Article

Major-Questions Lenity

Joel S. Johnson†

Both the historic rule of lenity and the new major questions doctrine rest on a fundamental commitment to the separation of powers for important policy questions. In light of that shared justification, the logic of the major questions doctrine in the administrative-law context has much to offer lenity in the criminal-law context. In fact, the major-questions framework is strikingly similar to a rationale that has recently emerged in some of the Supreme Court's decisions narrowly construing federal penal statutes. That emerging rationale can be understood as a modest form of major-questions lenity that may lead to a more robust version of the doctrine—one that would work to restore historic lenity's insistence on legislative clarity in crime definition, substantially limit the practice of implicit delegation of crime definition, and help to curb lower-court adoption of overly broad and literalistic constructions of penal statutes.

---

† Associate Professor of Law, Pepperdine Caruso School of Law. For helpful comments and consultations, I am grateful to Akhil Amar, Nila Bala, Jeffrey Bellin, Aaron-Andrew Bruhl, Jack Chin, Adam Crews, Seth Davis, Blake Emerson, Sheldon Evans, Eric Fish, Eve Hanan, Andy Hessick, Carissa Hessick, Sarah Jones, Sam Kamin, Ed Larson, Gary Lawson, Ben Levin, Richard McAdams, Ben McJunkin, Jamelia Morgan, Zachary Price, Bob Pushaw, Richard Re, Kannon Shanmugam, Michael Smith, India Thusi, Anna VanCleave, and Ilan Wurman. This project also greatly benefited from comments offered by participants at CrimFest, the Southwest Criminal Law Workshop, and the National Conference of Constitutional Law Scholars. Special gratitude is owed to Sarah Alexander, Ellie Ritter, and Ryan Schmidt for their excellent research assistance.

TABLE OF CONTENTS

INTRODUCTION

The rule of lenity grew out of a rich judicial tradition of strictly construing any reasonable doubts in the language of penal statutes in favor of the accused.[1] The Supreme Court broke from that tradition nearly a century ago,[2] and commentators have called for its renewal ever since.[3] In the context of administrative law, the Court has recently broken from another interpretive tradition—general deference to administrative agencies in the face of indefinite statutory language.[4] Under the newly articulated major questions doctrine, Congress is not presumed to have delegated policymaking authority to agencies on "major" questions of "vast economic and political significance," absent clear statutory authorization.[5]

---

1. *See infra* Part I.A—B (discussing lenity's history).

2. *See infra* Part I.C (discussing lenity's decline).

3. *See, e.g.*, Steffen Seitz, *The Rule of Lenity and Affirmative Defenses*, 102 WASH. U. L. REV. 427, 427–28 (2024) (arguing that lenity's domain should extend to justificatory defenses); Maciej Hulicki & Melanie Reid, *The Rule of Lenity as a Disruptor*, 113 J. CRIM. L. & CRIMINOLOGY 803, 809 (2024) (arguing for a "full[ ] embrace [of] the rule of lenity"); David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 525 (2018) ("[T]he rule of lenity ought to be reconstructed to recover and reclaim the important due process foundation that begat the rule."); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 724 (2017) (arguing for restoration of "the historical rule of lenity"); John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 UC DAVIS L. REV. 1955, 2029 (2015) ("[C]ourts can and should transform the weak and theoretically bankrupt rule of lenity back into the strong, normatively robust rule of strict construction of penal statutes."); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (arguing for the "rehabilitation of lenity"); Lane Shadgett, *A Unified Approach to Lenity: Reconnecting Strict Construction with its Underlying Values*, 110 GEO. L.J. 685, 712–14 (2022) (arguing for a more robust version of lenity that aligns with its historical justifications); *see also* F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2302–03 (2022) (arguing for restoring the historic practice of narrowly construing criminal statutes); Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351 (2019) (advocating for new clear-statement rules for constraining criminal laws).

4. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022) (observing that the Court "unhitched" the major questions doctrine from the then-existing general deference regime, "oust[ing]" *Chevron* "from its position as the starting point for evaluating whether an agency can exert regulatory authority").

5. West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

On their face, these two doctrines of statutory interpretation have little to do with each other: Lenity is usually invoked by criminal defendants seeking narrow constructions of penal statutes, while the major questions doctrine tends to arise in the civil context when invalidation of some regulatory policy is sought. Yet beneath their surface differences lies a common foundation. Both rest on a separation-of-powers insistence that it is the legislature's prerogative to set policy on important issues.

Cast in that light, the logic of the major questions doctrine has much to offer lenity. In fact, the major-questions framework is strikingly similar to an emerging rationale in some of the Court's recent decisions adopting narrow constructions of penal statutes.[6] In this line of cases—culminating in *Dubin v. United States*[7] and *Fischer v. United States*[8]—the Court has invoked a tradition of "interpretive 'restraint'" for federal penal statutes that is rooted in separation-of-powers concerns.[9] When doing so, the Court often highlights the significant consequences of the government's broad readings[10] and sometimes notes that clear

6. *See infra* Part IV.B (comparing recent criminal-law decisions to the major-questions rationale).

7. 143 S. Ct. 1557 (2023).

8. 144 S. Ct. 2176 (2024).

9. Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)).

10. *See, e.g.*, *Fischer*, 144 S. Ct. at 2189–90 (declining the government's invitation to turn a provision of the Sarbanes-Oxley Act "into a one-size fits-all solution to obstruction of justice"); *Dubin*, 143 S. Ct. at 1572 (noting that the government's broad reading of federal aggravated identity theft statute would "sweep in the hour-inflating lawyer" and "the steak-switching waiter" who "use[ ] various common billing methods"); Ciminelli v. United States, 143 S. Ct. 1121, 1128 (2023) (noting that the government's "theory" of wire fraud would "make[ ] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract or tort law"); Ruan v. United States, 142 S. Ct. 2370, 2379–82 (2022) (discussing the sweeping consequences of the government's broad reading of a drug statute); Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021) (noting that the government's broad reading of the Computer Fraud and Abuse Act "would attach criminal penalties to a breathtaking amount of commonplace computer activity"); *Marinello*, 138 S. Ct. at 1108 (explaining how the government's broad reading of an obstruction provision of the Internal Revenue Code "could apply to a person who pays a babysitter $41 per week in cash without withholding taxes, leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to accountant" (citations omitted)); Yates v. United States, 574 U.S. 528, 536, 540 (2015) (plurality opinion) (noting that the government's "unrestrained" reading would have turned a Sarbanes-Oxley Act provision focused on "records" and "documents" into "an all-encompassing ban on the spoliation of evidence" that would "sweep within its reach physical

direction from Congress would be needed before adopting those readings.[11] That emerging rationale not only follows the same logic as the major questions doctrine; it also represents a step toward restoring lenity's historic role in the construction of penal statutes.

Lenity has a significant historical pedigree as a robust rule of strict construction, both at English common law and in the early days of the Republic.[12] Modern commentators often focus on fair-notice, individual-liberty, and democracy-promoting rationales for lenity.[13] But when the Supreme Court justified adoption of the English rule of strict construction as a matter of federal law, Chief Justice Marshall emphasized a more basic separation-of-powers justification, explaining that the legislature is "to define a crime" and "ordain its punishment" because "the power of punishment is vested in the legislative, not in the judicial department."[14] As Dan Kahan has observed, this principle of legislative primacy in crime definition "meant not just that Congress was entitled to take the lead in defining criminal law,

---

objects of every kind," including a fish); Bond v. United States, 572 U.S. 844, 858–59 (2014) (explaining how the government's broad reading of a law criminally prohibiting chemical weapons "would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room").

11. *See, e.g.*, *Marinello*, 138 S. Ct. at 1108 (explaining that if "Congress [had] intended" a broad interpretation, "it would have spoken with more clarity than it did"); *Yates*, 574 U.S. at 540 (noting that "[i]f Congress [had] meant to make [a provision of the Sarbanes-Oxley Act] an all-encompassing ban on the spoliation of evidence, one would have expected a clearer indication of that intent").

12. *See infra* Part I.A–B (describing lenity's historical development).

13. *See, e.g.*, Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921 (2020) (arguing that "[a]s compared to the modern version of the rule of lenity, the historical rule of strict construction better advances democratic accountability, protects individual liberty, [and] furthers the due process principle of fair warning"); Stinneford, *supra* note 3, at 2029 (noting that historical "strict construction" was "based upon the premise that the law 'delights' in life and liberty"); Romantz, *supra* note 3, at 524–25 (emphasizing lenity's fair-notice justification); Price, *supra* note 3, at 886–87 (highlighting "lenity's role in advancing the democratic accountability of criminal justice"); *see also* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* H. FRIENDLY, BENCHMARKS 196, 209–10 (1967) (defending lenity as a source of protection for liberty); Hessick & Hessick, *supra* note 3, at 2347–59 (arguing that a more robust judicial practice of narrow construction would promote liberty, democratic accountability, and fair notice); Hessick & Kennedy, *supra* note 3, at 384 (noting that criminal clear-statement rules would "protect liberty directly").

14. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

but also that Congress was obliged to do so however inconvenient the consequences might be."[15]

Treating strict construction as a separation-of-powers constraint on the judiciary aligned the doctrine with another early basic tenet of federal criminal law—that federal courts lacked the power to create common law crimes.[16] Strict construction ensured that the judiciary did not accept prosecutors' efforts to expand federal criminal law by engaging in common law crime definition under the guise of statutory interpretation. It required that, in order for courts "[t]o determine that a case is within" the scope of a federal penal statute, "its language must authorise [courts] to say so."[17] The Court insisted that it was Congress's prerogative and obligation to define crimes (which of course opens the door to punishment); it would not accept implicit delegation of that important function to prosecutors and courts by means of open-ended statutory language. Throughout the nineteenth century, the Court led the federal judiciary in applying this American version of strict construction of federal penal statutes.[18]

But in the twentieth century, the Court deliberately weakened the rule of strict construction to the point of near irrelevance.[19] That effort was part of a larger methodological shift at

---

15. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 361.

16. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); Kahan, *supra* note 15, at 361 (explaining how both "*Wiltberger*'s principle of strict construction" and "*Hudson*'s prohibition on common law crimes . . . forbade the judiciary to assume significant policymaking responsibilities in the field of criminal law").

17. *Wiltberger*, 18 U.S. (5 Wheat.) at 96; *see* Gary Lawson, *"The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, HARV. J.L. & PUB. POL'Y PER CURIAM 5 (June 20, 2024), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/06/Lawson-How-I-Learned-vf.pdf [https://perma.cc/F7KQAXB9] (characterizing the "classical version [of lenity]" applied in *Wiltberger* as a rule that "says that no one should be criminally convicted unless the law *clearly and unambiguously* establishes that the defendant's conduct violates the law").

18. *See, e.g.*, United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1867); Ballew v. United States, 160 U.S. 187, 197 (1895); Sarlls v. United States, 152 U.S. 570, 576 (1894); United States v. Reese, 92 U.S. 214, 219 (1875); Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850).

19. *See infra* Part I.C (explaining how the Court's approach to statutory interpretation shifted in the twentieth century).

the Court towards purposivism, an approach to interpretation aimed at implementing the "spirit" of a legislative enactment by looking to a wide range of materials to determine legislative intent.[20] Viewing strict construction as an impediment to a court's ability to implement legislative intent,[21] the purposivist Court sapped it of its strength, renaming it "the rule of lenity" and relegating it to "the end of the interpretive process."[22] That demotion ensured that federal courts would rely on lenity very rarely as a "tool of last resort"[23] to be used only if ambiguity remained after considering all other indicia of legislative intent that could be gathered from all legal materials that purposivism made available.

Since that time, the Court has retained the weakened version of lenity, even after new personnel shifted the Court's methodology away from purposivism and towards textualism.[24] If anything, despite protestations from Justices Scalia and

---

20. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 272 (2020) (observing that the "strong purposivist notion is to" implement the "spirit" of the legislative enactment); *see, e.g.*, Friendly, *supra* note 13, at 200 (describing interpretation as "the art of proliferating a purpose" (quoting Brooklyn Nat'l Corp. v. Comm'r, 157 F.2d 450, 451 (1946)); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 87 (1958) (arguing that the goal of interpretation is to implement the purpose underlying the law); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907) ("The object of genuine interpretation is to discover the rule which the law-maker intended to establish . . . .").

21. Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385, 402 (1987) ("One of the consequences of attending to [a criminal] code's general purposes . . . may be to reject strict interpretation in many particular instances.").

22. Hopwood, *supra* note 3, at 717; *see* Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 354 (1943) (noting that penal laws "are not to be construed so strictly as to defeat the obvious intention of the legislature"); *see also* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (explaining that a court construing an ambiguous statute "may utilize . . . all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress"); United States v. Brown, 333 U.S. 18, 25 (1948) (making clear that strict construction would not override "common sense" or "evident statutory purpose"); United States v. Gaskin, 320 U.S. 527, 529–30 (1944) (giving the rule of lenity no weight when it would cause "distortion or nullification of the evident meaning and purpose of the legislation").

23. Hessick & Kennedy, *supra* note 3, at 380.

24. *See infra* text accompanying notes 148–53 (describing Justice Scalia's advocacy for robust lenity).

Gorsuch,[25] the modern Court has further weakened lenity, often restricting its application to when "grievous ambiguity" remains following the use of all other interpretive tools.[26] As it now stands, the Court has not relied on lenity as a necessary justification for a narrow construction of a penal statute in over a decade,[27] likely longer. [28]

While lenity's decline in use might suggest its practical demise,[29] the decline should not be viewed in isolation. The Court continues to show a clear preference for narrow constructions of penal statutes. But it justifies them using other tools. A close look at the Court's behavior shows that it has not merely cast lenity aside, but has instead *fragmented* it into a set of more targeted interpretive tools.[30] These partial substitutes for lenity—the scienter presumption, the federalism presumption, and the avoidance of constitutional vagueness concerns—are substantive canons of construction[31] that reflect policy preferences for narrow readings of limited sets of penal statutes and ultimately promote the same anti-delegation, separation-of-powers value

25. *See infra* text accompanying note 154 (observing that Justice Gorsuch has followed Justice Scalia in arguing for robust lenity).

26. Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

27. Joel S. Johnson, *Ad Hoc Constructions of Penal Statutes*, 100 NOTRE DAME L. REV. 73, 76, 79 (2024) (observing that, over the ten-year period from the 2013 Term through the 2022 Term, "the Court *never* firmly relied upon the rule of lenity").

28. *See* Price, *supra* note 3, at 886 (observing that, as of 2003, lenity "appear[ed] occasionally as a supplemental justification for interpretations favored on other grounds" but "never st[ood] alone to compel narrow readings"); *see also* Allen, *supra* note 21, at 397 ("Frequently, in analyzing judicial opinions in which the strict interpretation rule is relied on, one is left in doubt whether the rule determined the outcome in significant degree or, rather, the rule was invoked primarily as a means of articulating results based largely on other considerations.").

29. Aaron-Andrew P. Bruhl, *Understanding the Mechanisms of Interpretive Change*, 103 N.C. L. REV. 1083, 1107 (2025) (observing that "an interpretive tool" can be "kill[ed] off" by "ignor[ing] it").

30. *See infra* Part II (describing the fragmentation of lenity).

31. Canons of construction fall into two basic categories—descriptive canons (i.e., "semantic" or "linguistic" canons), and substantive canons (i.e., "normative" canons). *See, e.g.*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 516–17 (2023); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).

that Chief Justice Marshall used to justify strict construction.[32] Yet in another set of cases, the Court's narrow constructions are "ad hoc," in the sense that they are based on the ordinary meaning of the particular statute's text without reliance on a substantive canon or some other widely applicable principle of construction.[33]

Through fragmentation, lenity's practical effect has not been totally lost in the Court's decisionmaking process. Yet the absence of a unified, generic strict-construction approach has a significant cost. The upshot of fragmentation is a regime of partial leniency: The Court applies a policy of interpretive leniency only if one of the narrowly tailored partial substitutes for lenity is triggered.[34] That regime effectively deprioritizes the generic separation-of-powers value on which Chief Justice Marshall based historic strict construction while elevating the importance of more targeted values related to *mens rea*, federalism, and constitutional vagueness concerns.[35] When those targeted values are present, the substitute tools do a decent job of replicating strict construction and protecting the anti-delegation principle articulated by Chief Justice Marshall. But for indeterminate penal statutes that do not implicate one of those targeted values, the legislative task of crime definition is implicitly delegated both to prosecutors and to courts. For these penal statutes—perhaps most penal statutes[36]—the principle of legislative primacy in crime definition has been effectively overridden, and outcomes hinge on whether the judiciary will exercise its delegated authority to adopt narrow constructions on a largely discretionary *ad hoc* basis.[37]

---

32. *See infra* Part II.A–C (discussing the Court's use of constitutional vagueness concerns, the scienter presumption, and the federalism presumption).

33. *See infra* Part II.D (discussing the Court's use of ad hoc rationales in recent cases); *see also* Johnson, *supra* note 27, at 79 ("[A] majority of the Court repeatedly purported to rest narrow constructions of penal statutes on ad hoc rationales.").

34. *See infra* Part III (describing the regime of partial leniency).

35. *See infra* Part III (describing the regime of partial leniency).

36. *See, e.g.*, Johnson, *supra* note 27, at 103–04 (observing that from the 2013 Term through the 2022 Term, the Supreme Court "definitively relied upon a substantive canon as part of its holding in only eight of [its] twenty-seven" decisions narrowly construing federal penal statutes).

37. *See infra* Part III (describing the regime of partial leniency).

An approach that allows for implicit delegation of crime definition may have been a good fit for the purposivist paradigm of the mid-twentieth century, in which the Court abandoned the long tradition of more robust generic strict construction.[38] In that era, the Court might have understood broad and indeterminate language in penal statutes to evince a legislative purpose of interbranch collaboration in the criminal lawmaking process. In effect, the Court engaged in delegated judicial crime definition while trying to remain faithful agents of Congress's purpose.[39]

But the implicit-delegation approach has an uneasy relationship with the current textualist paradigm, which promises to "constrain the federal judiciary" by remaining "faithful to the words actually used by the legislature,"[40] without entertaining notions of interbranch collaboration to arrive at constructions that give effect to the spirit of statutes.[41] Textualist courts do not view the presence of broad and open-ended language in penal statutes as an invitation to engage in delegated judicial crime definition, but rather as a mandate to apply the plain text as written.[42]

In the textualist age, the combination of indeterminate statutory language and the absence of robust lenity—or some other generic policy of strict construction—grants significant interpretive discretion to lower courts that follow the Court's methodology.[43] Because the Court does not endorse a robust generic

38. See *infra* notes 137–44 and accompanying text (describing how purposivists weakened strict construction).

39. *See infra* Part III.A (describing implicit delegation of crime definition within the purposivist context).

40. Grove, *supra* note 20, at 271.

41. Faithfulness to the text's ordinary meaning is thought to prevent courts from acting according to their own unfair predilections in an unfair or arbitrary manner. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed., Princeton University Press 1997) (arguing that the formalism of textualism "is what makes a government of laws and not of men").

42. *See infra* Part III.A (discussing the textualist approach to penal statutes).

43. This Article assumes that lower courts often follow the Court's interpretive methods, either because they view them as binding or simply because they operate within a paradigm of statutory interpretation set by the Court's lead. *See* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 106 (2020) (showing how lower courts follow the Supreme Court's lead on methods of statutory interpretation); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1344–46 (2018) (reporting that some lower-court judges surveyed

version of lenity, lower courts often rely only on statute-specific ordinary-meaning analysis when construing penal statutes. And because they cannot devote as many resources to interpretive questions as can the Supreme Court, their ordinary-meaning analysis tends to be more simplistic, often yielding overly broad and literalistic constructions.[44] A fraction of these lower-court constructions can be corrected by the Court,[45] with the benefit of more focused and resource-intensive analysis of linguistic meaning.[46] But not most.

The partial-leniency regime also encourages the implicit delegation of criminal lawmaking authority to prosecutors, who seek to expand criminal enforcement. Prosecutors use their charging discretion to pursue conduct on the peripheries of open-ended statutory language. Many of these sweeping theories of prosecution are never tested in court because most cases are resolved through plea bargaining. When they are tested, prosecutors can often convince lower courts to adopt their expansive

---

believe that they may be bound by at least some of the Court's interpretive methods); Zachary B. Pohlman, *State-Federal Borrowing in Statutory Interpretation*, 31 GEO. MASON L. REV. 839, 841 (2024) (observing that state courts often borrow statutory-interpretation methodology and tools, including substantive canons, from federal-law decisions of the Supreme Court).

44. *See, e.g.*, United States v. Dawson, 64 F.4th 1227, 1235–37, 1239 (11th Cir. 2023) (adopting broad construction based on "plain meaning" as informed by dictionaries and rejecting lenity); United States v. Fischer, 64 F.4th 329, 335–36 (D.C. Cir. 2023) (adopting broad construction based on "ordinary or natural meaning" as informed by dictionaries (quoting Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994))); United States v. Taylor, 44 F.4th 779, 787–88 (8th Cir. 2022) (adopting broad construction based on "natural" meaning and dictionaries); United States v. Lumbard, 706 F.3d 716, 722–23 (6th Cir. 2013) (adopting broad construction based on the statute's "ordinary and natural meaning" as informed by dictionaries); United States v. Desposito, 704 F.3d 221, 226–27 (2d Cir. 2013) (adopting broad construction based on "ordinary meaning" and dictionaries).

45. *See, e.g.*, United States v. Van Buren, 940 F.3d 1192, 1207–08 (11th Cir. 2019) (adopting broad construction based on circuit precedent that relied only on the plain language of the statute (citing United States v. Rodriguez, 628 F.3d 1258, 1263 (11th Cir. 2010))), *rev'd*, 141 S. Ct. 1648, 1661 (2021); United States v. Rehaif, 888 F.3d 1138, 1144 (11th Cir. 2018) (adopting broad construction based on circuit precedent that provided scant analysis of statutory language (citing United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997))), *rev'd*, 139 S. Ct. 2191, 2200 (2019).

46. *See* Johnson, *supra* note 27, at 79 (noting that the Court's ordinary-meaning analysis "often involve[s] sophisticated and resource-intensive analysis of dictionaries, statutory context, descriptive canons of interpretation, and other tools for determining linguistic meaning").

readings.[47] Courts that do so are adopting a definition of crime set by prosecutors, not by Congress, and are ultimately engaging in criminal lawmaking at odds with the ban on federal common law crime definition.[48]

Change could come. The logic of the new major questions doctrine in the administrative-law context provides a fresh approach for a more robust, generically applicable principle of strict construction for penal statutes.[49]

Under the major questions doctrine, the Court applies an "implied-limitation rule"[50] to broad or open-ended language in statutes on which agency action is based, requiring clear statutory authorization that Congress has delegated policymaking authority concerning "major" questions to the administrative agency.[51] In effect, the rule prevents Congress from engaging in implicit delegation of major policy questions and reduces the discretion of agencies to issue regulations on those topics.[52] The Court has recently used the major questions doctrine to invalidate several significant agency actions, drawing significant scholarly attention and criticism.[53]

---

47. *See infra* Part II.B (describing implicit delegation of crime definition to prosecutors).

