IS CHEVRON RELEVANT TO FEDERAL CRIMINAL LAW?

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The principles of legality and separation of powers are conventionally understood to require that lawmaking, law-interpreting, and law-enforcement be carried out by distinct institutions. This Article challenges this understanding in the context of federal criminal law. Descriptively, Professor Kahan maintains that federal criminal law is most accurately conceptualized as a “common law-making” regime in which Congress delegates power to courts by enacting incompletely specified statutes. Normatively, he argues that the law would be better if the delegated lawmaking authority that courts now exercise were instead wielded by the Department of Justice. The legal mechanism for this reform would be the so-called Chevron doctrine, which requires courts to defer to executive branch readings of ambiguous regulatory statutes. The likely advantages of such an arrangement, Professor Kahan argues, include greater expertise in the making of criminal law, greater uniformity in the interpretation of it, and (most surprisingly) greater moderation in the enforcement of it.

My target in this Article is the orthodox understanding of institutional roles in federal criminal law. This view gives pride of place to separation of powers. Combining the authority to make, enforce, and interpret law in the hands of a single actor, it is said, is a blueprint for tyranny. Yet it is exactly this concentration of functions that I want to defend. Federal criminal law would be better by any conceivable measure, I will argue, if the executive branch were treated as an authoritative law-expositor, and not merely an authoritative law-enforcer. The proper mechanism for integrating these powers is the so-called Chevron doctrine, which requires courts to defer to administrative interpretations of ambiguous statutes as binding exercises of delegated lawmaking authority.¹

My dissent from conventional wisdom relates to means, not ends. I defend the integration of lawmaking and law-enforcement functions not because I reject the values that separation of powers is meant to secure, but because I believe that these values along with a host of

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others would be better served by the kind of executive branch “interpretive lawmaking”\textsuperscript{2} that \textit{Chevron} contemplates.

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.\textsuperscript{3} 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 best conceptualized as a regime of delegated common law-making.\textsuperscript{4}

This state of affairs is not all bad; indeed, the system of federal common law crimes no doubt exists (in part) because it works so much better than the imaginary regime of legislative crimes ever would.\textsuperscript{5} But still, there are obvious problems associated with federal common law-making in this field. Federal judges frequently lack sufficient consensus to make the law uniform, sufficient expertise to make it rational, and sufficient democratic accountability to make it legitimate.

The way to conserve the benefits of delegated criminal law-making while avoiding the costs associated with criminal common law-making is to change the identity of the delegate. Applying \textit{Chevron} to federal criminal law would transfer to the executive branch the de facto criminal law-making authority that courts now exercise. Such a shift is desirable in criminal law for exactly the same reasons that it is desirable in other regulatory domains. Because the executive branch is more unified than the judiciary, its readings are more likely to be consistent. Because it has more experience with criminal law enforcement than does any court, its readings are more likely to be wise. And because it is ultimately accountable to the people at the polls, its readings are

\textsuperscript{2} This phrase appears in Martin v. Occupational Safety & Health Review Commission, 499 U.S. 144 (1991), which used it to characterize the nature of an agency’s interpretations of its own regulations. \textit{See id.} at 153. It is also an apt description of how courts conceptualize agencies’ interpretations of the statutes that these agencies administer. \textit{See} Abner S. Greene, \textit{Checks and Balances in an Era of Presidential Lawmaking}, 61 U. Chi. L. Rev. 123, 183 (1994) ("[I]t is well accepted that the Court may allow the executive branch to resolve statutory ambiguities, flesh out statutory vagueness, and fill in statutory gaps — all of which are interpretive lawmaking functions.").

\textsuperscript{3} \textit{See} United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

\textsuperscript{4} \textit{See generally} Dan M. Kahan, \textit{Lenity and Federal Common Law Crimes}, 1994 Sup. Ct. Rev. 345, 370–89 (illustrating "just how pervasive delegated lawmaking has been and continues to be in federal criminal jurisprudence").

\textsuperscript{5} \textit{See id.} at 396–425.
more likely to reflect popular sentiment than are those of unelected judges.

Separation of powers, of course, is about more than efficiency and accountability; it is about the rule of law. Perhaps surprisingly, the extension of *Chevron* to federal criminal law would also advance rule of law values. The shift of effective law-expositing authority from courts to the executive branch would actually enhance notice of what the law forbids and constrain arbitrary and partisan behavior by individual prosecutors.

I will present my argument in three parts. Part I identifies the baseline against which my proposal should be evaluated: not the fiction of legislatively defined crimes, but the reality of federal common law crimes. Part II describes a superior alternative world: a federal administrative law of crimes. Finally, Part III develops the doctrinal mechanisms necessary to *Chevronize* federal criminal law.

I. THE REAL BASELINE: FEDERAL COMMON LAW CRIMES

Who makes federal criminal law? The standard answer is Congress.\(^6\) This response, moreover, is typically offered not as a bare assertion of legal fact, but as a statement of high constitutional principle. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," the Supreme Court has explained, "legislatures and not courts should define criminal activity.\(^7\)

But the proposition that federal crimes are "solely creatures of statute\(^8\) is a truth so partial that it is nearly a lie.\(^9\) To be sure, Congress must *speak* before a person can be convicted of a federal crime, but it needn’t *say* much of anything when it does. Most federal crimes — including RICO, mail fraud, and theft — derive from exceedingly open-textured statutes.\(^10\) These statutes are brought into contact with the real world only through the mediation of intricate judge-made doctrines that specify what these laws actually prohibit. Federal criminal law contains none of the "old" federal common law condemned in *Erie Railroad Co. v. Tompkins*,\(^11\) but it is rife with the "new" federal common law blessed in *Textile Workers Union v. Lincoln Mills*.\(^12\)

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\(^6\) See, e.g., Whalen v. United States, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework . . . the power to define criminal offenses[,] and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.").


\(^9\) Cf. id. ("With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required.").


\(^11\) 304 U.S. 64 (1938).

This Part develops the claim that federal criminal law should be viewed as a system of delegated common law-making.\textsuperscript{13} It explains why Congress so frequently gives its criminal law-making powers away, where those powers go, and what the costs and benefits of this regime are. These considerations form the background against which my proposal to Chevronize federal criminal law should be appraised.

\subsection*{A. Federal Criminal Law as a Common Law-Making System}

To show that federal common law crimes exist and why, let me start with one particular statute — the Racketeer Influenced Corrupt Organizations Act (RICO).\textsuperscript{14} RICO forbids any person "to conduct or participate . . . in the conduct of [any enterprise] through a pattern of racketeering activity."\textsuperscript{15} No one can seriously claim that Congress defined the elements of this crime. The statute indicates that "enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact."\textsuperscript{16} This "definition" is anything but — it states neither necessary nor sufficient conditions for an "enterprise" and excludes literally nothing from its scope.\textsuperscript{17} A "pattern of racketeering activity' requires at least two acts of racketeering activity";\textsuperscript{18} the inclusion of "at least" suggests that "there is something to a . . . pattern beyond simply the number of predicate acts involved," but the statutory text itself "does not identify . . . [what] these additional prerequisites" are.\textsuperscript{19} Other key terms — such as "to conduct or participate . . . in the conduct" of a RICO enterprise\textsuperscript{20} — are excluded from the definitions section of RICO altogether.

Because RICO emerged from Congress incompletely specified, the task of giving content to its key terms has fallen on federal courts. To make the statute operative, federal judges have fashioned a dense network of definitions and tests: an entity constitutes a RICO "enterprise" only when it has an "ascertainable structure' distinct from [its racketeering acts]" and "function[s] as a continuing unit”;\textsuperscript{21} two or more racketeering offenses comprise a "pattern" only when they "are related,

\textsuperscript{13} My argument in this Part extends and refines the analysis developed in Kahan, cited above in note 4.
\textsuperscript{15} Id. § 1962(c).
\textsuperscript{16} Id. § 1961(4) (emphasis added).
\textsuperscript{17} See Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, Plain Meaning and Hard Cases, 103 YALE L.J. 1561, 1590 (1994).
\textsuperscript{21} E.g., United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) (internal quotation marks omitted).
and . . . pose a threat of continued criminal activity"; and in order "to conduct or participate . . . in the conduct" of a RICO enterprise, an individual must either "operate[s] or manage[s]" it. These and like formulations (which themselves leave ample room for further elaboration) are neither required by nor contrary to "congressional intent"; they are merely permissible conceptions of terms that are susceptible of a nearly limitless variety of reasonable constructions.

For this reason, RICO is best conceptualized not as a self-executing rule of law, but rather as an implicit delegation of authority to courts to fashion their own rules. Correspondingly, the doctrines that make up RICO case law should be understood not as bare "interpretations" of the statute, but rather as exercises of federal common law-making power — much the same way that the judge-made doctrines implementing the Sherman Act and § 301 of the Labor Act are understood.

Why does RICO embody this allocation of lawmaking responsibility? The answer is that Congress lacked the practical and political resources necessary to enact a completely specified version of RICO. Sponsors of the legislation wanted to train federal criminal resources not just on the "Cosa Nostra," but on all analogous forms of organized criminality. They found the task of defining the attributes of "organized crime," however, to be intolerably complicated, as well as exceedingly controversial. Incomplete specification allowed RICO's sponsors to negotiate these practical and political hazards. By framing the statute in highly general terms, Congress endowed RICO with sufficient breadth and flexibility to be adapted to all forms of organized.

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22 H.J. Inc., 492 U.S. at 239.
25 See, e.g., H.J. Inc., 492 U.S. at 248–49 (explaining that RICO should be given a highly general construction to facilitate continued evolution and adaptation of the statutory language to diverse factual circumstances).
30 See id. at 686–87.
criminality, yet avoided the need to reach consensus on exactly what (and who) organized criminality is.\textsuperscript{32}

Congress was perfectly aware that this approach would shift a great deal of law-defining authority to courts. Indeed, sponsors of RICO defended the generality of the statutory language as embodying an appropriate division of labor between the legislative and judicial branches. The “proper legislative role,” one sponsor explained to critics, is to “examine not only individual instances, but whole problems,” and the way to do that is to frame criminal statutes in “[c]omprehensive” terms.\textsuperscript{33} Fitting such terms to the specific “facts of the cases before them” is the proper “role of [the] court[s].”\textsuperscript{34}

The RICO story generalizes. Delegation — whether express or implied, whether to agencies or courts — is a strategy for maximizing Congress’s policymaking influence in the face of constraints on its power to make law.\textsuperscript{35} The most dramatic of these constraints is political. The difficulty of generating consensus on politically charged issues can easily stifle legislation, particularly criminal legislation.\textsuperscript{36} In such circumstances, members of Congress are likely to avail themselves of the “virtue[s] of vagueness,” drafting statutes in terms sufficiently general that legislators on both sides of a disputed issue can “tell [their] constituents that [they] obtained language to protect them” while leaving it to courts “to devise an interpretation of what ‘congressional intent’ was.”\textsuperscript{37}

Other constraints on Congress’s lawmaking are more mundane but equally powerful. They include the limited time that members of Congress have to satisfy the demands of important constituents before they


\textsuperscript{34} Id. The year before, Senator McClellan suggested that the statute would afford wide remedial discretion to courts: “The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill.” 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan).


\textsuperscript{36} See, e.g., Katharine Q. Seelye, \textit{Crime Bill Fails on a House Vote, Stunning Clinton}, N.Y. Times, Aug. 12, 1994, at A1 (reporting that Democratic-sponsored legislation was “foiled by a bizarre if unintended alliance among liberal blacks, conservative gun Republicans”).

\textsuperscript{37} Charles R. Wise, \textit{The Dynamics of Legislation} 178 (1991) (internal quotation marks omitted) (discussing the 1980 amendment to the Hobbs Act); see also Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1494 (1994) (“It is entirely possible — indeed, highly probable — that, because it was unable to resolve the retroactivity issue . . ., Congress viewed the matter as an open issue to be resolved by the courts.”).
must stand for re-election. Criminal law-making, in this respect, confronts members of Congress with high opportunity costs: time spent enacting criminal legislation necessarily comes at the expense of time that could be spent enacting legislation sought by small, highly organized interest groups, which are more likely than the public at large to reward legislators for benefits conferred and to punish them for disabilities imposed. Again, one solution is highly general (even purely symbolic) criminal legislation, which takes little time to enact and which is likely to be sufficient to satisfy the public’s demand for criminal law.

Whenever Congress resorts to general statutory language to reduce the institutional cost of resolving particular issues itself, it necessarily transfers lawmaking responsibility to courts (or prosecutors). The result is a rich tapestry of federal common law, including federal common law crimes.

RICO is just one example; another is fraud. The concept of fraud is incompletely specified by design. It was devised by equity courts as a catchall for any species of grossly immoral and deceptive conduct that evaded recognized common law norms. Consistent with this function, nineteenth-century jurists either defined “fraud” in exceedingly general terms or simply refused to define it at all in order to preserve its adaptability to unforeseen forms of wrongdoing. By incorporating “fraud” (or its cognates) into a host of important federal criminal statutes — including those defining conspiracy to defraud the United States and mail and wire fraud — Congress did not make law as much as create a void in the law that courts would be obliged to fill.

They have, and with enthusiasm. Early in the life of these statutes (and regularly thereafter), the Supreme Court rejected the suggestion

40 See Kahan, supra note 4, at 370. For a detailed account of these dynamics, see Wise, cited above in note 37, at 124–85, and also Louis B. Schwartz, Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects, 41 LAW & CONTEMP. PROBS. 1, 26–54 (1977), who recount the role of special-interest politics in derailing comprehensive federal criminal code reform bills. Similar forces, of course, affect the creation of many other species of regulatory law. Indeed, far from suggesting that these dynamics are peculiar to federal criminal law, my goal is to draw attention to the similarity between federal criminal law and those statutory domains in which Congress’s incentives to delegate are already well understood.
41 Consider Story’s virtually limitless definition: “all acts . . . which involve a breach of legal or equitable duty . . . and which are injurious to another, or by which an undue and unconscientious advantage is taken of another.” 1 JOSEPH STORY, EQUITY JURISPRUDENCE § 187, at 190 (10th ed. 1870).
42 See, e.g., McAleer v. Horsey, 35 Md. 439, 451–52 (1872); Clyce v. Anderson, 39 Mo. 37, 40 (1871); Story, supra note 41, § 187, at 190.
44 Id. §§ 1341, 1343. I will refer to these offenses collectively as “mail fraud.”
that fraud should be confined to its "common law" meaning (as expansive as that was), to forms of misconduct actionable under state law, or to any particular schedule of wrongs that may have prompted Congress to enact them.\textsuperscript{45} Instead, courts were to determine the proper scope of the federal criminal fraud statutes by reference only to the general "evil sought to be remedied."\textsuperscript{46} Proceeding in this way, courts have filled the case reporters with a rich body of doctrine on the types of schemes that qualify as "fraudulent," the kinds of interests and victims that the statutes protect, and the nature of the statutes' jurisdictional predicates.\textsuperscript{47} In sum, courts have proceeded, Justice Stevens (alone) has candidly admitted, as if the fraud statutes were best "interpreted as implicit delegations of authority to courts to fill in the gaps in the common law tradition of case-by-case adjudication."\textsuperscript{48}

Property offenses — including those created by the National Stolen Property Act,\textsuperscript{49} the federal theft statute,\textsuperscript{50} and the mail fraud statute\textsuperscript{51} — are also the product of substantial federal common law-making. Like fraud, the concept of "property" is exceedingly open-textured; indeed, there is no general definition of the term that cuts across legal contexts.\textsuperscript{52} Yet Congress has made no attempt to define the conceptions of property that appear in federal criminal statutes.\textsuperscript{53} Again, that task has fallen, by default, upon courts.

