Towards an Administrative Rule of Lenity: Restoring the Constitutional Congress by Reforming Statutory Interpretation

By Joel S. Nolette

Note from the Editor:

In this article, Joel Nolette proposes an "administrative rule of lenity" as a solution to structural problems besetting our federal government and the constitutional separation of powers.

Mr. Nolette's article won First Place in the Article I Initiative Writing Contest, conducted by the Federalist Society's Article I Initiative on the topic *Restoring the Constitutional Congress*. Prof. Lillian BeVier, Hon. C. Boyden Gray, and Hon. Chris DeMuth were the esteemed judges for the Writing Contest. They completed a blind review of the submitted essays addressing the contest topic, and they selected this paper as the winner.

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• Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. Chi. L. Rev. 297 (2017), *available at* https://lawreview.uchicago.edu/publication/unbearable-rightness-auer.

• Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511 (1989), *available at* https://pdfs.semanticscholar.org/8c49/b3ca75816c19140be369a96dcafdbe68593f.pdf.

"All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."
—U.S. Constitution[1]

"[T]o make government work for us, we need a Congress whose members are responsible for the consequences their decisions impose on us."
—David Schoenbrod[2]

"I will be honest with you. I do want the credit without any of the blame."
—Michael Scott[3]

Shortly after the Supreme Court struck down the legislative veto in *Immigration and Naturalization Service v. Chadha*,[4] then-Representative Trent Lott observed:

> We are often dumbfounded at how the law[s] we have enacted have been translated into regulations which have the force of law. In some cases the regulations may be within the scope of our enactments but we frankly did not anticipate what costs and burdens might be necessary to implement our intent. But, in other cases the regulations bear little resemblance to what we thought was our intent in passing those laws. In any case, we still bear the ultimate responsibility for these regulations, no matter how much we might try to pass the buck and scapegoat the bureaucrats. . . . [I]f we bear the ultimate responsibility for these decisions, we should exercise that responsibility before significant damage is done.[5]

Congress did not heed this advice. The D.C. Circuit spoke of a "familiar" phenomenon in 2000: Congress passes vague or broadly worded statutes, and agencies implement them via regulations, interpretive guidance, and the like, essentially making law in Congress' stead.[6] With this system, Congress has figured out a way to "get the most credit for the least blame"—pass an underbaked law with an anodyne name, march out in front of the public to take credit for doing something about the issue in question, then blame the agency when the inevitable consequences of implementation—trade-offs, hard choices, winners and losers—foment political outrage.[7] Worse yet, as Representative

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1 U.S. Const. art. I, § 1.

2 David Schoenbrod, DC Confidential 4 (2017).

3 *The Office: Golden Ticket* (Mar. 12, 2009).

4 462 U.S. 919 (1983).

5 *Hearings Before the Comm. on Rules on the Impact of the Supreme Court Decision in the Case of Immigration and Naturalization Service v. Chadha Which Found the Legislative Veto Unconstitutional*, 98th Cong. 115–16 (1983-1984) (statement of Rep. Trent Lott).

6 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

7 Schoenbrod, *supra* note 2, at 77.

Lott mentioned, the agency will begin implementing the law in ways Congress never intended or authorized.

When this happens, congressional committees routinely will hale agency heads before them to chastise them for the policy choices they have made or for the mission creep occurring under their supervision. However, despite the fact that it crafted the law in question and has the power to amend it, Congress suddenly becomes unwilling or unable to do anything about it. Additionally, even where majorities in both chambers of Congress might want to change the law, procedural hurdles in the legislative process and the President's veto power effectively prevent Congress from reining in administrative agencies that have overstepped their bounds or made policy choices that Congress did not authorize.

This is not the way things are supposed to be. The government structure established by the Constitution is meant to protect liberty, securing freedom "both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights."[8] The first structural constraint established by the Constitution is the vesting of all legislative powers in one Congress[9]—powers that can only be exercised (for the most part) via specified procedures. The practice described above, however, circumvents this constraint: agencies promulgate rules "properly . . . regarded as legislative in . . . character and effect" without *any* formal process, let alone the constitutionally prescribed one of bicameralism and presentment.[10]

Besides being in tension with the Framers' constitutional design, these practices and procedures are at odds with our democratic traditions:

> [I]n America . . . . [b]efore you can impose your views on the polity, you have to convince your fellow citizens that you're right. That's what democracy is all about. So it makes good sense to require the president to gain the support of Congress even when his vision is morally compelling. He should not be allowed to lead the nation on a great leap forward through executive decree.[11]

Legislation-by-delegation has led to extensive executive lawmaking, frequently to the delight of allies in Congress. Yet what one executive does unilaterally, another can undo unilaterally.[12] The pen-and-phone strategy of making public policy can only guarantee ephemeral change.[13] Such instability is corrosive to the rule of law.[14]

The Supreme Court has largely absolved itself of responsibility for being Congress' keeper in this regard, which is understandable to some extent: if Congress refuses to exercise its constitutional prerogatives, how is the Court going to force it to do so? It has limited options, and none seem promising. For instance, the Court could stop deferring to agency interpretations of ambiguous statutes and regulations, as some Justices have suggested, instead of presuming that ambiguity equals delegation and policy discretion.[15] But this might not accomplish very much. After it was stripped of the unicameral legislative veto in Chadha, instead of refraining from delegating power to agencies to make policies pursuant to broadly-worded statutes, Congress largely "abdicate[d] its law-making function to the Executive Branch and independent agencies."[16] In similar fashion, Congress could react to the abandonment of Chevron and Seminole Rock deference simply by making broad but explicit delegations of lawmaking power and policy discretion to agencies, up to the outer limits of the nondelegation doctrine.[17] The Court could put teeth back into the nondelegation doctrine, but the Justices have shown little interest in doing so.[18] To boot, reinvigoration of the nondelegation

8 United States v. Lara, 541 U.S. 193, 214 (2004) (Kennedy, J., concurring in the judgment).

9 U.S. Const. art. I, § 1.

10 *Chadha*, 462 U.S. at 952.

11 Bruce Ackerman, The Decline and Fall of the American Republic 39 (2010).

12 *See* Victoria McGrane, *Here's How Trump Is Trying to Undo Obama's Work*, Boston Globe (Dec. 16, 2017), https://www.bostonglobe.com/news/nation/2017/12/16/legacylist/ctmDGw0Idbkis9hQP7qBUJ/story.html [https://perma.cc/YGE9-WRKG] ("[President Trump] has systematically attacked his predecessor's legacy, rolling back or undercutting a broad array of former President Obama's initiatives.").

13 *See, e.g.*, Robert Law, *Obama's 'Pen and Phone' Have Been Trumped When It Comes to DACA*, The Hill (Sept. 1, 2017), http://thehill.com/blogs/pundits-blog/immigration/348871-obamas-pen-and-phone-have-been-trumped-when-it-comes-to-daca [https://perma.cc/W5X4-SD7S].

14 *See* CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008) (noting that "the rule of law depends" on "legal stability").

15 *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in the judgment) (expressing interest in reconsidering *Seminole Rock*); *id.* at 1213–25 (Thomas, J., concurring in the judgment) (same); Michigan v. EPA, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (calling for the reconsideration of *Chevron*); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

16 *Chadha*, 462 U.S. at 968 (White, J., dissenting).

17 Additionally, abrogating *Seminole Rock* alone, without accompanying reforms, could prove counterproductive and exacerbate the problems of fair notice and due process that have led to calls for reform. *See* Aaron L. Nielson, *Beyond* Seminole Rock, 105 Geo. L.J. 943, 947 (2017) (observing that "overruling *Seminole* Rock . . . may harm the very people" opponents of the doctrine "hope to help" because agencies have discretion under *SEC v. Chenery*, 332 U.S. 194 (1947) (*Chenery II*), to decide whether to promulgate regulations by rulemaking, with various *ex ante* procedural safeguards, or by adjudication, with far fewer such protections); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 306–07 (2010) ("If policymaking by rule becomes sufficiently costly . . . then agencies will shift to purely adjudicatory mechanisms," which "offers less notice and less opportunity for widespread participation.").