48. Kahan, *supra* note 15, at 386; *see* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (making clear that the legislature "must . . . make an act a crime" and "affix a punishment to it").

49. *See infra* Part IV (providing a major-questions theory of lenity).

50. *See* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion) ("Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains . . . ."); CALEB NELSON, STATUTORY INTERPRETATION 923 (2d ed. 2023) (characterizing the Supreme Court's use of the major questions doctrine in *West Virginia v. EPA* as an application of "an implied-limitation rule"); *see id.* at 231–32 (describing implied-limitation rules in more detail).

51. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

52. *See infra* Part IV.A (describing the major questions doctrine).

53. Many scholars have condemned the doctrine as an antiregulatory tool of judicial aggrandizement at odds with the professed textualism of some of the Justices. *See, e.g.*, Sohoni, *supra* note 4, at 282–90 (questioning the doctrine's compatibility with textualism); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 472–76 (2023) (arguing that the doctrine increases judicial power on the basis of flawed assumptions that Congress is in decline or that delegations have corrupted its incentives); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (describing the major questions doctrine as "a clear effort to limit *Chevron*'s reach, or to blunt its force, by depriving agencies of *Chevron* deference in a certain set of cases" and arguing that the doctrine, at least in its stronger form, requires that questions of statutory meaning "be resolved unfavorably to the agency"); Lisa

Despite all the scrutiny, scholars have largely ignored how the logic of the major questions doctrine relates to lenity.[54] The major questions doctrine advances the same basic separation-of-powers insistence on legislative primacy in the administrative-law context that historic strict construction did in the context of penal statutes,[55] where the prospect of punishment raises the stakes of interpretation[56] and the limits on delegation have always been stronger.[57]

Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946 (2017) (characterizing the major questions doctrine as "antiregulatory"). This Article takes no substantive position on the use of the new major questions doctrine in the administrative-law context; rather, it borrows the "major questions" concept and applies it to penal statutes, a context where concerns about the delegation of criminal lawmaking are deeply rooted. *See infra* Part IV.B.

54. *But see* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 949–64, 982 (2024) (arguing that the major questions doctrine rests on norms of linguistic usage about how uncertainty is dealt with in "high-stakes" contexts and briefly suggesting that "[t]he rule of lenity" could be understood as "a manifestation of this more general intuition about language"); Lawson, *supra* note 17 (observing that the major questions doctrine can be "conceived" as "a civil rule of lenity" and that "the classical version of the rule of lenity treats all criminal cases as 'major questions' that require a *clear statement* from the legislature before statutes are given legal effect in particular cases"). At a higher level of generality, Michael Coenen and Seth Davis have argued that most justifications for the major questions doctrine support what they call the "equal application thesis," under which the principles of the major questions doctrine that apply to constrain agency action would equally apply to the judicial activity of construing statutes. *See* Michael Coenen & Seth Davis, *Does the Major Questions Doctrine Apply to the Federal Courts?*, 93 FORDHAM L. REV. 1951, 1954–59 (2025).

55. *See infra* Part IV.B (comparing lenity to the major questions doctrine).

56. *See* Wiltberger v. United States, 18 U.S. (5 Wheat.) 76, 95–96 (1820) (explaining that the rule of strict constructions is in part "founded on the tenderness of the law for the rights of individuals").

57. The Court has long made clear that federal courts lack the power to create common law crimes, *see supra* note 16, and that federal penal statutes with unduly vague language "undermine the Constitution's separation of powers" by "threaten[ing] to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges," in violation of the principle that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" United States v. Davis, 139 S. Ct. 2319, 2320 (2019). In addition, the administrative-law tradition of deferring to agency interpretations of ambiguous civil statutes never extended to government interpretations of criminal statutes. *Compare* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling a forty-year paradigm in which agency interpretations of civil statutes were generally afforded deference), *with* United States v. Apel, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

The Court's recent turn toward "interpretive restraint" in cases involving penal statutes can be understood as a modest form of major-questions lenity that may prepare the way for a stronger version of the doctrine.[58] Just as earlier administrative-law decisions showed hints of something like the major questions doctrine before the Court fully articulated it as a standalone doctrine,[59] so too might the series of "interpretive restraint" cases represent an initial step towards a more robust and clearly articulated conception of major-questions lenity as a generic rule for strictly construing penal statutes.

Regardless of the label, a robust major-questions lenity would do much to restore historic strict construction by extending to all federal penal statutes the anti-delegation protection that the modern stand-ins for lenity now only partially provide, at least to the extent interpretive questions implicate "major" concerns.[60]

In addition, a "majorness" trigger would distinguish major-questions lenity as a tool for constraining extremely broad penal statutes—a common type of penal statute[61] typically thought to be beyond the reach of lenity-like tools of interpretation that are triggered only by linguistic indeterminacy.[62] Insofar as major-questions lenity functions as an implied-limitation rule, its

58. *See infra* Part IV.B (describing how the Court invoked a tradition of "interpretive restraint" in both Dubin v. United States, 143 S. Ct. 1557 (2023), and Fischer v. United States, 144 S. Ct. 2176 (2024)).

59. *See infra* text accompanying notes 342–44 (discussing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

60. *See infra* Part IV.B (describing major-question lenity).

61. *See* Hessick & Hessick, *supra* note 3, at 2342 ("[L]egislatures routinely enact broad criminal statutes that sweep in far more conduct than the perceived problem that motivated the law."); Hessick & Kennedy, *supra* note 3, at 360–61 (describing the legislative incentives to write broad laws); Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 658–59 (2019) ("[O]urs is *not* a world where lawmakers tend to draft well-tailored, proportional statutes. Particularly in the realm of criminal law, the tendency is just the opposite . . . ."); Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, 28 CRIM. JUST., Spring 2013, at 4, 6 (highlighting the "deluge of overly broad" penal statutes).

62. Brennan-Marquez, *supra* note 62, at 642–43 (arguing that attempts to "recharacterize breadth as a species of linguistic uncertainty . . . . verge on incoherent" and calling for an alternative approach to address the problem of breadth in penal statutes).

application could extend to statutes with broad but seemingly clear language.[63]

Major-questions lenity could be understood as rooted in a normative commitment to the separation of powers.[64] It could also be viewed as a descriptive canon based on the high stakes of punishment,[65] or "commonsense principles of communication" that situate penal statutes within the context of our constitutional structure.[66] A descriptive justification would distinguish major-questions lenity from the conventional conception of lenity as a purely normative canon.[67]

The full embrace of major-questions lenity would promote the separation of powers by working to limit the practice of implicit delegation of crime definition.[68] Because major-questions lenity would not be relegated to the end of the interpretive process—as is modern lenity[69]—it would meaningfully help to curb lower courts' adoption of overly broad and literalistic

---

63. *See* NELSON, *supra* note 50, at 230 (explaining that implied-limitation rules "encourage courts to read implied limitations into seemingly general statutory language—language that is broad enough as a matter of ordinary usage to encompass the issue in question, but that does not specifically address that issue or show that members of the enacting legislature thought about it").

64. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring) (describing the major questions doctrine as a "clear-statement rule[ ]" that "protect[s] the . . . separation of powers"); *see also* Wooden v. United States, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in judgment) (arguing for a robust rule of lenity that would "prevent[] judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities" (quoting United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.N.H. 1812) (No. 15,718))).

65. *See* Wurman, *supra* note 54, at 958–60 (justifying the major questions doctrine in terms of requiring more clarity in high-stakes contexts).

66. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (Barrett, J., concurring); *see id.* (Barrett, J., concurring) (noting that "our constitutional structure[ ] . . . is itself part of the [relevant] legal context" and that, in light of Article I's Vesting Clause, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself").

67. *See, e.g.*, NELSON, *supra* note 50, at 162 (observing that "[t]here is widespread agreement that the rule of lenity is *not* a tool for identifying what members of the enacting legislature probably intended penal statutes to mean" and that "lenity is not a 'descriptive' canon," but rather one of "the most purely 'normative' of the canons").

68. *Cf.* Kahan, *supra* note 15, at 354 ("Because it forecloses Congress's tacit reliance on judicial lawmaking as a strategy for enlarging Congress's power to promulgate general policies, a rule of strict construction is tantamount to a nondelegation doctrine.").

69. *See* text accompanying note 22.

constructions of penal statutes based on expansive theories of prosecution.

This Article proceeds as follows. Part I provides important historical context by summarizing the history of strict construction and its demotion to a significantly weakened rule of lenity, drawing special attention to the doctrine's longstanding separation-of-powers justification. Part II provides a descriptive account of lenity's history after it was weakened, arguing that the Court did not merely diminish the doctrine but fragmented it into multiple partial substitutes that ultimately promote the same separation-of-powers value for targeted sets of penal statutes. Part III considers the implications of that state of affairs, contending that it creates a regime of partial leniency in which implicit delegation of crime definition is largely permitted, undermining the anti-delegation, separation-of-powers rationale on which historic strict construction was based. Part IV explores how the logic of the major questions doctrine relates to lenity and suggests that some of the Court's recent decisions can be understood as embracing a modest form of major-questions lenity that should be developed into a more robust version of the doctrine.

I. RISE AND FALL OF STRICT CONSTRUCTION

A. ENGLISH ORIGINS

As early as the sixteenth century, English common law courts relied on a "rule of strict construction" for penal statutes,[70] which they created in reaction to the large number of offenses that qualified for capital punishment.[71] The imposition of the death penalty for these offenses had previously been limited by the "benefit of clergy" defense, a medieval doctrine that spared defendants from capital punishment upon their recitation of certain passages of the Bible.[72] But as literacy rose and

70. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 748–51, 750 n.12 (1935).

71. *Id.*; *see also* Hopwood, *supra* note 3, at 714 (explaining that lenity's "genesis occurred . . . in England, where the death penalty was imposed for a multitude of crimes without regard for their severity"); 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 10–11 (1948) (describing the wide range of capital offenses under eighteenth century English criminal law).

72. Mullaney v. Wilbur, 421 U.S. 684, 692 (1975); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 87 (1998).

defendants could more easily rely on the defense,[73] Parliament abrogated the benefit-of-clergy doctrine.[74] Courts responded by "invent[ing] strict construction to stem the march to the gallows."[75]

In this emergent conflict, the legislature sought to advance a "policy of deterrence through severity," and courts aimed to "temper[ ] this severity with strict construction[,]" even if that sometimes led to "absurd" results.[76] To the extent judges applied strict construction to spare defendants from severe punishment clearly intended by Parliament, "the rule was in significant tension with parliamentary supremacy."[77] By the late eighteenth century, strict construction had come to be described as a rule "subject [to] more constant controversy than perhaps . . . any in the whole circle of the Law."[78]

The rule applied to ambiguous and vague statutory language.[79] In the case of ambiguity, a court would opt for a narrow interpretation that limited the statute's scope, thereby avoiding

---

73. Solan, *supra* note 72, at 87; *see* Hall, *supra* note 70, at 749 ("Benefit of clergy . . . did not become really important until the growing literacy among laymen in the latter part of the 14th century made a considerable number of them eligible to claim it under the literacy test adopted some years earlier.").

74. Solan, *supra* note 72, at 87; Hall, *supra* note 70, at 749.

75. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985); *see also* Hall, *supra* note 70, at 751 (identifying the death penalty as "the factor which had brought the doctrine of strict construction into existence as literally *in favorem vitae*").

76. Hall, *supra* note 70, at 751; *see* Hopwood, *supra* note 3, at 714 ("[S]trict construction thus 'reflected a systemic preference for life and liberty and a systemic bias against overpunishment.'" (quoting John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 UC DAVIS L. REV. 1955, 1997 (2015)); *see also* Kahan, *supra* note 15, at 358 ("By construing these statutes narrowly—indeed, in many cases, fantastically—English courts were able both to temper the severity of the law and to protect the judiciary's traditional prerogatives in the administration of criminal justice."); Solan, *supra* note 72, at 88–89 ("[S]trict construction of penal statutes came into play when a judiciary disapproved of legislative harshness it regarded as cruel. Thus, it used lenity to thwart, not promote, the will of the legislature.").

77. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129 (2010).

78. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 141 (Charles Warren Everett ed., 1928).

79. Ambiguity refers to linguistic indeterminacy that arises when a term can be used in more than one sense such that it is open to a "discrete number of possible meanings." LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES 38–39 (2010). Vague language is open to "innumerable possible meanings." *Id.*

imposition of the death penalty in a particular case.[80] One famous example involved an English court's strict construction of a statute requiring capital punishment for "those who are convicted of stealing horses."[81] The statute was ambiguous because it could be understood to cover those who steal any number of horses, including one, or to cover only those who steal multiple horses.[82] Although the first option was likely intended, the second was also fairly possible.[83] Applying strict construction, the court adopted a narrow construction of the statute, interpreting it as *not* applying to someone who stole only one horse and thereby avoiding imposition of capital punishment.[84]

When addressing vagueness, English courts would sometimes go so far as to "treat[] vague statutory language as devoid of meaning altogether."[85] One English court, for example, addressed a statute prohibiting the "stealing [of] sheep, *or other cattle*."[86] At the time, the term "cattle" was understood to "encompass all '[b]easts of pasture; not wild nor domestick.'"[87] The term "other cattle" was thus not merely ambiguous but vague insofar as "cattle" was open-ended and had practically "innumerable possible meanings."[88] The English court struck the term from the statute, deeming it "much too loose."[89]

B. AMERICAN ADOPTION AND ALTERATION

Trained in English common law, American judges applied strict construction "from the start,"[90] with the Supreme Court

80. *See* Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. 1565, 1577 (2023) ("In a typical application of the rule of strict construction, an English court would narrowly construe indefinite statutory language to avoid the imposition of the death penalty in a particular case.").

81. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765).

82. Solan, *supra* note 72, at 87–88.

83. *Id.* at 88.

84. *Id.* at 87.

85. Johnson, *supra* note 80, at 1577.

86. BLACKSTONE, *supra* note 81, at 87.

87. Johnson v. United States, 576 U.S. 591, 614 n.2 (2015) (Thomas, J., concurring) (quoting 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 286 (4th ed. 1773)).

88. *See* SOLAN, *supra* note 79, at 38.

89. BLACKSTONE, *supra* note 81, at 88; Solan, *supra* note 72, at 87–88.

90. Barrett, *supra* note 77, at 129–30 & nn.91–92; *see* Hessick & Hessick, *supra* note 3, at 2329–32 & nn.151–62 (identifying early state courts that applied strict construction); Hall, *supra* note 70, at 748 (noting "hundreds of cases

recognizing it as early as 1795.[91] But the rationale for the rule quickly took on an American flavor anchored in our constitutional structure. In an early case, *Wiltberger v. United States*,[92] Chief Justice Marshall justified the rule on both fair-warning and separation-of-powers grounds. "The rule that penal laws are to be construed strictly," he explained, "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department."[93] He elaborated that "the legislature, not the Court," is "to define a crime, and ordain its punishment."[94] Under the rule of strict construction, Chief Justice Marshall explained, "[t]o determine that a case is within the intention of a statute, its language must authorise [courts] to say so."[95]

At least in the federal system, the anti-delegation, separation-of-powers rationale that Chief Justice Marshall articulated is more basic than other justifications for strict construction, such as fair-notice or the protection of liberty, in the sense that preventing courts from engaging in criminal lawmaking is the main way those other values are secured.[96] But in another sense, those other values may be the ultimate ends that strict

---

stating and usually applying the common-law rule of strict construction"); *see also* Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What a Long Strange Trip It's Been,"* 28 GEO. MASON L. REV. 49, 57 n.42 (2020) (collecting early state cases).

91. *See* United States v. Lawrence, 3 U.S. 42, 45 (1975) (strictly construing a treaty that had "introduced" a new "highly penal" remedy for addressing desertion); *see also* Hessick & Hessick, *supra* note 3, at 2334 & nn.171–72 ("In 1794, the district court in South Carolina adopted the rule of strict construction for criminal statutes.").

92. 18 U.S. (5 Wheat.) 76 (1820).

93. *Id.* at 95; *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 63–64 (2005) (explaining that the separation of powers embodied in the Constitution made "Congress . . . obliged to define in advance, via generally applicable statutes, which misdeeds deserved punishment").

94. *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 24 (1812) (insisting that the legislature "must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction for the offence").

95. *Wiltberger*, 18 U.S. (5 Wheat.) at 96.

96. *See* Kahan, *supra* note 15, at 350 (arguing that the "nondelegation," separation-of-powers justification for lenity is "more basic" than the "other values associated with lenity" because "foreclosing judicial lawmaking is understood to be the primary means of securing the other values" and "the value of legislative primacy that it promotes is viewed as a sufficient justification for lenity").

construction serves. For the Founding generation, protecting individual liberty was a central justification for the separation of powers.[97] That may have been what Chief Justice Marshall meant when he spoke of "the tenderness of the law for the rights of individuals."[98] In the words of James Madison, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" that would threaten individual liberty.[99] Allowing Congress to delegate criminal lawmaking authority undermines that structure and directly threatens individual liberty[100] by increasing the risk of punishment for conduct not clearly covered by a penal statute.[101] For those reasons, penal statutes bring separation-of-powers concerns to their zenith.

In addition to providing an American basis for strict construction rooted in protecting liberty, the separation-of-powers rationale supplied a justification distinct from judicial resistance to the death penalty. That ensured the rule's continued application, given that the nineteenth century "marked the end of the death penalty as the chief mode of punishment for serious crimes" in the United States and England.[102]

---

97. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 306–07 (2021) (explaining how the Founders meant for the separation of powers to protect against government overreach); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1734–35 (2012) (discussing how the separation of powers protects individual liberty); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 402–07 (1996) (observing that, at the Founding, the "three main rationales" for "separation of powers" were "efficiency," "preserving liberty," and "avoiding tyranny").

98. *Wiltberger*, 18. U.S. (5 Wheat.) at 95.

99. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see* THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961) (warning of "the danger [to liberty]" posed by "assembling all power in the same hands").

100. *See* THE FEDERALIST NO. 47, *supra* note 99, at 303 ("When the legislative and executive powers are united in the same person . . . there can be no liberty[.]" (quoting Montesquieu)).

101. *See* Hessick & Hessick, *supra* note 97, at 307 (explaining that "[t]he threat from" combining legislative and executive powers "is more pronounced in criminal cases than in civil cases" in part because "criminal laws are the primary means by which the government deprives individuals of liberty" both by imposing "terms of imprisonment or even death" upon offenders and by "curtail[ing] the freedom of individuals" through the "prohibit[ion of] additional conduct").

102. Hall, *supra* note 70, at 751.

In *Wiltberger*, Chief Justice Marshall also articulated a clear limit on the American rule of strict construction, explaining that it applied only to ambiguous statutory language. As he put it, "[al]though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature" as "collected from the words they employ."[103] Chief Justice Marshall was adamant that "[w]here there is no ambiguity in the words, there is no room for construction."[104] This limit on the rule's domain brought strict construction in line with the American judicial norm of "faithful agency" to legislative will.[105]

A number of early courts viewed strict construction as a constraint on the judiciary rather than on Congress.[106] As one put it, "while it is said that penal statutes are to receive strict construction, nothing more is meant than that they shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for."[107]

That perception of the use of strict construction in *Wiltberger* appears to have been by design. As Dan Kahan has noted, Chief Justice Marshall "aligned strict construction with what was then the most basic tenet of federal criminal law: that federal courts lacked the power to develop a body of *common law crimes*."[108] By tying strict construction to "the plain principle,

103. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

104. *Id.* at 95–96. While riding circuit, Justice Marshall had previously noted that strict construction "has never been understood, by me at least, to imply, that the intention of the legislature as manifested by their words, is to be overruled; but that in cases where the intention is not distinctly perceived . . . it may be construed to embrace or exclude a particular case . . . ." The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93).

105. Barrett, *supra* note 77, at 132–33; *see* Kahan, *supra* note 15, at 359 (noting that, in *Wiltberger*, "[Chief Justice] Marshall deployed [strict construction] to dramatize the judiciary's *subservience* to Congress in the domain of criminal law").

106. Barrett, *supra* note 77, at 133 ("As some judges told it, the point of [strict construction] was to prevent courts from expanding penal statutes beyond their terms to further the statute's apparent purpose."); *see id.* at 133 n.102 (collecting cases).

107. The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4,499).

108. Kahan, *supra* note 15, at 359; *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 427–28 (2012) (observing that "'federal common law' has never had any proper place on the *criminal* side of the federal docket," a feature that "differentiate[s] *federal* criminal law from *state* criminal law,

that the power of punishment is vested in the legislative, not in the judicial department,"[109] he was "unmistakably allud[ing] to a parallel passage"[110] from the Court's earlier federalism and separation-of-powers decision in *United States v. Hudson*,[111] which announced that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction to the offense" before any person could be subject to criminal punishment.[112] Understood in that context, as Kahan has explained, *Wiltberger* instructed "that Congress could not anticipate a cooperative court willing to remedy defects in legislative draftsmanship or to extend a general principle by analogical reasoning."[113]

By adopting strict construction on that basis, Kahan has elaborated, Chief Justice Marshall made clear that the principle of legislative primacy in crime definition "meant not just that Congress was *entitled* to take the lead in defining criminal law, but also that Congress was obliged to do so however inconvenient the consequences might be."[114] In this way, early American federal courts "turned" the "initial motivation" for the English rule of strict construction "on its head" by using it to "reinforce, not undermine, the separation of powers."[115]

Throughout the nineteenth century, the Supreme Court led the federal courts in applying this distinctly American version of strict construction—narrowly construing "reasonable doubt[s]"

---

which has typically recognized the propriety of judge-fashioned common-law crimes").

109. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

110. Kahan, *supra* note 15, at 359.

111. 11 U.S. (7 Cranch) 32 (1812).

112. *Id.* at 34; *see also* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840, at 541–43 (2021) (providing historical context for the *Hudson* decision); Kahan, *supra* note 15, at 359–61 (elaborating on the political and social conditions that led to *Hudson* and its clear effect on the rationale in *Wiltberger*).

113. Kahan, *supra* note 15, at 361; *see also Wiltberger*, 18 U.S. (5 Wheat.) at 96 ("It would be dangerous . . . to carry the principle, that a case which is within the reason or the mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is . . . of kindred character, with those which are enumerated."); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 986 & n.102 (2021) (characterizing Chief Justice Marshall's opinion in *Wiltberger* as "declin[ing] to read a [penal] statute as expansively as its mischief").

114. Kahan, *supra* note 15, at 361.

115. Barrett, *supra* note 77, at 134.

in the text of federal penal statutes.[116] During this period, the "federal courts saw themselves [as] engaged in construction" of "statutory indeterminacy"[117] that sought to avoid "mak[ing] every doubtful phrase" in a penal statute "a drag-net for penalties."[118] State courts of the same period often applied strict construction in the same manner;[119] they sometimes also applied it in a way that resembled how English courts had used it to void vague or open-ended language.[120]

Leading treatises of the period described strict construction as applying to "statutes which subject one to a punishment or penalty, or to forfeiture, or a summary process calculated to take away his opportunity to make a full defence, or in any way deprive him of his liberty."[121] The rule had purchase whenever the

---

116. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 396 (1867); *see, e.g.*, Ballew v. United States, 160 U.S. 187, 197 (1895) ("[I]t is essential that the crime punished must be plainly and unmistakably within the statute."); Sarlls v. United States, 152 U.S. 570, 576 (1894) ("That is a penal statute, and must receive a strict construction."); United States v. Reese, 92 U.S. 214, 219 (1876) ("This is a penal statute, and must be construed strictly[.]"); Harrison v. Vose, 50 U.S. (9 How.) 372, 378 (1850) ("In the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of the [defendant].").

