JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF LAWS AND REGULATIONS WITH CRIMINAL AND ADMINISTRATIVE APPLICATIONS: AN ARGUMENT OVERLOOKED?†

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In *Kisor v. Wilkie*,[1] the Supreme Court appeared poised to reshape administrative law to give administrative agencies less judicial deference than they currently receive when interpreting their own rules. In *Kisor*, the petitioner—a Vietnam War veteran denied retroactive Veterans Affairs benefits for post-traumatic stress disorder—urged the Court to abandon its decades-old practice of deferring to an agency's "reasonable" interpretation of its own ambiguous regulation under *Auer v. Robbins*[2] and *Bowles v. Seminole Rock & Sand Co.*,[3] commonly called "*Auer*" or "*Seminole Rock*" deference.[4] The late Justice

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1. 139 S. Ct. 2400 (2019).
2. 519 U.S. 452 (1997).
3. 325 U.S. 410 (1945).
4. *Kisor*, 139 S. Ct. at 2408. Notably, even the government, which benefits from *Auer* deference, acknowledged "significant concerns" with the doctrine rather than defend the *status*

Scalia, who once said, "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean," would no doubt have been pleased to see *Auer* deference revisited.[5] Yet on June 26, 2019, a five-Justice majority decided to preserve *Auer*—much to the chagrin of the four Justices who concurred in the judgment only.[6] Despite the outcome, the Court's decision to take a second look at longstanding administrative law precedent is notable, and the four Justices who concurred in the judgment indicated that in another case, they would be amenable to overturning *Auer*.[7]

Given its willingness to reconsider previously settled principles such as *Auer* deference, the Court may be willing to address another form of deference that has never been settled: deference to agency interpretations of laws or rules "that contemplate both criminal and administrative enforcement."[8] Questions of whether such deference is appropriate could arise in either the *Auer* context or the *Chevron* context, where deference is owed to an agency's reasonable interpretation of an ambiguous statute that it administers.[9] Agencies routinely interpret federal statutes in adopting regulations to implement and enforce those statutes. In some instances, Congress provides for criminal

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quo. The Solicitor General argued that the Court should "[c]larif[y]" and "[n]arrow[]" *Auer* deference. *See* Brief for Respondent at 15, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15), 2019 WL 929000, at *14-15.

5. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

6. Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019) ; *see also id.* at 2425 (Gorsuch, J. concurring in the judgment) (observing that "a bare majority flinches, and *Auer* lives on"). Justice Gorsuch referred to the Court's refusal to overrule *Auer* as "more a stay of execution than a pardon" and contended that the conditions the majority articulated for applying *Auer* deference amounted to "keeping it on life support." *Id.* at 2425. Justices Thomas, Kavanaugh, and Alito joined Justice Gorsuch in calling for *Auer*'s burial.

7. *See, e.g.*, *id.* at 2426 (Gorsuch, J., concurring in the judgment); *id.* at 2448 (Kavanaugh, J., concurring in the judgment).

8. Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., joined by Thomas, J., respecting the denial of certoriari).

9. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). Significantly, in *Kisor*, the Chief Justice—the fifth vote to uphold *Auer*—went out of his way to note that the rationales for "judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress." *Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). In a separate opinion, Justice Kavanaugh cited the Chief Justice's statement on *Chevron*, remarking that "[l]ike the Chief Justice, I do not regard the Court's decision not to formally overrule *Auer* to touch upon the" correctness of *Chevron*. *Id.* at 2449 (Kavanaugh, J., concurring in the judgment) (quotation omitted). Given these statements, it probably will not be long before the Court reconsiders *Chevron* deference too.

penalties for violation of the statutes it directs administrative agencies to implement. As explained below, several agencies—the Commodity Futures Trading Commission (CFTC), Federal Energy Regulatory Commission (FERC) and Securities and Exchange Commission (SEC)—promulgated similar regulations proscribing fraud and manipulation.[10] These regulations implement Congress's general prohibitions of such conduct and can be enforced by those agencies through administrative or civil actions or by the Department of Justice through criminal prosecutions.

Deference to agency interpretations of laws or rules that carry both criminal and civil penalties is controversial because, in criminal cases, the rule of lenity calls for ambiguity in statutes or regulations to be resolved in favor of the defendant.[11] The conflict that arises between the rule of lenity and the principle of deference to agency interpretations of ambiguous statutes or rules can be avoided only if the statute (or rule) is given different meanings in the criminal and administrative/civil enforcement contexts. But that is not a satisfactory solution in light of another longstanding principle—"that the meaning of the words in a statute cannot change with the statute's application."[12] Accordingly, the conflict cannot truly be avoided, and one principle must prevail over the other. This conflict—together with related concerns about Congress delegating wide-ranging authority to federal agencies to give substantive content to general prohibitions that carry criminal penalties—are too important to be left unresolved.

