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AN UNSTABLE EQUILIBRIUM: EVALUATING THE "THIRD WAY" BETWEEN CHEVRON DEFERENCE AND THE RULE OF LENITY

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INTRODUCTION

During the 2016 term, the Supreme Court faced a consequence of the collision of two dominant historical trends: the expansion of the administrative state and the growth of federal criminal law. In *Esquivel-Quintana v. Sessions*, [1] the Court reviewed an agency

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[1] 137 S. Ct. 1562 (2017).

interpretation of a federal statute that triggers both criminal and non-criminal penalties. Because of the unique character of the statute and the posture in which the dispute arose, both *Chevron* deference and the rule of lenity arguably applied—each dictating opposite outcomes.

This Note will evaluate Justice Kagan's proposed "third way" between a strict application of *Chevron* deference on one hand and the rule of lenity on the other.[2] It will argue that the "third way" is a workable short-term solution that would allow the Court to preserve, at least in part, important values undergirding both lenity and *Chevron*. The "third way" would also afford many advantages over the approach taken by the Court in *Esquivel-Quintana*. Yet, despite its short-term virtues, the "third way" represents no more than a highly unstable equilibrium. In the pages that follow, this Note shows how the "third way" can operate only under today's specific prevailing understandings of *Chevron* and lenity. What is more, given the inextricable link between these two doctrines and fundamental debates about statutory interpretation and delegation, the "third way" provides no realistic long-term solution. The "third way" is vulnerable to destabilizing changes in doctrine, particularly in light of the fundamental nature of the underlying questions and the shifting ideological currents animating the Court.

I. DEFINING THE PROBLEM AND THE "THIRD WAY" SOLUTION

A. THE DILEMMA: *CHEVRON* DEFERENCE OR THE RULE OF LENITY?

The fundamental problem arises when courts review agency interpretations of statutes that carry both criminal and non-criminal applications. In cases involving this kind of dual-application statute,

[2] See Section I.B.

textual ambiguity creates a seemingly intractable dilemma for the courts: defer to the agency's interpretation under *Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*,[3] or apply the rule of lenity to resolve the question in favor of the defendant. Under the *Chevron* framework, a finding of ambiguity at Step One triggers deference to the agency so long as its interpretation passes the reasonableness inquiry at Step Two.[4] The rule of lenity, on the other hand, instructs courts to resolve ambiguities in criminal statutes under the permissible reading most favorable to the defendant. Chief Justice John Roberts noted the intractability of this dilemma: "[*Chevron* and the rule of lenity] each point in the opposite direction based on the same predicate, which is a degree of ambiguity in the statute."[5]

It is important to clarify at the outset that this Note addresses an issue related to, but importantly distinct from, another problem well-documented in the literature: how courts are to interpret ambiguities in statutory duties subject to both civil and criminal *enforcement*.[6] For instance, Congress frequently passes statutes criminalizing the violation of agency-promulgated regulations, but in order for criminal penalties to attach, the government must proceed with a criminal prosecution. This Note is concerned instead with statutes

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[3] 467 U.S. 837 (1984).

[4] The dilemma remains the same if you see *Chevron* has having only a single step. See *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton concurring); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598 (2009) ("*Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation.").

[5] Transcript of Oral Argument at 12, *Esquivel-Quintana v. Sessions*, 136 S. Ct. 1562 (2017) (No. 16-54).

[6] See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 297-98 (West 2012); Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 1 (2007); Stephen Wills Murphy, *The Rule of Lenity and Hybrid Statutes:* WEC Carolina Energy Solutions LLC v. Miller, 64 S.C. L. REV. 1129 (2013); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

that are interpreted in the first instance by administrative agencies whose interpretations themselves trigger both criminal and non-criminal penalties.

This puzzle arises in a relatively small number of cases involving statutory interpretations by administrative agencies but presents potentially large consequences across many areas of law. As Judge Jeffrey Sutton of the Court of Appeals for the Sixth Circuit rightly observed:

> The two rules normally operate comfortably in their own spheres. The rule of lenity has no role to play in interpreting humdrum regulatory statutes, which contemplate civil rather than criminal enforcement. And *Chevron* has no role to play in interpreting ordinary criminal statutes, which are not administered by any agency but by the courts.[7]

But the problem for a federal court runs far beyond resolving the limited cases and controversies involving dual-application statutes. While this particular problem may be marginal in the context of the vast body of federal law, it forces the Supreme Court to make direct doctrinal tradeoffs that have important consequences for the mine run of criminal and administrative law disputes. *Chevron* is transsubstantive, so alterations to the deference scheme made in this narrow context have the potential to create far-reaching effects across the entire administrative state. For instance, a finding that the rule of lenity applies to all dual-application statutes would add yet another categorical exclusion to a growing list of exceptions to the *Chevron* framework.[8] For those committed to *Chevron*'s deference regime,

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[7] *Carter*, 736 F.3d at 730 (Sutton concurring) (quotation marks and citation omitted).
[8] See, e.g., *United States v. Mead*, 533 U.S. 218, 226-27 (2001) (limiting the application of *Chevron* to rules "carrying the force of law"); *FDA v. Brown & Williamson Tobacco Corp.*,

additional exceptions threaten the stability and centrality of the doctrine. If, instead, the Court were to give *Chevron* deference to agency interpretations of statutes carrying criminal applications, it risks creating yet another categorical exception—this time to the rule of lenity.

For the Justices most concerned with protecting the values at the heart of the rule of lenity—namely, notice and ultimate congressional control over the criminal law [9] —such an exception would impermissibly allow Congress to circumvent the drafting requirements of the rule and delegate criminal lawmaking to administrative agencies. Besides, such a preference for *Chevron* deference would send a message to the lower courts about the relative unimportance of the rule of lenity as applied in ordinary criminal law cases.

The potential conflict between lenity and *Chevron* in the context of dual-application statutes is well-documented,[10] and though the Court has encountered this and related dilemmas in the past,[11] the collision between *Chevron* and the rule of lenity has found its way back onto the radar of the federal courts. For instance, Judge Sutton has highlighted the issue in two notable concurring opinions arguing for a strict application of the rule of lenity for dual-application

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529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation" and thus *Chevron* may not apply); *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (extending *Brown & Williamson*'s "extraordinary case[]" exception to the Affordable Care Act).

[9] See Section II.A.

[10] See, e.g., Elliot Greenfield, *A Lenity Exception to Chevron*, 58 BAYLOR L. REV. 1, 5 (2006) ("A conflict between these two rules of construction [the rule of lenity and *Chevron* deference] is thus likely to arise when an agency interpretation of a statute subjects an individual to criminal penalties . . . ."); Caitlin Miller, *The Balancing Act Between* Chevron *Deference and the Rule of Lenity*, 18 TEX. TECH. ADMIN. L.J. 193, 209-10 (2017).

[11] See Section II.D.

statutes.[12] His argument follows from two basic premises: first, that "the one-statute/one-interpretation rule governs dual-role statutes"; and second, separation of powers concerns dictate that "*Chevron* has no role to play in the interpretation of criminal statutes."[13] As a result, *Chevron* deference is "categorically unavailable" to agency interpretations of statutes involving both criminal and civil applications.[14] In his attempt to advance the cause of a more robust rule of lenity—and its precedence over considerations of deference—Judge Sutton has sounded the alarm and returned this issue to the fore within the federal judiciary.[15]

The issues presented in the two Sixth Circuit cases referenced above provide useful illustrations of the collision between *Chevron* and the rule of lenity.

In *Carter v. Welles-Bowen Realty, Inc.*,[16] the three-judge panel encountered this dilemma in the Real Estate Settlement Procedures Act (RESPA). The RESPA gave the Department of Housing and Urban Development (HUD) regulatory authority over the Act,[17] including the power to administer a list of exemptions from requirements contained therein.[18] The statute also provides a criminal penalty for violations of relevant provisions.[19] At issue in the case was a policy statement from HUD that purported to add to the statutory prerequisites for the application of a safe harbor

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[12] See *Carter*, 736 F.3d at 731 (Sutton concurring); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016) (Sutton concurring in part and dissenting in part).
[13] *Esquivel-Quintana*, 810 F.3d at 1027 (Sutton concurring in part and dissenting in part).
[14] Id. at 1031.
[15] See note 12.
[16] 736 F.3d 722.
[17] The RESA now gives regulatory authority to the Consumer Financial Protection Bureau. 12 U.S.C. § 2617; see also *Carter*, 736 F.3d at 725.
[18] 12 U.S.C. §§ 2617(a), 2607(c).
[19] 12 U.S.C. § 2607(d)(1).

provision.[20] On plaintiffs' view, Welles-Bowen Realty did not meet the prerequisite for the safe harbor announced in the HUD policy statement,[21] meaning Welles-Bowen was in violation of the statute and thus subject to criminal liability.[22] The government argued that the court should defer to its interpretation of the statute, but because the application of the safe harbor determined criminal liability, including criminal penalties, the rule of lenity could arguably control.[23] This brought the looming conflict between *Chevron* and lenity clearly into focus. While the panel ultimately resolved the case on other grounds,[24] Judge Sutton's concurrence emphasized the remaining tensions between these doctrines.

Esquivel-Quintana v. Lynch[25] presented a similar problem. Under the Immigration and Nationality Act (INA), aliens convicted of an "aggravated felony," including "sexual abuse of a minor," are subject to deportation.[26] The question before the Sixth Circuit was whether Esquivel-Quintana's conviction under a California statute criminalizing unlawful sexual intercourse with a minor[27] fell within "sexual abuse of a minor" under the INA. Reviewing the Department of Homeland Security's determination in an initial removal proceeding, the Board of Immigration Appeals (BIA) determined that Esquivel-Quintana's California conviction counted as "sexual

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[20] *Carter*, 736 F.3d at 725-26.
[21] Id.
[22] Id. at 729 (Sutton concurring in part and dissenting in part).
[23] Id. at 729 (Sutton concurring in part and dissenting in part).
[24] HUD's interpretation of the statute came in the form of policy guidance and the court found, *inter alia*, that it lacked the force of law required to trigger *Chevron* deference. Id. at 726-27.
[25] 810 F.3d at 1019.
[26] 8 U.S.C. § 1227(a)(2)(A)(iii).
[27] Cal. Penal Code § 261.5(c).

abuse of a minor" for purposes of the statute.[28] This determination, in the civil setting of the BIA, would have both criminal and noncriminal applications: removal from the United States (civil)[29] as well as an increased maximum prison term for illegal reentry (criminal). [30] Citing recent precedent from the Supreme Court holding that BIA interpretations of the INA are entitled to *Chevron* deference, [31] the Sixth Circuit majority deferred to the BIA's interpretation of "sexual abuse of a minor."[32] The court—citing *Leocal* and *Babbit*—noted that absent clearer guidance from the Supreme Court it was *Chevron* and not the rule of lenity that applied.[33]

B. A "THIRD WAY": JUSTICE KAGAN'S PROPOSED SOLUTION

Some have argued that the only way out of this dilemma is to subsume the rule of lenity within the *Chevron* inquiry. One scholar observed that there are but three options for reconciling the two doctrines:

> (1) lenity as a consideration at [*Chevron*] step one; (2) lenity as a consideration at [*Chevron*] step two; and (3) lenity as a consideration, if at all, only after determining that the statute

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[28] *Esquivel-Quintana*, 810 F.3d at 1021.
[29] 8 U.S.C. § 1227(a)(2)(A)(iii).
[30] 8 U.S.C. § 1326(b)(2). The Supreme Court has held that the rule of lenity applies both to substantive criminal law and the penalties it imposes. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).
[31] *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality); id. at 2214 (Roberts concurring in judgment).
[32] *Esquivel-Quintana*, 810 F.3d at 1019.
[33] Id. at 1024.

