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Increased Judicial Scrutiny for the Administrative Crime

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NOTES

INCREASED JUDICIAL SCRUTINY FOR THE ADMINISTRATIVE CRIME

INTRODUCTION

Observers have long recognized the extent to which administrative action pervades modern economic and legal life.[1] While the Constitution's text entrusts Congress with all legislative powers granted the federal government,[2] it cannot be denied that among the panoply of administrative powers now exercised by agencies are rule-making functions that operate almost exactly like legislation. Agencies can enact rules and regulations that are binding on all and are the law of the land.

The power of agencies to promulgate rules that define criminal conduct under certain statutes[3] is problematic. During the first century of United States history, only Congress could define criminal conduct.[4] Criminal laws have always been treated specially in the United States, as reflected in the Constitution.[5] Only Congress was believed to understand the peculiar community approbation in-

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1 *See, e.g.*, Reginald Parker, *Why do Administrative Agencies Exist?*, 45 GEO. L.J. 331, 361 (1957) (" 'Government by Decree' is an indisputable necessity in the 20th century in a country [the size of the United States].").

2 U.S. CONST. art. I, § 1.

3 A fairly obscure, but quite representative, statute authorizing administrative crimes is the Atlantic Salmon Convention Act of 1982, 16 U.S.C. §§ 3601-3608 (1988). Section 3604(a) delegates in fairly broad terms the power to enact regulations to the Secretary of Commerce, who under the act "shall promulgate such regulations . . . as may be necessary to carry out the purposes of the Convention and this Chapter." 16 U.S.C. § 3604(a) (1988). Section 3606(b)(2) then provides, *inter alia*, that violation of regulations promulgated under the Act are punishable by criminal penalties of a fine of not more than $50,000 or imprisonment of up to six months. *Id.* § 3606(b)(2).

Other administrative crimes are more serious. For example, willful violations of regulations promulgated under section 10 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78(j) (1988), can result in up to ten years imprisonment. SEC rule 10b-5 may be the most prominent administrative crime of all. Governing, *inter alia*, insider trading, this rule fueled the downfall of Ivan Boesky.

4 Congressional power to define crimes is sharply limited by the text of the Constitution; Congress can only create federal crimes that relate to federal lands and certain substantive areas, such as interstate commerce. Nonetheless, given the almost limitless Commerce Clause power Congress now enjoys, federal criminal law has become both voluminous and important. *See* WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 2.8 (1986).

5 *See infra* notes 15-19 and accompanying text.

volved in creating crimes.[6] In the early twentieth century, however, the exclusivity of the crime-making power eroded, and Congress and the Supreme Court recognized the administrative power to define the conduct prohibited by criminal statutes.[7] The justification for this change was based on a belief that Congress, in enacting statutes regulating areas of conduct and containing criminal penalties, "created" the crime. Agencies merely filled in the details of an established regulatory framework.[8]

Upon this narrow foundation, agencies have constructed a wide range of "administrative crimes." But in the interim, the primary tool with which all administrative power is checked—judicial review—has become blunted. Supreme Court case law now instructs reviewing courts to treat the bulk of agency actions with deference and thereby to respect administrative expertise.[9] Under the current deferential regime, challenges to agency rulemaking only succeed when such rules are either clearly precluded by statute or manifestly unreasonable.[10]

This Note argnes that such deference is inappropriate in the context of challenges to criminal rulemaking, because the policies underlying judicial deference are of diluted force and are outweighed by policies peculiar to criminal law. Instead, this Note will argue that reviewing courts should consider de novo[11] whether a particular criminal rule falls within the grant of power authorized in Congress's delegation. Part I discusses why criminal laws are given special treatment generally and reviews the historical basis to treating administrative crimes specifically in a special light. Part II reviews the separation of powers basis for agency rulemaking in general. Part III surveys the current standards for judicial review of agency rulemaking and explains why the policies underlying the current deferential standard are of limited applicability when criminal regnlations are involved. Finally, Part IV illustrates a proposed

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6 *See infra* notes 20-22, 37-54 and accompanying text.

7 *See* United States v. Grimaud, 220 U.S. 506 (1911) (ruling that Congress acted within its constitutional power in delegating to the Secretary of Agriculture the power to make rules for the lawful use of forest reservations).

8 *See id.* at 517.

9 *See, e.g.*, Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, . . . the challenge must fail.").

10 *Id.* at 842-43.

11 "De novo," as used in this Note, means "without deference to the agency," not the complete redetermination of all issues as found, but rarely employed, in § 706(2)(F) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(F) (1988). *See* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1131 n.71 (1987).

higher standard of review for administrative crimes and discusses potential criticisms of that standard.

I
THE ADMINISTRATIVE CRIME: WHY IS IT SPECIAL?

Why are any special protections needed for administrative crimes, as opposed to other agency rules? Crimes have always represented a special case, constitutionally and philosophically.[12] The criminal penalty represents the ultimate governmental intrusion on individual freedom,[13] together with a sense of community approbation not present in other government action. Section A of this Part will explain the constitutional and philosophical bases for the unique treatment of crimes. Because of the special nature of criminal penalties, initially the Supreme Court carefully scrutinized administrative crimes to ensure that Congress, not the agency, could fairly be considered responsible for determining what constituted a crime. Section B of this Part will trace the historical basis for treating administrative crimes in a different manner than other administrative actions.

A. Why are Crimes Special?

The Framers of the Constitution believed that the criminal sanction deserved special safeguards not necessary for other governmental actions.[14] Many of these safeguards are procedural in nature: examples include the Fifth Amendment's grand jury requirement; the Double Jeopardy, Self-Incrimination, and Due Process Clauses;[15] and the Sixth Amendment's right to a jury and to counsel.[16] Article I also places substantive restrictions on the power to make crimes by barring bills of attainder and ex post facto laws.[17] Some of these protections found their origin in the bitter memory of

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12 *See, e.g.*, 1 WILLIAM BURDICK, THE LAW OF CRIME § 2 at 3 (1946) ("A crime is a . . . wrong of such a public character that the sovereignty, the authority, and majesty of the entire body politic, prosecutes the offender as one who has committed a wrong against its peace and dignity").

13 *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250 (1968) (discussing why, considering the traditional role of criminal law, it should be reserved for what "really matters").

14 *Cf.* THE FEDERALIST No. 84, at 511-12 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (rebutting criticism of the absence of a Bill of Rights in the Constitution, Hamilton notes the Constitution's protection of the writ of habeas corpus as a safegnard against the "arbitrary imprisonment" that constitutes "the favorite and most formidable instrument[ ] of tyranny.").

15 U.S. CONST. amend. V.

16 U.S. CONST. amend. VI.

17 U.S. CONST. art. I, § 9, cl. 3.

arbitrary action by the King's executive agents.[18] Among the many grievances with colonial government the Constitution sought to redress, those concerning criminal laws were prominent.

It is also significant that early in its history the Constitution was held to bar judicially created crimes.[19] Common-law crimes were recognized in England and in many state courts, but in *United States v. Hudson & Goodwin*[20] the Supreme Court held that these crimes were beyond the power of the federal courts. The Court's decision rested primarily on the limited jurisdiction granted the courts under the Constitution.[21] However, the effect of the decision was that only the legislature could create crimes in the federal government.

This holding was consistent with the traditional concept of crime. Crimes were thought to differ from other sanctionable actions because they carried with them a sense of moral approbation.[22] "What distingnishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."[23] The determination of "community condemnation" is not within the realm of administrative expertise,[24] but rather is wholly within the province of the legislative branch.

Among the many rules granting special protection to the criminal defendant, the rule of lenity is particularly important to the present discussion. This rule requires that a court resolve statutory[25] and regnlatory[26] ambignities in favor of criminal defendants. In challenges to the validity of administrative crimes, the rule appears to conflict directly with the modern judicial policy of deference to

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18 *See* Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976).

19 United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

20 *Id.*

21 *Id.* at 33. *Hudson & Goodwin* addressed whether the federal circuit courts had jurisdiction over criminal libel claims against the government. The Court held they did not, emphasizing the limited jurisdiction given federal courts, particularly inferior federal courts, under the Constitution. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense." *Id.* at 34.

22 Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

23 *Id.*

24 "[T]here are no real values experts." Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1121 (1988).

25 *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427 (1985); United States v. Bass, 404 U.S. 336, 347-48 (1971).

26 *See* Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946) (stating in dicta that the same rules of construction governing statutes apply to administrative rules and regulations).

the agency construction of organic statutes.[27] The doctrines are at odds to the extent that the agency interpretation that provides the justification for a criminally punishable rule resolves otherwise ambiguous language to the detriment of the defendant.

United States v. Bass[28] sets forth the reasons supporting the lenity policy.[29] Bass was convicted for violating a provision of the Omnibus Crime Control and Safe Streets Act of 1968 barring exconvicts from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm."[30] The Court addressed whether a conviction could stand without a showing that the firearm in question was either in commerce or affected commerce.[31] The Court failed to discern any clear congressional intent[32] and applied the rule of lenity to reverse the conviction. The rule, Justice Marshall wrote, was founded on two policies.[33] First, defendants should have fair warning of conduct prohibited by law.[34] "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[35] Thus, the rule rests in part on the idea that only Congress should define what conduct is so deserving of community condemnation that the criminal sanction is appropriate. The policy for applying the rule of lenity in the administrative context seems even stronger than for statutory crimes since administrative crimes allow a nonlegislative branch to determine what types of conduct should be subject to criminal sanction.

B. The Evolution of the Administrative Crime

The Supreme Court first dealt with the interplay between the criminal law and delegation to administrative agencies in 1891 in *United States v. Eaton*.[36] Eaton, a margarine wholesaler, was prosecuted under section 18 of the Oleomargarine Act[37] for failing to

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27 *See infra* notes 204-21 and accompanying text. An agency's "Organic Statute" creates the agency and grants it whatever power it has.

28 404 U.S. 336 (1971).

29 Note that the rule of lenity is a policy, not a constitutional command. *See id.* at 348. Thus, the rule cannot *compel* the abandonment of the deference approach when the doctrines collide, though it does add another reason for rejecting deference when administrative crimes are at issue.

30 18 U.S.C. app. § 1202(a)(1), (5) (1988).

31 404 U.S. at 338.

32 *Id.* at 339-47.

