JUSTIFYING THE *CHEVRON* DOCTRINE: INSIGHTS FROM THE RULE OF LENITY

In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] the Supreme Court announced a simple rule: courts must defer to reasonable agency interpretations of ambiguous administrative statutes.[2] The Court has been chipping away at this blanket rule of deference ever since. Most significantly, in *United States v. Mead Corp.*,[3] the Court stated that *Chevron*'s application should be limited to agency interpretations issued with the "force of law."[4] Where *Chevron* deference was once the background presumption, it is becoming the exception.[5]

One could blame the diminishment of *Chevron*'s domain on legitimate concerns about agency capture, executive aggrandizement, and the like.[6] However, there are many satisfying responses to these policy arguments, most grounded in the twin observations that agencies are more expert and more politically accountable than courts and therefore more suited to the often complex and policy-driven task of administrative statutory interpretation.[7] *Chevron*'s diminution may be due to an even more fundamental problem: it is not clear how *Chevron* — in its original incarnation — can be justified. *Marbury v. Madison*[8] identifies the baseline assumption about interpretation: "It is emphatically the province and duty of the judicial department to [s]ay what the law is."[9] Why, then, should courts depart from this assumption when an agency has interpreted a statute?

The *Chevron* opinion gave at least four different answers to this question, without giving any clear signal as to which justifications the Court viewed as necessary or sufficient in and of themselves. The

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[1] 467 U.S. 837 (1984).

[2] *Id.* at 842–43.

[3] 533 U.S. 218 (2001).

[4] *Id.* at 227.

[5] *See, e.g.*, *id.* at 240 (Scalia, J., dissenting) ("Today the Court collapses [the *Chevron*] doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so.").

[6] *See, e.g.*, Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549 (2009); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

[7] *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 689–90 (2007); Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2229–30 (1997); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 309–10 (1986); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006).

[8] 5 U.S. (1 Cranch) 137 (1803).

[9] *Id.* at 177.

Court suggested that the judiciary should defer to agencies because (1) Congress intends the courts to do so, (2) agencies exercise delegated legislative power when they issue interpretations, (3) agencies are more politically accountable than courts, and (4) agencies have the necessary technical expertise that courts often lack.[10]

Over the last two decades, each of these rationales has proven unsatisfactory, such that the *Chevron* doctrine has gone from having four potentially viable rationales to having no clear theoretical foundation. On several occasions, most notably in *Mead*, the Court has attempted to shrink the boundaries of the *Chevron* doctrine in order to make it rest more comfortably on one or another of the original justifications.

But the Supreme Court's efforts have been misguided. It is not necessary to alter the *Chevron* doctrine in order to find a theoretical foundation for it. It is only necessary to enrich our understanding of one of the doctrine's original rationales: political accountability. As initially articulated in the *Chevron* opinion, this justification relied on the fact that resolving statutory ambiguities typically requires some sort of policy choice. "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.'"[11] The obvious problem with this formulation is that the Constitution also vested "judicial Power" in politically unaccountable courts.[12] If statutory interpretation, a core judicial role, requires the exercise of policy discretion, then it seems odd to argue that policy responsibility was only constitutionally vested in the politically accountable branches.

In fact, though, the political accountability rationale may be salvaged in part by an unlikely candidate: the rule of lenity. Under this rule, which pre-dates the Constitution by a large margin,[13] courts are instructed to adopt the meaning of an ambiguous criminal statute that will avoid attaching penal sanctions to an action in the absence of a clearly expressed legislative intention to do so.[14] While there are several implications of such a doctrine, one is of paramount importance for *Chevron* deference: the rule recognizes that it is inappropriate for the judiciary to make a policy choice even if such a choice seems to be required by a court's statutory interpretation duties. That this rule ex-

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[10] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 865–66 (1984).

[11] *Id.* at 866 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

[12] U.S. CONST. art. III, § 1.

[13] Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV 57, 86–97 (1998).

[14] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

isted at the time of the Framing helps relieve the tension between the assertion that the Constitution vested policy discretion in the politically accountable branches and the fact that statutory interpretation has traditionally been the province of the courts.

This Note thus argues that *Chevron* deference is best understood as maintaining the traditional constitutional balance in which policy discretion is kept out of the hands of the politically unaccountable judiciary, sometimes through the restraint of the judiciary itself. It also suggests that viewing *Chevron* in this light justifies — and indeed mandates — a return to the breadth and scope of the original *Chevron* rule. Part I of the Note explains the original rationales for *Chevron* deference and the vulnerabilities of each of these justifications. Part II explores the way in which the Court unsuccessfully attempted to rehabilitate some of these rationales by limiting the scope of the *Chevron* doctrine in *Mead*. Part III suggests an alternate means of rehabilitating the doctrine through an enriched understanding of the political accountability rationale for *Chevron*, as informed by the rule of lenity. Part IV concludes.

I. *CHEVRON*'S ORIGINAL SINS

Chevron has become "the most cited case in modern public law."[15] The rather unsubstantial nature of the Court's justifications for the doctrine suggests, however, that the Court was unaware of its significance.[16] Justice Stevens, writing for a unanimous Court,[17] offered four possible reasons why the judiciary should defer to reasonable agency interpretations of ambiguous statutes. None has, in its original incarnation, proved strong enough to justify an agency's right to exercise the conventional judicial authority to "say what the law is."[18]

One of the Court's four rationales, agency expertise, may be dispensed with immediately. The *Chevron* Court observed that the "regulatory scheme [at issue in the case was] technical and complex," and further noted that "[j]udges are not experts in the field."[19] But the ex-

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[15] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006).

[16] *See, e.g.*, David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–13 ("*Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions.").

[17] Oddly, Chief Justice Rehnquist and Justices Marshall and O'Connor took no part in the decision.

[18] Some have argued that *Chevron* is best understood as resting on all of the rationales together, rather than being premised solely on any one rationale. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271 (2008). While in some cases a collection of weak rationales can combine to make a strong one, the weaknesses of the *Chevron* rationales do not sufficiently offset one another to make this the case.