> is ambiguous and that deference is not warranted because the agency's interpretation is unreasonable.[34]

These three hybrid solutions have found no support from the Supreme Court.[35] But in *Esquivel-Quintana*, Judge Sutton suggested the beginnings of another possibility altogether. He acknowledged that there may in fact be space between the ambiguity required to trigger *Chevron* deference—when the statute "is silent or ambiguous with respect to the specific issue"[36]—and the ambiguity threshold for the rule of lenity, which, as explored below, is fiercely contested. When *Equivel-Quintana* made it before the Supreme Court,[37] Justice Kagan suggested that solution may exist in this space. During oral argument Justice Kagan proposed a kind of "third way" between either a reflexive application of *Chevron* on one hand or the rule of lenity on the other. Addressing counsel for Mr. Esquivel-Quintana, she asked:

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[34] David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 504 (2007). Rubenstein discussed these options within the specific context of immigration law.

[35] These proposed hybrid solutions do more than simply provide context for a discussion of Justice Kagan's "third way." They are important because they make explicit what judges may do already *sub silentio* in cases involving dual-application statutes. For instance, it is conceivable that a judge applying *Chevron* deference to a dual-application statute may include lenity considerations when making the threshold ambiguity determination or when defining the range of permissible interpretations knowing she is interpreting a statute with criminal applications. While this Note will discuss *Chevron* and lenity as analytically distinct concepts, I must acknowledge that statutory interpretation does not occur in a vacuum. I cannot delve deeply into these dynamics here, but it is important to mention the possibility that they are at work in cases involving dual-application statutes.

[36] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

[37] 137 S. Ct. 1562 (2017).

> Are you suggesting, Mr. Fisher, that if we turn *Chevron* off, we have to turn lenity on? Couldn't there be a middle ground between the two; in other words, some space where you say, because of this – the – the criminal application of this statute, we don't apply ordinary *Chevron* deference, but at the same time, we don't go straight into the kind of grievous ambiguity that – that triggers lenity? There's some middle area where the Court gets to decide just what is – it thinks is the best construction of the statute?"[38]

Justice Kagan went on to explain how exactly she would operationalize this "middle area" reserved for judicial statutory construction:

> It works – it works, if you think that ambiguity doesn't necessarily mean the same thing for *Chevron* purposes and for lenity purposes…The lenity purposes [sic] really demands grievous ambiguity, and but there's some sense in which there's – there's a lack of clarity, a lack of clear meaning that allows the Court to decide what the best interpretation of the language is.[39]

Under this view, when a statute subject to agency interpretation is sufficiently ambiguous to trigger *Chevron* deference, but not ambiguous enough to trigger the rule of lenity, a court conducts its own review. Thus, courts may avoid choosing between the "government-always-wins canon (*Chevron*) [and the] government-always-loses canon (rule of lenity)."[40] Importantly, while Justice

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[38] Transcript, *Esquivel-Quintana* at 12 (cited in note 5).
[39] Id. at 13.
[40] *Esquivel-Quintana*, 810 F.3d at 1031 (Sutton concurring in part and dissenting in part).

Kagan implied that in "decid[ing] what the best interpretation of the language is" courts would conduct *de novo* review of the agency interpretation, she did not unambiguously foreclose the possibility of applying some deference under a *Skidmore*-like regime.[41] This Note is concerned primarily with the former suggestion, but it will also highlight some of the important consequences in the event that Justice Kagan's "third way" accommodates *Skidmore*-like review.

Ultimately the Court side-stepped the central issue and decided the case on other grounds, so Justice Kagan's proposal remained just that. The result, however, left the "third way" as a tantalizing theoretical solution to a vexing problem that will likely resurface before the Supreme Court. But *Esquivel-Quintana* left the proposal's mechanics and implications largely undeveloped. This Note aims to fill in many of the gaps.

C. DOCTRINAL SURVEY

Although the conflict between *Chevron* and the rule of lenity has recently become a salient legal issue due to the warnings of Judge Sutton and others, it is not an issue of first impression for the Supreme Court. In the years since *Chevron* the Court has issued seemingly contradictory guidance on the matter.

In the 1992 case *United States v. Thompson/Center Arms Co.*, the Supreme Court faced the question of "whether a gun manufacturer

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[41] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that in addressing statutory ambiguity, "the rulings, interpretations and opinions of the [agency] under this [enabling statute], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evidence in its consideration, the validity of its reasoning . . . and all those factors which give it power to persuade, if lacking power to control.").

'makes' [within the meaning of the National Rifle Act] a short-barreled rifle when it packages as a unit a pistol together with a kit containing a shoulder stock and a 21-inch barrel[.]"[42] Federal law made it a crime to "make" a firearm without prior approval of the Secretary of the Treasury.[43] Writing for a plurality, Justice Souter stressed that the "key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness."[44] He went on to observe in a footnote that "this tax statute has criminal applications, and we know of no other basis for determining when the essential nature of a statute is 'criminal.'"[45] Because of the criminal application, the Court must "apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor."[46] Here the plurality of justices adopted the view later advanced by Judge Sutton.

The Court took up a related issue three years later in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*.[47] At issue in *Babbit* was whether the Secretary of the Interior exceeded his authority under the Endangered Species Act by promulgating a regulation that defined the term "take" in the statute to include "significant habitat modification." Writing for the Court, Justice Stevens deferred under *Chevron* to the Secretary's interpretation. He rejected the argument raised by Sweet Home Chapter arguing that the rule of lenity should apply because the statute at issue included

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[42] 504 U.S. 505, 507 (1992).
[43] See 26 U.S.C. §§ 5861, 5871.
[44] 504 U.S. 505, 517 (1992).
[45] Id. at 518 n. 10.
[46] Id. at 518.
[47] 515 U.S. 687 (1995).

criminal penalties. In order to do so, he included a footnote that distinguished the case from *Thompson/Center Arms*:

> We have applied the rule of lenity in a case raising a narrow question concerning the application of a statute that contains criminal sanctions to a specific factual dispute—whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles—where no regulations were present.[48]

Justice Stevens continued with what would become the authoritative guidance on interpretation of dual-application statutes:

> We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the "harm" regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them.[49]

In the years that followed, numerous lower courts cited *Babbitt* to reject suggestions to elevate the rule of lenity over *Chevron* deference when reviewing dual-application statutes.[50] But nine years later in *Leocal v. Ashcroft*, [51] a unanimous Court reaffirmed the teaching of *Thompson/Center Arms*. In *Leocal* the Court reviewed an

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[48] Id. at 703-04 n. 18.
[49] Id.
[50] See, e.g., *Sash v. Zenk*, 439 F.3d 61, 67 (2d Cir. 2006); *Esquivel-Quintana*, 810 F.3d at 1019; *Pacheo-Camacho v. Hood*, 272 F.3d 1266, 1271 (9th Cir. 2001).
[51] 543 U.S. 1 (2004).

appeal from a deportation order, finding that the petitioner's conviction for DUI causing seriously bodily injury was not a "crime of violence" under the statute.[52] The Court went on to note that even if a "crime of violence" was ambiguous in this context, the rule of lenity would have applied because it "must interpret the statute consistently" and it "has both criminal and noncriminal applications."[53]

This doctrinal tension has not gone unnoticed. Justice Scalia, writing for himself and Justice Thomas in a dissent from denial of certiorari in 2014, signaled willingness to address this doctrinal uncertainty, calling Justice Stevens' footnote in *Babbitt* a "drive-by ruling" that "deserves little weight."[54] According to Scalia, the *Babbitt* footnote "contradicts the many cases before and since holding that, if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings."[55]

There exists uncertainty surrounding the weight to give to *Babbitt* and whether the footnote in this decision controls dual-application statutes. This uncertainty is fueled by jurists like Justice Scalia and Judge Sutton who seek to replace the *Babbitt* footnote paradigm with one in which the rule of lenity controls. It is in this doctrinal context that Justice Kagan's proposes the "third way."

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[52] Id. at 11.
[53] Id. at 12 n. 8.
[54] *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia dissenting from denial of cert.).
[55] Id. at 353-54.

D. LENITY: THE PRIMARY BATTLEGROUND IN THE "THIRD WAY" DEBATE

While it is true that the "third way" rescinds deference to administrative agencies where it would otherwise be extended under *Babbitt*, the costs borne by the *Chevron* regime as a result of this change would not be as significant as those sustained by the rule of lenity. The reason for this apparent asymmetry is relatively straightforward: *Chevron* deference is no stranger to categorical exceptions to its application,[56] while the rule of lenity has functioned as a per se rule. As is clear already from the critiques of Judge Sutton, widespread disagreement persists about the proper content of the rule of lenity and its role in federal criminal law. But these disagreements have not seriously contemplated excepting entire categories of cases from its reach. Removing dual-application statutes from *Chevron*'s domain, on the other hand, represents no sea change in the area of administrative law, and thus requires less discussion here. But framing these debates as ones of degree (lenity) versus ones of kind (*Chevron*) is too simple. As this Note argues below, creating a third category for dual-application statutes, though they involve criminal penalties, is not the drastic departure from the modern application of the rule of lenity that some may fear.

II. EVALUATING THE PROPOSAL: STRENGTHS OF THE "THIRD WAY"

Justice Kagan's "third way" between *Chevron* and lenity is a viable, short-term measure given prevailing understandings of delegation, both to executive agencies tasked with administering civil regulatory regimes and to federal courts required to explicate

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[56] See note 8.

criminal statutes. It provides a way to analyze cases involving interpretations of statutes carrying criminal and noncriminal applications without having to make the choice between *Chevron* and lenity. [57] This approach has notable virtues but also serious limitations. In the pages that follow, I will outline some of the affirmative benefits of the "third way" before taking up some serious objections to the merits of the proposal.

