AN ORIGINALIST CASE FOR A ROBUST RULE OF LENITY

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Abstract

In the course of one evening, William Wooden broke into a storage facility in Georgia and stole from ten different storage units, resulting in ten counts of burglary. Twenty years later, the district court and then the Sixth Circuit Court of Appeals determined those convictions subjected him to an enhanced sentence under the Armed Career Criminal Act (ACCA), which applied to unlawfully armed offenders with three or more prior convictions "committed on occasions different from one another." When the Supreme Court heard Wooden's case in 2022, it was tasked with interpreting the ambiguous Occasions Clause. The Court unanimously concluded that the burglaries, which were committed sequentially in time as part of a single criminal spree, were separate offenses occurring on different occasions. Thus, Wooden was not subject to the enhanced sentence under the ACCA. The justices, however, did not see eye to eye about the proper way to resolve the ambiguity in the statute. After determining that the meaning of "occasions" was ambiguous, Justice Kagan, writing for the majority, consulted a balancing test to discern the clause's meaning. Justices Sotomayor and Gorsuch believed the rule of lenity provided a far simpler solution. Justice Kavanaugh, however, wrote a concurring opinion to challenge Justice Gorsuch's invocation of lenity and argue that the presumption of *mens rea* was better suited for resolving the case.

The rule of lenity, historically known as "strict construction," stands for the principle that when a penal law is ambiguous, the court should apply it in the way most favorable to the defendant. Although lenity is deeply entrenched in the American jurisprudential tradition and is well-supported by the Constitution, today, it is half-heartedly and inconsistently applied by federal judges, who disagree about what level of

* J.D. Candidate 2025, University of Florida Levin College of Law; B.A. 2022, University of Florida. First, I would like to express gratitude to my fiancé, Jesse Dieterle, and my parents, Scott and Leigh Swain, for their endless encouragement and support. I am incredibly grateful to my faculty mentors; the Honorable John Badalamenti, Professor Lyrissa Lidsky, and Professor Elizabeth Lear; for their advice throughout law school and feedback on this Note. I would also like to thank Brooke Sause, Jared Young, Dominic Vogt, Lauren Sellers, and Jake Orlick for their friendship and perspectives. *Soli Deo Gloria*.

statutory ambiguity is required to justify the application of lenity, or what rank lenity should hold relative to other interpretive conventions. As evidenced by the concurring opinions in *Wooden*, even the Court's originalist justices are unable to reach a consensus about how and when lenity should come into play. Lenity, therefore, has largely lost its bite. Despite the confusion that clouds the doctrine today, originalists should faithfully champion a robust rule of lenity, as understood by Chief Justice Marshall and Justices Scalia and Gorsuch, because it is the view best supported by the Constitution and reflected in historical practice.

INTRODUCTION

Non-originalists argue originalism is flawed because it only gets judges so far—when certain constitutional and statutory provisions are truly ambiguous, original meaning may not be able to supply judges with a determinative answer.[1] The harmful effects of statutory ambiguity are perhaps most acutely felt in the criminal law sphere, where the consequences of a

1. ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 84 (2017).

judge's interpretative methodology can be severe for criminal defendants, whose life and liberty are often at stake.

When the original meaning of a constitutional provision or statute is unclear, originalists disagree about the best way to resolve the ambiguity: some argue for a presumption of liberty,[2] while others support a presumption of constitutionality.[3] But there is another view. Original methods originalists contend that, rather than resorting to those competing theories of construction, courts should draw upon original interpretive conventions to interpret a text's meaning.[4] Original methods originalists argue the Founding generation had numerous legal tools and rules available to help clarify statutory ambiguities, and they expected future generations of interpreters to use those tools, as well.[5]

The rule of lenity, also known as "strict construction,"[6] is one such original interpretive convention. The rule of lenity—which, according to Justice Scalia, is "almost as old as the common law itself"[7]—is a substantive canon that instructs when a criminal law is unclear or ambiguous, the court should

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2. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260 (2004) (arguing because a constitution can only be legitimate if it protects citizens' natural rights, the original meaning of the Constitution favors a presumption of liberty, which "would place the burden on the government to show why its interference with liberty is both necessary and proper rather than . . . imposing a burden on the citizen to show why the exercise of a particular liberty is a fundamental right").

3. Justice Brandeis is often regarded as the source of the presumption of constitutionality, although the doctrine actually predates him by many decades. WURMAN, *supra* note 1, at 87. *See* Ashwander v. TVA, 297 U.S. 288, 354 (1936) (Brandeis, J., concurring) (arguing "courts should, in the exercise of their discretion, refuse an injunction unless the alleged invalidity" of a legislative act is clear); *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing the Supreme Court "can only disregard [an] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.").

4. WURMAN, *supra* note 1, at 91.

5. *Id.* at 85; John O. McGinnis & Michael Rappaport, *Original Methods Originalism*, 103 NW. U. L. REV. 751, 752 (2009) ("[T]he meaning of the Constitution should be interpreted based on the applicable interpretive rules of the time.").

6. *See* The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (describing the historic "legal principle that penal laws should be construed strictly"); *see also* United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) ("It is a principle grown hoary in age and wisdom, that penal statutes are to be construed strictly, and criminal statutes to be examined with a favorable regard to the accused.").

7. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (Amy Gutmann ed. 1997) ("The rule of lenity is almost as old as the common law itself, so I suppose that it is validated by sheer antiquity.").

apply it in the way most favorable to the defendant.[8] Lenity first appeared in English courts in the seventeenth century as an effort to temper the severity of Parliament's punishment for common law crimes.[9] Later, in the hands of judges in the early years of the United States, lenity became a widely recognized tool of statutory interpretation that served "distinctly American functions," such as upholding the Constitution's commitments to due process and separation of powers.[10]

However, despite lenity's long-accepted and venerated status in American jurisprudence, today, it is inconsistently and often half-heartedly applied by federal judges, who disagree about how and when lenity should come into play.[11] The likely culprit behind this disagreement is a series of ahistorical, freewheeling Supreme Court decisions in the mid-twentieth century that diluted lenity of its force in favor of that era's preferred methods of statutory interpretation, such as legislative history and legislative intent.[12] These decisions construed criminal statutes broadly despite the existence of narrower alternatives, and the once-robust rule of lenity became "little more than atmospherics."[13]

Today, the members of the Supreme Court are unable to reach a consensus as to what level of statutory ambiguity is required to justify the application of lenity, or what rank lenity

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8. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109 (2010) (describing lenity as a substantive canon that "express[es] a rule of thumb for choosing between equally plausible interpretations of ambiguous text."); Zachary Price, *The Rule of Lenity as A Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

9. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–50 (1935); Price, *supra* note 8, at 897.

10. Wooden v. United States, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring); *see also* Barrett, *supra* note 8, at 119 ("[T]he rule of lenity is most frequently characterized as one pursuing fairness to the criminal defendant, but it is also characterized as one designed to ensure that Congress, not the judiciary, is the branch to criminalize conduct.").

11. *See* Price, *supra* note 8, at 885–86 ("Nowadays [the rule of lenity] appears occasionally as a supplemental justification for interpretations favored on other grounds; it never stands alone to compel narrow readings."); *see also* Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 184 (2018) (finding federal appellate courts rarely invoke the rule of lenity framework or apply the rule).