18 *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1240–55 (2015) (Thomas, J., concurring in the judgment).

Shortly after this was written, the Court granted certiorari to determine whether a federal statute's "delegation of authority to the Attorney General to issue regulations . . . violates the nondelegation doctrine." Gundy v. United States, 86 U.S.L.W. 3441, 2018 U.S. LEXIS

doctrine in its classical form might not make much of a difference in practice: the line between permissible and impermissible delegations is in the eye of the beholder.[19] For a more effective and enduring solution to the unsustainable status quo, we need to find a different path up the mountain.[20]

The thesis of this article is that such a solution is already at hand—almost hiding in plain sight. Borrowing from the rule of lenity and the *contra proferentem* doctrine, the Court should adopt a canon of strict construction for interpreting and applying federal statutes that delegate authority to agencies and regulations adopted pursuant to those statutes. Under this canon, an agency action[21] will lack force or effect unless it is unambiguously authorized by statute or actually implements the unambiguous terms of a previously promulgated regulation. To determine whether a statute or regulation is unambiguous—and thus whether it *actually* authorizes the action in question instead of just leaving the matter unclear[22]—the Court would use traditional tools of statutory interpretation.[23] If the Court thereby concludes the statute or regulation is ambiguous, then it will construe the provision against the agency. This would replace the Court's current practice of presuming an agency's interpretation to be valid unless it is patently wrong.[24] In other words, the Court would flip the presumptions of *Chevron* and *Seminole Rock*—if a law or rule is ambiguous, then the "tie" goes to the regulated rather than the regulator.[25]

This canon—dubbed here an "administrative rule of lenity"[26]—could change the current dynamic that encourages

1586, at *1 (Mar. 5, 2018). Of course, whether *Gundy* reinvigorates the nondelegation doctrine in any meaningful way remains to be seen. The statutory scheme in question is one that Justice Scalia, joined by Justice Ginsburg, had already flagged as "sailing close to the wind with regard to the principle that legislative powers are nondelegable." Reynolds v. United States, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting). Given the *sui generis* nature of the law at issue in *Gundy* and the current composition of the Court, it seems unlikely that the case will amount to a meaningful resurrection of the nondelegation doctrine beyond its facts.

19 *See* United States v. Nichols, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("[H]ow do you know an impermissible delegation of legislative authority when you see it? By its own telling, the Court has had a hard time devising a satisfying answer."); *see also* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) ("Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary.").

20 Schoenbrod, *supra* note 2, at 7 ("We need to implement a solution that works for our times.").

21 In the broadest sense of the word. *See* 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). The issuance of "guidance," "policy memoranda," and "Dear Colleague" letters, among other forms of so-called "regulatory dark matter," is included. *See* Clyde Wayne Crews Jr., *Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter,"* Competitive Enterprise Institute (Dec. 2015).

22 *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring) (mentioning "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law").

23 *See* James M. Landis, The Administrative Process 49 (1938) ("The boundaries of any grant of administrative power are still a matter of the interpretation of statutes . . . .").

24 Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

25 At least twice recently, something approaching this idea has been mentioned, albeit in passing. Professors Cass Sunstein and Adrian Vermeule, in an earlier draft of a recent article of theirs, identified as an alternative to *Auer* deference the possibility "that in the face of ambiguity, the private sector is allowed to do what it wants." Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, ___ U. Chi. L. Rev. ___, at 1-3 (Working Draft May 15, 2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737 [https://perma.cc/7XHL-F2TX]. They called this idea a "creative answer" with "some appeal" in some cases, albeit one that to their knowledge "has no defenders." *Id.* Also recently, during a panel discussion at an administrative law conference, Professor Chris Walker identified as a "penalty for poor drafting" the proposal that courts should just "say no" whenever "it is clear that an agency is trying to expand its authority or is interpreting a statute in an aggressive way." "Separation of Powers: Congress, Agencies, and the Court," *Rethinking Judicial Deference: History, Structure, and Accountability*, Center for the Study of the Administrative State (June 2, 2016), *available at* https://vimeo.com/169757569 [https://perma.cc/4T4T-SPVT]. OIRA Administrator Neomi Rao, also on the panel, remarked that "maybe there's something to that" idea.

Additionally, something akin to this idea may have at one time been advanced and rejected. *See* Landis, *supra* note 23, at 49 n.2 (quoting from an SEC opinion in which the Commission concluded that "[t]o interpret our powers under our fundamental Act with undue strictness at this stage in our growth would be to sacrifice upon the altar of a by-gone legal formalism our ability to perform adequately our allotted task").

Finally, at least two states have codified provisions that could lead to this result in some cases. Colorado law provides that "[n]o rule shall be issued except within the power delegated to the agency and as authorized by law," and "[a] rule shall not be deemed to be within the statutory authority of any agency merely because such rule is not contrary to the specific provisions of a statute." Colo. Rev. Stat. § 24-4-103(8)(a). Florida law states that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required." Fla. Stat. § 120.536(1). That provision goes on, "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute," and "[n]o agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy." *Id.* Most relevant here, the statute then reads, "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute." *Id.*

26 Though titled an "administrative rule of lenity" here, this idea can just as readily be conceptualized as a "separation of powers clear statement" rule, *cf.* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (cleaned up) (discussing the federalism "plain statement rule" where, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute"), or a "most questions" (as opposed to just "major questions") doctrine, *see* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted) (discussing the rule in cases involving "a question of deep economic and political significance," where the Court presumes that "had Congress wished to assign that question to an agency, it surely would have done so expressly"), as this proposal stems both from due process considerations

legislative imprecision by requiring Congress to speak clearly on a policy matter before an agency may carry out its will. Likewise, it would prevent agencies from gaming ambiguities in their own regulations, and it would encourage them to seek congressional authorization any time they want to take action not clearly permitted by a statute.[27]

As Justice Jackson declared, dissenting in *Chenery II*, "men should be governed by laws that they may ascertain and abide by."[28] For too long, however, Congress has seen fit to pass laws that make it increasingly difficult to ascertain to whom and how they apply. Filling (or perhaps exploiting) the void, the administrative state has in practice become the chief lawmaking body of the United States. Of course, this means that law is made outside of the constitutionally-mandated process of bicameralism and presentment. This essay lays out the theoretical framework and rationale for a rule that could move us back toward constitutional government, and it briefly shows, through two contemporary examples, how this rule might operate in practice.

I. A Government of Laws and Not of Men

Foreshadowing the structure of the Federal Constitution that would follow along shortly after, the Massachusetts Constitution declares:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[29]

This design was not arbitrary. The Framers viewed separation of powers "as the absolutely central guarantee of a just Government."[30] At the heart of our system of government lies this core structural demarcation: the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws. Given this separation of powers, "the legislative power of Congress cannot be delegated"[31]—just as no one branch can assume the powers vested in another.[32]

The Framers were not content "to trust . . . parchment barriers against the encroaching spirit of power" that might imperil this design.[33] There needed to be "some practical security" to secure each branch "against the invasion of the others," lest "a tyrannical concentration of all the powers of government in the same hands" result.[34] Therefore, the Framers tried to design "the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[35] To this end, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means *and personal motives* to resist encroachments of the others."[36] "Ambition must be made to counteract ambition," and "[t]he interest of the man must be connected with the constitutional rights of the place."[37] Through this design, "the private interest of every individual"

