Major-Questions Lenity

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There is a fundamental connection between the historic rule of lenity and the new major questions doctrine. At their core, both doctrines reflect a commitment to the separation of powers 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 Supreme Court's recent decisions adopting narrow constructions of 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.

The Court significantly weakened lenity in the mid-twentieth century, and it now plays virtually no role in the construction of federal penal statutes. Instead, the Court relies on a set of more targeted interpretive tools for narrowly construing certain penal statutes. The practical effect is a regime of partial leniency that deprioritizes the generic separation-of-powers value on which historic lenity was based while elevating more targeted concerns. As a result, for most penal statutes, the principle that clear crime definition is the legislature's obligation has been lost, and outcomes often turn on whether courts will exercise implicitly delegated lawmaking authority to adopt narrow constructions on a largely discretionary and ad hoc basis.

A robust major-questions lenity would work to restore historic lenity's insistence on legislative clarity in crime definition. It would promote the separation of powers by disciplining prosecutors, courts, and ultimately Congress. Major-questions lenity would substantially limit the practice of implicit delegation of crime definition and help to curb the adoption of overly broad and literalistic constructions of penal states in the lower courts.

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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]

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. In fact, however, the doctrines have much in common, once their theoretical underpinnings are properly understood; both share 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. Indeed, the major-questions framework is strikingly similar to a rationale that has begun to emerge in some of

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[1] *See infra* Part I.A-B.

[2] *See infra* Part I.C.

[3] *See*, *e.g.*, David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARD. L. REV. 523 (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 E. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. 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 restoration of 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 increased use of clear-statement rules for constraining criminal laws).

[4] *See Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*); *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 U.S.A.* v. *Nat. Res. Def. Council* "from its position as the starting position for evaluating whether an agency can exert regulatory authority").

[5] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

the Court's recent decisions adopting narrow constructions of penal statutes.[6] In this line of cases—culminating in *Dubin* v. *United States*[7] (2023) and *Fischer* v. *United States*[8] (2024)—the Court has invoked a tradition "interpretive 'restraint'" for federal penal statutes that is rooted in separation-of-powers concerns,[9] often highlighting the significant consequences of the government's broad readings[10] and sometimes noting that clear 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, not the Court," is "to define a crime [ ] and ordain its punishment" because "the power of punishment is vested in the legislative, not 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

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[6] *See* Part IV.B.

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

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

[9] Marinello v. United States, 138 S. Ct. 1101, 1109 (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)).

[10] *See*, *e.g.*, *Fischer*, 144 S. Ct. at 2189-90; *Dubin*, 143 S. Ct. at 1572; Ciminelli v. United States, 143 S. Ct. 1121, 1128 (2023); Ruan v. United States, 142 S. Ct. 2370, 2377-78 (2022); Van Buren v. United States, 141 S. Ct. 1648, 1661-62 (2021); *Marinello*, 138 S. Ct. at 1108; Yates v. United States, 574 U.S. 528, 536, 540 (2014) (Ginsburg, J., plurality); Bond v. United States, 572 U.S. 844, 858-59 (2013).

[11] *See*, *e.g.*, *Marinello*, 138 S. Ct. at 1108; *Yates*, 574 U.S. at 540.

[12] *See infra* Part I.A-B.

[13] *See*, *e.g.*, Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921 (2020) ("As 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 __, at 2029 (noting that historical "strict construction" was "based upon the premise that the law 'delights' in life and liberty"); Romantz, *supra* note __, at 524-25 (emphasizing lenity's fair-notice justification); Price, *supra* note __, 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 __, 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 __, at 384 (noting that criminal clear-statement rules would "protect liberty directly").

[14] *Wiltberger* v. *United States*, 18 U.S. 76, 94-95 (1820).

the lead in defining criminal law, but also that Congress was obliged to do so however inconvenient the consequences might be."[15]

That understanding of strict construction as a separation-of-powers constraint on the judiciary aligned the doctrine with another early basic tenet of federal criminal law rooted in both separation-of-powers and federalism concerns—that federal courts did not have 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 thus insisted that it was Congress's prerogative and obligation to define crimes, an activity that opens the door to punishment of the people; 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 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 the implement

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

[16] *Id.* at 386; s*ee* 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.").

[17] *Wiltberger*, 5 Wheat. at 96.

[18] United States v. Hartwell, 73 U.S. 385, 396 (1867); *see, e.g.*, 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. 372, 378 (1850).

[19] *See infra* Part. I.C.

[20] Tara L. Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 272 (2020) (explaining that the primary goal for a purposivist is to implement the "spirit" of the legislative enactment); *see*, *e.g.*, FRIENDLY, *supra* note __, at 200-01 (describing interpretation as "the art of proliferating a purpose" (quoting Brooklyn Nat. Corp v. Comm'r, 157 F.2d 450, 451 (1946) (Hand, J.)); Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (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.").

legislative intent,[21] the purposivist Court sapped it of its strength, renaming it "the rule of lenity" and relegating it to the to "the end of the interpretive process," as something to be considered only if ambiguity remained after considering all other indicia of legislative intent that could be gathered from all legal materials that purposivism made available.[22] That demotion ensured that federal courts would rely on lenity only very rarely, as a "tool of last resort."[23]

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 Justice Scalia and Justice 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 firmly relied on lenity to justify 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 justifies them using other tools. A close look at the Court's behavior shows that it has not merely cast lenity aside, but has

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[21] Francis A. Allen, *The Erosion of Legality in 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 instances.").

[22] Hopwood, *Clarity*, *supra* note __, at 717; *see* Secs. & Exch. Comm'n v. C.M. Joiner Leasing Corp. 320 U.S. 344, 350 (1943); *see also* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (explaining that, in construing an ambiguous statute, a court "may utilize . . . all the light relevantly shed on the words and the clause and the statute that express the purpose of Congress"); United States v. Brown, 33 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 no weight when it would cause "distortion or nullification of the evidence meaning and purpose of the legislation").

[23] Hessick & Kennedy, *supra* note __ at 380.

[24] *See infra* Part I.C.

[25] *See infra* text accompanying notes __-__.

[26] Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting Staples v. United States, 511 U.S. 610, 619 n.17 (1994)).

[27] *See* Joel S. Johnson, *Ad Hoc Constructions of Penal Statutes*, 100 NOTRE DAME L. REV. at *4 (forthcoming 2024).

[28] *See* Price, *supra* note __, 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 __, 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, *Managing Interpretive Change* at *25 (manuscript March 1, 2024) ("There are at least two ways to kill off an interpretive tool: to abrogate it and to ignore it.").

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 a policy preference that favors narrow readings of a limited set of penal statutes and ultimately promote the same anti-delegation, separation-of-powers values that Chief Justice Marshall used to justify strict construction.[32] In another set of cases, however, 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 for justification.[33]

As a result of this fragmentation, lenity's practical effect has not been totally lost in the Court's decision-making 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. That 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. 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 any indeterminate penal statute that does 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—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 a narrow construction on a largely discretionary *ad hoc* basis.[34]

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[30] *See infra* Part II.

[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 with Textualism*, 137 HARV. L. REV. 515, 516-17 (2023); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).

[32] *See infra* Part II.A-C.

[33] *See infra* Part II.D; *see also* Johnson, *Ad Hoc*, *supra* note __, at *3.

[34] *See infra* Part III.

An approach that allows for implicit delegation of crime definition may have been a good fit for the purposivist paradigm of the of the mid-twentieth century, in which the Court abandoned the long tradition of more robust generic strict construction. In that era, the Court might have understood broad and indeterminate language in penal statutes to evince a legislative purpose of inter-branch 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.[35]

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,"[36] without entertaining notions of inter-branch collaboration to arrive at constructions that give effect to the spirit of statutes.[37] Textualist courts do not view the presence of broad and open-ended language in penal statues as an invitation to engage in delegated judicial crime definition, but rather as a mandate to apply the plain text as written.[38]

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.[39] Because the Court does not endorse a robust generic version of lenity, lower courts often rely only on statute-specific ordinary-meaning analysis when construing penal statutes. And because they have fewer resources than does the Court, their ordinary-meaning analysis tends to be more simplistic, often yielding broad and literalistic

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[35] *See infra* Part III.A.

[36] Grove, *supra* note __, at 271-72.

[37] 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*, *e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (Princeton 1997) (Amy Gutmann, ed) (arguing that the formalism of textualism "is what makes a government of laws and not men").

[38] *See infra* Part III.A.

[39] 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 e.g.*, Aaron-Andrew Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 106 (2020) (exposing 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 believe that they may be bound by at least some of the Court's interpretive methods); *see also* Zachary B. Pohlman, *State-Federal Borrowing in Statutory Interpretation* 31 GEO. MAS. L. REV. (forthcoming 2024) (observing that state courts often borrow statutory-interpretation methodology and tools of interpretation, including substantive canons, from federal-law decisions of the Supreme Court).

constructions.[40] A fraction of these lower-court constructions can be corrected by the Court,[41] with the benefit of more focused and resource-intensive analysis of linguistic meaning. But most will not.[42]

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 readings for reasons just described.[43] When courts do so, 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.[44]

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.[45]

Under the administrative-law major questions doctrine, the Court applies an "implied-limitation rule"[46] 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

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[40] *See*, *e.g.*, United States v. Dawson, 64 F.4th 1227, 1235-37, 1239 (11th Cir. 2023) (adopting broad construction based on "plain language" 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 "unambiguous . . . ordinary and natural meaning" and dictionaries); United States v. Taylor, 44 F.4th 779, 787 (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, 227 (2d Cir. 2013) (adopting broad construction based on "ordinary meaning" and dictionaries).

[41] *See*, *e.g.*, United States v. Van Buren, 940 F.3d 1192, 1208 (11th Cir. 2019) (adopting broad construction, relying on circuit precedent based only on the plain language of the statute (citing United States v. Rodriguez, 628 F.3d 1258, 1263 (11th Cir. 2010)), *reversed and remanded by* 141 S. Ct. at 1661 (2021); United States v. Rehaif, 888 F.3d 1138 (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)), *reversed and remanded in* 139 S. Ct. at 2200.

[42] *See* Johnson, *Ad Hoc*, *supra* note __, at *3 (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").

[43] *See infra* Part III.A.

[44] Kahan, *supra* note __, at 386; s*ee Hudson*, 11 U.S. at 34.

[45] *See infra* Part IV.

[46] *See Spector* v. *Norwegian Cruise Lines Ltd.*, 545 U.S. 119, 139 (2005) (Kennedy, J., plurality) ("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 also id.* at 231-32 (describing implied-limitation rules in more detail).

agency.[47] In effect, the canon prevents Congress from engaging in implicit delegation of major policy questions and reduces the discretion of agencies to issue regulations on those topics.[48] The Court has recently applied the major questions doctrine to invalidate several significant administrative agency actions, drawing significant scholarly attention and criticism.[49]

Yet, despite all the scrutiny, scholars have largely ignored how the logic of the major questions doctrine relates to lenity.[50] 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,[51] where limits on the delegation of criminal lawmaking are stronger[52] and the prospect of punishment raises the stakes of interpretation.[53]

The Court's recent turn toward invoking a tradition of "interpretive restraint" in cases involving penal statutes can be understood as a modest form of major-questions lenity that may prepare the way

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[47] *West Virginia*, 142 S. Ct. at 2609.

[48] *See infra* Part IV.A.

[49] 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 __, at 282-90 (questioning the doctrine's compatibility with textualism); Beau J. Baumann, *American Administrative Law*, 111 GEO. L.J. 465 (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 Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946 (2017) (characterizing the major questions doctrine is "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 *supra* n. __.

[50] *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").

[51] *See infra* Part IV.B.

[52] The Court has long made clear that federal courts lack the power to create common law crimes, *see* Kahan, *supra* note __, at 386; s*ee Hudson*, 11 U.S. (7 Cranch) at 34, and that federal penal statutes with unduly vague language "undermine the Constitution's separation of powers" by "threaten[ing] to hand the 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*, 588 U.S. 445, 451 (2019). In addition, the administrative law tradition of deferring to agency interpretations of ambiguous civil statutes did not extend to government interpretations of criminal statutes. *Compare Loper Bright*, 144 S. Ct. at 2273 (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.").

[53] *See Wiltberger*, 18 U.S. at 95-96.

a stronger version of the doctrine.[54] 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,[55] so too might the series of "interpretive restraint" cases be understood as an initial step towards a more robust and clearly articulated conception of major-questions lenity as a generic rule for strictly construing penal statutes.

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. 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.[56]

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[57] typically thought to be beyond the reach of lenity-like tools of interpretation that are triggered only by linguistic indeterminacy.[58] Insofar as major-questions lenity functions as an implied-limitation rule, its application would extend to statutes with broad but seemingly clear language.[59]

Major-questions lenity could be understood as rooted in a normative commitment to the separation of powers.[60] It could also be viewed as a descriptive canon based on the high stakes of

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[54] *See infra* Part IV.B.

