to grant federal agencies the authority to effectively implement the programs they are responsible for managing. The duty to superintend and care for prisoners is materially different from the execution of federal criminal laws. Giving the Justice Department *Chevron* deference in the latter context would empower the prosecutor to define primary conduct as unlawful. Deference in the management of the federal prison system does not pose that incongruity. It is closely analogous to the responsibilities that other federal agencies—for example, the Departments of Health, Education, and Welfare, the Department of Housing and Urban Development, or the Department of the Interior—have to manage economic or social welfare programs and federal property. Those agencies receive *Chevron* deference when they implement the programs entrusted to their care. The Justice Department should also receive *Chevron* deference when Congress vests it with similar responsibilities by directing the department to manage the federal prison system.<sup>103</sup>

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assess and collect fees for certain health care services by certain prisoners); *id.* § 4049 (same, to carry oleoresin capsicum (“pepper”) spray); *id.* § 4081 (same, to create a system for “the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions”); *id.* §§ 4125(a)–(b) (authorizing the Attorney General to use prisoners “for constructing or repairing roads, clearing, maintaining and reforestation public lands, building levees, and constructing or repairing any other public ways or works financed wholly or in major part by funds appropriated by Congress” and to “establish, equip, and maintain camps upon sites selected by him elsewhere than upon Indian reservations, and designate such camps as places for confinement of persons convicted of an offense against the laws of the United States”); *id.* § 4128 (same, to implement his responsibilities should the Federal Prison Industries fail to act); *id.* § 4282 (same, to promulgate regulations to fund transportation home and subsistence to a person arrested but acquitted).

<sup>103</sup> Ironically, there are instances in which even the Attorney General functions more like a regulator than a litigant. The Controlled Substances Act of 1970 regulates all drugs (labeled by that act as “controlled substances,” 21 U.S.C. § 802(6) (2012)) according to their perceived risk of addiction and medical utility. The act creates five “schedules” of controlled substances whose manufacture, distribution, or possession is regulated or prohibited and punished. *Id.* § 812. Section 201(a) of the Act authorizes the Attorney General to add substances to a schedule, to move a substance from one schedule to another, or to remove a substance altogether according to specified procedures. *Id.* § 811(a). The Attorney General must consult with the Secretary of Health and Human Services (HHS) by requesting a scientific and medical evaluation of a substance and the latter’s recommendation whether it should be controlled. 21 U.S.C. § 811(b). If the Attorney General receives a positive recommendation from the HHS Secretary, the Attorney General must consider eight factors regarding the substance, including its potential for abuse, scientific evidence of its pharmacological effect, its psychic or physiological dependence liability, and whether it is an immediate precursor of a substance already controlled. *Id.* § 811(c). Afterwards, the Attorney General must comply with the notice-and-hearing provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559 (2012), so that interested parties can comment on the proposed listing.

V. *CHEVRON* AND OTHER AGENCIES: THE GOVERNMENT AS REGULATOR

The proper answer is less clear where a statute creates both civil and criminal penalties,<sup>104</sup> as two federal circuit courts of appeals judges have recently noted.<sup>105</sup> As noted above, Justice Thomas has written that he would not give *Chevron* deference to an agency's interpretation of a statute when it is an issue in a criminal case.<sup>106</sup> A current majority of the Court has not

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21 U.S.C. § 811(a). Any aggrieved person may challenge in a federal court of appeals the Attorney General's decision to list a drug. *Id.* § 877. The scheduling process cannot be completed overnight, and the delay encourages drug traffickers to create so-called "designer drugs"—viz., substances with a pharmacological effect similar to a prohibited drug, but a slightly different chemical composition. In response, in 1984 Congress created an expedited procedure that permits the Attorney General to bypass several permanent scheduling requirements and temporarily schedule a substance when "necessary to avoid an imminent hazard to the public safety." *Id.* § 811(h). The Attorney General's listing authority more closely resembles the authority other department heads have to implement their own regulatory programs than it resembles the authority to outlaw primary conduct. If not, then the Attorney General should not receive *Chevron* deference when carrying out this responsibility.