12. *See* Callanan v. United States, 364 U.S. 587, 596 (1961); Huddleston v. United States, 415 U.S. 814, 831 (1974).

13. United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.); *see also* John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198–99 (1985) (noting that during this era, "the construction of penalty statutes no longer seem[ed] guided by any distinct policy of interpretation; it [wa]s essentially ad hoc").

should hold relative to other interpretive conventions. For example, in *Wooden v. United States*,[14] Justice Kagan, writing for the majority, consulted a multi-factored balancing test to discern an ambiguous term's meaning in the Armed Career Criminal Act (ACCA).[15] Justices Sotomayor and Gorsuch, on the other hand, believed lenity was the key to resolving the ambiguity.[16] Justice Kavanaugh, however, penned a separate concurring opinion solely to challenge Justice Gorsuch's invocation of lenity.[17] Without the full, authoritative support of the Court, lenity has lost its bite.[18] This is a tragedy in a criminal justice system plagued by overcriminalization and mass incarceration.[19]

Originalists should champion a robust rule of lenity as an original interpretive convention deeply embedded in the United States Constitution and well-supported by centuries of historical practice.[20] Among the approaches taken by the

14. 595 U.S. 360 (2022).

15. *Id.* at 368–69.

16. *Id.* at 388 (Gorsuch, J., concurring); *Id.* at 376 (Sotomayor, J., concurring).

17. *Id.* at 376–79 (Kavanaugh, J., concurring).

18. *See, e.g.*, David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 525 (2018) ("[T]he rule of lenity ought to be reconstructed to recover and reclaim the important due process foundation that begat the rule."); 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."); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 724 (2017) (arguing for a restoration of "the historical rule of lenity").

19. While the Crimes Act of 1790 set forth just 23 federal crimes, today, there are approximately 4,500 statutory federal crimes and 100,000–300,000 federal regulations carrying criminal penalties. Independent Task Force on Federal Priorities. *See* Next Steps: An Agenda for Federal Action on Safety & Justice: Recommendation 3: Streamline the Criminal Code, COUNCIL ON CRIM. JUST. (May 2020), https://councilоncj.foleon.com/taskforce/federal-priorities/rec3/ [https://perma.cc/RM4E-TLGA]; Heritage Explains: Overcriminalization, THE HERITAGE FOUND., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization [https://perma.cc/RQT6-VCJM] (last visited Nov. 8, 2023). Overcriminalization also has harmful effects on voting rights and defendants with mental health issues. *See generally* Neil L. Sobol, *Defeating De Facto Disenfranchisement of Criminal Defendants*, 75 FLA. L. REV. 287 (2023) (analyzing the disenfranchisement that results from the United States' mass incarceration problem); E. Lea Johnston, *Reconceptualizing Criminal Justice Reform for Offenders with Serious Mental Illness*, 71 FLA. L. REV. 515 (2019) (describing the adverse effect of over-criminalization on individuals with serious mental illness).

20. Lenity, of course, is not just for originalists. Non-originalists should also support a robust rule of lenity because it stems from constitutional values and contributes to a more merciful criminal justice system. In fact, non-originalist

justices on the Court today, Justice Gorsuch has it right: when confronted with ambiguous statutes, judges should first consult traditional tools of statutory interpretation.[21] If those tools yield no definitive answer, judges should then apply lenity, resolving the ambiguity in favor of the criminal defendant, rather than resorting to extratextual sources like legislative history or policy.[22] Originalists should embrace Justice Gorsuch's approach to lenity, which was exercised by Chief Justice Marshall and later promoted by Justice Scalia, because it is the view best supported by the Constitution and historical tradition.

Section II discusses lenity's roots in the text and structure of the Constitution—chiefly, it upholds constitutional commitments to due process and separation of powers. Section III then traces the historical practice of lenity from its inception at English common law and its migration to the United States during the Founding era to its development throughout the nineteenth and twentieth centuries and, finally, its use in the modern era of American jurisprudence. Finally, Section IV sketches the approaches to lenity taken by different members of the Court in *Wooden* and ultimately argues Justice Gorsuch's concurrence offers the most faithful understanding of lenity under an originalist framework.

I. LENITY'S CONSTITUTIONAL ROOTS

The rule of lenity is a legitimate substantive canon because it upholds the Constitution's commitments to due process and separation of powers.[23]

A. *Separation of Powers Rationale*

Perhaps the most classic justification for the rule of lenity in the American tradition is that it advances the Constitution's structural preservation of separation of powers. As James

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justices have applied and continue to apply lenity. *See, e.g.*, Yates v. United States, 574 U.S. 528, 547–49 (2015) (Ginsburg, J.) (invoking lenity to support the conclusion that a fish did not constitute a "tangible object," as used in § 1519 of the Sarbanes-Oxley Act); Wooden v. United States, 595 U.S. 360, 376 (2022) (Sotomayor, J., concurring).

21. *Wooden*, 595 U.S. at 395.

22. *Id.*

23. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 427 (1985) ("Application of the rule of lenity 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.").

Madison observed, "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[24] And under our Constitution, "[a]ll legislative powers" are "vested in . . . Congress."[25] Notably, this includes the power to punish.[26]

According to Justice Thurgood Marshall in *United States v. Bass*,[27] "this policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'"[28] Justice Marshall further elaborated, "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[29] Justice Story similarly cautioned against judicial overreach in the sphere of punishment in *United States v. Mann*[30]: "We cannot assume a jurisdiction to moderate the promulgated sentence of the legislature, neither ought we to increase its severity by enlarging doubtful expressions."[31]

Even earlier, in *United States v. Wiltberger*,[32] which involved the interpretation of Congress's first criminal statute, Chief Justice Marshall explained that lenity is founded on separation of powers principles:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It 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 in the judicial department. It is the legislature,

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24. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). According to Madison, the Constitution divides powers among three branches because the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("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.").

25. U.S. CONST. art. I, § 1.

26. *Wooden*, 595 U.S. at 391 (Gorsuch, J., concurring). *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

27. 404 U.S. 336 (1971).

28. *Id.* at 348 (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967)).

29. *Id.*

30. 26 F. Cas. 1153 (C.C.D.N.H. 1812).

31. Mann, 26 F. Cas. at 1157.

32. 18 U.S. 76 (1820).

> not the Court, which is to define a crime and ordain its punishment.[33]

This separation of powers argument is rooted in the ideal of legislative supremacy—lenity helps judges stay in their lane and avoid encroaching upon the legislature's punishment power, thereby ensuring "the intention of the legislature" governs statutory construction.[34]

As some scholars have noted, however, lenity may not always advance legislative intent in practice. Indeed, in some cases, the legislature may actually prefer an expansive reading of an ambiguous criminal statute to a narrow one and the application of lenity may cause those cases to fall through the cracks.[35]

Lenity's separation of powers rationale, however, remains compelling even if it occasionally usurps legislative intent. Lenity encourages the legislature to exercise more care in the drafting stage, and "it compels prosecutors to charge crimes with enough specificity to indicate to voters—and juries—what conduct has been treated as criminal."[36] Along the same lines, in *United States v. Santos*,[37] Justice Scalia argued lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead."[38]

Even if the exercise of lenity does not, in practical effect, compel the legislative and executive branches to exercise their duties in better faith, the separation of powers rationale remains persuasive—especially to originalists—due to its judge-restraining function. Regardless of any existing dysfunctions in the other branches, the legislature, not the judiciary, retains the power to punish. Lenity ensures judges exercise "neither force nor will, but merely judgment" when

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33. *Id.* at 95.