117. Johnson v. United States, 576 U.S. 591, 616 (Thomas, J., concurring in judgment).

118. *Harrison*, 50 U.S. (9 How.) at 378.

119. *See, e.g.*, Bunfill v. People, 39 N.E. 565, 567 (Ill. 1895); Myers v. Connecticut, 1 Conn. 502, 504–05 (1816); State v. Boon, 1 N.C. (Tay.) 191, 192–97 (1801).

120. *See, e.g.*, McConvill v. Mayor of Jersey City, 39 N.J.L. 38, 43–44 (1876) (holding that an ordinance forbidding the driving of "any [drove] or [droves] of horned cattle" through public places was "bad for vagueness and uncertainty in the thing forbidden" given the "interdetermina[cy]" of the term "drove"); State v. Mann, 2 Or. 238, 240–41 (1867) (holding a statute that prohibited "gambling devices" was "void" because "the term has no settled and definite meaning"); Jennings v. State, 16 Ind. 335, 336 (1861) (deeming a statute prohibiting "public indecency" void for vagueness), *overruled by* Wall v. State, 23 Ind. 150 (1864).

121. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES: INCLUDING THE WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL § 193 (2d ed. 1883); *see id.* § 189(c) ("It being a primary function of all laws to maintain the rights of individuals and the public, statutes taking any of them away, even where not unconstitutional, are to be strictly construed."); *see* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 349–50 (1891) (noting that "every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation"); *see also* BISHOP, *supra*, § 196 ("While the parts of a penal statute which are subject to punishment or a penalty are, from their odious nature, to be construed strictly, those which exempt from penal consequences will, because of their opposite character,

"plain meaning" of the statutory language was "reasonably open to question."[122] It kept courts from imposing criminal punishment beyond what the legislature had clearly authorized by statutory text,[123] even when a particular application seemed consistent with the statute's purpose or the "mischief" at which it was aimed.[124] Strict construction depended on the underlying assumption that a legislature "does not intend the infliction of punishment, or to interfere with the liberty or rights of the citizen," except where it "[e]xpresses itself clearly."[125] And the "degree of strictness"[126] a court applied when construing the statute sometimes varied according to "the severity of the penalty."[127]

C. DECLINE AND DEMOTION TO LENITY

Beginning in the mid-nineteenth century, strict construction declined at both the state and federal levels.

---

receive a liberal interpretation."). For a more detailed discussion of these treatises, see Hopwood, *supra* note 13, 926–28.

122. SUTHERLAND, *supra* note 121, §§ 349–50.

123. *See* BISHOP, *supra* note 121, § 194 ("Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused."); SUTHERLAND, *supra* note 121, § 353 ("[I]f there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty."); Lawson, *supra* note 17, at 5 (characterizing the "classical version [of lenity]" applied in *Wiltberger* as a rule that "says that no one should be criminally convicted unless the law *clearly and unambiguously* establishes that the defendant's conduct violates the law").

124. *See* SUTHERLAND, *supra* note 121, § 350 ("Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language."); *id.* ("[A penal statute] cannot be made to embrace cases not within the letter, though within the reason and policy, of the law."); BISHOP, *supra* note 121, § 194 (noting that strictly construed statutes apply only to acts "which are within both their spirit and letter").

125. SUTHERLAND, *supra* note 121, § 350; *see also id.* § 348 n.6 ("[W]e are thus far bound to a strict construction in a penal statute, that if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose." (quoting Nicholson v. Fields, 158 Eng. Rep. 695, 699 (1862) (Pollock, C.B.))).

126. BISHOP, *supra* note 121, § 193 (noting that the "degree of strictness" a court applied would "depend somewhat on the severity of the punishment" that a statute inflicted).

127. SUTHERLAND, *supra* note 121, § 347; *see also id.* §§ 349–50 (noting that strict construction requires that "every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation," and that "this consideration presses with increasing weight according to the severity of the penalty").

Many state legislatures began to view it as an obstacle to their own efforts to implement criminal policy through legislation,[128] much like the English Parliament had viewed the benefit-of-clergy defense as an impediment to deterrence-driven policies of capital punishment.[129] A number of state legislatures enacted "fair construction" statutes,[130] which provided that all provisions of a state's criminal code should "be construed according to the fair import of the terms" and that "[t]he rule of the common law that penal statutes are to be strictly construed[] has no application."[131] Other state laws abrogating strict construction required penal statutes to be "liberally construed" to effectuate "the true intent and meaning of the legislature."[132] Courts in most states with both types of statutes "consistently applied" them from the time of their enactment.[133]

At the federal level, Congress did not abrogate strict construction by statute. Yet the Supreme Court significantly weakened it, as part of a larger paradigm shift in its approach to statutory interpretation.

---

128. *See* 3 NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:7 (8th ed. 2018) ("[S]trict construction routinely frustrated legislative efforts to implement criminal law policy. Consequently, legislatures began directly to abrogate or modify the old rule."); Kahan, *supra* note 15, at 384 ("'[T]he disinclination of courts and lawyers to give to penal statutes any wider application than the letter required' was severely constraining the power of legislators 'to make improvements in the definition of old crimes.'" (quoting ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 143–44 (1930))).

129. *See supra* text accompanying notes 72–75 (describing the development of the benefit-of-clergy doctrine).

130. *See* Jeffries, *supra* note 75, at 204 n.41 (identifying the New York version as the "original" fair-construction statute); Hall, *supra* note 70, at 754 (treating the New York statute as representative of the fair-construction approach).

131. THE PENAL CODE OF THE STATE OF NEW YORK § 10 (COMM'RS OF THE CODE 1865).

132. Hall, *supra* note 70, at 754 (quoting the applicable Arkansas, Colorado, and Illinois statutes).

133. *See id.* at 756 (describing the applicable state statutes); *see also id.* at 756 n.41 (identifying "California, Idaho, Illinois, Kentucky, Minnesota, North Dakota, Oregon, South Dakota, Texas (court of criminal appeals), and Utah" as jurisdictions in which courts "consistently applied" the statutes from their enactment). In a minority of jurisdictions, however, courts continued to apply historic strict construction for decades. *See id.* at 755–56 & nn.39–40 (noting that, as of 1935, historic strict construction "still prevail[ed] generally, in spite of statutes embodying legislative canons of construction, in Arkansas, Colorado, Iowa, Nebraska, Nevada, and Washington").

In the early twentieth century, as federal statutes became increasingly complex and often served as scaffolding for the growing administrative state, the interpretive culture at the Court changed.[134] Interpretive questions about regulatory statutes occupied more of the Court's docket, and the Court and commentators were increasingly comfortable looking to a broader range of materials, including legislative history and practical consequences, to make sense of those statutes.[135] This new interpretive regime—now known as purposivism—would prove devasting for strict construction. By the New Deal era, commentators had come to view strict construction as thwarting courts' ability to ascertain legislative intent and ultimately impeding Congress's policy goals at the expense of "the immediate safety of society."[136]

Justice Frankfurter, a purposivist justice who joined the Court in 1939, led the attack on strict construction.[137] In a prominent law review article he wrote while on the Court, Justice Frankfurter expressed the view that the growth of complex regulatory statutes "compelled consideration of[] all that convincingly illumines an enactment, instead of merely that which is called, with delusive simplicity, 'the end result.'"[138] And in an opinion for the Court, Justice Frankfurter wrote that "penal enactments . . . are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay

134. Solan, *supra* note 72, at 97–101.

135. *Id.* The shift in the interpretive culture can be seen in a sharp change in the content of a leading statutory-interpretation treatise from its first edition to its second edition. *Compare* SUTHERLAND, *supra* note 121, § 380 (giving no interpretative role to legislative history), *with* 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 470 (2d ed. 1904) (discussing the use of evidence gained from congressional proceedings as evidence of legislative intent).

136. JOHN BARKER WAITE, CRIMINAL LAW IN ACTION 320–21 (1934); *see also* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1204 (2013) (arguing that strict construction impeded implementation of reform-oriented approaches to punishment that focused on deterrence and incapacitation).

137. Solan, *supra* note 72, at 102–08; *see* Hessick & Hessick, *supra* note 3, at 2339 ("[Justice] Frankfurter argued that the role of the Court in interpreting statutes is simply to implement the will of the legislature, not to . . . inject leniency into the interpretive process.").

138. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 542 (1947).

down.'"[139] He went on to note that "[s]tatutory meaning . . . is more to be felt than demonstrated."[140]

Operating within the purposivist framework, Justice Frankfurter sapped strict construction of its strength in an "indirect way."[141] He relegated it to "the end of the interpretive process," something to be considered only if ambiguity remained after looking to all indicia of legislative intent that could be gathered from the entire suite of available legal materials—text, purpose, structure, legislative history, etc.[142] As Justice Frankfurter put it, "[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers."[143]

That subtle, seemingly technical move all but eliminated strict construction at the federal level.[144] It meant that the Court would search far and wide for legislative intent before strictly construing an indeterminacy, thereby rendering strict construction a "tool of last resort"[145] reserved only for the very rare cases in which the broad range of materials for ascertaining legislative intent could not yield sufficient certainty.[146] As a marker of this

139. United States v. Shirey, 359 U.S. 255, 260–61 (1959) (quoting United States v. Whiteridge, 197 U.S. 135, 143 (1905)).

140. *Id.* at 261.

141. Sohoni, *supra* note 136, at 1204.

142. Hopwood, *supra* note 3, at 717; *see supra* note 10 (collecting cases). For arguments that Justice Frankfurter's reconceptualization of strict construction was ill-founded, see Romantz, *supra* note 3, at 535–37, and Hopwood, *supra* note 3, at 717–18.

143. Callahan v. United States, 364 U.S. 587, 596 (1961).

144. *See* Sohoni, *supra* note 136, at 1205 (observing that following this reformulation the rule "began to lose its bite"); Kahan, *supra* note 15, at 386 ("Ranking [strict construction] 'last' among interpretive conventions [has] all but guarantee[d] its irrelevance."); *see also* Hessick & Hessick, *supra* note 3, at 2239 (characterizing modern lenity as a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes").

145. Hessick & Kennedy, *supra* note 3, at 379.

146. *See, e.g.*, United States v. Bass, 404 U.S. 336, 347 (1971) (applying lenity "[a]fter 'seizing everything from which aid can be derived'" (quoting United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805)); *see* Stinneford, *supra* note 3, at 1958 ("[If] even the slightest evidence indicates a legislative preference for a broad construction of a criminal statute, the Supreme Court leaves the rule of lenity by the wayside.").

change, Justice Frankfurter labeled this diminished approach the rule of "lenity."[147]

In the decades that followed, the Court adhered to this reformulated and renamed version of lenity,[148] even as the addition of new members—most notably, Justice Scalia—moved the Court away from purposivism and towards textualism.[149] Justice Scalia himself advocated for a more robust version of lenity that would outrank purposivist interpretive tools for resolving textual indeterminacy, such as legislative history.[150] He emphasized lenity's separation-of-powers function of "assuring that the society, through its representatives, has genuinely called for punishment to be meted out" and that "legislative history can never provide [that] assurance."[151] Justice Scalia conceived of lenity as a rule that both "place[d] the weight of inertia upon the party that can best induce Congress to speak more clearly and ke[pt] courts from making criminal law in Congress's stead."[152] He thus argued that lenity should apply whenever "a reasonable

147. Bell v. United States, 349 U.S. 81, 83 (1955); *see* Stinneford, *supra* note 3, at 1995 n.233 (identifying *Bell* as the first use of "lenity" in place of "strict construction"); Solan, *supra* note 72, at 103 ("[Justice] Frankfurter may not have invented the rule [of lenity], but he apparently did name it."); *see also* Wooden v. United States, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in judgment) ("The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" (quoting The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93))).

148. *See, e.g.*, Dixson v. United States, 465 U.S. 482 (1984) (resolving ambiguity with legislative history rather than lenity); United States v. Turkette, 452 U.S. 576 (1981) (same); Bifulco v. United States, 447 U.S. 381 (1980) (same); Simpson v. United States, 435 U.S. 6 (1978) (same); Huddleston v. United States, 415 U.S. 814, 820–21, 831 (1974) (same). For an argument that the Court's decades-long process of weakening lenity helped to "perpetuate mass incarceration and its concomitant racial disparities," see Brandon Hasbrouck, *On Lenity: What Justice Gorsuch Didn't Say*, 108 VA. L. REV. ONLINE 239, 241 (2022).

149. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 298 (1992) (plurality opinion); Moskal v. United States, 498 U.S. 103, 109–11 (1990).

150. In both *R.L.C.* and *Moskal*, for example, Justice Scalia objected to the Court's use of legislative purpose and history, rather than lenity, to resolve statutory ambiguity. *See R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring) (arguing that using legislative history to resolve statutory ambiguity "compromises . . . the purposes of the lenity rule"); *Moskal*, 498 U.S. at 131–32 (Scalia, J., dissenting) ("If the rule of lenity means anything, it means that the Court ought not to do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art . . . .").

151. *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring).

152. *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

doubt persists."[153] In recent years, Justice Gorsuch has advocated for a similar approach.[154]

Despite their efforts, the modern textualist[155] Court has stuck with the diminished conception of lenity. If anything, the modern Court has further weakened the rule, often restricting its application to circumstances in which "grievous ambiguity" remains following the use of all other interpretive tools.[156] Thus, while purposivist justices may have "initially hamstrung lenity," some of the textualists that took their place "also bear some blame."[157] Lenity is now commonly understood as a purely normative canon that lacks any descriptive justification—and thus typically has little utility for textualists.[158] The Court has not

---

153. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 299 (2012) (quoting *Moskal*, 498 U.S. at 108); *see also* Abramski v. United States, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) ("[T]he rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' about whether Congress has made the defendant's conduct a federal crime . . . in other words, whenever those tools do not decisively dispel the statute's ambiguity.").

154. *See, e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring in judgment) ("Under [lenity], any reasonable doubt about the application of a penal law must be resolved in favor of liberty.").

155. *See* William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023) ("The Supreme Court is now dominated by devoted textualists."); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 ("The Roberts Court is often described as textualist.").

156. Pugin v. Garland, 143 S. Ct. 1833, 1843 (2023) (quoting Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016)); Maracich v. Spears, 570 U.S. 48, 76 (2013) (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)); Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)); Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974)).

157. Hessick & Hessick, *supra* note 3, at 2340; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1992) (noting that, in the 1980s, the Court "showed less enthusiasm for [lenity]"). For an argument that "the Court's general approach to statutory interpretation deploys textualist rhetoric to mask pragmatic decisions," see Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 124 (2016).

158. *See, e.g.*, NELSON, *supra* note 50, at 162 (observing that "[t]here is widespread agreement that the rule of lenity is *not* a tool for identifying what members of the enacting legislature intended penal statutes to mean" and that "lenity is not a 'descriptive' canon," but rather one of "the most purely 'normative' of the canons").

relied on lenity to justify a narrow construction of a penal statute in over a decade,[159] likely longer.[160]

The Court's approach seems to have further eroded strict construction in the states. For one thing, state courts tend to borrow the Court's interpretive methods, including its diminished rule of lenity.[161] Perhaps more significantly, model state legislation created in the latter half of the twentieth century rejected historic strict construction, echoing the Court's shift away from it.

In the 1960s, the American Law Institute's Model Penal Code—which broadly influenced state criminal law[162]—took the position that "when the language [of a Code provision] is susceptible of differing constructions it shall be interpreted to further the general purposes [of the Code] . . . and the special purposes of the particular provision involved."[163] The Code deliberately displaced "[t]he ancient rule that penal law must be strictly construed" on the ground that it "unduly emphasized only one aspect of the problem" of statutory indeterminacy—fair notice to potential offenders.[164]

---

159. *See* Johnson, *supra* note 27, at 76, 79 (observing that, over the ten-year period from the 2013 Term through the 2022 Term, "the Court *never* firmly relied upon the rule of lenity").

160. *See* Price, *supra* note 3, at 886 (observing that, as of 2003, lenity "appear[ed] occasionally as a supplemental justification for interpretations favored on other grounds" but "never st[ood] alone to compel narrow readings"); *see also* Jeffries, *supra* note 75, at 198–99 (noting in 1985 that "strict construction" of criminal statutes "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation").

161. *See generally* Pohlman, *supra* note 43 (observing that state courts often borrow statutory-interpretation methodology and tools, including substantive canons, from federal-law decisions of the Supreme Court).

162. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 948 (1999) ("The success of the [Model Penal] Code in stimulating American jurisdictions to codify or recodify their criminal law was unprecedented.").

163. MODEL PENAL CODE § 1.02(3) (AM. L. INST. 1985); *see also id.* § 1.02 explanatory note (noting that this provision "replaces the rule that penal statutes should be 'strictly construed' with the command that criminal statutes should be construed according to their fair import, and that ambiguities should be resolved by an interpretation that will further the general principles stated in this Section," such as "the fair warning provisions, and the special purposes of the statute involved").

164. *Id.* § 1.02 cmt. 4.

Likewise, a comment in the Uniform Statute and Rule Construction Act, promulgated in the 1990s,[165] expressly stated that "[t]he presumption that penal statutes shall be strictly construed is not included in this Act," noting that it had already "been expressly rejected by a number of States."[166] The comment also cited authority "demonstrat[ing] that courts," including the Supreme Court, had not "consistently appl[ied]" the presumption."[167]

As it now stands, over half of the states have statutes purporting to override historic strict construction.[168]

II. FRAGMENTATION OF LENITY

The typical telling of lenity's history ends there. The usual narrative is that strict construction transformed into a weakened rule of lenity, that defendants are worse off because of it, and that the Supreme Court is largely to blame for this state of affairs.[169] That narrative is partly true. But it is incomplete. A close look at the Court's behavior in recent decades shows that historic strict construction has not merely been diminished or eliminated—but has instead been *fragmented* into a set of more limited interpretive tools or approaches that continue to reflect

---

165. The Act was originally approved as the "Uniform Statutory Construction Act" in 1965 by the National Conference of Commissioners on Uniform State Laws but was later redesignated as the Model Statutory Construction Act. *See* UNIF. STATUTE AND RULE CONSTR. ACT prefatory note (NAT'L CONF. COMM'RS UNIF. STATE L. 1995). These previous versions were considered before the drafting of the final "Uniform Statute and Rule Construction Act" in 1995. *Id.*

166. *See id.* § 18 cmt. (The Construction Process).

167. *Id.*

168. *See* WILLIAM N. ESKRIDGE JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION 586 (2d. ed. 2024) ("As many as twenty-eight states have abolished or even reversed the rule of lenity by statute."); *see also* Allen, *supra* note 21, at 398 ("Following the Model [Penal] Code['s] lead, or arriving at similar positions independently, a substantial number of state legislatures have enacted statutory principles that exclude the mandate of strict interpretation.").

169. *See* Hessick & Hessick, *supra* note 3, at 2339–41 (explaining that lenity is now applied as a "tool of last resort" and arguing that the passage of "incredibly broad and imprecise laws" has led to "a staggering number" of incarcerations); Hopwood, *supra* note 3, at 701, 717–20 (describing how the Supreme Court weakened the rule of lenity); Romantz, *supra* note 3, at 525, 534–57 (tracing lenity's decline at the Supreme Court); Hessick & Kennedy, *supra* note 3, at 366–68 (observing that "the rule of lenity has become a shadow of its former self"); Shadgett, *supra* note 3, at 698–703 (exploring modern lenity's deficiencies).

a bottom-line preference for narrow constructions of indeterminate federal penal statutes. These interpretive tools often promote the same fair-notice and separation-of-powers values on which the early American approach to strict construction was based.

In recent terms, for example, when the Court has construed a penal statute, it has adopted a narrow construction nearly twice as often as it has adopted a broad one.[170] When justifying these narrow constructions, the Court sometimes relied on a substantive canon of construction, particularly the scienter presumption, the federalism presumption, or the avoidance of constitutional vagueness concerns.[171] These substantive canons vary in form and application. But each reflects a policy preference favoring narrow readings of penal statutes, traceable to the same separation-of-powers concern as historic strict construction. In other cases, the Court's narrow constructions are essentially "ad hoc," in the sense that they are based on the ordinary meaning of the particular statute's text without appealing to a more generic substantive canon for justification.[172] Yet even these decisions often reflect a mood of "interpretive restraint'" ultimately grounded in the same concerns.[173]

This Part examines each of these approaches—the three substantive canons and the *ad hoc* approach—providing a fresh account of how the modern Court uses these fragmented tools as partial substitutes for historic strict construction.

---

170. *See* Johnson, *supra* note 27, at 84–143 (examining all cases involving the construction of penal statutes from the 2013 Term through the 2022 Term); *see also* Johnson, *supra* note 27, at 94 ("Labeling a construction as 'narrow' conveys that the Court adopted a construction approximating the one sought by the party . . . seeking the narrower of the readings presented by the parties. Labeling a construction as 'broad' conveys the opposite.").

171. *See* Johnson, *supra* note 27, at 105–06.

172. *See id.* at 78–79.

173. Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)); *see*, *e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (explaining that the "Court has 'traditionally exercised restraint in assessing the reach of a federal criminal statute'" and noting that "[t]his restraint arises 'both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed'" (second alteration in original) (quoting *Marinello*, 138 S. Ct. at 1106, 1109)).

A. VAGUENESS DOCTRINE AND AVOIDANCE

In the absence of robust lenity, the Court has relied on the void-for-vagueness doctrine and a related form of constitutional avoidance to shoulder some of the work previously done by historic strict construction.

As the Court has explained, vague language in a penal statute presents constitutional concerns because it does not sufficiently define the standard of conduct.[174] That undermines due process, the separation of powers, and the principle of legality by effectively delegating the legislative task of crime definition, thereby inviting arbitrary enforcement and failing to provide adequate notice to ordinary people of what conduct is punishable.[175]

The birth of the constitutional void-for-vagueness doctrine is closely related to lenity's decline at both the state and federal levels. The Supreme Court recognized and developed the vagueness doctrine around the turn of the twentieth century, following the advent of the Supreme Court's due process review of state penal statutes under the Fourteenth Amendment and a simultaneous significant shift in how state courts construed those statutes under new fair-construction and liberal-construction regimes imposed by state legislatures.[176] Those events gave rise to constitutional vagueness challenges to state laws.

Importantly, the Court's vagueness analysis of a state law is distinct from that of a federal law, resulting from a federalism

---

174. *See* Johnson v. United States, 576 U.S. 591, 595 (2015) (explaining that a statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes").