<sup>104</sup> In a few cases, the Supreme Court has explained that a statute with both civil and criminal applications must be strictly construed—that is, as if the interpretation adopted would be applied only in criminal cases. *See, e.g.,* *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opinion) (applying the rule of lenity to a tax statute litigated in a civil setting, because the statute had criminal applications and therefore had to be interpreted consistently with its criminal applications); *id.* at 519 (Scalia, J., concurring in the judgment) (same). Whatever interpretation is appropriate for a criminal prosecution will also be applied in a civil suit. As Justice Scalia put it, "the lowest common denominator, as it were, must govern." *Clark*, 543 U.S. at 380 (citations omitted). In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), however, the Court suggested that the rule of lenity should not always apply to statutes that have both a civil and criminal application. *Id.* at 704 n.18 ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."). *Babbitt*, however, is not good authority for the proposition that *Chevron* trumps the rule of lenity when interpreting laws with civil and criminal application. It is unlikely that the Supreme Court meant to resolve this issue in a *footnote*. *See* *Wainwright v. Witt*, 469 U.S. 412, 418–22 (1985) (explaining that a footnote in the Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), did not state the correct standard for dismissing a member of the venire because of his views on capital punishment). Plus, the Court's post-*Babbitt* decisions in *Leocal*, *Clark*, *Abramski*, and *Apel* reiterated the point first made by the plurality in *Thompson/Center Arms Co.* that statutes with civil and criminal applications must be construed with their criminal applications in mind.

<sup>105</sup> *See* *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729–36 (6th Cir. 2013) (Sutton, J., concurring).

<sup>106</sup> *See* *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (opinion of Scalia & Thomas, JJ., respecting the denial of certiorari) ("I doubt the Government's pretensions to deference. They collide with the norm that legislatures, not executive officers, define crimes. When King James I tried to create new crimes by royal command, the judges responded that 'the King cannot create any offence by his prohibition or proclamation, which was not an offence before.' . . . James I, however, did not have the benefit of *Chevron* deference. . . . With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new

resolved the issue. Were the Supreme Court to apply *Chevron* deference to the interpretation of criminal statutes or regulations endorsed by an agency other than the Justice Department, executive branch officials would share with Article III judges the authority “to say what the law is,” a responsibility that *Marbury v. Madison* said falls within the charter of the federal courts.<sup>107</sup> That result would raise many of the same concerns discussed above in Point III that are posed by *affording* the Justice Department *Chevron* deference when it interprets criminal laws.

The Justice Department is unique in that its principal responsibility is to represent the federal government in court. Most agencies are responsible for implementing a congressional program regulating one or more activities undertaken outside of court, such as protecting highway safety, disbursing federal health care funds or educational loans, protecting the environment, regulating the distribution of pharmaceuticals, and so forth. To help agencies accomplish their mission, Congress gives them broad authority to promulgate regulations defining terms in the authorizing statutes (for example, “waste” vs. “recyclable” materials). To ensure compliance, Congress gives the agency administrative or civil enforcement authority. On occasion, Congress may even create a criminal investigation division within the agency, staffed by career federal law enforcement officers.<sup>108</sup> So the question arises whether those agencies should receive *Chevron* deference when they interpret an ambiguous act of Congress even though it is quite clear that the statute can be enforced criminally.

This question is a more difficult one than those discussed in Parts III and IV. Since the advent of the modern administrative state during the New Deal, Congress has largely responded to systemic problems in the economy

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crimes at will, so long as they do not roam beyond ambiguities that the laws contain. Undoubtedly Congress may make it a crime to violate a regulation, . . . , but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation[.] . . . [¶] The Government’s theory that was accepted here would, in addition, upend ordinary principles of interpretation. The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants. Deferring to the prosecuting branch’s expansive views of these statutes ‘would turn [their] normal construction . . . upside-down, replacing the doctrine of lenity with a doctrine of severity.’”) (citations omitted). Interestingly, the newest member of the Court, Justice Neil Gorsuch, wrote while a court of appeals judge that he would overrule *Chevron* altogether. See *Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring).

<sup>107</sup> 5 U.S. (1 Cranch) 137, 177 (1803); see also THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The interpretation of the laws is the proper and peculiar province of the courts . . . . It therefore belongs to [judges] to ascertain [the Constitution’s] meaning as well as the meaning of any particular act proceeding from the legislative body.”).