34. *Id.*

35. *See* Price, *supra* note 8, at 886 (reasoning "narrow construction may in fact thwart legislative desires more than it advances them"); see also Wooden v. United States, 595 U.S. 360, 391 (2022) (Gorsuch, J., concurring) ("If judges cannot enlarge ambiguous penal laws to cover problems Congress failed to anticipate in clear terms, some cases will fall through the gaps and the legislature's cumbersome processes will have to be reengaged.").

36. Price, *supra* note 8, at 887 ("Without the rule, politicians might prefer to choose broad language that obscures the extent to which criminal laws encompass unremarkable conduct.").

37. 553 U.S. 507 (2008).

38. *Id.* at 514.

interpreting ambiguous statutes.[39] In other words, rather than empowering judges to act as policymakers, lenity prevents judges from "mistak[ing] their own predilections for the law."[40] Lenity, therefore, retains legitimacy through the crucial role it plays in upholding the structural protections of the Constitution.

B. *Due Process Rationale*

Lenity is also closely tied to the Constitution's guarantee of due process. Under the Fifth and Fourteenth Amendments, neither the federal nor state government may deprive individuals of "life, liberty, or property, without due process of law."[41] Generally, the Due Process Clause prohibits the government from depriving individuals of those rights without, at a bare minimum, affording them those "customary procedures to which freemen were entitled by the old law of England."[42] The Due Process Clause, as originally understood, "sought to ensure that the people's rights are never any less secure against the governmental invasion than they were at common law."[43]

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39. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

40. Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). *See also* Judge Robert H. Bork, Speech at the University of San Diego Law School (Nov. 18, 1985) (reasoning "if judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge"); 4 WILLIAM BLACKSTONE, COMMENTARIES 301–02 (1769) (reasoning if judges could overextend ambiguous statutes, the self-governing people would become "slaves to their magistrates" and their liberties would depend upon "the private opinions of the judge").

41. U.S. CONST., amends. V, XIV, § 1.

42. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1855) (reasoning the Due Process Clause guarantees citizens access to "those settled usages and modes of proceeding" found in the common law); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1774–75 (2012).

43. Sessions v. Dimaya, 584 U.S. 148, 176–77 (2018) (Gorsuch, J., concurring). Lord Coke, whose teachings Chief Justice Rutledge considered to be "almost the foundations of our law," took this view of the English due process guarantee. Klopfer v. North Carolina, 386 U.S. 213, 225 (1967); 1 E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1797). *See also* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 341 (1987) ("Sir Edward Coke identified the 'law of the land' with 'due process of law' in his famous *Institutes*. '[B]y the law of the land [means] by the due course and process of law,' which Coke later defined as 'by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the Common

Among the "settled usages"[44] guaranteed by the Due Process Clause is "the ancient rule that the law must afford ordinary people fair notice of its demands."[45] At common law, the fair notice requirement took on special importance in the context of criminal proceedings. According to Sir William Blackstone, criminal indictments were required to provide defendants with "precise and sufficient certainty" about the charges involved, and the offenses themselves had to be set forth with "clearness and certainty" or else the indictments would be voided in court.[46]

The Founders also recognized the importance of fair notice in preserving liberty.[47] Alexander Hamilton, for example, wrote, "subjecting . . . men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny."[48] James Madison similarly warned of the "dangers to liberty" posed by a tyrannical government.[49] It is unsurprising, then, that fair notice is one of the most basic, widely-recognized protections of the Due Process Clause.[50]

Lenity works to further fair notice by ensuring criminal defendants are not caught off guard by broader statutory

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Law.'"); *Murray's Lessee*, 59 U.S. at 276 ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta*. Lord Coke, in his commentary on those words, says they mean due process of law.").

44. *Murray's Lessee*, 59 U.S. at 277.

45. Wooden v. United States, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law.").

46. 4 WILLIAM BLACKSTONE, COMMENTARIES 301–02 (1769); 2 W. HAWKINS, PLEAS OF THE CROWN, ch. 25, §§ 99, 100, pp. 244–45 (2d ed. 1726) ("[I]t seems to have been anciently the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it.").

47. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012–14 (2006) (discussing the Framers' fear that "tyranny" in the criminal justice system would result in less liberty and more punishment).

48. THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

49. THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

50. Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926) (reasoning "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law").

interpretations than they could reasonably anticipate.[51] According to Justice Scalia, lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."[52]

Some take issue with the fair notice rationale for lenity because most criminals—nay, even most law-abiding citizens—do not spend their leisure time reading statutes.[53] However, lenity's emphasis on fair notice does more than indulge the fantasy that criminals read statutes before acting. It also protects the promise, essential to the rule of law, that "whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance."[54] This rationale is echoed in Justice Holmes's famous opinion in *McBoyle v. United States*[55]:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.[56]

By guaranteeing procedural due process, lenity also upholds the life and liberty rights of criminal defendants.[57] Recall in *Wiltberger*, Chief Justice Marshall observed lenity is founded, among other principles, on "the tenderness of the law for the rights of individuals."[58] Lenity guarantees that in a standoff between an ambiguous criminal statute and a criminal

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51. Price, *supra* note 8, at 886; *see also Bass*, 404 U.S. at 348 (identifying fair notice as one of the core policies underlying lenity).

52. *Bass* at 513; *see also* United States v. Shackford, 27 F. Cas. 1038, 1039 (C.C.D. Me. 1830) (Story, J.) ("it would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties.").

53. *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 401–02 (1994).

54. Wooden v. United States, 595 U.S. 360, 390–91 (2022) (Gorsuch, J., concurring); Joshua S. Ha, *Limiting the Rule of Lenity*, 12 WAKE FOREST L. REV. ONLINE 46, 60–61 (2022) ("The legislature may not infringe upon a person's liberty without clearly stating its intent to do so.").

55. 283 U.S. 25 (1931).

56. *Id.* at 27.

57. Stinneford, *supra* note 18, at 2029 (noting the historic rule of lenity was "based upon the premise that the law 'delights' in life and liberty").

58. *Wiltberger*, 18 U.S. at 95.

defendant's liberty, "liberty must prevail."[59] The Founders struck this balance intentionally. Thomas Jefferson, for example, wrote:

> [W]hen an instrument admits two constructions the one safe, the other dangerous, the one precise the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless. [O]ur peculiar security is in the possession of a written constitution. [L]et us not make it a blank paper by construction.[60]

The Bill of Rights is, in many ways, an expression of the Founders' exaltation of criminal defendants' rights at the expense of a more expansive government.[61] Furthermore, centuries of American jurisprudence also serve to elevate individual rights in light of ambiguous criminal statutes.[62]

II. LENITY'S HISTORICAL PRACTICE

Lenity is deeply rooted in the American jurisprudential tradition, from its conception at English common law to Justice Scalia's advocacy for a robust rule of lenity in the late twentieth and early twenty-first centuries.