The judge-made criminal law of "property" rivals that of both RICO and fraud in its intricacy. For example, at one point, the government's interest in receiving honest services was understood to be property capable of misappropriation for purposes of the conspiracy and theft statutes, but not for purposes of the mail fraud statute;\textsuperscript{54} the Supreme Court pointed to unique federalism concerns to justify the


\textsuperscript{46} Durland, 161 U.S. at 313.


\textsuperscript{50} Id. § 641.

\textsuperscript{51} Id. §§ 1341, 1343.


\textsuperscript{54} Compare Haas v. Henkel, 216 U.S. 462, 479–82 (1910) (conspiracy and theft statutes), with McNally v. United States, 483 U.S. 350, 356 (1987) (mail fraud statute). But see Chappell v. United States, 270 F.2d 274, 276–77 (9th Cir. 1959) (finding that the theft statute applies only to tangible property and thus does not apply to an interest in honest services).
difference in approach.\textsuperscript{55} An author’s intangible interest in a copyright — a form of intellectual property — is not capable of being stolen for purposes of the National Stolen Property Act,\textsuperscript{56} but her trade secrets — another form of intellectual property — are;\textsuperscript{57} the distinction stems primarily from the perceived effects of adding criminal liability to the background civil regimes under which copyright and trade secrets are enforced.\textsuperscript{58} Confidential government information is property capable of being stolen for purposes of the theft statute, but only (in one court’s view, at least) if its confidential status is established by an independent source of law; without such a requirement, government bureaucrats could use the theft statute to create an “Official Secrets Act.”\textsuperscript{59} These policy judgments are, of course, subject to dispute. But what isn’t that courts, not Congress, made them, and used them to construct a criminal common law of property.

A final example relates to mens rea. Congress is notoriously careless about defining the mental state element of criminal offenses. Frequently, it says nothing about what types of mistakes of fact or law negate liability.\textsuperscript{60} When it does address the issue, it often speaks ambiguously, failing to specify, for example, exactly which clauses in a long and convoluted string are modified by the term “knowingly.”\textsuperscript{61}

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\textsuperscript{55} See McNally, 483 U.S. at 358 n.8, 359–60.
\textsuperscript{57} See id. at 216; United States v. Riggs, 739 F. Supp. 474, 473 (N.D. Ill. 1990).
\textsuperscript{58} See Dowling, 473 U.S. at 221–28; Riggs, 739 F. Supp. at 423. But cf. United States v. Brown, 925 F.2d 1301, 1307–09 (10th Cir. 1991) (holding that computer source code is not property under the National Stolen Property Act).
\textsuperscript{59} See United States v. Lambert, 446 F. Supp. 890, 899 (D. Conn. 1978), aff’d sub nom. United States v. Girard, 601 F.2d 69 (2d Cir. 1979). In fact, this position is an intermediate one among federal courts. Some have concluded that confidential information is always a “thing of value” for purposes of the theft statute, whether or not its confidential status is reflected in other sources of positive law. See, e.g., United States v. McAusland, 979 F.2d 970, 975 (4th Cir. 1992); United States v. Jones, 677 F. Supp. 238, 240–42 (S.D.N.Y. 1988). Others have concluded that information is never a “thing of value.” See, e.g., United States v. Tobias, 836 F.2d 449, 451 & n.2 (9th Cir. 1988); United States v. Hubbard, 474 F. Supp. 64, 79 (D.D.C. 1979). See generally United States v. Dinh Hung, 629 F.2d 908, 923–27 (4th Cir. 1980) (opinion of Winter, J.) (analyzing the issue in detail); Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright Comes Home: Executive Power and National Security Secrecy, 21 HARV. C.R.-C.L. L. REV. 349, 402 (1986) (“[T]here is no more important question about the extent to which the courts will fashion secrecy policy with Congress in the wings than whether or not [the theft statute] will be construed to reach an employee’s unauthorized transfer of government information . . . . ”). I will consider this question in greater detail in Part III in order to illustrate how Chevron would apply to contentious statutory issues.
\textsuperscript{60} See, e.g., 15 U.S.C. § 1 (1994) (“Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .”); 26 U.S.C. § 5861 (1994) (“It shall be unlawful for any person . . . . to receive or possess a firearm which is not registered to him . . . .”).
\textsuperscript{61} See, e.g., 7 U.S.C. § 202a(b)(t) (1994) (“[W]hoever knowingly uses, transfers, acquires, alters, or possesses coupons, authorization cards, or access devices in any manner contrary to this chapter or the regulations issued pursuant to this chapter shall . . . . be guilty of a felony . . . . [or] a misdemeanor . . . . ”); 18 U.S.C. § 217(c) (1994) (“[U]nder certain conditions[,] any . . . officer or employee . . . . of the executive branch . . . . who, within 1 year after [his or her] termination . . . .

Canons of interpretation could arguably be used to solve this problem. The Model Penal Code, for example, contains a series of rules that are sufficiently mechanical to resolve just about any type of ambiguity relating to the mental state element of an offense. The Supreme Court also resorts to canons to resolve such uncertainties. But its rules, unlike the Code’s, are not mechanical, and many of them — in true Llewellyan fashion — conflict with each other.

This is not to say that the Court’s mens rea jurisprudence is unprincipled or arbitrary. Generally speaking, the Court resolves ambiguities relating to mistakes of fact by considering how such mistakes bear on moral culpability. If knowledge of a particular fact — that, say, an assault victim is a federal officer and not a private citizen — is immaterial to culpability, then awareness of such a fact is not part of the mens rea element of that offense. If, in contrast, knowledge of a particular fact — that, say, an object removed from government land is valuable government property rather than an abandoned piece of junk — is material to culpability, then such knowledge is part of the definition of the crime. The Court follows a similar approach

knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served . . . in connection with any matter on which such person seeks official action . . . shall be punished . . . .”); id. § 2254(a) (“Any person who . . . knowingly transports or ships in interstate or foreign commerce . . . any visual depiction, if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and . . . such visual depiction is of such conduct . . . shall be punished . . . .”).

62 See Model Penal Code § 2.02(1) (1962) (creating the presumption that a criminal statute that is silent as to mental state requires proof of all recklessness with respect to all material elements); id. § 2.02(4) (creating the presumption that the mental state requirement applicable to one element of an offense applies to all other elements absent a plain statement to the contrary); id. § 2.02(9) (creating the presumption that ignorance or mistake “as to whether conduct constitutes an offense or as to the existence, meaning or application” of penal law is not a defense); id. § 2.04(1) (providing that “ignorance or mistake” of non-penal law is a defense when it negates the presence of the requisite mental state with respect to a material element).

63 Compare McNally v. United States, 483 U.S. 350, 359–60 (1987) (“[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”), with Moskal v. United States, 498 U.S. 103, 113 (1990) (“[F]ederal criminal statutes . . . intended to fill a void in local law enforcement should be construed broadly.” (first alteration in original) (quoting Ball v. United States, 462 U.S. 356, 362 (1983) (Stevens, J., dissenting)) (internal quotation marks omitted); compare United States v. Turley, 352 U.S. 407, 411 (1957) (“[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.”), with Taylor v. United States, 495 U.S. 575, 594–95 (1990) (“This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute’s purpose.”); compare Morissette v. United States, 342 U.S. 246, 263 (1952) (holding that the “mere omission from [the federal theft statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced” in the absence of clear indication that strict liability was intended), with United States v. Feola, 420 U.S. 671, 684 (1975) (refusing to construe the federal officer assault statute “as embodying an unexpressed requirement” of mens rea when doing so would frustrate implied “congressional purpose”).

64 See Feola, 420 U.S. at 685.

65 See Morissette, 342 U.S. at 270–71.
(generally speaking) in determining when a mistake of law defeats liability. If, independently of her knowledge of the law, an average person would know that a particular form of conduct (possessing hand grenades, for example) is socially undesirable or dangerous, then a mistake of law is not a defense. However, if without knowledge of the law, an average person would find such conduct (the claiming of an ordinary tax deduction, for example) morally unproblematic, then a mistake is likely to be viewed as a defense.

But this approach, however principled, is undeniably judgmental. Is knowledge that a false statement will be forwarded to a government agency material to the culpability of a person who lies to her employer? Is it immoral for a person to sell food stamps on the black market even if she is unaware that this conduct violates federal regulations? There are no obvious answers to these questions, yet courts must decide. We might say that when courts make contentious judgments like these, they do so at the behest of Congress, whose members, like anyone else, can see the institutional consequences of their failure to draft statutes clearly. But this is just another way of saying that courts engage in delegated lawmaking when they determine the mental state elements of ambiguous or silent criminal statutes.

B. Only Courts?

The claim that federal criminal law is a system of delegated common law-making is subject to one important qualification. It's true that Congress routinely uses incomplete specification to reduce the practical and political costs of legislating, and it's true that the inevitable consequence of doing so is the diminution of Congress's own role in defining operative rules of criminal law. But it isn't necessarily the case that all of the power that Congress gives away ends up being exercised by courts. For two reasons, federal prosecutors, too, end up with a significant share of delegated lawmaking authority.

The first is that prosecutors enjoy the power of initiative. Federal courts can exercise delegated lawmaking power only incident to their authority to adjudicate actual cases and controversies. As a result, they have the opportunity to fashion common law crimes only in cases

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65 See United States v. Freed, 401 U.S. 601, 609 (1971) (observing that “one would hardly be surprised to learn that possession of hand grenades is not an innocent act”).


68 See generally Michael L. Travers, Comment, Mistake of Law in Malum Prohibita Crimes, 62 U. Chi. L. Rev. 1301 (1995) (arguing that courts should and generally do recognize the mistake-of-law defense when the underlying conduct is legally prohibited but not inherently bad).

69 Cf. United States v. Yerman, 468 U.S. 63, 68–70 (1984) (holding that a statute criminalized false statements even when the statements were made without knowledge that they fell within a federal agency’s jurisdiction).


71 See U.S. Const. art. III, § 2.
that prosecutors bring. If U.S. Attorneys, as a group, decline to urge the application of a federal criminal statute to a particular form of misconduct, then courts will never deem the statute to prohibit such misconduct, regardless of how feasible and sensible such an application would be. Even more importantly, because individual prosecutors enjoy the power of initiative, it is much more likely that the rules they do urge on courts will be adopted. By paying close attention to the facts of the cases they select as vehicles for novel statutory readings, federal prosecutors can highlight the benefits and suppress the costs of the interpretations that they favor.72

The second reason that individual prosecutors enjoy de facto criminal law-making power is the stubborn persistence of the principal-agent conception of interpretation.73 Approaches to statutory interpretation can be located along a continuum that represents the division of effective lawmaking power between courts and legislators: at one extreme, the court functions as the (relatively) thoughtless agent of Congress, mechanically implementing the policy choices made when Congress enacted the statute; at the other, the court behaves as a delegated lawmaker, exercising on its own the policymaking discretion that Congress inadvertently or advertently declined to exercise.74 When criminal statutes are incompletely specified, courts must necessarily tend toward the delegated lawmaking extreme of the continuum. Nevertheless, because of the fiction that “the power to define criminal offenses . . . resides wholly with the Congress,”75 courts often speak, and sometimes act, as if their task were governed by the mechanical principal-agent conception of interpretation.

This result borders on incoherence. It hardly makes sense for courts to defer to congressional intent in determining what counts as a RICO “enterprise,” for example, because Congress intended that courts figure that out for themselves.76

But even more importantly, the persistence of the principal-agent conception of interpretation effectively transfers delegated lawmaking authority to individual prosecutors. Congress implicitly delegates lawmaking power when it drafts criminal statutes in exceedingly general or open-textured terms. If a court takes seriously the notion that only Congress can define the elements of crimes, it ought to view itself as powerless to construct any doctrine that narrows the scope of such

72 The Department of Justice has great power to leverage prosecutorial discretion into law-making power in the antitrust domain as well. See William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law, 60 Tex. L. Rev. 661, 678, 702 (1982).


76 See supra pp. 473–74.
broadly worded statutes. Indeed, the Supreme Court has on occasion taken exactly that position: "[if the omission of an organized crime nexus in RICO] is a defect . . . it is one ‘inherent in the statute as written,’ and hence beyond our power to correct."77 This form of law-making abdication empowers individual prosecutors, who face no check in advancing exceedingly broad statutory readings.78 Ironically, when courts pay homage to separation of powers by piously denying their own criminal law-making power, narrow statutory readings exist only at the mutable sufferance of individual U.S. Attorneys.

C. An Assessment

How should the phenomenon of federal common law crimes be regarded? For anyone who accepts the orthodox teachings on separation of powers, it's likely to provoke intense dismay. But I want to suggest a more complex and less one-sided assessment: federal criminal common law-making presents a mix of advantages and disadvantages, but is probably, on the whole, worthwhile. I will start by showing why, in theory, a system of criminal common law-making ought to be vastly superior to a system of legislatively specified crimes. I will then identify the real world propensities and pathologies that make it impossible to view the existing system of criminal common law-making with unqualified admiration.

1. Theoretical Benefits. — The primary advantage of criminal common law-making is its efficiency. Delegated criminal law costs less than legislatively specified criminal law and is more effective to boot. Furthermore, delegated criminal law-making, if properly conducted, poses no threat to the values that strict separation of powers is supposed to promote.

A system of common law crimes is cheaper than a system of legislatively specified crimes because of the generative character of open-textured statutory norms.79 When treated as delegations of lawmaker authority, RICO, the criminal fraud statutes, and like offenses spawn scores of distinct prohibitions. To achieve the same result without delegation, Congress would have to bear the high practical and political


78 See, e.g., United States v. DiGilio, 538 F.2d 972, 978 (3d Cir. 1976) (recognizing that the failure to read a limiting principle into a statute’s application to “theft” of government records “vest[s] considerable discretion in the Department of Justice with respect to selective case enforcement,” but concluding that “[w]e may not rewrite the statute in order to substitute our own enforcement standards for those of the executive branch”).

costs of specifying each of these prohibitions itself.\textsuperscript{80} Higher cost means reduced output — either of criminal law, or of the other types of legislation that Congress must forgo in order to devote more resources to producing criminal statutes. These are real social costs.\textsuperscript{81}

Delegated common law-making also promotes the efficient updating of the criminal code. As markets and technologies change, so do the forms of criminality that feed on them. Keeping up with the advent of new crimes would severely tax Congress’s lawmakers’ resources, and no doubt often exceed them, were Congress itself obliged to specify all operative rules of criminal law. It is much easier for courts to keep the criminal law up to date by simply adapting incompletely specified statutes to new crimes. Chief Justice Burger adverted to this updating economy when he described the mail fraud statute “as a first line of defense”: “When a ‘new’ fraud develops — as constantly happens — the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.”\textsuperscript{82}

A related efficiency associated with delegated common law-making is its power to avoid loopholes. Criminality assumes diverse and heterogeneous forms. Enumerating all of them is impossible. Accordingly, were Congress obliged to enact only fully specified criminal statutes, it would often be possible for offenders to evade punishment by substituting unprohibited types of wrongdoing for closely analogous illegal ones. To sidestep the crime of interstate transportation of

\textsuperscript{80} Of course, the costs that Congress avoids when it delegates don’t disappear; less work for Congress means more for the institutions that must make law in Congress’s stead. See Louis Kaplow, \textit{Rules Versus Standards: An Economic Analysis}, 42 DUKE L.J. 557, 609 n.143 (1992). There are many reasons, however, to believe that it is cheaper for courts to fill out incompletely specified criminal statutes than it would be for Congress to enact a fully specified criminal code. See Kahan, \textit{supra} note 4, at 405-09.