<sup>108</sup> See ENVIRONMENTAL LAW HANDBOOK § 6.0, at 96–109 (Thomas F. P. Sullivan ed., 21st ed. 2011); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1095–96, 1096 n.105 (2014) (discussing the EPA criminal investigation program).

or elsewhere by creating agencies staffed by experts to address and remedy whatever concern the public may have. Empowering an agency to promulgate regulations necessary to implement a social welfare program may have seemed novel in the 1930s, but today it partakes of the “Dog Bites Man” headline—it’s nothing new. Unless American society is willing to re-examine the legitimacy of the modern administrative state and to prune agencies of their authority to implement acts of Congress, federal agencies will be closely involved in the implementation of federal programs if for no other reason than that Congress cannot or will not do the job by itself; only executive branch officials can “take Care that the Laws [will] be faithfully executed.”<sup>109</sup> The same is true of agencies’ law-making power. Unless Congress is willing to decide for itself through legislation what ever-changing list of pharmaceuticals are “controlled substances,” what types of software should be subject to export licenses, and what industrial waste chemicals are “hazardous,” agencies will have the task of making those determinations on a case-by-case basis or via generic rulemaking.<sup>110</sup>

Congress often delegates lawmaking authority to a federal agency because its personnel are experts in a particular field (for example, pharmacology and hazardous waste disposal for the Food and Drug Administration and Environmental Protection Agency, respectively). Many of the agency’s regulations may simply amount to the application of a scientific standard incorporated into law (for example, “safe and effective” or “hazardous”) to a particular substance (for example, a new chemotherapy drug or a new solvent) in a manner that requires only resort to scientific or technical expertise and does not involve fundamental policy questions (for example, should the “safe and effective” review standard apply to new drugs that can be used for palliative care for the terminally ill, or should the armed forces be exempt from the laws dealing with the proper disposal of hazardous waste). Fact-finding undertakings like those do not involve the type of moral judgments that underlie criminal statutes because Congress has already made the moral judgments that drugs must be proven safe and effective to be distributed nationwide and that the proper disposal of hazardous waste is necessary to protect (inter alia) the integrity of the nation’s lakes, rivers, and aquifers. Because Congress has turned to scientific experts in the same way that we turn to physicians for their opinion, it makes sense to pay attention to what they

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<sup>109</sup> U.S. CONST. art. II, § 3 (the Take Care Clause); see *Bowsher v. Synar*, 478 U.S. 714 (1986) (ruling that Congress cannot remove—except through the impeachment process—an official responsible for the execution of the law).

<sup>110</sup> See *Baltimore Gas & Electric Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87 (1983) (approving generic rulemaking).

say. This chemotherapy drug might work; that one won't. This solvent will break down into harmless chemicals over a year; that one won't for a millennium. And so forth.

But that is not the rationale underlying *Chevron*. *Chevron* did not conclude that law-interpreting requires the type of scientific knowledge that administrative officials have in spades. *Chevron* rested on the principle that Congress presumably granted executive branch officials law-making and law-interpreting authority because they are responsible to the president, who is elected by the people and can be replaced by them, whereas judges with life tenure are responsible to no one but a higher court and cannot be replaced as long as they avoid committing felonies and remain *compos mentis*.<sup>111</sup> The criminal law reflects underlying moral judgments that it is the responsibility of the people to make in a democracy. Agencies lack expertise in making these moral judgments; their skills lie elsewhere. In fact, a recent study<sup>112</sup> concluded that there is a serious disconnect between the positions of the officials who work at federal agencies and the views of the people whom those officials are responsible for serving, with government officials largely holding a condescending view towards the public.<sup>113</sup> The rationale of *Chevron*

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<sup>111</sup> See *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. [¶] When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’”) (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). Yes, the *Chevron* opinion also said that, absent a good reason to the contrary, Congress is presumed to have delegated interpretive authority to an agency. But there is no more reason to presume that Congress delegated decision-making authority to an agency than there is to presume that Congress did not give the matter a moment’s thought. The presumption of congressional delegation invoked in *Chevron* was “a fictional presumed intent,” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517, which is a technical, legal term used to label what non-lawyers would call a “lie.”

<sup>112</sup> JENNIFER BACHNER & BENJAMIN GINSBERG, WHAT WASHINGTON GETS WRONG (2016).

<sup>113</sup> The study made that point in no uncertain terms:

[O]fficial Washington lives in its own inside-the-Beltway bubble, where Washingtonians converse with one another and rarely interact on an intellectual plane with Americans at large. We found that much of official and quasi-official Washington is content to think that ordinary Americans, and the politicians whom

therefore does not support giving deference in a criminal prosecution to an agency's policy-laden interpretation of a statute.