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59. *Wooden*, 595 U.S. at 389 (Gorsuch, J., concurring); 553 U.S. 507, 519 (2008) (arguing resolution of "statutory ambiguity in light of Congress's presumptive intent . . . [is a] position [that] turns the rule of lenity upside down. We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."). *See also* United States v. Kersee, 86 F. 4th 1095, 1110 (5th Cir. 2023) (Ho, J., concurring) (emphasis added) ("[W]e don't presume that citizens are dangerous criminals. We presume they're innocent. And to overcome that presumption, we require more than just notice and a hearing. We afford the accused with the assistance of counsel and a meaningful opportunity to present evidence and confront adverse witnesses. We impose a robust burden of proof on the government. *And when in doubt, we err on the side of liberty*.").

60. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803).

61. *See, e.g.*, U.S. CONST. amend. IV (the right of the people to be free from "unreasonable searches and seizures"); U.S. CONST. amend. VI (the rights of the accused to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); U.S. CONST. amend. VIII (the right of the people to be free from excessive bail, excessive fines, and the infliction of "cruel and unusual punishment").

62. *See* discussion *infra* Section III.

A. *Lenity at English Common Law*

The rule of lenity, historically called "strict construction," predates the Constitution. Chief Justice Marshall wrote in *Wiltberger*, "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."[63] While Chief Justice Marshall and Justice Scalia may have overstated lenity's antiquity,[64] lenity originated in sixteenth century English common law courts as a response to the brutality of English criminal law.[65] The sixteenth century treatise *A Discourse upon the Exposicion and Understanding of Statutes*, "the earliest treatise yet brought to light on the interpretation of statutes in England,"[66] explained that penal statutes should be construed strictly because "the law alwaies favoureth hym that goeth to wracke, nor it will not pulle him his nose that is on his knees."[67]

Lenity first came into existence as part of the English courts' efforts to usurp legislative intent in favor of "tenderness for the accused."[68] Because death was the customary punishment for all common-law crimes at the time, courts developed the "benefit of clergy" doctrine to free many defendants from the death penalty.[69] When Parliament responded by passing statutes to limit the benefit of clergy, courts then attempted to temper this severity with strict construction, requiring abrogation in the most specific terms possible.[70]

Sir Matthew Hale summarized strict construction in the context of benefit of clergy: "where any statute . . . hath ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised

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63. *Wiltberger*, 18 U.S. at 95.

64. *See* SCALIA, *supra* note 7.

65. Hall, *supra* note 9, at 749; Price, *supra* note 8, at 897.

66. SAMUEL E. THORNE, *Preface to* A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDINGE OF STATUTES, at v (Samuel E. Thorne ed., Lawbook Exchange, Ltd. 2003) (1942) (hereinafter DISCOURSE).

67. *Id.* at 154–55.

68. Barrett, *supra* note 8, at 129 ("Insofar as judges applied the rule of lenity to relieve defendants from harsh punishments that Parliament clearly intended to impose, the rule was in significant tension with parliamentary supremacy."). Ironically, then, the legislative supremacy rationale championed by future American judges was perhaps the judges' attempt to "distance themselves from lenity's rebellious reputation." *Id.* at 132. Thus, the "initial motivation for the rule of lenity was turned on its head as federal courts applied the rule to reinforce, not undermine, the separation of powers." *Id.* at 133–34.

69. Hall, *supra* note 9, at 749.

70. Price, *supra* note 8, at 897.

within such statutes, for *in favorem vite & privilegii clericalis*[71] such statutes are construed literally and strictly."[72]

Blackstone illustrated how strict construction worked in practice—courts declined to apply a horse theft statute to the theft of a single horse and interpreted a statute prohibiting the theft of "sheep, or other cattle" as applying only to sheep.[73]

Although the nineteenth century brought the end of the death penalty as the primary mode of punishment for serious crimes in England and thus nullified strict construction's chief justification—*in favorem vite*—the doctrine lived on in both English and American jurisprudence.[74]

B. *Lenity in the Early Years of the United States*

In the early years of American jurisprudence, lenity was applied "from the start" by lower federal court judges, who were schooled in the English tradition.[75]

In *Mann*, for example, Justice Story addressed the question of whether a federal statute authorized punishment against a shipowner.[76] Justice Story concluded the text of the statute failed to provide a "definite" answer and, therefore, in light of the principle of strict construction, he declined to extend punishment.[77] He wrote, "I will not be the first judge, sitting in this seat, to strain a proviso against the citizen, beyond the fair import of its expressions."[78]

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71. This roughly translates to "for the life and privileges of the clergy."

72. 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 335 (1736).

73. 1 WILLIAM BLACKSTONE, COMMENTARIES 88 (1765).

74. Hall, *supra* note 9, at 751.

75. Barrett, *supra* note 8, at 129–30 & nn.91–92. The earliest case in which a federal judge invoked lenity was *Bray v. The Atalanta*, which was decided in 1794. *Id.* at 129; *see* Bray v. The Atalanta, 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) ("[I]t is a penal law and must be construed strictly."). Notably, too, lenity was not only applied to criminal statutes but also to civil statutes which were penal in nature, such as forfeiture statutes. *See, e.g.*, Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 67–68 (1812); Shipp v. Miller's Heirs, 15 U.S. (2 Wheat.) 316, 325 (1817); Carver v. Astor, 29 U.S. (4 Pet.) 1, 92–93 (1830); *see also* G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 331, at 456 ("It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding prescribed for the enforcement of the penal law be criminal or civil.").

76. 26 F. Cas. at 1155–57.

77. *Id* at 1157. Justice Story relied in part upon the legislative supremacy rationale in his opinion: "I cannot feel at liberty, with this principle [of strict construction] before me, to impose a forfeiture, where the legislature has not plainly spoken its will to that effect . . . ." *Id.*

78. *Id.*

Similarly, in *The Adventure*,[79] Chief Justice Marshall applied lenity: "in cases where [legislative] intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail."[80]

In *The Enterprise*,[81] Judge Livingston also drew upon lenity: "[i]t should be a principle of every criminal code, and certainly belongs to ours, 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."[82]

Lenity first appeared on the national stage in *Wiltberger* as part of Chief Justice Marshall's campaign to adopt a canon of common law statutory interpretation tools in an effort to make American law "more uniform, predictable, and systematic" and "reinforce an image of the federal judiciary as a nonpartisan discoverer of the law."[83] This campaign came in response to fears among the Anti-Federalists that the judiciary would use its discretion to further the government's political interests and usurp the legislature's power.[84] Chief Justice Marshall's canons "appeared to constrain judicial discretion by limiting a court's freedom to construe a statute's meaning" and, therefore, left little room for the judges' own political agendas.[85]

In *Wiltberger*, the defendant committed manslaughter on a river in China.[86] However, the federal statute under which he was charged criminalized manslaughter only "on the high seas."[87] After acknowledging there were some other provisions in the statute that may have indicated the legislature intended to capture the defendant's conduct and that it made little sense

79. 1 F. Cas. 202 (C.C.D. Va. 1812).

80. *Id.* at 204.

81. 8 F. Cas. 732 (C.C.D.N.Y. 1812).

82. *Id.* at 734.

83. John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1626–27 (1992).

84. *Id.* at 1627. *See, e.g.*, Brutus No. XV (Mar. 20, 1788), *in* THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) ("[T]he judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.").