(like the rule of lenity) and structural constitutional principles (like the clear statement rule). With respect to the former, the "administrative rule of lenity," just like the traditional rule of lenity, requires that ambiguities in a provision be resolved against the entity responsible for it in order to encourage the drafter to speak clearly and to ensure that individuals are not deprived of life, liberty, or property unless a statute's or regulation's terms, scope, proscriptions, and penalties are comprehensible on the face of the text. With respect to the latter, the proposed rule enforces the principle that, in our constitutional system, it is generally the legislature's role (not the executive's) to make policy determinations that are binding on the people. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."). Accordingly, the Court should not presume congressional abdication of this policymaking responsibility absent a clear statement to this effect. *See* Cipollone v. Liggett Grp., 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part and dissenting in part) ("[O]ur jurisprudence abounds with rules of 'plain statement,' 'clear statement,' and 'narrow construction' designed variously to ensure that, absent unambiguous evidence of Congress's intent, extraordinary constitutional powers are not invoked, or important constitutional protections eliminated . . . ."); United States v. Bass, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

27 Some may, at this point, cry foul and marshal forth a parade of horribles about how this would grind government to a halt or require the legislature to speak at an impossibly precise level of specificity in statutes. *See Mistretta*, 488 U.S. at 372 ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Landis, *supra* note 23, at 2 ("The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance."). Recent empirical research shows that these fears are unfounded. As Professor Walker has shown, "[f]ederal agencies help draft statutes," both "in the foreground of the legislative process" and "in the shadows." Christopher J. Walker, *Legislating in the Shadows*, 165 U. Penn. L. Rev. 1377, 1378–79 (2017). This being the case, it is not too much to ask for clarity, even where the subject matter might be technical. When elected legislators might not know what to say exactly, all they have to do is ask the technocrats, as they already do.

28 *Chenery II*, 332 U.S. at 217 (Jackson, J., dissenting).

29 Mass. Const. art. XXX.

30 Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

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

32 *Cf.* United States v. Welden, 377 U.S. 95, 117 (1964) (Douglas, J., dissenting) ("Congress is not a law enforcement agency; that power is entrusted to the Executive. Congress is not a trial agency; that power is entrusted to the Judiciary.").

33 The Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961).

34 *Id.* at 305, 310.

35 The Federalist No. 51, at 317–18 (James Madison) (Clinton Rossiter ed., 1961).

36 *Id.* at 318–19 (emphasis added).

37 *Id.* at 319.

would act as "a sentinel over the public rights."[38] The mutually conflicting self-interest of those in power would prevent undue commingling of government functions, which, in turn, would safeguard freedom. This "separation of governmental powers . . . is essential to the preservation of liberty."[39]

This design "was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power" and "to save the people from autocracy."[40] As the *Chadha* Court said:

> The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President.[41]

Per this design, law, to be enforceable, must generally go through the gauntlet of the legislative process. This system cannot be short-circuited in the name of necessity, utility, practicality, or anything else—at least in theory.

II. The Rise and Rise of the Administrative State

The Founders viewed the legislature as the most dangerous branch.[42] To Madison, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[43] For this reason, the Framers divided the federal legislature into two chambers "as little connected with each other as the nature of their common functions and their common dependence on the society [would] admit."[44]

As this partition shows, "the Framers were determined that the legislative power should be difficult to employ."[45] They sought to preserve liberty by requiring the legislature to follow a rigorous process that would facilitate deliberation and compromise, and by calling for elections frequently enough to enable voters to hold representatives accountable. Chief among these procedural constraints is the requirement that a "matter which is properly to be regarded as legislative in its character and effect" go through the process of "bicameralism and presentment" before becoming law.[46] This serves to "assure[] that the legislative power would be exercised only after opportunity for full study and debate in separate settings."[47] This process also "promotes caution" and "rais[es] the decision costs of passing any law."[48] In short, before law can be made, there must be sufficient consensus as to what the law should be, as well as cooperation between various factions and government actors with differing interests.

Things have changed. The three branches of government have effectively reconfigured our constitutional structure "in ways so fundamental as to suggest that something akin to a constitutional amendment ha[s] taken place."[49] Congress now makes more lawmakers than laws by empowering bureaucrats in manifold administrative agencies[50] to "fill in . . . gaps" left by ambiguities in statutes.[51] The executive has accumulated significant power through this process,[52] and the Supreme Court has by and large endorsed this "more pragmatic, flexible approach" in light of "the contemporary realities of our political system."[53]

This reconfiguration has essentially made the executive branch the chief lawmaking body in the United States. Bureaucrats promulgate "'legislative rules'" which "have the 'force and effect of law'"[54]—that is, they make law, notwithstanding

38 *Id.*

39 *Mistretta*, 488 U.S. at 380.

40 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

41 462 U.S. at 959.

42 *Cf.* The Federalist No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the judiciary as "the least dangerous to the political rights of the Constitution").

43 The Federalist No. 48, at 306 (James Madison) (Clinton Rossiter ed., 1961); *see also* The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government, the legislative authority necessarily predominates.").

44 The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

45 Consumer Energy Council of Am. v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982); *see also* John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 202, 204 (2007) (noting that the Constitution "manifestly places value upon cumbersomeness, high transaction costs, and even . . . gridlock").

46 *Chadha*, 462 U.S. at 952.

47 *Id.* at 951. *See also* Bowsher v. Synar, 478 U.S. 714, 722 (1986) (observing that bicameralism and presentment "assure full, vigorous, and open debate on the great issues affecting the people").

48 John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 239–40.

49 Cass. R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 448 (1987).

50 There are currently 441 listed federal agencies at the Federal Register website. *See* Federal Register, https://www.federalregister.gov/agencies [https://perma.cc/L3SH-MA58] (last visited Apr. 8, 2018).

51 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

52 *Cf.* Sunstein, *supra* note 49, at 447 ("[T]he repudiation of the system of separation and of checks and balances was a central feature of the New Deal reformation. By creating a new set of autonomous administrative actors, the New Deal critics sought to bypass the common law courts and, occasionally, the legislative process . . . .").

53 Nixon v. Administrator of General Services, 433 U.S. 425, 441–42 (1977).

54 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1203 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979)).

euphemistic parlance[55] and despite assurances to the contrary.[56] These legislative rules are then fleshed out in so-called "interpretive rules," which are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[57] These interpretive rules formally "do not have the force and effect of law,"[58] but, in reality, as long as they are not "plainly erroneous or inconsistent with the regulation,"[59] interpretive rules "*do* have the force of law."[60] "Law is made" with scant procedural constraint.[61] Instead of bicameralism and presentment, we have "agency lawmaking on the cheap."[62]

Thus obtains what Gary Lawson called "the rise and rise of the administrative state."[63] Back in 1952, Justice Jackson could write:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.[64]

These developments have continued apace, and the administrative state now "wields vast power and touches almost every aspect of daily life."[65] One can hardly go a day without being affected, directly or indirectly, by at least one of the alphabet soup of federal agencies: "agency rulemaking powers are the rule rather than, as they once were, the exception."[66]

Of course, no one forced the executive to claim the power the legislature chose to give (or at least left for the taking). But neither the President nor the bureaucrats alone can be faulted. Congress has willingly ceded its constitutional prerogatives, and the Supreme Court has placed its imprimatur on this state of affairs.

