

ARTICLE

LENITY AND THE CONSTITUTION: COULD CONGRESS ABROGATE THE RULE OF LENITY?

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“Scholars who on any other question can be counted on for a definitive judgment—*constitutional, unconstitutional*—are uncharacteristically woolly in their constitutional claims about statutory interpretation. Their answers have been imprecise, because they have not asked the precise constitutional question: *could Congress abrogate the canon under consideration?*”¹

– Nicholas Quinn Rosenkranz, 2002

I. INTRODUCTION

The rule that penal statutes are to be interpreted strictly, also known as the rule of lenity, has been said to be as old as the task of statutory interpretation itself.² It has also been described, by no less than Jeremy Bentham, as “the subject of more constant controversy[] than perhaps of any in the whole circle of the Law.”³ Recent decisions of the Supreme Court appear to confirm Bentham’s assessment⁴ and the Court’s newest member, Justice Brett Kavanaugh, has admitted: “I do not have a firm idea about how to handle the rule of lenity.”⁵ Similarly, recent scholarship on the rule has left a num-

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¹ Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2087–88 (2002).

² See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); cf. Philip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 521 (2002) (“[W]hat we understand to be the rule of lenity—the rule that substantive criminal statutes should be interpreted narrowly—itsself has no early British counterpart. . . . [T]he substantive rule of lenity is an American creation, forged in the furnace of American constitutionalism.”).

³ JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 141 (Oxford Univ. Press 1928) (1776).

⁴ See, e.g., *Marinello v. United States*, 138 S. Ct. 1101, 1107–08, 1116 (2018) (illustrating disagreement among the Justices over the proper application of the rule to the Internal Revenue Code); *Lockhart v. United States*, 136 S. Ct. 958, 968, 977 (2016) (sentencing statute); *Yates v. United States*, 135 S. Ct. 1074, 1088, 1098–99, 1099 n.6 (2015) (Sarbanes-Oxley Act).

⁵ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2145 n.136 (2016).

ber of questions unanswered.⁶ The most significant controversy attending the rule concerns its constitutional status. Remarkably, this topic has not yet received sustained judicial or academic treatment. Judicial comments on the rule's constitutional status are limited to the odd *ipse dixit* linking the rule to the separation of powers⁷ and due process (specifically the concept of "notice" or "fair warning").⁸ Certain scholars adopt a similar stance.⁹ Others have suggested that the rule is of no constitutional moment and could be dispensed with tomorrow if Congress so desired.¹⁰ This Article is the first to conduct a comprehensive examination of the arguments for and against the rule as a constitutional requirement.¹¹ The examination is conducted in the mode suggested by the epigraph, namely, by asking: Could Congress abrogate the rule of lenity?

This Article proceeds in five parts. First, in light of the various controversies surrounding the rule, it is necessary briefly to articulate exactly which formulation of the rule is relied on here. Second, in order to establish a framework for the inquiry, this Article examines the relation between the Constitution and canons of statutory interpretation. Third, this Article rehearses the various arguments advanced by courts and scholars in favor of a constitutional foundation for the rule. These arguments typically focus on separation of powers and due process. However, this Article will also mention more speculative constitutional rationales for the rule, including the rule of law, federalism, and historical practice. Fourth and fifth, this Article will assess arguments against the separation of powers and due process rationales for the rule, respectively.

⁶ Consider the debate surrounding the proper interaction between the rule and deference to agencies. See generally, e.g., Bryan B. Becker, Comment, "*Sticker Shock*": Driving around Chevron and the Rule of Lenity in Immigration Removal, 77 OHIO ST. L.J. (SIXTH CIR. REV.) 73 (2016); Liza B. Fleming, Comment, *Lenity Calling: A Plea to End Chevron Deference for Criminal Insider Trading Law*, 89 TEMP. L. REV. 579 (2017); Patrick J. Glen & Kate E. Stillman, *Chevron Deference or the Rule of Lenity: Dual-Use Statutes and Judge Sutton's Lonely Lament*, 77 OHIO ST. L.J. (SIXTH CIR. REV.) 129 (2016); Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1 (2006); Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007); Paul J. Larkin, Jr., *Chevron and Federal Criminal Law*, 32 J.L. & POL. 211 (2017).

⁷ See, e.g., *Wiltberger*, 18 U.S. (5 Wheat.) at 88.

⁸ See, e.g., *United States v. Lanier*, 520 U.S. 259, 265 n.5, 266 (1997).

⁹ See, e.g., Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2204–05 (2002) (doubting that the rule can be completely ousted by statute). For other scholars' positions on this question, see *infra* Section II.B.

¹⁰ See, e.g., Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 425 (1994); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 1244 (2018) (Thomas, J., dissenting) ("[L]enity is a tool of statutory construction, which means States can abrogate it—and many have.").

¹¹ This Article is decidedly not concerned with the rule's desirability as a matter of public policy. This Article merely asks whether Congress *could* legislate to abrogate the rule, not whether it *should*. Readers interested in the normative debate surrounding the rule are directed to Elhauge, *supra* note 9, at 2178, 2192–206 (describing the rule as "a preference-eliciting default rule that burdens public prosecutors" while also "favor[ing] the politically powerless").

The tentative conclusion reached in this Article is that the rule is constitutionally required but only in a very limited sense. While Congress could considerably whittle down the rule by statutory enactment, separation of powers and due process concerns would require federal courts to interpret any statutory abrogation to leave operable the irreducible core of the rule as a tiebreaker in circumstances where all other tools of statutory interpretation are insufficient to resolve statutory ambiguity.

II. LENITY DEFINED

As has already been adverted to, the rule is the site of considerable disagreement amongst and between scholars and the courts.¹² While this Article avoids many of these controversies, it is necessary to articulate a working definition of the rule for the purposes of the ensuing discussion. To that end, the rule referred to in this Article is: *where a criminal statute remains ambiguous after the exhaustion of other interpretative methods, the ambiguity should be resolved in favor of the defendant.*

Three aspects of this definition warrant mention. First, the rule so formulated applies only to “criminal” statutes, that is, statutes imposing or extending liability for a criminal penalty.¹³ Other proponents of the rule apply it not only to “criminal” statutes, but also to all “penal” statutes. On this articulation, taxing statutes attract the rule,¹⁴ because they impose penalties.¹⁵ The “penal” rule has also been extended by analogy to immigration laws rendering individuals liable to deportation.¹⁶ This Article prefers a less controversial version of the rule, which sees it as necessarily engaged only by legislative provisions *creating* or *extending* criminal liability.

Second, no attempt is made in this Article’s formulation of the rule to specify the degree of ambiguity required to engage the rule.¹⁷ This is no

¹² See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 889–96 (2004) (outlining “three versions of the rule” with varying degrees of support in Supreme Court decisions).

¹³ See *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (holding that the rule “applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose”); *United States v. Canal Barge Co.*, 631 F.3d 347, 353 (6th Cir. 2011) (“[T]he rule of lenity is typically invoked only when interpreting the substantive scope of a criminal statute or the severity of penalties that attach to a conviction—not the venue for prosecuting the offense.”).

¹⁴ See, e.g., *Gould v. Gould*, 245 U.S. 151, 153 (1917) (“In case of doubt [statutes levying taxes] are construed most strongly against the government, and in favor of the citizen.”).

¹⁵ See, e.g., *Comm’r v. Acker*, 361 U.S. 87, 91 (1959) (“We are here concerned with a taxing Act which imposes a penalty. The law is settled that ‘penal statutes are to be construed strictly’ . . .”).

¹⁶ See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[B]ecause deportation is a drastic measure, and at times the equivalent of banishment or exile[,] . . . we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”).

¹⁷ For a survey of interpretative approaches requiring “ambiguity” as a trigger to their application, see Kavanaugh, *supra* note 5, at 2134–44. For further commentary on the problematic ambiguity threshold for many interpretative inquiries, see generally Frank H. Easter-

small question.¹⁸ On the one hand, Justice Antonin Scalia, writing with Bryan Garner, has said that the rule should apply whenever there is “a reasonable doubt” about the meaning of the statute.¹⁹ Those less enthusiastic about the rule would reserve it for instances of “grievous ambiguity,” a precondition that is rarely met.²⁰ Yet others have said that the rule is engaged “only when the equipoise of competing reasons cannot otherwise be resolved,”²¹ which presents another high bar to the rule’s application.²² For present purposes, it is sufficient to acknowledge the controversy over the “ambiguity” precondition rather than attempt to resolve it.

Third, the rule articulated above is only engaged at the end of the interpretative process, after the exhaustion of all other interpretative methods. This is now the conventional formulation of the rule. So, for example, in *Yates v. United States*²³ the Supreme Court explained: “[I]f recourse to traditional tools of statutory construction leaves any doubt about the meaning . . . we would invoke the rule.”²⁴ This version of the rule may aptly be described as a “tiebreaker.”²⁵ Not everyone accepts the cogency of this con-

brook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 90 (2017); Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791 (2010); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859 (2004); Meredith A. Holland, Note, *The Ambiguous Ambiguity Inquiry: Seeking to Clarify Judicial Determinations of Clarity Versus Ambiguity in Statutory Interpretation*, 93 NOTRE DAME L. REV. 1371 (2018).

¹⁸ See ANTONIN SCALIA, A MATTER OF INTERPRETATION 28 (1997) (“Every statute that comes into litigation is to some degree ‘ambiguous’; how ambiguous does ambiguity have to be before the rule of lenity . . . applies?”); see also *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.) (observing that the rule provides “little more than atmospheric, since it leaves open the crucial question—almost invariably present—of how much ambiguity constitutes an ambiguity”).

¹⁹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 299 (2012) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

²⁰ See, e.g., *Chapman v. United States*, 500 U.S. 453, 463 (1991) (finding no “grievous ambiguity”); *Huddleston v. United States*, 415 U.S. 814, 831 (1974) (same).

²¹ See, e.g., *Johnson v. United States*, 529 U.S. 694, 713 n.13 (2000) (Souter, J.) (posing the “equipoise of competing reasons” threshold but finding that it had not been met in the particular case).

²² See SCALIA & GARNER, *supra* note 19, at 298 (arguing that if Justice Souter’s “equipoise” threshold was required then “the rule would either never apply . . . or would be superfluous”).

²³ 135 S. Ct. 1074 (2015).

²⁴ *Id.* at 1088; see also *United States v. Shabani*, 513 U.S. 10, 17 (1994) (explaining that the rule of lenity “applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute”); *Moskal*, 498 U.S. at 108 (“[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.”); *Callanan v. United States*, 364 U.S. 587, 596 (1961) (“The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning . . .”).

²⁵ See, e.g., *United States v. Rodriguez*, 553 U.S. 377, 404 (2007) (Souter, J., dissenting) (alteration in original) (citations omitted) (describing the rule as “a ready tiebreaker. . . . [W]hich applies where (as here) we have seiz[ed] every thing from which aid can be derived,

ception of the rule. Justice Scalia and Chief Justice John Roberts have both opposed the view that the rule ranks last in the interpretative hierarchy, each preferring to invoke the rule prior to any regrettable resort to legislative history.²⁶ This Article has deliberately adopted a modest formulation of the rule in the hope that most readers will agree that the rule stands for *at least* the above definition, if not more.

III. CONSTITUTIONAL STATUTORY INTERPRETATION

A. *Asking the Right Question*

While much has been written about the constitutional dimensions of statutory interpretation,²⁷ few writers approach the topic with the acuity of Nicholas Quinn Rosenkranz. By parsing Rosenkranz's writing on the topic it is possible to develop an exhaustive categorization of constitutionally weighted rules of statutory interpretation; such a schema is proposed at the end of this Section. In his article proposing a set of legislative rules of federal statutory interpretation, Rosenkranz provocatively floats a number of interpretative directives that Congress might one day attempt to pass as law.²⁸ From the predictable—"[l]egislative history shall not be used to resolve ambiguity in any future act of Congress"²⁹—to the absurd—"[a]mbiguity in this Act shall be resolved by reference to the *I Ching*"³⁰—Rosenkranz's examples invite the reader to consider the constitutional limits on legislated interpretative directions. As Rosenkranz succinctly states: "To ask whether Congress may codify a particular interpretative method is precisely to ask whether the Constitution requires the method that is to be displaced."³¹

To take up Rosenkranz's challenge, perhaps the most direct route to an answer is to ask whether the rule is required, permitted, or prohibited by the Constitution. However, such phraseology obscures some important distinctions within the first category: constitutionally required rules. The paradigmatic case in this category is a rule that is, for all intents and purposes, constitutionally required and may only be abrogated by constitutional

but are left with an ambiguous statute"); *United States v. Canal Barge Co.*, 631 F.3d 347, 353 (6th Cir. 2011) ("[T]he rule of lenity is only a tiebreaker of last resort . . .").