\textsuperscript{81} I am assuming here that efficiency in criminal law-making is good. This is in fact a controversial assumption. According to one view, the chief virtue of separation of powers is that it \textit{prevents} the federal government from being perfectly responsive to the public demand for law; the brake that it applies to the lawmaking process secures individual liberty. See, \textit{e.g.}, INS v. Chadha, 462 U.S. 919, 959 (1983) (“With all the obvious flaws of delay, undiligence, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.”). Another conception of separation of powers, however, is less hostile to efficient lawmaking. On this account, checks and balances prohibit concentrations of power that would permit one branch to dominate the others, but otherwise leave institutions free to converge on allocations of authority that maximize the power of government to pursue collective ends. See, \textit{e.g.}, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment and opinion of the Court) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice which will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). My (qualified) defense of federal criminal common law-making presupposes that the latter, pragmatic conception is better. For a full historical and normative defense of that position in general, see Martin S. Flaherty, \textit{The Most Dangerous Branch}, 105 YALE L.J. 1725 (1996); for a defense of it in the context of federal criminal law in particular, see Kahan, cited above in note 4, at 398–415.

forged checks, swindlers could wait until they had carried the checks across state lines before signing them; to avoid a prohibition on the possession of a sawed-off shotgun, a meticulous criminal could cut the barrel down to 18 rather than 17.5 inches. Underspecified norms avoid this type of under inclusivity because they can be extended beyond their core applications to all analogous but unforeseen forms of wrongdoing. It was to conserve this sort of flexibility, and to discourage loopholing, that common law authorities refused to define "fraud." The same considerations continue to inform federal courts' interpretation of RICO, the fraud statutes, and federal property offenses.

Delegated common law-making not only reduces the cost of federal criminal law, but also improves its quality. Congress necessarily makes rules in anticipation of future cases. As a result, it lacks full information about how these rules will operate in the real world. Courts, in contrast, perform their delegated lawmaking function in the course of deciding actual cases. Consequently, they see more completely how statutes interact with real world circumstances and with each other, and can use this information to fashion rules of law that fully implement legislative goals and that avoid unforeseen conflicts with other values and policies. Had Congress attempted, for example, to define "property" for the purposes of federal criminal law —

83 See McElroy v. United States, 455 U.S. 642, 654-55 & n.19 (1982) (refusing to read the statute in a manner that would create such a loophole).

84 Cf. Staples v. United States, 114 S. Ct. 1793, 1812 (1994) (Stevens, J., dissenting) (criticizing the majority for reading a statute to exacerbate such a loophole).

85 As one such authority explained:
The common law not only gives no definition of fraud, but perhaps wisely asserts as a principle that there shall be no definition of it, for, as it is the very nature and essence of fraud to elude all laws in fact, without appearing to break them in form, a technical definition of fraud, making everything come within the scope of its words before the law could deal with it as such, would be in effect telling to the crafty precisely how to avoid the grasp of the law.

86 See, e.g., Moskal v. United States, 498 U.S. 103, 111-12 (1990) (concluding that 18 U.S.C. § 2314 applies to a general "class of fraud" and not only to the specific "instances of fraud" that were cognizable at common law or that inspired Congress's enactment of this provision); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248-49 (1989) (noting that confining RICO to particular types of enterprises would be "counterproductive" and contrary to Congress's intent that RICO "encompass a wide range of criminal activity, taking many different forms and [attracting] a broad array of perpetrators operating in many different ways"); United States v. Turkel, 352 U.S. 407, 416-17 (1957) (reading the National Motor Vehicle Theft Act broadly because "[p]rofessional thieves resort to innumerable forms of theft and Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion").

either statute-by-statute or generally — it seems unlikely that Congress would have crafted a set of distinctions as context-sensitive, and thus generally sensible, as the ones courts have developed.

Orthodox criminal law theory defends separation of powers not because it is efficient, but primarily because it is thought to be essential to the rule of law and democratic accountability. How does delegated common law-making affect these values? The answer is minimally, at least so long as delegated common law-making is carried out with a modest dose of good sense.

Consider the core rule of law value: "fair warning" or notice. Notice is most important when law is used to mark the boundary between socially desirable and socially undesirable conduct; in negotiating the technical requirements of the tax code or securities laws, for example, actors predictably and legitimately look to law to guide their conduct. But notice is much less important when the law is regulating clearly undesirable conduct; potential offenders don’t need the law to tell them that theft or organized criminality is wrong, because ordinary morality suffices. Indeed, persons who self-consciously search out gaps between common morality and law are engaged in a culpable form of loopholing, which ambiguity can justly be used to discourage.88

At least in theory, then, there is no necessary antagonism between delegated common law-making and fair warning. All that is necessary is that courts build sensitivity to social context into their common law-making methodology; as statutory applications approach the border between socially desirable and socially undesirable conduct, courts should either insist on more statutory clarity or supply it themselves through interpretation.89 Courts proceed in essentially this way, for example, when they define the mental state elements of incompletely specified criminal statutes.90

Nor is there any necessary tension between delegated common law-making and democracy. To begin, the suggestion that democracy requires confining criminal law-making authority to Congress rests on a false premise — namely, that Congress is perfectly able to satisfy the electorate’s demand for criminal law. It isn’t, because of the practical and political constraints on its lawmaking capacities. The law is likely to be closer in quantity and quality to what the public demands when courts, at the behest of Congress, accept responsibility for updating the

89 See Kahan, supra note 4, at 403–04.
90 See supra pp. 478–79.
law, closing loopholes, and infusing the law with the practical insights of experience.91

Even more importantly, the suggestion that it is undemocratic for courts to participate in defining the elements of criminal statutes overlooks the role of federal prosecutors. Through the power of initiative, individual prosecutors have a vital say in determining the content of incompletely specified statutes. Because federal prosecutors are appointed by the President and are accountable to the Attorney General, their participation in constructing a system of federal common law crimes assures that its content will be responsive to public sensibilities — at least in theory.

2. Practical Costs. — But of course, reality is more complicated. Federal criminal law is beset by three distinct pathologies that counteract some of the advantages associated with delegated common law-making.

The first is the limited expertise of federal judges. Although the judiciary’s contact with real world facts gives it a lawmaking advantage relative to Congress, the experience of individual judges (particularly at the appellate level) with criminal law remains limited and sporadic. Moreover, it should be obvious that specifying rules that meet the legitimate public demand for criminal law, keep the code up to date, close off loopholes, avoid conflicts of policy, and assure a basic correspondence between criminal prohibitions and social mores is not always a straightforward task. Under these circumstances, miscues are inevitable.

The costs of limited expertise are highest in the elaboration of statutes that mark the boundary line between socially desirable and socially undesirable behavior. The securities fraud provisions are the best example. Full legislative (or even judicial) specification of these statutes would be infeasible; the wrongful acts that they seek to prohibit are too heterogeneous.92 At the same time, analysts, arbitrageurs, corporate executives, and market participants must consult the law to guide legitimate economic activity. The track record of courts in resolving this tension has been poor. Misled, in part, by the sensational facts of the cases selected for prosecution, courts have fashioned a body of formless doctrines that create unacceptably high risks of overdeterrence and unfair surprise when applied generally.93

92 See supra pp. 475–76 (discussing fraud generally). See generally Cass R. Sunstein, Legal Reasoning and Political Conflict 143–44 (1996) (describing the difficulties in setting out and properly weighing the relevant factors making up a rule); Kaplow, supra note 80, at 562–64 & n.11 (discussing the respective costs and advantages of rules and standards).
The second pathology is judicial dissensus. An author’s copyright is not “property” for purposes of the National Stolen Property Act, but what about for purposes of the mail fraud statute, which has been construed to cover other intangible property interests, including interests in the exclusive use of information? Federal courts are of two minds on this question. Misappropriation of information in violation of a fiduciary duty is a prohibited form of fraud for purposes of the mail fraud statute, but what about for purposes of the securities fraud statutes? Again, federal courts disagree. Differences of opinion on what open-textured criminal statutes ought to mean are inevitable in a system comprised of 649 district court judges, who handle over 45,000 criminal cases annually and who are subject to review by twelve distinct courts of appeals. Such conflicts must ultimately be resolved either by the Supreme Court, which then must divert itself from other cases, or by Congress, which then loses the legislative economies associated with implied delegation. Moreover, in the time it takes to straighten matters out, participants in the legal system and society generally must endure the costs that accompany uncertainty over the scope of the law.

The third and final pathology is prosecutorial overreaching. U.S. Attorneys are extraordinarily ambitious and frequently enter electoral politics after leaving office. For this reason, they have strong incentives to use their power while in office to cater to — or to circumvent — local political establishments. The acquiescence of the Department of Justice in such behavior does not demonstrate that the interests of politically ambitious U.S. Attorneys coincide with those of the national electorate. Although nominally subordinate to the Attorney General, U.S. Attorneys enjoy a strong history and culture of independence for many, disregard of the United States Attorneys’ Manual.


100 See JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 230–31 (1978). Some well known recent examples of U.S. Attorneys who pursued political careers include Richard Thornburgh (Governor of Pennsylvania), James Thompson (Governor of Illinois), William Weld (Governor of Massachusetts), and Rudolph Giuliani (Mayor of New York City).
101 See id. at 201–06.
a detailed set of guidelines issued by the Justice Department to guide interpretation of criminal statutes — is a source of pride. The Department, for its part, lacks the adequate political incentives to check individual U.S. Attorneys, especially once they have initiated sensational prosecutions. The result can be an unhealthy distortion in the prosecutor’s contribution to delegated criminal law-making.

To make this point more vivid, consider Daniel Fischel’s account of Rudolph Giuliani’s “reign of terror” as U.S. Attorney for the Southern District of New York. According to Fischel, Giuliani’s high-visibility crackdown on “insider trading” was calculated to win the approval of established Wall Street firms, which were being routed by Michael Milken and other financial innovators. These firms did in fact supply valuable support to Giuliani in his subsequent New York mayoral campaigns. It is unlikely that Giuliani’s prosecutions had the support of the Reagan Justice Department, which had been very critical of the Carter Administration’s focus on white collar crime. Indeed, the Department did ultimately attempt to rein in Giuliani by issuing strict new guidelines on RICO and mail fraud prosecutions, but by that point, Giuliani’s crusade had already succeeded in gaining judicial acceptance of a variety of ill-considered legal doctrines and in creating a climate of career-destroying, life-ruining public hysteria.

Fischel’s depiction of Giuliani is contentious, but the strength of my argument doesn’t depend on whether his story is right. All that matters is that existing institutional structures make the kind of behavior that Fischel attributes to Giuliani both plausible and predictable. Individual U.S. Attorneys internalize the political benefits and externalize the practical and human costs of adventurous readings of


104 See Ruff, supra note 102, at 1203–08. See generally EISENSTEIN, supra note 100, at 54–100 (describing the interaction between the U.S. Attorneys and the Department of Justice).


106 See id. at 98, 111–12.

107 See id.


109 See FISCHEL, supra note 105, at 126; U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 6-4.211(a) (Supp. 1994) [hereinafter UNITED STATES ATTORNEYS’ MANUAL].

federal criminal law. The Department of Justice, which should internalize these costs through the President's electoral accountability, lacks the political and organizational wherewithal to combat this form of overreaching. Courts have the power to counteract it through the wise exercise of their common law-making power. But they don't, partly because they are weakened by lack of expertise and consensus, and partly because they cede too much of their lawmaking power to individual prosecutors. As a result, federal criminal law is broader and looser than it would be were it aligned with the interests of the national electorate. This agency cost is the most subtle but also the most serious threat to the benefits generated by Congress's delegation of criminal law-making power.

3. Overall. — On the whole, the pluses of criminal common law-making probably outweigh the minuses. As draining as the pathologies of this regime are, it seems unlikely that they completely vitiate the immense, systemic advantages of delegation. If we must choose between a system of federal common law crimes and a system of legislatively specified ones, then it probably makes sense to embrace the former.

But are these really the only two alternatives? Is there any way to retool the machinery of federal criminal law-making so as to conserve the positive effects of delegation while eliminating or reducing the negative ones? There is — by Chevronizing it.

II. THE ALTERNATIVE: A FEDERAL ADMINISTRATIVE LAW OF CRIMES

The core of my argument can be stated succinctly. Applying the Chevron doctrine would improve the content of federal criminal law

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111 Of course, the temptation to satisfy powerful local interests can also induce individual U.S. Attorneys to be unduly moderate in their interpretations of federal criminal law. As a practical matter, however, politically motivated restraint is much less of a concern than is politically motivated overreach. To begin with, rational U.S. Attorneys are much less likely to submit to the temptation to be unduly lenient; whereas excessive zeal carries little political risk, the perception that a prosecutor has declined to bring charges for political reasons reeks of scandal. Cf. JEREMY Bentham, Principles of Penal Law, in 1 The Works of Jeremy Bentham 401 (John Bowring ed., 1843) ("[E]rror on the minimum side [of punishment] . . . is least likely to occur . . . [and] is at the same time clear and manifest and easy to be remedied. An error on the maximum side, on the contrary, is that to which legislators and men in general are naturally inclined . . . ."). Furthermore, excessive moderation does less harm to the law than does overreach. The decision of one U.S. Attorney to pass up an opportunity to advocate a socially desirable interpretation doesn't prevent another from advocating it; however, once one U.S. Attorney succeeds in persuading a court to adopt an unduly broad reading of a federal criminal statute, that ruling will continue to do damage by virtue of its precedential effects and the political pressure subsequent U.S. Attorneys (and Congress) will face not to disavow newly broadened criminal rules.

112 For discussion of the agency costs associated with prosecutorial discretion generally, see Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. LEGAL STUD. 189, 300–01 (1983), and Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 J. LEGAL STUD. 43, 50–52 (1988).
by shifting to the Justice Department the delegated lawmaking powers now exercised jointly by courts and individual prosecutors. This transfer of authority would preserve essentially all the benefits associated with delegation and, at the same time, effectively treat all of the pathologies that afflict it. The Justice Department has greater law-making expertise than do courts because it comes into contact with all manner of crimes at all stages of the justice system. Its readings are more likely to be uniform than those of courts because it is a single, integrated agency. Finally, the Department is less likely to overreach than are individual U.S. Attorneys because it has less incentive to pander to local interests and is more likely to internalize the costs of unduly broad statutory readings. This Part develops these claims in greater detail.