Does that mean that an agency's interpretation of a criminal law is irrelevant? No. An agency, particularly the Justice Department, has experience in how a particular statute works even if that law imposes criminal penalties. The agency's position therefore may be quite illuminating. But the relevant standard is the one articulated in *Skidmore v. Swift & Co.*,<sup>114</sup> not *Chevron*. That standard considers whether an agency's interpretation is persuasive, but gives the courts the ultimate say on the matter.<sup>115</sup> "A persuasive agency

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they send to Congress, are uninformed and misguided and that policy makers generally should ignore them. This is more or less what they do. America's governmental agencies, of course, cannot completely ignore the president and Congress, but to the extent possible they pursue policy agendas of their own and expect citizens to do what they are told. Indeed, one of the ongoing discussions in official Washington concerns how best to impel citizens to obey – is it steering, compulsion, or the currently fashionable term "nudging," which means structuring alternatives to limit choices. Many officials exemplify what Aristotle called ἀνπευθυνος (anupeuthunos, or civic irresponsibility). Translated literally, ἀνπευθυνος refers to rulers who think they are too good to submit to public accountability.

It may, to be sure, be true that many Americans know little about government and politics. But so what? Most patients know little about medicine, and most clients know little about the law. We expect, however, that doctors and lawyers will exhibit a fiduciary responsibility toward those seeking their services. The ignorance of patients and clients is a reason to listen more carefully and explain more fully, not an excuse for dismissing them as unworthy of attention. A physician or attorney who regards those dependent upon their services as fools, and undertakes actions without taking much interest in their life circumstances and without giving much consideration to their needs and preferences, is guilty of medical or legal malpractice. Similarly, public servants who have disdain for the public they serve, and show little interest in the public's needs and wishes, are guilty of civic malpractice.

*Id.* at 10–11.

<sup>114</sup> 323 U.S. 134 (1944). *Skidmore* is mislabeled as a form of deference because, as the opinion makes clear, it states that a court should agree with an agency's interpretation only insofar as it finds that opinion *persuasive*. *Id.* at 140. Under *Chevron* Step 2, an agency can receive deference even if a court is unpersuaded that the agency's position is the one that the court would have adopted in the first instance. *See Chevron*, 467 U.S. at 844 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted). The approach set forth in *Skidmore* requires a court to agree with the agency, not just to find that its interpretation is a reasonable one.

<sup>115</sup> *Skidmore*, 323 U.S. at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

position would carry the same weight as an opinion by Arthur Corbin on contract law, Herbert Hovenkamp on antitrust law, William Prosser on tort law, David Shapiro on federal jurisdiction, Herbert Wechsler on criminal law, or Charles Allen Wright on federal civil procedure.”<sup>116</sup> Those figures are widely recognized and highly regarded legal experts, and the legal community, including the courts, seek and value their opinions. The difference is that, under *Skidmore*, the courts get the final say whether their opinion or an agency’s is right.<sup>117</sup>

Does that mean an agency cannot promulgate regulations the violation of which can be enforced in a criminal prosecution? No. Some statutory schemes direct federal agencies to identify specific widgets that cannot be distributed in interstate commerce (for example, unapproved “new drugs”) or that cannot be dumped into the water, air, or ground (for example, “hazardous wastes”). Congress should be free to draw on an agency’s scientific, technical, fact-finding or law-applying expertise without having to identify by itself every specific widget that can be enforced through the criminal law. But finding facts and applying a legal standard to the facts so found is quite different from deciding in the first instance whether pharmaceuticals or hazardous wastes should be regulated through the criminal law. The former does not involve the delegation concerns that militate against allowing regulatory agencies to decide whether and for how long someone can land in prison. Only Congress should have the power to make those judgments.<sup>118</sup>

#### CONCLUSION

*Chevron* launched a new approach to statutory interpretation in the post-New Deal administrative state based on the dubious presumption that, where it leaves ambiguity in a statute, Congress intended to delegate law-interpretation power to the federal agency charged with administering that act. That rule has come under attack on a variety of fronts, not the least of which is that it jettisons one of the oldest propositions in American legal history—that it is the duty of the courts to construe a law. Whatever the outcome of the challenges to the *Chevron* deference rule, it makes no sense to apply that

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<sup>116</sup> Paul J. Larkin, Jr., *The World After Chevron*, THE HERITAGE FOUND., LEGAL MEMORANDUM No. 186, at 6 (Sept. 8, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-186.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) (“[T]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.”). Notice problems remain but they can be addressed by a mens rea standard requiring proof of willfulness or by creating a mistake of law defense. See, e.g., Meese & Larkin, Jr., *supra* note 18.

rule to the Justice Department's interpretation of a criminal law or to an agency's non-scientific, non-technical, policy-laden judgment regarding what conduct should be made a crime.