²⁶ See *United States v. Hayes*, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting) (arguing that the rule, rather than legislative history, should have dictated the majority's approach); *Moskal*, 498 U.S. at 132 (Scalia, J., dissenting) ("If the Rule of Lenity means anything, it means that the Court ought not . . . use an ill-defined general purpose to override an unquestionably clear term of art . . .").

²⁷ See, e.g., Price, *supra* note 12, at 940 ("Rules of construction are inevitably about more than the meaning of words in a text. They set the parameters of inter-branch relations, effectuating background expectations about governmental structure and determining how much power legislatures may delegate.").

²⁸ See Rosenkranz, *supra* note 1, at 2087.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

amendment. Rosenkranz calls this a “[c]onstitutional [m]andatory [s]ubstantive [r]ule.”³² But there are other sorts of rules that might be considered constitutionally required in certain senses but not in others. It might be, for instance, that the Constitution requires that a rule of statutory interpretation apply presumptively, but that the rule may yield to contrary legislative intent on a statute-by-statute basis. Rosenkranz labels this a “constitutional default rule.”³³ One might think that the presumption against federal preemption is one such rule,³⁴ required as a default by the principles of federalism underlying Article I and the Tenth Amendment.³⁵

Still within the category of constitutionally required rules, one can conceive of a rule with a slightly different status. The Constitution may require that the courts apply a particular rule of statutory interpretation unless and until Congress decides to abrogate the rule wholesale. This appears a particularly apt characterization of certain rules of statutory interpretation that were deeply imbedded in practice and judicial philosophy at the founding, such as the extraterritoriality canon³⁶ or the presumption against waiver of sovereign immunity.³⁷ Rosenkranz calls such rules constitutional “starting-point rule[s].”³⁸ Finally, we might consider the Constitution to govern rules of statutory interpretation by requiring a certain outcome—“fair warning” to a criminal defendant, for example—but permitting courts (or Congress) to choose between interpretative rules that equally achieve this outcome. Rosenkranz describes this as a set of constitutional “immutable parameters.”³⁹

To summarize, inquiring into the constitutional status of a rule means asking into which of the following categories it falls:

1. Constitutionally required rule;
 - i. Constitutional mandatory substantive rule (only capable of being modified or abrogated by constitutional amendment);
 - ii. Constitutional default rule (capable of congressional modification or abrogation, but only on a statute-by-statute basis);

³² *Id.* at 2099.

³³ *Id.* at 2097–98.

³⁴ *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[The Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

³⁵ *See Rosenkranz, supra* note 1, at 2122 (“The interpretative principle that a federal statute be presumed not to alter the federal-state balance is a constitutional default rule required by the Tenth Amendment. . . . Congress may avoid the effect of this rule with an appropriately clear statement, but only statute by statute. It cannot reverse the rule *qua* default wholesale with a *general* statement—however clear—that the United States Code applies to states, federalism notwithstanding.”).

³⁶ *See SCALIA & GARNER, supra* note 19, at 268–72 (describing the historical foundations of the extraterritoriality canon).

³⁷ *See id.* at 281–89 (describing the historical foundations of the presumption against waiver of sovereign immunity).

³⁸ Rosenkranz, *supra* note 1, at 2094.

³⁹ *Id.* at 2096 (emphasis omitted).

- iii. Constitutional starting-point rule (capable of congressional modification or wholesale abrogation); or
 - iv. Rule falling within immutable constitutional parameters (capable of being discarded or displaced by Congress in favor of another rule that achieves the same constitutionally required objective);
2. Constitutionally permitted rule;⁴⁰ or
 3. Constitutionally prohibited rule.⁴¹

B. A Summary of the Answers to Date

Before attempting to independently arrive at an answer to where the rule fits within the above taxonomy, it might be helpful to consider briefly where others have come out on the question of the rule's constitutional status. Dan Kahan is the only scholar to have considered the issue in any depth.⁴² While accepting the "quasi-constitutional status" of the rule, he concludes that not only is it constitutionally dispensable, but it is inconsistent with the current system of delegated federal criminal lawmaking.⁴³ Einer Elhauge offers another perspective. Elhauge is of the view that the rule is a constitutional default rule, in the sense that Congress could opt out of it by legislating to avoid its application to a particular criminal statute.⁴⁴ To be clear, Elhauge does not go as far as Kahan. In fact, he expresses reservations about Kahan's suggestion that *wholesale* abrogation of the rule would be constitutionally permissible.⁴⁵ John Manning might well have offered the most comprehensive answer to date if he had included the rule in his systematic review of "constitutionally inspired clear statement rules."⁴⁶ Yet Manning's decision to leave the rule out of his survey is just as telling. It seems he views the rule as constitutionally *required* rather than constitutionally

⁴⁰ Although not the focus of this Article, constitutionally permitted rules may be divided into two sub-categories: (1) rules giving effect to, but going beyond, the minimum requirements of the Constitution; and (2) rules serving a constitutionally neutral purpose. As to the first of these sub-categories, see Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975) (emphasis omitted) (discussing Supreme Court's "power to fashion a substructure of . . . rules that are admittedly not integral parts of the Constitution and that go beyond its minimum requirements").

⁴¹ Some have argued that *Auer* deference is one such constitutionally prohibited rule and, thus, should be abolished. See, e.g., Ronald A. Cass, *Auer Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531 (2018).

⁴² See generally Kahan, *supra* note 10.

⁴³ *Id.* at 346.

⁴⁴ Elhauge, *supra* note 9, at 2203 ("[T]he rule of lenity is merely a default rule, and like all default rules this one should operate only if the relevant actor does not opt out of it.").

⁴⁵ *Id.* at 2204–05 (suggesting that it would be undesirable for Congress to legislate the wholesale abrogation of the rule as this would potentially bind future legislatures and would allow already powerful interest groups further influence in the lawmaking process).

⁴⁶ John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010).

inspired.⁴⁷ William Eskridge, on the other hand, has said in passing that the rule is only constitutionally inspired.⁴⁸ Justice Scalia expressed doubts about the rule as a constitutional requirement, calling it “judge-made public policy.”⁴⁹ Important articles on the rule by John Calvin Jeffries, Jr.⁵⁰ and Lawrence Solan⁵¹ prevaricate on the rule’s constitutional status, focusing instead on its desirability as a matter of policy. More modest contributions to the literature on lenity usually do not linger long on its constitutional status.⁵²

⁴⁷ *Id.* at 406 & n.26 (emphasis omitted) (“Nor does this Essay address the possibility that some portion of the Constitution might directly require Congress to speak clearly in a particular context, as in the fair notice requirements that apparently flow from the Due Process Clause. . . . In the realm of statutory interpretation, the Court implements these due process requirements through the rule of lenity. . . .”).

⁴⁸ William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 552 (2013) [hereinafter Eskridge, *New Textualism*].

⁴⁹ SCALIA & GARNER, *supra* note 19, at 296; *see also id.* at 296–97 (“Some authorities consider the rule to be based on constitutional requirements of fair notice and separation of powers . . . [b]ut application of the rule of lenity, vague as it is, does not coincide with the constitutional requirement of fair notice . . . [a]nd as for the separation of powers, the rule antedates both state and federal constitutions, and it applies not only to crimes but also to civil penalties.”).

⁵⁰ *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

⁵¹ *See generally* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

⁵² *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 50 (4th ed. 2006) (“This so-called rule of lenity . . . is not constitutionally compelled, but is said to support the principle of legality. . . .”); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 288 n.150 (1982) (“[T]he rule of strict construction has never been accorded independent constitutional status.”); Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2066 n.73 (2017) (postulating that the rule might be understood “as a special kind of law that enforces constitutional norms or implements the Constitution”); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 957 (2013) (describing the rule as a “constitutional backstop” and a “judicial, quasi-constitutional, obligation”); Hickman, *supra* note 6, at 935 (“Lenity’s status as an absolute constitutional requirement rather than a quasi-constitutional canon of construction is questionable.”); Orin S. Kerr, *A Rule of Lenity for National Security Surveillance Law*, 100 VA. L. REV. 1513, 1533 (2014) (“The rule of lenity is rooted in the separation of powers.”); Donald R. Lee, *Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945, 951 (1984) (“[D]ue process does not require the strict construction of penal statutes.”); Craig W. Palm, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 182 (1980) (“The Supreme Court has never held that strict construction of penal statutes is constitutionally compelled . . . ; *id.* at 182 n.53 (“[D]ecisions of the Supreme Court suggest] that the strict construction rule is prudential rather than mandatory.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 459 n.201 (1989) (“The principle is rooted in due process notions, which requires clear notice before the imposition of criminal liability.”) [hereinafter Sunstein, *Interpreting Statutes*]; Cass R. Sunstein, *Nondelegation Canons*, U. CHI. L. REV. 315, 332 (2000) (“The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves a time-honored nondelegation canon.”); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 918 n.113 (2003) (describing the rule as “an outgrowth of the fair notice concern”).

Rosenkranz, who has most succinctly asked the question, does not purport to answer it definitively. Instead, Rosenkranz uses the rule as a pedagogical tool in his broader effort to promote a federally legislated set of interpretative rules. Nevertheless, in the course of his discussion, Rosenkranz promiscuously makes three suggestions as to the rule's constitutional status, speculating that it might be: "a required and immutable incident" of the Due Process Clause, "informed by the Ex-Post Facto [C]ause";⁵³ a constitutional starting-point rule, only required until abrogated by Congress;⁵⁴ or subject to certain parameters set by the Due Process Clause and thus susceptible only to modification, not complete abrogation.⁵⁵ In light of the variety of superficially plausible alternatives offered by Rosenkranz and others, this Article offers the first extended analysis of the rule's constitutional status.

IV. CONSTITUTIONAL FOUNDATIONS OF THE RULE

Scholars that view the rule as constitutionally required—in any of the three senses articulated in Section II.A—generally justify their position with reference to the separation of powers and due process.⁵⁶ By and large, such scholars do not refer to the Federalist Papers⁵⁷ or convention debates to support their characterization of the rule as a constitutional imperative.⁵⁸ In-

⁵³ Rosenkranz, *supra* note 1, at 2094.

⁵⁴ *Id.* (emphasis omitted).

⁵⁵ *Id.* at 2097.

⁵⁶ See, e.g., William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1029 (1989) [hereinafter Eskridge, *Public Values*] ("The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable, as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe.").

⁵⁷ *But see* THE FEDERALIST NO. 78 (Alexander Hamilton) (discussing the moderating influence of the judiciary on "unjust and partial laws"). Hamilton argues, "But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts." *Id.*

⁵⁸ The exception is Eskridge, who makes a short but convincing case that the lack of Framing-era controversy over judicial "ameliorative powers"—such as the power to adopt narrow interpretations of otherwise broad statutory language—suggests tacit public approval of the rule as an incident of Article III judicial power. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1057 (2001) [hereinafter Eskridge, *Words*] ("There was little discussion about any ameliorative powers federal judges would have, which is remarkable in light of the thorough scouring of Article III by its critics (Centinel, Mason, Federal Farmer, Brutus). What discussion there was suggests agreement in favor of such a power. Brutus, the leading critic of Article III, and Publius, the leading defender, both explicitly maintained that judges have and ought to have the power to give statutes narrowing constructions. One of Publius'

stead, proponents of a constitutionally required rule find their strongest support in repeated Supreme Court pronouncements on the subject. This Part of the Article will marshal some of the Court's most forceful statements about the constitutional foundations of the rule. It will pay particular attention to the separation of powers and due process supports for the rule, as these are the focus of the Court's analysis. However, it will also discuss other potential constitutional justifications for the rule, including the rule of law, federalism, and historical practice. This Part will show that, contrary to the dissensus in the academy about the rule's constitutional status, the Court views the rule as a constitutional mandatory substantive rule, required by both the separation of powers and the Due Process Clause.