[19] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

pertise of the agency, standing on its own, would be weak grounds for a blanket rule of deference to agency interpretations. At a minimum, it would seem to demand that courts make some inquiry as to whether the agency employed its expertise when issuing the relevant interpretation, using something akin to the factors discussed in *Skidmore v. Swift & Co.*[20] It might also suggest, though, that a judge should decline to defer to an agency if he or she felt sufficiently technically proficient in the particular subject matter of the interpretation.

The other three rationales offered by the *Chevron* Court are — at least at first blush — more compelling. The Court suggested that courts should extend deference to agency interpretations because Congress intended for them to do so. As the Court explained, sometimes Congress has "explicitly left a [statutory] gap for the agency to fill,"[21] and "[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[22] In this understanding of *Chevron*'s rationale, the goal of statutory interpretation is the vindication of congressional intent. Thus, sometimes a court fulfills its duty to "say what the law is" by determining that Congress intended that the law should be whatever the agency says it is.[23]

The problem, as many commentators have observed, is that the notion that each statutory ambiguity represents a specific decision by Congress to delegate interpretive authority to the agencies strains credibility.[24] Certainly in a pre-*Chevron* world it would be inaccurate to say that Congress would be aware that, by including an ambiguous word in a statute, it was delegating its legislative power to the agency. Professor Peter Strauss has demonstrated that, in reality, pre-*Chevron* courts typically gave no deference to agency interpretations in the absence of an express delegation or some other factors that spoke strongly in favor of the agency interpretation.[25] Thus, to the extent Congress was paying attention to the courts' treatment of administrative statutes, it would have little reason to suspect that ambiguity would be considered a delegation. If *Chevron* deference is justified only with

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[20] 323 U.S. 134, 140 (1944).

[21] *Chevron*, 467 U.S. at 843.

[22] *Id.* at 844.

[23] *See, e.g.*, Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244–46 (1989); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 380–85 (1989).

[24] *See, e.g.*, Barron & Kagan, *supra* note 16, at 214; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[25] *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1120 (1987).

reference to congressional intent, then it would seem that such deference should, at a minimum, be denied to pre-*Chevron* statutes.[26]

The third potential rationale offered by the *Chevron* Court is closely related to this congressional intent explanation, and it fares no better. The *Chevron* Court referred to Congress's alleged grant of interpretive power to the agencies as an implied "legislative delegation."[27] It could be, then, that the judiciary must defer to agency interpretations because they are "legislative." Under this account, the judiciary is bound by legislative enactments. It can interpret them, but it cannot alter them. An agency with congressionally delegated legislative power may issue such enactments, and courts must abide by these legislative regulations as they would abide by a law from Congress itself.

It seems implausible, however, that each time an agency interprets a law, it is exercising *legislative* power. Indeed, in *Bowsher v. Synar*,[28] the Court explicitly recognized that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[29] The interpretation at issue in *Chevron* itself was a regulation, a form of administrative action that bears a strong resemblance to legislation.[30] Like laws, regulations are usually binding on a class of persons or entities rather than on an individual. They are typically the result of a comprehensive deliberative process, and there are generally limits on their retroactive application.[31] But not all agency interpretations are in the form of regulations. Some are the result of adjudicative proceedings whose binding effect is limited to the particular parties involved; some are formulated only in guidance letters or policy manuals that have not emerged from rigorous deliberation; some are developed for the first time over the course of litigation. Can courts really look on such interpretations as exercises of legislative

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[26] Even now, *Chevron* deference is not as ubiquitous as one might expect. Professors William Eskridge and Lauren Baer performed an empirical analysis and found that "from the time it was handed down until the end of the 2005 term, *Chevron* was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations." William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090 (2008). A rational congressperson, then, might not anticipate or intend that a statutory ambiguity would be resolved by an agency and not the courts. Moreover, as the *Chevron* Court itself acknowledged, statutory ambiguities are often the result of an inability of the legislative body to reach consensus on more specific language, rather than a desire on the part of Congress for a particular entity to fill in the statutory details. *Chevron*, 467 U.S. at 865.

[27] *Chevron*, 467 U.S. at 844.

[28] 478 U.S. 714 (1986).

[29] *Id.* at 733.

[30] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476–77 (2002).

[31] *Id.* at 477–78.

power? Should they be bound by those interpretations as they would be bound by a law?

The final potential *Chevron* rationale, and the one this Note argues is ultimately the most satisfactory, is grounded in the comparative political accountability of courts and executive agencies. The Court explained that "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do."[32] Because the resolution of an administrative statutory ambiguity involves policy discretion, courts must defer.[33]

The political accountability rationale for *Chevron* does not suffer from the flaws of the previous two: while every agency interpretation likely does not represent an intended delegation from Congress, or an exercise of legislative power, it may well be that every interpretation does represent the exercise of some policymaking authority. Indeed, that is exactly the problem. If statutory interpretation almost inevitably involves the exercise of policymaking discretion, and if such discretion should not be housed in the judiciary, then why are courts ever permitted to interpret the law?[34]

We might, however, understand this rationale as a theory of "second best."[35] Ideally, Congress would legislate with precision and courts would never have to exercise policymaking discretion by resolving statutory ambiguities. But Congress cannot always speak with this kind of precision, and so courts must issue interpretations that often involve some policy choices. In the context of administrative statutes, though, there is another politically accountable actor — the agency — that can take over the interpretive role, and so it should.[36]

But this explanation still fails because it cannot explain why, if interpretation inherently involves policy discretion and is thus ideally carried out by politically accountable parties, the Constitution would entrust this power to the least politically responsive branch. Moreover, it fails to take account of the Court's consistent refusal to extend deference to Department of Justice interpretations of ambiguous criminal

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[32] *Chevron*, 467 U.S. at 866.

[33] *See* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); Pierce, *supra* note 23, at 1256.