A. THE RULE OF LENITY AND *CHEVRON* DEFERENCE: THEORETICAL JUSTIFICATIONS

The rule of lenity traces its origins to the common law of England,[58] and as Chief Justice John Marshall observed is "perhaps not much less old than construction itself."[59] Lenity exists to secure two fundamental values particular to the criminal law: first, that citizens receive adequate notice of what constitutes a crime; and second, that it is the will of the people embodied in the legislature, not the courts, that defines the actions for which an individual may be subject to punishment.[60] As Justice Thurgood Marshall famously wrote in *United States v. Bass*, the rule of lenity ensures "a fair warning should be given to the world . . . of what the law intends to do if a certain line is passed" and "[t]o make the warning fair, so far as possible the line should be clear."[61] The rule of lenity allows citizens *ex ante* to know—or at least to discover—whether private

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[57] Observers will note that since ambiguity is the trigger for both *Chevron* and the rule of lenity, a court may sidestep the issue by simply finding lack of ambiguity in the statute. I will address this option and its associated costs in the pages that follow.
[58] William Blackstone, 1 *Commentaries on the Laws of England* *88 (Oxford ed. 2016).
[59] *United States v. Wiltberger*, 18 U.S. 76 (1820).
[60] See *United States v. Bass*, 404 U.S. 336, 348 (1971).
[61] Id. at 348 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes)) (quotation marks omitted).

conduct violates criminal prohibitions. The requirement that individuals be placed on adequate notice as to what conduct violates the criminal law is rooted in the same due process considerations protected by the Fifth and Fourteenth Amendments.[62] The rule of lenity also serves an institutional function. Strict construction of penal statutes passed by the legislature reflects the "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."[63] By demanding that criminal laws are strictly construed, the rule of lenity ensures that they "represent[] the moral condemnation of the community," rather than the will of an unelected judiciary.[64]

Contemporary commentators have defended the rule of lenity on different grounds entirely. The rule, by requiring heightened specificity in statutory drafting and reducing space for legislative compromise, may hinder a Congress whose actions in the area of criminal law are a one-way ratchet towards expansiveness and severity.[65] Under this view, lenity is a powerful tool for checking a duplicative, draconian, or otherwise oppressive federal criminal

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[62] John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406 (2010).

[63] *Bass*, 404 U.S. at 348 (quotation marks omitted).

[64] Id.

[65] Price at 915-16 (cited in note 6). The rule of lenity may, on the other hand, have precisely the opposite effect. William Eskridge argues that institutional forces operating within the federal judiciary and between the Congress and the courts, if anything, make the rule of lenity a force for over-criminalization. Because lower federal courts seek to avoid reversal and the Supreme Court likewise avoids reversal by statute (which Congress has expressed its willingness to do in response to interpretations of criminal laws), the judiciary ends up internalizing the preferences of the contemporary Congress. And these preferences tend towards criminalization. William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 561-62 (2001).

law.[66] Lenity may also serve the public interest by promoting legislative accountability. Requiring specific legislative authorization for criminal laws "maximizes the chance that laws will encounter political resistance" and prevents legislators for shirking responsibility for their actions by seeking refuge in lexical ambiguities.[67] These justifications for the rule of lenity reflect, at bottom, the collective understanding that criminal laws are *sui generis*.

The policy values served by the rule of lenity stand in stark contrast to those undergirding the Supreme Court's decision in *Chevron*.[68] The deference regime enshrined in the *Chevron* opinion was grounded in the proposition that ambiguities in the statutes administered by executive agencies were not problems to be addressed by the courts, but rather express congressional delegations of interpretative authority to the agency itself.[69] One perspective contends that *Chevron* "effected a fundamental transformation in the relationship between courts and agencies under administrative law," making deference "a ubiquitous formula governing court-agency relations."[70]

While *Chevron* has become central in contemporary administrative law and the subject of innumerable tenure articles and student notes, the decision itself was perhaps not the legal revolution

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[66] But see *Yates v. United States*, 135 S. Ct. 1074, 1098-99, 1100-01 (2015) (Kagan dissenting) (rejecting the application of an overly-muscular rule of lenity to capacious but clear federal statutes even where the courts encounter the consequences of "overcriminalization and excessive punishment in the U.S. Code.").

[67] Price at 916 (cited in note 6).

[68] 467 U.S. 837 (1984).

[69] Id. at 843-44.

[70] Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 834 (2001).

often imagined.[71] On this view, *Chevron* is a "standard of review rather than a rule of decision,"[72] arising as "a necessary consequence of and corollary to Congress's long-standing habit of relying on agencies to exercise substantial policymaking discretion."[73] This view finds support in the *Chevron* opinion itself, which grounded its deference regime in a series of judgments about the inherent, comparative advantages of agencies in administering complex regulatory regimes inevitably under-specified by Congress.[74]

Justice Stevens, writing for the Court, noted a number of these advantages, including an agency's subject matter expertise and the complexity of statutes entrusted to their care; the desirability of allowing agencies to adapt to new circumstances; and the relative political accountability of administrators as compared to Article III judges.[75] In *Carter* and *Esquivel-Quintana*, discussed above, the agencies resolved statutory ambiguity against the appellants in the context of adjudicatory proceedings against them. The agencies expected *Chevron* deference from the Court of Appeals, which allows them in an adjudicatory context to proceed on a case-by-case basis in interpreting statutory ambiguities. According to the *Chevron* court, allowing the agency to evaluate the "wisdom of its policy on a continuing basis" is a key virtue of permitting it to interpret flexibly the statutes it administers.[76]

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[71] Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 512.
[72] Bednar & Hickman at 1444 (cited in note 71).
[73] Id. at 1398.
[74] *Chevron*, 467 U.S. at 865.
[75] Id. at 864-66.
[76] Id. at 863-64.

These rationales for agency deference are compelling—at least when examined in a vacuum.[77] Agencies are responsible for administering highly technical regulatory regimes—like the Clean Air Act, the statute at issue in *Chevron*—requiring expert knowledge the government possesses only within the specialized agency. This collective expertise found in agencies distinguishes them from courts comprised of generalist judges.[78] Locating the responsibility for interpreting enabling statutes within agencies themselves also serves the goals of national uniformity and policy coordination. Agencies, unlike the lower federal courts, can ensure uniform application of regulatory policy and coordinate with other agencies responsible for overlapping or competing regimes.[79] Because, under this view, issues of statutory interpretation are inextricably bound up with policy judgments, administrative agencies by virtue of their accountability to the President are more democratically legitimate policy decisionmakers than federal courts.[80] Finally, deference to agency interpretations affords agencies the flexibility to address evolving conditions by changing positions within the permissible range of the statutory ambiguity.[81] Such deference allows an agency to adapt the statute to problems unforeseen by Congress.[82]

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[77] The virtues extolled by the *Chevron* opinion are not, by any means, universally shared. See notes 151-66 and surrounding text. The aim of this Note is not to wade into this active and contentious debate, but rather to highlight the bases for the substantial support that exists for the *Chevron* regime since, as I will argue, it is a desire to protect these values that lies at the heart of the Supreme Court's struggle with the issue presented by this Note.

[78] *Chevron*, 467 U.S. at 865 (acknowledging that "[j]udges are not experts in the field").

[79] Cass R. Sunstein, *Law and Administration after* "Chevron," 90 COLUM. L. REV. 2071, 2088 (1990).

[80] See *Chevron*, 467 U.S. at 865-66; Sunstein, *Law and Administration* at 2087 (cited in note 79).

[81] *Chevron*, 467 U.S. at 863-64.

[82] Sunstein, *Law and Administration* at 2089 (cited in note 79).

No matter the precise policy foundation from *Chevron*, its centrality in the area of administrative law cannot be overstated. Professor Cass Sunstein has observed that *Chevron* has become a "foundational, even quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."[83] He went on to describe the importance of *Chevron* in even more explicitly constitutional terms, arguing that the decision represents "a kind of counter-*Marbury* for the administrative state" that "declare[d] that in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is."[84] Drawing on another of Chief Justice Marshall's foundational works of constitutional jurisprudence, Professor Sunstein further characterized *Chevron* as "the administrative state's very own *McCulloch v. Maryland*, permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions."[85] *Chevron* sits squarely in the center of modern administrative law and forms the basis for the settled expectations of the judiciary, administrative agencies, and private actors alike.

B. PRESERVING *CHEVRON* AND LENITY

A "third way" between *Chevron* and the rule of lenity possesses a number of important advantages. Not only would it aid the Court in confronting its immediate concern of this vexing doctrinal dilemma, but it also would allow these two doctrines to remain unblemished in their respective spheres of the law. As discussed in detail above, the policy rationales for both the rule of lenity and

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[83] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006).
[84] Id. at 189.
[85] Id. at 190.

Chevron deference, while contested, are numerous and varied. "Third way" judicial review would allow the Court to preserve the many virtues of both doctrines without having to elevate one over the other. In other words, the "third way" is an attempt to maintain the doctrinal status quo. Given the settled expectations surrounding the role of lenity and the centrality of *Chevron* deference in administrative law, there is an untold benefit to the legal profession and private ordering in avoiding reverberations across the legal landscape that would certainly come with a frontal attack on either doctrine. However, as I will discuss in the sections below, the "third way" is not inherently conservative—its nature as such depends heavily on the existence of a prevailing set of narrow doctrinal assumptions that sustain it. These assumptions are bound together by a cogent animating theory, albeit a fiercely contested one.

C. THE "THIRD WAY" IS NO RADICAL DEPARTURE FROM CONTEMPORARY PRACTICE IN CRIMINAL LAW

Proponents of a robust rule of lenity will argue that Justice Kagan's "third way" is no middle ground at all because creating room for judicial construction of ambiguous dual-application statutes serves neither of the traditional policy aims of the rule of lenity: notice and congressional control over the criminal law. Moreover, the law contains already a number of explicit exceptions to the *Chevron* deference regime,[86] while the rule of lenity—grounded in constitutional due process considerations—is, at least on some understandings, an absolute.

These objections are serious ones but present more of a theoretical obstacle than a practical one. First, opening up room for judicial construction of dual-application statutes is not in fact a

[86] See note 8.

radical departure from current understandings of the rule of lenity. Given that such a move is only a small step under current law but one that allows the Court to sidestep a significant and potentially destabilizing issue, Justice Kagan's "third way" has undeniable merit. Second, the courts have developed institutional competence in this area already—not only in the ordinary interpretation of criminal statutes, but also as the congressionally-authorized administrators of segments of the federal criminal law.

1. The Operation of Federal Criminal Common Law

The existence and operation of federal criminal common law illustrates how "third way" judicial review would not be the radical departure from settled expectations that some fear. The traditional account of the rule of lenity says that strict construction of penal statutes ensures that individuals do not face penal sanctions for conduct not specifically contemplated by Congress. Its corollary, of course, is there can be no federal criminal common law.[87] Yet, history shows that both Congress and the courts have consented to the creation of a criminal common law.[88] Notable federal common law crimes include [89] violations of the Racketeering Influenced and Corruption Organizations Act (RICO);[90] honest service fraud under the mail and wire fraud statute;[91] conspiracy to defraud the United

[87] Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 197-98 (2002).
[88] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345, 389 (1994) ("Ranking lenity "last" among interpretive conventions sends the clear message that the Court is both willing and able to collaborate with Congress in the articulation of a comprehensive and effective body of federal criminal law.").
[89] Rosenberg at 202-08 (cited in note 87) (collecting statutes).
[90] 18 U.S.C. §§ 1961-64.
[91] 18 U.S.C. § 1346.

States; [92] and Armed Career Criminal Act violations based on "burglary" convictions. [93] For each of these crimes, Congress provided the framework for criminal liability and, through statutory ambiguity, delegated the details to the courts.[94]

The RICO statute provides a clear illustration of the operation of federal criminal common law. RICO criminalizes engaging in a pattern of racketeering activity consisting of, *inter alia*, enumerated predicate offenses "chargeable under State law." [95] In *United States v. Bagaric*,[96] the Second Circuit held that the state predicate offenses were to be given a "generic definition" under RICO rather than the definition particular to the relevant state law. By calling for a "generic definition" of RICO predicates, the Second Circuit sanctioned the development of federal criminal common law in this area.[97] Because the generic definition emerges from the courts and not Congress, this move is possible only where the rule of lenity is not applied in its strictest form.