175. *See* United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (explaining that vague laws delegate responsibility for "defining crimes" to "relatively unaccountable police, prosecutors, and judges" rather than elected officials); Jeffries, *supra* note 75, at 189–90 (explaining that the principle of legality "forbids the retroactive definition of criminal offenses" through "judicial innovation"); *see also* Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053, 2060, 2081–86 (2015) (explaining that the vagueness doctrine promotes the principle of legality by protecting two independent constitutional requirements of criminal law—the substantive requirement that "all crime must be based on conduct" and the process requirement that "there must be a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied").

176. *See* Johnson, *supra* note 80, at 1574, 1576–89 (describing the rise of the void-for-vagueness doctrine); *see also supra* Part I.C (tracing strict construction's decline).

constraint that limits its ability to construe state statutes.[177] Because the highest state court has the last word on the meaning of a state statute, the Court will follow any preexisting state-court construction, effectively preventing it from eliminating any constitutional concerns through judicial construction.[178] That federalism constraint, along with the availability of Fourteenth Amendment due process review in the late nineteenth century and the state-level decline of historic strict construction, created the conditions necessary for the vagueness doctrine to emerge and flourish in the twentieth century.[179] In fact, save for one early exception, every twentieth-century case in which the Court held a statute void for vagueness involved a *state* penal statute that a state court had construed in a way that did not eliminate vagueness concerns.[180]

The Court's application of the vagueness doctrine to state penal statutes thus functions as a federal due process limit on the *states*' discretion to enact and construe indefinite language in penal statutes.[181] That limit is more often triggered in a world in which states do not consistently apply robust lenity to their penal statutes.

The vagueness doctrine serves a different function in the context of federal penal statutes. Unduly vague language in those statutes "undermine the Constitution's separation of powers" by "threaten[ing] to hand responsibility for defining crimes

177. *Compare* Johnson, *supra* note 80, at 1589–1606 (describing the Supreme Court's vagueness analysis of federal laws), *with id.* at 1606–14 (describing the Court's analysis of state laws).

178. *See id.* at 1606; *see also* Kolender v. Lawson, 461 U.S. 352, 355 (1983) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494 n.5 (1982))); Wainwright v. Stone, 414 U.S. 21, 22 (1973) ("The judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute."); Winters v. New York, 333 U.S. 507, 514 (1948) ("Th[e] [state-court] construction fixes the meaning of the statute for this case.").

179. *See* Johnson, *supra* note 80, at 1569, 1575 (describing how the Court held void for vagueness state statutes that had not been effectively construed by state courts).

180. *Id.* at 1587–88 (observing that "with one exception, every case from 1914 until 1964 in which the Court invalidated a statute on a constitutional vagueness ground involved a state penal law that had already been construed at the state level" and that "the Court did not invalidate [another] federal law on a constitutional vagueness ground until 2015").

181. *Id.* at 1571.

to relatively unaccountable police, prosecutors, and judges," in derogation of the principle that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'"[182]

Yet in virtually all cases involving a federal penal statute, the Court need not deem the indeterminate language unconstitutionally vague.[183] The Court can instead engage in "vagueness avoidance," adopting a narrow construction of the indeterminate text that avoids any constitutional vagueness issues.[184] Vagueness avoidance thus functions as a constitutional avoidance canon[185] that has special salience in the context of penal statutes presenting vagueness concerns.[186] The Court's use of vagueness avoidance when narrowly construing penal statutes is driven by a separation-of-powers concern: Without a limiting construction, the effect of the law would be "to delegate the legislative task of defining prohibited conduct to a body other than the

182. United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

183. Johnson, *supra* note 80, at 1569 ("Vagueness challenges to federal laws . . . rarely succeeded—underscoring the important role of broad state-court constructions of state laws in early vagueness cases.").

184. Joel S. Johnson, *Vagueness Avoidance*, 110 VA. L. REV. 71, 72–73 (2024); *see* Skilling v. United States, 561 U.S. 358, 405 (2010) ("It has long been our practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); Johnson, *supra* note 80, at 1592 ("In the typical federal-law vagueness case, the Supreme Court engages in vagueness avoidance. It narrowly construes the indefinite law to avoid any constitutional vagueness issues."); Hopwood, *supra* note 3, at 698 (noting that the Supreme Court "rarely" applies the "void-for-vagueness doctrine" to invalidate federal penal statutes).

185. There are two main types of constitutional avoidance—the "unconstitutionality" canon and the "doubts" canon. John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997). Under the unconstitutionality canon, if one construction would render a statute unconstitutional, a court should adopt any plausible construction that would save it. *Id.* at 1496. Under the doubts canon, if one construction would raise serious constitutional questions, a court should adopt any plausible construction that would avoid those questions. *See id.*; Reno v. Flores, 507 U.S. 292, 314 n.9 (1993). Ambiguity triggers both canons. *See, e.g.*, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) (explaining that "the canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction'" (quoting Clark v. Martinez, 543 U.S. 371, 385 (2005)).

186. Vagueness avoidance is distinct from ordinary constitutional avoidance. The difference largely owes to the distinct concepts of ambiguity and vagueness and their relation to an important legal-process distinction between interpretation and construction. *See* Johnson, *supra* note 184, at 80–85, 86–91.

legislature."[187] That is the same anti-delegation concern about legislative primacy in crime definition that dates back to the early days of the Republic[188] and was a justification for strict construction that Justice Marshall gave in *Wiltberger*.[189]

It is no surprise then that the Court turned to vagueness avoidance as a way to adopt narrow constructions around the same time that the Court substantially weakened lenity.[190] Because the Court had moved lenity to "the end of the interpretive process,"[191] any constitutional vagueness concerns that bear on how the Court might construe statutory language "necessarily preceded [it] in the hierarchy of statutory-construction tools," with the practical result that vagueness avoidance often took on the role that the more robust rule of strict construction had historically played,[192] at least when statutory text presented issues of vagueness rather than mere ambiguity. The current Court continues to engage in vagueness avoidance to adopt narrow

187. Johnson, *supra* note 80, at 1589.

188. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). The Court continues to declare the principle that "the substantive power to define crimes and prescribe punishments" lies with the "legislat[ure]." Jones v. Thomas, 491 U.S. 376, 381 (1989); *see* Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity.").

189. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime[] and ordain its punishment.").

190. Johnson, *supra* note 80, at 1588; *see, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32–36 (1963); Scales v. United States, 367 U.S. 203, 223 (1961); United States v. Harriss, 347 U.S. 612, 620–24 (1954); Williams v. United States, 341 U.S. 97, 104 (1951); Jordan v. De George, 341 U.S. 223, 232 (1951); Dennis v. United States, 341 U.S. 494, 515–16 (1951); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 412–13 (1950); Screws v. United States, 325 U.S. 91, 102–05 (1945); United States v. Ragen, 314 U.S. 513, 523–25 (1942); Kay v. United States, 303 U.S. 1, 8–9 (1938).

191. Hopwood, *supra* note 3, at 717.

192. Johnson, *supra* note 80, at 1588–89.

constructions of penal statutes,[193] though it is often not explicit about doing so.[194]

Nevertheless, both the vagueness doctrine itself (mostly as applied to state penal statutes) and vagueness avoidance play a significant role in protecting the separation-of-powers concern that historic strict construction guarded during an earlier era.

B. SCIENTER PRESUMPTION

Another of the Court's partial substitutes for lenity is the presumption in favor of scienter (sometimes called the presumption in favor of *mens rea*).[195]

Under the scienter presumption, the Court presumes that the legislature intended to require a defendant to possess a culpable mental state with respect to each element of statutory offenses that "criminalize[s] otherwise innocent conduct," absent statutory evidence to the contrary.[196] The presumption applies when Congress does not specify a mental state in the statutory text,[197] and it "applies with equal or greater force" when a statute "includes a general scienter provision."[198] In addition, the severity of the punishment attached to the statutory offense may

---

193. *See, e.g.*, Percoco v. United States, 143 S. Ct. 1130 (2023) (adopting narrow construction that avoided a reading that gave the statute "an uncertain breadth that raises 'the due process concerns underlying the vagueness doctrine'" (citing Skilling v. United States, 561 U.S. 358, 408 (2010))).

194. *See* Johnson, *supra* note 184, at 116 ("In a recent line of cases, the Court has moved away from explicit vagueness avoidance . . . . [It] still adopts a narrowing construction, but it purports to rest its result on tools of *interpretation* that determine semantic meaning, rather than expressly relying on vagueness avoidance as a tool of construction.").

195. *See* Elonis v. United States, 575 U.S. 723, 734 (2015) (noting that different terms are often used to describe a defendant's "blameworthy" mental state, including "*mens rea*, scienter, malice aforethought, guilty knowledge, and the like").

196. United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); *see also, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 652–53 (2009).

197. *See* Staples v. United States, 511 U.S. 600, 605–06 (1994) (noting that "the common-law rule requiring *mens rea* has been 'followed in regard to statutory crimes even where the statutory definition did not in terms include it'" (quoting United States v. Balint, 258 U.S. 250, 251–52 (1922)).

198. Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (citing MODEL PENAL CODE § 2.02(4) (AM. L. INST. 1985)); *see also* Ruan v. United States, 142 S. Ct. 2370, 2377 (2022). When applied as a clear-statement rule, the scienter presumption effectively imposes a "clarity tax" on Congress. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

affect the degree of countervailing proof needed to rebut the presumption.[199]

Although the scienter presumption is "traceable to the common law,"[200] the Court's reliance on it as an "interpretive maxim"[201] for construing federal penal statutes goes back only as far as the mid-twentieth century. In an opinion by Justice Robert Jackson in *Morissette v. United States*, the Court observed that the English common law requirement of *mens rea* "took deep and early root in American soil."[202] As state legislatures codified common law crimes, Justice Jackson explained, state courts tended to infer the presence of *mens rea* requirements even when the statutes were "silent" in order "to protect those who were not blameworthy in mind."[203] The Court in *Morrissette* took the same approach, applying the presumption as a matter of federal law to adopt a narrow construction of a criminal conversion statute.[204] In doing so, the Court tied the scienter presumption to the separation-of-powers principle that "no federal crime can exist except by force of statute,"[205] declining to construe the conversion statute in an expansive manner that would cover conduct not accompanied by intent; the Court signaled that it would require clear Congressional authorization before applying the statute in a way that deviated from its common law analogue.[206]

---

199. *See Staples*, 511 U.S. at 616 (accounting for a "harsh" mandatory minimum sentence when concluding that the scienter presumption had not been rebutted).

200. *Rehaif*, 139 S. Ct. at 2195.

201. *Id.*

202. 342 U.S. 246, 251 (1952); *see* Dennis v. United States, 341 U.S. 494, 500 (1951) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.").

203. *Morissette*, 342 U.S. at 252.

204. *See id.* at 263 ("We hold that mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."). The Court's adoption of the scienter presumption in *Morissette* can be understood as an application of "general law." NELSON, *supra* note 50, at 1211 ("[T]he idea that most kinds of federal criminal statutes should be understood to have a scienter requirement of some sort, even if they do not make one explicit, has roots in general law." (citing *Morissette*, 342 U.S. at 250–63)).

205. *Morissette*, 342 U.S. at 259.

206. *See id.* at 262 (noting that the "inferences" to be drawn from "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states" may be quite different from those drawn from

The Court later underscored the presumption's connection to the principle that Congress must define the elements of a criminal offense and that it works to prevent "criminaliz[ing] a broad range of apparently innocent conduct."[207] The Court has also expressly noted that application of the scienter presumption is "in keeping with" the rule of lenity, which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability."[208] The scienter presumption advances those same rationales.[209]

In light of the constitutional values it protects, the scienter presumption can be understood as a "strong-form" substantive canon that counsels in favor of a particular outcome—stricter *mens rea* requirements—even when that outcome might be in some tension with the best reading of the text.[210] But the presumption could also be understood more modestly as a descriptive interpretive tool for situating statutory text in the broader context of the common law backdrop against which Congress

---

"the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.").

207. Liparota v. United States, 471 U.S. 419, 424, 426 (1985).

208. *Id.* at 427. Some state courts have suggested that the scienter presumption derives from strict construction. *See* Price, *supra* note 3, at 936 ("State courts have . . . occasionally invoke[d] strict construction to support the inference of a mens rea term.").

209. *See* Wooden v. United States, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (noting that the scienter presumption helps to prevent "unfairness [that] can result because of a lack of fair notice"); Price, *supra* note 3, at 937 ("[T]he rationales for strict construction generally support inferring mens rea terms absent clear instruction not to [do so].").

210. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring) (noting that "strong-form" substantive canons—which "counsel[ ] a court to *strain* statutory text to advance a particular value"— "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning" (quoting Barrett, *supra* note 77, at 123–24)).

enacted it.[211] Or it could be seen as an interpretive tool with both substantive and descriptive properties.[212]

Regardless, the Court's application of the scienter presumption has yielded narrow constructions of some penal statutes.[213] Not coincidentally, the Court began relying on the scienter presumption in the mid-twentieth century—close to when it reduced lenity to a "tool of last resort."[214] The scienter presumption thus took on some of the work previously assigned to historic strict construction—justifying narrow constructions for a particular set of penal statutes.[215] It continues to serve that function today.[216]

As a *presumption*, it creates a default rule and sets a high bar for Congressional efforts to override it. In effect, application of the presumption tips the scales in favor of a particular policy preference—stricter *mens rea* requirements—and places the burden of rebutting it on the proponent of the broader construction of the statute (typically the government),[217] often requiring

---

211. *See id.* at 2378 (Barrett, J., concurring) (identifying the scienter presumption as an example of an interpretive tool used to give context to statutory text); *see also* Justice Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913 (1999) (noting that "[l]anguage takes meaning from its linguistic context," as well as "historical and governmental contexts").

212. *See* Brian G. Slocum & Kevin Tobia, Response, *The Linguistic* and *Substantive Canons*, 137 HARV. L. REV. F. 70, 73 (2023) ("[L]inguistic validity and substantive value are *properties* of canons, not separate, mutually exclusive *categories* of canons. An interpretive canon may have one of these properties, both, or, arguably, neither (that is, neither linguistic nor substantive). Thus, an interpretive canon may be motivated by normative values but nonetheless also be textual.").

213. *See* Elonis v. United States, 575 U.S. 723, 734–37 (2015) (providing examples of when the Court has used scienter requirements to narrow penal statutes); *see also, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 652–53 (2009); United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994); Staples v. United States, 511 U.S. 600, 606 (1994); Liparota v. United States, 471 U.S. 419, 424–27 (1985).

214. Hessick & Kennedy, *supra* note 3, at 379; *see* Part I.C (tracing strict construction's decline).

215. *See supra* Part I.B (describing strict construction's function).

216. *See, e.g.*, United States v. Ruan, 142 S. Ct. 2370, 2377 (2022) (applying the scienter presumption to narrow a criminal statute); Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (applying the scienter presumption to narrow a criminal statute).

217. When the scienter presumption is applied as a clear-statement rule, the tilt in favor of the policy preference is even stronger. *See* Hessick & Kennedy, *supra* note 3, at 356 ("Clear statement rules protect the value or interest at issue

more than simply the "most natural grammatical reading."[218] In that way, the scienter presumption operates as a robust "tool[] of first resort," employed "at the beginning of the interpretive process."[219]

But the scienter presumption's reach is limited, because it applies only when the textual indeterminacy concerns mental culpability. That accounts for only a small fraction of the types of indeterminacy present in penal statutes.[220] Yet within that limited domain, the scienter presumption helps guard the separation-of-powers value that historic strict construction once protected.[221]

C. FEDERALISM PRESUMPTION

To justify another set of narrow constructions of penal statutes in the absence of robust lenity, the Court has used the federalism presumption.

The federalism presumption is a constitutionally inspired canon that counsels against construing statutory indeterminacy in a way that would encroach upon traditional areas of state law.[222] Unlike vagueness avoidance and the scienter presumption, the federalism presumption is not specific to penal statutes (though its roots can be traced to that context[223]); it can apply to any federal statute that poses a threat to federal-state

---

by requiring a particular outcome unless the statute contains explicit and unambiguous language to the contrary.").

218. *X-Citement Video*, 513 U.S. at 68–69 (explaining that the scienter presumption should be considered in addition to the "most natural grammatical reading" of the statute).

219. *See* Hessick & Kennedy, *supra* note 3, at 380 (explaining how clear-statement rules work).

220. For example, from the 2013 Term through the 2022 Term, the Court narrowly construed twenty-seven federal penal statutes; the rule of lenity was raised as a potential basis for narrowly construing the statute in twenty-one of those cases, but the scienter presumption was raised in only five of them. *See* Johnson, *supra* note 27, at 107–08.

221. In the five cases in which the scienter presumption was raised, the Court actually relied on it to justify the narrow construction in three of the cases. *Id.* at 109, 112–13. By contrast, the Court did not actually rely on lenity in any of the twenty-one cases in which it was raised. *Id.* at 109.

222. *See, e.g.*, McNally v. United States, 483 U.S. 350, 360 (1987) (declining to construe broad and indeterminate language in the federal fraud statutes in a broad manner that would enable federal prosecutors to "set[] standards of disclosure and good government for local and state officials").

223. *See infra* text accompanying notes 229–30 (explaining how the federalism presumption was first introduced).

relations.[224] Yet the Court has repeatedly made clear that, because "the punishment of local criminal activity" is "[p]erhaps the clearest example of traditional state authority,"[225] it "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."[226]

The Court typically articulates the federalism presumption as a clear-statement rule, meaning that the statute is presumed not to intrude upon a traditional area of state law absent a clear statement from Congress to the contrary.[227] The presumption thereby imposes a "clarity tax" on Congress.[228]

The Court arguably first stated something like a federalism presumption in the context of preemption of state criminal law. In *Cohens v. Virginia*,[229] Justice Story wrote that "[t]o interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately"; rather, because "[t]he motives for it must be serious and weighty[,] [i]t would be taken deliberately, and the intention would be clearly and unequivocally expressed."[230] The Court further developed the doctrine during the middle of the twentieth century.[231]

---

224. *See* Bond v. United States, 572 U.S. 844, 858 (2014) (giving examples of the federalism presumption's application to "several areas of traditional state responsibility," including "qualifications for state officers," "titles to real estate," and "land and water use" (first citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); then citing BFP v. Resol. Tr. Corp., 511 U.S. 531, 544 (1994); and then citing Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001))).

225. *E.g.*, *id.* (citing United States v. Morrison, 529 U.S. 598, 618 (2000)).

226. *Id.* at 858–59 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

227. *See, e.g.*, Cleveland v. United States, 531 U.S. 12, 14 (2000) (rejecting a reading that would amount to a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *BFP*, 511 U.S. at 544 ("[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." (quoting Frankfurter, *supra* note 138, at 539–40)).

228. Manning, *supra* note 198, at 403.

229. 19 U.S. (6 Wheat.) 264 (1821).

230. *Id.* at 443.

231. *See, e.g.*, Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding in the context of preemption that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress"); *see also* Frankfurter, *supra* note 138, at 540 ("[W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the

But the Court's 1991 decision in *Gregory v. Ashcroft*[232] ushered in the strong-form, generic federalism presumption that now operates as a clear-statement rule.[233] Justice O'Connor's opinion for the Court explained that, "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.'"[234] Justice O'Connor based this clear-statement rule on the constitutionally established "system of dual sovereignty between the States and the Federal Government."[235] Congress's authority to preempt state law "in areas traditionally regulated by the States," she explained, is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly."[236]

The clear-statement formulation of the federalism presumption plainly protects a constitutionally inspired federalism norm. But it also serves a separation-of-powers function by making sure that Congress does not *delegate* questions concerning whether federal law should intrude upon traditional areas of state law.[237] In that way, it reinforces the foundational separation-of-powers and federalism tenet of federal criminal law that federal courts do not have the power to create common law crimes.[238]

In light of the constitutional values it protects, the federalism presumption can be understood as a "strong-form" substantive canon that counsels in favor of a particular outcome—less federal intrusion into traditional areas of state law—even when

---

balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit . . . .").

232. 501 U.S. 452 (1991).

233. *See* Manning, *supra* note 198, at 407–08 (identifying *Gregory* as the moment at which the Court "adopted a powerful, generic federalism canon"); Eskridge & Frickey, *supra* note 157, at 624 (observing that the Court "created a new super-strong clear statement rule for federal regulation of at least some state functions" in *Gregory*).

234. *Gregory*, 501 U.S. at 460 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

235. *Id.* at 457–58.

236. *Id.* at 460.

237. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000) (defending clear-statement rules as nondelegation canons).

238. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction for the offence.").

that outcome might be in some tension with the best reading of the text.[239] But the presumption could also be understood more modestly as a descriptive interpretive tool for situating statutory text in the broader context of the structural, dual-sovereignty backdrop against which Congress enacted it.[240] Or it could be viewed as a tool of construction that has both substantive and descriptive properties.[241]

As a clear-statement rule, it effects a nondelegation norm targeted to the specific context of statutory indeterminacy that threatens the balance of federal-state relations.[242] In essence, the federalism presumption ensures that federal law will not impinge upon traditional areas of state law unless the Court is "absolutely certain"[243] that Congress meant for it to do so.[244] That mitigates the risk of adopting unduly expansive constructions that would constitute *judicial* encroachment upon traditional areas of state concern.

In that way, the federalism presumption closely relates to the longstanding anti-delegation concern about legislative primacy in crime definition that Chief Justice Marshall highlighted in *Wiltberger* to justify historic strict construction.[245] When the federalism presumption is applied to federal penal statutes, it

239. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring) (noting that "strong-form" substantive canons—which "counsel[ ] a court to *strain* statutory text to advance a particular value"—"are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning" (quoting Barrett, *supra* note 77, at 123–24)).

240. *See* Easterbrook, *supra* note 211, at 1913 (noting that "[l]anguage takes meaning from its linguistic context," as well as "historical and governmental contexts"); *see also Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring) ("[O]ur constitutional structure[ ] . . . is part of the [relevant] legal context . . . .").

241. Slocum & Tobia, *supra* note 212, at 73.

242. *See* Sunstein, *supra* note 237, at 337–40 (discussing the nondelegation purpose of clear-statement rules).

243. Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) ("[I]nasmuch as this Court in [a prior decision] has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

244. *See* Sunstein, *supra* note 237, at 338 ("[N]ondelegation canons have the salutary function of ensuring that certain important rights and interests will not be compromised unless Congress has expressly decided to compromise them.").

245. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment.").

functions much like that historic rule—strictly requiring clarity in the definition of certain criminal prohibitions.

As with the scienter presumption, however, the reach of the federalism presumption remains limited. It applies only when textual indeterminacy threatens a traditional area of state law. Although in theory that could extend to nearly all federal penal statutes because virtually all criminal law is a traditional area of state law, it has in practice been limited to a small fraction of questions of textual indeterminacy arising in the context of federal penal statutes.[246] Yet within its limited domain, the federalism presumption is effective in guarding the separation-of-powers concern previously protected by historic strict construction.[247] Since *Gregory*, the Court has relied on the clear-statement formulation of the federalism presumption to adopt narrow constructions of certain penal statutes, thereby doing some of the work previously done by historic strict construction.[248]

D. AD HOC NARROW CONSTRUCTIONS

Each of the three substantive canons just described—vagueness avoidance, the scienter presumption, and the federalism presumption—are ready-made principles that the Court has used to justify narrow constructions of penal statutes in recent decades, during an era without robust lenity. In another set of recent narrow-construction cases, however, the Court has based the narrow constructions on *ad hoc* rationales, in the sense that the Court "justifie[s] the narrow construction on the basis of 'ordinary meaning' of the particular statute's text—as informed by dictionaries, statutory context, and relevant descriptive canons

246. For example, from the 2013 Term through the 2022 Term, the Court narrowly construed twenty-seven federal penal statutes; the rule of lenity was raised as a potential basis for narrowly construing the statute in twenty-one of those cases, but the federalism presumption was raised in only nine of them. Johnson, *supra* note 27, at 107–08.