[34] Scalia, *supra* note 24, at 515 ("Policy evaluation is . . . part of the traditional judicial tool-kit.").

[35] *See generally* Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009) (describing the concept of the "second best" in legal theory).

[36] *Cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 626 (1996) (arguing that *Chevron* is based on a fiction of congressional delegation that protects the real constitutional value of political accountability).

statutes.[37] If the Court does defer to politically accountable actors when it can, then surely the Department of Justice — as a part of the politically accountable executive branch — should be a beneficiary of the *Chevron* doctrine. In Part III, this Note will argue that these difficulties with the rationale can be reconciled by a proper understanding of the role of the judiciary as informed by the rule of lenity. First, though, it is worthwhile to explore the Court's own failed attempt at harmonizing the *Chevron* doctrine with its alleged rationales.

II. *MEAD* UNBOUND

The Court has not been blind to the difficulties with the rationales for the presumption of deference articulated in *Chevron*. In 2001, in *Mead*, the Court sought to place *Chevron* on firmer ground by narrowing its scope so that it might be justified more comfortably by two of the original rationales: congressional intent and appropriate judicial respect for delegated legislative authority. This attempt, however, was largely unsuccessful.

The *Mead* Court held that the *Chevron* doctrine is only applicable if the interpretation at issue is made by an agency with the authority to make rules with the "force of law," and if the interpretation in question is made in the exercise of that authority.[38] The *Mead* majority explained the limited application of *Chevron* deference with reference to congressional intent:

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result.[39]

The Court seems to suggest that if an agency has been given the power to issue rules with the force of law, then that implies that Congress

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[37] *See* Crandon v. United States, 494 U.S. 152, 177 (1990) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); *see also, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 264 (2006) ("[T]he Attorney General must . . . evaluate *compliance* with federal law in deciding whether to prosecute; but this does not entitle him to *Chevron* deference."); Stenberg v. Carhart, 530 U.S. 914, 941 (2000) (citing the *Crandon* anti-deference position in rejecting an argument that a state attorney general's interpretation of a law should be considered authoritative).

[38] United States v. Mead Corp., 533 U.S. 218, 229 (2001).

[39] *Id.* (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)); *see also* Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent. Throughout the opinion, the Court refers to congressional intent, expectations, contemplations, thoughts, and objectives.").

would want the agency to be able to use this power when interpreting ambiguities and filling gaps. There is some sense to this: certainly if Congress has *not* explicitly granted the power to make legislative rules to an agency, it is unlikely to have intended that the agency use such a power when issuing interpretations. It does not follow, though, that when Congress *does* explicitly grant authority to an agency to make certain legislative rules, it is aware that it is generally granting authority to the agency to interpret all statutory ambiguities.

The issue of whether an agency has the power to make legislative rules is distinct from the issue of whether an agency should have the power to interpret laws. Indeed, if we follow the *expressio unius* principle, then we might assume that when Congress has delegated specific decisions to an agency within a statutory scheme, it does not desire the agency to make any others. The contrary assumption made by the *Mead* Court seems only slightly more likely than the *Chevron* Court's general declaration that all ambiguities represent delegations.[40] As with *Chevron*, the assumption may gain some validity if the doctrine becomes very well established, but it cannot be accurate with respect to pre-*Mead* laws and it does nothing to differentiate intentional ambiguity from instances where vague language is the result of a failure to reach congressional consensus.

But the *Mead* opinion does not rely solely on the myth of congressional intent. It also rests heavily on the notion that deference is owed to those administrative decisions that have the force of law. This reliance sounds in the second justification for *Chevron* discussed above: the idea that sometimes an agency issues an interpretation using legislative authority that Congress has delegated.[41] The judiciary must treat such interpretations just as they would treat laws. A court cannot invalidate a law merely because it believes the law is not the best way of vindicating Congress's goals; therefore, a court has no right to invalidate an agency pronouncement with the force of law for that reason either.[42] *Mead* makes this *Chevron* justification more plausible because it acknowledges that not all agency interpretations have the force of law, and it limits *Chevron* deference only to those that do.[43]

There are still major problems with *Mead*'s attempt to limit *Chevron* in this way. As a preliminary matter, the decision has raised major practical difficulties because lower courts have found it immensely challenging to distinguish between interpretations that do and do not

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[40] *See Mead*, 533 U.S. at 229; *Chevron*, 467 U.S. at 850.

[41] *See Mead*, 533 U.S. at 229 ("This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that '[s]ometimes the legislative delegation to an agency on a particular question is implicit.'" (quoting *Chevron*, 467 U.S. at 844)).

[42] *See id.*

[43] *See id.* at 229–31.

have the force of law.[44] But even if these practical difficulties could be resolved, there are also substantial problems with the *Mead* principle that courts must defer to some agency interpretations because they represent exercises of delegated legislative power.

The first of these problems is the uncomfortable intersection between this principle and the nondelegation doctrine. Under the nondelegation doctrine, because Article I, Section 1 of the Constitution states that "All legislative Powers herein granted shall be vested in Congress,"[45] these powers may not be exercised by the other branches. In particular, Congress may not delegate these powers to agencies. The general tension between this doctrine and *Chevron* deference has been discussed almost since *Chevron* was first handed down.[46] How can *Chevron* deference be based on Congress's implied delegation of legislative authority to an agency if such a delegation is a constitutional violation in and of itself?

Indeed, this tension, along with the increasing prevalence of administrative rulemaking, might lead to the belief that the nondelegation doctrine is largely defunct.[47] But while the Court has not invalidated a congressional grant of regulatory power under the nondelegation doctrine since 1935, it has consistently reiterated that the nondelegation doctrine still has constitutional force.[48] The Court's adherence to the idea that the Constitution permits "no delegation of those [legislative] powers"[49] coupled with its refusal to invalidate statutes that permit agencies to make legislative rules suggests that the Court sees legislative rules as distinguishable from congressionally issued laws, even if those rules may hold the force of law.[50] *Chevron* deference, therefore, cannot really be owed because some agency interpretations are the equivalent of legislative enactments as such interpretations would violate the nondelegation doctrine.