In this way, congressional delegations of criminal law to the courts should be understood to mirror, in certain respects, implied delegations of civil authority to administrative agencies. As discussed above, the growth of federal regulatory power required—or, on another account, facilitated—the delegation of congressional authority to administrative agencies. Some, including Justice Scalia, have argued that the same forces are at work in congressional development of criminal law: "Fuzzy, leave-the-details-to-be-sorted-

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[92] 18 U.S.C. § 371.
[93] 18 U.S.C. § 924(e)(2). See *Taylor v. United States*, 495 U.S. 575 (1990) (holding that burglary in § 924(e)(2) did not derive from state law but from "generic meaning.").
[94] Kahan at 389 (cited in note 88).
[95] Rosenberg at 202 (cited in note 87); 18 U.S.C. § 1961(1).
[96] 706 F.2d 42 (2d Cir. 1983).
[97] Rosenberg at 203 (cited in note 87).

out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem [crime control] but does not have the time (or perhaps the votes) to grapple with the nitty-gritty."[98] As the federal criminal law has expanded in scope, so too has the need for statutory gaps to be filled, and since "[t]here is no federal criminal administrative agency, [] filling in the statutes becomes the job of the courts."[99]

These developments raise important normative questions, but the key points here are descriptive ones. This Note leaves to others debates about federal criminal common law or the delegation of criminal lawmaking power to the Executive branch.[100] The examples of federal criminal common law discussed above do, however, highlight three important points relevant here. First, the judiciary already engages in some degree of federal criminal common lawmaking notwithstanding concerns about congressional origination that undergird the rule of lenity. Although the theoretical conception dictates that only Congress shall create criminal laws, we have, in some instances, tolerated a cooperative partnership between Congress and the courts. Second, the federal judiciary possesses the institutional competence to administer a body of criminal common law. Finally, while Congress does engage in some measure of delegation to the judiciary in the area of federal criminal common law, the examples noted above are specific and limited. When viewed against this backdrop, the "third way" is no radical departure from the treatment of certain criminal statutes within the federal courts.

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[98] *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia dissenting).
[99] Rosenberg at 214 (cited in note 87).
[100] See, e.g., Kahan (cited in note 88); see also *Gundy v. United States*, 138 S. Ct. 1260, No. 17-6086 (pending decision argued Oct. 2, 2018) in which the Supreme Court will revisit delegation principles in the context of a federal criminal statute.

2. Other Limits on the Rule of Lenity

The Supreme Court has also re-conceptualized—and some would argue, weakened—the two key values underlying the rule of lenity such that allowing courts to interpret the narrow group of statutes carrying criminal applications without considering the rule of lenity would be no large divergence from current practice.

First, permitting the courts to decide the most sensible reading of a statute with criminal applications does not run afoul of due process-driven conceptions of fair notice in contemporary criminal law. Several facets of the legal landscape illustrate this point. The Supreme Court has found adequate notice to criminal defendants in even the most extreme of circumstances.[101] For example, *United States v. Rodgers* held that a circuit split, and the attendant possibility that the Supreme Court would intervene to resolve it, was sufficient notice to a criminal defendant of the state of the law so as to avoid running afoul of constitutional guarantees.[102] It is true that whenever an appellate court considers issues of first impression or overturns settled law in the criminal setting, it necessarily violates notice protections afforded to the particular litigant before them; this fact inheres in common law adjudication. But *Rodgers* goes one step further. Not only do criminal defendants run the risk of an adverse *ex post* interpretation by an appellate court when they are in the legal system, but also citizens seeking to organize their affairs outside the bounds of the criminal law must do so with no better information than the possibility that a circuit split may be resolved against them. This conception of notice in the criminal law bears little resemblance

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[101] See Rosenberg at 217 (cited in note 87).
[102] 466 U.S. 475, 484 (1984).

to the "fair warning [] to the world . . . of what the law intends to do if a certain line is passed."[103]

The justice system also tolerates a diminished role for notice when advanced by other actors. As one commentator notes, judge-made criminal law is "hardly different from a defendant being charged for violating a federal criminal statute applied in an imaginative or unprecedented way; in either instance, the argument that the person was not on notice that his or her actions might be criminal is usually unavailing." [104] Certainly potential criminal defendants are no better able to evaluate the legality of their conduct when it is the U.S. Attorney rather than the judge advancing a capacious view of criminal conduct.

Notwithstanding strong language about the importance of notice to potential to criminal defendants, the judiciary has shown in other ways that its commitment to this proposition is not absolute.[105] For instance, it stands to reason that a complete prohibition on the development of judge-made criminal law on due process grounds would also apply to criminal common law in the states.[106] And the federal courts have, of course, never enforced such a prohibition.[107]

Second, many have come to accept that because of the nature of criminal lawmaking, there are inherent limits to congressional control. After all, Congress does not try criminal defendants itself; instead, it is the courts that administer and interpret congressional commands. Yet, as Rosenberg notes, there exists no sharp distinction

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[103] *Bass*, 404 U.S. at 348 (citing *McBoyle*, 283 U.S. at 27 (Holmes)) (quotation marks omitted).
[104] Rosenberg at 218 (cited in note 87).
[105] See also discussion of *Yi v. Bureau of Prisons*, 412 F.3d 526 (4th Cir. 2005) in Section IV.A.
[106] Rosenberg at 199 (cited in note 87).
[107] Id.

between making the law and interpreting it.[108] Thus, congressional control over the criminal law becomes a matter of degree. As will be discussed below, under a certain view, Congress remains supreme and encounters no delegation problem notwithstanding a large measure of delegation of criminal lawmaking to the federal courts.

Scholars have also raised substantive critiques of the congressional origination of criminal laws and have questioned its ability to serve either of its primary purposes in this area. They argue that it is not self-evident that federal criminal laws express the moral convictions of society, even if passed by elected representatives in Congress.[109] Furthermore, it is not clear that laws created by the judiciary would be any more oppressive or severe than those fashioned by Congress;[110] in fact, there is a compelling argument that judicially created laws would be *less* oppressive than those passed by Congress.[111] Accepting the functional view that Congress is at liberty to delegate its own criminal lawmaking power and doubting Congress' ability to speak with the voice of the people and prevent oppressive rule, important scholarship has emerged to question the very underpinnings of the rule of lenity.

3. Rule of Lenity: Unpredictable Application

The unpredictable application of the rule of lenity also prevents it from being the robust judicial bulwark sometimes imagined. According to Justice Scalia, the principal problem with the rule of lenity was "the uncertainty of its application."[112] Other

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[108] Id. at 215.
[109] Id. at 215-16.
[110] Id.
[111] Cf. Price at 915-16 (cited in note 6); but see Eskridge (cited in note 65).
[112] Scalia & Garner at 298 (cited in note 6).

commentators echo this observation, calling the rule "notoriously sporadic and unpredictable."[113]

Recent empirical scholarship has demonstrated that the federal courts have applied at least four unique conceptions of the rule of lenity, when they apply the rule at all.[114] The strictest construction of the rule applied by the Court requires resolution of statutory ambiguity in favor of the defendant "where text, structure, and history fail to establish that the Government's position is unambiguously correct."[115] Yet another conception "reserve[s] lenity for those situations in which reasonable doubt persists about the statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute."[116] A third requires that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on more than a guess as to what Congress intended."[117] The final and most permissive formulation, recently reaffirmed in an opinion by Justice Kagan, noted that the rule of lenity "applies only if, after considering text, structure, history and purpose, there remains grievous ambiguity or uncertainty in the statute such that the Court must

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[113] Kahan at 346 (cited in note 88); see also Stuntz at 56 (cited in note 65). What is more, there may be cases in which a court will decline to apply the rule of lenity altogether if it determines that the values underpinning the rule of lenity are protected by alternative procedural safeguards. See discussion of *Yi*, 412 F.3d at 526 in Section IV.A.

[114] Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity, and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101 (2016).

[115] *United States v. Granderson*, 511 U.S. 39, 54 (1994). See also *Muscarello v. United States*, 524 U.S. 125, 148-49 (1998) (Ginsburg dissenting); *Abramski v. United States*, 134 S. Ct. 2259, 2281 (2014) (Scalia dissenting).

[116] *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco*, 447 U.S. at 387) (quotation marks omitted) (emphasis in original).

[117] *Ladner v. United States*, 358 U.S. 169, 178 (1958); see also *United States v. Rodriguez*, 553 U.S. 377, 405 (2008) (Souter dissenting); *Barber v. Thomas*, 560 U.S. 474, 488 (2010).

simply guess as to what Congress intended."[118] These differing conceptions produce predictably and strikingly divergent results.[119]

The sporadic application of the rule of lenity supports two key conclusions. Principally, the rule of lenity does not operate in practice as the kind of mechanically-applied canon that shields all—or even most—defendants from adverse interpretations of ambiguous criminal statutes notwithstanding the theoretical conception of the rule. Additionally, there exist deeply-held, fundamentally-divergent understandings of the rule of lenity in the federal judiciary. Dan Kahan argues that the uncertainty surrounding the application of the rule is "not because the judiciary lacks principle but rather because it is institutionally committed to an additional principle or set of principles antagonistic to lenity . . . that Congress may delegate, and courts legitimately exercise, criminal lawmaking authority."[120] Though these divergent views have contributed to the jurisprudential uncertainty surrounding the application of the rule to cases ordinarily afforded *Chevron* deference—and thus, the space for

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[118] *Abramski*, 134 S. Ct. at 2272 n. 10 (quoting *Maracich v. Spears*, 570 U.S. 2191, 2209 (2013)) (quotation marks omitted).

[119] A recent paper by Daniel Ortner highlighted the impacts of four distinct lenity standards. First is the "unambiguously correct" standard outlined in *United States v. Granderson*, 511 U.S. 39 (1994), which requires courts to apply the rule of lenity unless the government's interpretation is unambiguous. This resulted in a resolution in favor of the defendant in 70% of cases. Second, cases invoking the "reasonable doubt" standard set forth in *Moskal*, 498 U.S. at 103 produced importantly distinct results. Out of a sample of 50 lower courts that invoked this standard, 64% *refused* to apply the rule of lenity. Courts apply the third lenity standard when there is "no more than a guess" as to Congress' intent on the matter. This "no more than a guess" standard resulted in rulings for the government more than 50% of the time. Finally, of the 11 cases before the Supreme Court that applied the "grievous ambiguity" standard found in *Abramski*, not a single one was decided in favor of lenity. See Ortner (cited in note 114).

[120] Kahan at 367 (cited in note 88).

Justice Kagan's "third way"—they also, as discussed below, undermine the long-term viability of her proposal.