First, elected officials in Congress discovered it was easier to draft ambiguous laws and let the other branches sort it out than to risk political fire for making difficult legislative choices themselves. "Voters routinely punish lawmakers who . . . challenge them to face unpleasant truths,"[67] so, assuming legislators want to be reelected, it makes rational sense for them to "avoid[] hard choices by using general language and delegating to agencies the job of promulgating and implementing regulations."[68] So Congress passes aspirational statutes,[69] delegating to unelected bureaucrats the difficult task of fleshing out the legislation outside of the legislative process. For example, the Clean Water Act, enacted in 1972, prohibits "the discharge of any pollutant by any person."[70] "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source."[71] "[N]avigable waters" is then defined as "the waters of the United States."[72] What are "the waters of the United States"? Congress did not define the term, nor has it amended the law to provide a definition, despite the fact that the reach of the Clean Water Act remains a hotly contested issue to this day.[73]

Second, the judiciary has aided and abetted the legislature's decision to leave statutes ambiguous, allowing agencies to run

55 *See* Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) ("Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out 'an intelligible principle' to guide the rulemaker's discretion."); City of Arlington v. FCC, 569 U.S. 290, 312, 315 (2013) (Roberts, C.J., dissenting) ("[M]odern administrative agencies . . . exercise legislative power . . . ."); *cf.* United States v. Seluk, 691 F. Supp. 525, 527–28 (D. Mass. 1988) ("[A]dvocates of contrasting views predictably use different terminology with contrasting tendencies as hidden persuaders. Characterizing the power . . . as a 'legislative' power encourages one to conclude that this power belongs only in the legislative branch. Similarly, on the other side, characterizing this power as a 'rulemaking' power encourages one to conclude that it is an inherent power of every court, administrative agency, and commission.").

56 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213 (1976) ("The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law.").

57 Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995).

58 *Id.*

59 *Seminole Rock*, 325 U.S. at 414.

60 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

61 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

62 Manning, *supra* note 48, at 240.

63 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

64 FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (citation omitted).

65 Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

66 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516.

67 Anthony King, *Running Scared*, The Atlantic (Jan. 1997), https://www.theatlantic.com/magazine/archive/1997/01/running-scared/376754/ [https://perma.cc/97RH-3B5G] (quoting Timothy J. Penny, former representative from Minnesota).

68 Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 Ga. L. Rev. 121, 151 (2016).

69 *See, e.g.*, Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 Wash. & Lee L. Rev. 1231, 1250 (1996) ("Congress often enacts environmental statutes with broad aspirational goals . . . .").

70 33 U.S.C. § 1311(a).

71 *Id.* § 1362(12).

72 *Id.* § 1362(7).

73 *See* Rapanos v. United States, 547 U.S. 715, 723–24 (2006) (describing the back-and-forth between courts and the Army Corps of Engineers over the meaning of "waters of the United States"); *see also Nat'l Assoc. Mfrs. v. Dep't of Defense*, http://www.scotusblog.com/case-files/cases/national-association-of-manufacturers-v-department-of-defense/ [https://perma.cc/WJS2-2CM7] (last visited Dec. 25, 2017) (involving

to "the outer limits" of federal power.[74] As long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."[75] The Court has "almost never" challenged "Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[76] Instead, it has upheld the most generic delegations imaginable, including one instructing an agency to regulate whenever "public convenience, interest, or necessity will be served thereby."[77] Justice Thomas has observed that:

> [T]he level of specificity [the Court] has required has been very minimal indeed. Under the guise of the intelligible-principle test, the Court has allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is "unfair" or "unnecessary." It has permitted the Executive to make trade-offs between competing policy goals. It has even permitted the Executive to decide which policy goals it wants to pursue. And it has given sanction to the Executive to craft significant rules of private conduct.[78]

This legislative abdication upends the expectations of the Framers, who took steps to "fortify" the other branches out of concern that the legislature would dominate the federal government.[79] The risk of encroachment now stems from another place: "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating."[80] Now, "the danger posed by the growing power of the administrative state cannot be dismissed."[81] The legislature has ceded much of its core power to the executive, and the Court has, for the most part, either given its approval or looked the other way.

Under this state of affairs, agencies can exploit the blurry distinction between interpretation and clarification on the one hand, and alteration and amendment on the other, to effect significant "change" under color of "clarification."[82] Agencies have attempted to resolve major questions—for instance, regarding the status of individuals residing in the country illegally,[83] or concerning the applicability of old civil rights laws to new circumstances[84]—despite the significant public policy implications of the actions and the lack of clear congressional authorization to take them. In many cases, including the examples just cited, agencies have sought to bypass even the minimal procedural constraints imposed by the Administrative Procedure Act.[85] No matter what one thinks about the underlying policy goals,[86] such executive unilateralism is the very sort of arbitrary government the Framers sought to prevent.[87] People tend to care

a jurisdictional dispute arising in a case challenging the Obama-Era "Waters of the United States" Rule)

74 *Rapanos*, 547 U.S. at 724.

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

76 *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

> The Court has invoked the nondelegation doctrine to strike down legislation on only two occasions, both in 1935. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). As Prof. Sunstein has observed, the nondelegation doctrine has had "one good year" and "two hundred and two bad years." Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 330 (1999). *See also* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 246 ("The congressional nondelegation doctrine had its last good year in 1935 (and perhaps its first good year then as well)."). But that may soon change. *See supra* note 18.

77 47 U.S.C. § 307(a). *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (rejecting a challenge to the Federal Communications Act that asserted the Act was "so vague and indefinite" that "the delegation of legislative authority is unconstitutional").

78 Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1251 (2015) (Thomas, J., concurring in the judgment) (citations omitted).

79 *See* The Federalist No. 51, at 319–20 (James Madison) (Clinton Rossiter ed., 1961).

80 City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

81 *Id.*

82 *See* Nielson, *supra* note 17, at 998 ("The line between 'change' and 'clarification' is . . . a question of degree more than kind.").

83 *See* Texas v. United States, 787 F.3d 733, 746 (5th Cir. 2015) (involving a challenge to President Obama's "deferred action" programs for individuals in the country unlawfully, which the administration contended were "exempt from . . . notice-and-comment").

84 G.G v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718, 722 (4th Cir. 2016) (noting that the Department of Education's Office for Civil Rights, "[i]n an opinion letter dated January 7, 2015," interpreted Title IX in "novel" fashion to require public schools to "treat transgender students consistent with their gender identity" whenever "a school elects to separate or treat students differently on the basis of sex").

85 5 U.S.C. § 551 *et seq.*

86 Even those sympathetic to the policy agenda recognize the problems with this process. *See, e.g.*, Sam Williamson, Note & Comment, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.: *Broadening Title IX's Protections for Transgender Students*, 76 Md. L. Rev. 1102, 1103 (2017) (footnotes omitted) ("While the Fourth Circuit's decision led to the appropriate conclusion—that the Gloucester County School Board must give Gavin access to the boys' restroom—the Fourth Circuit should have conducted its own statutory interpretation. . . . The judiciary should not continue to grant deference to administrative agencies on questions concerning the rights of discrete and insular minorities when the agencies' authority to regulate was merely implicitly delegated.").

87 Talk America, Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (criticizing *Seminole Rock* for "encourag[ing] the agency to enact vague rules which give it the power . . . to do what it pleases," thereby "frustrat[ing] the notice and predictability purposes of rulemaking, and promot[ing] arbitrary government").

> At this point, some "critics of the critics," as it were—that is, those who think the critics of the administrative state overstate their case—might respond that fears of agency gamesmanship and wholesale end-runs around either legislative or administrative processes are overblown, either because courts already tend to do a good job of checking agency mission creep or because agencies do not engage in such mischief all that often. *See, e.g.*, Robin Alexander Smith, Perez v. Mortgage Bankers Association *and the Future of* Seminole Rock, 40 Harv. Envtl. L. Rev. 173, 181 (2016) (internal quotation marks omitted) (noting that courts of appeals have not deferred to agency interpretation in cases where "it provides the basis for an enforcement action, has an immediate or direct effect on regulated parties, or is otherwise viewed as controlling in the field"); Connor N.

about this last point only when their political opponents occupy the White House.[88] They—we—should always care.

III. Towards An Administrative Rule of Lenity

The ultimate solution to the problems created by congressional self-abnegation is congressional self-assertion. In an ideal world, an enlightened citizenry would elect representatives willing to tell them hard truths rather than comforting lies, and these representatives would do their job in the legislature by dealing with difficult public policy issues rather than shunting them off for resolution in the opaque administrative state. But "experience" here has taught us "the necessity of auxiliary precautions" in addition to those structural checks the Framers built into the Constitution.[89] But what can possibly work to save Congress from itself,[90] especially when it apparently would prefer to be saved by the other branches?[91]

To start, the executive could order agencies under its control to stop making law by informal guidance and similar means.[92] This, however, is not a lasting fix, as a new administration could easily undo it. To get closer to effecting real change, the Court could adopt a rule of construction that would shift legislative incentives and require Congress to speak clearly when making law—the "administrative rule of lenity."