[55] *See infra* text accompanying notes __-__.

[56] *See infra* Part IV.B.

[57] *See* Hessick & Hessick, *supra* note __, 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 __ at 360-61 (describing legislative incentive to write broad laws); Kiel Brennan-Marquez, *Exteremely 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. 4, 6 (2013) (highlighting the "deluge of overly broad" penal statutes).

[58] *See, e.g.*, Brennan-Marquez, *supra* note __, at 642-43 (explaining that interpretive tools triggered by linguistic indeterminacy, such as lenity, do not address the problem of breadth in penal statutes).

[59] NELSON, *supra* note __, 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")

[60] *See West Virginia*, 142 S. Ct. at 2616-17 (Gorsuch, J., concurring) (describing 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, 1082 (2022) (Gorsuch, J., concurring in the 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" (citing *Wiltberger*, 5 Wheat. at 95-96)).

punishment[61] or "commonsense principles of communication" that situate the text of penal statues within the context of our constitutional structure.[62] Notably, a descriptive justification would distinguish major-questions lenity from the conventional conception of lenity as a purely normative canon.[63]

Under either conception, if major-questions lenity were embraced more fully, it would promote the separation of powers by working to limit the practice of implicit delegation of crime definition.[64] Because major-questions lenity would not be relegated to the end of the interpretive process—as is modern lenity—it would meaningfully help curb lower courts' adoption of overly broad and literalistic constructions of penal states 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 novel descriptive account of lenity's history after it was weakened, arguing that the Court did not merely diminish the doctrine but fragmented into a set of partial substitutes that ultimately promote the same separation-of-powers value for a targeted set of penal statutes. Part III considers the implications of that state of affairs, contending that it creates regime of partial leniency in which implicit delegation of crime definition is largely permitted, undermining the anti-delegation, separation-of-powers value on which historic strict construction was based. And 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.

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[61] *See* Wurman, *supra* note __, at 958-60.

[62] *See Biden*, 143 S. Ct. at 3380 (Barrett, J., concurring) (internal quotation marks omitted); *see id.* (Barrett, J., concurring) (noting that "our constitutional structure[] . . . is part of the [relevant] legal context" and that that, in light of Article I's Vesting Clause, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself").

[63] *See*, *e.g.*, CALEB NELSON, STATUTORY INTERPRETATION 152 (2d ed. 2023) (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").

[64] *Cf.* Kahan, *supra* note __, 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.").

I. RISE AND FALL OF STRICT CONSTRUCTION

A. English Origins

English common law courts created a "rule of strict construction" for penal statutes,[65] in reaction to the large number of offenses that qualified for capital punishment.[66] 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.[67] But as literacy rose and defendants could more easily rely on the defense,[68] Parliament abrogated the benefit-of-clergy doctrine.[69] Courts responded by "invent[ing] strict construction to stem the march to the gallows."[70]

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.[71] 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."[72] By the late eighteenth century, strict construction had come to be described as a rule "subject to more constant controversy than perhaps of any in the whole circle of the Law."[73]

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[65] Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-51 (1935).

[66] *Id.*; *see also* Hopwood, *Clarity*, *supra* note __, at 814; 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 10-11 (1948) (identifying several capital offenses under English criminal law).

[67] Mullaney v. Wilbur, 421 U.S. 684, 692 (1795); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. Rev. 57, 87 (1998).

[68] Solan, *supra* note __, at 87; *see* Hall, *supra* note __, 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.").

[69] *See* Radzinowicz, *supra* note __, at 10; Solan, *supra* note __, at 87; Hall, *supra* note __, at 749.

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

[71] Hall, *supra* note __, at 751; *see* Hopwood, *Clarity*, *supra* note __, at 714 ("[S]trict construction thus 'reflected a systemic preference for life and liberty and a systemic bias against overpunishment.'"); Kahan, *supra* note __, 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 __,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.").

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

[73] 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).

The rule applied to ambiguous[74] and vague[75] statutory language. In the case of ambiguity, a court would opt for a narrow interpretation that limited the statute's scope, thereby avoiding imposition of the death penalty in a particular case.[76] One famous example involved an English court's strict construction of a statute requiring capital punishment for "those who are convicted of stealing horses."[77] 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.[78] Although the first option was likely intended, the second was also fairly possible.[79] 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 capital punishment.[80]

When addressing vagueness, English courts would sometimes go so far as to "treat[] the vague statutory language as devoid of meaning altogether."[81] One English court, for example, addressed a statute prohibiting the "stealing [of] sheep, or other cattle."[82] At the time, the term "cattle" was understood to "encompass all '[b]easts of pasture; not wild nor domestick.'"[83] The term "other cattle" was thus not merely ambiguous, but vague insofar as "cattle" was open-ended and had practically "innumerable possible meanings."[84] The English court struck the term from the statute, deeming it "much too loose."[85]

B. American Adoption and Alteration

Trained in English common law, American judges applied strict construction "from the start,"[86] with the Supreme Court recognizing

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[74] 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: LAWS AND THEIR INTERPRETATION 38-39 (2010).

[75] A vague is open to practically "innumerable * * * applications." SOLAN, *supra* note __, at 38-39.

[76] Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. 1565, 1577 (2023).

[77] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765).

[78] Solan, *supra* note __, at 87-88.

[79] *Id.* at 88.

[80] *Id.* at 87-88.

[81] Johnson, *Federal-State Relations*, *supra* note __, at 1577.

[82] Blackstone, *supra* note __, at 87.

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

[84] SOLAN, *supra* note __, at 38.

[85] BLACKSTONE, *supra* note __, at 87; Solan, *supra* note __, at 87-88.

[86] Barrett, *supra* note __, at 129-130 & nn.91-92; *see* Hessick & Hessick, *Constraining*, *supra* note __, at 2329-32 & nn.151-62 (identifying early state courts that applied strict construction); Hall, *supra* note __, at 748 (noting "hundreds of cases stating and usually applying the common-law rule of strict

it as early as 1795.[87] But the rationale for the rule quickly took on an American flavor rooted in our constitutional structure. In an early case, *Wiltberger* v. *United States*,[88] Chief Justice Marshall justified the rule on both fair-warning and separation-of-powers grounds, explaining that the "rule that . . . a penal statute . . . is to be construed strictly" 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."[89] He elaborated that "the legislature, not the Court," was "to define a crime [ ] and ordain its punishment,"[90] and that the language of penal statutes should "be taken according to the common understanding of mankind . . . in their popular and received sense."[91] 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."[92]

In the federal system at least, 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.[93] But in another sense, those other values may be the ultimate ends that strict construction serves. Indeed, for the Founding generation, the primary justification for the separation of powers was the protection of individual liberty.[94] That may have been what Chief Justice Marshall meant when he spoke of "the tenderness of the law for the rights of individuals."[95] In the words of

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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).

[87] *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, *Construing*, *supra* note __, at 2334 & nn.171-72.

[88] 5 Wheat. 76 (1820).

[89] *Id.* at 94-95.

[90] *Id.* at 95; *see Hudson*, 11 U.S. at 24 (explaining 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.").

[91] *Id.* at 94.

[92] *Id.* at 96.

[93] *See* Kahan, *supra* note __, 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").

[94] *See* Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 306-21 (2020); *see also* 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).

[95] *Wiltberger*, 5 Wheat. at 95.

James Madison, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the definition of tyranny" that would threaten individual liberty.[96] Allowing Congress to delegate criminal lawmaking authority undermines that structure and directly threatens individual liberty[97] by increasing the risk of punishment for conduct not clearly covered by a penal statute.[98] For those reasons, separation-of-powers concerns are at their zenith when penal statutes are at issue.

In addition to providing an American justification for strict construction rooted in the protection of individual liberty, the separation-of-powers rationale provided a justification for strict construction distinct from judicial resistance to the death penalty. That was important for the rule's continued application because the nineteenth century "marked the end of the death penalty as the chief mode of punishment for serious crimes," both in the United States and in England.[99]

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."[100] Chief Justice Marshall was adamant that "[w]here there is no ambiguity in the words, there is no room for construction."[101] This limit on the rule's

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[96] The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also* The Federalist No. 48, at 309 (James Madison) (warning of the "danger[] to liberty" posed by the government); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–14 (2006) (discussing the Framers' concern with "tyranny" in the criminal justice system that would lead to less liberty and more punishment).

[97] *See* The Federalist No. 47, at 301 (James Madison) ("There can be no liberty where the legislative and executive powers are united in the same person . . . lest the same monarch . . . should enact tyrannical laws to execute them in a tyrannical manner.").

[98] *See* Hessick & Hessick, *Nondelegation*, *supra* note __, at 307 (explaining that "[t]he threat from" delegated lawmaking power "is more pronounced in criminal cases than in civil cases" 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" by means of "prohibit[ing] additional conduct").

[99] Hall, *supra* note __, at 751.

[100] *Wiltberger*, 18 U.S. at 95.

[101] *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 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93).

domain brought strict construction in line with the American judicial norm of "faithful agency" to legislative will.[102]

A number of early courts viewed strict construction as a constraint on the judiciary rather than on Congress.[103] 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."[104]

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."[105] By tying strict construction to "the plain principle, that the power of punishment is vested in the legislative, not in the judicial department,"[106] he was "unmistakably allud[ing] to a parallel passage"[107] from the Court's earlier federalism and separation-of-powers decision in *United States* v. *Hudson*,[108] 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.[109] 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."[110]

By adopting strict construction on this basis, Kahan as elaborated, Chief Justice Marshall made clear that the principle of

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[102] *See* Barrett, *supra note* __, at 131-33; *see also* Kahan, *supra* note __, 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").

[103] *Id.* 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).

[104] The Enterprise, 8 F. Cas. 732, 734 (Livingston, Circuit Justice, C.C.D.N.Y. 1810) (No. 4499).

[105] Kahan, *supra* note __, at 359.

[106] *Wiltberger*, 18 U.S. at 95.

[107] Kahan, *supra* note __, at 359.

[108] 11 U.S. (7 Cranch) 32 (1812).

[109] *Id.* at 34; *see also* Kahan, *supra* note __, at 359-60 (elaborating on the political and social conditions that led to *Hudson* and on its clear effect on the rationale in *Wiltberger*).

[110] Kahan, *supra* note __, at 361; *see 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."); *see also* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 986 & n.102 (2021) (characterizing Chief Justice Marshall's opinion in *Wiltberger* as "declining to read a [penal] statute as expansively as its mischief").

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."[111] In this way, early American federal courts thus "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."[112]

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]" in the text of federal penal statutes.[113] During this period, the "federal courts saw themselves [as] engaged in construction" of "statutory indeterminacy"[114] that sought to avoid "mak[ing] every doubtful phrase" in a penal statute "a drag-net for penalties."[115] State courts of the same period often applied strict construction in the same manner,[116] sometimes also applying it in a way that resembled how English courts had used it to void vague or open-ended language.[117]

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 defen[s]e, or in any way deprive him of his liberty."[118] The rule had purchase whenever the "plain meaning" of

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[111] Kahan, *supra* note __, at 361.

[112] Barrett, *supra* note __, at 134.

[113] United States v. Hartwell, 73 U.S. 385, 396 (1867); *see*, *e.g.*, 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. 372, 378 (1850).

[114] *Johnson*, 576 U.S. at 616 (Thomas, J., concurring in the judgment).

[115] *Harrison*, 50 U.S. at 378.

[116] *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. 191, 192-97 (1801).

[117] *See*, *e.g.*, McConvill v. Mayor & Alderman 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).

[118] JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES; INCLUDING THE WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL, WHAT IS SPECIAL TO THE CRIMINAL LAW, AND THE SPECIFIC STATUTORY OFFENCES AS TO BOTH LAW AND PROCEDURE § 193, at 186 (2d ed. 1883); *see id.* at § 189(c), at 179 ("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."); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 349-50, at 438-41 (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, at 189 ("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, receive a liberal

the statutory language was "reasonably open to question."[119] It prevented courts from imposing criminal punishment beyond what the legislature had clearly authorized by statutory text,[120] even when a particular application seemed consistent with the statute's purpose or the "mischief" at which it was aimed.[121] The underlying assumption was 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."[122] Notably, moreover, the "degree of strictness"[123] a court applied when construing the statute sometimes varied according to "the severity of the penalty."[124]

C. Decline and Demotion to Lenity

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

Many state legislatures began to view it as an obstacle to their own efforts to implement criminal policy through legislation,[125] much like English Parliament had viewed the benefit-of-clergy defense as impediment to deterrence-driven policies of capital

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interpretation."). For a more detailed discussion of these treatises, see Hopwood, *Restoring*, *supra* note __, 926-28.

[119] SUTHERLAND, *supra* note __, § 349-50 at 438-41.

[120] BISHOP, *supra* note __, § 194, at 187 ("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 __, § 353, at 433-44 ("[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.").