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[44] *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1463–64 (2005); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 219–21 (2006); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

[45] U.S. CONT. art. I, § 1.

[46] *See, e.g.*, Kmiec, *supra* note 33.

[47] *See, e.g.*, Barron & Kagan, *supra* note 16, at 201 (noting that the nondelegation doctrine is now honored almost exclusively in the breach).

[48] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers." (alteration in original) (citing Loving v. United States, 517 U.S. 748, 771 (1996))).

[49] *Id.*

[50] In fact, the Court has articulated a precise distinction between laws and legislative rules, finding that rulemaking is not an exercise of the legislative power because it is guided by an "intelligible principle" from a statute. *See id.*

We might side-step this nondelegation muddle by suggesting that the Court should treat certain regulations as laws even though they are not technically legislative enactments. While Congress may not — because it constitutionally cannot — delegate legislative power to the agencies, it may intend that certain forms of agency enactments — most notably, legislative rules — be as close to laws as possible. Therefore, as *Mead* recognizes, the courts should treat them that way. This position, though, is foreclosed because it contradicts the Court's approach to agency interpretations of their own regulations, as articulated in cases such as *Auer v. Robbins*[51] and *Bowles v. Seminole Rock & Sand Co.*[52] In these cases, the Court announced that it will usually accept the agency's own interpretation as long as it is not "plainly erroneous or inconsistent with the regulation."[53]

This deference in interpreting regulations runs contrary to the *Mead* idea that some regulations are to be treated as laws because the Court certainly would not look to Congress for an authoritative interpretation of its own vaguely worded law. Indeed, Professor John Manning has pointed out that the constitutional plan manifests an intention to separate lawmaking from law exposition powers,[54] as discussed in cases such as *INS v. Chadha*,[55] *Bowsher v. Synar*, and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*[56] In those cases, the Court clamped down on various attempts by Congress (the lawmaker) to play a role in interpreting its own laws. If *Mead* really grounds deference to agencies in the theory that certain types of agency enactments are similar enough to laws that they should be treated that way, then one would expect the Court similarly to clamp down on agency attempts at the exposition of agency-made "laws." But instead, the Court has continued to

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[51] 519 U.S. 452 (1997).

[52] 325 U.S. 410 (1945).

[53] *Id.* at 414. In his *Mead* dissent, Justice Scalia raised a practical challenge to the interaction between this doctrine and *Mead*, arguing that together these cases would mean that agencies "will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." 533 U.S. 218, 246 (2001) (Scalia, J., dissenting). Thus, *Auer* deference allows agencies to make "an end run around the boundaries drawn by *Mead*." John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 943 (2004). Some lower courts even assumed that — for this reason — *Mead* had effectively put an end to strong *Auer* deference. *See, e.g.*, Keys v. Barnhart, 347 F.3d 990, 993–94 (7th Cir. 2003) (suggesting that post-*Mead*, agency interpretation found in a legal brief should not be accorded strong *Auer* deference); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1307–10 (2007). But as noted below, the Court has not in fact abandoned such deference and has employed it as recently as last Term. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458 (2009).

[54] Manning, *supra* note 36, at 648–54.

[55] 462 U.S. 919 (1983).

[56] 501 U.S. 252 (1991).

grant strong *Auer* deference.[57] Indeed, as recently as June of 2009, the Court explained its approach to an EPA interpretation of an ambiguous statute and equally ambiguous regulation in terms of both *Mead* and *Auer*.[58] This continuing reliance on the *Auer* doctrine suggests that *Mead*'s limitation on *Chevron* deference still does not permit such deference to rest comfortably on the rationale that certain agency interpretations should be accorded the same judicial treatment as laws.

The Court's decision in *Mead*, then, fails to ground *Chevron* deference more securely either in an understanding of the doctrine as a vindication of congressional intent for agencies to act as statutory interpreters or as a means of ensuring that agency enactments issued with delegated legislative authority are treated by courts as congressional enactments would be. Some other satisfactory rationale for the doctrine is necessary.

III. RESURRECTING *CHEVRON*: THE RULE OF LENITY AND THE POLITICAL ACCOUNTABILITY JUSTIFICATION

A logical place to turn for justification of the *Chevron* doctrine is the fourth justification for deference articulated by the *Chevron* Court: political accountability. As noted in Part I, the chief problem with the political accountability rationale is that it fails to explain how the Constitution could vest policymaking power exclusively in the politically accountable branches when the quintessentially judicial task of statutory interpretation inherently involves policy judgments. This problem might lead to a conclusion that the Supreme Court's initial assertion that "[o]ur Constitution vests [policy] responsibilities in the political branches"[59] is incorrect and that the constitutional Framers *did* intend to give the judiciary some policy discretion. Such a conclusion, though, seems to conflict with the history of the Founding and in particular with insights we might glean from the role of the rule of lenity in the early Republic. This history redeems *Chevron*'s political accountability rationale because it suggests that in the early Republic, judges were expected to refrain from exercising policy discretion, even when their statutory interpretation duties might otherwise seem to demand it. *Chevron* deference represents a modern means through which judges can continue to exercise this restraint. This Part will first explore the history and will then suggest how we might understand *Chevron* as a modern successor to the rule of lenity.

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[57] *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537–38 (2007); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2347–49 (2007).

[58] *See Coeur Alaska, Inc.*, 129 S. Ct. at 2469–70.

