New Grounds for Lenity: Text, "Context," and Giving Criminal Defendants the Benefit of the Doubt

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Introduction

Is an undersized red grouper a "tangible object" within the meaning of the Sarbanes-Oxley Act?[2] Is a cigarette a "combination product" to deliver a drug (nicotine) to the body within the meaning of the Food, Drug, and Cosmetic Act?[3] These are classic puzzles of statutory interpretation that courts are frequently called on to resolve. What may surprise an ordinary person, however, is that different interpretive rules apply to one question and not the other. That is so because the Sarbanes-Oxley Act is a criminal statute and the Food, Drug, and Cosmetic Act authorizes regulatory action. Prosecutors read criminal statutes to know when they can impose penal sanctions on defendants and administrative agencies read authorizing statutes to know when they may regulate an industry. But statutes in both contexts are often ambiguous as to the precise extent of penal or regulatory liability, creating the need for judicial intervention.

The Supreme Court has come to stringently interpret administrative laws using the major questions doctrine, but it reads criminal statutes

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[2] *See* Yates v. United States 574 U.S. 528, 531–32 (2015).
[3] *See* FDA v. Brown & Williamson Corp., 529 U.S. 120, 125 (2000).

expansively without invoking the canon of lenity which would similarly narrow the statute's meaning. As a result, the Court gives regulated industries the benefit of the doubt under ambiguous statutes without extending the same benefit to criminal defendants. This Note argues that the Court lacks a principled reason for the disparity between criminal and administrative contexts and calls for the restoration of lenity.

Lenity is typically understood as a substantive canon that promotes mercy for criminal defendants by crediting them the benefit of the doubt when prosecuted under ambiguous laws. This is the rationale American courts inherited for lenity from the English common law, where "it was not grounded in any fiction about Parliament's presumed intent; rather it was unabashedly grounded in a policy of tenderness for the accused."[4] But, to the modern textualist Supreme Court, this traditional rationale rings hollow.

As the Court adopted textualism as its predominant mode of statutory interpretation,[5] it became skeptical of interpretive rules grounded in extra-constitutional values like "tenderness for the accused." Textualists take a limited view of the judicial role, believing Congress's express words are the only reliable evidence of its intent.[6] In their view, the law is constituted by the enacted statutory language leaving no room for judicial expansion.[7] Thus, substantive canons, like lenity, which interpret statutes using extra-constitutional values, appear to overstep the proper role of the judiciary. As Justice Barrett, the Court's leading voice on canons, has said:

> A judge applying a substantive canon often exchanges the best interpretation of a statutory provision for a merely bearable one. In doing so, she abandons not only the usual textualist practice of interpreting a statute as it is most

[4] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129 (2010).
[5] Textualism's influence on the modern Court across ideology is perhaps best evidenced by Justice Kagan's remark that "we're all textualists now." Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes,* YOUTUBE, at 08:29 (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg. Though while the influence of textualism has risen, its methodological commitments remain contested among the Justices who can reach opposing outcomes using textualism. *See e.g.* Bostock v. Clayton County, 590 U.S. 644, 685 (2020) (Alito, J., dissenting) ("The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated . . . .").
[6] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 395 (2012) ("The truth is that '[a]scertaining the intention of the legislature . . . boils down to finding the meaning of the words used.'") (quoting R.W.M. Dias, *Jurisprudence* 219 (4th ed. 1976)) (alteration in original).
[7] *See id.* at 397.

> likely to be understood by a skilled user of the language, but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values.[8]

Thus, the rise of textualism has meant that criminal defendants have increasingly lost the benefit of the doubt when prosecuted under arguably ambiguous statutes.[9]

There is, however, a different story to tell in the regulatory context, where the rise of the major questions doctrine has seen the textualist Court increasingly employ a clear-statement rule instead of deferring to the executive branch when a statute is ambiguous.[10] Until being abandoned,[11] the Court applied *Chevron* deference: an interpretive rule counseling the Court not to apply its own best interpretation of statutory text and defer to an agency's reasonable construction.[12] *Chevron's* application was first sharply limited as courts increasingly found statutes unambiguous which functionally created a new *Chevron* "step zero."[13] As *Chevron* has waned, the Court has increasingly relied on the major questions doctrine as their go-to interpretive rule for construing ambiguities in the administrative context.[14] The doctrine holds that Congress must "speak clearly" in order to authorize regulatory actions by executive agencies that are sufficiently big, novel, or politically contested.[15] Like lenity and *Chevron*, the doctrine is an interpretive rule that often counsels courts to strain statutory text against its best interpretation and is therefore *prima facie* suspect under textualism. Indeed, critics of the new judge-made doctrine argue that it serves as a "get-out-of-text free card[]."[16]

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[8] Barrett, *supra* note 7, at 124.
[9] *See infra* Part I.C.
[10] *See* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. 1020–21 (2023).
[11] Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2273 (2024).
[12] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 840 (1984).
[13] *See generally* Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).
[14] *See* Mila Sohoni, *The Major Questions Quartet*, 263–64 (arguing that the Court "unhitched the major questions exception from *Chevron*, which has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority.").
[15] *See, e.g.*, Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000))); *see generally* Deacon & Litman, *supra* note 9, at 1009 (recognizing that the most recent iteration of the major questions doctrine functions as a clear statement rule akin to other substantive canons).
[16] *See* West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting).