[121] *See* SUTHERLAND, *supra* note __, § 350 at 439-40 ("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 __, § 194, at 187 (noting that strictly construed statutes apply only to acts "which are within both their spirit and letter").

[122] *Id.*; *see also id.* § 348, at 437-38 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 (1862) 158 Eng. Rep. 695, 699; 7 H. & N. 810, 817 (Pollock, C.B.))).

[123] BISHOP, *supra* note __, § 193, at 185-87 (noting that the "degree of strictness" a court applied would "depend somewhat on the severity of the punishment" that a statute inflicted).

[124] Sutherland, *supra* note __, § 347, at 436 ("The construction will be more or less strict according to . . . the severity of the penalty . . . ."); *see also id.* § 349-50, at 438-41 (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").

[125] *See* 3 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 __, at 384 ("'[T]he disinclination of courts and lawyers to give penal statues 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 (Holt, 1930))).

punishment.[126] Most commonly, these enactments took the form of "fair construction" statutes,[127] 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."[128] Other state laws abrogating strict construction required penal statutes to be "liberally construed" to effectuate "the true intent and meaning of the legislature."[129] Courts in most states with both types of statutes "consistently applied" them from the time of their enactment.[130]

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.

In the early twentieth century, as federal statutes became increasingly complex, often serving as scaffolding for the growing administrative state, the interpretive culture at the Court changed.[131] 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.[132] 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."[133]

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[126] *See supra* text accompanying notes __-__.

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

[128] COMM'RS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK § 10 (1865).

[129] Hall, *supra* note 45, at 754 (quoting the applicable Arkansas, Colorado, and Illinois statutes).

[130] *See id.* at 756; *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 constructions, in Arkansas, Colorado, Iowa, Nebraska, Nevada, and Washington").

[131] Solan, *supra* note __, at 97-101

[132] *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* 1 J.G. Sutherland, Statutes and Statutory Construction 380 (1891) (giving no interpretative role to legislative history), *with* 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 879-90 (2d ed. 1904) (discussing the use of evidence gained from congressional proceedings as evidence of legislative intent).

[133] John Barker Waite, THE CRIMINAL LAW IN ACTION 320-21 (1934) (arguing that strict construction impeded implementation of reform-oriented approaches to punishment that focused on deterrence and incapacitation); *see* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1203 (2013).

Justice Frankfurter, a purposivist Justice who joined the Court in 1939, led the attack on strict construction.[134] In a prominent law review article he wrote while on the Court, he 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.'"[135] 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 down.'"[136] He went on to note that "[s]tatutory meaning . . . is more to be felt than demonstrated."[137]

Operating within the purposivist framework, Justice Frankfurter sapped strict construction of its strength in an "indirect way."[138] He relegated it to "the end of the interpretive process," something to be considered only if ambiguity remained after considering all indicia of legislative intent that could be gathered from the entire suite of available legal materials—text, purpose, structure, legislative history, etc.[139] 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."[140]

That subtle, seemingly technical move all but eliminated strict construction at the federal level.[141] It meant that the Court would search far and wide for legislative intent before strictly construing an ambiguity, thereby rendering strict construction a "tool of last resort"[142] reserved only for the very rare cases in which the broad

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[134] Solan, *supra* note __, at 102; *see* Hessick & Hessick, *supra* note __, at 2339 ("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.").

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

[136] United States v. Shirey, 359 U.S. 255, 260-61 (1959) (quoting United States v. Whiteridge, 197 U.S. 135, 143 (1905)).

[137] *Id.*

[138] Sohoni, *supra* note __, at 1204.

[139] Hopwood, *Clarity*, *supra* note __, at 717; *see supra* note __ (collecting cases). For an argument that Justice Frankfurter's reconceptualization of strict construction was ill-founded, see Romantz, *supra* note __, at 535-37; Hopwood, *Clarity*, *supra* note __, at 717-18.

[140] Callahan v. United States, 364 U.S. 587, 596 (1961).

[141] *See* Sohoni, *supra* note __, at 125 (observing that following this reformulation the rule "began to lose its bite"); Kahan, *supra* note __, at 386 (observing that "[r]anking [strict construction] 'last' among interpretive conventions [has] all but guarantee[d] its irrelevance"); *see also* Hessick & Hessick, *supra* note __, at 2239 (characterizing modern lenity as a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes").

[142] Hessick & Kennedy, *supra* note __, at 380.

range of materials for ascertain legislative intent could not do so with sufficient certainty.[143] As marker of this change, Justice Frankfurter labelled this diminished approach the rule of "lenity."[144]

In the decades that followed, the Court adhered to this reformulated and renamed version of lenity,[145] even as the addition of new members—most notably, Justice Scalia—moved the Court away from purposivism and towards textualism.[146] 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.[147] 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."[148] Justice Scalia conceived of lenity as a rule that both "place[d] the weight of intertia upon the party that can best induce Congress to speak more clearly and ke[pt] courts from making criminal law in Congress's stead."[149] He thus argued that lenity should apply whenever "the matter is not beyond reasonable doubt."[150] In recent years, Justice Gorsuch has advocated for a similar approach.[151]

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

[144] Bell v. United States, 349 U.S. 81, 83 (1955); *see* Stinneford, *supra* note __, at 1995 n.233 (identifying *Bell* as the first use of "lenity" in place of "strict construction"); Solan, *supra* note __, 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 the 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. at 204 (Marshall, Circuit Justice, C.C.D. Va. 1812))).

[145] *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).

[146] *See*, *e.g.*, United States v. R.L.C., 503 U.S. 291, 298 (1992) (Souter, J., plurality); Moskal v. United States, 498 U.S. 103, 109-11 (1990).

[147] 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 307-08 (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. . . .").

[148] *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring).

[149] *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (Scalia, J., plurality).

[150] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 299 (2012); *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").

[151] *See*, *e.g.*, Wooden, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment) ("Under [lenity], any reasonable doubt about the application of a penal law must be resolved in favor of liberty.").

Despite their efforts, the modern textualist[152] 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.[153] Thus, while purposivist justices may have "initially hamstrung lenity," some of the textualists that took their place "also bear some blame."[154] The Court has not relied on lenity to justify a narrow construction of a penal statute in at least a decade,[155] perhaps longer.[156]

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.[157] Perhaps more significantly, model state legislation created in the latter half of the twentieth century reflected a rejection of historic strict construction that mirrored that of the Court.

In the 1960s, the American Law Institute's Model Penal Code—which broadly influenced state criminal law[158]—took the position that "when the language [of a Code provision] is susceptible to differing constructions it shall be interpreted to further the general purposes [of the Code] and the special purposes of the particular provision involved."[159] The Code thus deliberately displaced "[t]he ancient rule that penal law must be strictly construed" on the ground

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[152] *See* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023) ("The Supreme Court is now dominated by devoted textulaists[.]"); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 ("The Roberts Court is often described as textualist.").

[153] 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*, 524 U.S. at 139 (quoting *Staples*, 511 U.S. at 619 n.17); Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting *Huddleston*, 415 U.S. at 831).

[154] Hessick & Hessick, *supra* note __, at 2340; *see also* William N. Eskridge, Jr. & Phillip 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]").

[155] *See* Johnson, *Ad Hoc*, *supra* note __, at *4.

[156] *See* Price, *supra* note __, at 886.

[157] *See* Pohlman, *supra* note __ (observing how state courts often borrow statutory-interpretation methodology and tools, including substantive canons, from federal-law decisions of the Supreme Court).

[158] *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. 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.").

[159] MODEL PENAL CODE § 1.02(3); *see also id.* § 1.02 Explanatory Note on Subsection (3) (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").

that it "unduly emphasized only one aspect of the problem" of statutory indeterminacy—fair notice to potential offenders.[160]

Likewise, a comment in the Model State Statute and Rule Construction Act promulgated in the 1990s[161] expressly stated that "[t]he presumption that penal statues shall be strictly construed is not included in this Act," noting that it had already "been expressly rejected in a number of States."[162] The comment also cited authority "demonstrat[ing] that courts," including the Supreme Court, had not "consistently appl[ied]" the presumption.[163]

As it now stands, over half of the states have statutes purporting to override historic strict construction.[164]

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.[165] 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 a bottom-line preference for narrow constructions of indeterminate federal penal statutes and that often promote the same fair-notice and separation-of-powers values on which the early American approach to lenity was based.

In recent Terms, for example, when the Court has been faced with construing a penal statute, it has adopted a narrow construction

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[160] 1 AM. L. INST., MODEL PENAL CODE AND COMMENTARIES 32-33 (1835).

[161] The Act was originally approved as the "Uniform Act" by the National Conference of Commissioners on Uniform State Laws, *see* UNIFORM STATUTES AND RULE CONSTRUCTION ACT N.* (NAT'L CONF. COMM'RS UNIF. STATE LAWS 1995), but later re-designated as the Model State Statute and Rule Construction Act, *see* MODEL STATUTE AND RULE CONSTRUCTION ACT (NAT'L CONF. COMM'RS UNIF. STATE LAWS 1995).

[162] *See* Model Statute and Rule Construction Act § 18 Cmt. on the Construction Process.

[163] *Id.*

[164] *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK, VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION & ADMINISTRATION IN THE REPUBLIC OF STATUTES 586 (2d. ed. 2024); *see also* Allen, *supra* note __, 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.").

[165] *See* Hessick & Hessick, *supra* note __, at 2339-41; Hopwood, *Clarity supra* note __, at 701, 717-20; Romantz, *supra* note __, at 525, 534-57; Hessick & Kennedy, *supra* note __, at 366-68; Shadgett, *supra* note __, at 698-703.

nearly twice as often as it has adopted a broad one.[166] 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. These substantive canons vary in form and application. But each reflects a policy preference favoring narrow readings of penal statutes, rooted in 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.[167] Yet even these decisions often reflect some degree of "interpretive 'restraint'"[168] ultimately rooted in the same concerns.[169]

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

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 do 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.[170] That undermines due process, the separation of powers, and the principle of legality by effectively delegating the legislative task of crime definition, thereby inviting

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[166] Johnson, *Ad Hoc*, *supra* note __, at *2 (examining all cases involving the construction of penal statutes from the October 2013 Term through the October 2022 Term); *see also* at *16 ("Labelling a construction '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. Labelling a construction 'broad' conveys the opposite.").

[167] Johnson, *Ad Hoc*, *supra* note __, at *3.

[168] *Marinello*, 584 U.S. at 2 (quoting *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995)).

[169] *See*, *e.g.*, *Dubin*, 143 S. Ct. at 1572 (explaining that "[t]h[e] 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 understand[d] of what the law intends to do if a certain line is passed'" (quoting *Marinello*, 138 S. Ct. at 1106, 1109)).

[170] *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").

arbitrary enforcement and failing to provide adequate notice to ordinary people of what conduct is punishable.[171]

The birth of the constitutional void-for-vagueness doctrine is closely related to lenity's decline at both the state and federal level. The Supreme Court recognized and developed the vagueness doctrine around the turn of the twentieth century, following the advent of Supreme Court due process review of state penal statutes under the Fourteenth Amendment and a simultaneous significant shift state courts' construction those statutes under new fair-construction and liberal-construction regimes.[172] Those events gave rise to constitutional vagueness challenges of state laws.

Importantly, the Court's vagueness analysis of a state law is distinct from that of a federal law[173] as a result of a federalism constraint that limits its ability to construe state statutes. Because the highest state court has the last word on the meaning of a state statute, the Court will follow any pre-existing state-court construction, effectively preventing it from eliminating any constitutional concerns through judicial construction.[174] 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.[175] Indeed, 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.[176]

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[171] *See Davis*, 139 S. Ct. at 2325; Jeffries, *supra* note __, 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").

[172] *See* Johnson, *Federal-State*, supra note __, at 1574; *id.* at __-__1576-89; *see also supra* Part I.C.

[173] *Compare* Johnson, *Federal-State*, *supra* at note __, at 15-89-1606 (describing the Supreme Court's vagueness of federal laws), *with id.* at 1606-14 (describing the Court's analysis of state laws).

[174] *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, 455 U.S. at 494 n.5)); Wainwright v. Stone, 414 U.S. 21 (1973) ("The judgment of federal courts as to the vagueness or not of a state statute must be made in 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.").

[175] *See* Johnson, *Federal-State*, *supra* note __, at 1569; *id.* at 1575.

[176] *See id.* at 1587-88 (observing that "with one exception, every case from 1914 until 1964 in which the Court invalidated a statute a constitutional vagueness ground involved a state penal law that had

The Court's application of the vagueness doctrine to state penal statutes has thus functioned as a federal due process limit on the *states'* discretion to enact and construe indefinite language in penal statutes.[177] And that limit is more often triggered in 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. As the Court has put it, federal statutes with unduly vague language "undermine the Constitution's separation of powers" by "threaten[ing] to hand the responsibility for defining crimes 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.'"[178]

Importantly, though, in virtually all cases involving a federal penal statute, the Court need not deem the indeterminate language unconstitutionally vague.[179] The Court can instead engage in "vagueness avoidance," adopting a narrow construction of the indeterminate text that avoids any constitutional vagueness issues.[180] Vagueness avoidance thus functions as a constitutional avoidance canon[181] that has special salience in the context of penal statutes presenting vagueness concerns.[182] The Court's application of vagueness

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already been construed at the state level" and that "the Court did not invalidate a single federal law on a constitutional vagueness ground until 2015").