D. RECONCILING THE RULE OF LENITY AND THE "THIRD WAY"

Does all of this mean that the rule of lenity is mere window dressing on the criminal law? Many judges and commentators certainly think so.[121] For others, presumably including Justice Kagan,[122] the answer is no. Proponents of a weak version of the rule of lenity do see a reason for the rule and do not necessarily reject ultimate legislative control in the area of criminal law. In general, these jurists are motivated by a "practical" conception of ultimate legislative control "under which courts are authorized to propound operative rules of law at Congress's explicit or implicit direction."[123] And because "the aim of this arrangement is to maximize the policymaking authority of actual legislators, the exercise of delegated lawmaking power cannot be viewed as judicial 'usurpation' of legislative prerogatives."[124] Thus, the rule of lenity remains neither to ensure adequate notice to criminal defendants nor to require Congress to explicitly authorize new criminal laws. Rather, lenity is a rule for the courts to apply only in the rare case in which

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[121] See e.g., Price at 886 (cited in note 6).; see *Abramski*, 134 S. Ct. at 2281 (Scalia dissenting) ("when a criminal statute has two possible readings, we do not choose the harsher alternative unless Congress has spoken in language that is clear and definite.").

[122] As discussed below, Justice Kagan is the author of the majority opinion in *Abramski*, which held that the rule of lenity should apply, but only when "there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Abramski*, 134 S. Ct. at 2272 n. 10 (quoting *Maracich*, 133 S. Ct. at 2191).

[123] Kahan at 398-99 (cited in note 88).

[124] Id.

congressional direction is so ambiguous that to give it effect could support no claim of faithful application.

On this view of the rule of lenity, "third way" review poses no threat to the doctrine at all. The rule is meant to serve as a mere backstop setting an outer boundary for the allocation of criminal lawmaking power between the Congress and the judiciary. In this way, it mirrors the "intelligible principle" standard applied to delegation to agencies in administrative law.[125] If the courts are the faithful agents of Congress seeking to effectuate delegated ends in the area of criminal law, it follows then that the rule of lenity should not be used to frustrate legislative purposes, even when faced with ambiguous statutes. It is for this reason that despite the discussion offering examples of how the rule of lenity has come unhinged from its classical justifications, the "third way"—which would weaken the doctrine yet again by exempting dual-application statutes from its protection—can be said to maintain the virtues of the doctrine.

E. CLARITY IN THE INTERPRETATION OF DUAL-APPLICATION STATUTES

Justice Kagan's "third way" possesses another key virtue: it allows the Supreme Court to provide clearer guidance to the lower courts in cases involving dual-application statutes. *Esquivel-Quintana* is instructive.[126] In an 8-0 decision authored by Justice Thomas, the Court declined to reach the *Chevron* versus lenity issue.[127] The Court found that the INA, "read in context, *unambiguously* forecloses the Board's interpretation."[128] Because the Court found no ambiguity in

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[125] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).
[126] See Section I.A.
[127] *Esquivel-Quintana*, 137 S. Ct. at 1562 (2017). Justice Gorsuch took no part in the consideration or decision of the case.
[128] Id. (emphasis added).

the statute, it failed to trigger either the rule of lenity or *Chevron* deference, releasing the Court of any obligation to prioritize one over the other. Justice Kagan, evidently, was unable to persuade her colleagues.

There is at least some persuasive evidence that the Court found the statute to be "unambiguous" precisely because of its ambiguity and the inescapable collision of *Chevron* and the rule of lenity to which finding otherwise would lead. For instance, the fact that the immigration judge, the BIA, and a panel of the Sixth Circuit all reached the opposite conclusion and found a conviction under the California statute to be "sexual abuse of a minor" is an indication that the provision is, at the very least, not entirely unambiguous. As Professor Roderick Hills argues, it "is difficult to take seriously [the opinion in *Esquivel-Quintana*] as an interpretation of 'unambiguous' statutory text" and it "is not . . .a remotely serious position" that "sexual abuse of a minor" is entirely unambiguous. [129] This Note does not adopt a position on the views of Hills and others, but the point remains the same: the opinion in *Esquivel-Quintana* creates uncertainty about the reach of the decision and the persuasiveness of its analytic method beyond the particular question presented.

Despite the outrage expressed over the interpretative method, this move by the Court can easily be explained. On the views of some, Justice Thomas' opinion was the most recent example of "*Chevron* avoidance," a strategy that "punt[s] tougher questions about how *Chevron* works, [makes] disingenuous unambiguity determinations,

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[129] Roderick Hills, *Ambiguity – the most ambiguous concept in the law of interpretation*, PRAWFSBLAWG (May 30, 2017), archived at https://perma.cc/CK4J-EL59; see also Ryan Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. Rev. (forthcoming 2019) (manuscript at 5) ("The Supreme Court went out of its way to avoid the question, implausibly declaring that the statutory language at issue was 'ambiguous'").

or simply ignores *Chevron* altogether."[130] These tough questions avoided by the Court in *Esquivel-Quintana* are, as discussed above, quite clear. And the Court's practice of sidestepping tricky doctrinal questions by finding the relevant statute unambiguous is well-recognized in the literature.[131] The application of *Chevron* deference is fertile ground for such a tactic.[132]

The practice of *Chevron* avoidance invites comparisons to well-documented practice of constitutional avoidance. Some have observed that despite the similarities and the fact that constitutional avoidance has become an accepted tool of statutory interpretation,[133] *Chevron* avoidance is potentially more damaging.[134] Whereas Congress may correct a court's mistaken application of constitutional avoidance by enacting more precise statutory language, it lacks any practicable means of re-delegating to an agency interpretive authority over any ambiguous term once the statute has been explicated by the courts.[135] In this particular way, *Chevron* avoidance frustrates Congress' supervisory authority over the administrative process.

This is not the only cost of *Chevron* avoidance. In the general case, the perception of such a tactic jeopardizes rule of law principles by

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[130] Asher Steinberg, Esquivel-Quintana *and* Chevron *Avoidance*, THE NARROWEST GROUNDS (May 30, 2017), archived at https://perma.cc/2LTR-65Y4.

[131] Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 865 (2004).

[132] Cf. Lisa Schultz Bressman, *How* Mead *Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464-69 (2005) (describing how uncertainty surrounding the application of *Mead* causes the Court to avoid deciding whether *Chevron* deference is due by either resolving the case under *Skidmore* or finding that both *Chevron* and *Skidmore* support the agency's interpretation of the statute).

[133] See SCALIA & GARNER at 247-51 (cited in note 6).

[134] Steinberg (cited in note 130).

[135] Id.

eroding confidence in language itself.[136] And, sidestepping fundamental tensions between *Chevron* deference and the rule of lenity provides no guidance to the lower courts beyond an authoritative interpretation of the statute at issue. For now, the *Babbitt* footnote seems to control and to compel courts to defer to agency interpretations of ambiguous statutes notwithstanding criminal applications. But a plurality of the justices in *Leocal*, addressing the issue head on, went the other way and held that the rule of lenity must take priority.[137] The Court's decision in *Esquivel-Quintana* does nothing to resolve this uncertainty. On another reading, the practice of *Chevron*/lenity avoidance contained in *Esquivel-Quintana* falters not because of what the decision fails to do, but rather what it *does* implicitly hold: that a finding of unambiguity is a permissible basis for avoiding intractable, doctrine-destabilizing questions.[138]

F. THE "THIRD WAY" AND THE END OF DUAL-APPLICATION STATUTES?

Increased clarity in the interpretation of dual-application statutes offers another potential advantage for the courts: forcing the government to back away from dual-application statutes entirely. While this Note has been concerned with the *criminal* half of dual-application statutes, administrative agencies are after all primarily

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[136] See Solan at 859 (cited in note 131). Professor Solan, a legal academic and linguist, outlines the concept of "pernicious ambiguity" which occurs "when the various actors in a dispute all believe a text to be clear, but assign different meanings to it." Id. Such competing, mutually-exclusive yet "clear" interpretations show, according to Solan, a "complete communicative breakdown" which directly implicates the legitimacy of written law. Id. Though, by contrast, this Note deals with competing claims of ambiguity and unambiguity, implications for the rule of law remain the same.

[137] See notes 50-52 and surrounding text.

[138] See Steinberg (cited in note 130).

concerned with the enforcement and implementation of *civil* regulatory regimes. If the Court lays down an authoritative interpretation of the statute under the "third way," the agency loses the ability to change its interpretation of the statute[139]—contrary to one of the main virtues of *Chevron* deference—even where it contemplates only civil action. This presents the agency with a distinct choice: pursue enforcement actions under dual-application statutes and risk ossification of the law following judicial review, or petition Congress to decouple civil and criminal applications so that the statutes authorizing ordinary civil actions receive *Chevron* deference. Administrative agencies would ultimately have to weigh the benefits of dual-application statutes on one hand against the uncertainty and potential for ossification on the other. Certainly, such a balancing would be highly statute and agency-specific, and any attempt to predict the ultimate result would be speculative at best. But what is clear is that an authoritative "third way" interpretation from the courts would force the government to consider the implications of its enforcement actions and perhaps, in cases in which ossification is undesirable, petition Congress to decouple dual-application statutes.

III. EVALUATING THE PROPOSAL: WEAKNESSES OF THE "THIRD WAY"

While Justice Kagan's proposed "third way" offers a number of notable benefits in cases involving dual-application statutes, the solution is ultimately a highly contingent one. The viability of "third way" framework rests on a number of key assumptions about the Court's understanding of *Chevron* deference and the rule of lenity, both of which are highly contested. What is more, since *Chevron* and

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[139] Here I will merely flag the potential interaction with the analysis set forth in *Nat'l Cable & Telecomms. Ass'n v. Brand-X Internet Servs.*, 545 U.S. 967 (2005).

lenity are inextricably linked to fundamental debates over statutory interpretation and delegation, a lasting consensus will likely remain elusive. As a result, the proposed "third way" is built on shifting ground.

A. VULNERABILITY TO DOCTRINAL SHIFTS IN THE RULE OF LENITY AND *CHEVRON*

A principal issue with the "third way" is that it is only operable given prevailing understandings of the rule of lenity. As articulated by Justice Kagan, courts would apply the "third way" to dual-application statutes sufficiently ambiguous to otherwise trigger *Chevron* deference, but that failed to reach the threshold of "grievous ambiguity." This, of course, requires that the ambiguity thresholds for *Chevron* and lenity be distinct. While these thresholds are distinct under the Court's current understandings, each is deeply contested. The *Abramski* case, for instance, highlights the deep division over the proper application of the rule of lenity. Writing for a five-member majority, Justice Kagan reaffirmed the Court's preference for the more modest form lenity, holding that the Court would only apply the rule if there remained a "grievous ambiguity" *even after* "considering text, structure, history, and purpose" of the statute.[140] Justice Scalia, writing for the four dissenting Justices, outlined a much more robust conception of lenity, writing that "when a criminal statute has two possible readings, we do not choose the harsher alternative unless Congress has spoken in language that is clear and definite."[141] He went on to argue that because "it cannot be said that the statute unambiguously commands the Government's []

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[140] *Abramski*, 134 S. Ct. at 2259.

[141] Id. at 2281 (Scalia dissenting) (quotation marks and citation omitted).

reading" the ambiguity must be resolved in favor of the defendant.[142] *Abramski* illustrates a wide gulf between these competing conceptions of the rule.