In *Whitman v. United States*,[13] the late Justice Scalia recognized this conflict and suggested the Court resolve it in an appropriate case.[14] Whitman appealed his convictions for securities fraud and conspiracy to commit securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[15] The district court instructed the jury in accordance

10. *See infra* pp. 189–92.

11. *See* United States v. Santos, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").

12. *See id.* at 522; *see also* Clark v. Martinez, 543 U.S. 371, 382 (2005).

13. 135 S. Ct. 352 (2014).

14. *Id*. at 352–54.

15. United States v. Whitman, 555 F. App'x 98, 100 (2d Cir. 2014); *see also* 15 U.S.C. § 78j(b) (prohibiting "any manipulative or deceptive device or contrivance in contravention of such rules or regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors," in "connection with" the "purchase or sale" or any security or securities-based swap); 17 C.F.R. § 240.10b-5 (making it unlawful to "employ any device, scheme, or artifice to defraud," make a material misstatement or omission, or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person[] in connection with the purchase or sale of any security").

with Second Circuit precedent, which provides that defendants violate Section 10(b) and Rule 10b-5 when they trade while in "knowing possession" of material nonpublic information.[16] On appeal, Whitman urged the Second Circuit to adopt the Ninth Circuit's standard that a defendant is liable under Section 10(b) and Rule 10b-5 only if the inside information was a "significant factor" in his decision to trade.[17] The Second Circuit declined to adopt that standard because it was bound by "controlling circuit precedent," and therefore, only the court sitting *en banc* could adopt Whitman's proposal.[18]

The "controlling circuit precedent" that the Second Circuit cited—*United States v. Royer*[19]—adopted a "knowing possession" standard based in part on SEC Rule 10b5-1, which also applies a "knowing possession" standard.[20] In *Royer*, the Second Circuit held that the SEC's interpretation of the federal securities laws was entitled to deference under *Chevron*.[21] But *Chevron* was a civil action, and Justice Scalia argued that according *Chevron* deference to an agency interpretation of a law such as Section 10(b) that provides for both criminal and administrative enforcement allows "federal administrators . . . [to] in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain."[22] Justice Scalia elaborated that applying *Chevron* deference in this context would "upend ordinary principles of interpretation"[23] because "[t]he rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants"[24] and "vindicates the principle that only the *legislature* may define crimes and fix punishments."[25]

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16. *Whitman*, 555 F. App'x at 107.

17. *Id.*

18. *Id.*

19. 549 F.3d 886 (2d Cir. 2008).

20. *See Whitman*, 555 F. App'x at 107 (quoting United States v. Royer, 549 F.3d 886, 899 (2d Cir. 2008)) (noting that under *Royer*, it is a violation of the law to trade while in knowing possession of nonpublic information that is material to those trades); Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,716 (Aug. 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, 249) (stating that Rule 10b5-1 provides that "a person trades 'on the basis of' material nonpublic information when the person purchases or sells securities while aware of the [material nonpublic] information," subject to certain affirmative defenses set forth in the rule).

21. *See Royer*, 549 F.3d at 899 (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984)); Roth ex rel. Beacon Power Corp. v. Perseus L.L.C., 522 F.3d 242, 249 (2d Cir. 2008).

22. Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., joined by J. Thomas, respecting the denial of certoriari).

23. *Id.*

24. *Id.*

25. *Id.* at 354. Justice Scalia nevertheless did not dissent from the denial of certiorari,

The late Justice's concerns implicate not only the SEC's interpretation of the federal securities laws, but also virtually any agency's interpretation of statutes that provide for criminal punishment in addition to civil penalties for violations of the regulatory scheme, including the Commodity Exchange Act (CEA) (administered by the CFTC) and the Federal Power Act (FPA) and Natural Gas Act (NGA) (administered by FERC). In the Dodd-Frank Act, Congress amended the CEA to add Section 6(c)(1), prohibiting the use or attempted use of "any manipulative or deceptive device or contrivance," "in connection with" swaps, futures contracts, and contracts for sale of commodities in interstate commerce, "in contravention of" CFTC rules.[26] Similar to how it wrote Section 10(b) of the Securities Exchange Act, Congress directed the CFTC to promulgate rules to implement the general prohibition. The CFTC subsequently adopted Rule 180.1, which prohibits "intentionally or recklessly" using or attempting to use "any manipulative device, scheme, or artifice to defraud" in connection with those products.[27] Willful violation of Rule 180.1 is a felony.[28] Notably, the scope of Rule 180.1 has been the subject of recent litigation centered on the question of whether Congress intended to prohibit either fraud or manipulation alone, or only fraud-based manipulations.[29] For instance, in *U.S Commodity Futures Trading Commission v. Monex Credit Co.*,[30] the CFTC argued that the plain language of Section 6(c)(1) supports its position that the provision prohibits fraud alone, and contended in the alternative that its reading of Section 6(c)(1) is entitled to *Chevron* deference.[31]

With respect to FERC, under the Energy Policy Act of 2005, Congress amended the FPA and NGA to prohibit the use of "any manipulative or deceptive device or contrivance" in connection with electricity and natural gas transactions within FERC's statutory jurisdiction, "in contravention of such rules and regulations as the Commission may prescribe as necessary in the

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noting that Whitman did "not seek review on the issue of deference." *Id.*

26. *See* 7 U.S.C. § 9(1) (2018).