247. In the nine cases in which the federalism presumption was raised, the Court relied on it to justify the narrow construction in three of the cases. *Id.* at 109, 112. By contrast, the Court did not actually rely on lenity in any of the twenty-one cases in which it was raised. *Id.* at 109–10.

248. *See, e.g.*, Snyder v. United States, 144 S. Ct. 1947, 1949, 1956–57 (2024) (corruption statute); Ciminelli v. United States, 143 S. Ct. 1121, 1124, 1128 (2023) (wire fraud); Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) (fraud statutes); Bond v. United States, 572 U.S. 844, 844, 859–60 (2013) (chemical weapons statute); Cleveland v. United States, 531 U.S. 12, 12, 14 (2000) (mail fraud); McNally v. United States, 483 U.S. 350, 350, 360 (1987) (mail fraud).

of interpretation—thereby ignoring or significantly discounting the role of substantive canons in its decisionmaking."[249]

In recent terms, the Court has been especially fond of this *ad hoc* approach. In the ten-year period from the October 2013 Term through the October 2022 Term, the Court adopted a narrow construction of a penal statute in twenty-seven cases.[250] It relied on an *ad hoc* justification for nineteen of them (seventy percent).[251] The low rate of reliance on substantive canons in these cases was not for lack of opportunity: In all but one of the narrow-construction cases, "at least one—and usually multiple—substantive canons were invoked in party or amicus briefs."[252] In more than two-thirds of the cases, at least one canon was raised during oral argument, "often by a Justice."[253] The strong tendency towards reliance on *ad hoc* rationales, rather than on substantive canons, appears to have been a choice.

The current Court's fondness for *ad hoc* constructions has several potential explanations.[254] But it seems at least partially motivated by modern textualist commitments that view substantive canons with suspicion to the extent they are inescapably judge-made and policy-driven.[255] The *ad hoc* approach is likely

---

249. *See* Johnson, *supra* note 27, at 104.

250. *Id.* at 96 (observing that "[i]n the forty-three cases reviewed" during the ten-year period, "[t]he Court narrowly construed the penal statute at issue on twenty-seven occasions"); *see also id.* at 91–95 (describing the study's methods).

251. *Id.* at 105. In the remaining eight narrow-construction cases, the Court "definitively relied upon . . . . vagueness avoidance (three times), the federalism presumption (three times), or the scienter presumption (three times)." *Id.* In that same set of cases, "the Court *never* definitively relied upon the rule of lenity." *Id.* In one case, the Court also relied upon "ordinary constitutional avoidance." *Id.*

252. *Id.* at 114; *Id.* at 105, tbl.1 (showing that substantive canons were in party or amicus briefs for twenty-six of the twenty-seven cases).

253. *Id.* at 114; *see also id.* at 105, tbl.1 (showing that substantive canons were raised at oral argument in twenty of the twenty-seven cases).

254. *See, e.g.*, *id.* at 123–25 (suggesting that efforts to rely on substantive canons may be softened to retain votes needed to hold together a majority); *id.* at 125–27 (suggesting that the *ad hoc* approach may be preferred because it maximizes interpretive discretion in future cases).

255. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (noting that "strong-form" substantive canons "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning" (quoting Barrett, *supra* note 77, at 123–24); West Virginia v. EPA., 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (characterizing certain substantive canons as "get-out-of-text-free cards"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–36 (2016) (reviewing ROBERT A. KATZMAN, JUDGING STATUTES

viewed as more consistent with the rule-of-law values on which textualism is based.[256]

In an article Justice Barrett wrote before becoming a judge, she cautioned that substantive canons "pose[ ] a significant problem of authority" when a court applies them "to strain statutory text," because "something other than legislative will" is functioning as the court's "interpretive lodestar," rendering the court "something other than a faithful agent."[257] For that reason, in her view, substantive canons are "at apparent odds with the central premise from which textualism proceeds," except when used merely "as tie breakers between equally plausible interpretations."[258]

Justice Kavanaugh has separately raised doubts about substantive canons to the extent their application depends on an "ambiguity trigger" that requires a judge to determine that the text is ambiguous before applying the canon.[259] That creates a "major problem" in his view because "ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis."[260] Substantive canons are especially suspect, according to Justice Kavanaugh, when triggered by "front-end ambiguity," particularly when the ambiguity can be resolved through less controversial tools of interpretation that determine semantic meaning.[261] He prefers an interpretive approach in which courts first seek to determine the "best reading" of a statute and then deviate from that reading only if it violates a settled rule of

---

(2014)) (raising suspicions about how application of substantive canons often depends on an "ambiguity trigger"); *see also* SCALIA, *supra* note 41, at 28 (characterizing substantive canons as "dice-loading rules" that pose "trouble" for "the honest textualist"); Eidelson & Stephenson, *supra* note 31, at 521 (arguing that substantive canons are incompatible with textualism).

256. *See, e.g.*, SCALIA, *supra* note 41, at 25 (justifying textualism with rule-of-law values); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 555 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012)) (noting that Justice Scalia's advocacy for canons "is dominated" by a concern for "[c]ontinuity[,] . . . a rule of law value").

257. Barrett, *supra* note 77, at 110.

258. *Id.* at 123.

259. See Wooden v. United States, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring) (citing Kavanaugh, *supra* note 255, at 2136–39); Kavanaugh, *supra* note 255, at 2135–36.

260. *See Wooden*, 142 S. Ct. at 1075–76 (Kavanaugh, J., concurring).

261. *Id.* at 1075.

interpretation, including certain settled substantive canons, or if it is clearly unconstitutional.[262]

For these reasons and perhaps others, the Court has elected not to rely on substantive canons in its *ad hoc* narrow-construction cases.[263] Nevertheless, these canons—or at least the values on which they are based—still seem to play some role in the Court's decisionmaking process. As an initial matter, the frequency with which substantive canons are raised in briefs and at oral argument suggests that they might have done some persuasive work.[264] In addition, Justices sometimes write concurring opinions in these cases that argue for explicit reliance on substantive canons.[265] And some majority opinions note that the narrow construction adopted, though based on an *ad hoc* rationale, nonetheless comports with a substantive canon.[266] On other occasions when narrowly construing penal statutes, the Court refers to a "tradition[ ]" of "exercis[ing] restraint" rooted in both fair-notice and separation-of-powers concerns, without tying that tradition to a specific substantive canon.[267]

---

262. Kavanaugh, *supra* note 255, at 2148.

263. When the Court does rely on substantive canons, it tends to rely on those not triggered by ambiguity, but rather on those triggered by vagueness or implemented as front-end clear-statement rule (e.g., federalism and scienter presumptions). *See* Johnson, *supra* note 27, at 121–23 (observing that "[t]he Court has been more willing to justify narrow constructions of penal statutes on the basis of substantive canons *not triggered by ambiguity*—namely, the scienter presumption, the federalism presumption, and vagueness avoidance" as a result of how "these canons operate in application").

264. *See supra* text accompanying notes 250–53 (noting that party or amicus briefs cited a substantive canon in all but one of the twenty-seven narrow-construction cases decided from the October 2013 through October 2022 Terms).

265. *See, e.g.*, Snyder v. United States, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J., concurring) ("[L]enity is what's at work behind today's decision, just as it is in so many others."); *Wooden*, 142 S. Ct. at 1083–86 (Gorsuch, J., concurring in judgment) (arguing for explicit reliance on robust lenity); *Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring) (noting that the scienter presumption helps to prevent "unfairness [that] can result because of a lack of fair notice").

266. *See, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (invoking lenity and vagueness avoidance but disclaiming reliance on them); McDonnell v. United States, 579 U.S. 550, 574–76 (2016) (invoking vagueness avoidance and federalism presumption only as corroboration for a conclusion already reached); Burrage v. United States, 571 U.S. 204, 216 (2014) (noting lenity in passing after justifying narrow construction with ordinary-meaning analysis).

267. *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (explaining that "[t]his Court has 'traditionally exercised restraint in assessing the reach of a federal criminal statute'" and noting that "[t]his restraint arises 'both

That rhetoric and the Court's repeated reliance on an *ad hoc* approach continue to reflect a bottom-line general preference for narrow constructions of penal statutes—an outcome consistent with historic strict construction and its separation-of-powers justification, even if not expressly justified on that basis or on the basis of some other substantive canon.

III. DELEGATION COSTS OF PARTIAL LENIENCY

One implication of fragmentation is that lenity's practical effect has not been totally lost in the Supreme Court's decisionmaking process. The Court no longer explicitly employs lenity as a robust rule of decision, except very rarely when grievous ambiguity remains following the application of all other interpretive tools.[268] But it still shows a preference for narrow constructions, sometimes justifying them using other interpretive tools that advance the same separation-of-powers concern.[269]

The fragmented approach may have some benefits. From the perspective of judicial administration, for example, it may be preferable to have a regime with several more targeted rules favoring narrow constructions, rather than one blanket rule that potentially applies across the board, but often debatably so.

Yet the absence of a unified, generic strict-construction approach also has a significant cost. The functional result of fragmentation is a regime of *partial leniency*. The Court applies a policy of interpretive leniency only if one of the narrowly tailored partial substitutes for lenity is triggered. This effectively deprioritizes the generic separation-of-powers value on which Chief Justice Marshall based historic strict construction in *Wiltberger*,[270] while raising the importance of more targeted values related to *mens rea*, federalism, and constitutional vagueness concerns. When those concerns are present, the substitute tools do a decent job of replicating historic strict construction and

---

out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed'" (third alteration in original) (quoting Marinello v. United States, 138 S. Ct. 1101, 1106, 1109 (2018))).

268. *See supra* text accompanying notes 142–48 (explaining how lenity was demoted to a tool of last resort).

269. *See supra* Part II (identifying more targeted tools the Court uses to adopt narrow constructions of penal statutes).

270. *Supra* text accompanying note 92–101.

protecting the anti-delegation principle on which it rested.[271] But for any open-ended penal statute that does not implicate those targeted values, the legislative task of crime definition is implicitly delegated both to the judiciary[272] and to prosecutors.[273] For these penal statutes—perhaps most penal statutes[274]—*Wiltberger*'s rule of legislative primacy has in effect been overridden, and the prospect of a narrow construction hinges on whether the judiciary will exercise its implicitly delegated criminal lawmaking authority to adopt a narrow construction on a largely discretionary *ad hoc* basis.

A. IMPLICIT DELEGATION TO COURTS

Consider what a robust lenity regime would look like. As Kahan has explained, such a regime would insist upon legislative primacy in crime definition both by "disciplining courts" and by "disciplining Congress itself."[275] It would discipline courts by "constrain[ing] [them] to choose the narrowest reasonable readings of ambiguous criminal statutes."[276] And it would discipline Congress by preventing any "operative rule of criminal liability that lacks Congress's self-conscious and express imprimatur."[277] Robust lenity would, in other words, "promote[] legislative supremacy by *forcing* Congress to take the lead in the field of criminal law and to forgo judicial assistance in defining criminal obligations."[278]

The current partial-leniency regime, by contrast, disciplines courts and Congress only when indeterminate statutory text presents a relatively narrow set of federalism, *mens rea*, or constitutional vagueness concerns. In all other instances, the judiciary

---

271. *Supra* Part.II.

272. *See* Kahan, *supra* note 15, at 347 (arguing that the "underenforcement of lenity . . . reflects the existence of another largely unacknowledged, but nonetheless well established, rule of federal criminal law: that Congress may *delegate* criminal lawmaking power to courts").

273. *See infra* Part III.B (describing how criminal lawmaking power is implicitly delegated to prosecutors).

274. *See, e.g.*, Johnson, *supra* note 27, at 103–04 (observing that in twenty-seven cases from the 2013 Term through the 2022 Term in which the Supreme Court narrowly construed federal penal statutes, it "definitively relied upon a substantive canon as part of its holding" only eight times).

275. Kahan, *supra* note 15, at 350–51.

276. *Id.* at 351.

277. *Id.*

278. *Id.*

has wide discretion to choose broad or narrow constructions of the indeterminate statutes, "creat[ing] a risk that [it] will exceed congressionally desired limits on criminal liability by disguising judicial definitions of crimes as mere 'interpretations.'"[279]

Congress, for its part, implicitly delegates its criminal lawmaking authority to the courts by using open-ended language in the penal statutes it enacts.[280] Lawmakers may see this as an attractive way to create penal laws applicable to a wider range of foreseen and unforeseen conduct,[281] a way to manage the significant practical constraints of legislating,[282] or a means of decreasing political accountability by avoiding having to make difficult decisions about where exactly the line should be drawn between criminal and non-criminal conduct.[283] The partial-leniency regime enables this sort of implicit delegation, providing no real incentive to draft penal statutes more precisely, outside the targeted areas implicating *mens rea*, federalism, and constitutional vagueness concerns.

An interpretive approach that allows implicit delegation of crime definition to the judiciary may have been a good fit for the more pragmatic, purposivist interpretive culture of the mid-

279. *Id.*

280. *See id.* at 351, 353 ("[O]pen-ended statutory language presents Congress with essentially the same benefits as express delegation of lawmaking authority.").

281. *See id.*; Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1493 (2008) (arguing that overbroad penal statutes are at times necessary because "ex ante linguistic formulation runs out of precision in describing the cases to which it will apply in the unseen future").

282. *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 993 (2019) (noting that "[c]arefully crafted laws require significant time and effort," which "are often in short supply when legislatures are in session"); Kahan, *supra* note 15, at 353 (explaining that "open-textured statutes require smaller investments of time and less political consensus to enact than do extremely precise statutes" and "may facilitate more efficient updating of legal norms" because "the generality of these statutes means that courts can modify or overrule prior decisions without awaiting amendment of the statutory language by Congress"); *cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 261 (1994) ("It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts.").

283. *See* Johnson, *supra* note 27, at 130 (explaining that the use of "broad and open-ended language in penal statutes . . . effectively delegates the line-drawing task to courts," such that "[w]hen a court's narrow construction yields a politically unpopular outcome, legislators can place the blame on the judiciary . . . [a]nd if the outcome is politically popular, legislators can praise the judiciary for correctly giving effect to the law").

twentieth century—the paradigm in which the Court weakened historic strict construction.[284] In that era, the Court looked to a broader range of source materials, including legislative history and practical consequences, to arrive at constructions deemed consistent with Congressional purpose.[285] Because Congress effectively increases the reach of its legislative power through implicit delegation,[286] it may have been sensible for a purposivist Court to have understood open-ended statutory language to evince a Congressional "preference for a lawmaking collaboration rather than a lawmaking monopoly."[287] In effect, the Court would be engaging in delegated judicial crime definition while trying to remain faithful agents of Congress's purpose.

But the implicit-delegation approach is a poor fit for the current textualist paradigm, which promises to "constrain the federal judiciary" by remaining "faithful to the words actually used by the legislature."[288] Textualism starts with the premise that because "Congress makes law only by formally enacting texts," courts' obligation as faithful agents requires them to apply "valid statutes as they find them, rather than seeking to improve upon them in the course of giving them effect."[289] The goal is "fidelity to the text as written,"[290] as understood by a reasonable reader[291] using certain interpretive tools, such as dictionaries and descriptive canons of construction that capture

284. *See supra* text accompanying notes 135–38 (explaining how Justice Frankfurter led the charge in implementing a purposivist approach that weakened the rule of lenity).

285. *See* Solan, *supra* note 72, at 97–101 (describing the shift in the interpretive culture that took into consideration tools such as legislative history).

286. *See* Kahan, *supra* note 15, at 368 ("[D]elegation (whether express or implied) enlarges Congress's policymaking power by reducing the political and practical costs of legislation.").

287. *Id.* at 369.

288. Grove, *supra* note 20, at 271.

289. Eidelson & Stephenson, *supra* note 31, at 522–23 (describing foundational premises of modern textualism); *see also* SCALIA, *supra* note 41, at 20 ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

290. Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856 (2020).

291. *See* Eidelson & Stephenson, *supra* note 31, at 524 (explaining that for "modern textualists . . . the relevant content is what a . . . reasonable reader would take a lawmaker who promulgated the statute to have said"); Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning,"* 90 GEO. WASH. L. REV. 1053, 1056–57 (2022) (drawing attention to a scholarly dispute about whether "ordinary meaning" is an empirical concept or a legal concept).

"generalizations about how particular linguistic constructions are used and understood by competent speakers of English."[292]

Textualism does not usually entertain notions of inter-branch collaboration to arrive at constructions that give effect to the spirit of statutes.[293] By merely determining the ordinary meaning of the text, the thinking goes, courts suppress their own potential to act according to unfair predilections in an unfair or arbitrary manner.[294] For textualist courts, then, the presence of broad and open-ended language in penal statutes—many of which may have been drafted in a purposivist era—is not typically viewed as an invitation to engage in delegated judicial crime definition,[295] but rather as a mandate to apply the text as written.

In the current paradigm, then, broad and literalistic constructions of penal statutes are to be expected throughout the court system. The combination of open-ended statutory language and the absence of a robust, generic policy of strict construction have the effect of granting lower federal courts[296] and state courts[297] significant interpretive discretion. And the textualist

---

292. Eidelson & Stephenson, *supra* note 31, at 516.

293. *See id.* at 523 ("[T]extualists believe that courts are obligated to take valid statutes as they find them, rather than seeking to improve upon them in the course of giving them effect."). *But see* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (recognizing that Congress sometimes intentionally enacts statutes implicitly delegating regulatory authority to agencies to "fill up the details" of a statutory scheme or to regulate subject to the limits imposed by "a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable'" (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015))).

294. *See, e.g.*, SCALIA, *supra* note 41, at 25 (arguing that the formalism of textualism "is what makes a government of laws and not men").

295. To be sure, self-described textualists have acknowledged that statutory construction often depends on some degree of delegated authority. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("The whole theory of *lawful* congressional 'delegation' is . . . that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action."); Barrett, *supra* note 77, at 123 ("When Congress has delegated resolution of statutory ambiguity to the courts, it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it."). But recognition of *some* unavoidable delegated authority does not amount to acceptance of delegation to a degree that amounts to cooperative lawmaking or judicial crime definition.

296. This Article assumes that lower courts often follow the Court's interpretive methods. *See supra* note 43.

297. *See* Pohlman, supra note 43 (observing that state courts often borrow statutory-interpretation methodology from federal-law decisions of the Supreme Court).

interpretive culture[298] in which they exercise that discretion encourages them to adopt sweeping literalistic constructions of broadly worded penal statutes.[299]

What is more, as Joshua Kleinfeld has observed, "statutory interpretation is different at the top and bottom of the legal system."[300] Because lower courts have fewer resources for resolving issues of statutory indeterminacy,[301] they tend toward "simpler and quicker interpretive approaches"[302] that are *cheaper* in terms of the resources they require. As Kleinfeld has put it, "the version of rule-oriented textualism that prevails in the ordinary criminal courthouses . . . is not the subtle stuff of visionary jurists like Easterbrook and Scalia."[303] Rather, "[i]t's a kind of

298. *See* William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court, 1993 Term-Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime tells lower court judges . . . how strings of words in statutes will be read, what presumptions will be entertained as to statutes's [sic] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities."); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) ("Justice Scalia's textualist statutory interpretation methodology has taken startlingly strong hold in some states, although in a form of which the Justice himself might not approve.").

299. At a minimum, the interpretive discretion granted to lower courts is likely a "patchwork" of decisions, with some courts adopting broad constructions and others adopting narrow constructions. *See* Tara L. Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1600 (2021) (contending that when the Supreme Court delegates questions of constitutional law to the lower courts, the decisions of lower courts are "likely to push the law in *opposing* directions" and yield "a patchwork of disparate decision"); *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1730–31 (2021) (arguing that the "rhetoric" of textualism "obscures the discretionary choices an interpreter must make when resolving a hard case" and that "motivated or unmindful judge[s] can pick and choose texts and (con)texts" to reach desired results).

300. Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1816 (2021).

301. *See* Johnson, *supra* note 27, at 132 (noting that "[w]hile the Supreme Court resolves statutory interpretation questions in a 'research-rich environment,' conditions in the lower courts are more meager" (quoting Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 13 (2018)).

302. Bruhl, *supra* note 301, at 14; *see id.* at 26–27 ("[L]ower courts use fewer interpretive tools overall, and they especially avoid the most complex tools.").

303. Kleinfeld, *supra* note 300, at 1818.

'them's the rules' approach one might get from the TSA at the airport."[304]

Both substantive canons and simple forms of ordinary-meaning analysis (e.g., mere reliance on dictionaries) are cheap relative to more complex arguments, such as those based on statutory context or analogies to other statutory schemes.[305] But because the Supreme Court has significantly weakened lenity—and recently shown a preference for justifying narrow constructions with *ad hoc* constructions rather than substantive canons[306]—lower courts will often rely exclusively on statute-specific ordinary-meaning analysis. And because lower courts tend to rely on cheaper tools, their ordinary-meaning analysis will often be relatively simplistic.[307] When coupled with the open-ended language found in many penal statutes, simplistic ordinary-meaning analysis that looks to dictionaries and little else is likely to result in more broad and literalistic constructions in the lower courts.[308] A fraction of these constructions can be corrected by the Supreme Court,[309] with the benefit of more sophisticated and resource-intensive analysis of linguistic meaning.[310] But most will not.

In sum, the Court's reluctance to apply robust lenity or some other widely applicable policy of strict construction gives a pass to Congress in enacting broad and open-ended language that implicitly delegates the task of crime definition. The Court relies on sophisticated textualist methods to decline using that delegated authority to engage in criminal lawmaking. But the

304. *Id.*

305. *See* Johnson, *supra* note 27, at 133 ("[S]ubstantive canons and dictionary definitions can easily be included in briefs and grasped by lower courts. More complex arguments require significantly more research and analysis by lawyers, law clerks, and judges. All else equal, resource-strapped lower courts are likely to employ substantive canons or simple forms of ordinary-meaning analysis."); *see* Eskridge & Nourse, *supra* note 299, at 1727 (noting that more sophisticated forms of textualist analysis can be "costly"); *see also* Kleinfeld, *supra* note 300, at 1816 (describing a lower court as "an ecosystem of mechanically applied textual rules" for reasons of bureaucratic administration).

306. *Supra* text accompanying notes 249–53.

307. Johnson, *supra* note 27, at 134.

308. *Id.* at 82 n.42 (collecting examples).

309. *Id.* at 135 n.302 (collecting examples).