A. Separation of Powers

Chief Justice Marshall first proposed a separation of powers rationale for the rule in *United States v. Wiltberger*,⁵⁹ where he wrote:

The rule that penal laws are to be construed strictly . . . is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.⁶⁰

It has been suggested that the particularly strong rule announced in *Wiltberger* has been constrained somewhat by subsequent jurisprudence.⁶¹ That may be so, but the idea that the rule "is founded" in the separation of powers has retained its vitality in the two centuries since *Wiltberger*.⁶² On this account, the rule is said to preserve the separation of powers by preventing federal courts from exercising legislative power.⁶³ Nowhere is this division

main arguments in favor of judicial independence was that it would give federal judges freedom to mitigate the effect of 'unjust and partial laws.' No one questioned the rule of lenity, nor did any debater ever question the authority of Blackstone and Bacon, whose canons of statutory construction were libertarian and protective of common law rights.").

⁵⁹ 18 U.S. (5 Wheat.) 76 (1820).

⁶⁰ *Id.* at 95.

⁶¹ Solan, *supra* note 51, at 89–122 (tracking the progressive narrowing of the rule from its early days, through Justice Frankfurter's influence, to the Rehnquist Court's jurisprudence).

⁶² For more recent iterations of the separation of powers sentiments expressed in *Wiltberger*, see *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment."); *id.* at 267 n.6 ("Federal crimes are defined by Congress, not the courts . . ."); *United States v. Aguilar*, 515 U.S. 593, 600 (1995) ("We have traditionally exercised restraint in assessing the reach of a federal criminal statute . . . out of deference to the prerogatives of Congress . . ."); *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citations omitted) ("Federal crimes, of course, are solely creatures of statute. . . . Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate."); *Whalen v. United States*, 445 U.S. 684, 689 (1980) ("[T]he power to define criminal offenses . . . resides wholly with the Congress.").

⁶³ *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

so important, the argument runs, than in the field of criminal law, which involves laws “defining conduct which entail stigma and penalties and prison.”⁶⁴ In this particular area, the politically accountable branches of government must alone exercise the power to make laws.⁶⁵

A characteristic example of the Court’s reliance on the above reasoning to constitutionalize the rule can be found in *United States v. Bass*.⁶⁶ There, the majority wrote: “[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 Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.”⁶⁷ Nowhere in the Court’s musings on this issue does one find any suggestion that federal courts might, if directed by Congress, get into the business of “defin[ing] criminal activity”⁶⁸ or “ordain[ing] . . . punishment,”⁶⁹ a topic that is discussed further in Section IV.A of this Article. While it is true that the Court has never been asked to consider the constitutional validity of a statute explicitly abrogating the rule, all indicators suggest that if and when the Court is asked to consider such a law it would have grave doubts about its compatibility with the separation of powers.⁷⁰ In summary, the burden of authority on this issue suggests that the Court views the rule as a constitutional mandatory substantive rule capable of being modified or abrogated only by constitutional amendment.

⁶⁴ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952).

⁶⁵ Jeffries, *supra* note 50, at 202 (“As the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formation of the social contract. The legislature, therefore, was the only legitimate institution for enforcing societal judgments through the penal law.”); *see also* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 427 (2012) (“Structurally, this rule has guaranteed that no person may be sent to the gallows or to prison unless both houses of Congress—and especially members of the lower house, the one most directly accountable to the people—have specifically authorized this grave intrusion upon bodily liberty.”); Kerr, *supra* note 52, at 1533 (emphasis omitted) (“Crimes reflect the judgment of the public as expressed through its legislature: Criminal offenses are charged in the name of The People.”).

⁶⁶ 404 U.S. 336 (1971).

⁶⁷ *Id.* at 348.

⁶⁸ *Id.*

⁶⁹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

⁷⁰ *See* Elhauge, *supra* note 9, at 2205 (“Where a legislature does clearly enact an interpretative statute that aims to undermine the preference-eliciting function of a statutory canon like the rule of lenity, however, that type of opt-out arguably violates whatever constitutional clauses in the particular jurisdiction vest legislative authority in each generation’s legislature and interpretative authority in the courts.”). *But see* *Sessions v. Dimaya*, 138 S. Ct. 1204, 1244 (2017) (Thomas, J., dissenting) (“[L]enity is a tool of statutory construction, which means States can abrogate it—and many have.”); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (emphasis omitted) (arguing that “the Constitution adopts no freestanding principle of separation of powers. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale.”).

B. Due Process

The other constitutional doctrine commonly referred to in the Supreme Court's lenity jurisprudence is the notice—or fair warning—requirement of the Due Process Clause.⁷¹ This constitutional foundation for the rule was invoked even prior to *Wiltberger* and is frequently expressed in terms suggesting that the rule is a constitutional mandatory substantive rule.⁷² So, for example, in *Dunn v. United States*,⁷³ the Court wrote:

[The rule] reflects *not merely a convenient maxim of statutory construction*. Rather it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus . . . courts *must* decline to impose punishment for actions that are not “plainly and unmistakably” proscribed.⁷⁴

Lower courts have grappled with the question of whether Congress could abrogate the rule, and at least one concluded that Congress has no such power, the rule being a necessary component of the due process guarantee.⁷⁵ It remains true, however, that the Supreme Court has not yet had to

⁷¹ See, e.g., *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”); *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (citation omitted) (“We have traditionally exercised restraint in assessing the reach of a federal criminal statute . . . out of concern that ‘a fair warning should be given’”); *Bass*, 404 U.S. at 348 (referring to the fair warning value served by the rule); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“[I]t is reasonable that 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. To make the warning fair, so far as possible the line should be clear.”).

⁷² For early invocations of a due process type justification for the rule, see *United States v. Wilson*, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830) (No. 16,730) (opinion of Baldwin, J.) (“[The rule] is founded on the tenderness of the law for the rights of individuals”); *United States v. Mann*, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718) (opinion of Story, J.); *The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499) (opinion of Livingston, J.) (“It 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.”). I am indebted to Judge Barrett for collecting these early authorities. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129–30 (2010).

⁷³ 442 U.S. 100 (1979).

⁷⁴ *Id.* at 112–13 (1979) (emphasis added) (citations omitted); see also *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *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 courts in defining criminal liability.”).

⁷⁵ See *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976) (“While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. To do so would be to violate the principles of due process on which the canon of interpretation rests.”).

confront squarely the question of whether Congress could oust the rule, either wholesale or with respect to a particular statute.

C. Further Constitutional Foundations?

Aside from separation of powers and due process, some scholars have proffered the rule of law⁷⁶ and federalism⁷⁷ as independent constitutional supports for the rule.⁷⁸ One might also think that the rule belongs in the constitutional structure simply by the weight of historical practice supporting it. These three propositions are dealt with below.

1. The Rule of Law

Cass Sunstein has said that “[i]n interpreting statutes, courts employ a clear-statement principle in favor of the ‘rule of law’ . . . the most celebrated aspect of this general idea is the rule of lenity.”⁷⁹ Others write, relatedly, of what they view as the law’s inherent bias towards liberty.⁸⁰ The level of gen-

⁷⁶ See, e.g., FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 89 (2009) (“This canon is sometimes invoked under ‘rule of law’ principles”); Sunstein, *Interpreting Statutes*, *supra* note 52, at 471 (describing the rule as “the most celebrated aspect of this general idea [of the rule of law]”). But see Jeffries, *supra* note 50, at 219 (“[T]here is no reason to suppose that strict construction . . . bears any necessary or predictable relation to the concerns suggested by the rule of law.”); Kahan, *supra* note 10, at 364 (“[L]enity applies even when it is perfectly obvious that a narrow reading is unnecessary to assure notice or other rule of law values.”).

⁷⁷ See, e.g., WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 380 (2d ed. 2007) (“Because federal law often criminalizes conduct that is also subject to state regulation, there is substantial potential for overlap and inconsistency. . . . These concerns translate into an elevated rule of lenity in the federal system that is designed to protect state authority.”); William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593, 626–27 (1992) (describing late 1980s Supreme Court jurisprudence combining the rule with federalism values to create “a rebuttable presumption that federal criminal statutes will not be used as a weapon to interfere in local politics”); Kahan, *supra* note 10, at 421–25 (discussing some of the shared constitutional values served by federalism and the rule); John J. O’Connor, *McNally v. United States: Intangible Rights Mail Fraud Declared a Dead Letter*, 37 *CATH. U. L. REV.* 851, 869 n.180 (1988) (“In addition to the concepts of notice and separation of powers . . . the Supreme Court also has identified federalism as an underpin of the rule of lenity, because unbridled constructions of federal statutes could infringe upon the jurisdiction of state law.”); Note, *The New Rule of Lenity*, 119 *HARV. L. REV.* 2420, 2430–31 (2005) (cataloguing cases from the Rehnquist Court that applied the rule in tandem with the federalism clear-statement rule).

⁷⁸ Two additional constitutional arguments in favor of the rule characterize it as giving effect to the equal protection clause or as a twin to the canon of constitutional avoidance. See, e.g., ESKRIDGE, FRICKEY & GARRETT, *supra* note 77, at 375 (identifying a possible grounding for the rule in equal protection values and claiming that “[r]eflecting . . . equal protection values, the canon provides courts a way to limit prosecutorial discretion by thwarting arbitrary or discriminatory applications of a criminal statute.”); Eskridge & Frickey, *supra* note 77, at 600 (linking the rule to the rule to avoid constitutional difficulties).

⁷⁹ Sunstein, *Interpreting Statutes*, *supra* note 52, at 471.

⁸⁰ See, e.g., AMAR, *supra* note 65, at 543 n.58 (in the context of the Eight Amendment, arguing that “[c]riminal laws are often written in overbroad ways precisely because it is understood—and in some respects constitutionally required . . . that such laws will be softened in

erality at which such statements are made, however, is cause for suspicion. It is true that the rule is directed towards maximizing predictability and minimizing arbitrariness in lawmaking, a goal that is shared by the formal conception of the rule of law, which demands that laws be: clear, public, prospective, practicable, generally applicable, stable, internally consistent, and impartially administered.⁸¹ It pays to remember that the rule of law finds no explicit support “in the Constitution as a freestanding principle and cannot be judicially enforced as such.”⁸² Closer analysis reveals that the idea that the rule is constitutionally required by the rule of law adds nothing to the proposition that the rule is constitutionally required by separation of powers and the notice guarantee of due process. Sunstein describes the due process clause as the “constitutional basis for the rule of law ideal,” in the sense that it is through the due process clause that the courts channel most rule of law concerns.⁸³ Jeremy Waldron, on the other hand, sees the rule of law as being operationalized by the separation of powers doctrine. Waldron writes:

[T]he two principles engage similar or overlapping concerns. To insist on being ruled by law is, among other things, to insist on being ruled by a process that answers to the institutional articulation required by Separation of Powers—there must be law-making

practice”); Cross, *supra* note 76, at 89 (“The theory of the canon seems grounded in a libertarian position limiting the government . . .”); ESKRIDGE, FRICKEY & GARRETT, *supra* note 77, at 375–76 (“The canon may reflect a basic libertarian bias in favor of freedom versus regulation.”); LAWRENCE M. FREIDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 63–82 (1993) (describing an early trend in a liberty-biased “republican criminal justice”); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (Henry J. Friendly ed., 1967) (describing the law’s “instinctive distaste against men languishing in prison”); Eskridge, *Words*, *supra* note 58, at 1021–25 (surveying early State case law, deducing an “ameliorative” dimension to judicial power, as historically conceived, and noting that the author “found a great[] number of cases narrowing broad statutory language under courts’ ameliorative powers. The animating philosophy undergirding most of these cases was libertarian”); see also *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals.”). A particular expression of the law’s so-called bias towards liberty might be seen in the antebellum doctrine of the “presumption of liberty” applied in fugitive slave cases. See, e.g., *Miller v. McQuerry*, 17 F. Cas. 335, 340 (C.C.D. Ohio 1853) (No. 9583) (opinion of McLean, J.) (“The presumption of freedom attaches to every resident of a free state, without regard to color”); see also Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 928 (2012) (referring to the northern states’ attempts to protect fugitive slaves’ presumption of liberty); Christopher Kozak, *The Rule of Liberty* 3 (Apr. 7, 2017) (unpublished manuscript) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948761 [<https://perma.cc/6QUE-HDAU>] (discussing the “rule of liberty” as a “cousin” of the rule of lenity).