27. *See* 17 C.F.R. § 180.1(a) (2019).

28. *See* 7 U.S.C. § 13(a)(5) (2018).

29. *See* U.S. Commodity Futures Trading Comm'n v. Monex Credit Co., 311 F. Supp. 3d 1173 (C.D. Cal. 2018), *rev'd and remanded*, 931 F.3d 966 (9th Cir. 2019); *see also* U.S. Commodity Futures Trading Comm'n v. Kraft Foods Grp., Inc., 153 F. Supp. 3d 996, 1008–09 (N.D. Ill. 2015) (holding that Section 6(c)(1) and Regulation 180.1 prohibit only fraudulent conduct).

30. 931 F.3d 966 (9th Cir. 2019).

31. *See* Brief for Appellant at 21, U.S. Commodity Futures Trading Comm'n v. Monex Credit Co., 931 F.3d 966 (9th Cir. 2019). The Ninth Circuit ruled in the CFTC's favor, holding that the CFTC "may sue for fraudulently deceptive activity, regardless of whether it was also manipulative." *Monex*, 931 F.3d at 976.

public interest" or "for the protection of" electricity or natural gas ratepayers.[32] Shortly thereafter, FERC promulgated regulations prohibiting the use of "any device, scheme, or artifice to defraud" in connection with natural gas and electricity transactions.[33] The FPA and NGA contain criminal penalties for violation of these and other provisions and rules.[34] In enforcing these rules, FERC has successfully argued for *Chevron* deference to its interpretation of the FPA.[35]

Deference to agency interpretations of laws or rules that provide for both criminal and administrative enforcement is in great tension, if not outright conflict, with the rule of lenity, which "requires interpreters to resolve ambiguity in criminal laws in favor of defendants."[36] In *Whitman*, Justice Scalia remarked that "[d]eferring to the prosecuting branch's expansive views of these statutes 'would turn [their] normal construction . . . upside-down.'"[37] Where an ambiguous statute or regulation implicates both criminal and administrative enforcement, deferring to an agency's interpretation—however reasonable—to resolve that ambiguity may deprive a defendant of the favorable interpretation that the rule of lenity would otherwise require.

The rule of lenity is a longstanding precept of American criminal law, rooted in the principle that criminal laws should be construed strictly.[38] The rule also reflects fairness principles, including the right to fair notice of what conduct is prohibited,[39] and the separation of powers, in particular the recognition that the power to define crimes lies in the legislative branch only.[40]

The Supreme Court has not articulated an entirely consistent view on how the rule of lenity should be applied in the interpretation of statutes that carry both criminal and civil penalties. *Crandon v. United States*[41] involved a civil

32. *See* 16 U.S.C. § 824v(a) (2012) (Federal Power Act amendment); 15 U.S.C. § 717c-1 (2012) (Natural Gas Act amendment).

33. *See* 18 C.F.R. §§ 1c.1, 1c.2 (2019).

34. *See* 15 U.S.C. §§ 717t, 3414(c) (2012); 16 U.S.C. § 825o (2012).

35. *See* FERC v. Maxim Power Corp., 196 F. Supp. 3d 181, 201–02 (D. Mass. 2016).

36. Whitman v. United States, 135 S. Ct. 352, 353 (2014); *see also* United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citation omitted).

37. *Whitman*, 135 S. Ct. at 353 (alteration in original) (quoting Crandon v. United States, 494 U.S. 152, 178 (1990) (Scalia, J., concurring in the judgment)).

38. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Chief Justice Marshall explaining that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

39. *See* United States v. Kozminski, 487 U.S. 931, 952 (1988); *see also* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 13 (2006).

40. *See* Greenfield, *supra* note 39.