[59] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

A. The Rule of Lenity and Resistance to Judicial Policymaking in the Early Republic

In general, there seems to be historical support for the notion that the Framers opposed the idea of courts making policy choices. In a series of articles, Professors John Manning and William Eskridge engaged in a spirited debate about the history of the "judicial Power"[60] and the historical support for the textualist — as opposed to the purposivist — school of statutory interpretation.[61] While the two scholars draw diverging conclusions with respect to much of the evidence concerning the "judicial Power" at the time of the Framing, both agree that the constitutional drafters likely opposed giving judges a role in policy decisions.[62] Indeed, on two separate occasions the Framers rejected proposals that would have given the judiciary a pre-enactment veto through which judges could invalidate laws for policy reasons.[63] Each time, opponents of the proposal cited distaste for a plan that would allow the judicial exercise of policy discretion. Responding to the first proposal, Elbridge Gerry noted that "[i]t was quite foreign from the nature of [the] office to make [the judiciary] judges of the policy of public measures,"[64] and John Dickinson argued that judges "ought not to be legislators."[65] Objecting to the second proposal, Nathaniel Gorham observed that judges "are not to be presumed to possess any peculiar knowledge of the mere policy of public measures[,]" and Gerry complained that such a plan made judges "Legislators[,] which ought never to be done."[66]

Still, both Manning and Eskridge acknowledge the dangers in relying too heavily on evidence from the Framing debates — which may be misleading in large part because the record of the proceedings was not available to those who voted on constitutional ratification[67] — and the fact remains that the "judicial Power" indisputably includes statutory interpretation. If this task inevitably involves policymaking, then

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60 U.S. CONST. art. III, § 1.

61 William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1777–1806*, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

62 Eskridge, *supra* note 61, at 1037–38 (admitting that he shares "common ground" with Manning in accepting as a "working hypothesis," *id.* at 1038, the idea that judges are not meant to refuse to enforce laws "because they are unwise or reflect poor policy judgments," *id.* at 1037).

63 *Id.* at 1031–35.

64 *Id.* at 1031 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 108–09 (Max Farrand ed., 1986)) (internal quotation mark omitted).

65 *Id.* at 1031–32 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 108–09) (internal quotation mark omitted).

66 *Id.* at 1035 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 64, at 73, 79) (internal quotation mark omitted).

67 *Id.* at 1038; Manning, *supra* note 61, at 59 n.237.

the "judicial Power" must as well, and *Chevron* cannot rest on the inappropriateness of judicial policy decisions if policy considerations are inherent in the judicial role.

Perhaps, though, the key to resolving the tension lies in a reexamination of the historical understanding of statutory interpretation. While it may be true that the interpretation of ambiguous statutory provisions must entail some policy discretion, it is certainly not true that *Chevron* represents the first attempt to *minimize* the extent to which the judiciary can exercise this power. In fact, anxiety that the judiciary will use its powers of statutory interpretation to usurp policymaking authority from the politically accountable branches can be detected in an early canon of statutory interpretation: the rule of lenity.[68] This rule requires courts to avoid finding a defendant criminally liable if the penal statute is ambiguous and the defendant's conduct is not clearly barred.

The rule appears to have originated in the British common law as a sort of "thumb on the scale" on behalf of criminals, when conviction for almost any offense meant certain death.[69] By the time of the early American Republic, penalties had softened, but the rule remained in place with two new justifications.[70] First, the rule protected individual rights, both by forcing legislators to be explicit (and thus accountable) when abridging those rights and by giving citizens fair notice when an action is illegal.[71] Second, and more importantly for the purposes of this Note, the rule was used to promote legislative supremacy. In 1820, Chief Justice John Marshall explained this element of the rule:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[72]

For this reason, the rule has been referred to as a sort of "nondelegation doctrine" for courts: it ensures that courts do not play a role in making federal criminal law by adding substantive content through the open-ended interpretation of vague statutory provisions.[73]

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[68] *See* Hall, *supra* note 13, at 759–61.

[69] *See id.* at 761.

[70] *Id.*; *see also* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 12 (2006) (describing notice and legislative supremacy as the main rationales for the rule); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885–86 (2004) (same).

[71] Price, *supra* note 70, at 885–86.

[72] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

[73] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347.

The Founding generations' concern with "legislative supremacy" in the context of the rule of lenity thus provides further evidence that they believed policy choices should be made by politically accountable actors and not the judiciary. As Chief Justice Marshall pointed out while riding circuit, in some cases, "the act to be punished is in itself indifferent, and is rendered culpable only by the positive law. In such a case, to enlarge the meaning of words[] would be . . . to punish, not by the authority of the legislature, but of the judge."[74] Judges can avoid such an exercise of policy discretion by adopting the narrowest construction of an ambiguous criminal statute. When the rule of lenity operates in this manner, it is the statutory interpretation corollary of the "political question doctrine," announced in *Marbury v. Madison*, under which the judiciary will refuse to review the exercise of certain "important political powers" invested in the other branches.[75]

The existence of the rule of lenity in the early Republic works to redeem *Chevron*'s political accountability rationale. It demonstrates that the Founding generations recognized the possibility that statutory interpretation could involve political discretion, but that they believed such policymaking could be avoided through judicial self-restraint: when resolution of a statutory ambiguity in the criminal context required a policy choice, judges were expected to demur. We might see *Chevron* as a sort of natural extension of this principle into administrative law. The *Chevron* doctrine — like the rule of lenity — requires the judiciary to refrain from exercising political discretion in order to ensure that such discretion remains in the politically accountable branches.

It may seem odd to point to a single canon of interpretation — one that applies to a single field of statutory law — as support for the idea that judges in the Founding generations were expected to avoid using ambiguous statutes as a means of judicial policymaking. In fact, though, the problem of judicial policymaking through statutory gap filling may have arisen extremely infrequently in the Founding era for a combination of reasons. The rule of lenity is significant, then, because it shows that in the rare instances in which judges did believe that a statutory ambiguity could only be resolved through the exercise of political discretion, they declined to exercise this power.

But why was it so rare for statutes in the Founding generations to present ambiguities whose resolution required policy choices when such ambiguities abound in the present day? In large part it was because Congress produced fewer and more detailed statutes, and — in the administrative law context — many of these statutes were not sub-

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[74] The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93).