Under this rule, the Court would refuse to give effect to any agency action that Congress did not clearly authorize in a duly-enacted statute. By essentially flipping the default rules embodied in *Chevron* and *Seminole Rock*, this rule could alter the dynamic among Congress, agencies, and the electorate that has led to the status quo. It would strip Congress of the political benefits obtained from delegating away legislative power in broad, vague terms, because Congress could no longer get away with failing to make policy choices itself but then faulting (or praising, as the case may be) agencies for their policy choices. If federal policy binding on the citizenry is to be made, Congress is going to have to make it. This rule would in turn encourage agencies or the executive to seek congressional approval by way of new legislation any time there is a risk that contemplated agency action might exceed the scope of existing law. Perhaps most important of all, this would ensure that individuals are subject only to duly-enacted laws (and fixed judicial constructions thereof), not agency decree.

While there may be times when Congress can properly make a "general provision" and leave it "to those who are to act under such general provisions to fill up the details,"[93] "what qualifies as a

Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 821 (2010) (concluding that "[a]gencies do not commonly use guidance to make important policy decisions outside of the notice and comment process" and thus "the consternation over guidance documents . . . is overstated").

But gamesmanship and end-runs do happen, see infra Section IV, and, with *Chevron* and *Seminole Rock* both in place, the playing field is highly skewed in agencies' favor when they make such mischief, even if the Court has carved out exceptions to its general, deferential posture towards agency action in order to check the most egregious instances of misbehavior. *See* Chamber of Commerce v. U.S. Dep't of Labor, No. 17-10238, slip op. at 44 (5th Cir. Mar. 15, 2018) (discussing judicial skepticism "of federal regulations crafted from long-extant statutes that exert novel and extensive power over the American economy"); *see also* ACA Int'l v. FCC, No. 15-1211, slip op. at 19 (D.C. Cir. Mar. 16, 2018) ("The Commission's capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority for purposes of the *Chevron* framework."). Even where the courts, on occasion, refuse to defer to agencies, it is problematic enough that the current administrative law playing field is such that agencies think they can permissibly take action to "fundamentally transform[] over fifty years of settled and hitherto legal practices" and "[e]xpand[] the scope of . . . regulation in vast and novel ways" without new legislation endorsing the action. *Chamber of Commerce*, No. 17-10238, slip op. at 3, 13.

At any rate, the larger point here should not be lost, which is to figure out ways to encourage Congress to legislate clearly in the first instance and to afford fair notice to the citizenry of what the law (properly enacted through bicameralism and presentment) requires (and proscribes). The status quo facilitates, rather than checks, Congress' penchant for (to paraphrase Judge Silberman) legislating mush and letting agencies give it concrete form later. Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).

88 *Compare Texas*, 787 F.3d at 745–46 (noting that the state-plaintiffs challenged the Obama-Era DAPA program as invalid under the APA and in violation of the Take Care Clause), *with* Complaint at 43–48, Public Citizen, Inc. v. Trump, No. 1:17-cv-00253 (D.D.C. Feb. 8, 2017), *available at* https://www.citizen.org/sites/default/files/complaint-public-citizen-nrdc-cwa-v-donald-trump.pdf?utm_content=buffer9ff53&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer [https://perma.cc/H458-TJGP] (alleging, among other things, that the Trump Administration's "one in, two out" executive order violates the APA and the Take Care Clause).

89 The Federalist No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961). *See* Schoenbrod, *supra* note 2, at 7 ("Recognizing that the selfishness inherent in the human nature of voters and officials could, unless tamed, bring bad government, the drafters of the Constitution quite consciously came up with a solution that worked in their time and long after. In recent decades," however, the federal government has "rendered that solution ineffective. We need to implement a solution that works for our times.").

90 *See* James L. Buckley, Saving Congress From Itself: Emancipating the States & Empowering Their People (2014); *see also* Gerald G. Ashdown, *Marshall, Marbury, and Mr. Byrd: America Unchecked and Imbalanced*, 108 W. Va. L. Rev. 691, 703 (2006) ("Congress will have to protect itself. Byrd thinks they are losing the battle, sometimes with self-inflicted wounds.").

91 *See* House of Representatives v. Burwell, 130 F. Supp. 3d 53, 57 (D.D.C. 2015) ("[T]he House of Representatives complains that . . . the Secretary of Health and Human Services . . . the Secretary of the Treasury, and their respective departments . . . have spent billions of unappropriated dollars to support the Patient Protection and Affordable Care Act.").

To be fair, things have become so distorted that even when Congress tries to defund executive action, the executive branch has recourse to workarounds. *See* House of Representatives v. Burwell, No. 14-1967 (RMC), 2016 WL 2750934, at *6, *18 (May 12, 2016) (discussing how the Treasury Department made reimbursement payments "to issuers of qualified health plans" under the Affordable Care Act despite the fact that Congress did not "appropriate[] money for . . . reimbursements").

92 *See Attorney General Jeff Sessions Ends the Department's Practice of Regulation by Guidance*, Dep't of Justice (Nov. 17, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-ends-department-s-practice-regulation-guidance [https://perma.cc/LLJ4-UHDA] ("Today, in an action to further uphold the rule of law in the executive branch, Attorney General Jeff Sessions issued a memo prohibiting the Department of Justice from issuing guidance documents that have the effect of adopting new regulatory requirements or amending the law. The memo prevents the Department of Justice from evading required rulemaking processes by using guidance memos to create de facto regulations.").

93 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

detail is itself no detail."[94] Determining what is a matter of policy for Congress and what are details that can be left to agencies is a difficult line-drawing exercise, and the lines drawn are likely to shift with the political winds or the composition of the Court.[95] A clear background rule like this—functioning like *Chevron*, although cutting in the opposite direction of *Chevron*—would promote clarity and specificity.[96]

The Court need not look far to justify such an approach. It already has useful analogues at hand to support its adoption of such a rule, and those analogues have similar supporting rationales. The criminal law rule of lenity and the contract law doctrine of *contra proferentem* illustrate why an administrative rule of lenity is both prudent and practical.

A. The Rule of Lenity

In criminal law, the rule of lenity requires a court to construe an ambiguous criminal statute in favor of the defendant.[97] This rule puts the due process principle of fair notice into practice, protecting people from liability for crimes they could not have known were crimes.[98] Lenity also creates a dynamic in which the executive is encouraged to "induce Congress to speak more clearly" so that enforcement will not be hindered due to imprecise statutory language.[99] Additionally, it forces Congress to "lay bare the full extent of the conduct they intend to" proscribe or penalize, "exposing themselves to whatever resistance or ridicule their choices entail" and ensuring "that the public had maximum opportunity to influence . . . the enactment of the prohibition . . . ."[100]

This rule has a venerable pedigree: courts have historically "refused to apply" vague laws "under the rule that penal statutes should be construed strictly."[101] Yet "no one contends that the rule of lenity should apply in the civil context" where property rights, but not personal liberty, are at stake, as is frequently the case in administrative disputes.[102] The usual explanation for the differential application of the rule of lenity is that the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[103] This rationalization falls apart upon examination.

In the text of the Constitution, due process applies equally to deprivations of life, liberty, and property, without differentiation. Nevertheless, courts have reasoned that the rule of lenity need not apply to "an indefinite civil statute" like it does to a criminal one because it is "a more serious matter to deprive a man of his liberty on a prosecution based upon a vague and indefinite statute than to deprive him of a property right alone."[104] But the Court has

94 United States v. Nichols, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

95 *See supra* note 19 and accompanying text.