41. 494 U.S. 152 (1990).

lawsuit alleging violations of a statute that makes it a crime for a private party to pay, and a government employee to receive, supplemental compensation for the employee's government service.[42] Although the context did not involve a criminal prosecution, the Court held that because the "[g]overning standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."[43] Five years later, however, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,[44] the Court declined to apply the rule of lenity in affirming a Department of the Interior regulation defining "harm" under the Endangered Species Act of 1973—an act with both criminal and civil applications. In doing so, the Court asserted that it had "*never* suggested that the rule of lenity should provide the standard for reviewing *facial* challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."[45]

Nearly a decade later, in *Leocal v. Ashcroft*,[46] the Court reversed a deportation order based on a legal permanent resident's conviction for driving under the influence—which an immigration judge and the Board of Immigration Appeals had classified as a "crime of violence."[47] The Court applied the rule of lenity to interpret the statute at issue, 18 U.S.C. § 16, in the petitioner's favor, notwithstanding that the case involved a civil proceeding.[48] Observing that the statute "has both criminal and noncriminal applications," the Court reasoned that it "must interpret the statute consistently" across the different contexts.[49] Because the rule of lenity in a criminal case would compel reading the ambiguity in the statute's definition of a "crime of violence" to exclude the petitioner's DUI conviction, the Court held that the petitioner's conviction was not a "crime of violence" for purposes of deportation either.[50]

Justice Scalia had previously advocated for the application of the rule of lenity in a case involving the application of a novel theory of criminal liability under the federal securities laws. In *United States v. O'Hagan*,[51] the Supreme

42. *See id.* at 158.

43. *Id.*

44. 515 U.S. 687 (1995).

45. *Id.* at 704 n.18 (emphasis added); *see also* Greenfield, *supra* note 39, at 40 (observing that "[t]he fact that the challenge was made facially rather than as applied to 'a specific factual dispute' appears to be the primary basis of the Court's conclusion" (quoting *Babbitt*, 515 U.S. at 704 n.18)).

46. 543 U.S. 1 (2004).

47. *Id.* at 5–6.

48. *Id.* at 11–12, 12 n.8.

49. *Id.* at 12 n.8.

50. *Id.* at 11–13, 12 n.8.

51. 521 U.S. 642 (1997).

Court held that an attorney who purchased stock in the target corporation of a takeover bid based on inside information that he obtained as a member of the law firm representing the acquirer could be found guilty of securities fraud in violation of Section 10(b) and Rule 10b-5. In *O'Hagan*, the majority recognized the "misappropriation" theory of insider trading—which holds that "a person commits fraud 'in connection with' a securities transaction, and thereby violates Section 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[52] Justice Scalia, however, argued that this outcome "does not seem to accord with the principle of lenity we apply to criminal statutes (which cannot be mitigated here by [Rule 10b-5], which is no less ambiguous than the statute)."[53] Justice Scalia reasoned that, had the majority applied the rule of lenity, Section 10(b) would "require the manipulation or deception of a *party to a securities transaction*."[54] In other words, the viability of the misappropriation theory hinged on this interpretive debate.

The Court recently provided a window into how it might resolve the conflict between the rule of lenity and deference to agency interpretations. In *United States v. Davis*,[55] the Court considered whether to apply, at the government's behest, the doctrine of constitutional avoidance in order to preserve a criminal statute's constitutionality.[56] The Court explained that, on the one hand, "when presented with two fair alternatives, the Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly."[57] On the other hand, applying the doctrine of constitutional avoidance to "*expand* the reach of a criminal statute in order to save it would run afoul of the rule of lenity."[58] The rule of lenity thus provided a basis to reject the government's request to apply the constitutional avoidance canon. Attempts to rely on an administrative agency's *more expansive* reading of a statute or rule carrying criminal penalties might well suffer the same fate.

Against this unsettled backdrop, lower courts have not uniformly resolved the question of whether they owe deference to agency interpretations of

52. *See id.* at 652.

53. *Id.* at 679 (Scalia, J., concurring in part and dissenting in part).

54. 521 U.S. at 679 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

55. No. 18-431 (S. Ct. June 24, 2019).

56. *Id.* at 17–19. The statute at issue provided enhanced penalties for "crime[s] of violence" involving a firearm. *See* 18 U.S.C. §§ 924(c), (c)(3)(B) (2006).

57. *Id.* at 17 (quotation omitted).

58. *Id.* at 19.

statutes with both criminal and civil applications.[59] The question of how to resolve the conflict between principles of agency deference and the rule of lenity remains ripe for clarification by the high Court.[60]

Another doctrine that could play a role in resolving interpretive questions about "dual hat" criminal-regulatory statutes is the non-delegation doctrine, which provides that "the legislative power of Congress cannot be delegated."[61] Although the Supreme Court has not invoked the doctrine to strike down a statute in nearly a century, the doctrine is a means by which the judicial branch can ensure that Congress does not entirely abdicate its lawmaking responsibilities to the executive or judicial branch. Justice Scalia's opinion in *Whitman* hinted at the non-delegation issue created when courts defer to agency interpretations of statutes with both criminal and administrative applications.[62] The non-delegation doctrine is rooted in the Constitution's vesting in Congress the power to make all laws that are necessary and proper[63] and is founded on considerations of separation of powers,[64] maintaining checks and balances among the three branches,[65] and public

59. *Compare* United States v. Kanchanalak, 192 F.3d 1037, 1047 n.17 (D.C. Cir. 1999) (holding that the fact that "criminal liability is at issue does not alter the fact that reasonable interpretations of [an agency's statute] are entitled to deference"); *accord* Sash v. Zenk, 439 F.3d 61, 67 (2d Cir. 2006); Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271–72 (9th Cir. 2001), *with* Dolfi v. Pontesso, 156 F.3d 696, 700 (6th Cir. 1998) (stating that "[j]udicial deference under *Chevron* in the face of statutory ambiguity is not normally followed in criminal cases") (citing Evans v. U.S. Parole Comm'n, 78 F.3d 262, 265 (7th Cir. 1996)).