In order to reconcile textualism and the major questions doctrine, its defenders have argued that, while it is a substantive clear statement rule, it is compatible with textualism because it serves to protect the constitutional separation of powers.[17] Alternatively, Justice Barrett has argued that it could be understood as a linguistic canon that applies ordinary principles of interpretation and thereby aids the Court in determining the best interpretation of the statute.[18] The major questions doctrine appears to be either a substantive canon that preserves a constitutional value, or a linguistic canon reflecting ordinary interpretive practice.

This Note explores both of these possibilities as rationales for the rule of lenity. A minority of the Court has adopted a separation of powers rationale for lenity to invoke a strong form of the canon consistent with textualism.[19] Lenity may serve the constitutional separation of powers by ensuring that "the legislature, not the Court, define[s] a crime, and ordain[s] its punishment."[20] We will see in Part I that this rationale has deep roots in how the rule was understood in the founding era, and ties into a longstanding intra-textualist split. But the idea that lenity may be a linguistic canon reflecting ordinary interpretive practice has been unrealized by the Court and in scholarship. However, after introducing Barrett's linguistic understanding of the major questions doctrine in Part II, I argue that the rule of lenity has equal claim to be a linguistic canon as the major questions doctrine.

Importantly, my argument is biconditional. If you accept the major questions doctrine as a linguistic canon, then there is no principled reason not to extend criminal defendants the benefit of the doubt. The same goes for the converse: if you reject lenity for textualist reasons, then it is time to reconsider the major questions doctrine. Under textualism, different interpretive regimes have been developed for criminal and administrative statutes. I contend that there is no principled reason to give the benefit of the doubt to regulated industries under a clear statement rule without providing similar protection for criminal

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[17] *See id.* at 735 (Gorsuch, J., concurring) ("Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.").

[18] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("The doctrine serves as an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'" (quoting *Brown & Williamson*, 529 U.S. at 133)).

[19] This appears to be the view of Justices Gorsuch and Alito who offered a separation of powers framework for the doctrine in a concurrence in *West Virginia v. EPA*. *See* West Virginia v. EPA, 597 U.S. 697, 737 (Gorsuch, J., concurring). Excepting Justice Barrett's concurrence in *Biden v. Nebraska*, which was not joined by any other Justice, none of the other Justices who invoke the major questions doctrine have written to explain their views of its basis.

[20] *See* United States v. Wiltberger 18 U.S. (5 Wheat.) 76, 95 (1820).

defendants prosecuted under ambiguous statutes. Viewing the rule of lenity as a linguistic canon that reflects our ordinary linguistic practice of construing penalties narrowly provides a new rationale for the canon and could reestablish the parity between the Court's interpretive practices in administrative and criminal law. Whatever the ultimate basis the Court adopts for its major questions doctrine, the same rationale will support applying lenity with equal force.

I. A BRIEF HISTORY OF THE LOSS OF LENITY

Reviewing the history of lenity in American jurisprudence, we will see that criminal defendants gradually lost the benefit of the doubt over several evolutions in judicial philosophy. Founding era judges inherited a strong notion of lenity from English common law and embraced it as a substantive canon.[21] But since the founding era, the scope of lenity has narrowed under both liberal and conservative Supreme Courts.[22] Lenity was restricted by the Warren Court, which diminished the role of lenity by utilizing more tools of interpretation such as legislative evidence.[23] Then, as textualism gained influence, lenity was invoked less frequently because the Court more often determined that there was an unambiguous interpretation of the statute and so no ambiguity to trigger lenity.[24] In this period, the trigger for applying lenity shifted from a "reasonable dispute over meaning" to "grievous ambiguity."[25] As with *Chevron* deference, this effectively created a "step zero" for lenity, and more and more cases were resolved without finding sufficient ambiguity at the first step to merit giving the defendant the benefit of the doubt at the second step.[26]

However, even as the role of lenity shrank, an intra-textualist dispute arose and some judges called for a return to the traditional strong form of lenity.[27] Since textualism cautions against legislative evidence,[28] by

[21] *See* Shon Hopwood, *Restoring the Historical Rule of Lenity*, 95 N.Y.U. L. REV. 918, 924 (noting the origins of the American rule of lenity in the English common law "benefit of cleregy," which "[c]ourts developed . . . to spare those charged with trivial offenses from capital punishment.").