96 *Cf.* Scalia, *supra* note 66, at 517 (discussing the merits of "a background rule of law against which Congress can legislate").

97 *See* Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

98 United States v. Santos, 553 U.S. 507, 514 (2008) (plurality op.) (pointing out that the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain") (citations omitted); *see* Dunn v. United States, 442 U.S. 100, 112 (1979) ("[F]undamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."); *see also* John M. Darley, Kevin M. Carlsmith, & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & Soc'y Rev. 165, 165 (2001) ("A legal code in a complex society is designed . . . . to announce beforehand the rules by which citizens must conduct themselves . . . .").

99 *Santos*, 553 U.S. at 514 (citations omitted); *see* Liparota v. United States, 471 U.S. 419, 427 (1985) (noting that the rule of lenity "strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability"); *cf.* Crandon v. United States, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

100 Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 911, 914 (2004).

101 Johnson v. United States, 135 S. Ct. 2551, 2568 (2015) (Thomas, J., concurring in the judgment); *see Crandon*, 494 U.S. at 158 (referring to the rule of lenity as a "time-honored interpretive guideline"); *see also* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 756 (2010) ("[W]hat we now call judicial review consisted of a refusal to give a statute effect as operative law in resolving a case.").

102 Sash v. Zenk, 439 F.3d 61, 65 (2d. Cir. 2006) (Sotomayor, J.); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 704 n.18 (1995) ("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."); Price, *supra* note 100, at 910 n.166 ("[T]he rule of lenity's method of resolving conflicts automatically in favor of the narrower view has no analogue in the interpretation of civil statutes . . . .").

Some courts have questioned whether this is the case. *See* Hill v. Coggins, 867 F.3d 499, 514 (4th Cir. 2017) ("[I]t is unclear whether the rule of lenity applies in a civil dispute."); Leslie Salt Co. v. United States, 55 F.3d 1388, 1398 (9th Cir. 1995) ("The rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character."); Whitfield v. United States, 99 A.3d 650, 656 n.14 (D.C. 2014) (citation omitted) ("The fact that [the law in question] is a civil traffic regulation, rather than an actual criminal statute, is of no moment. The rule of lenity is not so unduly restrictive in its application."); United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharm., 208 S.W.3d 907, 913 (Mo. 2006) ("The rule [of lenity] is applicable where violation of a civil statute has penal consequences."); Rand v. Comm'r, 141 T.C. 376, 393 (T.C. 2013) ("[A]lthough often considered in the criminal context, the rule of lenity has been applied in the civil context and specifically with regard to civil tax penalties."). However, these instances appear to be the exception rather than the rule.

103 Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498–99 (1982).

104 General Const. Co. v. Connally, 3 F.2d 666, 667 (W.D. Okla. 1924); *see also* Spell v. McDaniel, 591 F. Supp. 1090, 1105 (E.D.N.C. 1984) (stating "that property deprivations are qualitatively different from deprivations of liberty" for purposes of the due process clause); *cf.* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 250 (1922) (affirming a civil

rebuffed this type of thinking.[105] The Court, in fact, has called the "dichotomy between personal liberties and property rights" "a false one."[106] Instead, the Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property," and "[n]either could have meaning without the other."[107] Influential thinkers like John Locke even cast life and liberty as species of the right to property—"every Man has a Property in his own Person," which "no Body has any Right to but himself."[108] This "false dichotomy" falls apart further when one considers situations "when a substantial deprivation of property will appear more egregious than a minimal intrusion on one's liberty."[109] Having an across-the-board rule to require fair notice of "what the law intends to do if a certain line is passed" makes intuitive sense, whether the proscriptions and concomitant sanctions are criminal or civil.[110]

Even if one accepts the liberty/property distinction that has been imported into the Due Process Clauses by many courts and commentators, a more expansive application of the rule of lenity finds further justification in light of the increasing "disappearance of any clearly definable line between civil and criminal law."[111] With growing frequency, "much of the conduct that we would typically consider to be a violation of a regulation, subject to civil penalties in federal court or in an administrative tribunal, is criminalized in the same statute."[112] Take again, for example, the Clean Water Act. In one section of the Act, the law imposes a criminal penalty of "no[] more than $25,000 per day of violation" for negligently breaking the law.[113] In the very next subsection of the same code provision, the law imposes a civil penalty "not to exceed $25,000 per day for each violation" of the law.[114] Should the rules governing statutory interpretation turn on "magic words or labels," when there is little distinction in reality or effect[115]—in this case, simply the characterization of an otherwise identical penalty? One would think not: after all, a reviewing court should look to "substance and application"[116] and consider a law's "practical operation" rather than merely the "form of descriptive words which may be applied to it."[117]

The Court has, in fact, already applied the rule of lenity outside a strictly criminal context. Because statutes must be construed consistently even when they have both criminal and civil applications, the Court has applied the rule of lenity when a law had such dual application, even if, in a given case, only civil penalties were threatened.[118] Recently, Justice Ginsburg, joined by Justices Scalia, Sotomayor, and Kagan, called for application of the rule in a case where a law threatened "draconian civil liability."[119] Language from earlier decisions supports the idea that lenity should be applied more broadly.[120] Some state courts have overtly done so, applying a rule of strict construction when "statutes and rules are penal in nature," even if they threaten only "a civil penalty," including in cases involving "administrative law and procedures."[121]

A wider sweep to lenity would be "consonant alike with ordinary notions of fair play and the settled rules of law," whether life, liberty, or property is threatened.[122] It would encourage both Congress and agencies to speak clearly in the first instance, and it would urge agencies to seek change by influencing legislation

statute as "sufficiently definite" and distinguishing a case "dealing with definitions of crime" as "not applicable" given it was a criminal law).

105 Zinermon v. Burch, 494 U.S. 113, 132 (1990) (rejecting a "categorical distinction between a deprivation of liberty and one of property").

106 Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

107 *Id.*

108 John Locke, Second Treatise of Government § 27.

109 Frost v. City & Cty. of Honolulu, 584 F. Supp. 356, 361 (D. Hawai'i 1984); *see infra* notes 140–144 and accompanying text.

110 United States v. Bass, 404 U.S. 336, 348 (1971) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

111 John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 193 (1991); *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1329 (1991) ("[I]t is extremely difficult to draw principled lines to distinguish between criminal and civil cases.").

112 Erica Marshall, *The Rule of Lenity: A Five-Minute Guide to Navigating the Intersection of Administrative and Criminal Law*, Fed Soc Blog (May 1, 2017), http://www.fed-soc.org/blog/detail/the-rule-of-lenity-a-five-minute-guide-to-navigating-the-intersection-of-administrative-and-criminal-law [https://perma.cc/Z6BF-9Z5F].

113 33 U.S.C. § 1319(c)(1).

114 *Id.* § 1319(d).

115 Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992).

116 United States v. Constantine, 296 U.S. 287, 294 (1935).

117 Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 363 (1941) (internal quotation marks omitted).

118 *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see also* United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992) (noting that the rule of lenity can be properly invoked in a civil case when dealing with a criminal statute); Crandon v. United States, 494 U.S. 152, 158 (1990) ("[B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.").

119 Maracich v. Spears, 133 S. Ct. 2191, 2219 (2013) (Ginsburg, J., dissenting).

120 *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (emphasis added) ("No one may be required at peril of life, liberty *or property* to speculate as to the meaning of penal statutes.").

121 *In re* Woodrow Wilson Constr. Co., 563 So.2d 385, 391 (La. Ct. App. 1990); *see also* People v. Mobil Oil Corp., 192 Cal. Rptr. 155, 164 (Cal. Ct. App. 1983) ("Because the statute is penal, we adopt the narrowest construction of its penalty clause to which it is reasonably susceptible in the light of its legislative purpose. This principle is not rendered inapplicable merely because an action arises out of an administrative proceeding rather than a criminal prosecution. Where the statute to be construed is a penal one, these principles apply even when the underlying action is civil in nature."). *But see* Handyman Connection of Sacramento, Inc. v. Sands, 20 Cal. Rptr. 3d 727, 747 (Cal. Ct. App. 2004) ("Handyman urges us either to import the so-called 'rule of lenity' from criminal law into civil administrative law, or to treat occupational regulatory statutes as contracts of adhesion to which licensees are involuntary parties. To do either would be unwarranted.").