60. For instance, although the Supreme Court recently denied review of a D.C. Circuit decision applying *Chevron* deference to uphold a Bureau of Alcohol, Tobacco and Firearms rule classifying bump stocks as machine guns under the National Firearms Act of 1934 and the Gun Control Act of 1968, Justice Gorsuch criticized the appellate court for applying *Chevron* in part because "the law . . . carries the possibility of criminal sanctions." In his view, *Chevron* "has no role to play when liberty is at stake." Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 19-296, slip. op. at 2–3 (S. Ct. Mar. 2, 2020). Despite his concerns, Justice Gorsuch agreed that the decision did not merit review because the appellate court's asserted errors "might be corrected before final judgment" and the Court would benefit from the decisions of other appellate courts that are considering challenges to the same rule. *See id.* at 4.

61. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

62. Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari) (comparing deference principles to King James I's creation of "new crimes by royal command").

63. *See* U.S. CONST. art. I, § 8, cl. 18.

64. *See* Mistretta v. United States, 488 U.S. 361, 371 (1989).

65. *See, e.g.*, Wayne McCormack, *Checks and Balances in the Tripartite U.S. Government*, 5 J. INT'L & COMP. L. 437, 447 (2018) (describing non-delegation doctrine as creating checks and balances because Congress cannot delegate its lawmaking authority to the executive branch).

policy.[66]

Before President Franklin D. Roosevelt's New Deal and the birth of the modern administrative state, non–delegation doctrine precedent consisted of an array of Supreme Court decisions pronouncing that Congress may not delegate its legislative authority to the other branches, while still finding grounds on which to endorse the congressional delegations at issue. For instance, in *Wayman v. Southard*,[67] which concerned Congress's delegation to the federal courts of the power to create their own procedures, the Court identified a difference between "important subjects, which must be entirely regulated by the legislature itself" and subjects of "less interest, in which a general provision may be made, and power given to those who are to act under which general provisions to fill up the details."[68] In a later case, *Marshall Field & Co. v. Clark*,[69] the Court addressed the constitutionality of the congressional delegation of the authority to suspend provisions of the Tariff Act of 1890 (related to the free importation of certain goods) to the President when the President determined that other countries imposed "reciprocally unequal and unreasonable" tariffs.[70] While the Court declared the non-delegation principle to be critical to the system of government that the Constitution sets forth, it ruled nevertheless that Congress had not delegated to the President the power to make law; rather, Congress had empowered the President to serve as its "mere agent" to "ascertain and declare the event upon which [Congress's] expressed will was to take effect."[71] The Court charted a similar path in *United States v. Shreveport Grain & Elevator Co.*[72] There, the Court again recognized the non-delegation principle but upheld a law empowering certain agency heads to make rules and regulations permitting "reasonable variations" from requirements related to the labeling of food packages.[73]

66. *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 54 n. 208 (2010) (including ensuring that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," guaranteeing that "to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion," and ensuring that "courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.") (quoting Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (citations omitted)).

67. 23 U.S. 1 (1825).

68. *Id.* at 43.

69. 143 U.S. 649 (1892).

70. *Id.* at 680.

71. *Id.* at 692-93.

72. 287 U.S. 77 (1932).

73. *Id.* at 82.

Echoing *Wayman*, the Court ruled that "Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."[74]

The Court's contemporary articulation of the non-delegation doctrine began to take shape in *J.W. Hampton, Jr., & Co. v. United States*,[75] another case in which the Court upheld a law authorizing the President to regulate tariffs. The Court acknowledged that Congress may find it necessary to "seek[] the assistance" of other branches of government,[76] and ruled that so long as Congress's delegation is governed by an "intelligible principle" to which the agency is "directed to conform," the delegation is permissible.[77] The Court has since further defined the meaning of "intelligible principle," stating that it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority."[78]

So defined, this "intelligible principle" standard provides Congress substantial latitude to delegate, so it is not surprising that the Court has struck down congressional delegations as lacking an intelligible principle only twice in its history. In 1935, in *Panama Refining Co. v. Ryan*,[79] the Court struck down a provision of the National Industrial Recovery Act of 1933 (NIRA) authorizing the President to prohibit trade in petroleum and petroleum-based products produced in excess of certain state quotas. In determining whether the delegation was permissible, the Court looked to "whether the Congress has declared a policy with respect to [the] subject; whether the Congress has set up a standard for the President's action; [and] whether the Congress has required any finding by the President in the exercise of [his] authority."[80] The Court found that the provision "does not state whether or in what circumstances or under what conditions" the President was permitted to impose trade restrictions, "establishes no [criterion]" to govern the President's actions, and "does not require any finding by the President as a condition of

74. *Id.* at 85; *see also* Wayman v. Southard, 23 U.S. 1, 43 (1825).