A. Chevron and Administrative Criminal Law-Making

Start with basics: what is the *Chevron* doctrine? At one level, *Chevron* is a simple canon of construction. It provides that, when a "statute is silent or ambiguous with respect to" an issue resolved by an administrative agency, a court should defer to the agency’s interpretation as long as it is "reasonable."113

At a more fundamental level, the *Chevron* doctrine is a device for allocating lawmaking power between the judiciary and the executive. It accepts the realist insight that statutory ambiguity and silence should often be viewed as implicit delegations of lawmaking authority, and establishes a presumption that such authority is to be exercised by the agencies that enforce such statutes rather than by courts.114 The grounds for the presumption are policy-laden: agencies are likely to know more about the subject matter that they are regulating, and (at least when they are part of the executive branch) are more democratically accountable.115 When they determine the "reasonableness" of the agency’s view, courts apply the conventional standard of review for administrative lawmaking, under which the court’s inquiry is confined to an assessment of the coherence and completeness of the agency’s statement of reasons.116

My proposal is that courts apply *Chevron* to the Department of Justice’s interpretations of federal statutes. As long as the Department has offered a reasoned justification for its interpretation before prosecution,117 a court should treat the prosecution's reading of an incom-

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114 See id. at 843–44 (equating statutory ambiguity with the implicit delegation of lawmaking authority).
117 See *Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 50 (holding that post hoc rationalizations are not entitled to deference); infra section II.B.3.
pletely specified statute as a binding exercise of delegated lawmaking power. If the Department has not offered an interpretation before the prosecution, or has offered one unsupported by reasoned decisionmaking, the court should reject the prosecution’s reading — a disposition that would leave the Justice Department free to renew its defense of its position in future proceedings.118

This proposal is admittedly at odds with existing judicial authority. Although they apply Chevron to a wide variety of administrative interpretations, federal courts refuse to apply it to the Department of Justice’s readings of the criminal prohibitions collected in title 18 of the United States Code.119 They do so, first, on the ground that Congress hasn’t delegated to the Department the authority to engage in interpretive lawmaking with respect to general criminal statutes. “[A] criminal statute,” Justice Scalia has explained,

is not administered by any agency but by the courts. . . . 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.120

Second, courts decline to give the Department Chevron deference on “rule of law” grounds:

[T]he law of crimes must be clear. There is less room in a statute’s regime for flexibility, a characteristic so familiar to us on this court in the interpretation of statutes entrusted to agencies for administration. We are, in short, far outside Chevron territory [when we are interpreting criminal statutes].121

Neither of these rationales for denying Chevron deference makes much sense. The suggestion that Congress has entrusted “administration” of criminal statutes to courts rather than to the Department is a conclusion in search of an argument. Congress never says who it expects to exercise the power that it gives away when it enacts incompletely

118 Cf. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (noting that an agency is free on remand to adopt a rationale that could not be advanced for the first time before a reviewing court). For further discussion, see below at page 501.
119 See, e.g., United States v. Harden, 37 F.3d 595, 599 n.2 (11th Cir. 1994) (“[T]he policies and procedures of the United States Department of Justice and its interpretation of statutes are not binding upon the judicial branch of our Government.” (quoting Appellant’s Brief at 23) (internal quotation marks omitted)); United States v. Turley, 891 F.2d 57, 59 n.1 (3d Cir. 1989) (“[A Justice Department interpretation of the mail fraud statute] is not precedent for the courts . . . .”); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987) (“We are, in short, far outside Chevron territory here.”). But cf. United States v. Ivic, 700 F.2d 51, 64 (4th Cir. 1983) (“While we recognize that non-compliance with internal departmental guidelines is not, of itself, a ground of which defendants can complain, these Guidelines nevertheless are important evidence of the understanding of the department of government charged with the administration of the statute.”).
120 Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).
121 McGoff, 831 F.2d at 1077.
specified criminal statutes. Indeed, Congress has never identified the entity responsible for filling in any incompletely specified regulatory statute. This is, in fact, exactly the kind of silence presupposed by *Chevron*, which, as Justice Scalia has noted in another context, "represents merely a fictional, presumed intent" in favor of agency rather than judicial specification. The presumption is based on the belief that law made by agencies is likely to be better and more democratically legitimate than law made by courts. To determine the applicability of *Chevron* to the Department of Justice’s readings, then, courts should address the issue of which institution — the judiciary or the Justice Department — is better situated to exercise delegated criminal law-making power.

The "rule of law" explanation for denying *Chevron* deference is even less satisfying. The idea that "the law of crimes must be clear" is also a fiction — but one that is not nearly as helpful as *Chevron*. There is just as much if not more "room . . . for flexibility" in the interpretation of RICO, the mail fraud statute, and the federal property offenses as there is in any administrative regulatory statute; the question isn’t whether these statutes will be given shape by someone other than Congress, but

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122 The legislative history of RICO, which contemplates aggressive gap-filling by courts, see supra p. 474, is arguably an exception, but even RICO did not involve an express delegation of lawmaking authority to the judiciary.


124 See Sunstein, supra note 115, at 2086–87, 2090 (describing *Chevron* deference as a policy-based "reconstruction" of congressional intent).

125 One could take the position that an agency "administrs" a statute for *Chevron* purposes only if Congress has authorized the agency to implement statutory directives through notice-and-comment rulemaking or administrative adjudication, see, e.g., id. at 2093, functions the Department of Justice doesn’t perform with respect to the criminal offenses found in title 18 of the United States Code. But this position is contested, see Trans Union Corp. v. FTC, 81 F.3d 228, 230 (D.C. Cir. 1996), and, significantly, isn’t how Justice Scalia understands *Chevron*, see EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring in part and concurring in the judgment) (rejecting as "an anachronism" the proposition that interpretations of "agencies without explicit rulemaking power . . . [should] not be accorded deference"). Even assuming, however, that this is the right view of *Chevron*, invoking it still doesn’t justify denying deference to Justice Department interpretations. The presumption that courts should defer to agencies that possess rulemaking and adjudicatory powers itself rests on policy considerations identified by courts rather than on any formal congressional directive; thus, the (unanswered) question then becomes whether these policy considerations support deference to Justice Department interpretations of criminal statutes — regardless of the Department’s lack of rulemaking and adjudicatory authority. See Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1992 Utah L. Rev. 51, 84–87. Moreover, courts do in fact defer (to a greater or lesser extent depending on the context) to statutory interpretations rendered by agencies (including the Justice Department) that lack authority to issue binding rules or administrative determinations. See, e.g., EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988) ("[T]he EEOC’s interpretation of ambiguous language [in Title VII of the 1964 Civil Rights Act] need only be reasonable to be entitled to deference."); infra p. 509 (reviewing judicial deference to the Justice Department’s interpretations of the Sherman Act and the Voting Rights Act). In Part III, I show how this doctrinal approach, sometimes referred to as Skidmore deference, can be adapted to Justice Department interpretations of criminal statutes. See infra pp. 508–09.

126 McCafferty, 831 F.2d at 1077.
only whether courts or the Justice Department will be doing the shaping. If the rule of law is to be a criterion for choosing between them, then we need some account of which law-defining mechanism — common lawmaking or *Chevron's* "interpretive lawmaking" — better comports with rule of law values.\(^{127}\)

What makes the reluctance of courts to defer to Justice Department readings of criminal statutes all the more puzzling is that courts routinely apply *Chevron* to agency interpretations in a closely analogous criminal law setting. Scores of statutes — from the Controlled Substances Act,\(^ {128}\) to the Arms Export Control Act,\(^ {129}\) to the Food and Drug Act\(^ {130}\) — authorize executive agencies to issue criminally enforceable regulations.\(^ {131}\) In the course of promulgating such rules, agencies frequently make contentious interpretations of the statutes they administer. Courts find it completely appropriate to apply *Chevron* deference to these readings.\(^ {132}\) If it is consistent with congressional intent and with the rule of law to treat the interpretations of these agencies as a species of delegated lawmaking, why treat the interpretations of the Department of Justice differently?\(^ {133}\)

\(^{127}\) *Chevron*, of course, is not without its critics. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 467–71, 475–78 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 973–75, 976–77, 979 (1992). The main argument against the doctrine is that it unduly concentrates power in agencies. That claim is obviously relevant to my proposal to *Chevronize* federal criminal law. The desirability of *Chevron* in federal criminal law, however, neither presupposes nor entails its desirability in other regulatory domains. Accordingly, I plan to defend *Chevron* locally, not globally; that is, I will attempt to show that *Chevron* does not unduly concentrate power in the context of federal criminal law, without making broad claims about *Chevron*'s effects elsewhere. Indeed, one could accept the critics’ claim about *Chevron* as a general matter (although I do not) and still conclude that *Chevronizing* federal criminal law in particular makes sense.


\(^{129}\) 22 U.S.C. § 2778 (1994) (authorizing the President to promulgate criminally enforceable standards relating to the export of weapons and weapons technology).

\(^{130}\) 21 U.S.C. § 355(f) (1994) (authorizing the FDA to promulgate criminally enforceable regulations relating to testing of new drugs).


\(^{133}\) One answer to this question might be a denial of its premise: applying *Chevron* in this context does violate legislative supremacy and rule of law values. For a compelling rebuttal, consider Sanford Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretation*.
B. An Assessment

To determine whether courts have wisely declined to give *Chevron* deference to Justice Department readings, it is necessary to answer the questions that the courts’ own explanations beg. That’s what I now propose to do. The Justice Department, I will argue, is in fact better situated than courts are to exercise the lawmaker power that Congress implicitly delegates when it enacts incompletely specified criminal statutes. Federal criminal law will be better in content, more legitimate in its origins, and more consistent with the rule of law if it is treated as an administrative lawmaker system rather than as a common lawmaker one.

1. *Chevron* and the Efficiency of Delegation. — For starters, *Chevron*izing federal criminal law would conserve essentially all of the benefits associated with implied delegation. Congress enjoys the institutional economies of incomplete specification regardless of whether it’s the judiciary or the Justice Department that finishes the task. In addition, the Justice Department, like courts, can update the law more quickly than Congress can, and can use its contact with actual cases to tailor the law to circumstances unforeseen by Congress.

The only respect in which criminal interpretive lawmakering is not functionally identical from a deterrence standpoint to criminal common lawmakering is in its capacity to combat loopholes. Incomplete specification discourages loopholing through persistent ambiguity. When the law is fully specified (or treated as if it were), a potential offender can readily identify and exploit gaps between what the law should cover and what it actually does. But in a regime that combines incomplete specification with delegated common lawmakering, such behavior becomes exceedingly risky, because a potential offender can never be certain that a court won’t adapt the law ex post to fill what appeared to be a gap ex ante. In contrast, under the rule against post hoc rationalizations — an important corollary of *Chevron* — the Justice Department’s readings would be binding only if announced in advance of prosecution. 134 Accordingly, some of the deterrent effects of ambiguity would be lost. 135

But there would also be compensating effects. The law deters a particular form of wrongdoing most effectively when it prohibits it in clear terms. If a statute prohibits a particular form of wrongdoing only ambiguously, some individuals will engage in it either out of ig-

134 This rule prevents courts from deferring to positions that agencies announce for the first time in litigation. See infra p. 501.
135 Exactly how much the rule against post hoc rationalizations would detract from deterrence depends on whether the rule is construed to prevent deference only to interpretations announced in the course of prosecution or to all interpretations subsequent to the criminal transaction. I consider this issue below in section II.B.3.
norance of the law or in the hope that courts will resolve the ambigu-
ity in their favor.  

Ultimately, then, the best way to prevent the exploitation of a potential loophole is to close it. This consideration favors administrative lawmaking over common law-making, because the Justice Department can exercise delegated lawmaking powers more quickly than can courts. Under Chevron, a binding rule against a particular form of wrongdoing would go into effect as soon as the Justice Department decided that a statute should be read to support it and issued a regulation to that effect; without Chevron, the Department must not only formulate such a reading, but also persuade courts through litigation to ratify it through their own common law-making.

The law of controlled substances furnishes an example. It is relatively easy to alter the chemical composition of psychedelic drugs without changing their effects. This fact allows illicit drug manufacturers to evade the law by replacing clearly illegal substances with not-yet-illegal substitutes.  

There are at least two strategies for dealing with this form of loopholing. Under the common law strategy, the legislature can authorize courts to determine case-by-case which drugs satisfy a highly general definition of “controlled substance.” Alternatively, under the administrative strategy, the legislature can authorize an agency to promulgate and update — through accelerated rulemaking procedures — a list of precisely defined controlled substances.

Each approach has advantages and disadvantages. The power of courts under the common law approach to treat all analogous forms of drugs as illegal, whether or not previously designated as such, will deter some potential offenders from even trying to loophole. But other offenders, including the stupid ones and the ones who place an exceptionally high value on drug distribution, will continue to take their chances until a court holds in clear terms that a particular substance is unlawful — which could take quite a while, particularly if district courts or courts of appeals initially reach conflicting judgments. The administrative strategy, in contrast, allows an administrator to issue a regulation banning a new psychedelic drug very soon after it hits the streets (or comes out of the lab). Still, the few manufacturers who manage to market the substance before the regulation is issued are certain to go unpunished (although the speed with which the agency is able to respond might sufficiently diminish expected returns to make jumping through this window of opportunity unprofitable).

In the Controlled Substances Act, Congress opted for the administrative strategy, but it’s hard to say which approach is likely to be more effective across the run of different criminal law settings. It is probably fair to say that in this respect, too, the choice between crimi-

2. Chevron and the Pathologies of Criminal Common Law-Making. — The choice is anything but a wash, however, when one takes into account the pathologies associated with criminal common law-making. Chevronizing federal criminal law would counteract all three.

(a) Expertise. — Transferring delegated lawmaking authority from courts to the Department of Justice would likely avert many of the miscues associated with the judiciary’s limited expertise in criminal law. The instrumentalities of the Justice Department handle many times the number of cases that district courts handle. Moreover, the Justice Department has close contact with cases at all stages of development; district courts see only the unusual ones that don’t end in plea bargains, and circuit courts only the even more unusual ones that generate appeals. Because its involvement in criminal law is so much more extensive than that of any court, the Justice Department is more likely to appreciate all the policy implications of a disputed statutory issue. The policymaking insights stemming from such day-to-day regulatory responsibilities provide one of the primary rationales for requiring courts to give agency readings Chevron deference.

(b) Uniformity. — The Chevronization of federal criminal law would also solve the problem of inconsistent judicial interpretations. Frequent disagreements are inevitable when 649 district judges, reviewed by twelve separate courts of appeals, are all independently empowered to identify the best readings of ambiguous criminal statutes. The Department of Justice, in contrast, is a single, integrated agency; for Chevron purposes, it would speak with a single voice in declaring what incompletely specified statutes mean. Courts would still review

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139 U.S. Attorneys investigate many individuals whom they never charge with offenses, and of the ones they do charge, over 75% plead guilty (or nolo contendere). See BUREAU OF JUSTICE STATISTICS, supra note 99, at 447 tbl.16, 462 tbl.5.28.