The "grievous ambiguity" conception of lenity affirmed by the *Abramski* court reserves its application for only the most extraordinary cases. And this stringent formulation produces predictable results in the lower courts.[143] The conception of lenity espoused by Justice Scalia, on the other hand, would require the application of the rule of lenity in any case in which the language of the criminal statute is not "clear and definite." This Note leaves a more thorough treatment of these standards to others, but what is clear for the present purposes is that Justice Scalia's view of lenity leaves little, if any, room for "third way" judicial review. Justice Scalia's formulation sets lenity's ambiguity threshold at, or theoretically even below, that required at *Chevron* Step One. Doing so simply returns the Court to the necessary choice between lenity and *Chevron* presented but ultimately skirted in *Esquivel-Quintana*. Though Justice Scalia's understanding of the rule of lenity likely remains the minority view on the Court,[144] a changing composition of Justices threatens to upend the doctrine and thus eliminate space for "third way" judicial review.

"Third way" review of dual-application statutes is also vulnerable to changes in the *Chevron* framework. Just as lowering the ambiguity threshold for lenity may crowd out "third way" judicial review, so too may raising the ambiguity requirement at *Chevron* Step

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[142] Id.

[143] See Ortner (cited in note 114). In fact, a recent empirical study found not a single application of the rule of lenity by a court following the grievous ambiguity standard.

[144] The writings of then-Judge Gorsuch provide few clues about the Justice's own views on the subject. There is, however, reason to believe that he will be sympathetic to a more robust conception of the rule of lenity. Cf. Kahan at 393 (cited in note 88).

One. There are a number of possible reasons why this might occur. First, the permissible tools for determining ambiguity at *Chevron* Step One are hotly contested.[145] As the set of permissible tools of statutory interpretation expands and contracts with a changing federal bench, so too will the results of ambiguity determinations in the marginal case. Next, since *Chevron* Step One serves a gatekeeper of deference to agency interpretations, it remains possible that a judge may use backwards induction to incorporate her policy preferences at the initial stage.[146] Based on philosophical correlates, we may expect a textualist judge to be more likely to resolve ambiguities at Step One,[147] thus implicitly raising its ambiguity threshold and denying the discretion afforded to administrative agencies. The Court's

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[145] See Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 618 (2014) ("The problem, however . . . is that the Court never sets out what those "traditional tools" are, likely because it could not agree on them if it wanted to."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) ("But the current situation in statutory interpretation, as I see it, is more akin to a situation where umpires can, at least on some pitches, largely define their own strike zones.").

[146] See Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589 (2006) (noting that "statutory ambiguities often cannot be resolved without judgments of policy"). And as Justice Scalia succinctly put it, "[p]olicy evaluation is, in other words, part of the traditional judicial tool-kit that is used in applying the first step of *Chevron*—the step that determines, *before* deferring to agency judgment, whether the law is indeed ambiguous." Scalia, *Judicial Deference* at 515 (cited in note 71).

[147] Justice Scalia himself argued that textualism dictates a more restrictive *Chevron* Step One. Scalia, *Judicial Deference* at 521 (cited in note 71) ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its test and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."). Professor Merrill provides another explanation for a possible inverse relationship between textualism and deference: textualism makes statutory construction into "a kind of exercise in judicial ingenuity" that "places a great premium on cleverness." Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. REV. 351, 372 (1994). A judge drawn to such methods, he argues, will be less inclined to defer to the judgment of others. Id.

newest member, Justice Kavanaugh, has explicitly acknowledged this tendency.[148]

Yet, as Professor Thomas Merrill argues, it may not only be these judges who possess the incentive to raise the ambiguity threshold at Step One. Judges of other ideological stripes may face similar pressures and behave comparably.[149] No matter the motivations for raising the ambiguity threshold at *Chevron* Step One, the consequence for "third way" judicial review remains the same: the space between Step One ambiguity and "grievous ambiguity" narrows and the inescapable choice between *Chevron* and lenity returns.

Though this Note has focused primarily on the impact of the "third way" on the rule of lenity, Justice Kagan's proposal also poses potentially significant consequences for *Chevron* by threatening its ultimate viability. There is reason to think that once the Court carves out this interpretative power over dual-application statutes it will be reluctant to relinquish it.[150] The significance of this possibility lies not so much in cases involving dual-application statutes, but in the ancillary effects on the mine run of cases involving *Chevron* deference. [151] For some, any expanded judicial role that limits

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[148] Kavanaugh at 2129 (cited in note 145).

[149] Merrill argues that the years-long fight between Justices Stevens and Scalia over the use of legislative history drove both the "intentionalist" and "textualist" camps to a more searching ambiguity requirement at *Chevron* Step One in order to demonstrate that their preferred methods of statutory interpretation produced the more principled and judicially-limiting course. Merrill, *Textualism* at 370 (cited in note 147). Though neither Justices Scalia nor Stevens are any longer on the Court, the possibility that struggles over legislative history or other tools of statutory interpretation continue to impact Step One determinations.

[150] See Bressman at 1467 (cited in note 132).

[151] See David Feder, Esquivel-Quintana v. Lynch*: The Potential Sleeper Case of the Supreme Court Term,* YALE J. REG. NOTICE & COMMENT BLOG (Sept 13, 2016), archived at https://perma.cc/G5N7-9YED ("So what happens if the Court decides that

deference to agencies is cause for celebration; for others, it threatens the balance of power in the modern administrative state. This represents yet another flashpoint in the broader ideological struggle over delegation and the separation of powers and is consequently still another liability for "third way" judicial review. The potentially profound implications of opening up space for a larger judicial role in constructing dual-application statutes are likely among the reasons the Supreme Court declined to adopt Justice Kagan's suggestion in *Esquivel-Quintana*.

Above all, perhaps the most significant threat to the viability of the "third way" is the uncertainty surrounding the *Chevron* doctrine itself. It is beyond the scope of this Note to examine the administrative law jurisprudence of all nine Justices, but it is important to highlight that of three of them: the Chief Justice and the Court's two newest members. First, as some commentators have noted, the Chief Justice often holds the pivotal vote in cases that contemplate restricting *Chevron* and has used this position to curb its influence by widening the application of the so-called "major case" exception.[152] He has also sought to limit deference in other ways, for

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Chevron deference is inappropriate for a hybrid civil-criminal statute? It is likely that Chevron will lose a good deal of its bite. Though there does not yet appear to be a definitive empirical study, anecdotal evidence suggests that there are a good number of these sorts of statutes—and they're very familiar ones. Leading examples include the Clean Water Act, 33 U.S.C. § 1251 et seq.; the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.; the Truth in Lending Act, 15 U.S.C. § 1601 et seq.; and the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.") (citation omitted); but see *Carter*, 736 F.3d at 730 (Sutton concurring) (quotation marks and citation omitted) ("The two rules [*Chevron* and the rule of lenity] normally operate comfortably in their own spheres.").

[152] Note, *The Rise of Purposivism and the Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1242-43 (2017) (arguing that the Chief Justice has been instrumental in enlarging the "major case" exception to *Chevron*, which he famously applied in *King v. Burwell*).

example arguing in a powerful dissent that the courts must not defer to administrative agencies on questions of their own jurisdiction.[153]

Second, the late Justice Scalia has been replaced on the Court by Justice Neil Gorsuch, whose writings on the Court of Appeals suggest a willingness, if not desire, to revisit the separation of powers scheme enshrined in *Chevron*.[154] While sitting on the Court of Appeals, Judge Gorsuch leveled a harsh critique of the state of separation of powers in the modern administrative state, going so far as to suggest reexamining the nondelegation doctrine.[155] Judge Gorsuch also took aim at *Chevron* directly, questioning *Chevron*'s

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[153] *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts dissenting) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."). The Chief Justice also joined the majority in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), where it held at *Chevron* Step Two that the EPA acted unreasonably by failing to consider cost. Professor Catherine Sharkey has argued that this move, what she calls a kind of blending of *Chevron* Step Two and *State Farm* "hard look" review, may be the result of "[t]he present moment of *Chevron* retreat." Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2412 (2018). Such a doctrinal shift is but one way the Court may continue to develop the law in response to the slow erosion of *Chevron*.

[154] Interestingly, as one commentator has suggested, Justice Gorsuch's views on the *Chevron* doctrine may be influenced by his geographical roots in the Tenth Circuit. Unlike many of his colleagues—and his predecessor—with backgrounds on the Court of Appeals for the D.C. Circuit where the Executive Branch in Washington exposed them to the full spectrum of agency action in administrative law cases, then-Judge Gorsuch's primary occasion for encountering administrative law matters came in review of BIA appeals. Eric Citron, *The Roots and Limits of Gorsuch's Views on* Chevron *Deference*, SCOTUSBLOG (Mar. 17, 2017), archived at https://perma.cc/Q8FW-AFMW. This is, of course, particularly relevant in the area of dual-applications statutes.

[155] Judge Gorsuch acknowledged the historical difficulty the courts have had policing the boundary of permissible delegations, but argued, "the difficulty of the inquiry doesn't mean it isn't worth the effort" since "[a]t stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts." *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch dissenting from the denial of rehearing *en banc*); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154-55 (10th Cir. 2016) (Gorsuch concurring).

foundational premise that the courts should infer an intent by Congress to delegate legislative power from statutory ambiguity.[156] Notably—and particularly relevant here—Judge Gorsuch directly responded to the arguments advanced by Judge Sutton in *Carter* and *Esquivel-Quintana* that in the context of dual-application statutes the judicial application of the rule of lenity must trump *Chevron* deference to the executive.[157] Extending Judge Sutton's reasoning, Judge Gorsuch wrote: "[a]nd try as I might, I have a hard time identifying a principled reason why the same rationale doesn't also apply to statutes with purely civil applications."[158] But most centrally for now-Justice Gorsuch, the problem with *Chevron* is "that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them. A duty expressly assigned to them by the APA and one often likely compelled by the Constitution itself."[159] Though the full extent of Justice Gorsuch's impact in this area remains to be seen, his strong views expressed while on the Court of Appeals combined with the Chief Justice's

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[156] *Gutierrez-Brizuela*, 834 F.3d at 1153.

[157] Id. at 1155-56.

[158] Id. In addition to the broader point about Justice Gorsuch's apparent hostility to the entire *Chevron* regime stressed here, his citation to Judge Sutton's concurrences discussed in detail above suggest that in the more particular case involving dual-application statutes Justice Gorsuch may be willing stake out a strong position on the lenity versus *Chevron* question that the Court in *Esquivel-Quintana* deftly avoided.

[159] Id. at 1152-53 (emphasis in the original). And these criticisms seem to be finding expression in Justice Gorsuch's early opinions while on the Court. As one observer argues, Gorsuch, like other textualists, has employed "a more muscular *Chevron* step one inquiry" to find the statute unambiguous. Chris Walker, *Gorsuch's "Clear Enough" & Kennedy's Anti-"Reflexive Deference": Two Potential Limits on* Chevron *Deference*, YALE J. REG. NOTICE & COMMENT BLOG (June 22, 2018), archived at https://perma.cc/JKV4-G7CL (discussing, in particular, Justice Gorsuch's 5-4 majority opinion in *Wisconsin Central Ltd. v. United State*s, 138 S. Ct. 2067 (2018)).

leadership and demonstrated willingness to limit *Chevron* indicate that doctrine has become more vulnerable since Justice Gorsuch's elevation to the Court.