33 *Id.* at 348.

34 *Id.*

35 *Id.*

36 144 U.S. 677 (1891).

37 24 Stat. 209 (1886) (repealed 1939).

keep records required "by law."[38] The law requiring such records was a regulation of the Treasury Department; the statute authorized the Treasury Department to promulgate regulations necessary to implement the act.[39] The issue before the court was whether a criminal conviction could follow from failure to comply with procedures not required by statute.

The Court held that it could not.[40] In so doing, the Court first noted the absence of common-law crimes in federal court, thus emphasizing the necessity of statutory authority for federal crimes.[41] The Court then cited precedent that established that administrative regulations could only implement statutes, but could not in any way alter them.[42] The Court further stated that the rule's application was particularly important in criminal cases:

> Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offence by the regulation of a department. It is a principle of criminal law that an offence which may be the subject of criminal procedure is an act committed or omitted "in violation of a public law, either forbidding or commanding it. . . . It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence[.]"[43]

Thus, the general requirement that rules promulgated by an administrative agency fit tightly within their statutory scheme was only part of the Court's decision. The special requirements for criminal law also required invalidation of any rule that, on close scrutiny, was not mandated by Congress.[44]

In re Kollock[45] was the first case approving a criminal conviction for violation of an administrative rule. This approval, however, fell well within the standard of review used in *Eaton*. As in *Eaton*, the defendant in *Kollock* was prosecuted for a violation of the Oleomargarine Act. The prosecution charged the defendant with violating a provision of the statute that proscribed selling margarine unless it was "marked stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe."[46] Kollock sold margarine in packages without such stamps, but argued that the statute impermissibly dele-

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38 *Id.* § 16.

39 144 U.S. at 685.

40 *Id.* at 688.

41 *Id.* at 687.

42 *Id.* (citing Morrill v. Jones, 106 U.S. 466, 467 (1882)).

43 *Id.* at 687-88 (citation omitted).

44 *Id.* at 688. *See infra* notes 204-21 and accompanying text.

45 165 U.S. 526 (1896).

46 *Id.* at 532 (quoting the Oleomargarine Act, 24 Stat. 209 (1886) (repealed 1939)).

gated to the Commissioner the power to define a criminal offense.[47] The Court held that "[t]he criminal offence [was] fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."[48] A close look at the statute revealed that the defendent committed a statutory crime, not an administrative one; the agency merely filled in gaps of minutia.

The agency role in defining a crime was much larger in *United States v. Grimaud*.[49] Credited as the case that gave birth to the administrative crime,[50] *Grimaud* involved a prosecution for illegally allowing sheep to graze on government lands.[51] Although the statute defined the proscribed activity and provided for the appropriate punishment, regulations promulgated by the Secretary of Agriculture defined which government properties were off-limits.[52]

The Court likened this scheme to that in *Kollock*, calling the selection of prohibited sites "a matter of administrative detail."[53] Congress defined the activity to be regnlated as well as the punishment. The agency merely detailed the circumstances that created the activity. Clearly, though, the *Grimaud* agency's role in selecting which government sites were off-limits was of a more significant character than the *Kollock* agency's package-defining rule. The *Grimaud* Court focused on whether delegation of power to the agency by Congress was legislative or administrative. The Court took the same care in examining whether Congress had authorized the regulation as it had in *Eaton*. However, after determining that Congress had authorized the regnlation and that the delegation was of administrative, not legislative, character, the Court let the regulation stand. "[T]he authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense."[54] Thus, *Eaton* and *Grimaud* established that the use of criminal penalties in regnlation did not dispositively determine whether the power delegated was legislative or administrative. The criminal character of the regulations, however, was important in determining the scrutiny necessary to ensure

47 *Id.* at 533.

48 *Id.*

49 220 U.S. 506 (1911).

50 *See* Edmund H. Schwenk, *The Administrative Crime, its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 59 (1943).

51 220 U.S. at 513.

52 *Id.* at 520.

53 *Id.* at 516.

54 *Id.* at 521.

that the agency did not exceed whatever power had been delegated to it.

Since *Eaton*, the Court has not *directly* addressed the special problems that arise when a court reviews agency regulations that are punishable by criminal penalties. In these early cases, however, the Court closely scrutinized such regulations to determine whether they were authorized by Congress.[55] *Eaton* suggested that this was due in part to the regulations' criminal character. This Note argues that the Court's approach in *Eaton*'s was entirely proper.[56]

II

SEPARATION OF POWERS AND ADMINISTRATIVE AGENCIES

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[57]

Montesquieu's words resonated loudly in the minds of the Framers,[58] for the liberal political philosophy he expounded seemed a particularly appropriate safeguard after a long struggle to escape the oppression of a despotic monarch.[59] Moreover, in the years between the Revolutionary War and the drafting of the Constitution, the Framers witnessed a second form of tyranny, that of state legislators with runaway control over state government.[60] Separation of powers was thus a vital concept to the Constitution they drafted: "All legislative Powers. . . . shall be vested in a Congress of the United States;[61] . . . The executive Power shall be vested in a Presi-

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55 *See also* United States v. George, 228 U.S. 14, 22 (1913) ("Where the charge is of crime, it must have clear legislative basis.").

56 *See infra* notes 236-47 and accompanying text.

57 BARON MONTESQUIEU, DE L'ESPRIT DES LOIS, *quoted in* M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 90 (1967).

58 Madison wrote in his first separation of powers essay in the Federalist Papers that Montesquieu was "[t]he oracle who is always consulted and cited on this subject." THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

59 *See* Levi, *supra* note 18, at 373-74.

60 *Id.* at 374-75. *See also* THE FEDERALIST No. 48, at 310-11 (James Madison) (Clinton Rossiter ed., 1961).

61 U.S. CONST. art. I, § 1.

dent of the United States of America;[62] . . . The judicial Power of the United States, shall be vested in one supreme Court."[63]

The Framers did not, however, envision a constitutional system in which the three branches were to be kept wholly separate from one another.[64] Rather, they foresaw an interdependent system of checks and balances designed to prevent one branch from usurping the function of another.[65] As Madison wrote, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained."[66] However, the Framers did not envision the most important separation of powers problem of the modern era—the administrative state.[67]

Thus, courts and commentators have struggled ever since to find a proper role for administrative agencies commensurate with

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62 U.S. CONST. art. II, § 1.

63 U.S. CONST. art. III, § 1.

64 THE FEDERALIST No. 48, at 308-09 (James Madison) (Clinton Rossiter ed., 1961).

65 *See* THE FEDERALIST No. 51, at 320-23 (James Madison) (Clinton Rossiter ed., 1961).

66 THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

67 In executing their statutory mandates to implement regulatory schemes, administrative agencies perform two broad types of functions—adjudication and rulemaking. *See generally* Administrative Procedure Act, 5 U.S.C. § 550 (1988). Generally, adjudication concerns matters of individual import, whereas rulemaking usually has general application. *See* United States v. Florida East Coast Ry. Co., 410 U.S. 224, 244-46 (1973) (discussing the differences between adjudication and rulemaking). Rulemaking under the APA can apply to particular parties, 5 U.S.C. § 551(4) (1988), but this has no significance for the discussion of administrative crimes, since a rule applicable only to a particular party and imposing criminal sanctions would violate the Constitution's Bill of Attainder Clause. U.S. CONST. art. I, § 9, cl. 3. Rules are sometimes categorized as "legislative," that is, promulgated under a specific delegation of power from Congress, or "interpretive," that is, rules issued without the force of law, but useful as a guide to the agency's beliefs about its organic statute. *See* KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.8-.10 (2d ed. 1979). However, the continuing vitality of the distinction is called into question by Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). *See infra* notes 204-22 and accompanying text. The definition of administrative crimes relates almost exclusively to the rulemaking function, because administrative agencies cannot adjudicate matters involving penal sanctions. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228 (1896) (issuing habeas corpus writ on behalf of Chinese immigrants who were subjected to hard labor and deportation after being adjudged to be in the country unlawfully by a summary proceeding before a court or executive officer). Moreover, the Court generally has shown more concern over ensuring the validity of quasi-judicial adjudication than quasi-legislative rulemaking, largely because adjudicating matters of individual rights directly implicates due process. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (adopting due process test for administrative adjudication, which balances the due process rights of the litigant against the product of the cost of more process and its utility in the particular situation). The distinction between adjudication and rulemaking is important, because of the different concerns the Court emphasizes in reviewing each activity; a decision affecting one function might not carry over to the other.

the Constitution's separation of powers. Two leading schools of thought regarding the role of agencies have emerged from this struggle.[68] The "traditional school" views agencies as necessary adjuncts to congressional legislation, required because Congress lacks the flexibility and expertise to deal with the complex issues that continually arise in the course of a regulatory scheme.[69] The "new school" focuses instead on the relative accountability of the three branches, reasoning that Congress generally abandons its responsibility to resolve controversial policy choices because of re-election motives.[70] By this view, the role of agencies and courts is evaluated according to their relative abilities to fill the vacuum left by Congress.

A. The Constitutional Role of the Agency: Two Schools of Thought

1. *The Traditional School: The Agency as Expert*

The administrative state in its present form traces back to the New Deal. That era experienced the creation of a wide range of administrative agencies whose special expertise, it was hoped, would lead the nation out of the Depression through skillful administration of regulatory statutes.[71] Courts proved quite willing to defer to the purported expertise of agencies under the prevailing economic conditions; agencies would claim an issue needed resolution in their favor to implement statutory goals, and nonexpert courts were loath to contradict them.[72] This conception of administrative agencies provides one explanation for modern judicial deference to agency interpretations of their own organic statutes, because these interpretations are "so bound up with successful administration of the regulatory scheme that it may seem only sensible to give principal interpretive responsibility to the 'expert' agency that lives with the statute constantly."[73]

A second rationale behind the traditional school's approach recognizes that agencies are inherently more flexible than Con-

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68 *See* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 491 (1985). It should be noted that in practice, theories of both schools guide separation of powers jurisprudence as it pertains to agencies, and that many commentators espouse elements of each.

69 *Id.* at 490-91.

70 *Id.* at 491.

71 *See* Aman, *supra* note 24, at 1111-21.

72 *Id.* at 1121-22.