[177] *See id.* at 1571.

[178] *Davis*, 588 U.S. at 451 (quoting *Hudson*, 7 Cranch at 34).

[179] Johnson, *Federal-State*, *supra* note __, 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.").

[180] 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 statutes as impermissibly vague to consider whether the prescription is amenable to a limiting construction"); *see* Johnson, *Federal-State*, *supra* note __, 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, *Clarity*, *supra* note __ at 698 (noting that the Supreme Court "rarely . . . strike[s] [ ] down" "vague federal criminal laws").

[181] There are two main types of constitutional avoidance—the "unconstitutionality" canon and the "doubts" canon. John C. 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* Reno v. Flores, 507 U.S. 292, 314 n.9 (1993). Ambiguity triggers both canons. *See*, *e.g.*, Johnson v. Arteaga-Martinez, 142 S. C.t 1827, 1833 (2022) (explaining that "the canon of constitutional avoidance 'comes into play only when, after 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)).

[182] 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, *Vagueness Avoidance*, *supra* note __, at 80-85, 86-91.

avoidance to adopt narrow constructions of penal statutes is driven by a separation-of-powers concern that, 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 legislature."[183] That is the same anti-delegation concern about legislative primacy in crime definition that dates back to the early days of the Republic[184] and was one of the justifications Justice Marshall gave in *Wiltberger* for adoption of strict construction.[185]

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.[186] Because lenity had been moved to "the end of the interpretive process,"[187] 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 the vagueness avoidance often filled the role that the more robust historic rule of strict construction had previously played,[188] 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 constructions of penal statutes,[189] though it is often not explicit about doing so.[190]

Nevertheless, both the vagueness doctrine itself (mostly as applied to state penal statutes) and vagueness avoidance play a

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[183] Johnson, *Federal-States*, *supra* note __, at 1589.

[184] *See Hudson*, 11 U.S. 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."). The Court still declares 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."); *Bass*, 404 U.S. at 348 ("[L]egislatures and not courts should define criminal activity.").

[185] *See Wiltberger*, 18 U.S. at 95 ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment."); *supra* Part I.B.

[186] *See* Johnson, *Federal-States*, *supra* note __, 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. Harris, 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. 512, 523-25 (1942); Kay v. United States, 303 U.S. 1, 8-9 (1938).

[187] Hopwood, *Clarity*, *supra* note __, at 717.

[188] *See* Johnson, *Federal-States*, *supra* note __, at 1588-89.

[189] *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*, 561 U.S. at 405, 408-09)).

[190] *See* Johnson, *Vagueness Avoidance*, *supra* note __, at 116 ("In a recent line of cases, the Court has moved away from explicit vagueness avoidance. . . . [It] still adopts a narrow 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.").

significant role in protecting the separation-of-powers concern that historic strict construction guarded during an earlier era.

B. Scienter Presumption

Another partial substitute for lenity that the Court has used for some penal statutes is the presumption in favor of scienter (sometimes called the presumption in favor of *mens rea*[191]).

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 a statutory offenses that "criminalize[s] otherwise innocent conduct" absent statutory evidence to the contrary.[192] The presumption applies when Congress does not specify a mental state in the statutory text,[193] and it "applies with equal or greater force" when a statute "includes a general scienter requirement."[194] In addition, the severity of the punishment attached to the statutory offense may affect the degree of countervailing proof needed to rebut the presumption.[195]

Although the scienter presumption is "traceable to the common law,"[196] the Court's reliance on it as an "interpretive maxim"[197] 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*,[198] the Court observed that the English common law requirement of *mens rea* "took deep and early root in American soil."[199] As state legislatures codified common law crimes, Justice Jackson explained, state courts tended to infer the presence

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[191] *See* Elonis v. United States, 575 U.S. 723, 734 (2015) (noting that the different terms are often used to describe *mens rea*, such as "scienter, malice aforethought, guilty knowledge, and the like").

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

[193] *E.g.*, *Staples*, 511 U.S. at 606.

[194] Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (citing ALI, Model Penal Code § 2.02(4), p. 22 (1985)); *see also Ruan*, 142 S. Ct. at 2377 (similar). When applied as a clear-statement rule, the scienter presumption effectively imposes a "clarity tax" on Congress. John Manning, *Clear-Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

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

[196] *Rehaif*, 139 S. Ct. at 2195.

[197] *Id.*

[198] *See* Morissette v. United States, 342 U.S. 246 (1952); *cf.* United States v. Balint, 258 U.S. 250 (1922) ("While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, . . . there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement.").

[199] *Id.* at 251; *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.").

of *mens rea* requirements even when the statutes were silent[200] in order "to protect those who were not blameworthy in mind."[201] 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.[202] In doing so, the Court tied the scienter presumption to the separation-of-powers principle that "[n]o federal crime can exist except by force of statute,"[203] 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 way that deviated from its common law analogue.[204]

The Court later underscored the presumption's connection to the principle that it is Congress's task to define the elements of a criminal offense[205] and that it works to prevent "criminaliz[ing] a broad range of apparently innocent conduct."[206] 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."[207] The scienter presumption advances those same rationales.[208]

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[200] *Morissette*, 342 U.S. at 252 ("As the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation."); *id.* ("Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.").

[201] *Id.*

[202] *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 *Morissette* Court's adoption of the scienter presumption can be understood as an application of "general law." NELSON, *supra* note __, 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)).

[203] *Morissette*, 342 U.S. at 259.

[204] *See id.* at 262 (noting that the "inferences" to be drawn from "Congressional silence as to the 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 same silence in creating an offense to general law, for those whose definition the courts have no guidance except the Act.").

[205] *Liparota*, 471 U.S. at 424.

[206] *Id.* at 426.

[207] *Id.* at 427. Some state courts have suggested that the scienter presumption derives from strict construction. *See* Price, *supra* note __, at 937 ("State courts have . . . occasionally invoke[d] strict construction to support the inference of a *mens rea* term.").

[208] *See Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring) (noting that scienter presumption helps to prevent "unfairness [that] can result because of a lack of fair notice"); Price, *supra* note __, at 937 ("[T]he rationales for strict construction generally support inferring *mens rea* absent clear instruction to [do so].").

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 re requirements—even when that outcome might be in some tension with the best reading of the text.[209] 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 enacted it.[210] Or it could be seen as an interpretive tool with both substantive and descriptive properties.[211]

Regardless, the Court's application of the scienter presumption has yielded narrow constructions of some penal statutes.[212] 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."[213] 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.[214] It continues to serve that function today.[215]

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),[216] often requiring more than simply the "most natural grammatical reading."[217] In that way, the scienter

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[209] *See Biden*, 143 S. Ct. at 2376 (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 natural meaning" (quoting Barrett, *supra* note __, at 123-24)).

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

[211] *See* Brian G. Slocum & Kevin Tobia, *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.").

[212] *See*, *e.g.*, *Elonis*, 575 U.S. at 734-37; *Flores-Figueroa*, 556 U.S. at 652-53; *X-Citement Video*, 513 U.S. at 70; *Staples*, 511 U.S. at 606; *Liparota*, 471 U.S. at 424-27.

[213] Hessick & Kennedy, *supra* note __, at 380; *see* Part I.C.

[214] *See* supra note __.

[215] *See*, *e.g.*, *Ruan*, 142 S. Ct. at 2377; *Rehaif*, 139 S. Ct. at 2195.

[216] 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 __, at 356 ("Clear statement rules protect the value or interest at issue by requiring a particular outcome unless the statute contains the statute contains explicit and unambiguous language to the contrary.").

[217] *X-Citement Video*, 513 U.S. at 68-69.

presumption operates as a robust "tool[] of first resort," employed "at the beginning of the interpretive process."[218]

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.[219] Yet within that limited domain, the scienter presumption helps guard the separation-of-powers value that historic strict construction once protected.[220]

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.[221] Unlike vagueness avoidance and the scienter presumption, the federalism presumption is not specific to penal statues (though its roots can be traced to that context[222]); it can apply to any federal statute that poses a threat to federal-state relations. Yet the Court repeatedly made clear that, because "the punishment of local criminal activity" is "[p]erhaps the clearest example of traditional state authority,"[223] 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."[224]

The federalism presumption is typically articulated 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

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[218] Hessick & Kennedy, *supra* note __, at 380.

[219] For example, from the 2013 Term through the 2022 Term, the Court narrowly construed 27 federal penal statutes; the rule of lenity was raised as a potential basis for narrowly construing the statute in 21 of those cases, but the scienter presumption was raised in only 5 of them. *See* Johnson, *Ad Hoc Constructions*, *supra* note __, at *25.

[220] In the 5 cases in which the scienter presumption was raised, the Court actually relied on it to justify the narrow construction in 3 of the cases (60%). Johnson, *Ad Hoc Constructions*, *supra* note __, at *29. By contrast, the Court did not actually rely on lenity in any of the 21 cases in which it was raised (0%). *Id.* at *27.

[221] *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").

[222] *See infra* text accompanying notes __-__.

[223] *Bond*, 572 U.S. at 858 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000)).

[224] *Id.* at 858-59 (quoting *Bass*, 404 U.S. at 349).

Congress to the contrary.[225] The presumption thereby imposes a "clarity tax" on Congress.[226]

The Court arguably first stated something like a federalism presumption in the context of preemption of state criminal law in *Cohens* v. *Virginia*,[227] in which 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."[228] The Court further developed the doctrine during the middle of the twentieth century.[229]

But its 1991 decision in *Gregory* v. *Ashcroft*[230] ushered in the strong-form, generic federalism presumption that now operates as a clear-statement rule.[231] Justice O'Connor's opinion for the Court explained that, "if Congress intends to alter the usual constitutional balance between the States and Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[232] Justice O'Connor based this clear-statement rule on the constitutionally established "system of dual sovereignty between the States and the Federal government," noting the "numerous advantages" of that system.[233] 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."[234]

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[225] *See*, *e.g.*, Cleveland v. United States, 531 U.S. 12 (2000) (rejecting reading that would amount to a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) ("[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 __, at 539-40)).

[226] Manning, *supra* note __, at 403.

[227] 19 U.S. (6 Wheat.) 264 (1821).

[228] *Id.* at 443.

[229] *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 __, at 539-40 ("[W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.").

[230] 501 U.S. 452 (1991).

[231] *See* Manning, *supra* note __, at 408 (identifying *Gregory* as the moment at which the Court "adopted a powerful, generic federalism canon"); Eskridge & Frickey, *supra* note __, at 624 (observing that the Court "created a new super-strong clear statement for federal regulation of at least some state functions" in *Gregory*).

[232] *Gregory*, 501 U.S. at 460.

[233] *Id.* at 457-58.

[234] *Id.* at 460.

This 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.[235] 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.[236]

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 that outcome might be in some tension with the best reading of the text.[237] 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.[238] Or it could be viewed as a tool of construction that has both substantive and descriptive properties.[239]

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.[240] In essence, the federalism presumption ensures that federal law will not impinge upon traditional areas of state law unless the Court is "absolutely certain"[241] that Congress meant for it to do so.[242] That mitigates the risk of

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

[236] *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 for the offence.").

[237] *See Biden*, 143 S. Ct. at 2376 (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 natural meaning" (quoting Barrett, *supra* note __, at 123-24)).

[238] *See* Easterbrook, *supra* note __, at 1913 ("Language takes meaning from its linguistic context," as well as "historical and governmental contexts"); *see also Biden*, 143 S. Ct. at 3380 (Barrett, J., concurring) (noting that "our constitutional structure[] . . . is part of the [relevant] legal context").

[239] *See supra* note __.

[240] *See* Sunstein, *supra* note __, at 337-40 (explaining how clear statement rules serve nondelgation purposes).

[241] *Gregory*, 501 U.S. at 464 ("[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's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.").

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

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.[243] And when the federalism presumption is applied to federal penal statutes, it 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 has been limited. It applies only when the textual indeterminacy threatens a traditional area of state law. Although in theory that could extend to nearly all federal penal statutes, it has in practice been limited only to a fraction of questions of textual indeterminacy that can arise in the context of federal penal statutes.[244] Yet within its limited domain, the federalism presumption is effective in guarding the separation-of-powers concern previously protected by historic strict construction.[245] Since *Gregory*, the Court has relied on the clear-statement formulation of the federalism presumption to narrowly construe certain federal penal statements, thereby doing some of the work previously done by historic strict construction.[246]

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 an essentially *ad hoc* rationale, in the sense that it "justifie[s] the

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[243] *See Wiltberger*, 18 U.S. at 95 ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment.").