85. Yoo, *supra* note 83, at 1627.

86. Price, *supra* note 8, at 897.

87. United States v. Wiltberger, 18 U.S. 76, 94 (1820).

for culpability to turn on such minor differences in location,[88] Chief Justice Marshall applied lenity. Chief Justice Marshall concluded that because Congress did not make the defendant's act punishable in clear terms, neither could the Court properly enlarge the statute.[89] Chief Justice Marshall's reliance on lenity in *Wiltberger* is remarkable in light of his belief that it was "extremely improbable" that Congress intended the interpretation that lenity yielded.[90] For Chief Justice Marshall, therefore, lenity upheld the principles of fair notice and defendants' rights, even if it meant failing to honor legislative intent.[91]

Throughout the rest of the nineteenth century, courts continued to apply the rule of lenity when faced with ambiguous penal laws.[92] The nineteenth century standard for lenity was best summarized by legal scholar Jabez Sutherland: "[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."[93] The nineteenth century Supreme Court frequently applied this version of lenity, requiring courts to construe statutes in favor of defendants whenever the text presented any reasonable doubt as to its meaning.[94] For the courts of this era,

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88. For example, murder, piracy, and munity were banned "upon the high seas or in any river . . . ." *Id.* at 78 n.(a) (quoting The Act of April 30, 1790 § 8); *see also id.* at 105.

89. *Id.*

90. *Id.*

91. Perhaps this focus is unsurprising in light of lenity's original purpose, which was to upend Parliamentary intent. *See* Barrett, *supra* note 8, at 133–34.

92. *See, e.g.*, United States v. Eighty-Four Boxes of Sugar, 32 U.S. 453, 462–63 (1833) ("The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly."); United States v. Lacher, 134 U.S. 624, 628 (1890) ("before a man can be punished, his case must be plainly and unmistakably within the statute."); United States v. Open Boat, 27 F. Cas. 354, 357 (C.C.D. Me. 1829) ("penal statutes are construed strictly . . . forfeitures are not to be inflicted by straining the words so as to reach some conjectural policy, not avowed on the fact of the statute").

93. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 353, p. 444 (1891); *see also* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW §§ 133–34, p. 172–73 (2d ed. 1858).

94. The Merino, 22 U.S. 391, 403–04, 408 (1824) (affirming the defendant's conviction under a "highly penal" law after concluding that "no reasonable doubt" existed as to its application); Harrison v. Vose, 50 U.S. 372, 378 (1850) ("In the construction of a penal statute, it is well settled . . . that all reasonable doubts concerning its meaning ought to operate in favor of the respondent."); United States v. Hartwell, 73 U.S. 385, 395–96 (1868) (observing "penal laws are to be construed strictly," such that "they must . . . leave no room for a reasonable doubt" as to the legislature's meaning).

the question was not what degree of ambiguity was required to justify lenity or how many other interpretive conventions they needed to exhaust before resorting to lenity. Rather, the inquiry was simple and straightforward—if the text was ambiguous (if a textual analysis presented any reasonable doubt as to the statute's meaning), judges invoked lenity.

C. *A Turn for the Worse: The 20th Century Federal Practice of Lenity*

The Supreme Court continued to apply lenity in the same manner throughout much of the twentieth century.[95] However, in the 1960s and 1970s—a "bygone era of statutory construction"[96]—the Court decided a series of ahistorical, freewheeling cases. These decisions took a startling turn from the Court's traditional approach to lenity and injected a sense of confusion into the doctrine that is still felt today.

In *Callanan v. United States*,[97] Justice Frankfurter denigrated lenity's historic role,[98] arguing it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one . . . ."[99] He reasoned, "The 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."[100] Justice Frankfurter's application of lenity may be partly attributable to that era's "new interpretive culture," where courts were more willing to add legislative history and other extratextual interpretive conventions to their statutory construction toolbox.[101] Justice Frankfurter, unlike

95. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931); Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity . . . . It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."); Bass, 404 U.S. at 347–48; Rewis v. United States, 401 U.S. 808, 812 (1971).

96. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 437 (2019).

97. 364 U.S. 587 (1961).

98. Frankfurter was the first to call "strict construction" "lenity" in *Bell v. United States*. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 103 (1998).

99. *Callanan*, 364 U.S. at 596.

100. *Id.*

101. Solan, *supra* note 98, at 107 ("In the traditional mode of interpretation, courts looked first to the language of the statute, then to canons of construction. If these were not dispositive, lenity would apply. The new interpretive culture added legislative history and other extratextual materials to the types of information that courts were willing to examine. In both instances, lenity comes at the end of the process.").

Chief Justice Marshall, wanted to avoid frustrating legislative purpose at all costs, even if that meant neglecting the constitutionalized guarantee of fair notice.[102]

Then, in 1974, the Court introduced a new word—"grievous"—to its lenity jurisprudence via one line of dicta. In *Huddleston v. United States*,[103] Justice Blackmun declined to apply lenity after finding no ambiguity in a criminal statute.[104] In making this observation, Justice Blackmun noted there was "no grievous ambiguity or uncertainty in the language and structure of the Act."[105]

It is doubtful Justice Blackmun could have imagined this single sentence of dicta would have such a powerful effect on the Court's lenity jurisprudence. But an effect it did have. Although some judges continued to apply lenity as it was historically understood, others viewed *Huddleston* as an endorsement of a new "grievous ambiguity" standard and ran with it, diluting lenity of the force it once enjoyed in favor of the era's preferred methods of statutory interpretation, legislative history and legislative intent.[106] This line of decisions construed criminal statutes broadly despite the existence of narrower alternatives.

In *Moskal v. United States*,[107] for example, Justice Thurgood Marshall held a flimsy view of lenity: "[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[108]

Similarly, in *Lewis v. United States*,[109] Justice Blackmun held that a constitutionally invalid conviction could constitute a predicate for a ban on the possession of firearms by a

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102. *Id.*

103. 415 U.S. 814 (1974).

104. *Id.* at 831–32.

105. *Id.* at 831.

106. *See* Solan, *supra* note 98, at 107 (reasoning the court's "departure from the traditional statement of lenity correlated with the changed role that legislative history played in statutory analysis").

107. 498 U.S. 103 (1990).

108. *Id.* at 108 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)). Justice Marshall's description of lenity here is seemingly inconsistent with one of his later opinions, suggesting that the flimsy view of lenity produces inconsistent results even when applied by the same judge. *See* Hughey v. United States, 495 U.S. 411, 422 (1990) (Marshall, J.) ("[L]ong-standing principles of lenity . . . preclude our resolution of the ambiguity . . . on the basis of general declarations of policy in the statute and legislative history.").

109. 445 U.S. 55 (1980).

convicted felon despite the availability of a plausible, narrower reading that would have limited the ban to valid prior convictions.[110]

In *Smith v. United States*,[111] Justice O'Connor rejected a narrow interpretation of a ban on the "use" of a firearm "during and in relation to . . . [a] drug trafficking crime" as a ban on the use of the firearm "as a weapon."[112] Justice O'Connor instead held the statute covered the use of a firearm as consideration in a narcotics transaction.[113]

Later, in *Muscarello v. United States*,[114] Justice Breyer observed, "The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended."[115]

These decisions garnered criticism from scholars, who lamented how the once-mighty rule of lenity had become a mere "argument of convenience in federal courts . . . used to buttress results obtained on other grounds, not to compel decisions on the merits."[116] One scholar complained, "[T]he construction of penalty statutes no longer seem[ed] guided by any distinct policy of interpretation; it [wa]s essentially ad hoc."[117] While a judge on the D.C. Circuit, Justice Scalia also criticized the Courts' application of lenity as providing "little more than atmospherics."[118] Justice Scalia understood that in order for lenity to retain any bite, the Court would need to be more explicit about lenity's proper place in the interpretive hierarchy. This would involve determining "how much ambiguousness constitutes ambiguity."[119]

D. *Justice Scalia and the Resurgence of the Rule of Lenity*

It was against this backdrop that Justice Scalia, now a Supreme Court justice, sketched his approach to lenity over a series of opinions and became "lenity's most unexpectedly

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110. *Id.* at 67–68.