75. 276 U.S. 394 (1928).

76. *Id.* at 406.

77. *Id.* at 409.

78. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (finding no unconstitutional delegation where the Public Utility Holding Company Act of 1935 authorized the SEC to require certain companies to take steps to ensure that their corporate structure does not unfairly distribute voting power among shareholders); *see also* Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (upholding Congress's delegation to the judicial branch of the power to determine sentencing guidelines under the Sentencing Reform Act of 1984).

79. 293 U.S. 388 (1935).

80. *Id.* at 415.

his action."[81] Because the law thereby gave the President "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit," and because "disobedience to his order is made a crime punishable by fine and imprisonment," the Court deemed it unconstitutional.[82] Later that year, in *A.L.A. Schechter Poultry Corp. v. United States*,[83] the Court struck down another NIRA provision for similarly granting the President "virtually unfettered" discretion, this time to approve "codes of fair competition" for trades or industries.[84]

Panama Refining and *Schecter Poultry* stand as the exception because the intelligible principle standard is a flexible one, driven by the fundamental purpose of administrative agencies to use their expertise to implement Congress's laws, and "a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[85] If Congress intends that an agency use its expertise to issue rules and guidance to further implement federal laws, and sets sufficient parameters for the agency to follow,[86] denying deference to the agency's interpretation of those laws could frustrate Congress's intent and arguably require Congress to legislate at a level of specificity it may not be competent to achieve in all cases. At the same time, as Justice Scalia observed in *Whitman*, deference to agency interpretations of laws that carry both criminal and administrative penalties "collide[s] with the norm that legislatures, not executive officers, define crimes."[87]

This tension is particularly acute where Congress delegates to administrative agencies a mandate to give substantive content to very general prohibitions. A prime example is the broad anti-manipulation and anti-fraud authority that Congress has delegated to the SEC, CFTC and FERC.[88] As

81. *Id.*

82. *Id.*

83. 295 U.S. 495 (1935).

84. *Id.* at 530–32, 541-42.

85. *Mistretta*, 488 U.S. at 372.

86. *See generally* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1054 (2015) (discussing an agency survey in which rule drafters view their role as implementing policy for ambiguous laws).

87. Whitman v. United States, 135 S. Ct. 352, 353 (2014); *see also id.* at 354 (noting that the rule of lenity "vindicates the principle that only the *legislature* may define crimes and fix punishments," and that "Congress cannot, through ambiguity" leave that job to administrative agencies).

88. *See* 7 U.S.C. § 6(c)(1) (2012); Prohibition on Market Manipulation, 75 Fed. Reg. 67,657, 67,658 (proposed Nov. 3, 2010) (noting that, in promulgating rules under CEA Section 6(c)(1), "the Commission proposes to interpret CEA section 6(c)(1) as a broad, catch-all

noted previously, these broad prohibitions also carry criminal penalties.[89] Agencies can argue from these broad delegations that Congress clearly intended deference to their further definitions of the prohibitions. Yet the prospect of criminal enforcement renders any such deference highly troubling under the rule of lenity and the non-delegation doctrine, especially in light of the separation-of-powers principle that defining crimes is the exclusive province of the legislature.

In *Touby v. United States*,[90] the Court acknowledged that its precedent was "not entirely clear as to whether more specific guidance" beyond the intelligible principle standard is required when "Congress authorizes another branch to promulgate regulations that contemplate criminal sanctions."[91] In *Touby*, which concerned a non-delegation doctrine challenge to a statute delegating to the Attorney General the authority to schedule controlled substances on a temporary basis, the Court did not resolve this question, finding that the statute "passes muster even if greater congressional specificity is required in the criminal context."[92] In so ruling, the Court pointed to

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provision reaching fraud in all its forms—that is, intentional or reckless conduct that deceives or defrauds market participants[]"); 16 U.S.C. § 824v(a) (2012); 15 U.S.C. § 717c-1; 18 C.F.R. §§ 1c.1, 1c.2; Prohibition of Energy Market Manipulation, 71 Fed. Reg. 4244, 4249 (Jan. 19, 2006) ("The language of EPAct 2005 sections 315 and 1283 is modeled after section 10(b) of the Exchange Act, which has been interpreted as a broad anti-fraud 'catch-all clause.' SEC Rule 10b–5, on which the final rule is patterned, does not expressly limit itself to manipulation . . . . We will retain similar language in our final rule, which will permit the Commission to police all forms of fraud and manipulation that affect natural gas and electric energy transactions and activities the Commission is charged with protecting."); 15 U.S.C. § 78j(b) (2012); 17 C.F.R. § 240.10b-5; SEC v. Zandford, 535 U.S. 813, 819 (2002) (stating that Section 10(b) should be construed "flexibly to effectuate its remedial purposes") (internal quotation marks omitted).