[244] For example, from the 2013 Term through the 2022 Term, the Court narrowly construed 27 federal penal statutes; the rule of lenity was raised as a potential basis for narrowly construing the statute in 21 of those cases, but the federalism presumption was raised in only 9 of them. *See* Johnson, *Ad Hoc Constructions*, *supra* note __, at *25.

[245] In the 9 cases in which the federalism presumption was raised, the Court actually relied on it to justify the narrow construction in 3 of the cases (33.3%). Johnson, *Ad Hoc Constructions*, *supra* note __, at *29. By contrast, the Court did not actually rely on lenity in any of the 21 cases in which it was raised (0%). *Id.* at *27.

[246] *See*, *e.g.*, Snyder v. United States, 144 S. Ct. 1947, 1956-57 (2024); *Ciminelli*, 143 S. Ct. at 1128; Kelly v. United States, 140 S. Ct. 1565, 1574 (2020); *Bond*, 572 U.S. 844; *Cleveland*, 531 U.S. at 12; *McNally*, 483 U.S. at 360.

narrow construction on the basis of 'ordinary meaning' of the particular statute's text—as informed by dictionaries, statutory context, and relevant descriptive canons of interpretation—thereby ignoring or significantly discounting the role of substantive canons in its decision-making."[247]

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 27 cases,[248] and it relied on an *ad hoc* justification for 19 of them (70%).[249] 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 studied, "at least one—and usually multiple—substantive canons were invoked in party or amicus briefs."[250] And in two-thirds of the cases, at least one was raised during oral argument, "often by a Justice."[251] 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.[252] 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

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[247] *See* Johnson, *Ad Hoc Constructions*, *supra* note __, at *23.

[248] *Id.* at *18 ("In the 43 cases reviewed" during the ten-year period, "the Court narrowly construed the penal statute at issue on 27 occasions."); *see also id.* at *14-*17 (describing the study's methods).

[249] *Id.* at *19. In the remaining 8 narrow-construction cases, the Court "definitely relied upon . . . "vagueness avoidance (three times), the federalism presumption (three times), or the scienter presumption (three times)." *Id.* at *24. 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 "non-vagueness related constitutional avoidance." *Id.*

[250] *Id.* at *31; *see id.* at *23, Table 1 (showing that substantive canons were in party or amicus briefs for 26 of the 27 cases).

[251] *Id.* at *31; *see id.* at *23, Table 1 (showing that substantive canons were raised in 18 of the 27 cases).

[252] *See*, *e.g.*, *id.* at *38-*40 (suggesting that efforts to rely on substantive canons may be softened to retain votes needed to hold together a majority); *id.* at *40-*42 (suggesting that the *ad hoc* approach may be preferred because it maximizes interpretive discretion in future cases).

policy-driven.[253] The *ad hoc* approach is likely viewed as more consistent with the rule-of-law values on which textualism is based.[254]

As Justice Barrett explained in an article she wrote before becoming a judge, 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."[255] 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."[256]

Justice Kavanaugh has separately raised suspicions 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.[257] 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."[258] Substantive canons are especially suspect, according to Justice Kavanaugh, when they are triggered by "front-end ambiguity," particularly when the ambiguity can be resolved through less controversial tools of interpretation that determine semantic meaning.[259] He prefers an interpretive approach in which courts instead first seek to determine the "best reading" of a statute and then deviate from that reading only if it violates a settled rule of interpretation, including certain settled substantive canons, or if it is clearly unconstitutional.[260]

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[253] *See*, *e.g.*, *Biden*, 143 S. Ct. at 2376 (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 natural meaning" (quoting Barrett, *supra* note __, at 123-24); *West Virginia*, 142 S. Ct. at 2625 (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) (book review) (raising suspicions about substantive canons to the extent their application depends on an "ambiguity trigger," which requires judges to determine that the text is ambiguous, rather than clear, before applying the canon); *see also* SCALIA, *supra* note __, at 28 (characterizing substantive canons as "dice-loading rules" that pose "trouble" for "the honest textualist"); Eidelson & Stephenson, *supra* note __, at 521 (arguing that substantive canons are incompatible with textualism).

[254] *See*, *e.g.*, SCALIA, *supra note* __, 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) (book review) (noting that Justice Scalia's advocacy for canons "is dominated" by a concern for "[c]ontinuity[,] . . . a rule of law value").

[255] Barrett, *supra* note __, at 110.

[256] *Id.* at 110, 123.

[257] See *Wooden*, 142 S. Ct. at 1075-76 (Kavanaugh, J., concurring in the judgment) (citing Kavanaugh, supra note __, at 2136-39); Kavanaugh, *supra* note __, at 2135-36.

[258] *See Wooden*, 142 S. Ct. at 1075-76 (Kavanaugh, J., concurring in the judgment).

[259] *Id.* at 1075.

[260] Kavanaugh, *supra* note __, at 2148.

For these reasons and perhaps others, the Court has not elected to rely on substantive canons as part of the holding in its *ad hoc* narrow-construction cases. Nevertheless, these canons—or at least the values on which they are based—seem to have played some role in the Court's decision-making 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.[261] In addition, Justices sometimes write concurring opinions in these cases that argue for reliance on substantive canons.[262] And some majority opinions note that, although the adopted narrow construction was based on an *ad hoc* rationale, the outcome was nonetheless consistent with a substantive canon.[263] At other times, the Court refers to a "tradition[]" of "exercis[ing] restraint" when narrowly construing penal statues, rooted in both fair-notice and separation-of-powers concerns, without tying that tradition to a specific substantive canon.[264]

That rhetoric and the Court's repeated reliance on an *ad hoc* approach continues 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. COSTS OF PARTIAL LENIENCY

One implication of fragmentation is that lenity's practical effect has not been totally lost in the Supreme Court's decision-making process. The Court no longer explicitly employs lenity as a robust rule of decision, except very rarely when grievous ambiguity

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[261] *See supra* text accompanying notes __-__.

[262] *See*, *e.g.*, *Snyder*, 144 S. Ct. at 1960 (Gorsuch, J., concurring) ("'[L]enity is what's at work behind today's decision, just as it is in so many others."); Bittner v. United States, 143 S. Ct. 713, 724-25 (2023) (arguing for reliance on a robust conception of lenity); *Wooden*, 142 S. Ct. at 1083-86 (Gorsuch, J., concurring) (similar); *id.* at 1076 (Kavanaugh, J., concurring) (noting that the scienter presumption helps to prevent "unfairness [that] can result because of a lack of fair notice").

[263] *See*, *e.g.*, *Van Buren*, 141 S. Ct. at 1654-60 (invoking lenity and vagueness avoidance but disclaiming reliance on them); *McDonnell*, 579 U.S. at 574-76 (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).

[264] *See*, *e.g.*, *Dubin*, 143 S. Ct. at 1572 (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 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 understand[d] of what the law intends to do if a certain line is passed'" (quoting *Marinello*, 138 S. Ct. at 1106, 1109 (2018)).

remains following the application of all other interpretive tools.[265] But it still shows a preference for narrow constructions, sometimes justifying them using other interpretive tools that advance the same separation-of-powers concern.

The fragmented approach may have some benefits. From the perspective of judicial administration, for example, it may be preferable to have a regime in which there are 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*,[266] 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 protecting the anti-delegation principle articulated in *Wiltberger*.[267] 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[268] and to prosecutors.[269] For these penal statutes—perhaps most penal statutes—*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 as explained, such a regime would advance legislative primacy in crime definition both by "disciplining courts" and by "disciplining

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[265] *See supra* text accompanying notes __-__.

[266] *See supra* text accompanying notes __-__.

[267] *See supra* text accompanying notes __-__.

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

[269] *See infra* Part. III.B.

Congress itself."[270] It would discipline courts by "combat[ing]" the risk of judicial "encroachment upon legislative prerogatives" by "constrain[ing] courts to choose the narrowest reasonable readings of ambiguous statutes."[271] And it would discipline Congress by preventing any "operative rule of criminal liability that lacks Congress's self-conscious and express imprimatur."[272] 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."[273]

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 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.'"[274]

Congress, for its part, implicitly delegates its criminal lawmaking authority to the courts by using open-ended language in the penal statues it enacts.[275] This may be seen as an attractive way to create penal laws applicable to wider range of foreseen and unforeseen conduct,[276] as a way to deal with the significant practical constraints on the difficult task of legislating,[277] or as 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.[278] The partial-leniency regime enables this

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[270] Kahan, *supra* note __, at 350-51.

[271] *Id.* at 351.

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *See id.* at 353.

[276] *See id.*; Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1493 (2008) (contending that expansive laws can be beneficial because they allow the state to punish those who adapt their behavior to legal regimes).

[277] *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 __, at 353 (explaining that "open-textured statues require smaller investments of time and less political consensus to enact than do extremely precise statues" 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., 114 S. Ct. 1483, 1494 (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").

[278] *See* Johnson, *Ad Hoc*, *supra* note __, at 44 (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

sort of implicit delegation, providing no real incentive to draft penal statutes more precisely, outside the targeted *mens rea*, federalism, and constitutional vagueness concerns.

An interpretive approach that allows implicit delegation of crime definition to the judiciary may be a good fit for the more pragmatic, purposivist interpretive culture of the mid-twentieth century—the paradigm in which the Court weakened historic strict construction.[279] 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.[280] Because Congress effectively increases the reach of its legislative power through implicit delegation,[281] 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."[282] 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."[283] 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."[284] The goal is "fidelity to the text as written,"[285] as understood by a reasonable reader[286] using certain interpretive tools, such as dictionaries and descriptive canons of construction that capture "generalizations about how particular linguistic constructions are used and understood by speakers of English."[287]

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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").

[279] *See supra* text accompanying notes __-__.

[280] *See* Solan, *supra* note __, at 97-101.

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

[282] *Id.* at 369.

[283] Grove, *supra* note __, at 271-72.

[284] Eidelson & Stephenson, *supra* note __, at 522-23 (describing foundational premises of modern textualism); *see also* SCALIA, *supra* note __, 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.").

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

[286] Eidelson & Stephenson, *supra* note __, at 524; Grove, *supra* note __, 1056-57 (drawing attention to a scholarly dispute about whether "ordinary meaning" is an empirical concept or a legal concept).

[287] Eidelson & Stephenson, *supra* note __, at 516.

Textualism does not usually entertain notions of inter-branch collaboration to arrive at constructions that give effect to the spirit of statutes. By merely determining the ordinary meaning of the text, the thinking goes, courts suppress their own potential to act according to their own unfair predilections in an unfair or arbitrary manner.[288] For textualist courts, then, the presence of broad and open-ended language in penal statues—many of which may have been drafted in a purposivist era—is not generally viewed as an invitation to engage in delegated judicial crime definition,[289] 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 has the effect of granting lower federal courts[290] and state courts[291] significant interpretive discretion. And the textualist interpretive culture[292] in which they exercise that discretion encourages them to adopt sweeping literalistic constructions of broadly-worded penal statutes.[293]

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

[289] 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 (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 __, 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.

[290] This Article assumes that lower courts often follow the Court's methods. *See supra* note __.

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

[292] *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' 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 startingly strong hold in some states, although in a form of which the Justice himself might not approve.").

[293] At a minimum, the interpretive discretion granted to lower courts is likely to a "patchwork" of decisions, with some courts adopting broad constructions and others adopting narrow constructions. *Cf.* Tara L. Grove, *Sacrificing Legitimacy in Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1600 (2021) (contending that, when the Supreme Court delegates questions of constitutional law to the lower courts, lower-court decisions 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 judges can pick and choose texts and (con)texts" to reach desired results").

What is more, as Joshua Kleinfeld has observed, "statutory interpretation is different at the top and bottom of the legal system."[294] Because lower courts have fewer resources for resolving issues of statutory indeterminacy,[295] they tend toward "simpler and quicker interpretive approaches"[296] that are *cheaper* in terms of the resources they require. As Kleinfeld has put it, "the version of the rule-oriented textualism that prevails in the ordinary criminal courthouses . . . is not the stuff of visionary jurists like Easterbrook and Scalia."[297] Rather, "it's a kind of 'them's the rules' approach one might get from the TSA at the airport."[298]

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.[299] 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[300]—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 is likely to be relatively simplistic most of the time.[301] When coupled with the open-ended language found in many penal statues, 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.[302] A fraction of these constructions can be corrected by the Supreme Court,[303] with the benefit

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

[295] *See* Johnson, *Ad Hoc*, *supra* note __, at *46 (explaining 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)).

[296] Bruhl, *supra* note __, at 14; *see id.* at 26-27 (finding that "lower courts use fewer interpretive tools overall, and they especially avoid the most complex tools").

[297] Kleinfeld, *supra* note __, at 1818.