[22] Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 59 (1998) ("The rule of lenity has been narrowed dramatically over time in response to changes in the ways that courts generally interpret statutes.").

[23] *See infra* Part I.B.

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

[25] *See infra* notes 43–48 and accompanying text.

[26] *See* Hopwood, *supra* note 20, at 931 ("The Supreme Court's current version of lenity is significantly weaker than the historical rule of strict construction. With the court required to exhaust every other interpretive resource before applying it, lenity plays almost no role in deciding cases of statutory ambiguity.").

[27] *See infra* notes 55–68 and accompanying text.

[28] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (Amy Gutmann ed., new ed. 1997) ("It is simply incompatible with democratic government, or indeed, even with

reducing consideration of other interpretive tools to disambiguate statutes, one could think that there would be more occasions to invoke the canon. This dispute continues at the modern Court and should be corrected by the Court to restore parity with interpretive rules in the administrative context.

A. Lenity at the Founding

In *United States v. Wiltberger*,[29] Chief Justice Marshall invoked the rule of lenity in its strong form as inherited from English common law. The dispute concerned whether a defendant could be convicted of manslaughter when the statute only granted jurisdiction over such crimes "on the high seas" while the defendant had been aboard a ship in a shallow river.[30] Because the action had taken place abroad, American federal courts only had jurisdiction over the criminal act if the Court determined that admiralty law applied.[31] The Court ruled for the defendant, concluding "that Congress has not in this section inserted the limitation of place inadvertently; and the distinction which the legislature has taken, must of course be respected by the Court."[32] Lenity formed part of the Court's rationale alongside the Court's analysis of the statute and Chief Justice John Marshall articulated the twin justifications for lenity that pervade the Court's later jurisprudence:

> The rule that penallaws [sic] are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[33]

The Court reaffirmed the traditional justification inherited from English common law by appealing to the substantive value of mercy or tenderness for the criminal defendant. But the court also contributed a new, uniquely American, justification for lenity by appealing to structural considerations of the separation of powers. Justice Marshall held that the Constitution assigned Congress the role of proscribing criminal conduct and reasoned that lenity ensured that the Court does not

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fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.").

[29] 18 U.S. (5 Wheat.) 76 (1820).

[30] *Id.* at 94–95.

[31] *Id.*

[32] *Id*. at 104.

[33] *Id*. at 95.

overstep its constitutional role by penalizing conduct that Congress has not clearly expressed its intention to proscribe. It is this second justification, resting on an idea of judicial modesty in a government of separated powers, which justifies the application of lenity for its contemporary defenders at the Court.[34]

Lenity continued to be recognized in its traditional strong form into the Progressive Era, when Justice Holmes invoked it to narrowly construe the National Motor Vehicle Theft Act in *McBoyle v. United States*.[35] There, the Court had to determine "the meaning of the word 'vehicle' in the phrase 'any other self-propelled vehicle not designed for running on rails.'"[36] The defendant had been charged under the Act for knowingly transporting a stolen airplane which the government contended was a "vehicle" within the meaning of the statute.[37] Holmes acknowledged that it was "[n]o doubt etymologically . . . possible to use the word to signify a conveyance working on land, water or air," but argued that the meaning of "vehicle" should be confined to its more prototypical meaning of "a thing moving on land."[38] Holmes invoked lenity to narrowly construe the statute and reasoned that:

> 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. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.[39]

Here, Holmes invokes lenity in its strong form by creating a clear statement requirement for penal laws. It is not sufficient that an airplane is arguably within the extension of "vehicle"; Congress must use clearer language to expressly indicate that this was its intention. Holmes refused

[34] *See, e.g.*, United States v. Moskal, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." (citing *Wiltberger*, 5 Wheat. at 96)).
[35] 283 U.S. 25 (1931).
[36] *Id*. at 26.
[37] *Id*. at 25.
[38] *Id*. at 26.
[39] *Id*. at 27.

to use the judicial power to expand the scope of the statute to the broadest reading of its ambiguous language even if this was within Congress's purpose in enacting the statute. As in *Wiltberger*, the statute was strictly construed out of a special judicial solicitude for criminal defendants. However, Holmes expressed this protection in terms of "fair notice," evoking constitutional due process considerations, rather than Marshall's expression of "tenderness" for the accused and legislative supremacy.