111. 508 U.S. 223 (1993).

112. 18 U.S.C. § 924(c)(1)(A) (2000); *see Smith*, 508 U.S. at 242–44 (Scalia, J., dissenting).

113. *Id.* at 237.

114. 524 U.S. 125 (1998).

115. *Id.* at 138 (quoting United States v. Wells, 519 U.S. 482, 499 (1997)).

116. *See, e.g.*, Price, *supra* note 8, at 901; Jeffries, *supra* note 13, at 198–99 (1985) ("Today, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation.").

117. Jeffries, *supra* note 13, at 199–200.

118. United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985).

119. *Id.*

ardent advocate."[120] According to Justice Scalia, text always ranks first, and lenity always ranks second: at step one, he argued, judges should first focus on the plain meaning of a text to determine, using textual tools of interpretation, whether there are any common-sense definitions of the terms on their face.[121] When the text indicates broad liability, judges should apply the plain meaning without invoking lenity.[122] In many cases, of course, the work will stop here.[123] When, however, the text presents multiple plausible readings, then judges should proceed to step two. At step two, judges resort to lenity and resolve ambiguity in favor of the defendant, cutting off any broader readings based on non-textualist interpretive conventions, like policy or legislative history.[124] "In each case, it is the plain text that controls, and lenity blocks broader readings."[125] Justice Scalia's view was informed by the classical rationales of fair notice and separation of powers, his desire to produce consistent interpretive outcomes,[126] and his strong commitment to textualism.[127]

Justice Scalia demonstrated his approach to lenity in *Santos*, which addressed the meaning of the term "proceeds" in a federal money-laundering statute.[128] At step one, Justice Scalia inquired whether there was a single, common-sense definition

120. Rabb, *supra* note 11, at 191. *See also, e.g.*, Moskal v. United States, 498 U.S. 103, 131–32 (1990) (Scalia, J., dissenting); Smith v. United States, 508 U.S. 223, 241–44 (1993) (Scalia, J., dissenting); United States v. R.L.C., 503 U.S. 291, 307–08 (1992) (Scalia, J., concurring).

121. Price, *supra* note 8, at 891–92; Rabb, *supra* note 11, at 191–92; Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 210–11 (1994); United States v. Santos, 553 U.S. 507, 513–14 (2008).

122. Price, *supra* note 8, at 892.

123. *See, e.g.*, Deal v. United States, 508 U.S. 129, 135–36 (1993) (Scalia, J.) (rejecting the argument that the statute's language was facially ambiguous and therefore declining to invoke lenity).

124. Price, *supra* note 8, at 891–92; Rabb, *supra* note 11, at 191; Newland, *supra* note 121, at 210–11; *Santos*, 553 U.S. at 513–14.

125. Price, *supra* note 8, at 892.

126. Newland, *supra* note 121, at 210; *see* United States v. R.L.C., 503 U.S. 291, 307–11 (1992) (Scalia, J., concurring) (criticizing the majority's reliance on policy and legislative history to resolve an ambiguous statute's meaning because it undermined the purposes of lenity: fair notice and ensuring "society, through its representatives, has genuinely called for punishment to be meted out.").

127. Price, *supra* note 8, at 893 ("Scalia's textualist methodology itself entails a bias toward narrow readings—with the consequence that lenity often supports the same result as of his brand of textualism.").

128. *Santos*, 553 U.S. at 509.

of "proceeds."[129] Scalia found two equally plausible meanings: "proceeds" could mean "receipt" or "profits."[130] After concluding the statute was ambiguous, Justice Scalia proceeded to step two and invoked lenity, applying the "profits" definition because it was more "defendant-friendly."[131]

Importantly, Justice Scalia only employed textualist tools of interpretation at step one of his analysis.[132] Justice Scalia purposefully avoided all non-textualist interpretive methods, such as legislative intent or public policy, in determining whether the statute was ambiguous.[133] Justice Scalia's rejection of the impulse to speculate about "a dubious congressional intent" was not a matter of mere jurisprudential preference.[134] Rather, he argued his approach best mirrored *Wiltberger*, the Court's "seminal rule-of-lenity decision,"[135] where Chief Justice Marshall wrote, "[P]robability is not a guide which a court, in construing a penal statute, can safely take."[136] Thus, Justice Scalia's approach to lenity was laudable on both textualist and originalist grounds.

Despite Justice Scalia's valiant efforts, however, he did not succeed in convincing the rest of the Court that his view of lenity was the correct one. Instead, the Court often followed the *Moskal* and *Huddleston* practice of fixating on a "grievous ambiguity" requirement and considering legislative history before resorting to lenity.[137]

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129. *Id.*

130. *Id.* at 511–14 ("From the face of the statute, there is no more reason to think that 'proceeds' means 'receipts' than there is to think that 'proceeds' means 'profits.' Under a long line of our decisions, the tie must go to the defendant.").

131. *Id.* at 514.

132. *See id.* at 511–14.

133. *Id.* at 515 ("When interpreting a criminal statute, we do not play the part of a mindreader."); *see also* United States v. R.L.C., 503 U.S. 291, 307–11 (1992) (Scalia, J., concurring) (criticizing the majority's use of legislative history to clarify the meaning of a facially ambiguous statute in a manner unfavorable to the defendant).

134. *Santos*, 553 U.S. at 515.

135. *Id. See also supra* notes 83–90 and accompanying text.

136. United States v. Wiltberger, 18 U.S. 76, 105 (1820).

137. *See, e.g.*, Shaw v. United States, 580 U.S. 63, 71 (2016) (Breyer, J.) (concluding lenity should not apply because the statute was "clear enough"); Salman v. United States, 580 U.S. 39, 51 (2016) (Alito, J.) (rejecting the defendant's appeal to lenity because he failed to show grievous ambiguity). At times, the Court has been so cavalier as to only address arguments calling for lenity in mere footnotes. Abramski v. United States, 573 U.S. 169, 188, n.10 (2014) (Kagan, J.) (refusing to apply lenity because although the text was ambiguous, "the context, structure, history, and purpose resolve[d]" the ambiguity); Ocasio v. United States, 578 U.S. 282, 295, n.8 (2016) (Alito, J.).