[298] *Id.*

[299] *See* Johnson, *Ad Hoc*, *supra* note __, at *46-*47 ("[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 __, at 1727 (noting that more sophisticated forms of textualist analysis can be "costly"); *see also* Kleinfeld, *supra* note __, at 1816 (describing "an ecosystem of mechanically applied textual rules" in lower courts for reasons of bureaucratic administration).

[300] *See supra* text accompanying notes __-__.

[301] *See* Johnson, *Ad Hoc*, *supra* note __, at *47.

[302] *See supra* note __ (collecting examples).

[303] *See supra* note __ (collecting examples).

of more sophisticated and resource-intensive analysis of linguistic meaning.[304] But most will not.

In sum, the Court's reluctance to apply robust lenity or some other widely applicable policy of strict construction enables Congress to enact 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 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 inter-branch collaborative criminal lawmaking,[305] 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 legislatures, each of whom benefits from more and broader crimes."[306] When a legislature enacts broad and open-ended penal statutes, it creates a principal-agent relationship with prosecutors.[307] The open-ended statutory language effectively delegates significant discretion to prosecutors, insulating the legislature from political backlash.[308] 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.[309]

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[304] *See* Johnson, *Ad Hoc*, *supra* note __, at *3 (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").

[305] *See supra* text accompanying notes __-__.

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

[307] *Id.*

[308] *Id.*

[309] Hessick & Kennedy, *supra* note __, 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").

Prosecutors use their charging discretion[310] to pursue conduct on the peripheries of the open-ended language of penal statutes, reflecting expansive understandings of the statute's scope.[311] When doing so, they are using the criminal lawmaking authority implicitly delegated to them by the open-ended statutory text. 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.[312] And because most criminal cases are resolved through plea bargaining, prosecutors also often perform an adjudicative function.[313] That consolidation of enforcement, legislative, and adjudicative functions grants prosecutors vast power and discretion.[314]

Prosecutors often use that discretion to threaten particular defendants with more serious charges as a tactic for securing a guilty plea to a lesser charge.[315] When using that tactic, prosecutors have a strong incentive to push the boundaries of open-ended statutes.[316] 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 expansive reading of the statute on which it was based evades judicial review.[317]

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[310] *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 to charge 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 charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

[311] *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.*, Resp. Br. 9-37, *Dubin*, 143 S. Ct. 1557 (No. 22-10); Resp. Br. 19-43, *Ruan*, 142 S. Ct. 2370 (Nos. 20-1410 and 21-261); Resp. Br. 14-39, *Rehaif*, 139 S. Ct. 2191 (No. 17-9560); Resp. Br. 13-46, *Marinello*, 138 S. Ct. 1101 (No. 16-1144); Resp. Br. 20-26, *McDonnell*, 579 U.S. 550 (No. 15-474); Resp. Br. 14-55, *Yates*, 574 U.S. 528 (No. 13-7451); Resp. Br. 17-34, *Elonis*, 875 U.S. at 723 (13-983); Resp. Br. 15-31, 33-51, *Burrage*, 571 U.S. 204 (No. 12-7515).

[312] *See Wiltberger*, 18 U.S. at 95; *see* Hopwood, *Clarity*, *supra* note __, at 699 ("Broad or unclear laws . . . allow federal prosecutors to stretch the law beyond what anyone had anticipated.").

[313] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876 (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.").

[314] *See* Johnson, *Ad Hoc*, *supra* note __, at *50.

[315] *See Bordenkircher*, 434 U.S. at 358.

[316] Barkow, *supra* note __, at 879.

[317] 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).

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 the broadly worded statute, even when the Supreme Court later rejects them.[318] 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.[319] 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.[320]

The partial-leniency regime encourages all this. Apart from instances when indeterminate statutory language implicates the targeted federalism, *mens rea*, or constitutional vagueness concerns, the Court's interpretive approach enables Congress to implicitly delegate the task of crime definition to prosecutors, who use that delegated authority to pursue broad theories of prosecution. Consistent and explicit rejection of such theories on the basis of robust lenity or some other generic policy of strict construction would help to rein in the excesses of that delegated discretion.[321] It would promote an interpretive culture in which overly expansive theories of prosecution would more likely be viewed as invalid, thereby encouraging courts to reject them and, in turn, encouraging prosecutorial charging policies and practices that recognize hard limits on the scope of penal statues.[322]

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[318] *See infra* text accompanying notes __-__.

[319] *See* Johnson, *Ad Hoc*, *supra* note __, at *51; *see id.* ("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.").

[320] Kahan, *supra* note __, at 386; s*ee Hudson*, 11 U.S. at 34.

[321] *Cf.* Kahan, *supra* note __, 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."); *id.* at 356 ("[T]o the extent that is is rigorously enforced, lenity, . . . makes it harder for Congress to make criminal law by raising the practical and institutional cost of such legislation.").

[322] 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* Stuntz, *supra* note __, at 510. But that change in behavior would not wholly undermine a regime of strict construction. As Stephen Smith has pointed out, "the problem of ambiguity 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. 880, 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.

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.[323] Although it later embraced textualism, the Court has continued to adhere to the weakened conception of lenity, apart from a few targeted areas in which it has employed partial substitutes.[324] But weak lenity is a poor fit for textualism. And its persistence has had the effect of enable 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[325] and that Chief Justice Marshall used to justify historic strict construction.[326]

Yet 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[327] and has explicated the "major questions doctrine," a canon of construction that functions as an "implied-limitation rule"[328] requiring clear statutory authorization before concluding that Congress has delegated policy-making authority concerning "major" questions to an agency.[329] The Court has already applied this newly explicated canon to invalidate several significant administrative agency actions,[330] 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

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[323] *See supra* Part I.C.

[324] *See supra* Part I.C.

[325] *See Hudson*, 11 U.S. 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.").

[326] *See Wiltberger*, 18 U.S. at 95 ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment."); *supra* Part I.B.

[327] *See Loper Bright*, 144 S. Ct. at 2273 (overruling the general deference regime that *Chevron* began).

[328] *See supra* n.__.

[329] *See infra* note __.

[330] *See*, *e.g.*, *Biden*, 143 S. Ct. 2355 (2023) (using major questions doctrine to strike down agency action providing student loan relief); *West Virginia*, 142 S. Ct. 2587 (using major questions doctrine to strike down environmental regulation); Nat'l Fed'n of Indep. Bus. V. Dep't of Lab., Occupational Safety and Health Admin., 142 S. Ct. 661 (2022) (applying major questions doctrine to strike down agency action involving vaccine mandate).

previously understood broad and open-ended statutory language as an invitation to issue regulations on those major questions.[331]

The emergence of the major questions doctrine in the administrative law context has been subject to scholarly criticism.[332] 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 are stronger.[333]

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 the 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.[334] In *FDA* v. *Brown & Williamson*,[335] for example, the Court explained that "extraordinary cases" may warrant "hesitat[ion] before concluding that Congress has intended . . . an implicit delegation" deserving of deference.[336] As that language suggests, this version of the doctrine situated considerations of "majorness" or "extraordinariness" as a carve-out to the now abrogated *Chevron* two-step framework.[337] But in a recent series of cases

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[331] *See infra* Part IV.A.

[332] *See supra* note __.

[333] *See supra* note __.

[334] *See* Sunstein, *Two Major*, *supra* note __, at 484 (characterizing the major questions doctrine as a "linear descendent" of *Industrial Union Department, AFL-CIO* v. *American Peroleum Institute et al.*, 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).

[335] 529 U.S. 120 (2000).

[336] *Id.* at 159.

[337] *See Loper Bright*, 144 S. Ct. at 2273 (overruling *Chevron*).

At "step one" of the old *Chevron* framework, courts applied ordinary tools of statutory interpretation to assess whether the statutory language is 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 USA, Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 842-43 & n.11 (1984); *see Nat'l Cable & 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, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. at *11 n.60 (forthcoming 2024)

preceding *Chevron*'s demise—which Mila Sohoni has called the "major questions quartet"[338]—the Court "unhitched the major questions exception from *Chevron*."[339] Indeed, in *West Virginia* v. *EPA*,[340] the member of the quartet that most clearly articulates the doctrine, the majority opinion did not mention *Chevron* at all.[341]

Instead, Chief Justice Roberts's majority opinion in *West Virginia* articulated a new, stronger version of the major questions doctrine, explaining that, "[i]n 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."[342] 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.'"[343]

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."[344] He explained that Article I's Vesting Clause locates "[a]ll federal 'legislative powers . . . in Congress,"[345] quoting Chief Justice Marshall's instruction "that 'important subjects . . . must be entirely regulated by the legislature itself.'"[346]

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.[347] Although the nondelegation doctrine has essentially fallen into desuetude,[348] Justice Gorsuch (joined by Chief

(noting that "[m]ost observers viewed *Brown & Williamson* as deploying the major questions exception at step one").

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

[339] *Id.* at 263.

[340] 142 S. Ct. 2587 (2022).

[341] *See id.* at 2599-2616; *see also* Tobia, Walters & Slocum, *supra* note __, at 11 ("[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].").

[342] 142 S. Ct. at 2605, 2609 (quoting *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014)).

[343] *Id.*

[344] *Id.* at 2616-17 (Gorsuch, J., concurring).

[345] *Id.* at 2617 (Gorsuch, J., concurring) (quoting U.S. Const. Art. I, § 1).

[346] *Id.* (Gorsuch, J., concurring) (quoting *Wayman*, 10 Wheat. at 42-43).

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

[348] *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.").

Justice Roberts and Justice Thomas) argued for its revitalization in an opinion dissenting from the Court's 2019 decision in *Gundy* v. *United States*[349]; Justices Alito and Kavanaugh also signaled some willingness to strengthen the nondelegation doctrine at that time.[350] 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,[351] means of furthering the same separation-of-powers norms that a strong-form nondelegation doctrine would advance.[352]

Following *West Virginia*, most commentators understood the new major questions doctrine as a substantive canon in the form of a clear-statement rule,[353] as Justice Gorsuch had suggested. 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.[354]

Any conception of the major questions doctrine as a purely substantive canon, however, stands in "tension" with modern

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[349] 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

[350] Justice Alito concurred in the Court's judgment in *Gundy*, but "did not join either the plurality's constitutional or statutory analysis," which Justice Gorsuch took as a signal 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 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.").

[351] 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.

[352] *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 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").

[353] *See*, *e.g.*, Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1035 (2023) (characterizing the "core features of the new major questions doctrine" as "resembl[ing] a clear statement rule); Sohoni, *supra* note __, at 309-15 (similar); *see also* Tobia, Walters & Slocum, *supra* note __, at 12 (observing that "the vast majority of commentators" understood the Court to have articulated a clear-statement rule).

[354] 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 indeterminacies" related to major questions "should be resolved against the agency's assertion of power." Tobia, Walters & Slocum, *supra* note __, at 12 (describing this conception of the major questions doctrine); *see* Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENVT'L L & POL'Y REV. 47 (2022) (suggesting that, although the major questions doctrine is a substantive canon, it may not be a clear-statement rule).

textualism, at least for some textualist Justices currently on the Court.[355] And insofar as a majority of the Court has not been totally clear on the major questions doctrine's normative foundations—apart from a general appeal to separation of powers—its status as a substantive canon may be more suspect.[356]

Perhaps for that reason, efforts to justify the major questions doctrine as a descriptive canon quickly emerged. Most prominently, in *Biden* v. *Nebraska*,[357] 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"[358] of "common sense" that avoids "literalism."[359] In her view, "we [would] 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" 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."[360] 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.'"[361] That premise, she explained, reflects "our constitutional structure, which is itself part of the [relevant] legal context."[362] 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."[363]

For Justice Barrett, then, the major questions doctrine need not be thought of as a substantive canon or a clear-statement rule.[364] Rather, in her view, it can be understood as a less potent descriptive

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[355] *See supra* n.__.

[356] *See* Tobia, Walters & Slocum, *supra* note __, at 13 ("Most substantive canons either reflect broad societal consensus or are tied closely to constitutional law. The [major questions doctrine] at first glance has neither of these attributes.").

[357] 143 S. Ct. 2355 (2023).

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

[359] *Id.* at 2379 (Barrett, J., concurring).

[360] *Id.* (Barrett, J., concurring).

[361] *Id.* (Barrett, J., concurring) (quoting *United States* v. *Telecom Ass'n* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanugh, J., dissenting from denial of reh'g en banc)).

[362] *Id.* (Barrett, J., concurring).

[363] *Id.* (Barrett, J., concurring) (citing U.S. Const. Art. I., § 1).