Finally, Justice Kavanaugh too has cast a wary eye toward the *Chevron* deference regime. He has argued that while "*Chevron* makes a lot of sense in certain circumstances" where Congress has delegated policy-making authority to the executive branch, it "has not been limited to those kinds of cases."[160] By conditioning deference to the executive branch on a judicial determination of ambiguity, the Court has staked "billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, [and] labor laws" to an ambiguity determination without "neutral principles on which to debate and decide that question."[161] This key flaw, argued Kavanaugh, can make *Chevron* "antithetical to the neutral, impartial rule of law."[162]

While sitting on the D.C. Circuit, then-Judge Kavanaugh advanced the view that the Supreme Court has in fact set out a robust check on congressional delegation to executive branch agencies through the so-called "extraordinary cases" exception to *Chevron*.[163] According to Kavanaugh,

> If an agency wants to exercise expansive regulatory authority over some major social or economic activity—regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters, for example—an

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[160] Kavanaugh at 2152 (cited in note 145).
[161] Id.
[162] Id. at 2154.
[163] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 422-23 (D.C. Cir. 2017) (Kavanaugh dissenting from denial of rehearing *en banc*).

> *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take a major regulatory action.[164]

Under this conception of the Supreme Court's "major rules doctrine," where a court is confronted with an agency regulation of major import promulgated under ambiguous statutory authority, it must vacate the rule and force the agency to get express statutory authorization.[165] In reading Supreme Court jurisprudence in this particular way, Justice Kavanaugh has revealed his interest in further curbing congressional delegation to the executive branch, at least where Congress fails explicitly to delegate policymaking authority. It is difficult to know the extent of Justice Kavanaugh's *Chevron* skepticism, but both his academic and judicial writings demonstrate some willingness to restrict delegation to the executive and raise doubt about *Chevron*'s ability to moderate the relations between the political branches.

So, what would a modification or even rejection of *Chevron* and a more muscular federal judiciary mean for the "third way"? This Note argues, perhaps paradoxically, that a wholesale replacement of the *Chevron* framework with more rigorous judicial review would, at least in theory, be *less* disruptive to the "third way" than the shifts

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[164] Id. at 421.

[165] Michael Sebring, Note, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the* Chevron *and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189, 212 (2019) ("The major rules doctrine carves a *Mead*-like exception from *Chevron*—like the major questions doctrine—but takes one step further: major rules must be authorized by clear statutory statements, or are otherwise unlawful. This represents a significant departure from and replacement for the major questions doctrine, which holds that statutory ambiguities implicating questions of major political and economic significance are to be reviewed de novo—not be held unlawful.").

within the confines of the existing doctrine discussed above.[166] The "third way" would, after all, be a significant expansion of judicial review of statutes that most courts have considered governed by the *Babbitt* footnote. And if anything, a Court that rejected *Chevron* in favor of a more muscular review of administrative interpretations in the mine run of civil actions would look more like it would conducting "third way" review than it would giving *Chevron* deference. In this way, it is possible that a comprehensive change to *Chevron* would in fact make the "third way" closer to the rule than the exception. While the ability of the "third way" to coexist with a more assertive federal judiciary is certainly positive at least in theory, any significant change to a "foundational, even quasi-constitutional" [167] doctrine like *Chevron* would be sure to have innumerable unforeseen consequences across all of administrative law.[168]

B. NEITHER THE BENEFITS OF *CHEVRON* NOR LENITY?

Another concern is that given the difficulty of this task and the doctrinal dilemma posed by dual-application statutes, courts will reflexively find ambiguity that falls within the range triggering "third way" review. Though this move saves both doctrines of *Chevron* and lenity for the mass of cases that involve either exclusively civil or criminal applications, "third way" judicial review offers neither the benefits of *Chevron* nor the rule of lenity. There are

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[166] See Section IV.A.

[167] Sunstein, Chevron *Step Zero* at 188 (cited in note 83).

[168] See, e.g., John C. Brinkerhoff Jr. & Daniel B. Listwa, *Deference Conservation – FOIA's Lessons from a* Chevron*-less World*, 71 STAN. L. REV. ONLINE 146, 148 (2018) (arguing that powerful institutional forces will cause the courts to find other avenues for deference to executive agencies even absent the *Chevron* standard). Brinkerhoff and Listwa argue that courts may do so by "characterizing questions of law as questions of fact, closing off review through procedural or jurisdictional determinations, and preserving erroneous agency decisions." Id. at 154.

serious arguments to be made that statutory interpretation by the courts offers none of the virtues of *Chevron* deference: the expertise, flexibility, or democratic accountability of administrative agencies. Judicial construction of the statute also fulfills neither of the primary purposes of the rule of lenity. It means the courts, not Congress, are speaking clearly on the meaning of criminal provisions. And from the perspective of the particular defendant subject to the dual-application statute, a provision that is sufficiently ambiguous to trigger "third way" review but is ultimately resolved against him can make no serious claim of providing adequate notice. Perhaps maintaining the integrity of both *Chevron* and lenity in the typical case is worth this tradeoff. But what is clear is that by accomplishing neither the objectives of *Chevron* or lenity, "third way" review threatens to rankle those on all parts of the ideological spectrum. Notwithstanding the argument made in the previous section, there will be many judges who are unpersuaded by the claim that either *Chevron* or the rule of lenity are saved by the "third way." This reality represents a barrier that could make it very difficult for the "third way" to gain traction.

C. ALL-IN ON AMBIGUITY DETERMINATIONS

It now becomes clear that "third way" judicial review places considerable weight on the ability of judges to discern and elucidate the gradations of ambiguity that anchor the approach. As Professor Solan observes, "[t]he problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous."[169] And unlike at

[169] Solan at 859 (cited in note 131) (emphasis in original); see also Kavanaugh at 2136 (cited in note 145) ("Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains "enough" ambiguity to cross the

Chevron Step One, which only requires a single threshold ambiguity determination, Justice Kagan's approach requires a court to place ambiguity within a range. This further complicates the "third way" inquiry because the ambiguity of ambiguity applies with equal force in determining the bottom of the range, *Chevron* Step One, as it does to the top, the rule of lenity.[170] The ambiguity of ambiguity, therefore, presents a magnified problem for courts seeking to implement Justice Kagan's framework. To be sure, such problems with ambiguity determinations appear in many other areas of the law and are inevitable given the lexical imprecision inherent in human language and the powerful political incentive for Congress to draft ambiguous statutes.[171] The particular difficulty for "third way" judicial review is its reliance on courts marking gradations of an already ill-defined spectrum.

D. THE CENTRALITY OF DELEGATION

Relatedly, the lack of consensus surrounding questions of statutory interpretation imbues "third way" judicial review with a high degree of instability. While the "third way" may skirt the choice between *Chevron* and the rule of lenity, it merely exchanges that dilemma for equally difficult questions of statutory interpretation inherent in the Court's ultimate task. The "third way" requires the Court decide the most "sensible construction" of the statute, which

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line beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference.").

[170] Then-Judge Scalia noted this very problem in the context of the rule of lenity, saying that the rule stated plainly "provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity." *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985).

[171] Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 630 (2002); see also Robert A. Katzmann, *Judging Statutes* 47 (Oxford 2014).

is just an exercise in statutory interpretation. And despite efforts to cast statutory interpretation as a mechanical, agnostic exercise, it is inextricably tied to fundamental value judgments.[172] These value judgments manifest themselves in significant disagreements about which tools of interpretation the courts may properly consider as well as the order in which they should apply them.[173] What is more, even if there existed agreement on the proper tools of statutory interpretation, there is no guarantee that there would be consensus on how to employ them.[174] Admittedly, these methodological conflicts may arise any time the Court engages in statutory interpretation, so this alone does not set apart the "third way." However, as discussed above, the direct conflict between *Chevron* deference and the rule of lenity—the very problem "third way" judicial review attempts to solve—is distinctive because of the close connection of both doctrines to issues of delegation. By contrast, interpretation of statutes like the tax or bankruptcy codes, in the average case, presents a weaker connection to these fundamental disagreements. And divisions over delegation are, in turn, closely linked to those of statutory interpretation. In this way, the "third way" may be simply taking the essential conflict posed by *Chevron* and the rule of lenity and recasting it in the form of statutory interpretation. The ideological battle between deference and lenity in the area of dual-application statutes may live on in "third way" judicial review, though in a different form.

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[172] See Jerry L. Mashaw, *As-If-Republican Interpretation*, 97 YALE L. J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law.").
[173] See Gluck at 618-19 (cited in note 145) (discussing the lack of consensus on the Court surrounding the "traditional tools of statutory construction" mentioned in *Chevron*).
[174] Katzmann at 112 (cited in note 171) (comparing *Yates*, 135 S. Ct. at 1074, with 135 S. Ct. at 1090) (Justice Ginsburg, writing for the Court, and Justice Kagan in dissent used the same tools of statutory interpretation to interpret the phrase "tangible object" as included in the statute and reached different results).

The most crucial destabilizing force acting on the "third way" is the link between delegation and the problem it seeks to solve. According to Professor Kahan, the rule of lenity "isn't about notice, prosecutorial discretion, individual liberty, or any of the other values conventionally associated with lenity; it is about how criminal lawmaking power should be allocated between Congress and the judiciary."[175] The Justices most at ease with congressional delegation of criminal lawmaking to the federal courts and the creation of a federal criminal common law are those most likely to favor a weak form of lenity, such as the "grievous ambiguity" standard reaffirmed in *Abramski*.[176] Proponents of a strong rule of lenity, on the other hand, argue that because of the unique purposes and penalties of the criminal law, the legislature alone may define it.[177] Justice Scalia's "new textualism," a dominant ideological current within the federal courts for the past quarter-century, was deeply rooted in a particular view of the separation of powers. Specifically, it was firmly committed to "overthrow[ing] methods of statutory interpretation that require the exercise of normative discretion by the courts."[178] A strong rule of lenity that drew bright lines between the courts and Congress was central to this project. Though both *Chevron* and lenity are inextricably bound up with delegation, views on the subjects cannot be completely reduced to those on delegation; important cross-cutting cleavages exist on the Court. For instance, Justice Scalia, formerly one of the Court's most ardent supporters of a more robust

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[175] Kahan at 348 (cited in note 88).

[176] Kahan argues that these justices are comfortable with this allocation of power between Congress and the courts because of, "a shared belief in the existence of democratically approved public values—accessible through the Court's own deliberative process—that can be used to discipline and guide the generative elaboration of statutory terms." Id. at 395.

[177] See, e.g., *Carter*, 736 F.3d at 732 (Sutton concurring).

[178] Kahan at 348 (cited in note 88).

rule of lenity, was also one of the strongest defenders of *Chevron* deference.[179]

These divergent views reflect, at bottom, fundamental disagreements about the sources of legitimate political power and the proper role of the national government's constitutive branches. Their existence and implications for "third way" judicial review of dual-application statues are crucial. These issues have divided able-minded judges and scholars alike, and there is little reason to believe they will subside. It stands to reason, then, that significant ideological disagreements over their corollaries—the proper level of deference to administrative agencies and the role of the judiciary in criminal lawmaking—will endure. Given that "third way" judicial review requires that a particular set of assumptions about lenity and deference holds, the viability of the solution is highly contingent and tenuous.