73 Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989).

gress.[74] Important policy issues in regulated areas arise too quickly for Congress to address them adequately.[75] Thus, agencies, able to respond far more quickly than Congress, fill in the statutory gaps. This greater flexibility also allows agencies to experiment with different solutions to a problem in a manner Congress could not accomplish efficiently.[76]

Neither rationale advanced by the traditional school is persuasive when applied in the administrative crime context. While many, if not most, agency actions involve value judgments,[77] making rules punishable by criminal sanctions involves a special kind of value judgment: what conduct does society deem so blameworthy as to deserve its highest measure of condemnation?[78] The expertise theory of administrative agencies is problematic when used to resolve any value judgment,[79] but is particularly difficult when the determination of societal mores is at issue. Agencies have no expertise to determine what conduct deserves the criminal penalty.

Moreover, flexibility is not a virtue when criminal penalties are at issue. There is a historical basis for arguing that flexibility is an undesirable attribute of any legislative decision: in advocating the President's veto power, Hamilton wrote that one factor militating in favor of such power was to

> increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation. . . .[80]

Agencies, whose procedures for enacting rules are far simpler than those Congress must follow to pass statutes,[81] are therefore at

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74 *See* Aman, *supra* note 24, at 1108 ("In many ways, the best and tbe worst that can be said for substantive agency law is that it is disposable.").

75 *See generally* Pierce, *supra* note 68.

76 Aman, *supra* note 24, at 1108.

77 *See* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281 (1986).

78 *See supra* notes 22-24 and accompanying text.

79 *See* Aman, *supra* note 24, at 1221.

80 THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

81 *Compare* § 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), requiring agencies to provide mere notice of a proposed rulemaking and an opportunity to comment on it for procedural validity (§ 556 imposes stricter procedural standards for rules promulgated under statutory authority, requiring a hearing "on the record," but such formal rulemaking is rarely employed), *with* U.S. CONST., art. I, § 7, requiring approval of both Congress and the President (or, in the absence of presidential approval, a super-majority vote by each branch) for statutory validity. The driving philosophy behind the required procedures is that checks are necessary to ensure that Congress

greater risk of making "bad laws" than Congress. The hope that agencies also stand a better chance of making good laws may be sufficient to outweigh this fear in the general case; certainly this view informs the traditional school. Yet this trial-and-error approach conflicts with the great care criminal law exercises on the defendant's behalf to ensure that the criminal penalty is not imposed by mistake.[82] Shifting laws might cause notice problems, but more fundamentally, substantive experimentation is anathema to the notions of moral culpability that underlie criminal law.

2. *The New School: The Agency as Political Entity*

The new school looks to the political and institutional sources of agency power, rather than to its functional utility.[83] This approach assumes that congressional delegation of power to agencies lacks real standards chiefly because its members are motivated by re-election and therefore avoid making controversial decisions out of fear that doing so might harm their re-election bids.[84] Because this view assumes Congress has abdicated its value-deciding role, the new school's focus of inquiry shifts to how best to control the

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does not monopolize governmental power and thereby enact unsound legislation. *See* I.N.S. v. Chadha, 462 U.S. 919, 944-51 (1983). *See generally* THE FEDERALIST No. 73 (Alexander Hamilton) (Clinton Rossiter ed., 1961). While this philosophy is undermined to some extent by *any* agency action carrying legislative effect, the absence of checks and balances is particularly troubling when the rationales advanced to justify agency rulemaking are not implicated, as is the case when administrative crimes are involved.

82 A worthwhile analogy can be made to the burden of proof required at civil and criminal trials. Civil trials generally employ a "more-probable-than-not" standard, while criminal trials use a "beyond-a-reasonable-doubt" standard. Outcome errors—conviction of the innocent, or acquittal of the guilty—will occur less frequently in the long term under the former test, since the scales are not tilted either way. Nouetheless, our system rests on the belief that the barm suffered from defendant-borne criminal errors warrants the added protection for criminal defendants. By the same token, wide-ranging agency experimentation with various rules could be expected, over the long term, to produce the best regulatory scheme, but the mistakes of such a trial-and-error system (bad rules) cause concern when the effects of those mistakes will be borne by criminal defendants.

83 This approach is derived from a broader movement that evaluates the role of private interests in public policymaking, which spawned deregulation as well as broad deference to agency decisionmaking. *See* Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 N.W.U. L. REV. 646, 646-47 (1988).

84 *See* Pierce, *supra* note 68, at 491. *See also* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Writing from an economic perspective, these authors argue that legislators choose to delegate in order to reduce their decision costs (the costs of acquiring information to make a decision and the costs of the detrimental effects that decision might have), although doing so increases agency costs (the inevitable costs attributable to an agent having different goals than the principal). *Id.* at 6.

political decisions of administrative agencies.[85] This is a question of power which, when framed in this manner, tends to undercut the role of courts in controlling administrative agencies in favor of the executive branch. The approach assumes that although Congress is the most politically accountable branch, when it abdicates its policy-making role, another branch must exercise its power. The executive branch, which is politically accountable through the President, is considered a better actor than the unelected judiciary.[86] This concept of agency power underlies the modern approach of judicial deference to agency interpretations of organic statutes.[87]

Even if one assumes that in the general case the new school takes the proper approach, the approach's validity is suspect when applied to administrative crimes. This is true for two reasons: First, as was true for the traditional school's flexibility explanation, criminal law permits fewer defendant-harming errors than does civil law.[88] Thus, errors caused by allowing a less accountable decision-maker to determine criminally blameworthy conduct are intolerable in the criminal sphere even if acceptable in the civil sphere. Second, the accumulation of power inherent in allowing the executive branch to make the law becomes both more apparent and more troublesome when criminal penalties are involved. The executive branch prosecutes criminal cases; allowing the same branch to promulgate crimes would run afoul of the purpose of the separation of powers: to curb undue government infringement on liberty.[89] As Montesquieu warned, "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[90]

B. The Nondelegation Doctrine: A Failed Method of Judicial Control Over Agency Action

> The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what

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85 *See, e.g.*, James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399 (1986). DeLong argues that the proper role of courts in the administrative separation of powers problem is "to ensure that somebody somewhere in the system performed adequate quality control and to recognize that the somebody need not necessarily be a court." *Id.* at 417-18.

86 *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) ("[W]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of Government to make such policy choices. . . ."); Pierce, *supra* note 68, at 506 (analyzing the basis for judicial deference to administrative agencies in *Chevron*).

87 *See infra* notes 203-22 and accompanying text.

88 *See supra* note 82.

89 *See* THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

90 MONTESQUIEU, *quoted in* VILE, *supra* note 57, at 93.

> that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.[91]

These words of John Locke illustrate a pure form of separation of powers, as would a literal reading of the opening clause of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."[92] The Court once acknowledged this idea, at least in principle, through the nondelegation doctrine, which bars the delegation of legislative power by Congress: "That 'Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' "[93] Yet the limited utility of this vehicle for policing the apparent constitutional mandate provoked a leading commentator to remark that "the statement that the nondelegation doctrine has failed needs no qualification."[94] In only two cases has the Supreme Court held that a grant of power violated the nondelegation doctrine.[95] The doctrine requires only that Congress express some "intelligible principle"[96] to guide an agency charged with implementing a statute, but apparently, even that modest standard no longer holds any force.[97]

Nonetheless, some judges[98] and commentators[99] have argned that a return to some form of the nondelegation doctrine is necessary. Reasons for this spring readily to mind: uneasiness remains concerning the enormous law-making power agencies now wield, while the arsenal of controls on agency power continues to

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91 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (Harlan Davidson ed., 1982).

92 U.S. CONST. art. I, § 1.

93 United States v. Grimaud, 220 U.S. 506, 521 (1911) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

94 KENNETH C. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 3.2, at 150-51 (2d ed. 1978).

95 *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Both cases arose under the National Industrial Recovery Act of 1933, 48 Stat. 195 (1933) and involved the delegation of almost limitless power to regulate industry and set prices.

96 J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).

97 *See* DAVIS, *supra* note 94, § 3.5.

98 *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment).

99 *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985); *see also* Aranson et al., *supra* note 84, at 63-67 (the nondelegation doctrine should be revived as an instrument to block legislative delegations which confer purely private benefits).

shrink.[100] While many have voiced the need for a new nondelegation doctrine,[101] the approaches and justifications for such a doctrine vary significantly.

Chief Justice Rehnquist was among the first to call for a resurrection of the doctrine with his concurring opinion in *Industrial Union Dep't v. American Petroleum Inst.*[102] In *Industrial Union*, the Chief Justice argued that Congress improperly delegated power to the Occupational Health and Safety Administration to determine acceptable limits of Benzene, a hazardous substance.[103] He argued that the determination of whether, and to what extent, costs of safety measures should be taken into account in deciding the necessity of regulations was such a fundamental policy question that Congress could not permissibly delegate it.[104] Similarly, Professor David Schoenbrod advocates drawing the nondelegation line at the delegation of the power to set "goals," rather than "rules."[105] Thus, both Rehnquist and Schoenbrod argue that fundamental policy choices clearly represent legislative power and therefore cannot be constitutionally delegated.[106]

Justice Scalia took a very different approach in his dissent to *Mistretta v. United States*.[107] *Mistretta* involved a challenge to the United States Sentencing Commission, which was created "as an independent commission in the judicial branch"[108] to set uniform sentences in order to alleviate the wide disparity then characterizing judicial sentencing. The Court upheld this delegation. In his dissent, Scalia argued that the Court had not abandoned the strict form of separation of powers as espoused by Locke; instead, the Court had merely consistently recognized that some discretion and latitude inevitably results from executive power.

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore

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100 *Cf.* I.N.S. v. Chadha, 462 U.S. 919 (1983) (holding legislative vetoes of agency actions unconstitutional as violative of separation of powers).

101 *See, e.g.*, Aranson et al., *supra* note 94; Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657; Schoenbrod, *supra* note 99.

102 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment); *see also* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

103 448 U.S. at 672.

104 *Id.*

105 Schoenbrod, *supra* note 99, at 1248.

106 While this approach has the virtue of satisfying the Constitution's literal command, it would have the drawback of opening to litigation the validity of thousands of delegations now resting in the United States Code. KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 3.1-.2, at 64 (1989).

107 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

108 28 U.S.C. § 991(a) (Supp. IV 1982). *See* Mistretta, 488 U.S. at 368 (describing the Sentencing Commission).

> assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.[109]

The Sentencing Commission, Scalia argued, had no independent constitutional authority for its actions. "The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law."[110] Its creation was a naked delegation of legislative power, unlike the typical case in which Congress delegates a power that in effect already existed. Although Scalia's approach would not affect the most common type of delegation case, in which Congress delegates authority to an executive agency, his approach bases such delegation on a new theory that reconciles modern practice with classical theory.

Scalia's approach focuses on to whom power is delegated, whereas Rehnquist and Schoenbrod concentrate on the extent of power delegated. Another approach is possible: a limitation based on the type of interest the delegated power affects.[111] For example, since liberty is a highly valued interest, the power to delegate the authority to promulgate rules punishable by criminal penalties might be circumscribed. This type of approach has the appeal of limiting certain types of governmental regulation to those government officials directly elected by the people. Nevertheless this approach suffers from the same practical drawbacks as Justice Rehnquist's in that it requires the invalidation of huge volumes of law. Although the approach has received some limited support in the past from commentators[112] and the judiciary,[113] no current member of the Supreme Court has ever endorsed such a view.

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109 488 U.S. at 417.

110 *Id.* at 420.

111 *See* Dripps, *supra* note 101, at 657; Lisa A. Cahill & J. Russell Jackson, Note, *Nondelegation After* Mistretta: *Phoenix or Phaëthon?*, 31 WM. & MARY L. REV. 1047 (1990); *Cf.* Aranson et al., *supra* note 84, at 63 (arguing that a revitalized nondelegation doctrine should be used to police delegations that serve purely private interests).

112 *See* Harlan S. Abrahams & John R. Snowden, *Separation of Powers and Administrative Crimes: A Study of Irreconcilables*, 1 So. ILL. U. L.J. 1 (1976) (arguing that the power to make crimes is a core function of the legislature and thus cannot be delegated); *but see* DAVIS, *supra* note 94, § 3.11, at 191 ("[The Abrahams & Snowden article] has value as a collection of separation of powers literature that has little value.").

113 *See* United States v. Robel, 389 U.S. 258, 269 (1967) (Brennan, J., concurring in result). *Robel* involved a delegation to the Secretary of Defense to classify worksites as "defense facilities" that were to be off-limits to members of the Communist Party under the Subversive Activities Control Act of 1950, 50 U.S.C. § 784 (a)(1)(D). Robel, a Communist, was indicted for being willfully employed at a "defense facility" in violation of

Thus, while administrative crimes lie on the borderline of permissible agency action, a nondelegation approach does not appear to be the answer. Instead, close judicial supervision to ensure, insofar as is possible, that crimes created by administrative agencies are within congressional purview seems a more appropriate check on administrative crime-making power.[114] But the nondelegation doctrine, which has never been overruled, remains at least in theory as an outer limit on agency power.

III
JUDICIAL REVIEW OF AGENCY REGULATIONS

Judicial review traditionally has been an integral element in the valid delegation of power from Congress to administrative agencies.[115] Indeed, one of the reasons for requiring Congress to articulate some "intelligible principle"[116] when delegating authority is to give the courts some basis on which to judge whether an agency has exceeded its statutory mandate.[117] Interestingly, a changed view of political accountability has helped to undermine the role of judicial review of administrative action.[118] Originally, courts reviewed agencies to ensure that their actions could fairly be attributed to the legislative branch. But the modern Supreme Court has backed away from this position, asserting that while agencies are not as politically accountable as Congress, they are still more accountable than the

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the statute. Justice Brennan, while approving broad delegations of power in general, argued that this delegation was impermissible given the criminal penalty and First Amendment issues involved.

> "The area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights. . . . Before we can decide whether it is an undue infringement of protected rights to send a person to prison . . . it ought at least to appear that Congress authorized the proscription as warranted and necessary."

389 U.S. at 275-77. *See also* State v. Maitrejean, 192 So. 361 (La. 1939); Howell v. State, 230 S.E.2d 853 (Ga. 1976) (state cases holding that administrative rules punishable by criminal penalties are unconstitutional as violative of state constitutions).

114 *See infra* Part III.

115 *See* Farina, *supra* note 73, at 487.

116 *See supra* text accompanying notes 96.

117 *See* Schoenbrod, *supra* note 99, at 1239; Farina *supra* note 73, at 487.

118 *See generally* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984). Komesar argues that in analyzing judicial review of another branch of government, the allocation of decisionmaking and the relative merits of decisionmaking between the institutions of government are often overlooked. "Whenever a political decision is declared invalid, the judgment of the judicial branch has been substituted for that of other branches of government." *Id.* at 366. He argues for a generally reduced role for the judicial branch, because even when courts perceive a "political malfunction," they "should not abandon the presumption [of legislative validity] unless [the court] *in the given setting* . . . can offer an alternative superior to the defective legislative process." *Id.* at 376.

judiciary, and thus should be entitled to the benefit of the doubt in close cases.[119]

Yet there are independent reasons why judicial review should retain an important role in the evaluation of administrative crimes. Section A of this Part examines the special problem of statutory schemes that preclude any review of regulations during trial. Section B discusses the general standard of judicial review of agency actions, as well as instances in which courts apply a higher standard of review.

A. Unreviewable Regulations

Recoguizing the traditional role of the judiciary as arbiter of statutory interpretation, courts normally entertain a presumption of reviewability for challenges to the validity of agency regulations.[120] Nonetheless, many statutes granting rulemaking powers to agencies provide that some rules are either immune to challenge in litigation or subject to challenge in only a limited fashion.[121] Some courts have been hesitant to enforce these "no-review" provisions when criminal penalties are involved,[122] and this Section argues that this is the proper approach.

Courts confronting a statute precluding or limiting judicial review of administrative actions face a constitutional dilemma.[123] One horn of the dilemma hinges on the well-established role of courts in adjudicating constitutional rights. "The supremacy of the Constitution . . . and the sanctity of the rights guarantied by it, none will question."[124] Yet the Constitution also grants Congress broad authority over the jurisdiction of Article III courts, the dilemma's second horn. "[Congress has the power of] investing . . . [courts] with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."[125]

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119 *See supra* notes 83-87 and accompanying text. *See also* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986).

120 *See* Administrative Procedure Act, 5 U.S.C. § 703 (1982) ("Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.").

121 *See, e.g.*, Clean Air Act, § 307(b), 42 U.S.C. § 1857 h-5(b) (Supp. V 1970) (limiting review of certain rules promulgated by the Environmental Protection Agency to the District of Columbia Court of Appeals within 30 days of such rules' promulgation, and precluding review at enforcement proceedings).

122 *See infra* text accompanying notes 161-74, 189-93.

123 Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1367 (1953).

124 *Id.* (quoting Cary v. Curtis, 44 U.S. 244 (3 How.) 244 (1845)).

125 *Id.*

Thus, the denial of judicial review raises difficult issues as to the enforceability both of constitutional rights, and of separation of powers.[126] These concerns are magnified when criminal prosecutions are involved.[127] The process due criminal defendants is of a greater magnitude than that due other litigants.[128] Thus, the denial of an element of this due process comes at a higher constitutional price. Moreover, since it is the judiciary that imposes criminal penalties, following no-review statutes in this context forces the courts to fulfill their harshest obligation without the concurrent duty to ensure that a conviction satisfies the law.[129]

The Supreme Court first faced this dilemma in *Yakus v. United States*.[130] The case involved a Fifth Amendment challenge, raised during a criminal prosecution, to regulations promulgated under the Emergency Price Control Act of 1942.[131] The statute, designed to control inflation during World War II,[132] limited such challenges to administrative hearings or to an Emergency Court of Appeals, and then, barring new circumstances, only permitted challenges within 60 days of the regnlation's enactment.[133] Yakus argued that the regulation he was convicted under, which barred the sale of meat above an administratively fixed price, violated the Act, and that precluding a chance for review of his claim at trial denied his right to due process.[134]

The Court rejected this challenge based on three grounds. First, the wartime exigencies of the case required rejection: Congress found a real possibility of runaway inflation, and wanted to avoid the delays and potential inconsistencies that could result from case-by-case attacks on the regulations.[135] The Court's two other reasons, however, confronted the horns of the aforementioned dilemma, and resolved it in favor of the government.

The Court disposed of Yakus's due process challenge by analogizing his situation to that of a litigant who waives the right to assert a constitutional right by failing to raise it in a timely manner.[136] Ya-

126 *See* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983) (arguing that the proper resolution of the dilemma is to allow preclusion of review except when constitutional challenges are involved).

127 Yakus v. United States, 321 U.S. 414, 460 (Rutledge, J., dissenting).

128 *See id.* at 473.

129 *See* Estep v. United States, 327 U.S. 114, 125 (1946) (Murphy, J., concurring).

130 321 U.S. 414 (1944).

131 56 Stat. 23, 50 U.S.C. app. § 901 (1988), *as amended by* the Inflation Control Act of 1942, 56 Stat. 765, 50 U.S.C. app. §§ 961-971 (1988).

132 321 U.S. at 419-20.

133 *Id.* at 428.

134 *Id.* at 431.

135 *Id.* at 431-32.

136 *Id.* at 444.

kus, before violating the price regulation, could have challenged the regulation in an administrative hearing or before the Emergency Court of Appeals. "A sufficient answer to [Yakus' due process challenge] . . . is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them . . . ."[137] Thus, the Court held that a criminal defendant's due process rights are satisfied as long as an opportunity exists in some forum to challenge the validity of the law under which she is prosecuted.

The *Yakus* Court also based its decision on Congress's power to define the jurisdiction over Article III courts.

> Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations . . . foreclose any . . . consideration of the validity of a regulation as a defense to a prosecution for its violation [other than by the Emergency Court of Appeals].[138]

Thus, presuming the statute satisfied due process, Congress's power over the jurisdiction of Article III courts authorized denial of judicial review.

The latter two grounds for the Court's decision were attacked in a spirited dissent by Justice Rutledge.[139] Withholding judicial review in this criminal prosecution, he argued, violated both due process and the dictates of Article III.[140] Rutledge questioned the constitutionality of forcing a criminal defendant to litigate an essential element of the crime in a separate forum or to forego such review altogether.