122 Connally v. Gen'l Constr. Co., 269 U.S. 385, 391 (1926).

rather than by "interpretation."[123] An administrative rule of lenity would also increase transparency and accountability: no longer could Congress delegate to an agency the task of balancing policy trade-offs pursuant to a mandate to, say, "regulate in the public interest," without specifying what, exactly, constitutes "public interest" and what rules might promote that interest.[124] Congress would have to make hard choices itself and speak clearly, or else risk non-enforcement of its vague enactments.

B. Contra Proferentem

In contract law, a court faced with an unresolvable ambiguity in an agreement construes the ambiguity against the party responsible for inserting it into the contract. This canon of construction, known as *contra proferentem*, "provides that '[i]n choosing among the reasonable meanings of a promise or agreement . . . that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.'"[125] This rule makes sense: "the drafter of a contract occupies an advantageous position regarding the language of the contract," and "fairness requires as a matter of law that the bigger piece of the contract 'pie' not go to the slicer."[126]

Similarly, the legislature that writes a law or the agency that promulgates a regulation occupies an advantageous position relative to those who will be subject to those rules. If fairness requires the non-drafting party to benefit from an ambiguity in a contract between private parties, it makes sense that non-drafting parties in a coercive context like regulation should have ambiguities in laws or regulations construed in their favor as well.[127] As discussed above, this is especially true since agencies have means by which they can avoid any formal process altogether in effectively amending regulations or even underlying statutes.[128]

In the administrative state, however, the opposite of *contra proferentem* is the law. Under *Seminole Rock*, if "the meaning of the words used" in a regulation "is in doubt," the promulgating agency's construction "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[129] This, especially along with *Chevron*,[130] has proved to be a very large thumb on the scale in favor of the government whenever a term in a statute or regulation is fairly susceptible of more than one interpretation.[131] Agencies have exploited this advantageous playing field to adopt expansive interpretations of unclear statutes and regulations.[132] The Court has recognized that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."[133] But the Court has basically endorsed "unforeseeable . . . [agency] expansion" of statutory or regulatory language by deferring to agencies' interpretations of their own rules, giving those interpretations "the force of law" unless they are completely irrational.[134]

Furthermore, like with contracts of adhesion that unsophisticated consumers neither read nor comprehend,[135] it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation . . . have knowledge of its promulgation or familiarity with or access to the Federal

123 *See* Price, *supra* note 100, at 888 ("The rule of lenity . . . . compels lawmakers and enforcers to indicate explicitly what they are doing.").

124 *Cf. id.* at 886 (noting how "legislatures" "routinely" delegate the responsibility of defining terms in statutes "to courts and executive officials," but "[l]enity . . . blocks expansive readings and impedes delegated discretion by requiring courts to choose narrow interpretations automatically").

125 Mesa Air Grp., Inc. v. Dep't of Transp., 87 F.3d 498, 506 (D.C. Cir. 1996) (quoting Restatement (Second) of Contracts § 206 (1979)).

126 David S. Miller, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 Colum. L. Rev. 1849, 1852 (1988).

127 *Cf., e.g.*, Sackett v. EPA, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear. . . . Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). . . . In a Nation that values due process, not to mention private property, such treatment is unthinkable. . . . Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.").

128 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (observing that, thanks to "judge-made doctrines of deference," agencies can use "interpretive rules," which are exempt from *ex ante* notice-and-comment requirements, "not just to advise the public" regarding the meaning of existing law "but also to bind them" to that interpretation).

129 *Seminole Rock*, 325 U.S. at 413–14.

130 467 U.S. 837.

131 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1104 (2008) (noting that "[t]he agency win rate for cases where the Court invoked *Seminole Rock* (or an analogous precedent) was an outstanding 90.9%").

132 *See, e.g.*, *Sackett*, 566 U.S. at 133 (Alito, J., concurring) ("Congress did not define what it meant by 'the waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority.").

133 Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

134 *Mortg. Bankers Ass'n*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment); *see also Sackett*, 566 U.S. at 132 (Alito, J., concurring) (observing that "the combination of the uncertain reach of" federal law "and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to" agencies' "tune" regarding what the law says)

135 *See* Black's Law Dictionary 390 (10th ed. 2014) (defining an adhesion contract as "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position"); *see also* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. Rev. 437, 484 (2011) (referring to "the statutory-like mechanism of adhesion contracts").

Register."[136] This only magnifies the problems with the status quo. As James Madison wrote:

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?[137]

Laws and regulations should "have sufficient content and definitiveness as to be a meaningful exercise";[138] if they do not, the reviewing court should construe ambiguity in favor of the non-drafting party, just as courts do already with contracts, especially given the imbalance in bargaining power between the regulators and the regulated. The administrative rule of lenity thus provides a bright-line background rule to avoid entirely "the potential due process problems posed by 'penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'"[139]

IV. Operationalizing the Administrative Rule of Lenity

How would applying this canon work in practice? Two examples—one involving a statute and one a regulation—illustrate how this might work to accomplish the intended result of encouraging Congress to draft laws with more precision and urging agencies to turn to Congress to make new law rather than doing so themselves through so-called interpretation.

A. Waters of the United States

Andy Johnson built a stock pond on his property in Wyoming by damming a small creek that ran through his front yard.[140] Little did he know this act would ignite a "regulatory war":[141]

> [O]fficials from the Environmental Protection Agency paid a visit to the pond and . . . told [Johnson] he was facing "a very serious matter." In a January 2014 violation notice, the agency said Mr. Johnson had violated the Clean Water Act by digging out Six Mile Creek and dumping in tons of river rocks without getting necessary federal permits. The agency ordered him to take steps to restore the creek under the supervision of environmental officials, or face accumulating fines of as much as $37,500 a day.[142]

Rejecting the EPA's position, but unwilling either to destroy his stock pond or to incur ruinous fines with fingers crossed hoping eventually to be vindicated, Johnson sued in federal court. He argued, among other things, that the creek was "too far removed from navigable rivers to fall under the E.P.A.'s authority."[143] The case ultimately settled after a two-year struggle.[144]

Consider how the case would have played out if the administrative rule of lenity were in effect. Because Congress left "waters of the United States" ambiguous, despite the fact that the phrase is notoriously unclear,[145] Johnson could have responded confidently to the EPA's compliance order by arguing that his creek could not be regulated as "waters of the United States," particularly since it clearly was not "navigable."[146] If Congress wanted to give the EPA jurisdiction and enforcement authority over this creek, it would have to do so by defining "waters of the United States" so as to include such a body of water. Until that happened, or until a fixed and final judicial construction of the text were provided authorizing such a broad scope to the Act,[147] Johnson could not be penalized under the Clean Water Act, thereby vindicating the principle that "no citizen should be held accountable for a violation of a statute whose commands are uncertain."[148]

With an administrative rule of lenity in place, this "regulatory war" could have been avoided before the first shot was fired. Congress is at fault for the ambiguous reach of the law, and until Congress fixes the problem or the Court fixes the

136 Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

137 The Federalist No. 62, at 379 (James Madison) (Clinton Rossiter ed., 1961).

138 Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).

139 United States ex rel. Purcell v. MWI Corp., 807 F.3d 281, 287 (D.C. Cir. 2015) (quoting Satellite Broad. Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987)).

140 *See* Jack Healy, *Family Pond Boils at Center of a 'Regulatory War' in Wyoming*, N.Y. Times (Sept. 18, 2015), https://www.nytimes.com/2015/09/19/us/regulatory-war-fought-over-a-wyoming-familys-pond.html [https://perma.cc/MRQ5-V3PP].