[75] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165 (1803).

ject to judicial review. Further, when courts did confront statutory gaps, they had a large set of interpretive tools that were generally seen as avoiding the need for judicial policy choices.

Manning, surveying the statutory interpretation practices of the early federal judiciary, notes the difficulty of his task as "relatively few federal statutory cases occupy the early volumes of case reports."[76] This paucity can in part be explained by the relative paucity of statutory law in general. As Professor Cass Sunstein has noted, many areas of law were not, at the time of the Framing and for more than a century after, dealt with through statutes; they were dealt with through the common law.[77] It is true, of course, that the common law was developed by courts. But it is not true that courts employing the common law in their decisions were considered to be making policy.[78] Instead, the courts — at least at the time of the Framing — were believed to be applying precedent and identifying principles of natural law that governed human conduct; they were not making the law, but rather "discovering" it.[79]

Further, in the administrative law context (where policymaking through interpretation might be particularly likely), courts were confronted with very few textual gaps. Scholars have noted that administrative statutes at the time were far more detailed than those with which we are now familiar.[80] Moreover, many administrative statutes directly allocated their elaboration to the executive branch,[81] and many made no provision for judicial review.[82]

When a federal judge *was* confronted with a statutory gap, it was generally expected that he could resolve it without resorting to his own political preferences through the use of extratextual tools, such as the

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[76] Manning, *supra* note 61, at 9.

[77] Sunstein, *supra* note 7, at 2593 ("For much of the nation's history, the basic rules of regulation were elaborated by common law courts, using the principles of tort, contract, and property to set out the ground rules for social and economic relationships.").

[78] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 9–30 (1977); Ann Woolhandler, *Judicial Deference to Administrative Action — A Revisionist History*, 43 ADMIN. L. REV. 197, 213 (1991) (observing that in the early Republic, courts "traditionally exercised significant lawmaking powers" but that "such powers were called law 'discovering' or 'interpretation' rather than lawmaking").

[79] *See* HORWITZ, *supra* note 78, at 13 ("[T]here is no evidence that before the Revolution Americans ever thought that the reception of common law principles endowed judges with the power to be arbitrary."); *cf.* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276 (1996) (suggesting that pre-*Erie* federal common law — because it was based on the law of nations — did "not leave courts free to formulate rules of decision according to their own standards").

[80] *See, e.g.*, Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 8 (citing THEODORE J. LOWI, THE END OF LIBERALISM 94 (1969)).

[81] *See, e.g.*, Woolhandler, *supra* note 78, at 209.

[82] *See, e.g.*, Mashaw & Perry, *supra* note 80, at 10.

common law backdrop of the law and fundamental principles of equity.[83] Indeed, Eskridge has suggested that the Framers drew a sharp distinction between "a judge's imposing his own 'political preference' . . . onto the words of a statute, as opposed to the judge's applying established precedents, common law and international law baselines, and common sense to figure out how statutes ought to apply in the context of concrete cases."[84] Eskridge argues that this distinction between judicial policymaking and judicial adherence to extratextual sources such as the common law is what Alexander Hamilton was referencing in *The Federalist No. 78* when he declared that, if courts, in the process of statutory or constitutional interpretation, "should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."[85]

Eskridge also points out that an analysis of early cases demonstrates that judges engaging in statutory interpretation in the early Republic "understood the words through a process by which the entire legal landscape [rather than the text alone] came into play."[86] And yet, the same analysis demonstrates that judges did not "[hold] themselves out as officials authorized to impose their 'will' onto statutes or to engage in 'legislative' activities."[87] Instead, throughout this period "judges presented themselves as Blackstonian discoverers of the law," with the statutory text serving as a primary, but far from an exclusive, source for such discoveries.[88] Thus, a judge confronted with apparently ambiguous statutory language could generally turn to resources beyond his own policy preferences in order to resolve the ambiguity.

Criminal law, however, broke from the norm in two significant ways: it was dominated by statutes that were subject to judicial review, and courts confronting criminal cases were sometimes deprived

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[83] *See, e.g.*, Eskridge, *supra* note 61; John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1625 (1992) ("The Court also relied upon the common law as another extrinsic aid for legal definitions and meaning.").

[84] Eskridge, *supra* note 61, at 1051 n.311.

[85] *Id.* at 1051 (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (internal quotation mark omitted). Manning interprets this same passage to reflect a more general suspicion of judicial discretion (and to supply support for his "faithful agent" theory of statutory interpretation). Manning, *supra* note 61, at 83–84. Neither reading is clearly correct, but both support the thesis that — in general — the Framers did not anticipate that judges would exercise independent policy discretion in the course of statutory interpretation. If Manning's faithful agent theory of statutory interpretation generally did hold sway at the time, then there is even greater reason to believe that the constitutional grant of judicial power was not meant to include any grant of policymaking authority, as the faithful agent theory makes congressional intent as expressed in text (rather than any equitable judicial considerations) the touchstone of all statutory interpretation. *See generally id.*

[86] *See* Eskridge, *supra* note 61, at 1083.

[87] *Id.*

[88] *Id.*

of the significant interpretive tools provided by the common law and natural law baselines. An 1812 decision, *United States v. Hudson & Goodwin*,[89] established that federal courts had no criminal common law jurisdiction.[90] The *Hudson* Court thereby mandated that federal criminal law be exclusively statutory, requiring that in all criminal cases, "[t]he legislative authority of the Union must . . . make an act a crime, [and] affix a punishment to it."[91] Moreover, as noted above, there were instances in the criminal law of the early Republic in which a particular action was rendered "culpable *only* by the positive law."[92] In those instances, the court simply could not rely on extratextual sources to eliminate statutory ambiguity because the culpability of the acts was established by positive law, that is, by the exercise of political will. The rule of lenity prevented the judiciary from exercising such will by asking judges unable to clearly discern congressional intent to simply adopt the narrowest construction of the statute. This blanket rule ensured that the judiciary did not make policy by expanding the text beyond what the legislature had set out. In this way, the rule of lenity's existence helped to preserve a constitutional scheme in which policy choices were made exclusively by those in the politically accountable branches.