> The fact is that if he violates the regulation he must be convicted, in a trial in which either an earlier and summary civil determination or the complete absence of a determination forecloses him on a crucial constitutional question. . . . This may be all very well for some civil proceedings. But, so far as I know, criminal proceedings of this character never before have received the sanction of Congress or of this Court.[141]

Rutledge argued that due process required more[142] and that Congress's power over jurisdiction did not compel acceptance of the Act's procedure.[143] Merely because Congress could withhold jurisdiction did not mean that it could bestow a jurisdiction so limited as

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137 *Id.* at 434.
138 *Id.* at 443.
139 *Id.* at 460-89 (Rutledge, J., dissenting).
140 *Id.* at 468.
141 *Id.* at 478.
142 *Id.* at 479.
143 *Id.* at 467-68.

to violate due process.[144] The judicial power, once granted, must include at a minimum the ability to adjudicate a criminal defendant's constitutional challenges.[145]

Shortly after *Yakus*, the Court in *Estep v. United States*[146] affirmed the general ability of Congress to withhold review but avoided the strict application of that rule. *Estep* involved another wartime statute, the Selective Training and Service Act of 1940.[147] Estep was a Jehovah's Witness who claimed religious exemption from the draft under the "regular or duly ordained ministers of religion" exception.[148] The local draft board refused his claim, as did the appeal board.[149] Estep then requested, under statutory procedure, that the Selective Service administrative board appeal his case to the President.[150] The Board rejected this request, and Estep reported for induction but subsequently refused to serve, claiming the religious exemption.[151]

Estep was convicted for refusing to submit to the draft and was sentenced to five years imprisonment. The Supreme Court reversed his sentence and ordered a new trial, holding that the Act validly precluded review of draft board orders within their jurisdiction,[152] but that the Act did not intend to bar challenges to a board's exercise of jurisdiction.[153] Thus, the Court held that an exception, albeit a narrow one, existed to the Act's no-review provisions: "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."[154]

Generally, then, the Court approved of the Act's scheme, which "enlisted the aid of the federal courts only for enforcement purposes."[155] Justice Murphy attacked this apparent approval in a blistering concurrence.[156]

> To sustain the convictions of the two petitioners in these cases would require adherence to the proposition that a person may be criminally punished without ever being accorded the opportunity

144 Hart, *supra* note 123, at 1379, stresses this point in discussing *Yakus*: "I don't believe that courts can be given criminal jurisdiction and at the same time be told to exercise it in violation of the Constitution."

145 321 U.S. at 467-68.

146 327 U.S. 114 (1945).

147 54 Stat. 894 (1946) (expired 1947), 50 U.S.C. app. § 311 (1988).

148 *Id.* § 5(d).

149 327 U.S. at 116.

150 *Id.*

151 *Id.*

152 54 Stat. 894, § 10(a)(2)(1946) (expired 1947) (current version at 50 U.S.C. app. § 311 (1988)).

153 327 U.S. at 121.

154 *Id.* at 122-23.

155 *Id.* at 119.

156 *Id.* at 125 (Murphy, J., concurring).

> to prove that the prosecution is based upon an invalid administrative order. . . . To sanction such a proposition is to place an indelible . . . 'blot upon our jurisprudence and civilization.' "[157]

Justice Murphy denied that Congress's power over jurisdiction included the power to require courts to "exercise criminal jurisdiction without regard to due process of law or other individual rights."[158] According to Murphy, a court whose power did not include the ability to adjudicate all defenses raised by a criminal defendant was not a court at all under the Constitution. Justice Rutledge also concurred, echoing his *Yakus* dissent.[159]

The wartime exigencies in both cases leave the scope of their troubling implications in doubt. A federal court later observed that, "Whether a legislative scheme similar . . . to that sustained in *Yakus* could today withstand a constitutional challenge by a criminal defendant is not settled by *Yakus*."[160] When confronted with this dilemma, courts generally have been willing to employ sleight of hand to avoid facing the issue in situations where a decision could not be blamed on emergency wartime circumstances.

In *Adamo Wrecking Co. v. United States*,[161] for example, the Court was confronted with a challenge to an emission standard promulgated by the Environmental Protection Agency under the Clean Air Act.[162] The Act's terms barred challenges to emission standards in criminal prosecutions. This suit, however, challenged whether the regulation was in fact an emission standard contemplated by the Act at all.[163] The Court permitted this challenge, in effect allowing the use of judicial review to determine whether such review was barred.[164] The Court distinguished the intricate statutory scheme of the Act from the broad mandate in *Yakus*.[165] The Act contained a broad spectrum of penalties: civil penalties for some actions, criminal penalties for others, and unreviewable penalties for still others.[166] The Court reasoned that the rule of lenity[167] required that the defendant be allowed a determination of whether the regulation at issue was what Congress envisioned as an "emission stan-

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157 *Id.* at 125-26 (quoting McVeigh v. United States, 78 U.S. 259 (11 Wall.) 267 (1870)).

158 *Id.* at 127.

159 *Id.* at 132 (Rutledge, J., concurring).

160 United States v. Saade, 652 F.2d 1126, 1133 (1st Cir. 1981) (decided on other grounds).

161 434 U.S. 275 (1978).

162 84 Stat. 1685 (1970) (current version at 42 U.S.C. § 7412 (1988)).

163 434 U.S. at 277-78.

164 *Id.* at 279.

165 *Id.*

166 *Id.* at 280-82.

167 *See supra* text accompanying notes 26-35.

dard."[168] The case evinces the Court's apparent discomfort with denying all review to criminal defendants; certainly the decision did not serve the efficiency policies behind Congress's preclusion of review in the Act.[169]

Justice Powell, in his concurrence, made explicit his unease with barring criminal defendants from judicial review.[170] He perceived a notice problem in no-review statutes since the fair warning owed to criminal defendants is limited to the Federal Register.[171] He concluded that, "[I]t . . . is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of [the rule's] promulgation or familiarity with or access to the Federal Register."[172] Powell did not address the merits of a direct challenge to the rule's validity, but distinguished *Yakus* because of its wartime circumstances.[173]

Lower courts have also struggled with the no-review problem in criminal prosecutions. In *United States v. Emerson*,[174] the Ninth Circuit held that, in the absence of clear and convincing evidence that Congress intended preclusion, review must be granted to criminal defendants who challenge regulations on constitutional grounds.[175] Emerson was prosecuted for trafficking Ecstasy, a drug "temporarily" placed on the schedule of illegal drugs by an officer of the Drug Enforcement Administration (DEA).[176] The defendant challenged a delegation within a delegation: Congress had delegated the power to desiguate prohibited drugs to the Attoruey General, who then delegated that power to the DEA.[177] Although the Controlled Substances Act[178] precluded judicial review of schedule inclusion during prosecution, the court held that potentially serious constitutional problems could result from precluding review of these issues.[179] The court found that this merited an exception in

168 434 U.S. at 284-85.

169 *See id.* at 292 (Stewart, J., dissenting) ("The Court's interpretation . . . conspicuously frustrates the intent of Congress to establish a speedy and unified system of judicial review under the Act.").

170 *Id.* at 289 (Powell, J., concurring).

171 *Id.*

172 *Id.* at 290.

173 *Id.*

174 846 F.2d 541 (9th Cir. 1988).

175 *Id.* at 544.

176 *Id.* at 542.

177 The delegation of the power to place drugs on the prohibited schedule to the Attorney General has survived attack. United States v. Davis, 564 F.2d 840, 843-44 (9th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

178 21 U.S.C. §§ 801-904 (1982 & Supp. III 1985).

179 846 F.2d at 544.

the absence of clear evidence to the contrary[180] and allowed Emerson to present and win his challenge. The court held that the subdelegation of temporary schedule designation did not conform to the requirements of the Act.[181]

More recently, however, the Ninth Circuit held that no review was available to a defendant charged with selling advanced technology without a permit. In *United States v. Mandel*,[182] the defendant was charged with exporting advanced-technology electronics included on the Commerce Department's Commodity Control List (CCL) without a license in violation of the Export Administration Act of 1979.[183] Mandel sought information through discovery that would allow him to challenge whether the Department had " 'followed the legislative mandate . . . in placing the items' . . . on the CCL."[184] The district court granted his request, reasoning that under the no-basis-in-fact standard employed in *Estep*, judicial review of agency rulemaking was always available in criminal prosecutions.[185]

The Court of Appeals for the Ninth Circuit reversed, noting that review of an administrative act is required only when the act affects the individual rights of the defendant, and when this effect constitutes an element of the criminal offense charged.[186] Neither was true of *Mandel*. The court held that the administrative act at issue was a rule of general applicability, and this rule was not an element of the offense. The latter point, however, seems questionable; since the offense charged was a violation of a regulation promulgated under the Act, the regulation's existence, at least, was certainly an element of the offense. Moreover, the regulation in *Mandel* concerned national security and foreign policy, historically spheres where executive latitude is at a maximum.[187] Thus, once again, exigent circumstances allowed a court to evade a square resolution of what circumstances require a judicial review of administrative action in a criminal trial.

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180 *Id.* at 544.

181 *Id.* at 547-49.

182 914 F.2d 1215 (9th Cir. 1990).

183 18 U.S.C. § 371 (1988); 50 U.S.C. app. § 2410(b)(3) (1988).

184 914 F.2d at 1218.

185 *Id.* at 1220. The district court also relied on United States v. Mendoza-Lopez, 481 U.S. 828 (1987). *See also* United States v. Mandel, 696 F. Supp. 505 (E.D. Cal. 1988).

186 914 F.2d at 1221.

187 *See* Zemel v. Rusk, 381 U.S. 1 (1965) (holding that the Secretary of State's control over the issuance of passports is legitimate in light of foreign policy concerns); United States v. Moller-Butcher, 560 F. Supp. 550 (D.C. Mass. 1983) (holding that Congress may delegate more power in foreign affairs than in domestic affairs when a statute affects imports).