310. *Id.* at 79 (noting that the Court's ordinary-meaning analysis "often involve[s] sophisticated and resource-intensive analysis of dictionaries, statutory context, descriptive canons of interpretation, and other tools for determining linguistic meaning").

interpretive cues from the Court end up encouraging lower courts with far fewer interpretive resources to adopt broad and literalistic constructions of open-ended penal statutes.

B. IMPLICIT DELEGATION TO PROSECUTORS

The partial-leniency regime also has the effect of delegating criminal lawmaking authority to prosecutors, who use that authority to expand the reach of criminal enforcement.

While the textualist Court can be seen as declining Congress's invitation to engage in interbranch collaborative criminal lawmaking,[311] the same cannot be said of prosecutors. As Bill Stuntz observed, "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes."[312] When a legislature enacts broad and open-ended penal statutes, it creates a principal-agent relationship with prosecutors.[313] The open-ended statutory language effectively delegates significant discretion to prosecutors, insulating the legislature from political backlash.[314] Elaborating on Stuntz's insight, Carissa Byrne Hessick and Joseph Kennedy have noted that such delegation enables the legislature to "frame" any prosecutions "for innocuous behavior under broadly written laws" as "failure[s] of prosecutorial discretion," rather than legislative failures.[315]

Prosecutors use their charging discretion[316] to pursue conduct on the peripheries of the open-ended language of penal

311. *Supra* text accompanying notes 40–42.

312. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

313. *See id.* at 543 ("Criminal statutes are a grant of power to police and prosecutors . . . . Anytime a principal grants power to an agent, there is a risk that the agent will not use the power in the way the principal would like.").

314. *See id.* at 510 (describing the politics that drive criminal legislation and characterizing prosecutors and legislators as "natural allies").

315. Hessick & Kennedy, *supra* note 3, at 363 (explaining that a legislature "can claim that this sort of prosecution is not what they intended when they passed the imprecise or overbroad statute, and instead simply reflects poor judgment on the part of the prosecutor filing the charge").

316. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The

statutes, reflecting expansive understandings of the statute's scope.[317] When doing so, they are using the criminal lawmaking authority implicitly delegated to them by the open-ended statutory text.[318] As a functional matter, they are not merely engaged in the executive task of enforcing criminal law but also the legislative task of crime definition.[319] And because most criminal cases are resolved through plea bargaining, prosecutors also often perform an adjudicative function.[320] That consolidation of enforcement, legislative, and adjudicative functions grants prosecutors vast power and discretion.[321]

Prosecutors often use that discretion to threaten particular defendants with more serious charges as a tactic for securing a

---

charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

317. *See* Erik Luna, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1495 (2010) ("[P]rosecutors . . . have every incentive to extend criminal liability."). The Justice Department tends to advocate for expansive readings of federal penal statutes. *See*, *e.g.*, Brief for the United States at 9–37, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10); Brief for the United States at 19–43, Ruan v. United States, 142 S. Ct. 2370 (2022) (Nos. 20-1410 and 21-5261); Brief for the United States at 14–39, Rehaif v. United States, 139 S. Ct. 2191 (2019) (No. 17-9560); Brief for the United States at 13–46, Marinello v. United States, 138 S. Ct. 1101 (2018) (No. 16-1144); Brief for the United States at 20–26, McDonnell v. United States, 579 U.S. 550 (No. 15-474); Brief for the United States at 14–55, Yates v. United States, 574 U.S. 528 (2016) (No. 13-7451); Brief for the United States at 17–34, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983); Brief for the United States at 15–31, 33–51, Burrage v. United States, 571 U.S. 204 (2014) (No. 12-7515).

318. *See* Stuntz, *supra* note 312, at 509 (observing that as criminal law expands, "both lawmaking and adjudication pass into the hands of police and prosecutors," with the result that "law enforcers, not the law, determine who goes to prison and for how long").

319. *See* Wiltberger v. United States, 18 U.S. (5 Wheat.) 76, 95 ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); Hopwood, *supra* note 3, at 699 ("Broad or unclear laws . . . allow federal prosecutors to stretch the law beyond what anyone had anticipated.").

320. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law,* 61 STAN. L. REV. 867, 876–77 (2009) ("At the federal level, just as in the states, most criminal cases are resolved without ever going to trial. Plea bargaining . . . is the norm. This means that a prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases."); *id.* at 878 ("In most cases, . . . the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range.").

321. Johnson, *supra* note 27, at 137–38.

guilty plea to a lesser charge.[322] When using that tactic, prosecutors have a strong incentive to push the boundaries of open-ended statutes.[323] If an expansive theory of prosecution yields a guilty plea to a lesser charge, then it has done its job. And because the more serious charge is ultimately dropped, the aggressive reading of the statute on which it was based evades judicial review.[324]

Some expansive theories of prosecution under open-ended statutes are ultimately tested in court. But for reasons already explained, lower courts often adopt the expansive readings as within the ordinary meaning of statutory text, even when the Supreme Court later rejects them.[325] Federal prosecutors are thus able to advance sweeping readings in the lower courts in many cases over many years, unless and until the Supreme Court intervenes.[326] When courts accept prosecutions premised on expansive readings of federal penal statutes, they functionally adopt a definition of prohibited criminal conduct set by prosecutors, not by Congress, and ultimately engage in criminal lawmaking at odds with the ban on federal common law crime definition.[327]

---

322. *See* Bordenkircher v. Hayes, 434 U.S. 357, 358, 365 (1978) (holding that due process permits "a state prosecutor [to] carr[y] out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged"); *see also* Stuntz, *supra* note 312, at 520 ("By threatening [multiple charges], prosecutors can, even in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty.").

323. Barkow, *supra* note 320, at 879.

324. There is not a meaningful pre-trial opportunity for criminal defendants to challenge the scope of a criminal statute—for example, in a motion to dismiss proceeding equivalent to that of civil litigation. *See* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 348–49 (2015) (observing that judges very rarely dismiss indictments and arguing for a more robust approach that matches the motion-to-dismiss proceeding in civil litigation).

325. *Supra* text accompanying notes 296–310.

326. *See* Johnson, *supra* note 27, at 138–39; *see id.* at 139 ("For example, a decade before the Supreme Court adopted a narrow reading of the Computer Fraud and Abuse Act in *Van Buren*, prosecutors in multiple jurisdictions had argued for a reading so broad that it encompassed any Internet user who violated a website's terms of service.").

327. *See* Kahan, *supra* note 15, at 386 ("Lenity seeks to assure legislative supremacy by preventing courts from using common-lawmaking discretion to complete statutory offenses that emerge incompletely specified from

The partial-leniency regime encourages all of this. Apart from instances when indeterminate statutory language implicates targeted federalism, *mens rea*, or constitutional vagueness concerns, the Court's interpretive approach enables implicit delegation of the legislative task of crime definition to prosecutors, who use that delegated authority to pursue far-reaching theories of prosecution. Consistent and explicit rejection of those theories based on robust lenity or some other generic policy of strict construction would help to rein in the excesses of that delegated discretion.[328] It would promote an interpretive culture that discredits overly expansive theories of prosecution, thereby encouraging courts to reject them and, in turn, encouraging prosecutorial charging policies and practices that recognize hard limits on the scope of penal statutes.[329]

IV. LENITY AS A MAJOR QUESTIONS DOCTRINE

A central theme in lenity's story so far has been its relationship to shifts in the interpretive culture set by the Supreme Court. The transformation of historic strict construction into the significantly weakened modern version of lenity was a product of the Court's shift toward purposivism.[330] Although it later embraced textualism, the Court has continued to adhere to the

---

Congress."); *see also* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that there are no federal common law crimes).

328. *See* Kahan, *supra* note 15, at 356 ("[T]o the extent that it is rigorously enforced, lenity, . . . makes it harder for Congress to make criminal law by raising the practical and institutional cost of such legislation."); *see also id.* at 354 ("Because it forecloses Congress's tacit reliance on judicial lawmaking as a strategy for enlarging Congress's power to promulgate general policies, a rule of strict construction is tantamount to a nondelegation doctrine.").

329. Skeptics may suggest that, if robust lenity were enforced, Congress would simply change its behavior—by writing clearer and more specified criminal statutes and perhaps even by overruling judicial decisions adopting narrow constructions. *See, e.g.*, Stuntz, *supra* note 312, at 561–65 (suggesting that a robust lenity "might cause more overcriminalization than it prevents"). But that change in behavior would not wholly undermine a regime of strict construction. As Stephen Smith has pointed out, "the problem of [indeterminacy] in criminal statutes is not just inartful crime definition (although that assuredly is a problem), but also that it can be difficult to foresee the many interpretive questions that will arise in real-world prosecutions." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 941 (2005). In any event, to the extent the concern is delegating authority through indeterminate language, robust application of a judicial doctrine that encourages criminal legislation that is more considered and specific would be a success.

330. *Supra* Part I.C.

weakened conception of lenity, apart from a few targeted areas in which it has employed partial substitutes.[331] But weak lenity is a poor fit for textualism. Its persistence enables implicit delegation of criminal lawmaking to the executive and the judiciary—undermining the separation-of-powers principle of legislative primacy in crime definition that dates back to the early days of the Republic[332] and that Chief Justice Marshall used to justify historic strict construction.[333]

Another change in the interpretive culture is afoot. Over the last few terms, in the context of administrative law, the Court has both abolished a regime of general deference to reasonable agency interpretations of ambiguous statutory language[334] and explicated the "major questions doctrine," a canon of construction that functions as an "implied-limitation rule"[335] requiring clear statutory authorization before concluding that Congress has delegated policymaking authority concerning "major" questions to an agency.[336] The Court has already applied this newly explicated canon to invalidate several significant administrative agency actions,[337] and more invalidations are sure to follow. In effect, the major questions doctrine prevents Congress from implicitly delegating major policy questions and reduces the discretion of administrative agencies that previously understood broad and open-ended statutory language as an invitation to issue regulations on those major questions.[338]

---

331. *See supra* Part II (identifying targeted tools the Court has used to adopt narrow constructions).

332. *See Hudson*, 11 U.S. (7 Cranch) at 34 ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

333. *See* Wiltberger v. United States, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment."); *supra* Part I.B.

334. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling the general deference regime that *Chevron* began).

335. NELSON, *supra* note 50, at 923.

336. West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

337. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2361–76 (2023) (using major questions doctrine to strike down agency action providing student loan relief); West Virginia v. EPA, 142 S. Ct. at 2609–16 (using major questions doctrine to strike down environmental regulation); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 667–70 (2022) (using major questions doctrine to strike down agency action involving vaccine mandate).

338. *See infra* Part IV.A (describing the Court's use of the major questions doctrine).

The emergence of the major questions doctrine in the administrative-law context has been subject to scholarly criticism.[339] But whatever its merits or demerits, it purports to advance the same basic separation-of-powers value of legislative primacy in the administrative-law context that historic strict construction did in the context of penal statutes—where limits on the delegation of criminal lawmaking have always been stronger.[340]

This Part thus explores how the logic of the major questions doctrine relates to lenity and suggests that some of the Court's recent decisions invoking a tradition of "interpretive restraint" when construing penal statutes can be understood as a modest form of major-questions lenity. It then argues that a stronger and more clearly articulated version of the doctrine is needed and considers what the contours of a more robust major-questions lenity should be.

A. THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine is not entirely new. Earlier decisions showed signs of it.[341] In *FDA v. Brown & Williamson*,[342] for example, the Court explained that "extraordinary cases" may warrant "hesitat[ion] before concluding that Congress has intended . . . an implicit delegation" deserving of deference.[343] That version of the doctrine situated considerations of "majorness" or "extraordinariness" as a carve-out to the now-abrogated *Chevron* two-step framework.[344] But in a recent series of cases

339. *See supra* note 53 (collecting criticisms of the major questions doctrine).

340. *See supra* notes 56–57 (explaining how the criminal context is especially sensitive to delegation concerns).

341. *See* Sunstein, *supra* note 53, at 484 (characterizing *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), and the major questions doctrine as a "linear descendent" of *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 44 U.S. 607 (1980)); *see also* Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 200–04 (2023) (suggesting that the Court applied a version of the major questions doctrine as early as the late-nineteenth century).

342. 529 U.S. 120 (2000).

343. *Id.* at 159.

344. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*). At "step one" of the old *Chevron* framework, courts applied ordinary tools of statutory interpretation to assess whether the statutory language was ambiguous; if it was ambiguous, the court proceeded to "step two," which required deference to the agency's reasonable interpretation of the statute, even if it was not the "best" interpretation. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43, 837 n.11 (1984); *see* Nat'l Cable &

preceding *Chevron*'s demise—which Mila Sohoni has called the "major questions quartet"[345]—the Court "unhitched the major questions exception from *Chevron*."[346] In *West Virginia v. EPA*,[347] the member of the quartet that most clearly articulates the doctrine, the majority opinion did not mention *Chevron* at all.[348]

Instead, Chief Justice Roberts's majority opinion in *West Virginia* articulated a new, stronger version of the major questions doctrine, explaining that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[349] And "[t]o convince us otherwise," he elaborated, the agency must point not just to "a merely plausible textual basis" for its "decisions of vast economic and political significance," but rather "clear congressional authorization for the power it claims."[350]

In a concurring opinion, Justice Gorsuch (joined by Justice Alito) described the major questions doctrine as a "clear-statement rule[]" that "protect[s] the Constitution's separation of powers."[351] He explained that Article I's Vesting Clause locates "[a]ll federal 'legislative powers . . . in Congress,"[352] quoting Chief Justice Marshall's instruction "that 'important subjects . . . must be entirely regulated by the legislature itself.'"[353]

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative."); *see also* Kevin Tobia et al., *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1165 n.60 (2024) ("Most observers viewed *Brown & Williamson* as deploying the major questions exception at step one.").

345. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

346. *Id.* at 263.

347. 142 S. Ct. 2587 (2022).

348. *Id.* at 2599–616; *see* Tobia et al., *supra* note 344, at 1165–66 ("[T]he majority opinion in *West Virginia v. EPA*, the leading cases in the quartet, did not even mention *Chevron* in its elaboration or application of the [major questions doctrine].").

349. *West Virginia*, 142 S. Ct. at 2605, 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

350. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

351. *Id.* at 2616–17 (Gorsuch, J., concurring).

352. *Id.* at 2617 (Gorsuch, J., concurring) (quoting U.S. CONST. art. I, § 1).

353. *Id.* (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

Justice Gorsuch's conception of the major questions doctrine seems to share roots with the nondelegation doctrine. That doctrine purports to forbid the delegation of legislative power to agencies absent an "intelligible principle" to guide the agency's implementation of the statute.[354] Although the nondelegation doctrine has essentially fallen into desuetude,[355] Justice Gorsuch (joined by Chief Justice Roberts and Justice Thomas) argued for its revitalization in an opinion dissenting from the Court's 2019 decision in *Gundy v. United States*;[356] Justices Alito and Kavanaugh also signaled some willingness to strengthen the nondelegation doctrine at that time.[357] More recently, however, Chief Justice Roberts and Justice Kavanaugh seemed to pull back—both joining a majority opinion that applied the weaker version of that doctrine that the Court has traditionally applied,[358] rather than Justice Gorsuch's dissenting opinion advocating for a more robust version of the doctrine.[359]

---

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

355. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002) ("The Supreme Court has resoundingly rejected every nondelegation challenge that it has considered since 1935.").

356. 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

357. Justice Alito concurred in the Court's judgment in *Gundy*, but "[did] not join either the plurality's constitutional or statutory analysis," indicating that he might be "willing, in a future case with a full Court, to revisit" the issue. *Id.* at 2131 (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach [to nondelegation] we have taken for the past 84 years, I would support that effort."). Justice Kavanaugh later suggested that he too would be willing to reevaluate the nondelegation doctrine in light of Justice Gorsuch's dissent in *Gundy*. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019). More generally, the Court seems to be engaged in a larger project of vindicating a stricter and more formalist understanding of the separation of powers. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1090 (2022) ("There can be little doubt that the United States Supreme Court has entered a new era of separation of powers formalism, even if the precise contours and implications of this formalistic approach are still unfolding.").

358. *See* FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2496 (2025) (rejecting a nondelegation challenge to a statutory scheme that grants certain powers to the FCC).

359. *See id.* at 2539 (Gorsuch, J., dissenting) ("By employing the modern, enfeebled form of the intelligible principle test, we do the Constitution no favors."); *see also id.* at 2511–18 (Kavanaugh, J., concurring) (explaining that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law" overturning *Chevron* and introducing the strong-form version of the major questions doctrine).

In light of that recent history, Justice Gorsuch's clear-statement articulation of the major questions doctrine can be understood as an alternative, albeit more modest,[360] means of furthering the same separation-of-powers norms that a strong-form nondelegation doctrine would advance.[361]

Following *West Virginia*, many commentators understood the new major questions doctrine as a substantive canon in the form of a clear-statement rule,[362] as Justice Gorsuch had suggested.[363] On that understanding, the major questions doctrine represents a normative commitment to preventing courts from construing statutory language as a delegation of lawmaking authority to agencies on "major" questions, absent an explicit statement to that effect.[364]

Yet any conception of the major questions doctrine as a purely substantive canon stands in "tension" with modern textualism, at least for some textualist Justices currently on the Court.[365] Insofar as a majority of the Court has not been totally clear on the major questions doctrine's normative foundations—

---

360. The major questions doctrine is less extreme in the sense that it yields a narrow construction of a statute, rather than a determination that the statute is void altogether, as would occur under the nondelegation doctrine. *Supra* note 354 and accompanying text.

361. *See Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting) (characterizing application of "the 'major questions' doctrine" as being "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency," in light of the fact that the nondelegation doctrine has "become[ ] unavailable to do its intended work").

362. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012, 1035 (2023) (characterizing the "core features of the new major questions doctrine" as "resembl[ing] a clear-statement rule"); Sohoni, *supra* note 4, at 309–15 (similar); *see also* Tobia et al., *supra* note 344, at 1166 (observing that "the vast majority of commentators" understood the Court to have articulated a clear-statement rule).

363. *See supra* notes 351–53 and accompanying text.

364. Alternatively, the doctrine could be understood as a substantive canon that operates not as clear-statement rule, but as a tie-breaker canon that instructs that "any statutory ambiguities" related to major questions "should be resolved against the agency's assertion of power." Tobia et al., *supra* note 344, at 1166; *see* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47–48 (2022) (suggesting that, although the major questions doctrine is a substantive canon, it may not be a clear-statement rule).

365. Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (quoting Barret, *supra* note 77, at 123–24).

apart from a general appeal to separation of powers—its status as a substantive canon may be more suspect.[366]

Perhaps for that reason, efforts to justify the major questions doctrine as a descriptive canon quickly emerged. Most prominently, in *Biden v. Nebraska*,[367] Justice Barrett argued in a concurring opinion that the major questions doctrine is not a substantive canon but instead a "tool for discerning—not departing from—the text's most natural interpretation" by "situat[ing] text in context"[368] of "common sense" that avoids "literalism."[369] She took the view that "we [would] 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'"[370] noting that "clarity may come from specific words in the statute" or "[s]urrounding circumstances, whether contained within the statutory scheme or external to it."[371] Quoting a D.C. Circuit opinion by then-Judge Kavanaugh, Justice Barrett elaborated that "[t]his expectation of clarity" follows from "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[372] That premise, she explained, reflects "our constitutional structure, which is itself part of the [relevant] legal context."[373] In light of Article I's Vesting Clause, she continued, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[374]

For Justice Barrett, then, the major questions doctrine need not be thought of as a substantive canon or a clear-statement

366. *See* Tobia et al., *supra* note 344, at 1168 ("Most substantive canons either reflect a broad societal consensus or are tied closely to constitutional law. The [major questions doctrine] at first glance has neither of these attributes.").

367. 143 S. Ct. 2355 (2023).

368. *Id.* at 2376, 2378 (Barrett, J., concurring); *see also id.* at 2376 (Barrett, J., concurring) (noting that a substantive-canon conception of the major questions doctrine could be seen as "inconsistent with textualism").

369. *Id.* at 2379 (Barrett, J., concurring).

370. *Id.* at 2380 (Barrett, J., concurring) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

371. *Id.* at 2380 (Barrett, J., concurring).

372. *Id.* (Barrett, J., concurring) (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

373. *Id.* at 2380 (Barrett, J., concurring).

374. *Id.* (Barrett, J., concurring).

rule.[375] Rather, she understands the doctrine as a less potent descriptive canon that provides context about ordinary meaning.[376] Sometimes, she acknowledged, "[a] court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing," with the result that "the court must adopt the agency's reading despite the 'majorness' of the question."[377]

Justice Barrett's account has been met with some scholarly criticism.[378] But it is not the only way of understanding the major questions doctrine as a descriptive canon. Ilan Wurman has separately defended the doctrine on a descriptive ground by appealing not to the context of constitutional structure, but instead to philosophical concepts concerning the relationship between textual indeterminacy, epistemology, and the stakes of a particular situation.[379]

As Ryan Doerfler has observed, "to say that the meaning of a statute is 'clear' or 'plain' is, in effect, to say that one *knows* what that statute means."[380] And "ordinary speakers attribute 'knowledge'—and, in turn, 'clarity'—more freely or less freely depending upon the practical stakes."[381] When stakes are low,

375. *See id.* at 2381 (Barrett, J., concurring) (distinguishing her view from "the 'clear statement' view of the major questions doctrine" on the ground that her view does not enable courts "to choose an inferior-but-tenable alternative that curbs agency authority").

376. *See id.* at 2380 (Barrett, J., concurring).

377. *Id.* (Barrett, J., concurring).

378. *See, e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unbounded, Unfounded, and Confounded*, 112 CALIF. L. REV. 899, 942–43 (2024) (characterizing Justice Barrett's approach as "strained" and "deeply inflected with the kind of debatable judgments that might sound right to a regulation skeptic but not to a progressive"); Chad Squitieri, *Placing Legal Context in Context*, HARV. J.L. & PUB. POL'Y PER CURIAM 9 (June 20, 2024), https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2024/06/Squitieri-Placing-Legal-Context-in-Context-vf.pdf [https://perma.cc/27DWAC3P] (criticizing "Justice Barrett's linguistic conception of the [major questions doctrine]" for "fail[ing] to account for the specific way in which the Constitution separates and vests lawmaking authority in both the President and Congress"); Tobia et al., *supra* note 344, at 1197–202 (presenting empirical findings to challenge Justice Barrett's descriptive account of the major questions doctrine).

379. Wurman, *supra* note 54, at 949–52. *But see* Tobia et al., *supra* note 344, at 1190–97 (presenting empirical findings that challenge Wurman's argument); Wurman, *supra* note 54, at 961 (contesting the methods used in the empirical project of Tobia, Walters & Slocum).

380. Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527 (2018).

381. *Id.* at 528.