[364] *See id.* at 2381 (Barret, 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").

canon that provides context about ordinary meaning. 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."[365]

Justice Barrett's account—which has been met with some scholarly criticism[366]—is not the only way of understanding the major questions doctrine as a descriptive canon. Ilan Wurman has separately justified the doctrine on a descriptive ground, by appealing not to the context of constitutional structure, but instead to philosophical and legal-philosophical literature concerning the relationship between textual indeterminacy, epistemology, and the stakes of a particular situation.[367] As Ryan Doerfler has observed, "to say the meaning of a statute is 'clear' or 'plain' is, in effect, to say that one *knows* what the statute means."[368] And "ordinary speakers attribute 'knowledge'—and, in turn, 'clarity'—more freely or less freely depending upon the practical stakes."[369] When stakes are low, "speakers are willing to concede that a person 'knows' this or that given only a moderate level of justification."[370] But when stakes are high, "speakers require greater justification before allowing that someone 'knows' that same thing[.]"[371]

Building on Doerfler's work, Wurman views the major questions doctrine as reflecting a linguistic norm, which he calls an "importance canon." In "high-stakes" contexts, according to Wurman, both "ordinary readers and speakers are more likely to find the statute ambiguous" than they would "in a relatively lower-stakes context."[372] And that "suggest[s]" that ordinary speakers "would demand clearer proofs that the agency has the asserted power when

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[365] *Id.* (Barrett, J., concurring).

[366] *See*, *e.g.*, Chad Squitieri, *Placing Legal Context in Context*, 19 Harv. J. L. & Pub. Pol'y 1, 9 (2024) (criticizing "Justice Barret'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, Walters & Slocum, *supra* note __, at 38-45 (presenting empirical findings to challenge Justice Barrett's descriptive account of the major questions doctrine).

[367] Wurman, *supra* note __, at 949-52; *but see* Tobia, Walters & Slocum, *supra* note __, at 32-38 (presenting empirical findings that challenge Wurman's argument); *see also* Wurman, *supra* note __, at 961 (contesting the methods used in the empirical project of Tobia, Walters & Slocum).

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

[369] *Id.* at 527-28.

[370] *Id.* at 528.

[371] *Id.*; *see also id.* at 544-47 (exploring various linguistic and philosophical explanations).

[372] Wurman, *supra* note __, at 959.

the regulation involves high stakes."[373] 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."[374]

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,[375] 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. And the descriptive-canon conception does 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 authorization in high-stakes situations.[376] Under any of these understandings, 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.

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 conception 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

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[373] *Id.*

[374] *Id.*

[375] These three are Chief Justice Roberts and Justices Thomas and Kavanaugh.

[376] 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 supra* note __.

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.'"[377] Indeed, the Court's adoption of historic strict construction in *Wiltberger* was essentially an application of that general principle to the specific context of penal statutes. Recall that Chief Justice Marshall rooted strict construction in the "plain principle" 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 the judicial department."[378] 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."[379]

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.[380] 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. Prosecutors are thus now able to use their charging discretion to pursue conduct on the peripheries of indeterminate statutory language. 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.[381]

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."[382] And it would instruct courts to be "reluctant to read into ambiguous statutory text the [delegated prosecutorial authority] claimed to be lurking there."[383] Or, as Chief Justice Marshall put it

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[377] *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting *Wayman*, 10 Wheat. at 42).
[378] *Wiltberger*, 18 U.S. at 95.
[379] Kahan, *supra* note __, at 361.
[380] *See supra* text accompanying notes __-__.
[381] Kahan, *supra* note __, at 386; s*ee Hudson*, 11 U.S. at 34.
[382] *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted).
[383] *Id.* (internal quotation marks omitted).

in *Wiltberger*, "[t]o determine that a case is within the intention of a [penal] statute, its language must authorise [courts] to say so."[384]

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.[385] In some of those cases, the Court has invoked a tradition "interpretive restraint'" for penal statutes,[386] often highlighting the significant consequences of the government's broad readings[387] and occasionally noting that clear direction from Congress would be needed before adopting sweeping constructions of the statutes.[388] 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[389]

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."[390] 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 the person has authority to do so or whether doing so was instrumental to the commission of the predicate crime.[391] The Supreme Court disagreed, narrowly construing the terms "uses" and "in relation to" as applying only when "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal."[392]

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[384] *Wiltberger*, 5 Wheat. at 96.

[385] *See supra* Part II.D.

[386] *Marinello*, 584 U.S. at 2 (quoting *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995)).

[387] *See*, *e.g.*, *Fischer*, 144 S. Ct. at 2189-90; *Dubin*, 143 S. Ct. at 1572; *Ciminelli*, 143 S. Ct. at 1128; *Ruan*, 142 S. Ct. at 2377-78; *Van Buren*, 141 S. Ct. at 1661-62; *Marinello*, 138 S. Ct. at 1108; *McDonnell*, 579 U.S. at 574-76; *Yates*, 574 U.S. at 536 (2014) (Ginsburg, J., plurality); *Bond*, 572 U.S. at 858-59.

[388] *See*, *e.g.*, *Marinello*, 138 S. Ct. at 1108; *Yates*, 574 U.S. at 540.

[389] 143 S. Ct. 1557 (2023).

[390] 18 U.S.C. § 1028A(a)(1) (emphasis added).

[391] *United States* v. *Dubin*, 27 F.4th 1021, 1022 (5th Cir. 2022) (en banc) (adopting rationale of panel opinion); see *United States* v. *Dubin*, 982 F.3d 318, 325-26 (5th Cir. 2020).

[392] *Dubin*, 143 S. Ct. at 1563.

Writing for an eight-Justice majority, Justice Sotomayor justified that "targeted reading" by relying on the statute's text and title, statutory context, and a linguistic canon of interpretation.[393] But she also highlighted the "far-reaching consequences" that would have resulted from "the staggering breadth" and "implausib[ility]" of the government's reading, which would have "swe[pt] in the hour-inflating lawyer, the steak-switching waiter, the building contractor who tacks an extra $10 onto the price of paint he purchased[,] [s]o long as they used various common billing methods."[394] 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."[395]

In drawing attention to these implausible applications of the government's broad 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.'"[396]

Notably, 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" required to trigger the modern doctrine. 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,'"[397] adding that "'[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language.'"[398] That stated justification brings to mind Chief Justice Marshall's insistence on legislative primacy in crime definition[399] and the related justification for the administrative-law major questions doctrine.[400]

After justifying the tradition of interpretive restraint, Justice Sotomayor provided three recent examples—*Van Buren* v. *United*

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[393] *Id.* at 1564-67, 1569-72.

[394] *Id.* at 1572

[395] *Id.* at 1573.

[396] *Id.* at 1572 (quoting *Marinello,* 138 S. Ct. at 1109 (quoting *Aguilar*, 515 U.S.at 600)).

[397] *Id.* (quoting *Marinello,* 138 S. Ct. at 1106).

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

[399] *See Wiltberger*, 18 U.S. at 94-95 (explaining 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 the judicial department.").

[400] *See supra* text accompanying notes __-__.

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."[401] She focused on those decisions' analysis of the implausible consequences of broad government readings of federal penal statutes.[402] 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."[403] 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."[404] Although Justice Barrett's majority opinion based that conclusion only on interpretive tools for determining ordinary meaning,[405] she also noted how the "far-reaching consequences" of the broader construction of the statute advanced by the government "underscore[d] [its] implausibility."[406] That reading, Justice Barrett explained, would have "criminalize[d] every violation of a computer-use policy," thereby transforming "millions of otherwise law-abiding citizens [into] criminals."[407]

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]."[408] In a majority opinion by Justice Breyer, the Court rejected the government's broad reading of the statute, which would 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

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[401] *Id.*

[402] *See id.*

[403] 18 U.S.C. § 1030(a)(2)(C).

[404] *Van Buren*, 141 S. Ct. at 1662.

[405] *See id.* at 1661 (explaining that "the text, context, and structure" of the CFAA sufficiently supported the narrowing construction and disclaiming reliance on lenity and constitutional avoidance).

[406] *Id.*

[407] *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.*

[408] 26 U.S.C. § 7212(a).

contributes, or fails to provide every record to an accountant."[409] The Court determined that, if Congress had meant for the statute to reach that far, "it would spoken with more clarity than it did."[410]

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.[411] 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.[412] If Congress had intended that result, Justice Ginsburg's plurality opinion explained, "one would have expected a clearer indication of that intent."[413]

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 broad reading of the statute. It then declined to adopt that broad 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 adopted 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" that is separate and distinct from the modern rule of lenity (and thus free from the grievous-ambiguity trigger). Eight justices joined Justice Sotomayor's majority opinion in *Dubin*. And the only Justice who did not—Justice Gorsuch[414]—has separately penned recent concurring opinions expressly advocating for both a robust version of lenity[415] and a robust substantive-canon version of the administrative-law major questions doctrine.[416]

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[409] *Marinello*, 138 S. Ct. at 1108.

[410] *Id.*

[411] 18 U.S.C. § 1519.

[412] *Yates*, 574 U.S. at 536, 540 (Ginsburg, J. plurality)

[413] *Id.*

[414] Justice Gorsuch concurred in the judgment, taking the view that the statute should be deemed void for vagueness. *See Dubin*, 143 S. Ct. at 1575-77 (Gorsuch, J., concurring in judgment).

[415] *See Snyder*, 144 S. Ct. at 1960 (Gorsuch, J., concurring); *Bittner*, 143 S. Ct. at 724-25 (Gorsuch, J., concurring); *Wooden*, 142 S. Ct. at 1063 (Gorsuch, J., concurring).

[416] *See West Virginia*, 142 S. Ct. at 2616-17 (Gorsuch, J., concurring).

2. Fischer *v.* United States[417]

The Court continued the trend in *Fischer* v. *United States*, a recent case concerning the scope Section 1512(c) of the Sarbanes-Oxley Act in the context of a prosecution related to the events at the U.S. Capitol on January 6, 2021.[418]

Section 1512(c) imposes up to twenty years imprisonment on certain forms of corrupt conduct. 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."[419] 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."[420]

On January 6, 2021, while Congress was convening a joint session to certify the votes of the 2020 Presidential election, many supporters of the-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.[421] Fischer was one of the individuals who allegedly trespassed and engaged in a physical confrontation with police.[422] He was charged with a number of crimes,[423] 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. That count carried a substantially higher penalty than the other charges brought against him.[424]

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, documents, objects, or . . . other things" used in an official proceeding.[425]

Writing for a six-Justice majority, Chief Justice Roberts justified the narrow reading on the basis of the statute's text, linguistic

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[417] 144 S. Ct. 2176 (2024).

[418] *Id.* at 2182.

[419] 18 U.S.C. § 1512(c)(1).

[420] 18 U.S.C. § 1512(c)(2).

[421] 144 S. Ct. at 2182.

[422] *Id.*

[423] Fischer with "forcibly assault[ing] a federal officer, enter[ing] and an remain[ing] in a restricted building, and engag[ing] in disorderly and disruptive conduct in the Capitol, among other crimes." *Id.*

[424] 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 sim months' to eight years' imprisonment." *Id.*

[425] *Id.* at 2190.

canons of interpretation, and statutory history and context.[426] But he also relied on avoidance of the "peculiar" consequences that would result from the government's "unbounded" reading of the residual clause, which would have "criminaliz[ed] a broad swath of prosaic conduct, exposing activists"—including "peaceful protester[s]"—and lobbyists . . . to decades in prison."[427] Those consequences, he reasoned, "'underscore[d] the implausibility of the Government's interpretation,'"[428] 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."[429] Notably, 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."[430]

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.'"[431] For that reason, he elaborated, the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute."[432] 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."[433] The government's broad reading, he elaborated, "would intrude on that deliberate arrangement of constitutional authority over federal crimes, giving prosecutors broad discretion to seek" significant criminal penalties.[434]

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

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[426] *Id.* at 2183-89.
[427] *Id.* at 2189.
[428] *Id.* (quoting *Van Buren*, 563 U.S. at 394).
[429] *Id.*
[430] *Id.*
[431] *Id.* (quoting *Wiltberger*, 5 Wheat. at 95).
[432] *Id.* (quoting *Marinello*, 584 U.S. at 11).
[433] *Id.* (quoting *Aguilar*, 515 U.S. at 600).
[434] *Id.*

restraint" in light of "far-reaching consequences."[435] Yet in *Fischer*, they did not think that principle applied. For one thing, according Justice Barrett, the majority's "appeal to consequences" was "overstated."[436] 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 scope.[437] And although the residual clause carries a twenty-year maximum penalty, she explained, the majority "'glosse[d] over the absence of any prescribed minimum,'" which she took to indicate a scope that "encompasses actions that range in severity."[438] In addition, and more fundamentally, Justice Barrett understood Congress to have clearly defined an "expansive" reach for the residual clause.[439] And "[o]nce Congress has set the outer boundaries of liability"—even if set broadly—the Court should understand that as granting "the Executive Branch . . . discretion to select particular cases within those boundaries."[440] She concluded that the majority's narrow construction—which she viewed as "[a]textual"—"failed to respect the prerogatives of the political branches."[441]

In other words, in the language of major-questions lenity, the *Fischer* dissenters did not apprehend sufficiently high stakes to warrant application of an implied-limitation rule. That may suggest that 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. It might also suggest that they would be slow to embrace major-questions lenity as a front-end presumption that would require a clear statement from Congress to be overcome.