The Supreme Court has held, however, that judicial review of administrative *adjudications* is required when those adjudications form an element of a subsequent criminal prosecution. In *United States v. Mendoza-Lopez*,[188] the defendant was prosecuted for violating the Immigration and Nationality Act[189] by returning to the United States after a deportation proceeding. Mendoza-Lopez argued that the administrative law judge in his deportation hearing violated his due process rights by failing to advise him of his right to counsel and other procedural rights.[190] The Act precluded judicial review of the deportation hearing,[191] but the court held that a criminal defendant must have the right to challenge a prior administrative hearing if the hearing establishes an essential element of a subsequent criminal prosecution.[192]

Both *Mendoza-Lopez* and *Emerson* explicitly bar preclusion of judicial review of administrative actions that raise constitutional issues, at least in the absence of "clear and convincing" evidence that Congress intended to bar such review.[193] Commentators have argued that this is the only proper exception to Congress's power to withhold jurisdiction of the review of administrative actions.[194] One must therefore examine the constitutional dimensions of a challenge that an administrative agency acted beyond the scope of its delegated authority in promulgating a particular administrative crime. With some exceptions, ultra vires challenges—those that claim an agency has exceeded its delegated power—generally are not treated by courts as constitutional in nature,[195] but the issue is close. Professor Paul Verkuil has recommended the creation of a "subnondelegation doctrine," to "ensur[e] that Congress' legislative power, presumably satisfactorily delegated initially, is not redelegated beyond its intended limits."[196] He also argues that "*Ultra vires*

188 481 U.S. 828 (1987).

189 8 U.S.C. § 1326 (1988).

190 481 U.S. at 831.

191 *Id.* at 835.

192 *Id.* at 839.

193 846 F.2d at 544.

194 *See* Verkuil, *supra* note 126, at 772-73; *but see* Webster v. Doe, 486 U.S. 592, 606 (1988) (Scalia, J., dissenting). In *Webster*, Justice Scalia vehemently disagreed with the majority's construction of the National Security Act, which precluded review of employment termination decisions by the Director of the Central Intelligence Agency, to allow review of colorable constitutional claims. The majority applied this construction in order to avoid the "serious constitutional question" that a construction precluding such review would raise. *Id.* at 603. Justice Scalia argued that congressional power over the jurisdiction of federal courts includes the power to withhold jurisdiction, as Congress sees fit, over some issues, including constitutional issues. *Id.* at 611. "[T]he power not to create any lower federal courts at all includes the power to invest them with less than all of the judicial power." *Id.*

195 Verkuil, *supra* note 126, at 751.

196 *Id.* at 753.

issues . . . are of a magnitude close enough to constitutional levels that their foreclosure ought only to be accepted when Congress has specifically made that determination."[197]

In the criminal context, the ultra vires issue is of constitutional dimension. In the civil realm, the delegation of administrative law-making power is in part a recognition of what would be true anyway: the executive has discretion in administering statutes, and with that discretion comes the ability to decide policy, and thus law.[198] This discretion, though, cannot operate in criminal cases, because ambignities that create discretion in the civil context must be resolved in favor of the defendant in the criminal realm.[199] Thus, the administrative promulgation of any rules defining a criminal penalty is valid only insofar as Congress delegated such power to the agency, and anything exceeding this is an unconstitutional usurpation.

The judicial power envisioned by Article III must include the power to review a criminal defendant's challenge to the administrative rule under which the defendant is prosecuted.[200] Without this opportunity, the judiciary would be implicated in the unconstitutional imposition of criminal sanctions. As Justice Murphy wrote in *Estep*:

> There is something basically wrong and unjust about a juridical system that sanctions the imprisonment of a man without ever according him the opportunity to claim that the charge made against him is illegal. I am not yet willing to conclude that we have such a system in this nation. Every fiber of the Constitution and every legal principle of justice and fairness indicate otherwise.[201]

Furthermore, a no-review provision for an administrative crime is not made constitutional by the opportunity to challenge a regnlation in a limited time and forum. It is no solace to a defendant facing prosecution under an arguably illegal rule to know that she would have had the chance to challenge the rule had she thought of it earlier. Nor is it comforting to know that the rule was in fact challenged by a civil litigant whose motives may differ greatly from a defendant facing an actual criminal conviction. Indeed, real reason exists to doubt whether a judge presiding over a civil challenge to a regulation punishable by criminal penalties will evaluate the rule in the same light as he might in a criminal trial, where the stakes are more apparent.[202] Thus, a criminal defendant's due process rights

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197 *Id.*

198 *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

199 *See supra* text accompanying notes 26-35.

200 *See supra* text accompanying notes 157-60.

201 Estep v. United States, 327 U.S. 114, 131 (1945) (Murphy, J., concurring).

202 *See* National Rifle Ass'n v. Brady, 914 F.2d 475, 479 n.9 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991). The *Brady* court dismissed a civil litigant's claim that a

must include the ability to raise constitutional claims at trial, including ultra vires claims, which attack the validity of administrative crimes.

B. Scope of Review

1. *The* Chevron *Approach*

As the foregoing suggests, judicial review of administrative rule-making should play a crucial role in ensuring the validity of agency regulations. The Supreme Court, however, sharply curtailed that role in *Chevron U.S.A. v. Natural Resources Defense Council*.[203] *Chevron* concerued regulations promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act Amendments of 1977.[204] The Act required certain states to issue permits before allowing the construction or modification of "major stationary sources" of pollution.[205] The EPA's regulations defined "stationary source" to include all polluting components of a single plant; this "bubble" concept of "stationary source" allowed industries to add or modify polluting facilities without a permit so long as the change did not increase the aggregate pollution output of the plant.[206] The Natural Resources Defense Council (NRDC) sued to set aside the regulations.[207]

In ruling for the NRDC, the Court of Appeals for the District of Columbia found that neither the language nor the legislative history of the Act settled the meaning of "stationary source."[208] Instead, the court's decision rested on the purposes of the 1977 amendments to the Act. The court reasoned that the Act was desigued to improve air quality and, therefore, the EPA's bubble concept of "stationary source," which merely preserved the status quo within a given plant, conflicted with the purposes of the Act.[209]

Reversing the Court of Appeals' decision, the Supreme Court devised a two-step test for challenges that assert an agency has misconstrued its organic statute. First, the reviewing court must determine whether Congress has spoken with clear intent on the precise

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rule whose violation could be punished criminally was ultra vires, in part because the issue arose in a civil trial where the special concerns of a criminal prosecution were not present.

203 467 U.S. 837 (1984).

204 Pub. L. No. 95-95, 91 Stat. 685 (1977) (currently codified at 42 U.S.C. § 7401 (1988)).

205 *Id.* § 172(b)(6), 42 U.S.C. § 7502(b)(6) (1988).

206 467 U.S. at 840.

207 *Id.* at 841.

208 National Resources Defense Council v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982).

209 *Id.* at 726.

issue at hand; if it has, that intention controls.[210] If Congress is silent on the issue, the court must decide whether the agency's interpretation of its enabling statute is within a permissible construction of that statute.[211] The latter determination should be made with substantial deference to the agency's construction of the statute: "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[212] Agreeing with the Court of Appeals that the Act did not explicitly define "stationary source," the Supreme Court held that the EPA's resolution was reasonable, and thus warranted deference.[213]

The *Chevron* approach has been the subject of considerable debate by commentators.[214] Those favoring the *Chevron* test have argued that "interpretation" is a chimerical concept in cases when Congress does not speak precisely to particular issues, because in such cases there are no laws to interpret, only policy choices to make.[215] Some argue that, in such a situation, deference to agencies is appropriate, because Congress, in delegating power to agencies, has indicated it wants them to define these issues, and because agencies are better situated politically than courts to resolve policy decisions. Agency heads, at least, can be removed by the President for

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210 467 U.S. at 842-43.

211 *Id.* at 843.

212 *Id.* at 844.

213 *Id.* at 845.

214 For arguments approving of *Chevron*, see DeLong, *supra* note 85; Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Starr, *supra* note 119. For arguments against *Chevron*, see Aman, *supra* note 24; Farina, *supra* note 73; Sunstein, *supra* note 77. Professor Davis regards *Chevron* as "extraordinarily inspiring in one aspect and extremely discouraging in another aspect." DAVIS, *supra* note 106, § 29.16-10, at 524. He views the Court's recognition that a new presidential administration's opinions on policy are valid considerations in agency decisionmaking as "[u]nprecedented . . . entirely welcome . . . realistic, and inspiring." *Id.* § 29.16-9, at 522-23. On the other hand, Davis considers the Court's conclusion that all reasonable agency interpretations of organic statutes are entitled to deference a "purposeful abuse of power" that "exceeded its Constitutional power, and . . . violated a fundamental of democratic government." *Id.* § 29.16-2 to .16-8, at 510-21. Davis's view rests on his opinion that the language of § 706 of the APA, mandating that "the reviewing court shall decide all relevant questions of law," clearly contradicts the Court's deferential approach to agency interpretations of law.

Interestingly, Davis considers the holding of *Chevron* both acceptable and entirely unremarkable, reading the EPA's regulation as a legislative rule of the type always afforded the force of law. The fact that among the major commentators on *Chevron* only Davis puts any weight on the distinction between legislative and interpretive rules seems to indicate either the difficulty in distinguishing which type of rule is involved in a given case, or the waning importance of distinguishing between the two.

215 *See* Pierce, *supra* note 68. This argument would reconcile *Chevron* with Davis's interpretation of § 706 of the APA, which requires courts to decide all issues of law arising from the review of agency action. *See supra* note 214. If there is no law to apply, § 706 is inapposite.

unpopular decision-making, while courts are insulated from the ramifications of their actions.[216]

In response, commentators have argued that the *Chevron* system of allocating accountability for policy choices iguores the Constitution's resolution of the separation of powers question.[217] Professor Cynthia Farnia has argued that whether it is truly possible to separate interpretation, or saying what the law is, from legislation, or saying what the law should be, is not the relevant inquiry.[218] The Constitution, as interpreted since *Marbury v. Madison*,[219] recognizes a difference between the two, and the proper role of the courts is to resolve questions of interpretation.[220] Indeed, if interpretation were limited to only precise issues clearly resolved by the legislature, the much-vaunted judicial expertise in matters of statutory review would seem rather superfluous.

Nevertheless, the *Chevron* standard is now firmly entrenched. The Supreme Court has steadfastly pledged its allegiance to the *Chevron* test, although differences amongst the Court's members about its application have prompted occasional claims of "evisceration" of the test,[221] or overly formalistic applications that "trivialize[] the art of judging."[222]

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216 *See* Pierce, *supra* note 214, at 307-08. *See also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983) (arguing that deference is a natural adjunct to the nondelegation doctrine, because the upholding of delegations and deferrence to agency interpretations are recoguitions of the power delegated to agencies to make law).