140 See Sunstein, supra note 115, at 2089–90. The Supreme Court relied on this very consideration in holding that judicial deference is due the Secretary of Labor, the administrator responsible for enforcing the Occupational Safety and Health Act (OSHA), rather than the Occupational Safety and Health Review Commission (OSHRC), a purely adjudicatory agency, when the two disagree about the meaning of an OSHA regulation. See Martin v. Occupational Safety and Health Review Comm’n, 499 U.S. 144, 152–53 (1991). The functions of the Secretary and OSHRC under OSHA’s “split-enforcement” structure are roughly analogous to those of the Justice Department and the judiciary in criminal law. See generally George Robert Johnson, Jr., The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 ADMIN. L. REV. 315 (1987) (examining when and how the split-enforcement structure works and possible improvements to the structure through its use in other areas of the law). Martin has no direct bearing on the allocation of interpretive lawmaking authority between the Justice Department and the judiciary in criminal law; for one thing, the Martin Court stressed that its conclusions were grounded in considerations unique to the regulatory domain of OSHA and wouldn’t generalize to other regulatory domains. See Martin, 499 U.S. at 157–58. Nonetheless, Martin does at least support the idea that interpretive lawmaking power can and should be distributed between the Justice Department and the judiciary in the way that best serves the regulatory objectives at stake in the particular setting of criminal law.
these readings under *Chevron*, but courts are much more likely to agree about whether the Justice Department’s reading of an ambiguous statute is within the range of permissible interpretations than they are about which particular reading within that range is best.141

Reducing lower-court dissensus might well have been another of the Supreme Court’s goals in *Chevron*.142 That has certainly been the effect of the doctrine in practice. In the years immediately following *Chevron*, the affirmance rate in cases challenging agency decisions rose significantly.143 Because courts were agreeing much more often with agency readings, they necessarily had less occasion to disagree among themselves on whether agencies were getting it right. *Chevron* would likely have a similar quieting effect on judicial disagreements in criminal law.

(c) Prosecutorial Overreaching. — Perhaps the strongest objection to *Chevron*izing federal criminal law is that it would involve institutional self-dealing. How can it be fair to permit the law-enforcer to say what the law is? The whole point of separation of powers, according to this objection, is to exclude the natural biases of prosecutors from lawmaking and law-interpreting. This anxiety, however, is misplaced: far from making criminal law-making more partisan, *Chevron* would moderate it substantially.

To begin, the self-dealing concern assesses *Chevron* from a false baseline. As I’ve argued, federal criminal law does not strictly separate lawmaking, law-interpreting, and law-enforcing powers.144 Congress implicitly delegates much of its lawmaking power to the judiciary. The judiciary, whose willingness to exercise this power is inhibited by the principal-agent conception of interpretation, in turn cedes part of its authority to U.S. Attorneys. And — as proponents of the institutional self-dealing concern would predict — U.S. Attorneys consistently overreach in the hope of pleasing local interests who are in a position to confer future political rewards. The question is how *Chevron* would affect this distribution of authority.

*Chevron*izing federal criminal law would not only transfer lawmaking authority from the judiciary to the executive, but also reallocate it within the executive branch itself. At present, the executive branch influences the formation of federal common law crimes almost entirely through the uncoordinated actions of individual U.S. Attorneys. But under *Chevron*, prosecutorial readings would be entitled to deference only if endorsed and defended in advance by the Justice Department.

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142 See id. at 1095, 1117–22.


144 See supra sections I.A–B.
itself. As a result, officials within the Department, and not U.S. Attorneys, would have the final word on how the executive’s interpretive lawmaking powers should be exercised.

This shift in responsibility would help counteract prosecutorial overreaching. Distant and largely invisible bureaucrats within the Justice Department lack the incentives that individual U.S. Attorneys have to bend the law to serve purely local interests. In addition, the Department is more likely than are U.S. Attorneys to internalize the social costs of bad readings. Because the Department, through the President, is accountable to the national electorate, it is more likely to be responsive to interests hurt by adventurous readings, particularly readings that discourage socially desirable market activities. The Department also has much more reason to care about the impact of such interpretations on the public fisc. Accordingly, Chevron should make the executive’s interpretations of criminal statutes both milder and more consistent with nationwide interests than they are now.¹⁴⁵

Shifting authority from individual U.S. Attorneys to the Justice Department should reduce the influence of interest groups for the same reasons that shifting power from independent agencies to the President does. The reason that the President is better at resisting interest-group domination than are independent agencies is not that the President typically has better motives than do agency heads; rather, the explanation is Madison’s axiom that the influence of factions diminishes as their numbers grow.¹⁴⁶ Because he or she is responsive to a large collection of unruly national constituencies, the President is less likely to be captured by any one of them than is an agency, which typically oversees only a single industry, the members of which are well posi-

¹⁴⁵ Even without Chevron, the Justice Department could issue internal regulations prohibiting prosecutions based on novel theories unless approved in advance by the Department’s Criminal Division. Indeed, the Department has come close to doing this on a limited basis by requiring U.S. Attorneys to obtain authorization before indicting under certain statutes. See, e.g., UNITED STATES ATTORNEYS’ MANUAL, supra note 109, § 9-2.133 (1988) (various statutes); id. § 9-2.135 (Foreign Corrupt Practices Act); id. § 9-110.101 (RICO). The prospect that the Department would implement such oversight on a global basis, however, is exceedingly remote — not because such a reform would be undesirable, but because the political incentives to undertake it are too small. The benefits of centralizing interpretive authority, while substantial, would accrue to the Justice Department as an institution only over the long term, whereas the steep political cost of ending U.S. Attorneys’ historical independence would be borne immediately and entirely by the individual Attorney General who initiated such a regime. This misalignment of incentives suggests that the reallocation of interpretive authority within the Justice Department is likely to occur only if imposed from without, either by the judiciary, through Chevron, or by Congress, through an express statutory delegation of interpretive lawmaking authority to the Justice Department.

¹⁴⁶ Madison wrote:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

tioned to influence the relevant congressional oversight committee.\(^{147}\) These dynamics explain why the antitrust enforcement policies of the nominally independent Federal Trade Commission are more responsive to industry interests than are those of the presidentially controlled Antitrust Division of the Justice Department.\(^{148}\) Likewise, we should expect the Justice Department to behave more moderately than individual U.S. Attorneys do in construing federal criminal statutes — not because the Department is less subject to interest group pressures, but because it is subject to many more such pressures emanating from a greater variety of sources.\(^{149}\)

Anecdotal evidence strongly corroborates the moderation of the Justice Department relative to U.S. Attorneys. To maximize his leverage in white collar prosecutions, Rudolph Giuliani typically charged those who violated technical tax provisions with more severe RICO or mail fraud offenses — a tactic that created a serious risk of overdeterrence and wasted punishment.\(^{150}\) The Department ultimately responded by issuing guidelines that barred this practice.\(^{151}\) The federal "drug kingpin" statute mandates lengthy prison sentences for persons convicted of playing a managerial role within a large-scale drug distribution scheme.\(^{152}\) The U.S. Attorney for the Western District of Wisconsin convinced the Seventh Circuit to extend the severe penalties of the statute to individuals who don't manage a drug operation but who are convicted of aiding and abetting the kingpin.\(^{153}\) Again, the Department ultimately disavowed this application of the statute,\(^{154}\) which clearly frustrates the scheme of graduated penalties established by the federal drug laws. Consistent with their traditional disregard for the Justice Department's directives, however, U.S. Attorneys have contin-

\(^{147}\) See Frank H. Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L. Rev. 1328, 1341–42 (1994); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 105–06 (1994); see also Edward A. Zelinsky, James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions, 102 Yale L.J. 1165, 1177–78 (1993) (defending tax subsidies over direct spending programs on the ground that the IRS is influenced by a greater number of competing interests than are congressional committees that appropriate money for programs).


\(^{150}\) See Fischel, supra note 105, at 123–26; see also Ellen S. Podgor, Tax Fraud — Mail Fraud: Synonymous, Cumulative or Diverse?, 57 U. Cin. L. Rev. 903, 923–33 (1989) (criticizing this application of mail fraud and RICO statutes).


\(^{153}\) See United States v. Pino-Perez, 870 F.2d 1230, 1231 (7th Cir. 1989) (en banc).

\(^{154}\) See Brief for the United States in Opposition at 8–9, Pino-Perez (No. 88-7142) (noting that the Justice Department had advised U.S. Attorneys not to charge those who aided and abetted a drug kingpin, but opposing certiorari nevertheless on the ground that the defendant was serving a concurrent sentence of equal length on a separate count).
ued to advance this understanding of complicity liability in the lower courts. Under *Chevron*, this couldn’t happen.

Indeed, *Chevronizing* federal criminal law would likely create political and bureaucratic dynamics that magnify the effects of the Justice Department’s relative conservatism. Under the existing common law-making regime, U.S. Attorneys generally need not and do not seek Department approval for particular prosecutions. As a result, they are free to make the first move in the interpretive lawmaking game. If the Justice Department objects to an adventurous reading, it can, in theory, force a U.S. Attorney to abandon it. But the Department faces strong disincentives against doing so. If the Department tries to call off a crusading U.S. Attorney’s prosecutions of greedy “insider traders,” it opens itself up to charges of favoritism or corruption; if it voluntarily disarms a successful field marshal in the war against drugs, it risks being branded an appeaser. Inaction is the likely result, leaving the lawmaking field open to enterprising U.S. Attorneys even when they are moderately opposed by the Justice Department.

*Chevron*, however, would shift the burden of bureaucratic persuasion to the U.S. Attorney. Unless her reading is officially and publicly approved in advance by the Justice Department, a court would be obliged to reject it. Thus, the U.S. Attorney would be forced to petition the Department for permission before advancing a novel reading of a federal criminal statute. In the absence of a well publicized and sensational prosecution, vetoing the U.S. Attorney’s request — most likely through silence — is unlikely to generate significant public interest, much less significant public opposition. By changing the formal

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155 *See* United States v. Hill, 55 F.3d 1197, 1199 (6th Cir. 1995) (holding that defendants could in some circumstances be held liable for aiding and abetting under an “illegal gambling business” statute that was similar to the drug kingpin statute).

156 *See* Ruff, *supra* note 102, at 1204. For exceptions, *see note 145* above.

157 *See* Eisenstein, *supra* note 100, at 1195; Ruff, *supra* note 102, at 1208 (“Once an indictment is returned, the Department is unlikely to order its dismissal simply because the United States attorney’s policy judgment or interpretation of the law was at odds with that of the Criminal Division.”). The Clinton Justice Department’s recent misadventures with the federal child pornography statute highlight the political dynamics that lead the Department to acquiesce in the broad readings pioneered by individual U.S. Attorneys. The Department initially confessed error before the Supreme Court in a case in which the court of appeals had construed the statute (18 U.S.C. § 2252) to apply to images of fully dressed minors. *See* Brief for the United States at 8–9, Knox v. United States, 510 U.S. 939 (1993) (No. 92-1183). The Justice Department’s action, engineered by a Department official long opposed to the regulation of obscenity, provoked intense political opposition. *See* Joan Biskupic, *Politics Still Plays a Role in Solicitor General’s Office*, WASH. POST, Feb. 22, 1994, at A1; Neil A. Lewis, *The White House’s Pre-emptive Move on Child Pornography*, N.Y. TIMES, Nov. 13, 1993, at 11. Attempting to defuse the controversy, the White House initially proposed new child pornography legislation. *See* Lewis, *supra*, at 11. But when even this peace offering failed to quiet the issue, the Justice Department switched its position on the existing statute, successfully opposing certiorari after the lower court reaffirmed its broad reading on remand. *See* Knox v. United States, 115 S. Ct. 897 (1995); Brief for the United States in Opposition at 9, Knox (No. 94-413); Linda Greenhouse, *Court Rejects Appeal of Man Convicted in Child Smut Case with Political Overtones*, N.Y. TIMES, Jan. 18, 1995, at D20.
legal effect of administrative inaction, then, *Chevron* would substantially reduce the political cost of moderation.158

This is not to say that *Chevron* would reduce the cost of moderation to zero. Parochial interests — allied with ambitious U.S. Attorneys — will still occasionally bring irresistible pressure to bear on the Justice Department. My point is only that under *Chevron* adventurous interpretations of federal criminal statutes would be less of a problem than are now, both because they would occur less frequently and because, when they did occur, there would be less reason to doubt that they embody national rather than merely parochial concerns.159

Nor is this to say that the shift of effective law-interpretive authority from U.S. Attorneys to the Justice Department would itself be costless. The reward that successful prosecutions confer on individual U.S. Attorneys gives them a legitimate incentive to innovate; their ongoing contact with actual cases affords them practical insights into the consequences of proposed statutory applications; their sheer number fuels the evolution of doctrine. *Chevron* would undercut these benefits to some extent.

Appropriate institutional structures, however, can at least minimize these losses. Federal prosecutors already participate in Justice Department policymaking through the fifteen-member Advisory Committee of U.S. Attorneys.160 Giving this or some similar entity a prominent role in the Justice Department’s interpretive lawmaking process would conserve the energy and experience possessed by U.S. Attorneys as a whole while decoupling those characteristics from the temptations that lead individual U.S. Attorneys to overreach.

3. *Post Hoc Rationalizations.* — Courts often invoke the rule of law to justify denying *Chevron* deference to executive branch interpretations of ambiguous criminal statutes.161 But the fact of the matter is that *Chevronizing* federal criminal law would actually *enhance* respect for rule of law values relative to the federal common law-making

158 In fact, one could plausibly worry that shifting authority from individual U.S. Attorneys to the Justice Department might make federal criminal law excessively moderate. Consider the charge, for example, that the Nixon Justice Department inappropriately compromised an antitrust action against International Telephone & Telegraph. See Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594, 604–05 (1973). But see SUZANNE WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION 158–63 (1977) (arguing that norms of professionalism and political incentives combine to prevent executive branch officials from declining to prosecute strong antitrust claims, and rebutting charges that inappropriate political considerations influenced the ITT case or others). Undue lenience, however, is both less likely to occur and less likely to do lasting damage to the law than is undue severity. See supra note 111. Accordingly, it’s better for the Justice Department to err on the side of moderation than it is for the U.S. Attorneys to err on the side of zeal.

159 Furthermore, the moderating effects of *Chevron* on prosecutorial overreaching can be fortified with related doctrinal devices, which I explore in the next two sections. See infra sections II.B.3–4.


161 See supra p. 490.
baseline. This benefit arises from the best adaptation of the rule against "post hoc rationalizations."

It is a basic axiom of administrative law that a reviewing court may uphold agency action — including its interpretive lawmaking under *Chevron* — only on grounds articulated and defended by the agency in agency proceedings. The court cannot rely on a rationale fashioned by agency counsel for purposes of litigation, although on remand the agency itself remains free to adopt and defend such a position.