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Dubin and *Fischer* can be understood as applying an early, modest form of major-questions lenity, through the language of "interpretive restraint," as informed by the prospect of far-reaching

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[435] Justice Sotomayor wrote the majority opinion in *Dubin*, *see infra* text accompanying notes __-__, and Justice Barrett wrote the majority opinion in *Van Buren*, *see infra* text accompanying notes __-__. Justice Kagan, for her part, joined the majority opinions in *Marinello*, *Van Buren*, and *Dubin*. *See infra* text accompanying notes __-__.

[436] *Fischer*, 144 S. Ct. at 2201 (Barrett, J., dissenting).

[437] *Id.* (Barrett, J., dissenting).

[438] *Id.* (Barrett, J., dissenting).

[439] *Id.* (Barrett, J., dissenting); *see also id.* __-__ (providing statutory analysis to support the conclusion that the residual clearly had a broad reach).

[440] *Id.* (Barrett, J., dissenting).

[441] *Id.* (Barrett, J., dissenting).

consequences and potentially severe penalties. Just as earlier administrative-law decisions showed hints of something like the major questions doctrine, long before the Court's recent full articulation of that doctrine as a standalone tool of construction,[442] 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.[443]

Regardless of the label, it is crucial that the Court actually explicate a concrete tool of interpretation. 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, which gives the judiciary more latitude when construing penal statutes in future cases.[444] 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 of different penal statutes by prosecutors and lower courts.[445] Clear guidance is needed.

C. Contours of Major-Questions Lenity

The discussion of major-questions lenity thus far has been rooted in the Court's own decisions. But as the last section suggested, the form of major-questions lenity currently on display at the Court is inadequate and undertheorized. A more robust and clearly articulated version of rule is needed. Indeed, important questions remain about major-questions lenity's scope and operation. A key question is *when* the doctrine would 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 has to do with 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

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[442] *See infra* text accompanying notes __-__.

[443] *See* Bruhl, *Managing*, *supra* note _, at *23 ("A new name need not mean a new too, nor does the continuation of an old name preclude novelty in substance.").

[444] *See* Johnson, *Ad Hoc*, *supra*, note __, at *44-46 (suggesting that "a majority of Justices [may] prefer *ad hoc* constructions because they seek to maximize interpretive discretion in future cases involving penal statutes").

[445] *See infra* text accompanying notes __-__.

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 raised by major-questions lenity is what exactly would trigger the doctrine—whether all or only some subset of interpretive questions concerning penal statutes would be considered "major" questions. This question determines the scope of the rule's application and the degree of discretion afforded to courts determining 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.[446] As scholars have long observed, "criminal statutes are among the most important species of law that Congress makes" given their "severe" sanctions, high costs of administration, wide applicability to the electorate, and "symbolic import."[447] And 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.[448]

Perhaps most notably, the Constitution requires prosecutors to prove the *fact* of a violation of a criminal statute beyond a reasonable doubt,[449] a standard of proof higher than the preponderance

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[446] *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.").

[447] *See* Kahan, *supra* note __, 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. 177, 136-60 (2011) (arguing that the added stigma of criminal laws warrants more due process protection); Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & 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.").

[448] Hessick & Hessick, *Nondelegation*, *supra* note __, at 300 ("The text of the Constitution . . . demonstrates 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 the grand jury and petit jury requirements, the right to the assistance of counsel, the speedy trial guarantee, and the prohibition on double jeopardy. *See id.* amends. V, VI; *see also* Hessick & Hessick, *Nondelegation*, *supra* note __, 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.").

[449] *See In re Winship*, 397 U.S. 358, 364 (1970). For more detailed discussions of the history of and justification for the beyond-a-reasonable-doubt standard in the criminal context, see generally Daniel

standard used in the civil context. The stricter factual burden of proof for criminal cases reflects an understanding that determinations of criminal guilt are higher-stakes than those concerning civil liability.[450] A broadly applicable major-questions lenity would extend that understanding to *legal* determinations about the scope of criminal statutes, requiring stricter proof—clear authorization by the text—of prosecutions that test their boundaries. In that way, broad applicability without qualification would essentially reinstate historic strict construction.[451]

But maybe major-questions lenity's domain should 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 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. And 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 "economical and political significance" of the asserted agency action.[452] 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.

Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015), and Joel S. Johnson, Note, *Benefits of Error in Criminal Justice*, 102 VA. L. REV. 237 (2016).

[450] Doerfler, *supra* note __, at 550 ("[T]he 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 the premise that she committed a civil violation.").

[451] The analogy to the beyond-a-reasonable-doubt standard has historical support. Consider how Justice Brokcholst Livingston described strict construction in an opinion issued with 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 __, at 927-28 & nn.50-51 (citing other examples of this formulation in cases and treaties from the same era).

[452] *West Virginia*, 142 S. Ct. at 2595 (quoting *Brown & Williamson*, 529 U.S. at 160).

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. As such, 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."[453]

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.[454] That would echo how early American courts applied historic strict construction, varying the "degree of strictness"[455] according to "the severity of the penalty,"[456] and with how the beyond-the-reasonable-doubt standard has sometimes been made stricter in the context of capital punishment.[457] It would also align with some of the language in the majority opinion in *Fischer*.[458] 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 punishment attaches are less inclined to find indeterminacy in the text than those faced with serious felony statutes to which more serious punishment attaches.

Indeed, 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. A felony-misdemeanor line would make clear for lower courts,

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[453] *See Wooden*, 142 S. Ct. at 1075-76 (Kavanaugh, J., concurring in the judgment).

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

[455] BISHOP, *supra* note __, § 193, at 185-87 (noting that the "degree of strictness" a court applied would "depend somewhat on the severity of the punishment" that a statute inflicted).

[456] Sutherland, *supra* note __, § 347, at 436 ("The construction will be more or less strict according to . . . the severity of the penalty . . . ."); *see also id.* § 349-50, at 438-41 (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*, 511 U.S. at 616 (accounting for a "harsh" mandatory minimum sentence when concluding that the scienter presumption had not been rebutted).

[457] *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).

[458] *See* 144 S. Ct. at __ (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").

prosecutors, and defense counsel when major-questions lenity is triggered. And 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 a tool of interpretation.

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 extends 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 not specifically address that issue or show that members of the enacting legislature thought about it."[459] That aspect of major-questions lenity distinguishes it from the modern rule of lenity[460] and other interpretive tools whose application depends on linguistic indeterminacy.[461] 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.[462]

Major-questions lenity could be employed as a substantive canon, potentially in the form of a clear-statement rule,[463] consistent with Justice Gorsuch's views. Notably, in *Wooden* v. *United States*[464]—which was decided the same Term as *West Virginia*—Justice Gorsuch argued in a concurring opinion (joined by Justice Sotomayor)

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[459] CALEB NELSON, STATUTORY INTERPRETATION 230 (2d ed. 2023).

[460] *See* Muscarello v. United States, 524 U.S. 125, 139 (1998) (restricting 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. 610, 619 n.17 (1994)).

[461] For example, ordinary constitutional avoidance is typically triggered by ambiguity. *See*, *e.g.*, Johnson v. Artega-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 Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018)). And vagueness avoidance is ordinarily triggered by vagueness in statutory language. *See* Johnson, *supra* note __, at 74.

[462] *See supra* notes __-__.

[463] *Cf.* Hopwood, *supra* note __, 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 __, at 353-58 (advocating for increased use of clear-statement rules for constraining the reach of criminal laws).

[464] 142 S. Ct. 1063 (2022).

for a more robust version of lenity that require "any reasonable doubt about the application of a penal law [to] be resolved in favor of liberty"[465]; he did the same the following term in a concurring opinion (joined by Justice Jackson) in *Bittner* v. *United States*.[466]

In making his argument—which echoes Justice Scalia's view of lenity[467]—Justice Gorsuch emphasized "lenity's role in vindicating the separation of powers,"[468] noting that "[p]erhaps the most important consequence" of Article I's Vesting Clause "concerns the power to punish."[469] 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."[470] 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 imposing the costs of ambiguity on presumptively free persons."[471] 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'"[472] 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.'"[473] 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.[474]

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 indeterminacy more easily and in

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[465] *Id.* at 1081.

[466] *See* 143 S. Ct. 713, 724-25 (2023) (Gorsuch, J., concurring)

[467] *See supra* text accompanying notes __-__.

[468] *Id.* at 1083.

[469] *Id.*

[470] *Id.* (quoting United States v. Mann, 26 F. Ca. 1153 (No. 15,718) (CC NH 1812)).

[471] *Id.* (quoting United States v. Santos, 553 U.S. 507, 514 (2008) (Scalia, J, concurring)).

[472] *Id.* (quoting *Wiltberger*, 5 Wheat. at 95).

[473] *Id.* at 1086 (quoting *Wiltberger*, 5 Wheat. at 96).

[474] Relatedly, in his concurring opinion in *Loper Bright*—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. at 2286 (Gorscuch, J., concurring).

favor of resolving that ambiguity "against major and novel assertion[s] of [that] authority."[475]

Alternatively, a major-questions lenity could instead be descriptively justified as a contextualizing canon,[476] 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.[477] 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,'"[478] such that "a reasonably informed interpreter would expect Congress to legislate on 'important subjects.'"[479]

Notably, either descriptive justification for major-questions lenity would run counter to the typical modern understanding of lenity as a purely normative canon that lacks any descriptive justification.[480] But to the extent the descriptive justifications are persuasive in the context of the major questions doctrine, they would seem to apply equally to major-questions lenity.

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 convincing."[481] This conception would thus likely be more attractive to textualists who accommodate a wider range of context when determining ordinary meaning[482] or view substantive canons to be in serious "tension with

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[475] Wurman, *supra* note __, at 959.

[476] *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[.]").

[477] *Biden*, 143 S. Ct. at 3380 (Barrett, J., concurring); *see id.* (Barrett, J., concurring) (noting that "our constitutional structure[] . . . is part of the [relevant] legal context").

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

[479] *Id.* at 2380-81 (Barrett, J., concurring).

[480] *See*, *e.g.*, NELSON, *supra* note __, 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").

[481] *Id.* at 2381 (Barrett, J., concurring).

[482] *See* Grove, *supra* note __, 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").

textualism."[483] But it may be less effective at combatting broad and literalistic constructions in the lower courts.[484]

Nevertheless, a descriptive-canon conception would still be significantly stronger than the current version of lenity, which resides at "end of the interpretive process"[485] as a "tool of last resort."[486] 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 the these competing conceptions is not necessary. Any of them could be used to reform lenity and promote the separation of powers by disciplining prosecutors, courts, and ultimately Congress. Major-questions lenity would limit the practice of implicit delegation of crime definition.[487] Because it would elevate lenity in the order of operations—retrieving it from the end of the interpretive process—major-questions lenity would help curb the adoption of overly broad and literalistic constructions of penal states 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.[488]

Under any of these conceptions, moreover, major-questions lenity would address Justice Kavanaugh's suspicions about substantive canons with ambiguity triggers[489] (including the modern version of lenity), because its application does not strictly turn on ambiguity,[490] but on the nature of the action taken pursuant to the statute. To be

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[483] *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

[484] *See supra* text accompanying notes __-__.

[485] Hopwood, *Clarity*, *supra* note __, at 717.

[486] Hessick & Kennedy, *supra* note __, at 380.

[487] *Cf.* Kahan, *supra* note __, 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.").

[488] The clear-statement, substantive-canon conception of major-questions lenity may be slightly better at changing the interpretive culture in lower courts insofar as 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.

[489] Recall that Justice Kavanaugh views ambiguity triggers with suspicion because "ambiguity . . . cannot readily be determined on an objective basis." *Wooden*, 142 S. Ct. at 1075-76 (Kavanaugh, J., concurring in the judgment). He prefers an interpretive approach that seeks the "best reading" using tools that determine semantic meaning. Kavanuagh, *supra* note __, at 2148.

[490] *See* Heinzerling, *supra* note __, 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*, 142 S. Ct. at 2609 (suggesting that the major questions doctrine stems from a "'reluctan[ce] to read into ambiguous statutory text' the delegation claimed to be lurking there"). But that is not the main focus.

sure, the major-questions trigger could still involve some degree of discretionary judgment to determine what constitutes a "major" question.[491] 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 a whether a broader reading would yield far-reaching consequences, or draw the distinction on the basis of the degree of the potential punishment attached to the penal statute being construed.

CONCLUSION

This Article has identified a fundamental connection between the new major questions doctrine and 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 narrow constructions of penal statutes. That emerging rationale can be understood as a modest form of major-questions lenity that may prepare the way 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 states in the lower courts. In doing so, 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.

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[491] *See supra* Part IV.C.1.