As we have seen, "third way" judicial review requires a fine-tuned set of doctrinal circumstances. What makes these circumstances particularly fragile is the close link between both *Chevron* deference and the rule of lenity and fundamental values related to delegation. The relevant political institutions at issue are different—Congress and the executive in the case of *Chevron*, and Congress and the judiciary in the case of lenity—but the motivating concerns behind each are closely tied.

IV. A ROLE FOR *SKIDMORE* DEFERENCE?

As noted at the outset, while Justice Kagan most likely envisioned the "third way" to be *de novo* review, her proposal did not

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[179] Laura Myron, Chevron *Deference and Interpretive Authority After* City of Arlington v. FCC, 38 HARV. ENVTL. L. REV. 479, 489 (2014) ("Justice Scalia is the Court's most ardent defender of *Chevron*.").

foreclose the possibility that, given the posture in which dual-application statutes reach the Court, it would consider *Skidmore*-like deference.[180] Viewed in light of the underlying policy goals of a deference regime and the rule of lenity, such an approach possesses decided advantages. First, "third way" review of dual-application statutes under the *Skidmore* standard provides a vehicle for incorporating the informed policy judgments of the agencies tasked with administering the statutory regime—a principal virtue of *Chevron*—even if here subject to ultimate determination by the courts. This benefit, however, is a limited one. The *Carter* case, involving an agency's interpretation of RESPA, was fertile ground for informed, policy-based input by the agency. The *Esquivel-Quintana* case, on the other hand, required the courts to engage in something closer to pure statutory interpretation—the kind of inquiry in which it has relative expertise. Next, explicit judicial recognition that both the courts and litigants may rely on agency rulings and interpretations for guidance may alleviate some concerns related to notice to potential criminal defendants. To be sure, such notice does not apply to matters of first impression or in instances in which an agency changes its interpretations. But unlike the courts, which can only resolve particular cases or controversies, agencies possess the capacity to issue prospective guidance to individuals and entities seeking to order private behavior. Certainly, published guidance from an administrative agency better informs private ordering than the uncertainty of litigation before the courts.

It is well-documented that administrative agencies operate while cognizant of their place in the shadow of judicial review.[181] There is

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[180] See note 40.

[181] See generally Ian R. Turner, *Working smart* and *hard? Agency effort, judicial review, and policy precision,* 29 J. THEORETICAL POL. 69, 69-71 (2017) ("[A]gencies develop and implement policy while continually facing the prospect of having their actions reviewed and potentially invalidated.").

every reason to expect that agencies would change litigation and rulemaking positions in response to a judicially-imposed "third way," especially given the possibility that such review accommodates *Skidmore*-style deference. Under this understanding of "third way" judicial review, agencies would possess the incentive to produce detailed guidance and opinions in anticipation of future litigation surrounding dual-application statutes. Though this guidance would not control reviewing courts, it would provide a body of persuasive authority upon which courts could draw.

Perhaps surprisingly, there is some reason to think that agencies could behave similarly even if the Court determines the "third way" to be *de novo* review. This is because although the Supreme Court has sent mixed signals about dual-application statutes, the *Babbitt* footnote ostensibly controls in the lower courts, meaning *Chevron* takes precedence over the rule of lenity.[182] From the perspective of the agency, then, "third way" review injects a high degree of uncertainty into their operations involving dual-application statutes. In response, the government may resurrect a once-successful—and potentially paradigm-shifting—litigation strategy in response to this new doctrinal framework. That is, the government may argue that it is not the mere existence of a dual-application statute that triggers "third way" judicial review, but rather the existence of the competing underlying policy aims of *Chevron* and lenity. The Fourth Circuit's 2004 decision in *Yi v. Fed. Bureau of Prisons* illustrates the space between these two positions.[183] This case outlines the type of argument that would likely come to dominate litigation under *Skidmore*-like review.

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[182] See note 49.
[183] 412 F.3d at 526.

A ROADMAP: *YI V. FED. BUREAU OF PRISONS*

Yi concerned the Bureau of Prisons' (BOP) interpretation of 18 U.S.C. § 3624(b), which allows federal prisoners to accrue credit for good time served to be applied against the prisoner's sentence. Yi, who was awarded 592 days' good time credit, challenged the BOP's calculation and argued that "term of imprisonment" as included in the statute allows him to receive an additional 87 days' credit to be applied to his sentence.[184] The BOP noted that its calculation method appeared both in its Sentencing Computation Manual and in a rule promulgated using notice-and-comment procedures.[185] Yi argued *inter alia* that the rule of lenity applied to the BOP's interpretation of the statute and therefore the ambiguity in the statute should be resolved in his favor. The Fourth Circuit agreed that the provision of the statute was ambiguous but declined to apply the rule of lenity. The panel gave a pair of reasons for declining to apply lenity: first, the provision of the Sentencing Computation Manual and the rule promulgated using APA procedures "provide the public with sufficient notice" of the BOP's calculation methods; and second, because Congress expressly tasked the BOP with administering the statute in question, *Chevron* requires deference to trump lenity.[186]

Yi is significant because it provides the government a potential roadmap to handle dual-application statutes under Justice Kagan's "third way," applying either *de novo* or *Skidmore* review. After assuming that good time credit determinations are the sorts of matters covered by the rule of lenity, the Fourth Circuit held that lenity's requirements can be satisfied when curative measures are in

[184] Id. at 528.
[185] Bureau of Prisons Program Statement, No. 5880.28; 28 C.F.R. § 523.20.
[186] 412 F.3d at 535.

place: namely, notice in the form of agency-promulgated rules.[187] This is remarkable because it suggests that the rule of lenity is not a *per se* rule but rather one that applies only when its underlying policy values are implicated. On this view, lenity and *Chevron* may not be in conflict at all in cases in which agency regulations obviate notice deficiencies. The panel also found that these curative measures can be created not by Congress in the form of statutory clarity, but by the *agency* itself.

There is good reason to think that the Supreme Court would be highly skeptical of even the appearance that the courts gave any persuasive effect to the government's interpretation of the criminal law.[188] Some scholars have argued for the application of a *Chevron*-

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[187] The Fourth Circuit's rationale in *Yi* is notable especially in light of how other circuits approached the same issue. Writing just four months after *Yi,* then-Judge Sotomayor declined to apply the rule of lenity to the BOP's interpretation of 18 U.S.C. § 3624(b) because "the regulation at issue [] interprets neither the substantive ambit of a criminal prohibition nor the penalty it imposed." *Sash*, 428 F.3d at 134.

[188] The Supreme Court has expressed its unwillingness to accept similar contentions. See *Crandon v. United States*, 494 U.S. 152, 178 (1990) (Scalia concurring in judgment) (rejecting the majority opinion's citation to an advisory opinion by the Attorney General in support of its statutory construction, saying that such a document "is not an administrative interpretation that is entitled to deference under *Chevron*" and noting that the Court has "never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) (rejecting the appellant's reliance on the government's interpretation of a criminal statute contained in the United States Attorneys' Manual and in Air Force Judge Advocate General opinions, emphasizing "we have never held that the Government's reading of a criminal statute is entitled to deference."); Cf. *Stenberg v. Carhart*, 530 U.S. 914, 941 (2000) (declining to accept the Nebraska Attorney General's interpretation of a criminal abortion restriction because "precedent warns against accepting as authoritative [the Nebraska] Attorney General's interpretation of state law when the Attorney General's interpretative views do not bind the state courts or local law enforcement authorities") (quotation marks omitted). Though it remains unlikely that the Court would accept such arguments, the aforementioned decisions suggest the outcome could be different if the executive interpretations possessed the force of law required by *Christensen* and *Mead*.

like deference scheme in the area of federal criminal law,[189] but such a position has found no support on the Court. Justice Scalia summed up this baseline discomfort, which was likely shared by even his colleagues with vastly different conceptions of the rule of lenity: "to give persuasive effect to [the executive's interpretation] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with the doctrine of severity."[190]

The *Yi* case is significant because it helps to illustrate not only an opening the "third way" will provide for the government in litigation, but also the potential consequence of understanding Justice Kagan's proposal as one accommodating of *Skidmore*-like deference. These potential consequences are more than noteworthy speculations. Because of the Court's announced aversion to giving any persuasive authority to executive branch interpretations in the area of criminal law, it is likely to be wary of any steps taken down this road. This, in turn, threatens the viability of the "third way."

CONCLUSION

This Note has shown that Justice Kagan's "third way" possesses a number of decided advantages for the Court: it preserves some of the virtues of the rule of lenity and the *Chevron* doctrine and avoids some of the vices that flow from recent attempts to resolve the conflict between them. Yet, these benefits exist only under a very narrow set of doctrinal assumptions and are only satisfactory given a functional understanding of the relationship between Congress the judiciary in the administration of the criminal law—and the highly circumscribed conception of the rule of lenity that comes with it.

This reality threatens the viability of the "third way" in two principal ways. First, the ability of small disturbances in the legal

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[189] See Kahan (cited in note 88).
[190] *Crandon*, 494 U.S. at 178 (Scalia concurring in judgment).

landscape to eliminate space for the "third way" significantly impacts its permanence if implemented by the Court. Relatedly, the Court may look ahead to this inherent precariousness of the solution and forego its implementation altogether. And the potential that these doctrinal disturbances occur is not simply academic. As the writings of Judge Sutton and others demonstrate, there exists a notable contingent of judges for whom the functional delegation of criminal lawmaking to the judiciary is intolerable, and thus seek to resurrect a more robust rule of lenity. This is to say nothing about potential changes to the *Chevron* doctrine. Because of the inextricable link between each doctrine and fundamental disagreements about the separation of powers and permissible levels of delegation, the doctrinal foundation upon which the "third way" is built sits on shaky ground. And it is precisely because of its tie to bedrock doctrinal disagreements that the conflict between the rule of lenity and *Chevon* is likely to rear its head again, leaving Justice Kagan's "third way" as an alluring, but ultimately unworkable, solution for the courts.

It is therefore possible that the solution to the problem posed by dual-application statutes may lie somewhere else entirely. Perhaps the only viable solution exists in the congressional *construction* of the statutes rather than judicial *interpretation* of them. And, as suggested above, it may be the "third way" itself that best galvanizes Congress to decouple criminal and noncriminal penalties arising in the administrative context, thus rendering the "third way" obsolete. Or, perhaps the Court must abandon the "one-statute/one-interpretation rule" and treat dual-application statutes differently depending upon the context in which they arise.[191] Whatever the case

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[191] See Transcript, *Esquivel-Quintana* (cited in note 5) (Justice Alito said, "I don't see anything odd about having the same phrase interpreted using a different

may be, the "third way" provides a short-term stop-gap but no viable long-term solution to the conflict between *Chevron* and lenity.

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methodology in a civil case and in a criminal case."); see also Doerfler (manuscript at 30) (cited in note 129) ("[T]he above dilemma [the subject of this Note] rests on the premise that a statute can have only one meaning. Relax that premise, and it becomes possible to benefit from both *Chevron* and the rule of lenity in the appropriate settings. In civil cases, courts could defer to administering agencies' more technically-expert, more politically-accountable policy decisions, resolving statutory unclarity in the way the agency makes the most sense. At the same time, courts could resolve unclarity in favor of the defendant in criminal cases, thereby ensuring fair notice and preserving separation of powers where the practical stakes are raised.").