⁸¹ JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214–18 (1979).

⁸² Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 436 (2013). It should be noted, however, that Waldron allows that “even when a principle lacks specific legal status, it still may be an indispensable part of our constitutionalism, an indispensable touchstone for evaluating the operation of and any change in our constitutional arrangements.” On the constitutional status of the rule of law, see generally Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

⁸³ Sunstein, *Interpreting Statutes*, *supra* note 51, at 471.

before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is the enforcement of any order.⁸⁴

Rather than rely on the rule of law—“a political slogan of remarkable plasticity”⁸⁵—this Article prefers to consider the possibility of the rule as a necessary incident of the separation of powers and the due process guarantee.

2. Federalism

It is occasionally claimed that the fact that the rule can operate to give effect to values of federalism provides additional constitutional support. On this account, federal criminal laws ought to be interpreted strictly so as to limit federal legislative incursion into a field traditionally left to the states. Kahan articulates the values underlying this reasoning in the following terms:

What conduct a state chooses to criminalize and how severely it chooses to punish it are matters critical to the experience of deliberative democracy within that state. Because Federal criminal law dictates uniform, national answers to such questions, expansive readings of federal criminal law threaten to extinguish the opportunity that states have to use criminal law to express and shape local ideals.⁸⁶

This idea only occasionally finds expression in the case law.⁸⁷ The reason that the federalism rationale for the rule is not commonly relied upon independently of its other constitutional bases is that there is little to distinguish

⁸⁴ Waldron, *supra* note 82, at 459.

⁸⁵ Jeffries, *supra* note 50, at 212.

⁸⁶ Kahan, *supra* note 10, at 421.

⁸⁷ *See, e.g.*, Taylor v. United States, 136 S. Ct. 2074, 2089 (2016) (Thomas, J., dissenting) (applying the rule in combination with a federalism-inspired clear statement rule to limit the scope of the Hobbs Act); Cleveland v. United States, 531 U.S. 12, 24, 26–27 (2000) (refusing to “approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress”); McNally v. United States, 483 U.S. 350, 360 (1987) (“Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for state and local officials, we read [the statute] as limited in scope”); United States v. Enmons, 410 U.S. 396, 411 (1973) (“First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended . . . to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.”); United States v. Bass, 404 U.S. 336, 349 (1971) (citations omitted) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . we 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.”); *see also* Note, *supra* note 77, at 2430–31 (cataloguing cases from the Rehnquist Court that applied the rule with the federalism clear-statement rule).

a federalism-focused rule of lenity from the distinct federalism canon.⁸⁸ When applied to Congress's criminal lawmaking power the two rules are essentially coextensive—both require a narrow reading of ambiguous federal criminal statutes. Accordingly, this Article does not treat federalism as adding anything to the rule's constitutional status.

3. History

The constitutional relevance of historically ingrained judicial practices or customs is open to debate.⁸⁹ Some scholars argue that, in certain circumstances, a practice unknown at the founding may nevertheless become constitutionally entrenched if it comes to be generally accepted and followed.⁹⁰ Others argue that the only historical practices that ought to have any constitutional weight are those that were broadly accepted at the time of the Constitution's ratification.⁹¹ Yet others are somewhere in between.⁹² The rule would warrant serious consideration on either approach—it was widely known and enforced at the time of ratification⁹³ and has not been seriously doubted since.⁹⁴ This portion of the Article will briefly substantiate these two claims about the rule's historical pedigree but will conclude that historical practice informs, rather than determines, the constitutional status of the rule.

⁸⁸ There is some variance in the literature as to whether the methods of statutory interpretation that take account of federalism ought to be described as one canon or a set of canons. Compare SCALIA & GARNER, *supra* note 19, at 290–94 (describing the “presumption against federal preemption” canon), with ESKRIDGE, FRICKEY & GARRETT, *supra* note 77, at 367–75 (describing a number of related “substantive canons designed to protect state authority from federal encroachment”).

⁸⁹ As to the constitutional significance of historical practice, see generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641 (2013) (outlining fifteen different varieties of constitutional arguments from history); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 411 (2012) (providing an alternative taxonomy to that of Balkin).

⁹⁰ See, e.g., William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 *S. TEX. L. REV.* 433, 436 (1986) (“Those who would restrict claims of right to the values of 1789 . . . turn a blind eye to social progress and eschew adaption of overarching principles to changes of social circumstance.”); B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the “Pragmatic Moment,”* 91 *TEX. L. REV.* 1815, 1832–40 (2013) (providing examples of constitutional doctrines changing to reflect changes in social values).

⁹¹ See, e.g., Frank H. Easterbrook, *Abstraction and Authority*, 59 *U. CHI. L. REV.* 349, 359–62 (1992) (describing this as the “traditional” approach to constitutional interpretation).

⁹² See, e.g., AMAR, *supra* note 65; LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 9–34 (Oxford Univ. Press 2004) (discussing the idea of “the customary constitution”).

⁹³ See Eskridge, *Words*, *supra* note 58, at 1057 (observing that, during the Framing, “[n]o one questioned the rule of lenity”).

⁹⁴ See *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (describing the rule as “venerable”); *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (describing the rule as “well-recognized”).

When the rule was first mentioned in the annals of the Supreme Court⁹⁵ it was described as “not much less old than [statutory] construction itself.”⁹⁶ Not content to leave that proposition uninterrogated, scholars have traced the origins of the rule to the practice of seventeenth-century English courts strictly construing statutes that purported to displace the “benefit of clergy” (a common law doctrine that provided an exception to the death penalty for certain eligible defendants and crimes).⁹⁷ Some even locate the source of the rule in Byzantine times.⁹⁸ In any case, the rule was being applied by courts in the American colonies (and then states).⁹⁹ At the time of the framing, the rule was enshrined in legal textbooks—such as Blackstone’s *Commentaries* and Coke’s *Institutes*¹⁰⁰—that would have been well known to

⁹⁵ Lawrence Solan claims that the rule entered Supreme Court jurisprudence prior to *Wiltberger*. See Solan, *supra* note 51, at 89–91 (arguing the rule was deployed by the Supreme Court in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805), in which the Court said that “where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed”). Solan’s contention should be rejected. *Fisher* is best understood as a case concerning statutory interpretation by reference to inconvenient consequences; it did not specifically consider the rule.

⁹⁶ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Here, Chief Justice Marshall proves the truth of Alexis de Tocqueville’s diagnosis of American (and English) lawyers: “Americans have retained the law of precedents . . . [and] a taste and a reverence for what is old.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 353 (Henry Reeve trans., Sever and Francis 1862) (1835).

⁹⁷ Modern histories of the rule include, chronologically: Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–51 (1934); JEROME HALL, *THEFT, LAW AND SOCIETY* 356–63 (2d ed. 1952); GEORGE W. DALZELL, *BENEFIT OF CLERGY IN AMERICA & RELATED MATTERS* (John F. Blair 1955); J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800* 141–48 (Princeton Univ. Press 1986); Eskridge, *Public Values*, *supra* note 56; Barrett, *supra* note 72.

⁹⁸ See Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1189–90 nn.47–48 (drawing parallels between the rule and one of the maxims contained in the Digest of Justinian). While the maxims are traditionally thought of as part of the history of civil law, Miller shows that they can also be helpfully understood as early ancestors of the common law canons of interpretation. See also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 20–27 (1947) (tracing the related principle of *nulla poena sine lege* to ancient Roman times).

⁹⁹ See DALZELL, *supra* note 97, at chs. 9–18 (describing the benefit of clergy before and after the founding); Eskridge, *Words*, *supra* note 58, at 1024–25 (describing consistent application of the rule in state courts in the late 1700s).

¹⁰⁰ Early English scholarship describing the rule, which would plausibly have been available in America prior to ratification includes, chronologically: THOMAS COVENTRY, *A READABLE EDITION OF COKE UPON LITTLETON* §§ 54b, 153b, 238b (Saunders & Benning 1830) (expressing the general rule that penal laws were not to be extended by equity); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *88 (recounting two cases: one in which an English court strictly construed a statute prohibiting the stealing of “horses” such that it was inapplicable to the stealing of a single horse; and a second case in which a statute punishing theft of “sheep, or other cattle” was read only to apply to sheep); 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 469–70 (R.H. Small, 1st American ed. 1847) (recounting a 1639 case in which the court narrowly interpreted a statute making certain acts of manslaughter punishable by death); *id.* at vol. 2, 335, 371 (“That where any statute . . . 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 within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly.”); WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE*

the educated persons of the day including, of course, the Framers.¹⁰¹ For those who give constitutional weight to pre-ratification history and practice, the rule has a credible claim to constitutional significance.

Since *Wiltberger*, the application of the rule in individual cases may fairly be described as “sporadic and unpredictable,”¹⁰² or even “capricious . . . [and] bizarre;”¹⁰³ yet the existence of the rule itself has never been doubted. Quite the opposite, the Court has described the rule as “venerable,”¹⁰⁴ “time-honored,”¹⁰⁵ “long-established,”¹⁰⁶ “well-recognized,”¹⁰⁷ “traditional,”¹⁰⁸ “familiar,”¹⁰⁹ an “ancient requirement,”¹¹⁰ and a “long-standing principle[.]”¹¹¹ Thus, for those who give weight to post-ratification history and practice, the rule deserves special consideration as one of the oldest and most consistently invoked canons of statutory interpretation.¹¹² Nevertheless, this Article will not seek to argue that history, by itself, can

CROWN 343 (1716-1721); MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES. TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 126-27 (Clarendon Press, 1762) (“The Principle is true, that in Prosecutions on Penal Statutes the Words of the Statute are to be pursued. But it is equally true, that We are not to be governed by the Sound, but by the Well-known, True, Legal Import of the Words”); MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES. TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 357-59 (Sarah Coi 1763); 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 651 (Luke White, 6th ed. 1793) (“[P]enal laws are to be construed strictly; yet even in the Construction of these, the Intention of the Legislators ought to be regarded.”). This last source obviously postdates the Framing.

¹⁰¹ For an overview of the influence of European lawyers on the Framers, see DONALD S. LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 134-40 (1992). For the Supreme Court’s view of Coke’s influence in particular, see *Klopper v. North Carolina*, 386 U.S. 213, 225 (1967) (“Coke’s Institutes were read in the American Colonies by virtually every student of the law.”).

¹⁰² Kahan, *supra* note 10, at 346.

¹⁰³ Eskridge, *Public Values*, *supra* note 56, at 1083.

¹⁰⁴ *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

¹⁰⁵ *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *see also Dowling v. United States*, 473 U.S. 207, 229 (1985); *Rewis v. United States*, 401 U.S. 808, 812 (1971).

¹⁰⁶ *Dunn v. United States*, 442 U.S. 100, 112 (1979).

¹⁰⁷ *United States v. Rodgers*, 466 U.S. 475, 484 (1984).

¹⁰⁸ *Whalen v. United States*, 445 U.S. 684, 703 (1980) (Rehnquist, J., dissenting).

¹⁰⁹ *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978).

¹¹⁰ *United States v. R.L.C.*, 503 U.S. 291, 310 (1992) (Scalia, J., concurring).