This rule against post hoc rationalizations protects administrative law as a system of delegated lawmaking. It does so in part by operating as a prophylactic barrier to implicit common law-making: "in the swirl of litigation it is sometimes not entirely clear whether an argument that appeals to a court was actually presented in quite the fashion the court perceives." In addition, the rule against post hoc rationalizations assures that the agency exercises its power in the setting most conducive to reasoned decisionmaking. As both a practical and a procedural matter, the agency is more likely to give sympathetic attention to competing policies before it takes a position that it is obliged to defend in court.

These rationales would apply with full force were *Chevron* extended to federal criminal law. Permitting courts to approve only those statutory readings defended by the Justice Department in advance of prosecution would prevent courts from siphoning away the executive branch's delegated criminal law-making powers. Even more importantly, such an approach would be essential to securing the benefits associated with reallocation of power within the executive branch.

162 *See*, e.g., Department of Treasury v. Federal Labor Relations Auth., 494 U.S. 922, 933 (1990); SEC v. Chenery Corp., 318 U.S. 80, 88 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

163 *See*, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (applying the post hoc rationalization rule to an agency's interpretive lawmaking); Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("The short — and sufficient — answer to petitioners' submission is that the courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (citations omitted)).


165 Women Involved in Farm Econ. v. United States Dep't of Agric., 876 F.2d 994, 999 (D.C. Cir. 1989); *see also* Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962) ("This is not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid 'propelling[ing] the court into the domain which Congress has set aside exclusively for the administrative agency.'" (citation omitted) (quoting *Chenery*, 332 U.S. at 196)).

166 Nevertheless, an interpretation fashioned by the agency during the pendency of litigating — as opposed to a litigation position fashioned by agency counsel — is entitled to deference, as long as it is embodied in a regulation promulgated according to Administrative Procedure Act rulemaking procedures, which are "designed to assure [that] due deliberation" and not mere litigating convenience animates the agency's decision. Smiley v. Citibank (S.D.), N.A., 116 S. Ct. 1730, 1733 (1996).
Without the rule against post hoc rationalizations, courts would be obliged to defer to the litigating positions of individual U.S. Attorneys, who are much more likely than is the Justice Department itself to advance unduly broad readings for short-term political gain.

But there remains an ambiguity about how the rule against post hoc rationalizations should be adapted to federal criminal law. Courts could read it to bar deference only to those interpretations articulated by U.S. Attorneys in the course of prosecutions. Under this weak conception of the rule, the Justice Department proper would retain the power to issue interpretations that would be immediately effective, even in pending cases — an outcome tantamount to retroactive application of those interpretations. But under a stronger view, the rule would treat as post hoc rationalizations all readings issued after the conduct for which the defendant is being prosecuted and would thus make the Justice Department’s interpretive lawmaking purely prospective.

Neither conception is clearly ruled out by the operation of the rule in conventional administrative law settings. Ordinarily, agencies exercise their interpretive lawmaking authority in rulemaking proceedings, in which their interpretations are nearly always prospective only. One might conclude, then, that the Justice Department’s readings should also be denied retroactive effect. On the other hand, agencies are free to announce retroactively applicable rules of law in administrative adjudications, and in such instances, their interpretations of ambiguous regulatory statutes are entitled to Chevron deference. This practice doesn’t unequivocally support retroactive interpretive lawmaking by the Justice Department, however, because the Department lacks the authority to conduct administrative adjudications.

Thus, the only way to choose between weak and strong conceptions of the rule against post hoc rationalizations is to figure out which makes more sense. The principal advantage of the weak conception is that it would enhance deterrence. Giving the Justice Department the authority to announce retroactively binding interpretations would discourage offenders from seeking out loopholes in ambiguous criminal statutes.

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167 There is a strong presumption that agencies may exercise their rulemaking authority only prospectively. See Bowen, 488 U.S. at 208–09, 213–15.


170 In note 140 above, I discuss how interpretive lawmaking is allocated when regulatory responsibility is divided between rule-enforcing and adjudicatory agencies.
The advantage of the strong conception is that it would promote rule of law values. Courts necessarily give content to underspecified statutes in the course of applying them. This approach risks denying citizens fair warning, at least when the law is being used to regulate conduct that produces licit utility. The strong conception of the rule against post hoc rationalizations would increase notice because it would give Justice Department readings purely prospective effect.\footnote{Indeed, a respectable argument can be made that prospectivity in this setting is mandated by the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. For purposes of ex post facto analysis, administrative determinations that have the force of law receive the same treatment as statutes. See, e.g., Hamm v. Latessa, 72 F.3d 947, 961–62 (1st Cir. 1995) (Stahl, J., concurring in part and dissenting in part) (arguing that “[a] binding policy or regulation . . . is no different in its force and effect than a law passed by a legislature . . . [such that both are] subject to limitation under the Ex Post Facto Clause”), cert. denied, 65 U.S.L.W. 3260 (U.S. Oct. 8, 1996) (No. 95-9428). Justice Department interpretations can be understood to have the force of law if conceptualized as binding exercises of delegated lawmaking authority. Analogously, courts must defer to the United States Sentencing Commission’s interpretations of the Federal Sentencing Guidelines when the guideline at issue is ambiguous and the agency’s interpretation reasonable. See Stinson v. United States, 508 U.S. 36, 44–45 (1993). At least some courts take the position that, if a Commission interpretation does anything more than “clarify” existing law, it cannot be applied retroactively. See, e.g., United States v. Bertoni, 40 F.3d 1384, 1405 (3d Cir. 1994), cert. denied, 116 S. Ct. 1425 (1996).}

The strong conception would also reinforce prosecutorial even-handedness. Although it is less likely to be captured by parochial interests than are individual U.S. Attorneys, the Justice Department would still be too likely to err on the side of excess if allowed to specify rules with retroactive effect. That power would create too strong a temptation to fashion broad readings for the sake of winning particular cases or satisfying transient public demands for retribution. Giving Justice Department readings only prospective deference would immunize the Department’s interpretive lawmaking from these distorting influences.\footnote{The danger of this sort of vindictive lawmaking is one of the primary justifications for the constitutional bar on ex post facto legislation. See Harold J. Krent, The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking, 84 Geo. L.J. 2143, 2158–59 (1996). This danger is much reduced when criminal law-making is done by courts, which are less susceptible to the political temptation to fit the law to particular cases. Indeed, Krent has persuasively suggested that this difference in institutional propensities explains why innovative statutory interpretations, unlike new statutes, are readily afforded retroactive effect. See id. at 2173 n.162.}

On balance, the stronger conception seems superior. The deterrence gains associated with the weak approach are real but small; indeed, even if the Justice Department is limited to prospective interpretive lawmaking, criminal administrative lawmaking is likely to deter just as effectively as criminal common law-making, given the greater speed with which the Justice Department can announce clear statutory interpretations.\footnote{See supra pp. 493–94.} The rule of law losses associated with the weak conception, in contrast, are substantial and unavoidable. These losses are at the heart of the pathologies that now afflict the federal common law of crimes. The strong conception is preferable, then, be-
cause it would allow an administrative law of crimes to combine the legality of full legislative specification with most or all the efficiency of judicial common law-making.

4. Only the Justice Department? — My basic claim is that federal criminal law-making power should be understood to belong to the institution in the best position to exercise it. Because courts enjoy certain institutional advantages over Congress, common law-making trumps full legislative specification; because the Justice Department is even better than courts, interpretive lawmaking would be best of all. But do these conclusions apply across the entire field of federal criminal law? If not, are there devices for tracking criminal law-making power either to the judiciary or to Congress in the domains in which one or the other enjoys an institutional advantage, while leaving the flow of delegated power to the Justice Department unimpeded in the rest?

Chevron doesn’t compel an all-or-nothing institutional choice in theory and isn’t applied that way in practice. The preference that Chevron embodies for administrative lawmaking is qualified by certain policy-laden rules of interpretation, including the presumption against retroactivity,174 various federalism canons,175 and the canon favoring the interests of Native Americans.176 By using these rules instead of Chevron deference to resolve statutory ambiguities, courts effectively intercept delegated lawmaking authority before it reaches the agency. So-called “clear statement” rules reroute the captured power back to Congress: in the face of such a rule, only express congressional action will suffice to establish the disfavored reading. Rules that establish presumptions in favor of particular results direct the intercepted power to the judiciary, which is empowered to identify which considerations are sufficiently weighty to rebut the presumptions.177

It’s plausible to see the interplay between Chevron and the conventional rules of interpretation as reflecting judgments about relative institutional competence.178 On this view, Chevron should normally

176 See, e.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (“Statutes passed for the benefit of [Native Americans] . . . are to be liberally construed, doubtful expressions being resolved in [their] favor.” (citation omitted) (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918)) (internal quotation marks omitted)).
displace policy-laden canons of interpretation because agencies are better suited than courts to exercise delegated lawmaker power. When Congress’s lawmaker power should be viewed as nondelegable (as in the context of federalism), clear statement rules take priority. When the normative judgments of courts are preferred to those of political actors (because, for example, they supply representation-reinforcement for politically powerless groups such as Native Americans), *Chevron* should be subordinated to a presumptive rule of interpretation.\(^{179}\) The same approach could be taken within different sectors of federal criminal law to the extent that considerations of institutional competence vary across them.

It probably would make sense, for example, to deny the Justice Department interpretive lawmaker power when certain federalism values are at stake. Courts now apply (or purport to apply) a clear statement rule against interpretations that extend federal criminal statutes to conduct traditionally regulated by states unless those interpretations are necessary to combat local corruption or remedy interstate gaps in law enforcement.\(^{180}\) This rule implements the prevailing procedural conception of federalism: because states depend almost entirely on their representatives in Congress to protect their core sovereignty interests, the federalism clear statement rule assures that only Congress by statute, and not the judiciary by common law-making, can abridge those interests.\(^{181}\) Because the executive branch is also less responsive to state interests than is Congress, a federalism clear statement rule should be deemed to trump *Chevron* deference to Justice Department interpretations of federal criminal statutes as well.

Giving the federalism canon priority over *Chevron* would also reinforce controls against prosecutorial overreaching — a problem that *Chevronizing* federal criminal law would substantially reduce but not entirely eliminate.\(^{182}\) The residual risk of such behavior is greatest when local interests can appeal to federal officials (whether in the Justice Department or in the local U.S. Attorney’s office) to furnish them with some advantage that they haven’t been able to wrest through local politics. The federalism canon would limit the returns from this form of behavior by placing the power to substitute federal for local criminal law beyond the scope of the Justice Department’s interpretive lawmaker. It would also curb the use of the mail fraud statute as a

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\(^{180}\) *See*, e.g., *Monsul v. United States*, 498 U.S. 103, 113 (1990) (“[F]ederal criminal statutes that are intended to fill a void in local law enforcement should be construed broadly.” (alteration in original) (quoting *Bell v. United States*, 462 U.S. 356, 362 (1983) (Stevens, J., dissenting)) (internal quotation marks omitted)); *United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring a clear statement before a court will construe an ambiguous statute to “define as a federal crime conduct readily denounced as criminal by the States” (footnote omitted)).

\(^{181}\) *See* Kahan, *supra* note 4, at 355–56.

\(^{182}\) *See supra* pp. 497–500.
reinforcement for state tort norms, an application of federal criminal law that presents the greatest risk of chilling socially valued activity.183

Does it make sense to subordinate Chevron to other policy-laden rules of interpretation in federal criminal law? Experience might well reveal other domains within which either Congress or the judiciary enjoys institutional advantages over the Justice Department. Nevertheless, courts should definitely proceed with caution in recognizing interpretive rules that trump Chevron deference in the context of federal criminal law. Multiplying the number of such rules inevitably shifts effective lawmaking power to courts, which must exercise discretion in choosing among them.184 Thus, even if it were possible to justify each of several such rules individually, their cumulative effect in diluting the interpretive lawmaking power of the Justice Department might threaten the broader benefits associated with Chevronizing federal criminal law.185

III. GETTING THERE FROM HERE

The last Part sought to develop the theoretical benefits of Chevronizing federal criminal law; this one turns to the nuts and bolts of implementation. I begin by identifying how, consistent with existing doctrine, courts can transform federal criminal law from a common law-making regime into an administrative lawmaking one. I then consider the issues of when courts should demand that the Justice Department exercise interpretive lawmaking powers and what types of

183 See Coffee, Does “Unlawful” Mean “Criminal”? supra note 93, at 219–20; Coffee, From Tort to Crime, supra note 93, at 126–30.


185 “True defenses”—doctrines that exculpate notwithstanding sufficient proof of the elements of the offense, see Joshua Dressler, Understanding Criminal Law 182 (2d ed. 1995)—constitute another domain in which it probably makes sense to dispense with executive interpretive lawmaking. Because true defenses have traditionally been uncodified, and largely remain so, courts have traditionally assumed responsibility for determining their contours. The case for Chevronizing this pocket of federal criminal law is comparatively weak. The relative value of expertise is small, because defenses are generally much less complex and less fraught with questions of policy than are offenses like mail fraud, racketeering, or interstate transportation of stolen property. Inconsistency of definitions is likewise less important because of the relatively small proportion of federal cases in which defenses are asserted. Indeed, because the common law-making function is so well established in this setting, courts don’t generally defer to individual U.S. Attorneys in defining defenses. See, e.g., United States v. Torniero, 570 F. Supp. 721, 722–24 (D. Conn. 1983). Nor is this function—which affects common offenders much more than white collar ones—as likely to generate the special interest pressures that fuel prosecutorial overreaching. In addition, because defenses are uncodified, it would be more difficult to implement Chevron: what exactly would the Justice Department be interpreting when it purported to be exercising its interpretive lawmaking powers? Finally, insofar as the line between crimes and true defenses is a bright one, there would be little risk of creeping judicialization were defenses preserved as an enclave of common law-making within a Chevronized regime.
interpretations should be deemed sufficient to warrant judicial deference.

To make my analysis more concrete, I will at different points relate my proposals to an actual problem in federal criminal law: whether the unauthorized receipt of government information is theft. Section 641 of title 18 of the United States Code makes it a crime to take “without authority . . . any . . . thing of value of the United States.” Is confidential government information a “thing of value” for purposes of the statute? If so, is it always? When is receipt of this information “without authority” — only when receipt violates an independent legal prohibition, or whenever a person lacks express permission to receive it from a government official (and if so, which official)? Does it make any difference what use the person plans to make of the information — whether, for example, she plans to derive an advantage in a government procurement auction or instead to publish an exposé on corruption in the awarding of government contracts? Does the status of proprietary information under other federal laws, such as the mail fraud statute, affect the status of government information under § 641?

These questions have generated a fair amount of dissent among the courts that have addressed them. Chevronizing federal criminal law wouldn’t compel any particular set of answers. But it would create a concrete framework for resolving these (and many other) issues in an authoritative and fully considered fashion.