B. Legal Process and Lenity

Turning to more modern applications of lenity, the first steps away from lenity occurred with the rise of legal process and the consideration of legislative evidence, which gave greater consideration to legislative purpose and reduced the priority of lenity.[40] The approach to lenity during the liberal period of the Warren Court accentuates this analytical shift begun by Justice Frankfurter.[41] In contrast to the founding era, Justice Marshall's opinions reveal a more pluralistic approach to statutory interpretation, diluting the strong form of lenity observed in Holmes's and Chief Justice John Marshall's earlier opinions.

In *United States v. Bass*,[42] for example, the Court resolved the ambiguous statute through legislative evidence before considering lenity. There, the Court considered whether a defendant could be convicted under the Safe Streets Act for possessing a firearm without a showing that it had been possessed "in commerce or affecting commerce."[43] Before any consideration of lenity, Marshall reviewed the text, a linguistic interpretive rule (the rule of the last antecedent), and legislative history.[44] Lenity only entered into consideration because the statute

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[40] *See* Solon, *supra* note 21, at 107. Solon writes:

> Perhaps it would be more accurate to describe Frankfurter's innovation as applying the traditional rule of lenity in the new interpretive culture, and not as a reformulation of the rule itself. . . . The new interpretive culture added legislative history and other extratextual materials to the types of information that courts were willing to examine.

Id.

[41] Solon attributes the relegation of lenity from its traditional strong form to its current tie-breaker status to Justice Frankfurter. *See id.* at 60; *see e.g.*, 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 as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary.").

[42] 404 U.S. 336 (1971).

[43] *Id.* at 337.

[44] *See id.* at 346–47.

remained ambiguous after the application of these other interpretive rules reducing its historical role.[45] But having found a persistent ambiguity, Marshall invoked lenity and formulated its requirement as a clear statement rule: "we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*.'"[46] Marshall recognizes two policies underlying lenity: first, that it provides defendants fair warning,[47] and second that "because 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."[48]

Although Marshall found sufficient ambiguity in *Bass* to invoke lenity, the diminished priority he assigned to it can be seen by comparing his later opinion in *Moskal v. United States*.[49] There, he applied the same statutory analysis to determine that lenity did not apply in evaluating "[w]hether a valid title that contains fraudulently tendered odometer readings may be a 'falsely made' security for purposes of" a fraud statute.[50] Marshall rejected the defendant's argument that "Because it is possible to read the statute as applying only to forged or counterfeited securities, and because some courts have so read it, . . . we should simply resolve the issue in his favor under the doctrine of lenity."[51] Instead, Marshall emphasized that lenity served as an interpretive rule of last resort and found that evidence of legislative intent was controlling: "we 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."[52] This assigned lenity a more modest role than Holmes did in *McBoyle*, where lenity took priority over legislative purpose. By employing a more pluralistic set of statutory tools, Marshall had more ways to disambiguate the statute and would only invoke lenity as a last resort. In *Moskal*, he concluded that "although criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature."[53] By giving greater priority to other sources

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[45] *See id.* at 347.
[46] *Id.* at 347 (emphasis added) (quoting United States v. Universal C.I.T. Credit, 344 U.S. 218, 221–22 (1952)).
[47] *Id.* at 348 (citing McBoyle v. United States, 283 U.S. 25, 27 (1931)).
[48] *Id.* at 348.
[49] 498 U.S. 103 (1990).
[50] *Id.* at 107.
[51] *Id.*
[52] *Id.* at 108 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).
[53] *Id.* at 113 (quoting McElroy v. United States, 455 U.S. 642, 658 (1982)).

of interpretive authority, Marshall reduced lenity's influence compared to its historical strong form.

C. Textualism and Lenity

Shifting now to consider the rise of textualism and its implications for lenity, the proper role of lenity in statutory interpretation is part of a longstanding intra-textualist dispute at the Court. The dominant position has been to curtail the application of lenity by determining through textual analysis that the text provides an objective and unambiguous interpretation on its own.[54] However, even as the application of lenity has narrowed under textualism, some textualist judges have called for a return to the strong form of lenity invoked in the founding era.[55] Textualist judges have sharply split over whether lenity can be justified on textualist grounds.[56] Justice Gorsuch, who defends lenity, reconciles textualism and lenity by invoking a separation of powers rationale and calling for judicial modesty.[57]

In *Chapman v. United States*,[58] the Court was asked to determine whether to include the weight of blotter paper when calculating the mandatory minimum sentence for LSD possession under the Controlled Substances Act.[59] The sentencing statute was arguably ambiguous as applied to LSD because it calculated sentences based on the weight of a "mixture or substance containing a detectable amount of [LSD]."[60] Justice Rehnquist writing for the Court ruled that lenity did not apply after finding the phrase "mixture or substance" unambiguous and the defendant's interpretation "not a plausible one."[61] The Court further raised the standard to invoke lenity, finding it inapplicable "unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has 'seize[d] everything from which