¹¹¹ *Id.* at 308 (quoting *Hughey v. United States*, 495 U.S. 411, 422 (1990)).

¹¹² *See Barrett, supra* note 62, at 128-34 (describing the rule’s development in the early Republic); *see also id.* at 129 n.90 (“[A] review of early federal case law leaves one with the distinct impression that lenity was the most commonly applied substantive canon of construction. My searches yielded far more cases applying the rule of lenity than any other canon.”). *But see Eskridge, Words, supra* note 58, at 1069 (citations omitted) (“Federal judges in the 1790s were not as willing [as their state counterparts] to supplement criminal statutes, but I was surprised by their reluctance to ameliorate their harsh operation either. Decisions showing criminal defendants lenity in the 1790s typically involved procedural rather than substantive rights.”).

support the rule as a free-standing constitutional principle.¹¹³ Rather, the approach taken below is to consider history as informing the proper understanding of the requirements of the separation of powers doctrine and the due process clause.

V. ARGUMENTS AGAINST THE SEPARATION OF POWERS RATIONALE FOR THE RULE

Having outlined the arguments commonly advanced in favor of the constitutionally required rule, it is now time to consider the arguments of the opposing camp. The separation of powers rationale for the rule is commonly critiqued on two bases. First, it is said that, far from requiring the rule, a historically informed understanding of the separation of powers shows that Congress has long used ambiguous statutory provisions to delegate federal criminal lawmaking power to the courts. This can be labelled the “judicial criminal lawmaking argument.” Second, even if one does not accept that there is a constitutionally permissible practice of judicial criminal lawmaking, the fact that Congress can delegate federal criminal lawmaking power to executive agencies is said to cast doubt on the idea that Congress cannot delegate the same power to the courts. This argument will be referred to as the “agency-defined crimes analogy.” These two critiques of the separation of powers rationale for the rule are discussed seriatim below.

A. *Judicial Criminal Lawmaking Argument*

Kahan, the most prominent proponent of the judicial criminal lawmaking argument, claims that the power of Congress to delegate criminal lawmaking power to the courts is a “largely unacknowledged, but nonetheless well established, rule of federal criminal law.”¹¹⁴ Kahan argues that when criminal statutes are drafted in broad or open-textured language, Congress ought to be understood to be delegating to the courts the power to give pre-

¹¹³ See Barrett, *supra* note 62, at 128 (“To be sure, the historical acceptance of substantive canons does not settle the question of their legitimacy While history can inform the resolution of constitutional questions, it does not by itself decide them. . . . That said, history casts valuable light on the problem of substantive canons, for their long pedigree makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power.”).

¹¹⁴ Kahan, *supra* note 10, at 347. *But see* AMAR, *supra* note 65, at 426 (“No person may be criminally punished in federal court for misconduct unless both houses of Congress have affirmatively voted to criminalize this particular misconduct. This basic structural postulate marks federal criminal law as distinct from both federal noncriminal law and state criminal law.”); *id.* at 593 n.9 (“This basic postulate was ringingly affirmed by the Supreme Court in the 1812 case of *United States v. Hudson & Goodwin* and has never thereafter been called into question by the Court.”).

cise meaning to that language.¹¹⁵ Such an argument is familiar in non-criminal contexts, such as in the interpretation of various federal labor laws and the Sherman Act, where the Court has said: “Broadly worded . . . statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition.”¹¹⁶ The argument is more jarring in the criminal sphere,¹¹⁷ but Kahan argues that such an understanding is necessary to make sense of the Supreme Court’s development of statutory criminal law in two areas in particular—mail fraud¹¹⁸ and racketeering offenses.¹¹⁹ Once one recognizes Congress’s power to delegate federal criminal lawmaking power to the courts, Kahan argues, it becomes impossible to claim that the rule is constitutionally required. The logic of the judicial criminal lawmaking argument is attractive, but closer analysis reveals problems with the premises upon which it rests, as exemplified by Kahan’s claims about the Court’s mail fraud and racketeering jurisprudence.

1. Mail Fraud

With respect to the mail fraud cases, Kahan’s argument is essentially that federal courts have understood the word “defraud” in the statutory offense provisions to be a delegation of lawmaking authority to the courts, allowing for judicial development of the scope of the offenses.¹²⁰ The tenuousness of this claim is illustrated by the fact that only one member of the Court—Justice John Paul Stevens—has explicitly endorsed such an under-

¹¹⁵ Kahan, *supra* note 10, at 347, 353–54; *see also* Elhauge, *supra* note 9, at 2203 n.129 (disagreeing with the premise that *all* instances of ambiguity or generality in criminal statutes ought to be understood as congressional delegation of lawmaking power to the courts).

¹¹⁶ *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 (1981); *see also* *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (recognizing the role of federal courts in giving “shape to the [Sherman Act’s] broad mandate by drawing on common-law tradition”).

¹¹⁷ *See* AMAR, *supra* note 65, at 426–27 (“Such ‘federal common law’ has never had any proper place on the *criminal* side of the federal docket. . . . [S]tructurally, this rule has guaranteed that no person may be sent to the gallows or to prison unless both houses of Congress—and especially members of the lower house, the one most directly accountable to the people—have specifically authorized this grave intrusion upon bodily liberty.”).

¹¹⁸ As Kahan does, this Article uses the term “mail fraud” to describe mail fraud, 18 U.S.C. § 1341 (2012), and wire fraud, *id.* § 1343.

¹¹⁹ Kahan refers to an early case, interpreting the Crimes Act offense to “endeavoring to make a revolt.” *See* Kahan, *supra* note 10, at 372–73 n.119 (citing *United States v. Kelly*, 24 U.S. (11 Wheat.) 417–18 (1826)). In that case, the Court said, “This court is of opinion, that although the act of congress does not define this offense, it is, nevertheless, competent to the court to give a judicial definition of it.” *Kelly*, 24 U.S. (11 Wheat.) at 418. This example adds little to Kahan’s argument when one accepts that the statutory provision in question would likely be found to be fatally vague on the Court’s current jurisprudence. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971) (striking down on vagueness grounds an ordinance that made it a crime for “three or more persons to assemble . . . on any of the sidewalks . . . and there construct themselves in a manner annoying to persons passing by.”).

¹²⁰ Kahan, *supra* note 10, at 373–78.

standing of the judicial role. In his dissent in *McNally v. United States*,¹²¹ Justice Stevens wrote:

“Statutes like . . . the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress has identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.”¹²²

Before proceeding to the majority opinion in that case, it is worth noting that even Justice Stevens acknowledged that the rule could operate in the mail fraud context (he just concluded that there was no occasion for the rule in that instance because the statutory provision was, in his view, unambiguous.)¹²³

The majority in *McNally* responded to Justice Stevens’s invocation of the “common-law tradition” by quoting from an earlier mail fraud decision, *Fasulo v. United States*,¹²⁴ for the proposition that “there are no constructive offenses.”¹²⁵ The majority might just as well have quoted from Blackstone’s seminal statement of the rule: “The law of England does not allow of offences by construction.”¹²⁶ In adopting the narrower reading of the statute, the majority referenced the difference in judicial and legislative power with respect to the definition of crimes: “Rather than construe the statute in a manner that leaves its outer boundaries ambiguous . . . we read [the statute] as limited in scope If Congress desires to go further, it must speak more clearly than it has.”¹²⁷ Far from proving Kahan’s contention, *McNally* thus illustrates the Court’s continued fidelity to the rule as a prohibition on judicial criminal lawmaking. Nor are *McNally* and *Fasulo* the only mail fraud cases in which the Court has applied the rule.¹²⁸ Kahan’s reading of the mail fraud cases must be rejected. Those cases do not evince any rejection of the rule in favor of a power of judicial criminal lawmaking. To the contrary, the rule remains an important safeguard in the mail fraud context.

¹²¹ 483 U.S. 350 (1987).

¹²² *Id.* at 372–73; *see also* *United States v. Kozminski*, 487 U.S. 931, 965 (1988) (Stevens, J., concurring) (“Congress probably intended the definition [of ‘involuntary servitude’ in the criminal statute at issue] to be developed in the common-law tradition of case-by-case adjudication.”).

¹²³ *McNally*, 483 U.S. at 375.

¹²⁴ 272 U.S. 620 (1926).

¹²⁵ *McNally*, 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)).

¹²⁶ Blackstone, *supra* note 100, at 88.

¹²⁷ *McNally*, 483 U.S. at 360.

¹²⁸ *See, e.g.*, *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (strictly construing a mail fraud provision); *see also* *Tanner v. United States*, 483 U.S. 107, 131 (1987) (applying rule to mail fraud provision).

2. Racketeering

Kahan proffers another example of supposed judicial criminal lawmaking, this time in the field of racketeering, as governed by the Racketeer Influenced and Corrupt Organizations Act (“RICO”).¹²⁹ The central criminal prohibition of RICO outlaws participation in any “enterprise . . . through a pattern of racketeering activity.”¹³⁰ Kahan claims that federal courts, led by the Supreme Court, have developed a common law of racketeering after being delegated such power by Congress’s use of general language and by RICO’s liberal construction clause,¹³¹ which provides: “The provisions of this [statute] shall be liberally construed to effectuate its remedial purposes.”¹³²

Just as in the case of mail fraud, however, Kahan mischaracterizes the practices of the Court. In its RICO jurisprudence, the Court has admittedly given words in criminal provisions broad meaning, but that is because the provisions themselves are “drafted . . . broadly enough to encompass a wide range of criminal activity.”¹³³ A broadly worded, but clear, statute is a different thing to an ambiguous statute. In the RICO context, the Court is best understood, therefore, as giving effect to congressional intent.¹³⁴ What the Court has *not* done is create or extend criminal liability when the statutory language remains ambiguous after other interpretative methods have been exhausted. The Court has considered the rule in a number of RICO cases¹³⁵ and nowhere has it said that the rule has been displaced by the liberal construction clause.¹³⁶ To the contrary, the Court has recognized the rule to survive the liberal construction clause, explaining:

¹²⁹ Kahan, *supra* note 10, at 378–81.

¹³⁰ 18 U.S.C. § 1962(c) (2012).

¹³¹ Kahan, *supra* note 10, at 378–81.

¹³² Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. On the constitutionality of the liberal construction clause, see Lee, *supra* note 52 at 951 (“[D]ue process does not require the strict construction of penal statutes.”); Palm, *supra* note 52 at 182 (“The Supreme Court has never held that strict construction of penal statutes is constitutionally compelled.”); *id.* at 183 n.53 (“[Decisions of the Supreme Court suggest] that the strict construction rule is prudential rather than mandatory.”); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 309 (1983) (“If the liberal construction clause is applicable to determine the scope of criminal liability under [RICO], the provision is therefore unconstitutional.”).

¹³³ *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989).

¹³⁴ *United States v. Lanier*, 520 U.S. 259, 268 n.6 (1997) (clarifying that there is no tension between the traditional interpretative goal of pursuing congressional intent and the rule: “the policies favoring strict construction of criminal statutes oblige us to carry out congressional intent as far as the Constitution will admit”).

¹³⁵ *Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993) (“Because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity.”); *Russello v. United States*, 464 U.S. 16, 29 (1983) (citation omitted) (“Here, the language of the RICO forfeiture provision is clear, and ‘the rule of lenity does not come into play.’”); *United States v. Turkette*, 452 U.S. 576, 588 n.10 (1981) (“There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play.”).

¹³⁶ *But see* Michael Goldsmith, *RICO and Pattern: The Search For Continuity Plus Relationship*, 73 CORNELL L. REV. 971, 985 n.88 (1988) (“[T]he rule of lenity is irrelevant in this

The strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the ‘rule of lenity,’ it ‘only serves as an aid for resolving ambiguity; it is not to be used to beget one.’ . . . The strict- and liberal-construction principles are not mutually exclusive.¹³⁷

Moreover, some lower federal courts have been reluctant to accept the idea that RICO’s liberal construction clause is capable of completely abrogating the rule.¹³⁸ For example, in *United States v. McClendon*¹³⁹ a federal district court expressed the view that: “Congress’ call for a liberal interpretation in order to effectuate the Act’s ‘remedial purposes’ does not outweigh the Court’s duty under the ‘rule of lenity’ to construe criminal statutes strictly.”¹⁴⁰ Accordingly, Kahan’s characterization of the Court’s RICO jurisprudence is overstated. The rule remains applicable to RICO, provided there is a relevant ambiguity.