A. How: Skidmore as Carrot, Lenity as Stick

The most serious practical impediment to Chevronizing federal criminal law is also the most obvious: all courts that have considered the issue have denied that Chevron applies to executive branch readings of ambiguous criminal statutes. One way to surmount this doctrinal barrier, of course, would be for courts to reverse themselves. Alternatively, Congress could enact a statute directing courts to treat Justice Department interpretations as binding exercises of delegated lawmaking power.

188 See supra p. 490.
189 As long as Congress identified an “intelligible principle” to guide the Justice Department’s discretion, such a delegation would clearly be constitutional. Touby v. United States, 500 U.S. 160, 165–66 (1991) (upholding the delegation of criminal law-making authority to the Attorney General under the Controlled Substances Act) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted); see also Loving v. United States, 116 S. Ct. 1737, 1750–51 (1996) (upholding the delegation of authority to the President to define aggravating factors warranting death sentence by court martial); Mistretta v. United States, 488 U.S. 361, 372–74 (1989) (noting that the “intelligible principle” test . . . has been driven by a
But the implementation of my proposal doesn’t depend on legal developments as drastic, or as improbable, as these. Courts can effectively simulate the *Chevron*ization of federal criminal law, consistent with existing precedent, simply by alternating their application of two established canons of statutory interpretation: the *Skidmore* doctrine, which courts should use to uphold statutory constructions formally defended by the Department of Justice in advance of prosecution; and the rule of lenity, which courts should use to compel narrow interpretations in all other cases.

Start with *Skidmore*. *Chevron* is not the only doctrine that supports judicial acquiescence in executive branch interpretations. Indeed, courts often give substantial if not controlling weight to the readings of agencies (including, for example, the Equal Employment Opportunity Commission) that lack delegated lawmaking powers but that nonetheless possess important enforcement responsibilities. The leading statement of this approach appears in the Supreme Court’s decision in *Skidmore v. Swift & Co.*:

[The rulings of this Administrator] do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. . . . The fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. . . .

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

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practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives, and upholding the delegation of authority to the United States Sentencing Commission to define sentencing guidelines (citations omitted)). Indeed, still another alternative would be for Congress to delegate criminal interpretative lawmaking authority to an independent agency akin to the United States Sentencing Commission. It seems unlikely, though, that the expertise of such an agency would surpass that of the Justice Department. Moreover, the history of the Commission casts doubt on any claim that a criminal law-making agency would be insulated from partisan political influences. See generally Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 936 (1991) (“From the beginning, . . . the Federal Sentencing Commission has seemed more inclined to lead the severity revolution than to slow it.”).


consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. 192

Courts routinely give Skidmore deference to Justice Department readings. 193 The most prominent examples come from antitrust law, in which the Department’s interpretations, although not imbued with formal legal effect, are nonetheless routinely engrafted by courts into controlling rules of law. 194 Courts also accord substantial weight to the Justice Department’s reading of the Civil Rights Act of 1964 195 and the Voting Rights Act. 196 It would be perfectly consistent with these lines of authority to apply Skidmore deference to the Justice Department’s readings of ambiguous criminal statutes.

Doing so, moreover, should produce results that are very close to what Chevron would yield. As a formal matter, Chevron makes deference to executive branch readings mandatory and conclusive, whereas Skidmore makes the weight of executive readings depend on contextual considerations. 197 The distinction largely disappears, however, in the criminal law context, in which the relevant considerations — from expertise, to uniformity, to accountability, to rule of law values — all support giving conclusive weight to the Department’s considered views. 198

Now consider the rule of lenity. Lenity is the canon of construction that directs courts to select narrow rather than broad interpretations of

192 Id. at 139–40.
198 Exactly how much Chevron deference does and should differ from Skidmore deference is subject to debate. Compare, e.g., Breyer, supra note 127, at 379 (advocating a flexible, context-sensitive understanding of Chevron that moves it in the direction of Skidmore), with Yavelberg, supra note 197, at 173–75 (noting unhappily that Skidmore deference is often applied in a mechanical fashion akin to Chevron). I take no position on the proper relationship between these two doctrines as a general matter in administrative law. My only point is that the Skidmore doctrine, as it stands, is sufficiently malleable to support a strong, Chevron-like degree of deference to Justice Department readings of federal criminal law, an approach that is justified by highly particular, context-specific considerations. Cf. White, supra note 125, at 88–107 (using contextual considerations to justify conclusive deference to EEOC interpretations of civil rights statutes notwithstanding the agency’s lack of rulemaking authority).
ambiguous criminal statutes. The rule is notoriously underenforced. Indeed, its abrogation is a necessary condition of criminal common law-making. Defaulting to the narrowest reasonable reading would render incompletely specified statutes generatively inert, thereby forcing Congress itself to specify all operative rules of criminal law. In effect, the rule of lenity, conventionally understood, is an anti-delegation doctrine. Given the high cost and futility of complete legislative specification of criminal offenses, it's a good thing that courts have traditionally ignored this rule.

But lenity can play a much more salutary role as part of an administrative law of crimes. In such a regime, the court would adopt the narrowest reasonable reading of a criminal statute only when the Department of Justice has failed to give a reasoned justification for a broad reading in advance of prosecution; otherwise, the court would defer to the Department's reading under Skidmore. This approach would create appropriate institutional incentives for the Justice Department to engage in reasoned elaboration of criminal statutes. Moreover, lenity in such a regime wouldn't prevent Congress from ceding its lawmaking power through incomplete specification; it would merely assure that the power that Congress gives away is exercised by the executive branch rather than by the judiciary. When combined with Skidmore, lenity (like Chevron) functions not as an anti-delegation doctrine but as a useful delegation-tracking device.

Finally, such an approach would beneficially alter the legal consequences of lenity. Judicial interpretations — even those that amount to common law-making in substance — are treated as revealing fixed and immutable statutory meaning. As a result, when reliance on lenity blocks adoption of a worthwhile rule of law, the only way to undo the damage is for Congress to enact a new statute. In an administrative lawmaking system, however, a court would invoke lenity not to identify an authoritative statutory meaning, but only to punish the Justice Department for failing to defend its own broad reading in advance of prosecution. Under conventional administrative law principles, the Justice Department would remain at liberty thereafter to supply the missing ra-

199 See, e.g., McNally v. United States, 483 U.S. 350, 359–60 (1987) (holding that the rule of lenity permits courts to select the “harsher” of “two rational readings of a criminal statute . . . only when Congress has spoken in clear and definite language”).
200 See Kahan, supra note 4, at 346 & n.3.
201 See id. at 350–67.
202 See supra pp. 481–82.
203 That's the theory, at any rate; in practice, courts are much more likely to revisit interpretations that implement “common-law statutes” such as the Sherman Act and the Labor Act. William N. Eskridge, Jr., Overturing Statutory Precedents, 76 Geo. L.J. 1361, 1377–81 (1988) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting)) (internal quotation marks omitted). Practice is closer to theory, though, for interpretations of criminal statutes, which the Supreme Court rarely (if ever) reconsiders.
tionale and renew its position in a future case. This disposition would reduce the systemic costs of leniency, for it is generally much easier for the executive branch to announce precise interpretations of law than it is for Congress to enact precise statutes. Indeed, because ex ante specification of law is much more feasible for the Justice Department than it is for Congress, the occasions for applying leniency at all under an administrative law of crimes should be relatively infrequent.

Consider how the analysis so far relates to the problem of information theft. The Justice Department has not purported to resolve the difficult issues concerning the application of § 641 to government information (although the United States Attorneys’ Manual does sound a cautionary but largely unheeded note). Thus, were a prosecutor to charge someone with unlawfully receiving such information — whether Nina Totenberg for obtaining the Anita Hill affidavit or a defense industry executive for gaining confidences from a government procurement officer — a court would be obliged to dismiss the indictment under the rule of leniency. Such a disposition would prevent either courts or individual U.S. Attorneys from engaging in the implicit lawmaker required to bring the highly general language of § 641 to bear on unauthorized disclosure of information. But this disposition wouldn’t permanently disable the Justice Department from engaging in this task. In the event that the Justice Department announced and defended such an application, a prosecutor would be free to advance it in a subsequent case against another defendant.

B. When: “New Rules” of Federal Criminal Law

The doctrinal structure I’ve proposed obliges the executive branch to speak and the judiciary to listen when Congress implicitly delegates criminal law-making power. Making this structure work requires answering additional practical questions. When should a statute be deemed sufficiently ambiguous or incomplete to be an implicit delegation of lawmaking authority? When should a proposed statutory interpretation be deemed sufficiently policy-laden to require a reasoned defense in advance of prosecution?

Consider these issues in the context of information theft. In showing how Skidmore and leniency would track this issue to the Department of Justice, I simply assumed that § 641 is sufficiently ambiguous to require a delegated lawmaking solution. However, courts rarely find statutes such as § 641 to be “ambiguous” when they interpret them.

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204 In administrative law parlance, this disposition is referred to as a “Chenery remand,” so named after SEC v. Chenery Corp., 318 U.S. 80 (1943).

205 See supra pp. 481–82, 493–94.

206 See United States Attorneys’ Manual, supra note 109, § 9-2.024 (1988) (stating that “it is inappropriate to bring a prosecution” if intangible information is obtained for the purpose of public dissemination, unless the information was obtained by certain unlawful means — wiretapping, interception of correspondence, criminal entry, or trespass).
Their analysis is guided by a series of interpretive strategies — including analogical reasoning and the use of policy-laden rules of construction — designed to connect open-textured statutory language to particular facts. The power of these interpretive conventions to dispel ambiguity explains why courts so rarely invoke lenity, which applies only if "reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." Under a business-as-usual approach to interpretation, a court might well conclude that § 641 is not ambiguous for purposes of Chevron.

But business as usual would be inconsistent with Chevron, for the usual business of federal courts is criminal common law-making. As I've emphasized, policy-laden rules of construction frequently operate as delegation-tracking devices. The particular rules that courts draw upon when construing federal criminal statutes track lawmakers authority to the judiciary; they supply the normative inspiration necessary to translate incompletely specified statutes into operative rules of law. Accordingly, if courts continue to apply the entire range of these interpretive rules for the purpose of determining whether criminal statutes are "ambiguous" under Chevron, they, rather than the Justice Department, will be the system's principal delegated criminal lawmakers.

Adapting Chevron to federal criminal law, then, requires that courts turn off their imagination at a much earlier point in the interpretive process. But at what point? And by what doctrinal means?

These are complex questions, but the law is not barren of resources for constructing general answers. The goal is to divert the power to issue contentious, policy-laden statutory readings away from the judiciary and to the Department of Justice; that task requires doctrinal devices for measuring and assessing the relative innovation of particular statutory interpretations. The Supreme Court has developed such tools to address the analogous problem of whether a particular interpretation of the Constitution is too novel to be given retroactive effect. The Court's retroactivity jurisprudence consists of a variety of "new rule" tests that vary in content depending upon the perceived costs of judicial innovation in different legal settings.

207 See Kahan, supra note 4, at 384-89.
209 See supra pp. 504-05, 510-11.
210 See Kahan, supra note 4, at 386-89.
211 See, e.g., American Trucking Ass'ns v. Smith, 496 U.S. 167, 184 (1990) (plurality opinion) (indicating that an interpretation invalidating a state tax is a new rule only if it is a "clear break" with precedent); Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion) ("[A] case announces a new rule [for purposes of a habeas corpus claim] if the result was not dictated by precedent existing at the time the defendant's conviction became final.") Harlow v. Fitzgerald, 457 U.S. 512
The gist of my argument so far is that the law ought to tolerate very little judicial innovation when it comes to specifying the content of incomplete criminal statutes. The more imaginative a court is allowed to be, the greater its effective common law-making powers; and the greater its lawmaking powers, the greater the risks associated with limited judicial expertise, judicial dissensus, and prosecutorial over-reaching. Thus, courts ought to apply an expansive test for identifying which statutory applications count as “new rules,” which would have to be developed through interpretive lawmaking by the Department of Justice, and not through common law-making by the judiciary.

The most expansive “new rule” test comes from Teague v. Lane. That decision prohibits a court from granting a habeas corpus petition on the basis of any constitutional interpretation that isn’t “dictated” by precedent. An interpretation is deemed to be dictated only when no one could reasonably disagree that it is.

If used to identify new rules of substantive criminal law, the Teague formulation would ensure that courts do not implicitly make contentious policy choices in the guise of interpretation. Under the pernicious influence of the principal-agent conception of interpretation, courts sometimes describe readings of incompletely specified criminal statutes as “controlled” or “dictated” or “governed” by congressional intent. But Teague would oblige courts to be more forthcoming about the normative discretion that such readings entail:

[T]he fact that a court says that its decision is within the “logical compass” of an earlier decision, or indeed that it is “controlled” by a prior decision, is not conclusive for purposes of deciding whether the current decision is a “new rule” under Teague. Courts frequently view their decisions as being “controlled” or “governed” by prior opinions even when aware of reasonable contrary conclusions . . .

Because it forces courts to acknowledge the role of contentious policy choices in interpretation, the candid realism of Teague better suits a regime of administrative law crimes than does the false modesty that often accompanies criminal common law-making.

800, 818 (1982) (holding that an individual government official enjoys good faith immunity from § 1983 claims and Bivens actions when the official’s “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”). See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731, 1738–57 (1991) (detailing Supreme Court “new rule” jurisprudence).

214 See id. at 301 (plurality opinion); accord Butler v. McKellar, 494 U.S. 407, 412 (1990).
215 See Butler, 494 U.S. at 415; Fallon & Meltzer, supra note 211, at 1747–48.
216 See supra pp. 480–81.
217 Butler, 494 U.S. at 415.
To see how *Teague* would work here, return to the problem of information theft. Section 641 does not *dictate* — in the *Teague* sense — any particular answers to the questions of whether and when receiving confidential government information is theft. The terms “thing of value” and “without authority,” if construed literally, are expansive enough to reach the unauthorized disclosure of information. This usage, however, is without clear antecedents at common law. The statute’s legislative history is also inconclusive. The only specific application that Congress had in mind when it enacted § 641 was the theft of tangible property. Many of the reasons Congress had for making theft of tangible property illegal would no doubt apply to unauthorized disclosure of information. But these considerations vary in strength across different types of confidential information and are offset — to greater and lesser degrees in different contexts — by risks peculiar to government regulation of information. Because reasonable arguments can be made on both sides, it is the executive branch that should be responsible for making the policy choices involved in adapting § 641 to the disclosure of information.

In an administrative lawmaking regime, courts would be obliged to assess the novelty of statutory applications relative not only to congressional policy choices, but also to executive ones. Once *Chevron*ized, federal criminal law will come to be dominated by formally defended administrative interpretations, much the way it is now dominated by common law rules. It would be wasteful to deny these readings any generative effect. If the Justice Department were to conclude, for example, that the disclosure of confidential information relating to investigations of drug trafficking is “theft” for purposes of § 641, nothing would be gained by insisting that the Department engage in additional interpretive lawmaking before courts apply the statute to disclosure of information relating to investigations of weapons trafficking.