[54] One review of the Rehnquist Court's lenity cases found that "In thirty cases [of forty-eight], the Court found the statutes at issue unambiguous and therefore rejected narrow readings based on the rule of lenity. Often, the Court explicitly rejected claims that the rule applied. In other cases, the Court implicitly found the statutes unambiguous by not even mentioning lenity." Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2428 (2006).
[55] *See* Solon, *supra* note 21, at 110 ("Scalia has staked out a position very reminiscent of John Marshall's, especially those aspects of it that Frankfurter apparently had put to rest.").
[56] *See infra* Part I.D.
[57] *See infra* notes 81–87 and accompanying text.
[58] 500 U.S. 453 (1991).
[59] *Id.* at 455.
[60] *See id*. at 457.
[61] *Id.* at 459.

aid can be derived,' it is still 'left with an ambiguous statute.'"[62] Here, lenity remains a rule of last resort, but now can only be invoked when a statute is "grievously ambiguous;" otherwise, the court will apply its best reading of the statute without consideration of lenity.[63]

These two considerations worked together to deprive criminal defendants the benefit of lenity. Textualist judges generally retain the reduced priority of lenity from the legal process school but reject other interpretive tools, believing that express text is the only reliable indication of congressional intent.[64] Then, in a textualist mode of analysis, the judge is more likely to believe they can find an objective unambiguous interpretation of the text alone—and so there is no need for a gap filling interpretive rule like lenity.[65] Reducing lenity's analytical priority and requiring grievous ambiguity to trigger it in the first place, the Court has deprived criminal defendants of the benefit of the doubt under ambiguous criminal laws.

However, despite these dual pressures, some dissenting textualist judges have been willing to invoke lenity in its stronger form. Justice Scalia's dissent in *Moskal*, the "title washing" security fraud case discussed above, provides one such example.[66] Scalia rejected the pluralistic approach of the majority, which took into consideration Congress's broad purposes behind the statute and legislative history as evidence of such a purpose. "What displaces normal principles of construction here, according to the Court, is 'Congress' broad purpose in enacting [the statute]—namely, to criminalize trafficking in fraudulent securities that exploits interstate commerce.' But that analysis does not rely upon any explicit language, and is simply question-begging."[67] Here, Scalia pushes back against the expanded set of sources of interpretive authority canvassed by the majority. By prioritizing text over legislative

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[62] *Id.* at 463. (quoting Huddleston v. United States, 415 U.S. 814, 831 (1974) and United States v. Bass, 404 U.S. 336, 347 (1971)).

[63] As the dissent raised, there was legislative evidence in the record that complicated the majority's textual analysis which the majority did not consider. *See id*. at 470–71 (Stevens, J., dissenting). Justice Stevens wrote:

> Because I do not believe that the term 'mixture' encompasses the LSD and carrier at issue here, and because I, like the majority, do not think that the term 'substance' describes the combination any more accurately, I turn to the legislative history to see if it provides any guidance as to congressional intent or purpose.

Id.

[64] *See* Solon, *supra* note 21, at 109 ("[T]he Rehnquist Court routinely applies the narrow, Frankfurter version of lenity.").

[65] *See supra* note 54.

[66] 498 U.S. 103 (1990).

[67] *Id.* at 129 (Scalia, J., dissenting).

purpose, Scalia creates more room for lenity. He rejected that the "ordinary meaning" of a "falsely made document" extends to a genuinely issued document that incorporates a false odometer reading.[68] Scalia invoked lenity to strictly construe the statute to its more prototypical ordinary meaning.

> If the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art, and (to make matters worse) give the words a meaning that even one unfamiliar with the term of art would not imagine. The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.[69]

To justify invoking lenity, Scalia ties the canon to the constitutional values of fair notice and the separation of powers.[70] So while the predominant result of textualism has been the loss of lenity, it is possible to use a textual mode of analysis to return lenity to its traditional strong form. Judges who do so appeal to constitutional values like fair notice and the separation of powers to reconcile textualist commitments with a substantive canon like lenity.

D. Lenity at the Modern Court

There is an ongoing intra-textualist split at the modern Court over these two understandings of the validity of lenity under textualism. The disagreement is most sharply expressed in the competing opinions of Justices Kavanaugh and Gorsuch in *Wooden v. United States*.[71] There, the defendant had been deemed a career offender under the Armed Career Criminal Act after burglarizing several storage units in a single night.[72] The Sixth Circuit considered each burglary a separate "occasion" under the guidelines "because the burglary of each unit happened at a distinct point in time, rather than simultaneously," and deemed the defendant a career offender under the guidelines.[73] The majority opinion rejected this interpretation, arguing that the ordinary meaning of an "occasion" is not