3. *The Rule’s Continued Application to Generally Worded Statutes*

Kahan goes so far as to describe the mail fraud and racketeering decisions as constituting “federal common law crimes.”¹⁴¹ In so framing his argument Kahan comes perilously close to suggesting that *Hudson & Goodwin*¹⁴² is no longer good law.¹⁴³ The easiest response to Kahan, then, is

context since its application is limited to situations in which the legislature has failed to express a preference for how ambiguities in a statute are to be construed.”)

¹³⁷ *Sedima v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (citations omitted); see also Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 911–12 n.81 (2005) (“[Section] 904(a) does not constitute a reverse-lenity rule requiring RICO to be broadly interpreted whenever possible. Instead, a broad interpretation is justified only if the ‘remedial purposes’ of the statute so warrant; otherwise, the rule of lenity should apply.”)

¹³⁸ See, e.g., *United States v. Anderson*, 626 F.2d 1358, 1369–70 (8th Cir. 1980) (choosing to apply the rule over the liberal construction clause); *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting) (doubting whether RICO’s liberal construction provision was intended to apply to the provisions establishing criminal liability). For courts willing to apply the liberal construction provision to RICO’s penal provisions, see *United States v. Noriega*, 746 F. Supp. 1506, 1516–17 (S.D. Fla. 1990) (applying the liberal construction clause in interpreting some of RICO’s penal provisions to cover certain conduct engaged in abroad); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) (relying on the liberal construction clause to interpret the meaning of “enterprise” in § 1961(4)).

¹³⁹ 712 F. Supp. 723 (E.D. Ark. 1988).

¹⁴⁰ *Id.* at 729.

¹⁴¹ Kahan, *supra* note 10, at 427. Other writers on Kahan’s side of the ledger have sought to distance themselves from this rather radical proposition. See, e.g., Elhauge, *supra* note 9, at 2196 (“To interpret a legislatively enacted statute in line with the judge’s best reading of what the legislature preferred in ambiguous cases is not the equivalent of creating a common law crime.”).

¹⁴² 11 U.S. (7 Cranch) 32 (1812).

¹⁴³ Prior to *Hudson & Goodwin* there was disagreement amongst the federal judiciary as to whether federal courts could develop common law crimes. This disagreement manifested in the case of *United States v. Worrall*, 28 F. Cas. 774, 778–80 (C.C.D. Pa. 1798) (No. 16,766) where Justice Chase and Judge Peters ventilated their respective views on the issue. See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1067–73 (1984) (discussing *Worrall*). For an argument that *Hudson & Goodwin* was wrongly decided see

to point out that *Hudson & Goodwin* has not yet been overruled, and neither has *Wiltberger*. It is worth remembering that *Hudson & Goodwin* was decided just eight years before *Wiltberger* and that the two decisions share the same strict separation of powers philosophy. Indeed, Kahan himself recognizes as much.¹⁴⁴

In *Hudson & Goodwin*, the Court held that federal courts had no power to develop a body of federal criminal common law, observing “[t]he legislative authority of the Union must first make an act a crime” and “affix a punishment to it” before a federal court could enforce that punishment.¹⁴⁵ Chief Justice Marshall echoed these words in *Wiltberger*, writing: “[T]he power of punishment is vested in the legislative . . . department,” and “[w]e can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. But congress has not made them punishable, and this Court cannot enlarge the statute.”¹⁴⁶

The interrelation between and continued vitality of *Hudson & Goodwin* and *Wiltberger* is apparent in *United States v. Santos*.¹⁴⁷ There, the Court was asked to adopt a broad interpretation of the federal money-laundering statute. The majority referred to both *Hudson & Goodwin* and *Wiltberger* in its refusal to do so. The majority wrote: “even if, as Justice Stevens contends . . . statutory ambiguity ‘effectively’ licenses us to write a brand-new law, we cannot accept that power in a criminal case, where the law must be written by Congress.”¹⁴⁸ Then, referring to *Wiltberger* as “our seminal rule-of-lenity decision,”¹⁴⁹ the majority applied the rule and adopted the narrower interpretation of the statute at issue. The Court’s decisions in *Santos* and *McNally* illustrate the robust conception of the separation of powers that continues to hold true in the federal criminal context, a conception that is quite at odds with Kahan’s federal criminal lawmaking argument.

Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923) (relying on the legislative history of the Federal Judiciary Act of 1789 to suggest that members of the First Congress intended federal courts to have common law criminal jurisdiction).

¹⁴⁴ Kahan, *supra* note 10, at 359–61; *see also* Price, *supra* note 12, at 898, 909 (describing the harmonies between *Hudson & Goodwin* and *Wiltberger*).

¹⁴⁵ *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34.

¹⁴⁶ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 105 (1820).

¹⁴⁷ 553 U.S. 507 (2008).

¹⁴⁸ *Id.* at 523 (citing *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34); *see also* Morissette v. United States, 342 U.S. 246, 263 (1952) (citing *Hudson & Goodwin* as the animating “spirit” of a strict approach to construing penal statutes: “The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.”).

¹⁴⁹ *Santos*, 553 U.S. at 515.

B. Agency-Defined Crimes Analogy

A second critique of the idea that the separation of powers doctrine constitutionally requires the rule is grounded in the *Chevron* doctrine.¹⁵⁰ *Chevron* has come to be understood to mean that when a statute is “silent or ambiguous,” and a government agency has resolved that silence in a “reasonable” way, the courts should defer to the agency’s interpretation of the statute.¹⁵¹ If *Chevron* is applicable to criminal statutes—and this is not beyond debate—then it would appear to displace the rule, allowing courts to accept an agency’s “reasonable” interpretation of a criminal statute in circumstances where there is a narrower “reasonable” interpretation that otherwise would have prevailed by the operation of the rule. That courts are willing to sacrifice the rule to *Chevron* could only be possible in a world where courts did not consider the rule to be constitutionally required, or so the argument goes.

There are two responses to this argument. The first response is to doubt the underlying assumption that *Chevron* is applicable to ambiguous criminal statutes. This could be framed as a “*Chevron* step zero” argument that deference is inappropriate for this class of statute.¹⁵² Sunstein has suggested as much.¹⁵³ Alternately, the rule could be understood to trump deference at “*Chevron* step one.”¹⁵⁴ There appears to be some support for this position in the authorities.¹⁵⁵ After all, the Court in *Chevron* acknowledged that there was no place for deference to agency interpretations in situations where those interpretations are in tension with results reached by “traditional tools

¹⁵⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁵¹ This statement of the *Chevron* doctrine is necessarily brief and somewhat reductive. For a discussion of the changing content of the *Chevron* doctrine over time, see generally Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

¹⁵² See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (describing “*Chevron* step zero” as the threshold inquiry as to whether the *Chevron* framework applies at all).

¹⁵³ *Id.* at 210–11 n.106. (“[T]he rule of lenity ensures that ambiguities in criminal statutes are construed favorably to defendants; *Chevron* deference to criminal prosecutors would override that long-established principle.”); see also Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2115–16 (1990) [hereinafter Sunstein, *Law and Administration*] (“[C]riminal statutes are interpreted favorably to criminal defendants It would be odd to suggest that [this principle] can be overcome by agency interpretation. Principles of this sort are self-conscious efforts to counteract administrative or governmental bias, by requiring an express congressional judgment on the point before allowing certain results to be reached. These principles should not be overridden simply because the agency wants them to be.”).

¹⁵⁴ See, e.g., Hickman, *supra* note 6, at 934 (“[T]he rule of lenity may operate as a tie-breaker between competing statutory interpretations to establish a statute’s supposed plain meaning. A court applying the rule of lenity thus never gets past that first-level inquiry and, consequently, does not have the opportunity to defer to the government.”).

¹⁵⁵ See, e.g., *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (adverting to the possibility that the rule could operate in “*Chevron* step one”).

of statutory construction.”¹⁵⁶ If a court were to approach an ambiguous agency-administered criminal statute using the traditional tools of statutory interpretation (including the traditional rule of lenity), the court would likely conclude that congressional intent is best served by resolving the ambiguity in favor of the accused. This is because the court can assume that Congress knew of the rule when drafting the statute¹⁵⁷ and, accordingly, intended any ambiguities to be resolved in favor of the accused.

The relationship between *Chevron* and the rule has not been definitively decided by the Supreme Court,¹⁵⁸ although there are dicta pointing in both directions. In *Babbitt v. Sweet Home*,¹⁵⁹ the Court offered the following in an enigmatic footnote:

We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the [present] regulation . . . cannot be one of them.¹⁶⁰

Against this statement one has to weigh the preponderance of contrary indications emanating from the same source that suggest that there is no room for deference when interpreting criminal statutes.¹⁶¹ Justice Scalia put it in

¹⁵⁶ *Chevron*, 467 U.S. at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

¹⁵⁷ *McNary v. Haitian Refugee Centre, Inc.*, 498 U.S. 479, 496 (1991) (“Congress legislates with knowledge of [the Court’s] basic rules of statutory construction.”). *But see* Gluck and Bressman, *supra* note 52, at 946 (reporting results of a survey of sixty-five congressional staffers from 2011–2012 who participated in drafting criminal statutes, only thirty-five percent of whom were familiar with the rule by name).

¹⁵⁸ The Court was recently asked to resolve the question in the analogous deportation context but avoided pronouncing a view on the issue. *See* *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (“[P]etitioner and the Government debate whether the Board’s interpretation . . . is entitled to deference under *Chevron*. . . . We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board’s interpretation. Therefore, neither the rule of lenity nor *Chevron* applies.”).

¹⁵⁹ 515 U.S. 687 (1995).

¹⁶⁰ *Id.* at 704 n.18.

¹⁶¹ *See, e.g.,* *Abramski v. United States*, 573 U.S. 169, 191 (2014) (“Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly . . . a court has an obligation to correct its error.”); *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.”); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (giving no weight, in deportation proceedings, to the Immigration and Naturalization Service’s view that petitioner’s two convictions for DUI causing serious bodily injury were “crime[s] of violence” within the meaning of 18 U.S.C. § 16, a criminal statute); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 (1992) (applying the rule and declining to defer to agency interpretation of a tax statute); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., dissenting) (“[A]

characteristically succinct terms: “A court owes no deference to the prosecution’s interpretation of a criminal statute. . . . [L]egislatures, not executive officers, define crimes.”¹⁶²

Lower courts and the academy provide some support for this view. For example, the D.C. Circuit has held that Department of Justice interpretations do not warrant deference in either civil or criminal cases.¹⁶³ Amongst the academy, Elliot Greenfield has suggested that the rule ought to take precedence over *Chevron* due to the constitutional values the former protects.¹⁶⁴ Kristin Hickman argues, along similar lines, that “[e]levating the rule of lenity over judicial deference best effectuates the policy that legislatures rather than courts or agencies should make the moral judgments that underlie the criminalization of [private] behavior.”¹⁶⁵ Eskridge, Philip Frickey, and Elizabeth Garrett have also doubted that prosecuting agencies’ litigating positions are entitled to deference because such deference would offend the rule.¹⁶⁶ Kahan has, perhaps predictably, come out on the opposite side of the argument.¹⁶⁷

The second response to the agency-defined crimes analogy is that it too readily equates agency lawmaking power with judicial lawmaking power.¹⁶⁸ In *Chevron*, the Court accepted that silence or ambiguity in a statute could be read as a delegation of lawmaking authority to the agency administering the statute.¹⁶⁹ But porousness in the legislative-executive separation of powers does not immediately suggest that the separation between judicial and legislative branches is similarly compromised.¹⁷⁰ One of the primary justifi-

criminal statute[] is not administered by any agency but by the courts. . . . The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”)

¹⁶² *Whitman v. United States*, 135 S. Ct. 352, 352–53 (2014) (Scalia, J., concurring in the denial of certiorari).