217 *See* Farina, *supra* note 73, at 498.

218 Farina, *supra* note 73, at 477.

219 5 U.S. (1 Cranch) 137 (1803).

220 Farina, *supra* note 73, at 477-78.

221 I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring). This case concerned an interpretation of the Immigration and Nationality Act, 8 U.S.C. § 1101 (1988), which allowed aliens to petition for asylum upon a showing of a "well founded fear" of persecution if deported. The majority found that an immigration judge's decision that § 208(a) of the Act required a showing of a "clear probability of persecution" was contrary to the Act. 480 U.S. at 423-24. Justice Scalia agreed, reasoning that the language of the Act settled the question, but took umbrage with the Court's exhaustive search of the legislative history and its apparent belief that deference is unnecessary "whenever, '[e]mploying traditional tools of statutory construction,' [the Court is] able to reach a conclusion as to the proper interpretation of the statute." *Id.* at 454. Since *Chevron* requires deference whenever Congress has not clearly expressed its intention on the precise matter at hand, Scalia deemed the Court's opinion "flatly inconsistent" with *Chevron*. *Id.*

222 Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1985) (Stevens, J., dissenting). In *Young*, the Court reviewed a regulation promulgated by the Food and Drug Administration (FDA) under the authority of the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. § 346 (1988). At issue was the effect of the phrase "to such extent" in relation to the command that the Secretary of the FDA "shall promulgate" certain safety standards. 476 U.S. at 977. The Court held that the FDA's conclusion that the phrase "to such extent" modified the phrase "shall promulgate," thereby giving the agency discretion to not promulgate rules, was reasonable because although "Congress . . . was

While generally adhering to *Chevron*, the Court has delineated some areas where the policies behind deference either do not apply, or are outweighed by more important policies. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[223] the Supreme Court recently held that agency interpretations in a non-rulemaking context were not entitled to deference if they raised constitutional issues.[224] In *DeBartolo*, the National Labor Relations Board (NLRB) issued an order restraining a union from distributing leaflets to shoppers at a shopping mall whose contractor was alleged to pay substandard wages. This practice was said to be "coercive"[225] within the meaning of the National Labor Relations Act (NLRA).[226]

In affirming the Eleventh Circuit's reversal of the NLRB decision, the Supreme Court did not hold that the agency's decision violated the First Amendment.[227] Rather, the Court stated that its long-standing policy of interpreting so as to avoid serious constitutional issues whenever reasonably possible outweighed the policy behind deference.[228] Thus, the Court recognized that the policies implemented through *Chevron* deference could be trumped if other, more important policies are at issue.

Furthermore, *Chevron* deference is not appropriate when perhaps the main policy for deference is inapplicable: recognition of congressional trust in agency expertise.[229] In *Bowen v. American Hospital Ass'n*,[230] a plurality of the Court held that regulations promul-

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speaking directly to the precise question at issue in this case, [it did not] unambiguously express[] its intent." *Id.* at 980. This was despite the Court's agreement that the contrary interpretation "may seem to some to be the more natural interpretation." *Id.* Justice Stevens blasted the majority's rigidity in applying *Chevron*, arguing that the majority's level of deference was tantamount to an abdication of the judicial role. *Id.* at 988.

223 485 U.S. 568 (1988).

224 *See id.* at 575.

225 *Id.* at 574.

226 29 U.S.C. § 158(b)(4) (1988).

227 485 U.S. at 575-76.

228 *Id.* at 576.

229 The *Chevron* policy is in reality a hybrid of the policies advanced by the two schools of thought on agencies and the separation of powers. *See supra* notes 71-90 and accompanying text. Thus, when Justice Stevens wrote in *Chevron* that "the principle of deference to administrative interpretations 'has been consistently followed . . . whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations,' " 467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961)), he reiterated the old school's faith in administrative deference. But when he wrote that, "[w]hen a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency's policy, . . . federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do," *Id.* at 866, the new school's accountability based analysis was clearly at work.

230 476 U.S. 610 (1986).

gated by the Secretary of the Department of Health and Human Services (HHS) under the authority of the Rehabilitation Act of 1973[231] were not entitled to deference. The Court reasoned that this was appropriate because the Act granted directors of all federal agencies the same authority to promulgate rules prohibiting discrimination against the handicapped.[232] Because Congress had not entrusted the HHS with administering the Act to any special degree, the Court held that there was "not the same basis for deference predicated on expertise as we found . . . in *Chevron*."[233]

Similarly, the Court of Appeals for the District of Columbia has held that even when an agency *is* entrusted to administer an act, this interpretation is entitled to no deference if it concerns a common-law term over which the agency has no particular expertise.[234] Thus, even though an agency's interpretation of its organic statute generally deserves deference, that policy extends only to areas of the statute that implicate agency expertise. The following Section argues that, when criminal penalties are involved, agency expertise is not implicated, and, moreover, that the competing policies applicable in the criminal context outweigh the diluted *Chevron* policies.

2. *Why the* Chevron *Standard is Inapposite to Administrative Crimes*

A host of arguments have been advanced to support the deferential *Chevron* regime of judicial review. The expertise and flexibility that make agencies useful in a general sense are said to warrant deference, lest inexpert courts clumsily destroy those advantages. Moreover, agencies are said to deserve deference because of democratic principles: Congress, the most democratic branch, delegates power to administrative agencies, which are indirectly accountable politically, making intervention on the part of the judiciary, which is even less politically accountable, inappropriate.[235] These arguments, however, make far less sense in the context of review of administrative crimes. Furthermore, policies peculiar to criminal law outweigh the diluted policies behind the general deferential review scheme of *Chevron*.

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231 29 U.S.C. § 794 (1988).

232 476 U.S. at 642.

233 *Id.* at 642 n.30.

234 Aurora Packing Co. v. NLRB, 904 F.2d 73, 75 (D.C. Cir. 1990) (NLRB's interpretation of the scope of the word "employee" was not entitled to deference because Congress wanted the term to retain its common law meaning, and the NLRB had no expertise with the common law). *See also* Turner v. Perales, 869 F.2d 140 (2d Cir. 1989) (interpretations of states responsible for administering federal statutes entitled to no deference, because they do not possess expertise in the sense that federal agencies do).

235 *See, e.g.*, Pierce, *supra* note 68, at 506.

According to the traditional school,[236] agencies have two major virtues that Congress lacks: special expertise and increased flexibility. While increased scrutiny for agency rules might hamper these valuable characteristics, both attributes lose significance when criminal regulations are implicated. An agency's expertise in determining how best to regulate an area does not apply as well in the criminal context, which traditionally reflects community approbation. Agencies do not have any special insight into determining community values.

It might be argued that agencies' expertise comes into play in determining which actions within a particular area so warrant deterrence that a criminal penalty is needed; indeed, this argument seems necessary to explain why administrative crimes are *ever* allowed. But even if predominant, deterrence cannot be the sole rationale for a criminal rule, because otherwise a civil penalty would suffice. Assuming then that some element of approbation remains in even deterrence-based administrative crimes,[237] it can also be assumed that Congress, in defining the sphere of agency rules that are criminally punishable, supplies the needed stamp of blame. When an agency goes beyond the boundaries Congress enacts, however, the only source for the determination that the prohibited conduct is blameworthy is the agency itself. In noncriminal situations, such regulation beyond the scope of what Congress envisioned is considered permissible, if reasonable, because the expert agency is presumed to have a better idea of proper action than the reviewing court.[238] In the context of administrative crimes, however, the problem remains that agencies are simply not experts on community approbation. Consequently, the only way to argue that the agency expertise rationale is not undermined in this context is to contend that deterrence is the *only* justification for such crimes. In light of the fact that many administrative crimes are punishable by imprisonment, this argument seems untenable.[239]

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236 *See supra* notes 71-76 and accompanying text.

237 *Cf.* Malcolm E. Wheeler, *Manufacturers' Criminal Liability*, *in* LOUIS FRUMER & MELVIN FRIEDMAN, PRODUCTS LIABILITY § 1B.06 (1984) (suggesting that potential defendants' fear of the approbation and stigma associated with criminal conviction is a factor lawmakers believe will increase deterrence and justify the imposition of criminal sanctions for marketing unsafe products).

238 *See Chevron*, 467 U.S. at 865 (agencies are preferable to courts for making policy decisions unresolved by Congress because they have "great expertise and [are] charged with responsibility for administering the [statute,] . . . [whereas] [j]udges are not experts in the field, and are not part of either political branch of the Government.").

239 H.L. Packer has argued that creating crimes whose sole purpose is deterrence is unwise apart from the inherent unfairness of imprisoning people who have done nothing culpable. His argument is that deterrence is a "complex psychological phenomenon" that requires both fear of punishment and recognition of societal blame, so that

Moreover, the greater flexibility of agencies relative to that of Congress does not warrant deferring to agency judgment in the criminal context. It has been argued that the Constitution places procedural limitations on congressional lawmaking power so that the burdens on freedom represented by any law are more difficult to construct.[240] This argument applies even more strongly in the criminal context: declaring specific conduct so blameworthy as to deserve a criminal sanction should be possible only after running the gauntlet of political processes required by congressional lawmaking, but not for administrative rulemaking.[241] When criminal punishment is involved, flexibility is not a virtue.

The new school[242] considers deference appropriate because, when Congress has failed to address an issue, someone must fill in the gaps, and in effect, make the law. Agencies are preferable because they are more politically accountable than courts.[243] However, when the protection of criminal rights, like the protection of other constitutional rights, is involved, political accountability is not the critical inquiry. The concept of protected rights includes the idea of protection from the potential majoritarian tyranny that political accountability necessarily cannot control. It is entirely appropriate, therefore, that when Congress has left open an issue concerning criminal law, the courts close it by holding that no crime has been created. When criminal penalties are involved, the law must err in favor of the defendant.

While the policies supporting deference to agency interpretations seem less persuasive in the criminal context, a host of policies and concerns particular to criminal defendants emerge at full strength against deference to administrative agencies. The rule of lenity, for example, militates toward applying regulatory statutes in the light most favorable to the criminal defendant.[244] The requirement of fair warning cautions against convicting a defendant based on a regulation buried in the Federal Register.[245] Fundamental fairness notions favor an independent and impartial adjudicator for each of a criminal defendant's arguments, but deference, in effect, allows the agency that creates a rule to determine its validity.[246] In

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deterrence simply cannot work in the criminal context with culpability. PACKER, *supra* note 13, at 65.