89. *See, e.g.*, 7 U.S.C. § 9(1) (2018); 7 U.S.C. § 13(a) (2018) (making it a crime to engage in certain acts and to "willfully to violate any other . . . rule or regulation"); 7 U.S.C. § 79j(b) (2018); 15 U.S.C. § 78(f)(1)(A)(i) (2012) (making it a crime to willfully violate[] an SEC rule or regulation); 16 U.S.C. § 824v(a) (2012); 15 U.S.C. § 717c-1 (2006); 16 U.S.C. § 825o (2012) (noting the existence of criminal penalties for willful or knowing acts prohibited by the FPA); 15 U.S.C. § 717t (2006) (stating that criminal penalties for willful or knowing violations of acts prohibited by the NGA).

90. 500 U.S. 160 (1991).

91. *Id.* at 166. The Court cited United States v. Grimaud, which upheld a delegation to the Secretary of Agriculture of the power to make rules concerning the use of federal forest lands and to enforce violations of the rules as a criminal offense. 220 U.S. 506, 518, 521 (1911). The Court ruled that "the 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." *Id.* at 521.

92. *Touby*, 500 U.S. at 166.

requirements in the relevant provision that "meaningfully constrain[] the Attorney General's discretion to define criminal conduct" by, among other things, making a finding that scheduling a drug is "necessary to avoid an imminent hazard to the public safety," taking various prescribed factors into consideration, observing a public notice-and-comment period, and satisfying additional criteria for adding substances to federal drug schedules.[93]

Similarly, in *Yakus v. United States*,[94] the Court upheld several criminal convictions for violating price controls set by a presidentially appointed Price Administrator under emergency price control legislation. The Court held that Congress had "stated the legislative objective," "prescribed the method of achieving that objective—maximum price fixing," and had "laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established."[95] The Court further stated that "we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity . . . ."[96] In *Fahey v. Mallonee*,[97] however, the Court suggested there might be limits to Congress's delegation powers with respect to crimes, remarking that "it *might not be allowable [for Congress] to authorize creation [by an administrative agency] of new crimes in uncharted fields*."[98]

Given the Supreme Court's scant history of striking congressional delegations for lack of an intelligible principle, it is no wonder that some scholars have viewed the non-delegation doctrine as "dead."[99] Yet, there may be an opening with the current Court to revive the doctrine. In *Gundy v. United*

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93. *Id.* at 166–67.

94. 321 U.S. 414 (1944).

95. *Id.* at 423.

96. *Id.* at 444.

97. 332 U.S. 245 (1947).

98. *Id.* at 250 (emphasis added). *Fahey* did not involve an agency regulation that carried criminal penalties. Rather, the Court upheld a congressional delegation of power to the Federal Home Loan Bank Board to regulate the reorganization, consolidation, merger, or liquidation of building and loan associations, including the power to appoint a conservator or receiver. The Court observed that while it may not be permissible for Congress to authorize agencies to create novel crimes, "[a] discretion to make regulations to guide supervisory action" in matters such as banking, "one of the longest regulated and most closely supervised of public callings," and corporate management, "in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards," may be constitutionally permissible. *Id.*

99. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

States,[100] a convicted sex offender challenged a provision of the Sex Offender Registration and Notification Act (SORNA), arguing the provision was an unconstitutional delegation since it delegated authority to the Attorney General and allowed the Attorney General to issue rules for sex offenders who had been convicted before the passage of SORNA.[101] The Court upheld the provision as a lawful delegation by a five to three vote, with Justice Kavanaugh not participating.[102] In the dissent, Justice Gorsuch, joined by the Chief Justice and Justice Thomas, made clear they would reinvigorate the non-delegation doctrine.[103] And because Justice Alito stated that in a future case he would be willing to reconsider the Court's past approach of upholding "provisions that authorize[] agencies to adopt important rules pursuant to extraordinarily capacious standards,"[104] there may well be five votes to give the doctrine more teeth.[105] Recent comments by Justice Kavanaugh appear to confirm this. In a recent statement respecting a denial of certiorari, he stated that Justice Gorsuch "raised important points" in *Gundy* that "may warrant further consideration in future cases," and noted that the non-delegation doctrine could be used in cases involving "a major policy question of great economic and political importance."[106]

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100. 139 S. Ct. 2116 (2019).