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[68] *Id.* at 119.
[69] *Id.* at 132.
[70] *See id.* at 131.
[71] 142 S. Ct. 1063 (2022).
[72] *Id.* at 365.
[73] *Id.* at 363.

so narrow,[74] and that the statutory history suggested this was not Congress's intention.[75]

The majority, however, did not mention lenity as a possible justification for its decision and Kavanaugh wrote separately to explain why "lenity has appropriately played only a very limited role in this Court's criminal case law."[76] Comparing the narrowing of lenity to the narrowing of *Chevron* before it was overturned he argues: "Properly applied, the rule of lenity therefore rarely if ever plays a role because, as in other contexts, 'hard interpretive conundrums, even relating to complex rules, can often be solved.'"[77] This reaffirmed the structure we saw in *United States v. Chapman*,[78] where a textualist judge will rarely have occasion to invoke lenity because they can find an unambiguous reading of the text considered on its own, without needing to resort to substantive canons. As Kavanaugh explained, "if 'a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the [law] at issue.'"[79] If text can be read to find unambiguous answers to interpretive questions, there is no need to invoke a substantive canon of last resort like lenity.

In contrast, Justice Gorsuch wrote separately to call for greater consideration of lenity in the Court's analysis, echoing Justice Scalia's understanding of the rule as reinforcing the separation of powers.[80] Gorsuch invoked lenity in its stronger form by arguing that "any reasonable doubt about the application of penal law must be resolved in favor of liberty."[81] He rejected the limiting of lenity seen in *United States v. Chapman*, arguing that "[t]his 'grievous' business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions."[82] He additionally called for restoring lenity's analytical priority in statutory interpretation: "Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step

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[74] *See id.* at 367 ("[An ordinary person] would, using language in its normal way, group his entries into the storage units, even though not simultaneous, all together—as happening on a single occasion, rather than on ten 'occasions different from one another.'").

[75] *See id.* at 371 ("Congress added the occasions clause only after a court applied ACCA to an offender much like Wooden—a person convicted of multiple counts of robbery arising from a single criminal episode.").

[76] *Id.* at 376 (Kavanaugh, J., concurring).

[77] *Id.* at 377 (quoting Kisor v. Wilkie 588 U.S. 558, 575, 632 (2019)) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

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

[79] *Id.* at 377 (quoting *Kisor*, 588 U.S. at 632).

[80] *Id.* at 396 (Gorsuch, J., concurring) ("And [lenity] is just one of a number of judicial doctrines that seek to protect fair notice and the separation of powers.").

[81] *Id.* at 388.

[82] *Id.* at 392.

isn't to legislative history or the law's unexpressed purposes. The next step is to lenity."[83] To reconcile this strong form of lenity with textualism, he argued that lenity is an appropriate judicial doctrine because it enforces constitutional values like fair notice[84] and the separation of powers.[85] In doing so, he continues the project we observed in founding era cases where Chief Justice Marshall supplied a uniquely American justification for lenity grounded in structural considerations of our government to supplement the English common law justification that grounds the rule in tenderness for the accused. As Gorsuch concluded,

> From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.[86]

* * *

Reflecting on the slow demise of lenity situates the ongoing dispute in context. At the founding, the Court incorporated a strong form of lenity as a clear statement rule from English common law and coupled it with an American justification about the separation of powers. This strong form of lenity was weakened by the legal process school who, by expanding the toolkit of statutory interpretation, reduced the priority of lenity to a tiebreaking rule. Into the modern era, there has been a schism amongst textualist judges concerning whether it is judicially appropriate to invoke lenity to give a criminal defendant the benefit of the doubt. Justice Gorsuch defends lenity as a substantive canon that protects constitutional values which is directly analogous to his understanding of the major questions doctrine in the administrative context.[87] But other textualist judges, who have adopted the major questions doctrine, continue to refuse to invoke lenity. The following Part II demonstrates one additional path to reconciling lenity and textualism. Drawing from

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[83] *Id.* at 395.
[84] *Id.* at 389 ("Lenity works to enforce the fair notice requirement [of due process] by ensuring that an individual's liberty always prevails over ambiguous laws.").
[85] *Id.* at 391 ("Lenity helps safeguard [the separation of powers] by preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." (quoting United States v. Mann, 26 F. Cas. 1153, 1157 (No. 15,718) (CC NH 1812)).
[86] *Id.* at 392.
[87] *See* West Virginia v. EPA 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring) ("Like many parallel clear-statement rules in our law, [the major questions doctrine] operates to protect foundational constitutional guarantees.").

Justice Barrett's approach to the major questions doctrine as a linguistic canon, I develop an understanding of lenity as an interpretive rule that helps courts to read a statute as an ordinary person would.