B. Chevron as an Administrative Law Successor to the Rule of Lenity

Today, it is easy to recognize that judges have the potential to exercise political will in areas beyond the criminal law. Statutes have largely replaced the common law, and in any event, we now accept that common law is not an alternative to judicial policymaking; it *is* judicial lawmaking. Indeed, Sunstein has argued that the *Chevron* doctrine is — like *Erie* — an outgrowth of the realization that the law is not a "brooding omnipresence" for judges to discover, but rather the product of human ingenuity.[93] As statutes proliferated to replace the exercise of judicial will through the common law, a doctrine like *Chevron* became necessary to ensure that the judiciary could not simply exercise its will through statutory interpretation instead.[94] Moreover, administrative laws have become decidedly less detailed, and it is rare that statutory gaps in administrative laws can be filled by reference to

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[89] 11 U.S. (7 Cranch) 32 (1812).

[90] *Id.* at 34.

[91] *Id.* at 32, 34.

[92] The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93) (emphasis added).

[93] Sunstein, *supra* note 7, at 2583 (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)) (internal quotation mark omitted).

[94] *Id.*

fundamental principles of equity or other extratextual sources, as the laws generally codify a series of complex technical and political decisions. *Chevron* deference, therefore, is a natural extension of the rule of lenity for the modern era. It ensures that the judiciary does not use its position as statutory interpreter to usurp policymaking power that the Framers vested in the other branches.

There are, however, several potential problems with this theory. First, there are important justifications for the rule of lenity that sound only in the criminal law. The Court has explained, for example, that legislative supremacy is of particular importance in this area "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community."[95] Some have also noted that the rule of lenity is grounded in part in the criminal due process concerns of the Constitution.[96] One could argue, then, that the rule of lenity's rationales narrow it such that its existence has nothing meaningful to say about the judiciary's right to exercise policy discretion through statutory interpretation in general. But even if there are particular reasons to fear judicial policymaking in the criminal context, it is still significant that a doctrine existed — in the time of the early Republic — that curbed a court's ability to use its interpretive powers to make policy in the one significant sphere in which statutory law predominated.

A second potential objection is that the rule of lenity and *Chevron* differ in the sources of authority they serve to protect. The rule of lenity attempts to ensure that policymaking power remains in the hands of the legislature. One might, therefore, claim that while the rule of lenity does evince a discomfort with placing policy power in the hands of the judiciary, it does not suggest that it is any better to place that power in the executive branch, as *Chevron* deference does. Fortunately, it is not necessary for the rule of lenity to do that much work because the Constitution itself makes it clear that it is appropriate for the executive branch to make policy choices. We need only look to the President's power to veto legislation for political reasons[97] — the very authority that the Framers denied to judges — for confirmation of this relatively obvious principle.

But we also might raise a very different objection to the *Chevron*–rule of lenity analogy. We might argue that it does too much work. If we accept that the rule of lenity has something to say about how law should be interpreted in the administrative sphere, we may have to entertain the idea that it has more to say about it than we might wish.

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[95] United States v. Bass, 404 U.S. 336, 348 (1971).

[96] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

[97] *See* U.S. CONST. art. I, § 7.

Notably, the rule of lenity might suggest that courts should construe administrative statutes narrowly to avoid any consequences for private actors that Congress did not clearly intend. Indeed, several scholars have written about the conflict between the rule of lenity and *Chevron* in statutes that contain both civil and criminal sanctions, since *Chevron* directs that courts accept any permissible agency interpretation of an ambiguous statute, while the rule of lenity suggests that courts should adopt the narrowest interpretation of the ambiguous law.[98]

The easiest explanation for why *Chevron*, and not the rule of lenity, should apply in the context of administrative statutes is that for these statutes, there is another politically responsible actor — the agency — to whom the court can defer. In the criminal context, the only way for a court to avoid policymaking responsibility is to adopt a narrow construction. In the administrative context, it can defer to another politically accountable party to whom the statute grants authority. But this returns us to the other problem with the political accountability doctrine with which this Note began: if *Chevron* applies instead of the rule of lenity because of the existence of an alternate politically responsible body in which interpretive power can be housed, then why shouldn't the Department of Justice receive *Chevron* deference?

The answer may lie in the differences between criminal and administrative statutes. Criminal statutes operate directly on individuals. Agents from the Department of Justice must participate in the enforcement of the criminal laws, but the laws themselves are self-executing.[99] By contrast, administrative laws typically operate on private actors *through* the agency (and sometimes the states). The laws generally mandate what the agency must do to implement the statutory scheme, and grant the agency the powers of implementation.[100] This power to implement the statutory scheme necessarily involves the power to interpret the ambiguous provisions in the course of the implementation and to impose those interpretations on the actors within the statutory scheme. A court is therefore not granting the administrative agency any new powers when it defers to it, but rather recognizing

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[98] *See* Greenfield, *supra* note 70; Kristin E. Hickman, *Of Lenity,* Chevron*, and KPMG*, 26 VA. TAX REV. 905 (2007); Solan, *supra* note 13, at 128–47.

[99] *See, e.g.*, 18 U.S.C.A. § 111(a) (West 2003 & Supp. 2009) ("In General. — Whoever — 1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both. . . .").