101. *See id.* at 2123 (arguing the SORNA provision at issue "grants the Attorney General plenary power to determine
SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." (citing Brief for Petitioner at 42, Gundy v. United States, 139 S. Ct. 2116 (2019), No, 17-6086, 2018 WL 2441585, at 42)).

102. *See id.* at 2120–24 (rejecting Gundy's argument because the provision at issue merely "require[s] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible"; "the Attorney General's discretion extends only to considering and addressing feasibility issues"; and Congress's delegation "falls well within permissible bounds").

103. *See id.* at 2144–45 (claiming SORNA essentially grants legislative power to the Attorney General and emphasizing the necessity of procedural checks and balances to maintaining separation of powers).

104. *See Gundy* at 2130–31 (Alito, J., concurring in the judgment) (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 486 (2001)); *see also* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 486 (2001) (holding Section 109 of the Clean Water Act did not delegate authority to the Environmental Protection Agency to base air quality standards upon economic costs of compliance).

105. *See Gundy* at 2131 (Alito, J., concurring) (stating he "would support" the Court's reconsideration and expansion of delegation doctrine).

106. *See* Jimmy Hoover, *Kavanaugh Interested in Revisiting Executive Power Doctrine*, LAW360 (Nov. 25, 2019), https://www.law360.com/appellate/articles/1215247/kavanaugh-interested-in-revisiting-executive-power-doctrine?nl_pk=aea5a6e8-505c-4554-b40a-c047bc24948e&utm_source=newsletter&utm_medium=email&utm_campaign=appellate; *see also* Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., dissenting).

It is interesting that lenity and separation of powers challenges are not raised more frequently, given that the law is still unsettled on how much deference courts owe to agency interpretations. One can speculate as to why. Perhaps the higher burden of proof in criminal cases results in fewer cases that would be vulnerable to such challenges. One example could arise when the government's case is strong enough that it need not resort to agency interpretations of ambiguous statutes or rules to establish its claims. Another example is when defendants prioritize other arguments and strategies that they deem more likely to succeed. There have also been comparatively few criminal prosecutions for violations of the CEA, FPA and NGA (albeit an admittedly significant number of criminal cases involving federal securities laws violations).[107] Even Justice Scalia, who was so critical of the Second Circuit in *Whitman*, did not object to *denying* Whitman's petition because Whitman never sought review based on issues of deference.[108]

Another possible explanation for the issue not being joined frequently is that the conflict between deference to agency interpretations and the rule of lenity typically is not presented so starkly. An administrative agency like the SEC, CFTC or FERC will seek deference in their civil enforcement actions, where the defendant is not generally entitled to the benefit of the rule of lenity. Accordingly, defendants in civil actions may not raise the rule of lenity as a principle for interpreting the statute, even though the principle should be taken into account (to ensure consistent interpretation of the statute) in those cases where the statute carries criminal penalties. If the agency's interpretation becomes sufficiently well-established, it then may not occur to a criminal defendant to challenge the prevailing interpretation on grounds of lenity.

Although the Court in *Whitman* passed up the opportunity to address the

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107. *See* Speech of SEC Chair Mary Jo White, U.S. Sec. & Exch. Comm'n, All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets (Mar. 31, 2014), https://www.sec.gov/news/speech/2014-spch033114mjw (noting that the number of criminal cases related to SEC proceedings had doubled since 1993). At least with respect to the CEA, the trend appears to be changing as there has been a spike in federal criminal prosecutions of alleged violations of the CEA involving derivatives trading. *See* COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE DIVISION OF ENFORCEMENT 1, 13 (2018) (pointing out the "significant increase in the number of [these] actions"); *see also, e.g.*, Indictment, United States v. Thakkar, No. 1:18-crv-00036, at 4–6 (N.D. Ill. Feb. 14, 2018) (conspiracy to commit "spoofing," which the CEA, 7 U.S.C. § 6c(a)(C)(5)(C) (2018), characterizes as a disruptive trading practice); Indictment, United States v. Flotron, No. 3:17-crv-00220-JAM, at 3–7 (D. Conn. Sept. 26, 2017) ("spoofing" for precious metals futures contracts); Indictment, United States v. Coscia, No. 1:14-cr-00551, at 1, 9–19 (N.D. Ill. Oct. 1, 2014) (commodity fraud and "spoofing" for futures contracts).

108. Whitman v. United States, 135 S. Ct. 352, 354 (2014).

issue Justice Scalia identified, the Court's recent scrutiny of *Auer* deference in *Kisor* and the apparent support of five justices for deploying the non-delegation doctrine more forcefully suggests that the Court down the road may be inclined to squarely address the clash between agency deference principles on the one hand and the rule of lenity and the non-delegation doctrine on the other.