II. AN EXPANSIVE VIEW OF LINGUISTIC CANONS

In the debates over lenity, it has generally been agreed that lenity is a substantive canon that protects some substantive value.[88] The ongoing dispute about its continued validity under textualism turns on whether the substantive values it enforces are constitutional.[89] The background assumption of Gorsuch's opinion is that it is judicially appropriate under textualism to strain statutory language only in virtue of substantive values that can be found in the Constitution. This stands in contrast to lenity at the founding, where it was further animated by the extra-constitutional value of "tenderness for the accused." But there's another category of canons that textualists deem judicially cognizable: the linguistic canons.[90] Linguistic canons are interpretive rules that reflect how an ordinary reader would understand a statute. They are judicially appropriate because they aid the Court in reaching the best understanding of the text.[91] The traditional linguistic canons generally express grammatical rules applied by ordinary linguistic speakers, for instance, construing particulars in a list in light of the commonality they all share.[92] But Justice Barrett appears to take a broader view of the linguistic canons to include the major questions doctrine. This Part argues that her argument for the validity of the major questions doctrine applies with equal force to lenity. Thus, there is no principled reason for a textualist judge to adopt one and not the other.

A. Major Questions as a Linguistic Canon

I argue that recent jurisprudence in the administrative context has newly opened the door to expanding the set of linguistic canons. This shift has occurred as the Court is grappling with reconciling textualism

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[88] *See e.g.*, Barrett, *supra* note 3, at 128–34, Hopwood, *supra* note 20, at 931–37, Solon, *supra* note 21, at 134–43.
[89] *See supra* notes 85–97 and accompanying text.
[90] *See* Barrett, *supra* note 3, at 117 ("Linguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent.").
[91] *See* Barrett, *supra* note 3, at 122 n.52 ("Because linguistic canons are rules of thumb about how English speakers use language, textualists find them valuable to the project of determining how a statutory provision would be understood by a skilled user of the language.").
[92] *See, e.g.*, Yates v. United States 574 U.S. 528, 543 (2015) (applying the noscitur a sociis canon to narrowly construe "tangible object" in the Sarbanes-Oxley Act).

and the major questions doctrine.[93] While the majority view of the court is that the major questions doctrine can be reconciled with textualism because it enforces the constitutional separation of powers,[94] others have suggested that it may actually be a linguistic canon that reflects ordinary principles of linguistic practice.[95] By taking notice of how Justice Barrett defends the major questions doctrine as a linguistic canon, I argue that the same justification applies for lenity. I argue that if the set of linguistic canons is broad enough to support the major questions doctrine, then it is broad enough to support lenity. There is no principled reason to shield major industries from regulation with a clear statement rule and not extend the same benefit of the doubt to criminal defendants.

In *Biden v. Nebraska,* the Court invoked the major questions doctrine to deny the Secretary of Education the authority to "effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID-19 pandemic."[96] The Secretary had found the authority to relieve student debt under the HEROES Act which allowed the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a . . . national emergency."[97] The Secretary determined that COVID-19 was such an emergency and attempted to discharge $10,000 dollars of student debt for most student loan borrowers.[98] The majority focused on interpreting the meaning of "modify" in the act and determined that it conferred only the ability to "make modest adjustments and additions to existing provisions, not transform them."[99] Finding that the regulatory action was sufficiently

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[93] *Compare* Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (arguing that clear statement rules are in significant tension with textualism), *with* West Virginia v. EPA, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring) (arguing that the major questions doctrine is a clear statement rule, which "operates to protect foundational constitutional guarantees").

[94] *See* West Virginia v. EPA, 597 U.S. 735 (2022) (Gorsuch, J., concurring).

[95] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring). It is worth noting that Justice Barrett joined the majority in *Wooden*, *supra* note 52, in declining to apply lenity. *Cf.* Barrett, *supra* note 7 at 155 (arguing that lenity is consistent with textualism as long as it is employed as a "tie breaker between two equally plausible interpretations of the text").

[96] 143 S. Ct. at 2364 (quoting 87 Fed. Reg. 52944 (2022)).

[97] *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

[98] *Id.* at 2364.

[99] *Id.* at 2369.

novel,[100] economically significant,[101] and politically controversial,[102] the Court invoked the major questions doctrine holding "A decision of such 'magnitude and consequence' on a matter of 'earnest and profound debate across the country' must 'res[t] with Congress itself, or an agency acting pursuant to a *clear delegation* from that representative body.'"[103]

Justice Barrett wrote separately in *Biden v. Nebraska* to address how the major questions doctrine can be squared with textualism. She begins by acknowledging that the major questions doctrine appears to conflict with textualism: "I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause."[104] That is because "a strong-form canon 'load[s] the dice for or against a particular result' in order to serve a value that the judiciary has chosen to specially protect."[105] Barrett instead views the doctrine as encoding ordinary linguistic practices and understands the doctrine as "an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.'"[106] She justifies her view by appealing to hypotheticals which purport to show that we construe delegations of authority narrowly in our ordinary linguistic practice.