"speakers are willing to concede that a person 'knows' this or that given only a moderate level of justification."[382] But when stakes are high, "speakers require greater justification before allowing that someone 'knows' that same thing . . . ."[383]

Building on Doerfler's work, Wurman views the major questions doctrine as reflecting a linguistic norm, which he calls an "importance canon."[384] In "high-stakes" contexts, both "ordinary readers and speakers are more likely to find the statute ambiguous" than they would "in a relatively lower-stakes context."[385] That "suggest[s]" that ordinary speakers "would demand clearer proofs that the agency has the asserted power when the regulation involves high stakes."[386] In other words, "ordinary speakers are more likely both to find a statute more ambiguous when the stakes are high, and also to expect the ambiguity to be resolved against a major and novel assertion of authority."[387]

In any event, a division has emerged as to how the major questions doctrine should be understood—with Justice Gorsuch and Justice Alito advocating for a clear-statement, substantive-canon conception, and Justice Barrett and Wurman advocating for descriptive-canon conceptions. Three other current Justices have been willing to apply the doctrine,[388] but have not attached themselves to a specific conception.

All versions of the doctrine now on offer plainly advance a separation-of-powers norm that reduces the degree to which statutory text is understood to delegate questions of significance to administrative agencies. The substantive-canon conception does so directly—as a normative rule that actively discourages that result. The descriptive-canon conceptions do so indirectly—either by widening the scope of context considered when interpreting text to include commonsense understandings about principal-agent relationships and the structure of our constitutional government, or by demanding more proof of Congressional

382. *Id.*

383. *Id.*; *see also id.* at 544–47 (exploring various linguistic and philosophical explanations).

384. Wurman, *supra* note 54, at 916.

385. *Id.* at 959.

386. *Id.*

387. *Id.* For an argument against Wurman's descriptive justification see Levin, *supra* note 378, at 936–37.

388. These three are Chief Justice Roberts and Justices Thomas and Kavanaugh. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

authorization in high-stakes situations.[389] Under any of these understandings,[390] the major questions doctrine has the effect of constraining executive discretion to implement expansive readings of statutes that would implicate major questions and, in turn, constraining judicial discretion to adopt those readings.[391]

B. A STEP TOWARDS MAJOR-QUESTIONS LENITY

The logic of the major questions doctrine in the administrative-law context has much to offer lenity in the criminal-law context. And in a recent line of cases involving penal statutes, the Court appears to have embraced a modest version of major-questions lenity.

The major questions doctrine purports to advance the same basic separation-of-powers value of legislative primacy in the administrative-law context that historic strict construction did in the context of penal statutes. As Justice Gorsuch noted in his concurring opinion in *West Virginia*, the major questions doctrine comports with Chief Justice Marshall's general instruction "that 'important subjects . . . must be entirely regulated by the legislature itself.'"[392] Indeed, the Court's adoption of historic strict construction in *Wiltberger* amounted to an application of that general principle to the specific context of penal statutes.[393] Recall that Chief Justice Marshall tied strict construction to the "plain principle" that "the legislature, not the Court" is "to define

389. It is possible, moreover, that the descriptive justifications and the substantive justification are not mutually exclusive. Both could be understood as *properties* of the canon. *See* Slocum & Tobia, *supra* note 212, at 73.

390. Coenen and Davis have identified four distinct possible justifications for the major questions doctrine: (1) the semantic justification, (2) the anti-aggrandizement justification, (3) the clarity-mandating justification, and (4) nondelegation avoidance. Coenen & Davis, *supra* note 54, at 1970–93.

391. While applying the major questions doctrine keeps courts from adopting an agency's expansive reading of a statute, the use of the "majorness" trigger itself grants courts significant discretion to exercise some of the policymaking power the doctrine is meant to keep away from agencies. *See* Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 772–73 (2022) (characterizing the Court's use of the major questions doctrine as "highly laden with discretionary political judgment" and "an exercise of raw political power" that has the ultimate effect of arrogating Executive power to the Judiciary).

392. West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

393. *See* Lawson, *supra* note 17, at 5 (describing the "classical version of the rule of lenity" as "treat[ing] all criminal cases as 'major questions' that require a *clear statement* from the legislature before statutes are given legal effect in particular cases").

a crime [] and ordain its punishment," because "the power of punishment is vested in the legislative, not in the judicial department."[394] This principle of legislative primacy in crime definition "meant not just that Congress was *entitled* to take the lead in defining criminal law, but also that Congress was *obliged* to do so, however inconvenient the consequences might be."[395]

When the Court later substantially weakened historic strict construction and fragmented it into a set of partial but incomplete substitutes, the separation-of-powers value of legislative primacy in crime definition persisted only in a few targeted areas.[396] For the balance of penal statutes, no generic policy of strict construction continues to ensure that Congress does not implicitly delegate criminal lawmaking authority to prosecutors and courts.[397] Prosecutors thus may now use their charging discretion to pursue conduct on the peripheries of indeterminate statutory language.[398] When courts accept those prosecutions, they adopt a definition of crime set by prosecutors, not by Congress, and ultimately engage in criminal lawmaking at odds with the ban on federal common law crime definition.[399]

A reformulation of lenity as a major questions doctrine for penal statutes could work to restore a widely applicable anti-delegation principle of strict construction with actual teeth. When triggered, major-questions lenity would require the government to show "'clear congressional authorization' for the [prosecutorial] power it claims"[400] and instruct courts to be "reluctant to read into ambiguous statutory text the [delegated prosecutorial authority] claimed to be lurking there."[401] Or, as Chief Justice Marshall put it in *Wiltberger*, "[t]o determine that a case is within the intention of a [penal] statute, its language must authorise [courts] to say so."[402]

---

394. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

395. Kahan, *supra* note 15, at 361.

396. *See supra* Part II (describing the fragmentation of lenity).

397. *See supra* Part III (describing how the regime of partial leniency enables delegation of criminal lawmaking authority to courts and prosecutors).

398. *Supra* notes 316–329.

399. Kahan, *supra* note 15, at 405–06; *see* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.").

400. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

401. *Id.*

402. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820).

This sketch of major-questions lenity is strikingly similar to a rationale that has begun to emerge in some of the Court's recent cases adopting narrow constructions of penal statutes—particularly the decisions previously described as relying on *ad hoc* rationales.[403] In some of those cases, the Court has invoked a tradition of "interpretive restraint" for penal statutes,[404] often highlighting the significant consequences of the government's expansive readings.[405] Occasionally, the Court has noted that clear direction from Congress would be needed before adopting sweeping constructions of the statutes.[406] This language can be understood as a modest form of major-questions lenity—and potentially a first step toward a more robust version.

1. *Dubin v. United States*[407]

A prominent example is the 2023 decision in *Dubin v. United States*, both for the Court's analysis of the interpretive question before it and for the way in which the Court described its prior cases.

Dubin concerned the scope of the federal aggravated identity theft statute, which increases the penalty for anyone who, "during and in relation to" the commission of an enumerated predicate felony, "knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person."[408] The en banc Fifth Circuit had broadly construed the term "uses" to capture any person who recites another's name while committing a predicate crime, regardless whether doing so was instrumental to the commission of the predicate crime.[409] The Supreme Court disagreed, narrowly construing the terms "uses" and "in relation to" as applying only when "the defendant's

403. *Supra* Part II.D.

404. Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)).

405. *See supra* note 10 (collecting examples).

406. *See, e.g.*, *Marinello*, 138 S. Ct. at 1108 ("Had Congress intended that outcome, it would have spoken with more clarity . . . ."); Yates v. United States, 574 U.S. 528, 540 (2015) ("If Congress indeed meant to make . . . an all-encompassing ban . . . one would have expected a clearer indication of that intent.").

407. 143 S. Ct. 1557 (2023).

408. 18 U.S.C. § 1028A(a)(1) (emphasis added).

409. United States v. Dubin, 27 F.4th 1021, 1022 (5th Cir. 2022) (en banc) (adopting rationale of panel opinion); *see also* United States v. Dubin, 982 F.3d 318, 325–26 (5th Cir. 2020) (broadly construing the word "uses").

misuse of another person's means of identification is at the crux of what makes the underlying offense criminal."[410]

Writing for an eight-justice majority, Justice Sotomayor based that "targeted reading" on the statute's text and title, statutory context, and a linguistic canon of interpretation.[411] She also highlighted the "far-reaching consequences" that would have resulted from "the staggering breadth" and "implausibility" of the government's reading, which would have "swe[pt] in the hour-inflating lawyer, the steak-switching waiter, [and] the building contractor who tacks an extra $10 onto the price of the paint he purchased[,] [s]o long as they used various common billing methods."[412] And "[b]ecause everyday overbilling cases would account for the majority of violations in practice," she continued, "the Government's reading places at the core of the statute its most improbable applications."[413]

In drawing attention to these implausible applications of the government's expansive reading, Justice Sotomayor situated her analysis within a tradition of narrowly construing penal statutes. She explained that "[t]h[e] Court has 'traditionally exercised restraint in assessing the reach of a federal criminal statute.'"[414]

When invoking that tradition of "restraint," Justice Sotomayor did not mention lenity or strict construction by name; doing so would only have evoked the high bar of "grievous ambiguity" arguably required to trigger the modern doctrine.[415] Instead, she explained at a higher level of abstraction that the interpretive tradition "arises 'both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed,'"[416] adding that "[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language."[417] That stated justification brings to mind Chief

410. Dubin v. United States, 143 S. Ct. 1557, 1563, 1565–67 (2023).

411. *Id.* at 1564–67, 1569–72.

412. *Id.* at 1572.

413. *Id.* at 1573.

414. *Id.* at 1572 (quoting Marinello v. United States, 138 S. Ct. 1101, 1109 (2018)).

415. *Supra* note 156 and accompanying text.

416. *Dubin*, 143 S. Ct. at 1572 (quoting *Marinello*, 138 S. Ct. at 1106).

417. *Id.* (quoting United States v. Spears, 729 F.3d 753, 758 (2013)).

Justice Marshall's insistence on legislative primacy in crime definition[418] and the related justification for the administrative-law major questions doctrine.[419]

After justifying the tradition of interpretive restraint, Justice Sotomayor provided three recent examples—*Van Buren v. United States*, *Marinello v. United States*, and *Yates v. United States*—to illustrate how, "[t]ime and again, th[e] Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."[420] She focused on those decisions' analysis of the implausible consequences of broad government readings of federal penal statutes.[421] Each deserves brief elaboration here.

Van Buren concerned the scope of a provision of the Computer Fraud and Abuse Act that covered anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer."[422] The Court narrowly construed "exceeds authorized access" to encompass only "access[ing] a computer with authorization but then obtain[ing] information located in particular areas of the computer—such as files, folders, or databases—that are off limits."[423] Although Justice Barrett's majority opinion based that conclusion only on interpretive tools for determining ordinary meaning,[424] she also noted how the "far-reaching consequences" of the broader construction of the statute advanced by the government "underscore[d] [its] implausibility."[425] That reading, Justice Barrett explained, would have "criminalize[d] every violation of a computer-use policy," thereby

418. *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94–95 (1820) (insisting that "the legislature, not the Court," is "to define a crime [ ] and ordain its punishment" because "the power of punishment is vested in the legislative, not in the judicial department").

419. *See supra* text accompanying notes 349–53 (describing the Court's rationale for the major questions doctrine).

420. *Dubin*, 143 S. Ct. at 1572.

421. *Id.*

422. 18 U.S.C. § 1030(a)(2)(C).

423. Van Buren v. United States, 141 S. Ct. 1648, 1662 (2021).

424. *See id.* at 1661 (justifying the narrow construction on the basis of the statute's "text, context, and structure" and disclaiming reliance on lenity and constitutional avoidance).

425. *Id.*

transforming "millions of otherwise law-abiding citizens [into] criminals."[426]

Marinello involved a tax statute that criminally prohibited "corruptly or by force or threat of force . . . obstruct[ing] or imped[ing], or endeavor[ing] to obstruct or impede, the due administration of [taxes]."[427] In a majority opinion by Justice Breyer, the Court rejected the government's broad reading of the statute, which could have captured a wide range of individuals, including anyone "who pays a babysitter $41 per week in cash without withholding taxes," as well as someone who "'leaves a large cash tip in a restaurant,' 'fails to keep donation receipts from every charity to which he or she contributes,' or 'fails to provide every record to an accountant.'"[428] The Court determined that, if Congress had meant for the statute to reach that far, "it would have spoken with more clarity than it did."[429]

Yates concerned the scope of the term "tangible object" in section 1519 of the Sarbanes-Oxley Act, which criminally prohibits "destroy[ing] . . . any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation.[430] A plurality of the Court rejected the government's "unrestrained reading" of that term, which would have transformed the statute into "an all-encompassing ban on the spoliation of evidence" that would "sweep within its reach physical objects of every kind," including (in *Yates* itself) a fish.[431] If

426. *Id.* For example, the government's broad reading would have swept in conduct as commonplace as that of "an employee who sends a personal e-mail or reads the news using her work computer," in violation of her employer's policy. *Id.*

427. 26 U.S.C. § 7212(a).

428. Marinello v. United States, 138 S. Ct. 1101, 1108 (2018).

429. *Id.*

430. 18 U.S.C. § 1519.

431. Yates v. United States, 574 U.S. 528, 532, 536, 540 (2015) (plurality opinion). In *Yates*, Justice Ginsburg wrote a four-justice plurality opinion in which she invoked lenity, but only in a single paragraph, couched in the conditional tense, at the end of an eighteen-page opinion focused on the statute's text, descriptive canons, the statute's structure and title, and legislative history to resolve the ambiguity in the statute. *Id.* at 531–48. Justice Alito provided the fifth vote in favor of the narrow construction, but his concurring opinion relied solely on "traditional" text-based "tools of statutory construction." *Id.* at 549 (Alito, J., concurring in judgment); *cf.* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the

Congress had intended that result, Justice Ginsburg's plurality opinion explained, "one would have expected a clearer indication of that intent."[432]

The language of these opinions is striking. In each case, the Court demonstrated the high stakes of the interpretive question before it by drawing attention to the far-reaching consequences of the government's expansive reading of the statute. It then declined to adopt that reading and, in *Marinello* and *Yates*, said that it would require clear authorization from Congress before reading the penal statute to sweep so broadly. The Court may not have formally embraced major-questions lenity as a canon of construction, but the analysis in these cases sure seems to resemble it.

Just as striking is the fact that, following *Dubin*, nearly every member of the Court appeared willing to endorse an emerging "tradition[]" of "restraint"[433] that is separate and distinct from the modern rule of lenity (and thus free from the grievous-ambiguity trigger). Eight justices signed on to the majority opinion in *Dubin*. The only Justice who did not—Justice Gorsuch[434]—has separately penned recent concurring opinions expressly advocating for both a robust version of lenity[435] and a robust substantive-canon version of the major questions doctrine in the administrative-law context.[436]

2. *Fischer v. United States*[437]

The Court continued the trend in *Fischer v. United States*, a recent case concerning the scope of section 1512(c) of the

judgments on the narrowest grounds. . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

432. *Yates*, 574 U.S. at 540 (plurality opinion).

433. *Dubin*, 143 S. Ct. at 1572.

434. Justice Gorsuch concurred in the judgment, taking the view that the statute should be deemed void for vagueness. *Id.* at 1576–77 (Gorsuch, J., concurring in judgment).

435. *See* Snyder v. United States, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J., concurring) (arguing that "lenity is what's at work behind today's decision"); Bittner v. United States, 143 S. Ct. 713, 724–25 (2023) (Gorsuch, J., concurring) (arguing for a more robust version of lenity); Wooden v. United States, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring in judgment) (arguing for explicit reliance on a more robust version of lenity).

436. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring) (describing the major questions doctrine as a clear-statement rule).

437. 144 S. Ct. 2176 (2024).

Sarbanes-Oxley Act in the context of a prosecution related to the events at the U.S. Capitol on January 6, 2021.[438]

Section 1512(c) imposes up to twenty years imprisonment on certain forms of corrupt conduct.[439] Subsection (1) applies to any person who corruptly "alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding."[440] Subsection (2) set forth a residual clause, which extended the criminal prohibition to any person who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so."[441]

On January 6, 2021, while Congress was convening a joint session to certify the votes of the 2020 Presidential election, many supporters of then-President Donald Trump (who had lost the 2020 election) forced their way into the Capitol, breaking windows and assaulting police, resulting in the delay of the certification of the vote.[442] Fischer was one of the individuals who allegedly trespassed and engaged in a physical confrontation with police.[443] He was charged with a number of crimes,[444] including a violation of section 1512(c)'s residual clause on the theory that his conduct "otherwise obstruct[ed], influenc[ed], or imped[ed] any official proceeding" within the meaning of the Act.[445] That count carried a substantially higher penalty than the other charges brought against him.[446]

The Court held that the residual clause did not apply to Fischer's alleged conduct, narrowly construing it to cover only acts that affect "the availability or integrity" of "records,

438. *Id.* at 2182.

439. 18 U.S.C. § 1512(c).

440. *Id.* § 1512(c)(1).

441. *Id.* § 1512(c)(2).

442. *Fischer*, 144 S. Ct. at 2182.

443. *Id.*

444. *Id.* (noting that Fischer was charged with "forcibly assault[ing] a federal officer, enter[ing] and remain[ing] in a restricted building, and engag[ing] in disorderly and disruptive conduct in the Capitol, among other crimes").

445. *Id.* at 2183.

446. *Id.* at 2182. While the section 1512(c) charge carried the possibility of up to twenty years' imprisonment, the other crimes charged "carr[ied] maximum penalties ranging from six months' to eight years' imprisonment." *Id.*

documents, objects, or . . . other things" used in an official proceeding.[447]

Writing for a six-justice majority, Chief Justice Roberts justified the narrow reading on the basis of the statute's text, linguistic canons of interpretation, and statutory history and context.[448] But he also relied on avoidance of the "peculiar" consequences that would result from the government's "unbounded"[449] reading of the residual clause, which would have "criminaliz[ed] a broad swath of prosaic conduct, exposing activists"—including "peaceful protesters"—"and lobbyists alike to decades in prison."[450] Those consequences, he reasoned, "underscore[d] the implausibility of the Government's interpretation,"[451] noting that, if Congress had meant to impose criminal punishment on "*any* conduct that delays or influences a proceeding in *any* way, it would have said so."[452] Chief Justice Roberts also drew attention to the severity of the penalty attached to section 1512(c), relative to the "lesser penalties under more specific obstruction statutes."[453]

Then, in a paragraph that comes as close to invoking major-questions lenity as any in a majority opinion, Chief Justice Roberts quoted *Wiltberger* for the proposition that the Court has "long recognized 'the power of punishment is vested in the legislative, not in the judicial department.'"[454] For that reason, he elaborated, the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute."[455] By "cabining" the residual clause, Chief Justice Roberts explained, the Court was "afford[ing] proper respect to 'the prerogatives of Congress' in defining crimes and setting the penalties for them."[456] The government's expansive reading, he elaborated, "would intrude on that deliberate arrangement of constitutional authority over

447. *Id.* at 2190.
448. *Id.* at 2183–89.
449. *Id.* at 2187
450. *Id.* at 2189.
451. *Id.* (quoting Van Buren v. United States, 563 U.S. 374, 394 (2021)).
452. *Id.*
453. *Id.*
454. *Id.* (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).
455. *Id.* (quoting Marinello v. United States, 138 S. Ct. 1101, 1106 (2018)).
456. *Id.* (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)).

federal crimes, giving prosecutors broad discretion to seek" significant criminal penalties.[457]

While Chief Justice Robert's majority opinion in *Fischer* can be viewed as evidence of an emerging form of major-questions lenity, Justice Barrett's dissent (joined by Justices Sotomayor and Kagan) may suggest some limitations on the operation of that principle. The three dissenting Justices do not appear opposed to an implied-limitation rule for penal statutes under the banner of "interpretive restraint" in light of "far-reaching consequences."[458] Yet in *Fischer*, they did not think that principle applied. For one thing, according to Justice Barrett, the majority's "appeal to consequences" was "overstated."[459] In her view, "innocent activists and lobbyists who engage in lawful activity" would be "screen[ed] out" by the "corruptly" element of the statute or by First Amendment limitations on the statute's breadth.[460] And although the residual clause carries a twenty-year maximum penalty, she explained, the majority "glosse[d] over the absence of any prescribed minimum,"[461] which she took to indicate a scope that "encompasses actions that range in severity."[462]

More fundamentally, Justice Barrett understood Congress to have clearly defined an "expansive" reach for the residual clause.[463] And "[o]nce Congress has set the outer bounds of liability"—even if set broadly—the Court should understand that as granting "the Executive Branch . . . discretion to select particular cases within those boundaries."[464] She concluded that the majority's narrow construction—which she viewed as "atextual"—"failed to respect the prerogatives of the political branches."[465]

---

457. *Id.*

458. Justice Sotomayor wrote the majority opinion in *Dubin*, *see supra* text accompanying notes 407–421, and Justice Barrett wrote the majority opinion in *Van Buren*, *see supra* text accompanying notes 422–26. Justice Kagan, for her part, joined the majority opinions in *Marinello*, *Van Buren*, and *Dubin*. *See supra* text accompanying notes 407–29.

459. Fischer, 144 S. Ct. at 2201 (Barrett, J., dissenting).

460. *Id.* at 2202.

461. *Id.* (quoting Yates v. United States, 574 U.S. 528, 569 (2015) (Kagan, J., dissenting)).

462. *Id.*

463. *Id.*; *see also id.* at 2195 (providing statutory analysis to support the conclusion that the residual clearly had a broad reach).

464. *Id.* at 2202.

465. *Id.*

In the language of major-questions lenity, the *Fischer* dissenters did not apprehend sufficiently high stakes to warrant application of an implied-limitation rule. Perhaps they would not extend major-questions lenity to *all* criminal statutes but would instead restrict its application only to instances in which they are convinced that a broad reading would pose a real risk of far-reaching consequences. They may also be slow to embrace major-questions lenity as a front-end presumption that would require a clear statement from Congress to be overcome.

* * *

Dubin and *Fischer* can be understood as applying a modest form of major-questions lenity under the banner of "interpretive restraint," as informed by the prospect of far-reaching consequences and potentially severe penalties. Just as earlier administrative-law decisions foreshadowed the major questions doctrine long before the Court's recent full articulation of that doctrine as a standalone tool of construction,[466] so too might the series of "interpretive restraint" cases of which *Dubin* and *Fischer* are a part prepare the way for explication of major-questions lenity as a more robust, standalone doctrine in the criminal context. The Court may ultimately not embrace the moniker "major-questions lenity;" the "interpretive restraint" label may be preferable, if only because it would easily allow the Court to sidestep the modern case law that has entrenched a weakened version of lenity.[467]

Regardless of the label, it is crucial that the Court actually explicate a concrete interpretive tool. The Court's current tendency to sneak in concerns about far-reaching consequences and interpretive restraint into its *ad hoc* rationales is inadequate. That approach has the effect of arrogating discretionary power, giving the judiciary more latitude when construing penal statutes in future cases.[468] But that effect—which the Court may at times perceive as a benefit—comes at a significant cost. The current approach does little to deter broad and literalistic readings

466. *See supra* text accompanying notes 341–53.

467. *See* Bruhl, *supra* note 29, at 1107 ("A new name need not mean a new tool, nor does the continuation of an old name preclude novelty in substance.").

468. *See* Johnson, *supra* note 27, at 125 ("[A] majority of Justices [may] prefer ad hoc constructions because they seek to maximize interpretive discretion in future cases involving penal statutes.").

of different penal statutes by prosecutors and lower courts.[469] Clear guidance is needed. The Court should explicate a generic rule of major-questions lenity for penal statutes that functions as a front-end implied-limitation rule that frames the resolution of important interpretative questions.