240 *See* Farina, *supra* note 73, at 508.

241 *See supra* note 81.

242 *See supra* notes 83-87 and accompanying text.

243 *Id.*

244 *See supra* text accompanying notes 26-35.

245 *See supra* text accompanying notes 170-73.

246 *See supra* text accompanying notes 157-60.

short, the policies favoring deference seem quite unpersuasive, while those favoring full-scale, de novo review seem compelling.

Some courts have suggested what this Note argues—that challenges to agency interpretations raised in criminal prosecutions are not entitled to *Chevron* deference. In *United States v. McGoff*,[247] Judge Kenneth Starr of the Court of Appeals for the District of Columbia, generally a supporter of the *Chevron* framework,[248] wrote that the rights at stake for criminal defendants are "far outside *Chevron* territory,"[249] and that agency interpretations are entitled to no deference in criminal prosecutions.[250] *McGoff* involved the prosecution of a South African agent, who sought to acquire American media properties, for failure to register under the Foreign Agents Registration Act of 1938.[251] Though encouraging, Judge Starr's strong language was broad dictum; the case concerned an interpretation by the Justice Department, not an agency charged with administering the statute,[252] and the interpretation was never advanced prior to the immediate litigation.[253] Nonetheless, *McGoff* illustrates that some judges recognize a problem in deferring to agency interpretations of statutes when criminal charges are involved.

In *National Rifle Ass'n v. Brady*,[254] the National Rifle Association (NRA), in a civil proceeding, challenged gun control regulations promulgated by the Secretary of the Treasury. The Fourth Circuit upheld the regulations, promulgated under the Gun Control Act of 1968,[255] which punished violations with criminal penalties. In so doing, the court used the *Chevron* standard of review and rejected the NRA's contention that administrative crimes were not entitled to deference.[256] The court noted, however, that the issue arose in the context of civil litigation rather than during a criminal prosecution.[257] This comment implicitly suggests that had the challenge been brought in a criminal prosecution, the result might have been different.

> Many of the cases . . . on which the NRA relies in making this argument involve the application of the rule of lenity in criminal

247 831 F.2d 1071 (D.C. Cir. 1987).
248 *See* Starr, *supra* note 119.
249 831 F.2d at 1077.
250 *Id.* at 1084.
251 22 U.S.C. §§ 611-621 (1988).
252 *See supra* text accompanying notes 71-76, 229-33.
253 *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (*post hoc* explanations for agency action advanced by agency counsel during litigation are irrelevant for judicial review purposes).
254 914 F.2d 475 (4th Cir. 1990).
255 18 U.S.C. § 921 (1988).
256 914 F.2d at 478.
257 *Id.* at 479 n.3.

> prosecutions and are simply inapposite to questions of deference to agency regulations. . . . In addition . . . the government properly notes that any disputes over [the validity of the regulations] are far more likely to arise in [civil] contests . . . than in a criminal courtroom. The usual level of deference is *therefore* appropriate.[258]

Thus, because this litigation was civil, as is most litigation likely to arise under the regulations, deference was proper. The court implied that had this been a criminal prosecution, deference, and not the rule of lenity, would have been "simply inapposite."[259]

Chevron stands for the proposition that when someone other than Congress must decide what the law is, administrative agencies, with their particular expertise and greater political accountability, are better actors than the courts. Whether one agrees with this approach in general is irrelevant to administrative crimes, because the policies supporting deference simply do not apply in this context.[260] Agencies are not experts in assessing the societal mores underlying criminal law. Nor does the purported accountability advantage of the agencies merit deference when crimes are involved; if Congress is not clearly accountable for a criminal proscription, the solution is not to determine which of the remaining branches is more accountable, but rather to hold that no crime exists. Finally, the policies supporting special treatment for all criminal rules outweigh any remaining vitality of the *Chevron* policies. *Chevron* thus has no place in the review of administrative crimes.

IV
A Proposed Standard of Review for Administrative Crimes

This Note argues that the Constitution requires independent judicial review of the validity of administrative crimes in the context of a criminal prosecution, and that the policies advanced by deference to agency interpretations warrant less consideration in the criminal context. Consequently, in a criminal prosecution for violation of an administratively defined crime, the defendant should be allowed a de novo review of the regulation's validity. The judge should independently evaluate whether a rule is valid under the Constitution and its organic statute. This ensures that a defendant can only be punished under a law for which Congress, at least indirectly, can be held accountable. It also protects the defendant's right to a fundamentally fair trial before an impartial adjudicator.

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258 *Id.* at 480 n.3. (emphasis added).

259 *Id.*

260 *See supra* notes 236-46 and accompanying text.

A. A Hypothetical Application of the Proposed Standard

To illustrate the proposed standard of review, recall the regulatory scheme in *United States v. Mandel*.[261] The Export Administration Act of 1979[262] delegated to the Secretary of Commerce authority to desiguate items on a Commodity Control List (CCL), exports of which, without a license, were punishable by up to five years in prison.[263] The Secretary's decision was guided by a list of statutory criteria concerning the availability of an item on foreigu markets.[264] The Secretary was required to review items on the CCL periodically, but an item's inclusion on the list was barred from review in criminal prosecutions.[265]

Suppose the Secretary chose to bar exports of computerized cutlery to Japan by including such exports on the CCL, believing that this punitive measure would ultimately foster the United States's foreign policy goal of free trade.[266] Suppose also that an industrious inventor, Xerxes, managed to perfect the Carving Wizard, a kitchen carving knife requiring no human skill, and decided to peddle his wares in the Japanese market. Suppose further that the Justice Department learned of this entrepreneur's scheme, and chose to prosecute him.

Under the current regime, Xerxes would have no defense: he sold CCL goods without a permit and thus would be guilty. Under the arguments advanced in Part III. A. of this Note, however, Xerxes would have a due process right to attack the validity of the rule. If the court applied a deferential standard of review, the mere ability to challenge the rule would be of little value, because the Act leaves the determination of what is detrimental to competitiveness up to the Secretary, and unreasonableness is difficult to prove to a deferential court.[267] Under the proposed standard, however, the reviewing court, considering the validity question de novo, would employ traditional statutory construction methods. Based on these methods, the court would determine that Congress did not intend to au-

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261 914 F.2d 1215 (9th Cir. 1990). *See supra* notes 182-87.

262 50 U.S.C. app. § 2401-2420 (1988).

263 *Id.* § 2410(b).

264 914 F.2d at 1217.

265 *Id.* at 1220; 50 U.S.C. app. § 2412 n.8 (1988).

266 This is one of the grounds authorizing the Secretary to include items on the CCL 50 U.S.C. app. § 2405(a) (1988).

267 A deferential regime would make challenges under the Export Administration Act particularly difficult, since the Secretary's decisions are in the nature of a political question and therefore are "not subject to review to determine whether [they] had a basis in fact." 914 F.2d at 1223.

thorize CCL inclusion of gadgets of primarily consumer interest.[268] Xerxes would go free, and an unjust result would be avoided.

B. A Refutation of Likely Counter-Arguments to the Proposed Standard

Beneath the traditional notion that administrative crimes do not deserve particularly close scrutiny lurks the idea that administrative crimes are not "really" crimes at all: they generally involve behavior not culpable in a classical sense, and they are often invoked against corporations rather than individuals.[269] Thus, advocates of criminal penalties for administrative crime reject the traditional philosophy that criminals are outcasts shunned by society and that criminal penalties "should be reserved for what really matters."[270] The administrative paradigm, however, ignores the real differences that remain between civil and criminal penalties.

The simple fact that criminal penalties are generally more severe than their civil counterparts makes it more important that every element of the offense—including the validity of any regulation defining its terms—be proven. Additionally, a conviction for a criminal offense can have disastrous collateral estoppel effects.[271] In prosecutions involving administrative crimes, the defendant is often a corporation which may face a daunting array of civil actions for the conduct underlying the criminal prosecution.[272] Stigma or not, a defendant in such a situation has every right to expect a fair determination that the criminal prosecution rests on a regulation enacted in accordance with the law. Finally, while this of course cannot be proved, it does not seem that the stigma of the criminal conviction has disappeared, even in prosecutions under statutes that do not immediately seem to govern particularly shunned conduct, as exemplified by some of the recent prosecutions of Wall Street figures.[273]

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268 Legislative history evinces congressional desire to limit foreign policy export controls to rare situations when such controls might provide an effective and necessary United States response. *See* S. REP. No. 169, 96th Cong., 1st Sess. 5-9 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1147, 1152-1155.

269 *Cf.* Morissette v. United States, 342 U.S. 246 (1952) (discussing why strict liability is appropriate for "public welfare offenses," as contrasted with traditional common-law crimes).

270 *See* PACKER, *supra* note 13.

271 *See* Jonathan C. Tha, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical and Strategic Implications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079 (1982).

272 For example, the *Exxon Valdez* oil spill resulted in hundreds of civil actions against Exxon, all of which might have been automatically successful if Exxon had lost the criminal case brought against it. *See The Legal Reef Ahead for Exxon*, BUS. WK., Mar. 12, 1990.

273 *See, e.g.*, Paul Richter, *Wall St. Scandal Leaves so Many to Cope with Shame*, L.A. TIMES, Dec. 25, 1988, at 1 (Business Section).

CONCLUSION

The jurisprudential foundation for modern administrative law maintains that agencies only follow the instructions, however general, given to them by Congress. The modern approach of judicial deference in the review of administrative interpretations ignores the role of courts in monitoring this delegation by allowing agencies to, in effect, determine the parameters of their own powers. Whatever the reasons for this system in the larger sense, it is inappropriate in the context of regnlations defining criminal conduct. The policies supporting judicial deference in general—recognition of expertise and favoring the policy determinations of executive agencies over courts—are of lesser significance when criminal prosecutions are involved. Moreover, a host of special concerns for criminal defendants are at issue in the context of administrative crimes. In recognition of these concerns, courts should employ a de novo standard of review whenever the validity of administratively defined criminal penalties is challenged.

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