III. *WOODEN* AND THE CURRENT STATE OF LENITY

Today, confusion and disagreement persist. The current justices' views of lenity are best illustrated by *Wooden v. United States*. In that case, William Wooden broke into a storage facility in Georgia and stole from ten different storage units, resulting in ten counts of burglary.[138] The lower courts concluded those convictions subjected Wooden to an enhanced sentence under the ACCA, which applied to unlawfully armed offenders with three or more prior convictions "committed on occasions different from one another."[139] The question before the Supreme Court was whether those burglaries, which were committed sequentially in time as part of a single criminal spree, were separate offenses occurring on different occasions.[140] The Court unanimously concluded the answer was no: convictions arising from a single criminal episode only count as one occasion under the ACCA.[141]

The justices, however, did not see eye to eye about the proper way to reach that conclusion. After determining the meaning of "occasions" was ambiguous, Justice Kagan, writing for the majority, consulted a "multi-factored" balancing test to discern the term's meaning.[142] Justice Gorsuch, on the other hand, believed Justice Kagan's multi-factored balancing test provided poor guidance for lower courts, which could reasonably reach different results even when faced with similar fact patterns.[143] Rather than resorting to a balancing test, Justices Gorsuch and Sotomayor argued lenity was the key to resolving the case.[144] Justice Kavanaugh wrote a separate concurring opinion to challenge Justice Gorsuch's invocation of lenity, arguing that the presumption of *mens rea* was better equipped to address concerns about fair notice in criminal law.[145]

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138. Wooden v. United States, 595 U.S. 360, 362 (2022).

139. *Id.* at 363 (quoting 18 U.S.C. § 924(e)(1)).

140. *Id.*

141. *Id.*

142. *Id.* at 369 (reasoning "a range of circumstances may be relevant," such as timing, location, and nature of the conduct, in determining whether criminal acts occurred on different occasions).

143. *See Wooden*, 595 U.S. at 384–86 (Gorsuch, J., concurring).

144. *Id.* at 388 (Gorsuch, J., concurring) ("Because reasonable minds could differ . . . on the question whether Mr. Wooden's crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor."); *id.* at 376 (Sotomayor, J., concurring) ("[T]he rule of lenity provides an independent basis for ruling in favor of a defendant in a closer case. . . .").

145. *Id.* at 376 (Kavanaugh, J., concurring).

The other justices on the Court did not sign on to either concurring opinion, nor did they independently address lenity in *Wooden*. Based on previous opinions and scholarship, however, it is clear no consensus currently exists about the proper role lenity should play.[146] This suggests that either Justice Gorsuch's or Justice Kavanaugh's approach could easily gain traction with other originalist justices in the future.

Between Justice Kavanaugh's conception of lenity and Justice Gorsuch's, originalists should embrace Justice Gorsuch's view because it is better supported by the Constitution and historical tradition.

A. *Justice Kavanaugh's Approach to Lenity*

Although Justice Kavanaugh claimed he "would not upset our rule of lenity case law,"[147] he would have lenity play such a minor role that it would be rendered nearly nonexistent, a mere specter of statutory interpretation.

In his concurring opinion, Justice Kavanaugh subscribed to the formulation of lenity used by the *Callanan* and *Huddleston* courts—judges should apply lenity only if, after having "seiz[ed] everything from which aid can be derived," a federal criminal statute still seems to be "grievously ambiguous."[148] Justice Kavanaugh argued that the Court's repeated use of the term "grievous ambiguity" underscored his point, although he cited as support only three cases between 2014 and 2016, two of which solely referenced lenity in footnotes.[149]

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146. While Justice Thomas did not sign on to either concurrence, it seems his view of lenity would better align with Justice Gorsuch's. *See* United States v. R.L.C., 503 U.S. 291, 311–12 (1992) (Thomas, J., concurring) (agreeing with Justice Scalia that "the use of legislative history to construe an otherwise ambiguous penal statute against a criminal defendant is difficult to reconcile with the rule of lenity," but still affirming that lenity should come into play only after consulting the Court's "well-established principles of statutory construction" to determine whether the text is clear and definite). Justice Alito would more likely agree with Justice Kavanaugh, although perhaps he would take an even stronger anti-lenity stance. *See* Yates v. United States, 574 U.S. 528, 549–52 (2015) (Alito, J., concurring) (writing separately to argue the case should have been decided upon "narrow grounds" because the traditional tools of statutory interpretation yielded the correct answer and therefore there was no need to invoke lenity); Salman v. United States, 580 U.S. 39, 51 (2016). Chief Justice Roberts and Justice Barrett have both been silent on the matter on the Court, although Justice Barrett's scholarship before joining the Court indicates she may be more likely to side with Justice Gorsuch on the matter. *See* Barrett, *supra* note 8, at 128–34.

147. *Wooden*, 595 U.S. at 378 (Kavanaugh, J., concurring).

148. *Id.* at 377.

149. *See id.*; *supra* note 140.

Justice Kavanaugh believed the "grievous ambiguity" standard should be nearly impossible to meet. He wrote, "Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, 'hard interpretive conundrums, even relating to complex rules, can often be solved.'"[150] Armed with the confidence that judges can "almost always reach a conclusion about the best interpretation of the [law] at issue,"[151] Justice Kavanaugh continued:

> In short, because a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play. In other words, "if lenity invariably comes in 'last,' it should essentially come in never." . . . As I see it, that explains why this Court rarely relies on the rule of lenity, at least as a decisive factor.[152]

It is perhaps surprising Justice Kavanaugh minimized the significant role lenity has played in the Court's history, especially in light of the historical evidence carefully set forth in Justice Gorsuch's concurrence. But Justice Kavanaugh's main concern with a robust rule of lenity seemed to be its workability. He believed Justice Gorsuch was advocating for a change in the Court's lenity case law—he exhibited a fear that Justice Gorsuch wanted to make "the ambiguity trigger . . . easier to satisfy."[153] He argued:

> [A]ny front-end ambiguity in the statute [does not] justif[y] resort to the rule of lenity even before exhausting the tools of statutory interpretation… One major problem with that kind of ambiguity trigger is that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem, leading to

150. *Wooden*, 595 U.S. at 377 (Kavanaugh, J., concurring) (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019)).

151. *Id.* (quoting *Kisor*, 139 S. Ct. at 2448). This confidence is surprising, especially given the context of the Occasions Clause of the ACCA, which lower courts have struggled to interpret for years, often reaching contradictory judgments on similar facts. *Id.* at 384 (Gorsuch, J., concurring).

152. *Id.* at 377–78 (Kavanaugh, J., concurring) (quoting Kahan, *supra* note 53, at 386).

153. *Id.* at 378.

> significant inconsistency, unpredictability, and unfairness in application.[154]

While Justice Kavanaugh's concerns about inconsistency, unpredictability, and unfairness are valid, his opinion fundamentally misunderstood Justice Gorsuch's argument. Lenity, properly understood, does not employ a loose front-end ambiguity trigger; rather, traditional textualist tools of interpretation remain on the table.

Justice Kavanaugh proceeded to argue that the presumption of *mens rea* sufficiently addresses concerns about fair notice and sufficiently protects criminal defendants against vague and arbitrary federal criminal statutes.[155] However, while the *mens rea* presumption is undoubtedly an important staple of criminal law, the Court is not free to pick and choose which original interpretive conventions it deems sensible and cast out all others.[156] The *mens rea* presumption is by no means a substitute for lenity, a rule of decision deeply ingrained in our Nation's tradition and perhaps better rooted in the text of the Constitution than *mens rea* itself.[157]

B. *The Superior Approach: Justice Gorsuch's Rule of Lenity*

Justice Gorsuch's concurrence is not an esoteric grumble about the wisdom of judges past. Rather, it came as a practical response to the majority's confusing multi-factor balancing test[158] and the chaos the Occasions Clause has unleashed on lower courts.[159] He wrote, "[n]o list of factors, however thoughtful, can resolve every case under a law like [the ACCA]. Many ambiguous cases are sure to arise. In them, a rule of decision is required—and lenity supplies it."[160]

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154. *Id.*

155. *Id.* at 378–79.