¹⁶³ *United States v. W. Elec. Co.*, 900 F.2d 283, 297 (1990).

¹⁶⁴ See Greenfield, *supra* note 6, at 61 (“[L]enity . . . protects core constitutional rights—the due process requirement of fair warning and the primacy of Congress in defining criminal behavior.”).

¹⁶⁵ Hickman, *supra* note 6, at 934.

¹⁶⁶ ESKRIDGE, FRICKEY & GARRETT, *supra* note 77, at 334.

¹⁶⁷ See Dan M. Kahan, *Is “Chevron” Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489–506 (1996) (supporting deference to Department of Justice interpretations of criminal statutes). See also generally David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479 (2007) (arguing that, in the immigration context, the rule should only be applied if ambiguity remains after a *Chevron* analysis).

¹⁶⁸ See Elhauge, *supra* note 9, at 2196 n.108 (suggesting that the rule’s non-delegation justification makes no sense when non-delegation “has been abandoned elsewhere in the law”); Jeffries, *supra* note 50, at 203 n.40 (intimating that the rise of congressional delegation to administrative agencies weakens the argument against congressional delegation to the courts).

¹⁶⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

¹⁷⁰ Waldron is relatively unconcerned about the delegation of lawmaking power to the executive, but he remains concerned about the delegation of lawmaking power to the courts. See Waldron, *supra* note 82, at 465–66 (“Separation of Powers, is indifferent to delegation provided that the institution to which law-making is delegated remains distinctively legislative

cations for the compatibility of *Chevron* with the constitutional structure is that congressional delegation of lawmaking authority to the executive preserves democratic accountability. This justification has been expressed by Eskridge, Frickey, and Garrett as follows:

As part of the ‘political branches,’ agencies are, relatively speaking, more accountable to We the People than life-tenured federal judges. Not only are agencies directly or indirectly accountable to the elected President, they are also accountable to the elected Congress, which not only confirms their chiefs but also oversees their administration, potentially amends the statutes they are charged with enforcing, and (most important) determines their annual budget.¹⁷¹

A related justification for the democratic compatibility of broadly worded statutes empowering agencies with working out the details is that the public will generally hold Congress accountable for the *general policy position* reflected in a broadly worded piece of legislation and the *results* of that policy when filtered through administrative agencies.¹⁷² Neither of these arguments hold true for congressional delegation of lawmaking authority to the federal judiciary. First, federal courts are not answerable to Congress in the way agencies are.¹⁷³ Second, the judicial branch is perceived as sufficiently distinct from, and independent of, Congress such that the public are more likely to lay the blame for policy and results at the feet of “activist judges” than they are to tie the responsibility back to Congress.¹⁷⁴

In fact, the rule can be seen to have the more democratic function than *Chevron*.¹⁷⁵ Elhauge has described this function as follows:

[W]hen enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to

in character and . . . is distinguished clearly in conception and, as far as possible, institutionally, from judicial and enforcement function wherever they, in turn, are located.”).

¹⁷¹ ESKRIDGE, FRICKEY & GARRETT, *supra* note 77, at 328; see also Sunstein, *Law and Administration*, *supra* note 153, at 2087 (“[The] electoral accountability of the administrators [is] far greater than [that] of courts.”).

¹⁷² See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 395 (1989) (“Legislators are usually held accountable for the general provisions they adopt, not for the precise wording of their statutes. . . . In some cases legislators may also be held accountable for the general results of the legislation they have supported.”).

¹⁷³ Courts are, after all, the least democratic branch by virtue of their independence and protection—through the separation of powers—from Congressional oversight. *But see* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010) (describing the political accountabilities of agencies).

¹⁷⁴ See Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 1441, 1471–73 (2004) (discussing the label of “judicial activism” as applied to judicial interpretations of broadly worded constitutional and legislative provisions).

¹⁷⁵ KERR, *supra* note 52, at 1532 (arguing for the introduction of a rule of lenity in the national security law context because “[a] rule of lenity would . . . place the primary responsibility for rulemaking where it belongs: with the people, acting through their elected representatives”).

provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could.¹⁷⁶

Elhaug is describing a process by which the courts, faced with uncertainty about the scope of We the People's desire to criminalize conduct, will kick the ball back to Congress to clarify the democratic will.¹⁷⁷ Elhaug ought to be understood to be making a public choice theory argument,¹⁷⁸ asserting that strict rather than liberal construction is democracy-enhancing in the criminal sphere because of the nature of interest-groups and lobbyists.¹⁷⁹ He writes: "[A]n overly narrow interpretation is far more likely to be corrected by [Congress]" than a broad interpretation, because "there is no effective lobby for narrowing criminal statutes."¹⁸⁰ This claim has been borne out by empirical research¹⁸¹ and has received some Supreme Court endorsement.¹⁸²

This democratic preference for legislative, rather than judicial or executive, definition of crimes is of course applicable to non-criminal spheres of

¹⁷⁶ Elhaug, *supra* note 9, at 2165.

¹⁷⁷ *Id.* at 2194; *see also* 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.").

¹⁷⁸ *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

¹⁷⁹ *But see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–30 (2001) (suggesting that, apart from police, prosecutors and other government actors have little influence in criminal lawmaking and that criminal legislation is largely influenced by public opinion); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1088–90 (1993) (arguing that lawmakers face political pressure to punish and deter crime, and thus are rarely concerned with advancing laws to protect the rights of criminal defendants).

¹⁸⁰ Elhaug, *supra* note 9, at 2194; *see also* AMAR, *supra* note 65, at 497 (making a similarly democratic argument against federal common law crimes, Amar writes: "The mere ability of Congress to overturn a judge-promulgated criminal law code would not have adequately guaranteed broad populist approval of federal penal policy. Imagine a counterfactual world in which federal courts were permitted to promulgate a (possibly harsh) federal criminal code on their own authority—a world in which Congress is allowed to repeal the judges' criminal code but need not affirmatively enact the code itself. In such a counterfactual world, harsh penal policies might prevail even if the American people as a whole broadly disapproved of these policies.").

¹⁸¹ *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344 tbl.4 (1991) (demonstrating that Supreme Court statutory interpretation decisions are more likely to be overturned in the criminal context than any other); *see also* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions 1967-2011*, 92 TEX. L. REV. 1317, 1383 (2014) (conducting an updated study of congressional overrides of Supreme Court decisions and finding that "criminal defendants and prisoners almost always lose").

¹⁸² *See, e.g.*, United States v. Santos, 553 U.S. 507, 514 (2007) ("This venerable rule . . . places the weight of inertia upon the party that can best induce Congress to speak more clearly."); Crandon v. United States, 494 U.S. 152, 168 (1990) ("We are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity . . . remains, it should be resolved in the petitioner's favor unless and until Congress plainly states that we have misconstrued its intent.").

regulation. Yet the argument has special force in the context of criminal laws because of their acknowledged *expressive* function. On this account, criminal laws represent society's condemnation of a particular category of behavior, a condemnation that is backed up with a willingness to punish those who infringe upon this consensus.¹⁸³ This expressive function is frustrated in circumstances where there is a lack of democratic accountability for the content of criminal laws, as is the case in judicial criminal lawmaking.¹⁸⁴ While agency-defined crimes attenuate the expressive function of the criminal law, the agencies remain indirectly accountable to the public and thus agency-defined crimes can, in a pinch, be squared with our expressive hopes for criminal law. That is not the case with judicially defined crimes.

VI. ARGUMENTS AGAINST THE DUE PROCESS RATIONALE FOR THE RULE

Having defended the separation of powers rationale for the rule, this Article now turns to due process notice, and ultimately suggests that the rule remains an important component of this constitutional protection. There are two important critiques of the idea that the rule might be constitutionally required by the Due Process Clause. First, critics point out that notice is now largely agreed to be a fiction and thus an insufficiently strong constitutional value to require the rule (the "notice-is-a-fiction argument"). Second, many states have legislated to abrogate the rule and have not been found to have violated the Due Process Clause of the Fourteenth Amendment, thus it is argued to be unlikely that congressional abrogation would violate the Fifth Amendment (the "state practice argument").

A. *Notice-is-a-Fiction Argument*

The idea that due process notice requires the rule has been doubted by a number of commentators, primarily on the basis that notice is now largely acknowledged to be something of a fiction.¹⁸⁵ Jeffries put the point as well as any:

¹⁸³ *But see* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 31–32 (2008) (arguing that the requirement that law "purport[s] to stand in the name of the whole society" is not particular to criminal law but is in fact an essential element of a "legal system"). *See generally* Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* (1970).

¹⁸⁴ One potential exception to this assertion is presented by the judicially created crime of contempt, but that is beyond the scope of this Article.

¹⁸⁵ *See, e.g.*, Elhauge, *supra* note 9, at 2200 ("[T]he criminal code is rarely read by criminals, and thus advance specificity in the statutory code cannot normally provide them with notice."); Jeffries, *supra* note 50, at 212 (arguing that notice is now largely fictional and that it ought not be understood to require the rule "[i]n the great generality of cases"); Price, *supra* note 12, at 886 ("The [notice] theory is flawed because criminals do not read statutes.").

‘[F]air warning’ . . . may be discoverable only by a search of the precedents. . . . [T]his process of research and interpretation is anything but easy. For the trained professional, the task is time-consuming and tricky; for the average citizen, it is next to impossible. . . . But in the ordinary case, the notice given must be recovered from sources so various and inaccessible as to render the concept distinctly unrealistic.¹⁸⁶

There is an intuitive appeal to this argument, as one must accept that the vast majority of federal criminal defendants do not read in advance the statutes they infringe. Yet surely notice has always been somewhat illusory.¹⁸⁷ Nevertheless, notice was conceived to be an important constitutional value leading not just to the Fifth Amendment but also to the prohibitions on *ex post facto* laws and bills of attainder in Article I of the Constitution.¹⁸⁸

If we accept that notice has always been, to some degree, an illusory concept then it becomes hard to see any new force in the arguments of Jeffries and others that notice cannot justify the rule. The fictional quality of notice has never been thought to deprive it of its constitutional value. As Justice Holmes said in *McBoyle v. United States*¹⁸⁹:

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. To make the warning fair, so far as possible the line should be clear.¹⁹⁰

More recently, Justice Scalia wrote: “It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . but

¹⁸⁶ Jeffries, *supra* note 12, at 199; *see also* *United States v. R.L.C.*, 503 U.S. 291, 311–12 (1992) (Thomas, J., concurring) (“We must presume familiarity not only with the United States Code, but also with the United States Reports, in which we have developed innumerable rules of construction powerful enough to make clear an otherwise ambiguous penal statute.”); TOCQUEVILLE, *supra* note 96, at 354 (“The French lawyer is simply a man extensively acquainted with the statutes of his country; but the . . . American lawyer resembles the heirophants of Egypt, for like them he is the sole interpreter of an occult science.”).

¹⁸⁷ *See* JEREMY BENTHAM, TRUTH VERSUS ASHHURST 11 (1823) (“Scarce any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of laws are kept most happily and carefully from the knowledge of the people: statute law by its implied shape and bulk; common law by its very essence.”).

¹⁸⁸ U.S. Const. art. I, § 9, cl. 3 (prohibiting federal bills of attainder and *ex post facto* laws); *id.* art. I, § 10, cl. 1 (prohibiting state bills of attainder and *ex post facto* laws); *see* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring) (“The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens.”).

¹⁸⁹ 283 U.S. 25 (1931).

¹⁹⁰ *Id.* at 27.