C. CONTOURS OF MAJOR-QUESTIONS LENITY

As the last Section suggested, the form of major-questions lenity currently on display at the Court is inadequate and undertheorized. Important questions remain about the scope and operation of major-questions lenity. A key question is *when* the doctrine should be triggered—i.e., which theories of prosecution based on expansive readings of penal statutes are deemed sufficiently "major" to demand clear authorization from the text. Another question concerns justifications—whether major-questions lenity should be understood as a canon that rests on purely normative or also descriptive grounds. This Section takes up these questions in the spirit of moving toward a more robust and clearly articulated version of major-questions lenity.

1. The Majorness Trigger

A central question for major-questions lenity is what exactly should trigger it—whether all or only some subset of interpretive questions concerning penal statutes should be considered "major" questions. This question determines the scope of the rule's application and the degree of discretion afforded to courts in deciding whether it applies.

Major-questions lenity could naturally extend to *all* interpretive questions about criminal statutes by virtue of their special status relative to other laws.[470] As scholars have long observed, "criminal statutes are among the most important species of law that Congress makes," given their "severe sanctions," high

469. *See infra* text accompanying notes 296–310, 316–327.

470. *See, e.g.*, Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1953–54 (2019) (surveying different claims of criminal law "exceptionalism"); Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 CORNELL L. REV. 612, 614 (1992) ("Crimes have always represented a special case, constitutionally and philosophically." (citing 1 WILLIAM BURDICK, THE LAW OF CRIME § 2, at 3 (1946))); *see also* Lawson, *supra* note 17, at 5 ("[T]he classical version of the rule of lenity treats all criminal cases as 'major questions' that require a *clear statement* from the legislature before statutes are given legal effect in particular cases.").

costs of administration, wide applicability to the electorate, and "symbolic import."[471] Our legal system—chiefly the Constitution—treats their enforcement and adjudication with special care, providing a host of special rights to those accused of violating criminal laws to ensure that individual liberty is not easily restrained.[472]

Perhaps most notably, the Constitution requires prosecutors to prove the *fact* of a criminal violation beyond-a-reasonable-doubt,[473] a standard of proof higher than the preponderance standard used in the civil context.[474] The stricter factual burden of proof for criminal cases conveys that determinations of

---

471. *See* Kahan, *supra* note 15, at 368 (observing that "[b]y any measure, criminal statutes are among the most important species of law that Congress makes" because "[t]he sanctions for criminal violations are among the most severe and most costly to administer in the entire legal system"; "the subject matter of criminal law concerns the electorate more than any other issues"; and "the symbolic import of criminal law is vital to competing understandings of the nature of the American political regime"); *see also* W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction,* 38 AM. J. CRIM. L. 117, 136–73 (2011) (identifying the added stigma of criminal laws as a reason for more due process protection); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

472. Hessick & Hessick, *supra* note 97, at 300 ("The text of the Constitution . . . demonstrate[s] that our legal system regularly treats criminal laws differently from other laws."). Protections such as the prohibitions on ex post facto laws and bills of attainder limit substantive criminal law. *See* U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1. Other protections are procedural, including the grand jury and petit jury requirements, the right to the assistance of counsel, the speedy trial guarantee, and the prohibition on double jeopardy. *Id.* amends. V, VI; *see also* Hessick & Hessick, *supra* note 97, at 301 ("These constitutional provisions help to protect liberty, either by preventing the government from enacting certain laws or by ensuring that defendants enjoy procedural protections before they can be convicted and punished.").

473. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process requires proof beyond a reasonable doubt to sustain a conviction). For more detailed discussions of the history of and justification for the beyond-a-reasonable-doubt standard in the criminal context, see generally Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1069–70 (2015) (exploring the costs of following the maxim that it is better to let ten guilty go free than to punish one who is innocent), and Joel S. Johnson, Note, *Benefits of Error in Criminal Justice*, 102 VA. L. REV. 237 (2016) (providing counterpoints to Epps's analysis).

474. *See Winship*, 397 U.S. at 372 (Harlan, J., concurring) ("[D]ue process . . . requires a more stringent standard for criminal trials than for ordinary civil litigation.").

criminal guilt are higher-stakes than those concerning civil liability.[475] A broadly applicable major-questions lenity would extend that idea to *legal* determinations about the scope of criminal statutes, requiring stricter proof—clear authorization by the text—for prosecutions that test their boundaries.[476] In that way, broad applicability without qualification would essentially reinstate historic strict construction.[477]

But major-questions lenity's domain need not be so broad. Perhaps it should reach only *some* interpretive questions concerning penal statutes. Indeed, the Court's current partial-leniency regime could itself be understood as a way to divide major interpretive questions arising from penal statutes—those that implicate vagueness avoidance, the federalism presumption, or the scienter presumption—from non-major questions. The recent emergence of the "interpretive restraint" approach in cases such as *Dubin* and *Fischer* could be viewed as recognition of a residual major-question category for interpretive questions with potentially far-reaching consequences.

When applying the major questions doctrine in the administrative-law context, the Court employs this understanding of "majorness," often noting the "economic and political

---

475. Doerfler, *supra* note 380, at 550 ("The increased burden of proof for criminal conviction . . . suggests that acting on the premise that a defendant is guilty of a criminal offense is higher stakes than acting on the premise that she committed a civil violation.").

476. *See* GARY LAWSON, EVIDENCE OF THE LAW 77–78 (2017) (citation omitted) (advocating for a conception of lenity that would extend the beyond-a-reasonable-doubt standard of proof to interpretive questions arising from penal statutes).

477. Lawson, *supra* note 17, at 5 (describing the "classical version of the rule of lenity" as treating "all criminal cases as 'major questions' that require a *clear statement* from the legislature before statutes are given legal effect in particular cases"). The analogy to the beyond-a-reasonable-doubt standard has historical support. Consider how Justice Brockholst Livingston described strict construction in an opinion issued while riding circuit:

> It should be a principle of every criminal code . . . that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labours under the same uncertainty as to the meaning of the legislature.

The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4,499); *see also* Hopwood, *supra* note 13, at 927–28 & nn.50–51 (citing other examples of this formulation in cases and treaties from the same era).

significance" of the asserted agency action.[478] Similarly, in the criminal context, perhaps major-questions lenity should apply only if the government's asserted authority to prosecute conduct under a particular reading of a statute, if accepted, would have the effect of criminalizing a wide swath of activity, particularly activity that does not seem to be within the core of the statute's aim.

Yet this approach to major-questions lenity may leave courts with too much discretion. Asking whether the consequences of a proposed interpretation are sufficiently significant to warrant a "majorness" conclusion is an open-ended inquiry. The "majorness" trigger would thus be subject, at least to some degree, to Justice Kavanaugh's criticism of the ambiguity trigger for many substantive canons: "Majorness" conclusions would lie in the "eye of the beholder and [not] be readily determined on an objective basis."[479]

To the extent reducing judicial discretion through the use of crisp interpretive rules is a primary goal, a more promising alternative for determining "majorness" may be to focus on the severity of potential punishment attached to the penal statute being construed.[480] That would echo how early American courts applied historic strict construction, varying the "degree of strictness"[481] according to "the severity of the penalty,"[482] and with how the beyond-a-reasonable-doubt standard has sometimes

478. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022) (quoting FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 159–60 (2000)).

479. *See* Wooden v. United States, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring).

480. *Cf.* Smith, *supra* note 329, at 885 (suggesting that "the penal consequences of [courts'] interpretive decisions" should be relevant in the process of construing federal criminal statutes).

481. BISHOP, *supra* note 121, § 193 (noting that the "degree of strictness" a court applied would "depend somewhat on the severity of the punishment" a statute inflicted).

482. SUTHERLAND, *supra* note 121, § 347 ("The construction will be more or less strict according to . . . the severity of the penalty . . . ."); *see also Id.* § 349–50 (noting that strict construction requires that "every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation," and that "this consideration presses with increasing weight according to the severity of the penalty"); *cf.* Staples v. United States, 511 U.S. 600, 616 (1994) (accounting for a "harsh" mandatory minimum sentence when concluding that the scienter presumption had not been rebutted).

been made stricter in the context of capital punishment.[483] It would also align with some of the language in the majority opinion in *Fischer*.[484] Formal recognition of variability in severity of punishment would match the likely reality that judges faced with interpretive questions about misdemeanor statutes to which only relatively minor punishments attach are less inclined to find indeterminacy in the text than those faced with serious felony statutes to which more serious punishments attach.

The distinction between misdemeanors and felonies may be an attractive place to draw a crisp line between majorness and non-majorness. Drawing the line there would make for an easily administrable and low-cost rule that would leave little room for discretionary judgment as to major-questions lenity's domain.[485] A felony-misdemeanor line would make clear for lower courts, prosecutors, and defense counsel when major-questions lenity is triggered. It would also put the legislature on notice that courts will demand more clarity in the definition of crimes that the legislature chooses to classify as felonies.

2. Operation and Justifications

Whatever its domain, questions remain as to major-questions lenity's operation and justifications as an interpretive tool.

As an initial matter, an important implication of the "majorness" trigger relates to the type of statutory text to which major-questions lenity can apply. Insofar as major-questions lenity is an implied-limitation rule, its application could properly extend to statutes with broad but seemingly clear language. As Caleb Nelson has explained, implied-limitation rules "encourage courts to read implied limitations into seemingly general statutory language—language that is broad enough as a matter of ordinary usage to encompass the issue in question, but that does

483. *See* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 999–1000 (1993) ("Should not 'reasonable doubt' be taken more seriously when a defendant's life is at stake?"); *see also id.* at 1000 n.94 (listing state court cases that formally imposed a heightened standard in capital cases).

484. *See* Fischer v. United States, 144 S. Ct. 2176, 2189 (2024) (drawing attention to the severity of the penalty attached to the criminal prohibition at issue, relative to the "lesser penalties under more specific obstruction statutes").

485. Because courts would not have much discretion in administering the felony-misdemeanor line, their use of major-questions lenity would not raise the same concerns about judicial arrogation of discretionary power as more free-wheeling major-questions implementations. *See supra* text accompanying notes 468–69.

not specifically address that issue or show that members of the enacting legislature thought about it."[486] That aspect of major-questions lenity distinguishes it from the modern rule of lenity[487] and other interpretive tools whose application squarely depends on linguistic indeterminacy.[488] Major-questions lenity is thus uniquely suited as a tool for constraining extremely broad statutes—a common type of penal statute typically thought to be beyond the reach of lenity-like tools of interpretation.[489]

Major-questions lenity could be employed as a substantive canon, potentially in the form of a clear-statement rule,[490] consistent with Justice Gorsuch's views. Notably, in *Wooden v. United States*[491]—decided the same Term as *West Virginia*—Justice Gorsuch argued in a concurring opinion (joined by Justice Sotomayor) for a more robust version of lenity that requires "any reasonable doubt about the application of a penal law [to] be resolved in favor of liberty."[492] He did the same the following term (joined by Justice Jackson) in *Bittner v. United States*.[493]

In making his argument—which tracks Justice Scalia's view of lenity[494]—Justice Gorsuch emphasized "lenity's role in

---

486. NELSON, *supra* note 50, at 230.

487. *See* Muscarello v. United States, 524 U.S. 125, 138–139 (1998) (restricting modern lenity's application to instances when "grievous ambiguity" remains following the use of all other interpretive tools (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994))).

488. For example, ordinary constitutional avoidance is typically triggered by ambiguity. *See, e.g.*, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) ("[T]he canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018)). And vagueness avoidance is ordinarily triggered by vagueness in statutory language. *See* Johnson, *supra* note 184, at 74.

489. *See supra* notes 61–62 (collecting sources that illustrate the conventional wisdom).

490. *See* Hopwood, *supra* note 3, at 700–01 (arguing for reconceptualization of lenity as a clear-statement rule that would "prohibit[ ] the delegation of criminal-lawmaking powers to courts and federal prosecutors"); Hessick & Kennedy, *supra* note 3, at 353–58 (advocating for increased use of clear statement rules for constraining the reach of criminal laws).

491. Wooden v. United States, 142 S. Ct. 1063 (2022).

492. *Id.* at 1081 (Gorsuch, J., concurring).

493. *See* 143 S. Ct. 713, 724–25 (2023) (Gorsuch, J., writing only for two justices) (arguing for robust lenity).

494. *See supra* text accompanying notes 150–53 (describing Justice Scalia's arguments for a stronger form of lenity).

vindicating the separation of powers,"[495] noting that "[p]erhaps the most important consequence" of Article I's Vesting Clause "concerns the power to punish."[496] A robust rule of lenity "helps to safeguard this design," he explained, "by preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities."[497] The rule thus "'places the weight of inertia upon the party that can best induce Congress to speak more clearly,' forcing the government to seek any clarifying changes to the law rather than impos[ing] the costs of ambiguity on presumptively free persons."[498] Justice Gorsuch then quoted *Wiltberger* both for the proposition that robust lenity "helps keep the power of punishment firmly 'in the legislative, not in the judicial department'"[499] and for the proposition that "[t]o determine that a case is within the intention of a statute, its language must authorise us to say so."[500] Given that language—and its proximity in time to *West Virginia*— Justice Gorsuch's concurring opinion in *Wooden* could be understood as laying the groundwork for something like a robust version of major-questions lenity, conceptualized as a substantive canon.[501]

Major-questions lenity could also be understood as a descriptive canon. The descriptive basis could be cast in terms of Doerfler's and Wurman's linguistic and philosophical insights about "high-stakes" situations. On this view, when the stakes are high—whether in *all* criminal contexts or some subset—major-questions lenity would counsel in favor of finding textual

---

495. *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in judgment).

496. *Id.*

497. *Id.* (quoting United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.N.H. 1812) (No. 15,718)).

498. *Id.* (quoting United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion)).

499. *Id.* (quoting Wiltberger v. United States, 18 U.S. (5 Wheat.) 76, 95 (1820)).

500. *Id.* at 1086 (quoting *Wiltberger*, 18 U.S (5 Wheat.) at 96).

501. Relatedly, in his concurring opinion in *Loper Bright Enterprises v. Raimondo*—which overruled *Chevron* deference—Justice Gorsuch characterized "[t]he ancient rule of lenity" as one of "*Chevron*'s victims," suggesting that the government sometimes relied on *Chevron* deference to "leverage" statutory ambiguities "to penalize conduct Congress never clearly proscribed." 144 S. Ct. 2244, 2286 (2024) (Gorsuch, J., concurring).

indeterminacy more easily and in favor of resolving that ambiguity "against a major and novel assertion of authority."[502]

Major-questions lenity could instead be descriptively justified as a contextualizing canon,[503] consistent with Justice Barrett's linguistic conception of the major questions doctrine as based on "commonsense principles of communication" within the context of our constitutional structure.[504] The "expectation of clarity" on major questions of crime definition would be "rooted in the basic premise that Congress normally 'intends to make major policy decisions itself,'"[505] such that "a reasonably informed interpreter would expect Congress to legislate on 'important subjects.'"[506]

Either descriptive justification for major-questions lenity would run counter to the typical modern understanding of lenity as a purely normative canon.[507] But to the extent the descriptive justifications are persuasive for the major questions doctrine, they would seem to apply equally to major-questions lenity.[508]

To be sure, the practical realities of criminal lawmaking may suggest that specific legislatures intend for criminal

---

502. Wurman, *supra* note 54, at 959.

503. *Cf.* Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 281 (1982) ("If the legislature can be assumed to draft criminal statutes more carefully than civil statutes, then courts should construe criminal statutes more narrowly than they construe civil statutes.").

504. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) ("[O]ur constitutional structure[] . . . is part of the [relevant] legal context . . . .").

505. *Id.* (Barrett, J., concurring) (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (Kavanaugh, J., dissenting from denial of reh'g en banc)); *see also id.* at 2380 (Barrett, J., concurring) (elaborating that, in light of Article I's Vesting Clause, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself").

506. *Id.* at 2380–81 (Barrett, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 10 (1825)).

507. *See* NELSON, *supra* note 50, at 162 (noting that "[t]here is widespread agreement that the rule of lenity" is one of "the most purely 'normative' of the canons").

508. *See* William E. Brown, *New Grounds for Lenity: Text, "Context," and Giving Criminal Defendants the Benefit of the Doubt*, 62 AM. CRIM. L. REV. ONLINE 22 (2025), https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2025/03/New-Grounds-for-Lenity-PUBLISH.docx.pdf [https://perma.cc/V4XC-YZ49] ("If one . . . agrees with Justice Barrett that the major questions doctrine is justified as a common-sense rule of linguistic interpretation, then . . . the same can be said of lenity.").

statutes to give prosecutors sweeping authority.[509] But neither descriptive justification for major-questions lenity concerns a particular legislature's subjective intent. On Justice Barrett's account, the descriptive claim relates to the appropriate interpretive posture for a court: The "context" in which a court reads a statute is not the dirty political reality of its passage; it is the entire constitutional structure.[510] For her, a faithful agent of our constitutional system reads a statute with the background presumption that the legislature is acting constitutionally—that is, in fact, taking responsibility for major questions. In other words, the descriptive claim is not that Congress did not want to delegate; it is that a reasonable reader of a legal text within our constitutional system presumes that Congress has not delegated the awesome power to define criminal liability unless it says so clearly.[511]

The same goes for Wurman's high-stakes linguistic argument. The reason the stakes are high in criminal law is because our system has a normative commitment to liberty. But the descriptive claim is about how that shared normative commitment shapes our linguistic practices. The idea is that our community of speakers simply demands more evidence—more clarity—before it is comfortable concluding that a given text authorizes a severe deprivation of liberty. It is a claim about how our language works in the shadow of our shared values. The shared normative commitment may be the reason for the linguistic phenomenon, but it does not make the phenomenon less real as a descriptive matter.[512]

Yet a descriptive-canon version of major-questions lenity would be less potent than the clear-statement, substantive-canon conception. It could be "overcome" not just "by text directly authorizing the [prosecutorial] action," but also by additional "context demonstrating that the [government's] interpretation is

509. *See supra* text accompanying notes 312–15 (describing the relationship between legislatures and prosecutors).

510. *See Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring) (asserting that the Constitution and separation-of-powers concerns help contextualize statutory language).

511. *See supra* text accompanying notes 367–77 (describing Justice Barrett's approach).

512. *See supra* text accompanying notes 379–87 (describing Wurman's approach).

convincing."[513] This conception would thus likely be more attractive to textualists who accommodate a wider range of context when determining ordinary meaning[514] or view substantive canons to be in serious "tension with textualism."[515] But it may be less effective at combatting broad and literalistic constructions in the lower courts.[516]

Nevertheless, a descriptive-canon conception would still be significantly stronger than the current version of lenity, which resides at the "end of the interpretive process"[517] as a "tool of last resort."[518] As a descriptive aid for obtaining ordinary meaning, major-questions lenity would kick in at the beginning of the interpretive process.

For present purposes, choosing between these competing conceptions is unnecessary. Any could be used to reform lenity and promote the separation of powers by disciplining prosecutors, courts, and ultimately Congress. Consistent application of major-questions lenity would limit the practice of implicit delegation of crime definition.[519] Because it would elevate lenity in the order of operations—retrieving it from the end of the interpretive process—major-questions lenity would help to curb the adoption of overly broad and literalistic constructions of penal statutes in the lower courts. It would promote an interpretive culture in which overly expansive theories of prosecution would more likely be viewed as invalid criminal lawmaking, thereby encouraging courts to reject those theories and, in turn, encouraging prosecutorial charging policies and practices that recognize hard limits on the scope of penal statutes.[520]

---

513. *Biden*, 143 S. Ct. at 2381 (Barrett, J., concurring).

514. *See* Grove, *supra* note 20, at 267 (observing that some textualist justices follow a more "flexible . . . approach that . . . permits interpreters to make sense of th[e] text by considering policy and social context as well as practical consequences").

515. *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

516. *See supra* text accompanying notes 300–10 (discussing lower-court constructions of penal statutes).

517. Hopwood, *supra* note 3, at 717.

518. Hessick & Kennedy, *supra* note 3, at 379.

519. *Cf.* Kahan, *supra* note 15, at 354 ("Because it forecloses Congress's tacit reliance on judicial lawmaking as a strategy for enlarging Congress's power to promulgate general policies, a rule of strict construction is tantamount to a nondelegation doctrine.").

520. The clear-statement, substantive-canon conception of major-questions lenity may more easily change the interpretive culture in lower courts because

Under any of these conceptions, major-questions lenity would address Justice Kavanaugh's doubts about substantive canons with ambiguity triggers,[521] including the modern version of lenity, because its application would not strictly turn on ambiguity,[522] but on the nature of the action taken pursuant to the statute. The major-questions trigger could still involve some degree of discretionary judgment to determine what constitutes a "major" question.[523] But it can likely be applied in a more principled manner than can a conventional ambiguity trigger, at least in the context of penal statutes. Courts could simply apply it to all questions related to the imposition of criminal punishment on particular conduct, distinguish between "major" and "non-major" questions based on whether a broader reading would yield far-reaching consequences, or draw the distinction based on the degree of the potential punishment attached to the penal statute.

CONCLUSION

This Article has identified a fundamental connection between the new major questions doctrine and historic lenity. At their core, both doctrines reflect a separation-of-powers commitment to legislative primacy on important questions of policy. In light of that shared justification, the logic of the newly articulated major questions doctrine in the administrative-law context has much to offer lenity in the criminal-law context, and the major-questions framework is strikingly similar to a rationale that has begun to emerge in some of the Court's recent cases adopting

---

it would be easier to administer. Unlike a descriptive canon—which is one of many available tools for determining semantic meaning—a clear-statement, substantive canon would more often drive the interpretive analysis.

521. Recall that Justice Kavanaugh views ambiguity triggers with suspicion because "ambiguity . . . cannot be readily determined on an objective basis." Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring). He prefers an interpretive approach that seeks the "best reading" using tools that determine semantic meaning. Kavanaugh, *supra* note 255, at 2148.

522. *See* Heinzerling, *supra* note 53, at 1947–49 (observing that the interpretive principle underlying the major questions doctrine departs from an ambiguity trigger). To be sure, the major-questions trigger still involves some textual indeterminacy. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (suggesting that the major questions doctrine stems from a "'reluctan[ce] to read into ambiguous statutory text' the delegation claimed to be lurking there" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))). But that is not the main focus.

523. *See supra* Part IV.C.1 (discussing the majorness trigger).

narrow constructions of penal statutes. That emerging rationale can be understood as a modest form of major-questions lenity—one that may prepare the way for a more robust version of the doctrine.

A more robust and clearly articulated version of major-questions lenity could be implemented either as a substantive canon in the form of a clear-statement rule or as a descriptive canon. Either conception would promote the separation of powers by working to limit the practice of implicit delegation of crime definition. Because it would not be relegated to the end of the interpretive process—as is modern lenity—major-questions lenity would meaningfully help to curb the adoption of overly broad and literalistic constructions of penal statutes in the lower courts and promote an interpretive culture in which overly expansive theories of prosecution would more likely be viewed as invalid attempts at criminal lawmaking.