156. *Wooden*, 595 U.S. at 396 (Gorsuch, J., concurring) ("None of these [original interpretive conventions] should be artificially divorced from the others; all are worthy of our respect.").

157. *See* discussion *supra* Section II.

158. *See supra* notes 142–44 and accompanying text.

159. Indeed, Justice Gorsuch also recognizes confusion about the Occasions Clause will continue to persist. *Wooden*, 595 U.S. at 397 (Gorsuch, J., concurring) ("The rule of lenity has a critical role to play in cases under the Occasions Clause. The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty.").

160. *Id.* at 388 ("The rule seems destined as well to play an important role in many other cases under the Occasions Clause—a setting where the statute at issue supplies little guidance, does not define its key term, and the word it does use . . . can lead different people to different intuitions about the same set of facts.").

Lenity, according to Justice Gorsuch, is straightforward—"[w]here the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity."[161]

Justice Gorsuch made a thorough and compelling argument as to why his view of lenity is best supported by historical practice and the text of the Constitution. He addressed lenity's constitutional roots. It enforces due process's "fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws."[162] And it vindicates the separation of powers, "keep[ing] the power of punishment firmly 'in the legislative, not in the judicial department.'"[163] Then, Justice Gorsuch traced the history of lenity, including its inception at English common law and its usage during the Founding era.[164] And he addressed the errors of the *Huddleston* and *Moskal* courts, which he believes could "hardly supply any court with a sound basis for ignoring or restricting one of the most ancient rules of statutory construction—let alone one so closely connected to the Constitution's protections."[165]

But Justice Gorsuch didn't stop there—he also addressed the common criticisms of a robust rule of lenity. Justice Gorsuch, like Justice Scalia before him, took issue with the majority's implication that the Court possesses "the authority to punish individuals under ambiguous laws in light of [its] own perceptions about some piece of legislative history or the statute's purpose."[166]

He also acknowledged the "grievous ambiguity" requirement, which "does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions."[167] Justice Gorsuch observed the "grievous ambiguity" requirement does not further the original goals of lenity "to ensure that the government may not inflict punishments on individuals without fair notice and the assent of the people's

161. *Id.* at 395.
162. *Id.* at 389.
163. *Id.* at 391 (quoting United States v. Wiltberger, 18 U.S. 76, 95 (1820)).
164. *Wooden*, 595 U.S. at 388–92 (Gorsuch, J., concurring).
165. *Id.* at 394–95.
166. *Id.* at 394.
167. *Id.* at 392, 394 (noting the *Huddleston* decision did not "pause to consider, let alone overrule, any of this Court's pre-existing cases explaining lenity's original and historic scope" and discussed "grievous ambiguity" in mere dicta).

representatives."[168] Nor is it faithful to historical practice. He wrote:

> Tellingly, this Court's early cases did not require a "grievous" ambiguity before applying the rule of lenity. Instead, they followed other courts in holding that, "[i]n the construction of a penal statute, it is well settled . . . that *all reasonable doubts* concerning its meaning ought to operate in favor of [the defendant].[169]

Indeed, adhering to the correct historical understanding of lenity is a worthy pursuit in itself. But Justice Gorsuch also understood what Justice Kavanaugh and other advocates for a heightened "grievous ambiguity" standard failed to grasp. Justice Gorsuch asked the reader, and the other members of the Court, to put themselves in the shoes of a criminal defendant.

"If a judge sentenced you to decades in prison for conduct that no law clearly proscribed, would it matter to you that the judge considered the law 'merely'—not 'grievously'—ambiguous?"[170] This reaches the heart of the matter: the American people inherited a system of government where, in a standoff between an ambiguous criminal statute and a criminal defendant's liberty, lenity always tips the scale in favor of liberty.[171] "[L]iberty always prevails."[172] Justice Gorsuch thus entreated the Court to adopt the robust rule of lenity, as it was practiced by Chief Justice Marshall and Justice Scalia. "Any other approach," Justice Gorsuch warned, "would be 'unsafe" and "dangerous'—risking the possibility that judges rather than legislators will control the power to define crimes and their punishments."[173]

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168. *Id.* at 392 ("A rule that allowed judges to send people to prison based on intuitions about "merely" ambiguous laws would hardly serve those ends.").

169. *Id.* at 392–93 (quoting *Harrison*, 50 U.S. at 378).

170. *Wooden*, 595 U.S. at 392 (Gorsuch, J., concurring).

171. *Id.* at 389 (Gorsuch, J., concurring).

172. *Id.*; *see also supra* notes 57–62 and accompanying text.

173. *Wooden*, 595 U.S. at 395 (Gorsuch, J., concurring). Justice Gorsuch also recently argued in favor of a robust conception of lenity in his recent majority opinion in *Bittner v. United States*, which involved a civil penalty imposed for the petitioner's non-willful failure to comply with the reporting requirements of the Bank Secrecy Act. *See* Bittner v. United States, 598 U.S. 85, 102–03 (2023) ("In these circumstances, the rule of lenity, not to mention a dose of common sense, favors a strict construction.").

CONCLUSION

If originalists truly care about history and tradition,[174] they cannot easily cast the rule of lenity aside. Lenity is far too entrenched in our heritage to be disregarded,[175] and its legitimacy is too well-supported by the text of the Constitution to be trivialized.[176] Despite the efforts of some to curtail lenity over the last fifty years,[177] the 400-year-old doctrine is here to stay.[178] But until the Court agrees to restore lenity to its original, robust state, as understood by Chief Justice Marshall and Justices Scalia and Gorsuch,[179] courts will continue to construe ambiguous criminal statutes unpredictably and inconsistently. Some criminal defendants will receive mercy at the hands of our system, while others, though similarly situated, will face severe punishment for conduct not clearly prescribed by statute, perhaps in the name of public policy or legislative intent. This is not the criminal justice system our Founders envisioned.[180] And it is certainly not a system with which originalists should feel comfortable because it runs the risk of usurping separation of powers principles and endangering the guarantees of due process. Lenity was a central tool of penal statutory construction at the time of the Founding. It is time to return lenity to its rightful place. As Justice Gorsuch wrote, "[u]nder our rule of law, punishments should never be products of judicial conjecture about this factor or that one. They should come only with the assent of the people's elected representatives and in laws clear enough to supply 'fair warning . . . to the world.'"[181]

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174. *See, e.g.*, *generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022); Lawrence B. Solum & Randy E. Barnett, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023).

175. *See* discussion *supra* Section III.

176. *See* discussion *supra* Section II.

177. *See* discussion *supra* Sections III.C, IV.A.

178. Recently, for example, Justice Sotomayor asked a question about the relevance of lenity during oral arguments for *Pulsifer v. United States*. *See* Oral Argument at 31:55, Pulsifer v. United States (2023) (No. 22-340), https://www.oyez.org/cases/2023/22-340 [https://perma.cc/7HFB-MBW7].

179. *See* discussion *supra* Sections III.D, IV.B, IV.C.

180. *See supra* notes 24, 39, 48, 49, 60 and accompanying text.

181. Wooden v. United States, 595 U.S. 360, 397 (2022) (Gorsuch, J., concurring) (quoting *McBoyle*, 283 U.S. at 27).