Again, courts should conclude that a new reading is sufficiently grounded in previous executive policy decisions to obviate the need for additional delegated lawmaking only when the new reading is “dictated” by an existing one. This adaptation of *Teague* is necessary to prevent courts from implicitly engaging in lawmaking when they interpret the Justice Department’s own interpretive regulations. Whether an illegal weapons dealer should be considered a thief when she obtains confiden-

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219 See United States v. Lambert, 446 F. Supp. 890, 898 (D. Conn. 1978) (“In the realm of government records and information . . . there is no established common law of exclusive possession.”), affd sub nom. United States v. Girard, 601 F.2d 69 (1st Cir. 1979); cf. Nimmer, supra note 187, at 318-19 (discussing case law indicating that the temporary removal and photocopying of files that one is lawfully entitled to possess at a given place does not constitute a conversion).
220 See United States v. Truong Dinh Hung, 629 F.2d 908, 923-24 (4th Cir. 1980) (opinion of Winter, J.); Lambert, 446 F. Supp. at 892-93; see also Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579, 596 n.42 (1986) (“[N]o one contends that it occurred to Congress that it was restricting the dissemination of information when it enacted the statute.”).
221 See supra pp. 482-83 (elaborating on the costs of full ex ante specification).
tial information on FBI sting operations is one question; whether a jour-
nalist should be when she receives a leaked FBI report on the
background of a Supreme Court nominee is another. If a court is per-
mitted to treat the Justice Department’s affirmative answer to the first
question as sufficient to support an affirmative answer to the second, the
court, rather than the Department of Justice, will be giving content to
§ 641.

Applying Teague to the Justice Department’s interpretations is also
necessary to avoid the phenomenon of redelegation. Like Congress, the
Justice Department cannot hope to promulgate a fully specified criminal
code; the forms that criminal wrongdoing assume are simply too numer-
ous and diverse to be exhaustively enumerated ex ante. Articulating
concrete rules of law, moreover, is time-consuming and politically con-
troversial. Like Congress, then, the Justice Department might be
tempted to reduce its lawmaking burdens by promulgating relatively un-
controversial and open-textured standards that can be adapted to un-
foreseen species of criminality ex post.

If courts permit the Justice Department to resort to this economizing
device, however, most of the benefits of Chevron will be lost. Deferring
lawmaking responsibility to the point of application is tantamount to
delegating it to the law applier. If courts take on the responsibility of
converting highly general executive interpretations into concrete rules of
law, the results will reflect the lack of expertise and dissensus associated
with common law-making. If individual U.S. Attorneys take it on, the
predictable consequence will be prosecutorial overreaching.

But such redelegation couldn’t take place if Teague were used to as-
sess the nexus between a particular statutory application and previous
exercises of executive delegated lawmaking. By design, open-textured
formulations do not dictate unique operative rules. Accordingly, such
formulations would be insufficient under Teague to support contentious
statutory applications. Were the prosecution to seek support for a partic-
ular statutory reading by pointing to open-textured executive pronounce-
ments, the court would be obliged to find for the defendant under the
rule of lenity.

C. What: Reasoned Decisionmaking, Exposed to Public View

The final nuts-and-bolts issues concern what the Justice Depart-
ment must do to earn Chevron deference. When should a court view
the Justice Department’s interpretation of an ambiguous statute as a
“reasonable” one? Where should the court look to find the Depart-
ment’s considered views? Conventional administrative law principles
supply the answers. I’ll examine, in turn, what those principles say
about the content and the form of acceptable interpretive lawmaking
in this setting.

1. Content. — Under Chevron, an agency’s interpretation is
deemed to be “reasonable” as long as it isn’t “arbitrary and capricious”
for purposes of the Administrative Procedure Act — the same standard used to test the adequacy of all exercises of delegated lawmaking.\textsuperscript{222} This test focuses less on the quality of the agency’s result than on the caliber of its reasoning:

[A] court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action . . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.\textsuperscript{223}

If the agency fails to engage in this form of “reasoned decisionmaking,”\textsuperscript{224} the court must remand the case to the agency, which must then either articulate an adequate defense of its position or abandon it.\textsuperscript{225}

This standard can be readily adapted to an administrative law of crimes. For its interpretation to be reasonable, the Justice Department must supply a “satisfactory explanation” that addresses every “important aspect of the problem” that it is trying to solve.\textsuperscript{226} Such an explanation would have to show how the Justice Department’s reading advances such goals as deterrence,\textsuperscript{227} expressive condemnation,\textsuperscript{228} and desert.\textsuperscript{229} It would also have to identify the expected cost of enforcing such a reading, the risks of overdeterrence, and the impact of the Justice Department’s position on other context-specific values.

The problem of information theft again furnishes a useful illustration. Determining the proper treatment of unauthorized disclosures under § 641 requires balancing an intricate set of competing objectives. On one side are all the critical government functions that depend on confidential information — from enforcement of criminal laws, to the awarding of government contracts, to the protection of national security.

\textsuperscript{222} National Ass’n of Regulatory Util. Comm’rs v. Interstate Commerce Comm’n, 41 F.3d 721, 726 (D.C. Cir. 1994); see Sunstein, supra note 115, at 2104–05.


\textsuperscript{224} Id. at 52.

\textsuperscript{225} See SEC v. Chenery Corp., 332 U.S. 194, 200–03 (1947) (holding that the agency is free either to change its position or to reassert it following remand as long as the agency engages in reasoned decisionmaking).

\textsuperscript{226} Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43.


On the other are all the reasons, economic and political, that support the free pursuit of information, including information possessed by the government. The high value that our society attaches to such activity is reflected, for example, in the Freedom of Information Act and in the denial of copyright protection to government works. Against the background of public expectations about the legitimacy of information-seeking, application of § 641 to some behavior risks unfair surprise. Punishing even clearly illegitimate forms of information-seeking, moreover, risks chilling more ambiguous but ultimately desirable forms of it. The reasoned decisionmaking standard wouldn’t bar the Justice Department from resolving these tensions in favor of regulation, but it would require the Department to show that it has fully considered them.

The reasoned decisionmaking standard would also require the Justice Department to conduct its analysis at an appropriately low level of generality. Perhaps it makes sense to treat private confidential information as “property” capable of being misappropriated for purposes of the mail fraud statute, but it doesn’t necessarily follow that government information should be viewed as property susceptible of theft for purposes of § 641, given the special dangers associated with government control of information. The social value of prohibiting potential lawbreakers from seeking out information about pending criminal investigations is high, but it doesn’t necessarily follow that § 641 should therefore be used to prohibit journalists from seeking out confidential information about the qualifications of Supreme Court nominees — an application of the law that arguably has negative social value. A justification for applying § 641 to information-seeking that “entirely failed to consider” the effects of such a reading across diverse contexts, and the possibility of fashioning appropriate context-specific limiting principles, would be arbitrary and capricious.

The same would be true for an explanation that purported to derive rules on information theft solely from Congress’s “intent” in enacting § 641. Chevron deference presupposes that Congress has not resolved the issue at hand through its own policy choices. “Congressional intent” is thus no explanation at all, much less a reasoned one, for adopting a particular reading of an incompletely specified statute.

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235 See, e.g., American Petroleum Inst. v. EPA, 906 F.2d 729, 740 (D.C. Cir. 1990) (stating that “an agency’s conclusion that a particular course is compelled by a statute that is actually ambiguous does not display the caliber of reasoned decisionmaking necessary to warrant” Chevron deference); Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm’n, 826 F.2d 1125, 1129 (D.C. Cir. 1987) (holding that an agency cannot “assert a nonexistent congressional prohibition as a means to avoid responsibility for its own policy choice”).
In fact, the reasoned decisionmaking test would hold the Justice Department to a much higher standard than any that courts are required to meet when they make federal common law crimes. Courts frequently impute contentious, policy-laden readings of incompletely specified statutes to congressional intent. In addition, they often assume that they must analyze statutory questions at a high level of generality — either treating sensible statutory applications as entailing nonsensical ones, or eschewing sensible readings in order to avoid the nonsensical ones that they would ostensibly entail. These kinds of errors, which are attributable to the principal-agent conception of interpretation, are among the primary causes of the pathologies that afflict the federal common law of crimes. The power of Chevron to filter out these forms of specious reasoning is another one of its great advantages.

2. Form. — Justice Department interpretations of criminal statutes currently appear in a variety of formats — from formal statements of policy published in the Federal Register or the United States Attorneys' Manual, to informal memoranda distributed only within the Department, to briefs filed in court. Which of these formats are acceptable vehicles for the type of interpretive lawmaking that warrants Chevron deference?

Conventional administrative law principles establish a hierarchy among interpretive formats. At the top are agency pronouncements that have the formal effect of law, such as regulations promulgated after notice-and-comment rulemaking and doctrines fashioned in administrative adjudications. Reasonable interpretations that appear in these forms merit conclusive deference under Chevron. But interpretations that appear in less formal materials — including published interpretive rules, enforcement guidelines and manuals, and even internal memoranda — are still entitled to weight. Exactly how much depends both on how formal the interpretation is and on how important formality is in a par-

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236 See supra pp. 480–81.
237 See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248–49 (1989) (reasoning that Congress deliberately used general language in RICO to give the statute flexibility to deal with diverse and heterogeneous forms of criminality and that it is therefore "beyond the power" of courts to construe the language to protect legitimate businesses from liability); United States v. DiGilio, 538 F.2d 972, 978 (3d Cir. 1976) (indicating that application of § 641 to pilfered photocopies of confidential FBI files creates a possibility of abusive applications of the statute, but asserting that the solution to the problem must be legislative).
238 See, e.g., Liparota v. United States, 471 U.S. 419, 426–27 (1985) (concluding that those who engage in black market trade in food stamps should be given a broad mistake-of-law defense in order to protect from liability those who benignly tear up stamps or throw them away); Williams v. United States, 458 U.S. 279, 286 (1982) (holding that a statute prohibiting the making of a "false statement" to a bank should be read not to reach "check-kiting" in order to avoid the conclusion that "any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability").
240 See Anthony, supra note 190, at 42–63.
241 See id. at 44.
ticular context. In those settings in which the “reasonableness” of the agency’s interpretation depends on the full and public elaboration of the agency’s position, for example, courts demand much more formality before they will defer to the agency’s interpretation.242

The value of formality would be high in an administrative law of crimes. Making the Justice Department’s interpretations of incompletely specified statutes publicly accessible would promote both deterrence and fair notice. Even more importantly, public exposure of agency reasoning is essential to counteract the political dynamics that lead to prosecutorial overreaching. Chevron has the potential to moderate criminal law by shifting lawmakers’ responsibility from individual U.S. Attorneys, who frequently advance bad statutory readings for political gain, to the Justice Department, which gets much less benefit from such readings and which is much more likely to internalize the costs of them.243 This effect is accentuated when the Justice Department must justify its broad interpretations in public, for then it knows that it cannot escape being held accountable by interests who oppose such readings.244

Courts should therefore promote formality by reserving deference for Justice Department readings that appear in publicly accessible formats. The Justice Department is not statutorily authorized to elaborate the content of most incompletely specified criminal statutes through notice-and-comment rulemaking or agency adjudication. However, the Department can and often does supply interpretations in other published materials, including interpretive rules and the United States Attorneys’ Manual.245 Interpretations embodied in these formats are sufficiently visible to warrant deference. Alternatively, the Department could fashion new formats of comparable public accessibility for the express purpose of implementing its interpretive lawmaking powers.246 Courts shouldn’t defer to readings embodied in internal memoranda and briefs,

244 Narrow interpretations, in contrast, would require no public defense; the Department of Justice could implement those through silence, which would compel courts to apply the rule of leniency. See supra pp. 510–11. This asymmetry — requiring the Department to own up publicly to broad readings while permitting it to adopt narrow readings through the much lower profile course of inaction — adds weight to the moderation side of the policymaking scale. See supra p. 499.
245 See, e.g., United States Attorneys’ Manual, supra note 109, § 9-69.267 (1988) (identifying the proper statute for prosecuting the filing of false affidavits in federal court proceedings); id. § 9-105.160 (indicating when property may be considered “proceeds” under 18 U.S.C. §§ 1956–1957); id. §§ 9-I11.430, 9-I11.500-20 (establishing when an asset turned over to an attorney as payment for legal fees may be subject to the Forfeiture Statute).
however, for these interpretations are too low-profile to ensure notice and political accountability.  

CONCLUSION

My goal in this Article has been to defend an admittedly unorthodox claim: that the executive branch should make and interpret federal criminal laws and not just enforce them. Strict separation of these functions has traditionally been understood to be essential to fair notice, prosecutorial even-handedness, and democratic accountability. What I’ve tried to show, however, is that concentrating them through the mechanism of Chevron would better promote all of these values plus a host of others.

To see why this is so requires first seeing that one of the central axioms of federal criminal law — that there are no federal common law crimes — is a myth. There are indeed federal common law crimes — lots of them. They come into being because Congress predictably and systematically fails to enact fully specified criminal statutes, and because courts predictably and systematically (if not always rationally and self-consciously) give substance to these statutes through the exercise of normative discretion. This regime of delegated lawmaking is in fact much less expensive and much more effective than a regime of purely legislative crimes would be. But it is still imperfect in many ways.

Chevronizing federal criminal law would make things much better. Shifting delegated criminal law-making power from the judiciary to the executive branch would detract little, if at all, from the efficiency of delegation. It would, however, avoid many of the mistakes and inconsistencies that now plague criminal common law-making. Even more critically, by concentrating lawmaking responsibility within the executive branch, Chevron would counteract the political dynamics that lead to overreaching by U.S. Attorneys, who currently exercise disproportionate influence over how courts exercise their own common law-making authority. It would also enhance rule of law norms by forcing the Justice Department to articulate and defend its readings of incompletely specified statutes before applying them. In sum, a federal administrative law of crimes dominates a federal common law of crimes along every relevant dimension.

Still, the idea that federal criminal law should be Chevronized remains undeniably innovative, perhaps even heretical. However much sense an administrative law of crimes makes, isn’t the doctrinal novelty of this proposal a fatal objection to it?

247 In addition, the rule against post hoc rationalizations would prevent a court from treating an explanation in a brief as sufficient to justify a previously undefended interpretation. See supra section II.B.3.
It shouldn't be. Formal doctrines don't have lives independent of the purposes they serve. They are created for a reason. They adapt as circumstances, including our views on institutional functions, change. And finally, when the tension between them and our circumstances becomes intolerable, they expire and give way to new ones. This has happened time and again to the legal principles that organize our understanding of how powers should be allocated among different institutions.248

_Chevron_ itself is an example. It was heretical once to question _Marbury_'s teaching that "[i]t is emphatically the province and duty of the judicial department to say what the law is."249 But sensibilities changed. Participants in the legal culture came to be persuaded of the central insight of legal realism — that saying what the law is often involves saying what it ought to be. They also came to accept that the executive branch is often better at doing that than the judiciary, at least in administrative law. At that point, the teaching of _Marbury_ was overtaken — in one small but important way — by _Chevron_.250

Abstract doctrines, in short, have life cycles. The point of this Article has been to identify two — the separation of criminal law-making from law-enforcement powers, and the nonexistence of federal common law crimes — that have reached the end of theirs.

250 See Lessig, _supra_ note 248, at 436.