[100] *See, e.g.*, 42 U.S.C. § 7411(b)(1)(A) (2006) ("The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.").

a power the agency already has.[101] By contrast, it would be granting new authority to the Department of Justice to allow its interpretations to carry sway since the criminal statutory scheme operates directly on individuals, rather than through the agency.[102]

Support for this distinction comes from a pair of decisions from the Rehnquist Court. In concurring with the Court's decision in *Crandon v. United States*,[103] Justice Scalia directly confronted the question of whether *Chevron* deference should be given to a DOJ interpretation of a criminal law. He explained:

> The law in question, a criminal statute, is not administered by any agency . . . . 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.[104]

In a later case, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[105] the Court did grant *Chevron* deference to an agency interpretation of the Endangered Species Act, despite the fact that the Act could be both civilly and criminally enforced.[106] The Court considered whether the rule of lenity should trump, but, significantly, seemed only concerned that the notice (and not the legislative supremacy) aim of the rule of lenity might not be served by the *Chevron* doctrine.[107] Ultimately, it rejected those concerns as well.[108]

Although the Court has been far from clear in establishing how the rule of lenity and *Chevron* should interact with respect to hybrid civil-criminal statutes like the Endangered Species Act,[109] the key point is

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[101] It may appear that this explanation comes close to that of the *Mead* Court: we should defer to agencies on certain questions because the statute grants them authority to answer others. In fact, though, the argument here is much broader: because executing a statutory mandate inevitably requires the interpretation of that mandate, the agency must be presumed to have interpretive power in general. *Mead* would limit the acknowledgement of those interpretive powers only to agencies that have been entrusted with the right to make rules with the force of law. Note, too, that the agencies' power to interpret statutes (and enforce those interpretations on private parties) does not — in and of itself — suggest that Congress intended agencies to be the *exclusive* interpreters of ambiguous provisions (an argument that would come close to the "congressional intent" rationale this Note has already rejected). We need the political accountability rationale to explain why the courts should not also play a role in the interpretation.

[102] *But see* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490–91 (1996) (arguing that in fact, the Department of Justice should be thought of as administering federal criminal laws, and that *Chevron* deference should therefore be extended to certain DOJ interpretations).

[103] 494 U.S. 152 (1990).

[104] *Id.* at 177 (Scalia, J., concurring in the judgment).

[105] 515 U.S. 687 (1995).

[106] *Id.* at 703, 704 & n.18.

[107] *Id.* at 704 n.18.

[108] *Id.*

[109] *See, e.g.*, *id.* (acknowledging that the Court had declined to grant *Chevron* deference in another case involving a hybrid criminal-civil statute, *United States v. Thompson/Center Arms*

that there is a principled means of explaining why *Chevron* — and not the rule of lenity — should apply to administrative statutes but not criminal laws. It seems, then, that the rule of lenity can offer support for a reinvigorated political accountability rationale for *Chevron*. This rationale, most simply stated, is that the Constitution vests policymaking power in the hands of the politically accountable branches. It is the constitutional responsibility of the judiciary, through doctrines like the rule of lenity and *Chevron* deference, to avoid usurping some of this policy power through its statutory interpretation duties.

IV. CONCLUSION

The most significant consequence of the reinvigorated political accountability rationale is that it mandates a return to the original, pre-*Mead* scope of the *Chevron* doctrine. Once *Chevron* is understood as a constitutional responsibility of the judiciary to avoid policymaking power, it makes little sense to limit deference only to those interpretations issued with the force of law. The judiciary is exercising policy power whenever it supplants an administrative interpretation, regardless of the formality of that interpretation or its supposed "force."

The chief benefit of such a reinvigorated *Chevron* is that it will foster democratic values by ensuring that policy decisions are being made by politically responsible bodies. But it will do so not only by increasing the scope of agency interpretations that are allowed to receive deference, but also by clarifying the doctrine in general. The *Mead* muddle, and confusions attendant on the Court's other *Chevron* embellishments, have led to a lack of certainty as to where *Chevron* should apply.[110] Lower courts are, therefore, understandably tentative in their handling of the doctrine, sometimes leading to what Professor Adrian Vermeule has deemed a "*Chevron* avoidance" canon.[111] Reestablishing *Chevron* as a bright-line rule — if the agency's interpretation is reasonable and the statute is ambiguous, defer — would ameliorate this problem of *Chevron*'s general under-application. Thus, it would increase the chances of deference both by explicitly altering the rule, and by rendering the rule more administrable.

There is even evidence that the Court is moving toward the sort of broad application of the *Chevron* doctrine that a renewed understanding of the political accountability rationale demands. In its recent

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Co., 504 U.S. 505, 517, 518 & n.9 (1992), because of lenity concerns); Greenfield, *supra* note 70; Hickman, *supra* note 98, at 920–24. A full discussion of the Court's struggles to balance *Chevron* and the rule of lenity in hybrid statutes is outside the scope of this Note. For such a discussion, see sources cited *supra* note 98.

[110] *See* sources cited *supra* note 44.

[111] Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–29 (2009).

opinion in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,[112] the majority reduced *Mead* to a simple statement that certain interpretations are "not subject to sufficiently formal procedures to merit *Chevron* deference"[113] and then proceeded to apply *Auer* deference to the informal EPA Memorandum in question. Writing in concurrence, Justice Scalia argued that the majority's decision to accord *Auer* deference to the EPA Memorandum was unprecedented because the Memorandum interpreted not only an ambiguous regulation but also parts of the ambiguous law to which the regulation had not referred. Justice Scalia observed:

> One must conclude, then, that if today's opinion is *not* according the agencies' reasonable and authoritative interpretation of the Clean Water Act *Chevron* deference, it is according some *new* type of deference — perhaps to be called in the future *Coeur Alaska* deference — which is identical to [pre-*Mead*] *Chevron* deference except for the name. . . . I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it.[114]

Justice Scalia, as a notorious *Mead* opponent, may have optimistically exaggerated the import of the Court's decision. The Court has not announced any abandonment of *Mead*, but if it is moving in that direction, the Court may wish to ground any such *Mead* renunciation in the renewed understanding of the political accountability rationale articulated here. Doing so would ensure that any "future *Coeur Alaska* deference" would not suffer from the under-theorization problems of its *Chevron* and *Mead* predecessors.

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[112] 129 S. Ct. 2458 (2009).

[113] *Id.* at 2473.

[114] *Id.* at 2479–80 (Scalia, J., concurring in part and concurring in the judgment).