[a] necessary fiction.”¹⁹¹ In a similar vein, Justice Souter has described the notice dimension to the rule as “a benign fiction.”¹⁹² The fiction is necessary because it is a part of the constitutional theory of justice that the State shall not have the power to punish someone for conduct that person could not have reasonably known was criminal.¹⁹³

Yet to characterize notice as purely *symbolic* is to understate its worth. There are at least three *practical* arguments in favor of continued adherence to the notice requirement. First, notice can guide the behavior of the “one man in a hundred [that] takes the pains to inform himself [of the law] This citizen at least is entitled to know [the law], and he cannot be identified in advance.”¹⁹⁴ Lon Fuller labels this the “marginal utility principle.”¹⁹⁵ The utility is greatest in areas like corporate crime, where well-lawyered parties are more likely to have *ex ante* referred to the statute books and precedents and come to a reasoned view about the scope of the legal prohibition.¹⁹⁶ Second, one can conceive of notice operating indirectly from the one person in a hundred to others in that group who may emulate that person’s conduct. Fuller believes in this indirect operation of notice, writing: “[I]n many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many.”¹⁹⁷ Finally, legislative clarity in criminal law, and notice in particular, are important not only for potential defendants, but also to limit arbitrariness on the part of prosecutors and judges.¹⁹⁸ Justice Harlan summarized this value in his dissenting opinion in *United States v. Standard Oil Co.*¹⁹⁹:

The policy thus expressed is based primarily on a notion of fair play: in a civilized state the least that can be expected of government is that it expresses its rules in language that all can reasonably be expected to understand. Moreover, this requirement of clear

¹⁹¹ *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring) (citation omitted).

¹⁹² *United States v. Rodriguez*, 553 U.S. 377, 405 (2007) (Souter, J., dissenting) (citations omitted) (“The ‘fair warning’ that motivates the lenity rule . . . may sometimes be a benign fiction . . . but there is only one reading of this statute with any realistic chance of giving fair notice of how the [statute] will apply.”).

¹⁹³ For philosophical accounts of the value of notice, see, for example, FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 112–23 (Bruce Caldwell ed., Univ. of Chicago Press 2007) (1944); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW*, 210, 220–22 (1979).

¹⁹⁴ LON FULLER, *THE MORALITY OF LAW* 51 (2d. ed. 1969).

¹⁹⁵ *Id.* at 49.

¹⁹⁶ See Solan, *supra* note 51, at 135 n.361 (discussing the special notice considerations that apply to criminal violations of regulatory statutes).

¹⁹⁷ FULLER, *supra* note 194, at 51.

¹⁹⁸ Solan, *supra* note 51, at 135 (“The issue is not whether defendants read the statute books; for the most part, they do not. The system of criminal justice, however, is not concerned only with notice to the defendant, but also with notice to all those empowered to punish people on behalf of the government, especially prosecutors and judges.”).

¹⁹⁹ 384 U.S. 224 (1966).

expression is essential in a practical sense to confine the discretion of prosecuting authorities, particularly important under a statute . . . which imposes criminal penalties²⁰⁰

A second response to the notice-is-a-fiction argument can be mounted on a purely historical basis. The Court will not readily discard a due process protection that has historically been considered guaranteed by the Fifth Amendment. The Court has said that the content of due process is a “historical product”²⁰¹ and that notice is “the first essential of due process of law.”²⁰² Accordingly, it is extremely unlikely that the Court will waive the notice requirement any time soon, especially in circumstances where it has long recognized the illusory aspect to it.

B. State Practice Argument

Perhaps the most powerful argument against the claim that due process notice requires the rule is the glaring fact that many state statutes purport to abrogate, modify, or displace the rule, and none have yet been found to violate the Due Process Clause of the Fourteenth Amendment.²⁰³ State statutory abrogation of the rule can be traced back to the early 1800s, when Tennessee and Virginia passed gaming laws with provisions requiring courts to interpret them “remedially” despite their penal character.²⁰⁴ The first generally applicable statutory provision purporting to displace the rule came into effect in Arkansas in 1838.²⁰⁵ In Livingston Hall’s invaluable survey of the early legislative developments in this area, he describes how other states soon followed suit, often at the recommendation of “commissioners appointed to revise the penal codes of the older states, or draft new ones for territories on their admission to statehood.”²⁰⁶ The typical phrasing of these liberal construction clauses is illustrated by Field, Noyes, and Bradford’s *Draft of a Penal Code for the State of New York*: “The rule of the common law that penal statutes are to be strictly construed, has no application to this

²⁰⁰ *Id.* at 236 (Harlan, J., dissenting).

²⁰¹ *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

²⁰² *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

²⁰³ Interestingly, there are also states that have legislated to enshrine the rule. See FLA. STAT. § 775.021(1) (2018) (“The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”); OHIO REV. CODE ANN. § 2901.04(A) (West 2019) (“[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”).

²⁰⁴ Hall, *supra* note 97, at 752–53 n.22 (listing relevant Tennessee and Virginia gaming law provisions and subsequent case law interpreting them).

²⁰⁵ ARK. REV. STAT. (1837) ch. 129, §§ 22–23 (approved March 5, 1838) (codified as amended at ARK. CODE ANN. §§ 1-2-201–202 (2018)).

²⁰⁶ Hall, *supra* note 97, at 753.

Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”²⁰⁷

In spite of such clearly communicated legislative intent, the general trend amongst state courts in the nineteenth and early twentieth centuries was to ignore summarily these statutory stipulations. Writing in 1935, Hall claims that in New York “[t]he liberal construction statute has been more honored in the breach than in the observance.”²⁰⁸ Hall suggests that this may have been at least partially a result of the fact that few textbooks mentioned the various state legislative modifications to the rule.²⁰⁹ The result was that “legislative attempts to abrogate or modify the old rule have met with surprisingly little favor with . . . courts.”²¹⁰ The position does not appear to be much different today. Building on the work of Zachary Price, Jeffrey Love has conducted the most recent review of state practice.²¹¹ Love concludes “most state supreme courts seem to be invoking lenity when it suits their fancy.”²¹²

The mere fact that state statutes abrogating the rule have been haphazardly applied does not say much about the rule’s constitutional status. More informative are the instances when state courts have squarely confronted the validity and effect of statutes purporting to override the rule. While a handful of state high courts have endorsed the legislative abrogation of the rule, none of these have, to my knowledge, reached this conclusion after any detailed consideration of the constitutional underpinnings of the rule. More informative is the jurisprudence of the California Supreme Court, which has found the rule to survive an attempted statutory abrogation.

California’s liberal construction clause reads: “The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.”²¹³ An early attempt to reconcile the provision with the rule occurred in 1890, where the California Supreme Court appeared to preserve the rule, although in a rather unorthodox formulation:

²⁰⁷ DAVID W. FIELD ET AL., DRAFT OF A PENAL CODE FOR THE STATE OF NEW YORK § 10 (1864); see also Hall, *supra* note 97, at 753 n.25.

²⁰⁸ Hall, *supra* note 97, at 755 n.39.

²⁰⁹ *Id.* at 754–55 (“The leading treatises on statutory construction first ignored the existence of these statutes and then minimized their effect.”); see also *id.* at 755 n.38 (surveying nineteenth and early twentieth century American legal textbooks’ treatment of the rule).

²¹⁰ *Id.* at 754; see also *id.* at 755 (“[M]any courts have apparently never had their attention called to their liberal construction statutes, and some courts, though recognizing their existence, have read out of them all meaning as applied to penal statutes.”) (citations omitted).

²¹¹ Jeffrey A. Love, *Fair Notice About Fair Notice*, 121 YALE L.J. 2395, 2395–99 (2011). See also generally Price, *supra* note 12.

²¹² Love, *supra* note 211, at 2396. See generally Angelica Gonzalez, *The Rule of Lenity in the State of Montana: Is There Lenity?*, 79 MONT. L. REV. 205 (2018) (describing the haphazard application of the rule in Montana, even after its apparent legislative abrogation).

²¹³ CAL. PENAL CODE § 4 (2014).

While it is true the rule of the common law that penal statutes are to be strictly construed has been abrogated by [section 4 of the Penal Code], . . . it is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.²¹⁴

The due process values undergirding this statement were subsequently articulated in *People ex rel. Lungren v. Superior Court*,²¹⁵ in 1996, as follows: “[C]riminal penalties, because they are particularly serious and opprobrious, merit heightened due process protections for those in jeopardy of being subject to them, including the strict construction of criminal statutes.”²¹⁶

In 2002, the California Supreme Court was again confronted with a case requiring consideration of whether the liberal construction clause had abrogated the rule.²¹⁷ The Court’s answer was unequivocal: “[W]e have repeatedly stated that when a statute defining a crime or punishment is susceptible of two interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. This rule has constitutional underpinnings.”²¹⁸ The Court then went on to identify those underpinnings as fair warning and the separation of powers. The Court acknowledged “some tension” between the rule and the liberal construction clause but ultimately found that the rule survived as a last resort tiebreaker to resolve “true ambiguities . . . in a defendant’s favor.”²¹⁹

What this brief review of state practice reveals is that at least one state supreme court has, after careful consideration of the rule’s constitutional foundations, reached the conclusion that the legislature cannot *completely* abrogate the rule. The due process and separation of powers values animating the rule were deemed to be sufficiently strong in California to require the rule’s continued operation, but only as a true “tie-breaking principle” between otherwise reasonable interpretations.²²⁰

VII. A TENTATIVE, BUT NOT A “WOOLY,” CONCLUSION

In 2002, when Rosenkranz asked whether Congress could abrogate the rule of lenity he posed three possible answers to the question but did not purport to wholeheartedly endorse any one.²²¹ Similarly, in the intervening years few scholars have committed themselves to a conclusive answer. This Article has sought to marshal the arguments on both sides of the debate and

²¹⁴ *Ex parte Rosenheim*, 23 P. 372, 373 (Cal. 1890).

²¹⁵ 926 P.2d 1042 (Cal. 1996).

²¹⁶ *Id.* at 1054.

²¹⁷ *See People v. Avery*, 38 P.3d. 1, 2–3 (Cal. 2002).

²¹⁸ *Id.* at 5 (citations omitted).

²¹⁹ *Id.* at 6.

²²⁰ *Lexin v. Superior Court*, 222 P.3d 214, 249 n.30 (Cal. 2010).

²²¹ Rosenkranz, *supra* note 1, at 2094, 2097.

offer something by way of critique. The conclusion reached here is that the better view of the rule is that, in its true role as a last-resort tie-breaker, it *is* a constitutional mandatory substantive rule, to use Rosenkranz's terminology.

This view that the rule is constitutionally required, both as an incident of the separation of powers and as an expression of the notice requirement of the Due Process Clause, does not prevent Congress from passing a legislative directive such as California's liberal construction clause. Such a provision could permissibly be afforded weight by the courts in construing the provisions of the penal code. It may, in some circumstances, save a criminal statute from ambiguity by tipping the scales in favor of an expansive reading, just as the liberal construction clause in RICO has done.²²² Nevertheless, there would undoubtedly still arise occasions when, having "seize[d] everything from which aid can be derived,"²²³ including the assistance of any liberal construction clause, a court would be left with statutory ambiguity. In such cases the court would be constitutionally required to apply the rule, just as the Supreme Court appeared prepared to do in the RICO context,²²⁴ and just as the California Supreme Court has felt bound to do notwithstanding its own liberal construction clause.²²⁵ The constitutional requirement in such a case would derive from the separation of powers requirement that Congress, and not the judiciary, define crimes and the due process requirement that the public have fair warning of conduct liable to criminal penalty.

As stated at the outset, the purpose of this Article is to offer the first extended analysis of the rule's constitutional status. No doubt many will disagree with the conclusions reached here. Indeed, this Article invites such disagreement. The rule of lenity has for too long been applied or ignored without sufficient attention to its constitutional foundations. Attention to these foundations is especially important today as liberal construction clauses, like that in RICO, become more common in federal criminal statutes.²²⁶ The day cannot be far off when the Supreme Court will be called upon to definitively decide whether Congress can abrogate the rule of lenity.

²²² See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985) (applying RICO's liberal construction clause to 18 U.S.C. § 1964 (2012)).

²²³ See *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) ("Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.").

²²⁴ *Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993).

²²⁵ See, e.g., *People v. Avery*, 38 P.3d 1, 5 (Cal. 2002) (finding that the rule survived California's liberal construction clause).

²²⁶ See, e.g., 21 U.S.C. § 853(o) (2012) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").