141 *Id.*

142 *Id.*

143 *Id. See also* Complaint ¶ 50, Johnson v. EPA (D. Wyo. 2015), *available at* https://pacificlegal.org/wp-content/uploads/2017/09/Andy-Johnson-Complaint-8-27-15.pdf [https://perma.cc/ZYN2-CK4C] ("Johnson's construction of a stock pond is also beyond the reach of the Clean Water Act because six-mile creek is not a 'water of the United States.'").

144 Timothy Cama, *EPA Settles with Wyoming Farmer over Man-Made Pond*, The Hill (May 10, 2016), http://thehill.com/policy/energy-environment/279421-epa-settles-water-pollution-case-with-wyoming-farmer [https://perma.cc/DG7K-9BJ9] ("Under the settlement reached Monday in federal court, Johnson will not have to pay the fines or drain the pond.").

145 *See* 33 U.S.C. § 1362(7); *Sackett*, 566 U.S. at 133 (Alito, J., concurring) ("Congress did not define what it meant by 'the waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate.").

146 33 U.S.C. § 1362(7).

147 *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis.").

148 *Santos*, 553 U.S. at 514 (plurality op.) (citations omitted).

law's construction, no one should be penalized where the law's reach is uncertain.

B. On the Basis of Sex

Title IX of the Education Amendments of 1972 declares that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,"[149] and it empowers federal agencies "to effectuate the provisions" of the statute.[150] The Department of Education has issued regulations doing so, one of which allows recipients of federal education funds to "provide separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities are comparable.[151] As the text of the law suggests, "Title IX was enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities."[152] Regulations implementing Title IX must "effectuate [its] provisions"; an agency cannot, "under the guise of interpreting a regulation," "create *de facto* a new regulation," especially not one that sweeps beyond the scope of the underlying enabling act.[153] Regulations, therefore, must comport with the goal of ending the unequal treatment of women in education.

On May 13, 2016, the Department of Justice and Department of Education jointly released a "Dear Colleague" letter announcing that Title IX's prohibition on sex discrimination "encompasses discrimination based on a student's gender identity."[154] This meant that, while "[a] school may provide separate facilities on the basis of sex" pursuant to agency regulations, schools across the country could "not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so,"[155] at least not without jeopardizing federal funds.[156]

This letter was hailed by some as a "historic step" for the Obama administration "in its aggressive defense of civil rights."[157] It was also "sure to stoke growing outrage across the country over what has become an explosive political issue."[158] Officials from the respective departments published a blog post in tandem with the letter, stating that "protecting transgender students' right to be who they are does not harm other students," and that this protection was "achievable through common-sense approaches that foster safety and a positive learning environment for all students."[159] Apparently, these officials also thought these goals were achievable without congressional action or even notice-and-comment rulemaking, despite the facts that "[w]hen Title IX was enacted in 1972, the term 'sex' was commonly understood to refer to the biological differences between males and females," "the early users of the term 'gender identity' recognized the distinction between 'sex' and 'gender identity,'" and Title IX itself indicates a "binary definition" for "sex."[160]

The policy was rescinded before it could be litigated to the Supreme Court. Given the major, nationwide implications of this "guidance," it is possible that the Supreme Court would not have deferred to the agencies in light of the fact that this is the sort of situation where, "had Congress wished to assign that question to an agency, it surely would have done so expressly."[161] But this result would have been even more certain under the administrative rule of lenity. That rule would have resulted in an automatic loss for the agencies in any challenge to their policy. For such a dramatic expansion of the scope of agency regulations to have any binding effect, Congress would have had to amend Title IX to explicitly authorize it. Until that happened, because neither Title IX nor its implementing regulations clearly indicate that "sex discrimination" includes "gender identity discrimination," no agency could enforce such a position against an entity that disagrees.

"If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an

149 20 U.S.C. § 1681(a).

150 *Id.* § 1682.

151 34 C.F.R. § 106.33.

152 McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004); *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 523–24 (1982) (observing that Title IX was one of "several attempts . . . to enact legislation banning discrimination against women in the field of education" in the 1970s).

153 Christensen v. Harris Cty., 529 U.S. 576, 588 (2000). *See also City of Arlington*, 569 U.S. at 297 ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority."); Massachusetts v. EPA, 549 U.S. 497, 533 (2007) (observing how agencies are confined "to exercise discretion within defined statutory limits"); Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

154 U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on Transgender Students (May 13, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/7DN3-AEWT].

155 *Id.*

156 20 U.S.C. § 1682.

157 Caitlin Emma, *Obama Administration Releases Directive on Transgender Rights to School Bathrooms*, Politico (May 12, 2016), https://www.politico.com/story/2016/05/obama-administration-title-ix-transgender-student-rights-223149 [https://perma.cc/9EHX-M5DH].

158 *Id.*

159 Catherine E. Lhamon & Vanita Gupta, *Helping Schools Ensure the Civil Rights of Transgender Students*, HomeRoom (May 13, 2016), https://blog.ed.gov/2016/05/helping-schools-ensure-the-civil-rights-of-transgender-students/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [https://perma.cc/2FZH-5NS9].

160 Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 687–88 (N.D. Tex. 2016) (footnotes omitted).

161 King v. Burwell, 135 S. Ct. 2480, 2489 (2015). *See also* Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

ambiguous grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action."[162] In light of the foregoing principles, the same should be true whether an action is categorized as "major," "minor," or somewhere in between—especially since agency action falling anywhere between those two posts might still have "major" consequences for regulated parties. Before the executive may act to enforce a law, Congress must empower it to do so by actually enacting that law.[163] The legislative process might pose significant obstacles to passing laws, and this might frustrate those seeking to advance a policy that they feel justice requires. But these obstacles are a feature, not a bug, of our Constitution.[164]

V. Conclusion

The Constitution created a federal government with three separate branches "not to promote efficiency but to preclude the exercise of arbitrary power."[165] Congress, however, has largely abandoned its central, lawmaking role due to an incentive structure that encourages members to punt hard issues to the executive branch by delegating significant lawmaking power to administrative agencies. This has distorted the basic structure of the Constitution, weakened key constraints against arbitrary government, and eroded rule of law. The Supreme Court need not sit idly by while this happens: a canon of strict construction applied to federal administrative statutes and concomitant regulations could alter the playing field and force Congress to make laws rather than lawmakers by legislating in clear and specific terms. Adopting such a rule would not require a jurisprudential revolution—it would only require the Court to give fuller effect to extant rules whose rationale applies fittingly to this situation. Such a background principle could compel Congress to take responsibility anew to exercise the legislative power entrusted to it by "We the People."

162 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (internal quotation marks omitted) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."); *see also* Loving v. United States, 517 U.S. 748, 771 (1996) ("Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

163 In this way, the requirements of bicameralism and presentment serve as a sort of overarching embodiment of due process: if the Executive enforces something that has not been properly enacted into law via the prescribed method, then the prosecution cannot be said to comport with the "due process *of law*," even if the process itself is considered fair or adequate. *See* James W. Ely, Jr., "Due Process Clause," *The Heritage Guide to the Constitution*, Heritage.org ("There are certain respects in which 'due process of law,' . . . uncontroversially regulates the substance of governmental action. . . . by ensuring that executive and judicial deprivations are grounded in valid legal authority. In this respect, the Fifth Amendment's Due Process Clause limits the substance of executive or judicial action by requiring it to be grounded in law.").

164 *See* The Federalist No. 62, at 376 (James Madison) (Clinton Rossiter ed., 1961) (observing that the "complicated check on legislation" imposed by the structural constraints in the Constitution "may in some instances be injurious as well as beneficial," but defending it nevertheless as a safeguard against "the diseases to which our governments are most liable").

165 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).