One of her hypotheticals concerns the authority of a babysitter acting under parental delegation:

> Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the babysitter takes the kids on a road trip to an amusement

[100] *See id.* at 2363–64, 2373 (discussing how the act's authority had only previously been invoked to cover smaller more discreetly impacted classes of borrowers).

[101] *See id.* at 2373 (noting that the program would apply to "[p]ractically every student borrower" and cost the taxpayers $469–519 billion).

[102] *See id.* at 2373 (noting that Congress had considered and failed to enact eighty student loan reform legislation during a recent legislative term).

[103] *Id.* at 2374 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2616, 2620 (2022)) (emphasis added).

[104] *Id*. at 2376.

[105] *Id.* at 2377 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 27 (Amy Gutmann ed., new ed. 1997)).

[106] *Id.* at 2378 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). Although Barrett does not expressly say that she understands the major questions doctrine as a linguistic canon, her defense of the doctrine as a matter of ordinary linguistic practice suggests this result. *See* Brian Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. 70, 72 ("[W]hat makes a canon linguistic? For modern textualists, the answer seems to be that the canon reflects ordinary understanding of language. Justice Barrett relied mainly on 'common sense' in claiming that the major questions doctrine is a linguistic canon.").

> park, where they spend two days on rollercoasters and one night in a hotel.[107]

This, Barrett concludes, would be an unreasonable interpretation under our ordinary linguistic practices. While the babysitter's action is consistent with the instruction to have fun "in a literal sense," it is not a "*reasonable* understanding of the parent's instruction."[108] Textualism, on Barrett's telling, does not require literalism, and a judge may take notice of context which includes "common sense" rules that we use to communicate conversationally.[109] As her hypothetical purports to demonstrate, it is part of our ordinary practice of communication to narrowly construe delegations like the parent to the babysitter. As a result, she argues the doctrine is fully compatible with textualism, as it merely incorporates context to aid the court in finding "the most plausible reading of the statute."[110]

B. Lenity as a Linguistic Canon

If one accepts such a broad understanding of linguistic context to justify the major questions doctrine, one must also see lenity as fully consistent with textualism.[111] Consider the following extension of Barrett's hypothetical that shows that lenity is just as much a part of our commonsense ordinary linguistic practice. After the parent leaves for the weekend, the babysitter is supervising the children as they do their schoolwork. Wanting to induce the children to work hard, the babysitter gives them one of the following instructions:

> **Disciplinarian Babysitter**: "If you don't finish all your work before dinner, I'll put you in a timeout."
>
> **Benevolent Babysitter**: "If you finish all your work before dinner, I'll let you have an extra serving of ice cream."

The children proceed to finish all their schoolwork, but not all of their chores. Accordingly, the babysitter withholds the reward or inflicts

[107] Biden v. Nebraska, 143 S. Ct. at 2379. Barrett additionally offers a hypothetical of a grocery clerk acting under the delegated shop owner to buy provisions for the store; since the mechanics of these hypotheticals are the same, I omit the second for brevity.
[108] *See id.* at 2379–80.
[109] *See id.* at 2379.
[110] *Id.* at 2383.
[111] It is important to note that this section assumes that Justice Barrett's understanding of the major questions doctrine is fully consistent with textualism. This Note has no stake in whether this is correct but rather aims to place the major questions doctrine and lenity on equal terms.

the punishment. Here, "work" creates an ambiguity. Its narrow or prototypical meaning extends to the children's schoolwork in this context, but its literal meaning could also include the children's household chores. Comparing the two instructions, an ordinary interpreter would be more likely to find that the children had satisfied the disciplinarian babysitter's instruction, refusing to punish them but not awarding any reward. As a matter of common sense, it seems like our ordinary linguistic practice is to narrowly construe language in the presence of penal liability and adopt the narrower of two possible interpretations. If this is true, then a court that applied lenity to a criminal law would merely be interpreting the statute as would an ordinary person. Rather than protecting a substantive value, lenity would merely be reflecting our ordinary linguistic practices and would thereby be fully consistent with textualism.

Comparing Barrett's hypothetical to mine, the rule of lenity requires a more minimal conception of linguistic context. Textualists have long acknowledged that textualism does not require literalism; a textualist need not restrict her interpretation of a statute to its words in an atomized state by asking what each word, on its own, means.[112] A reasonable interpretation of any statute requires some notice of context; the hard question is how much notice is judicially appropriate.

If we think of linguistic context surrounding an utterance as a nesting doll made up of concentric layers, the individual words of the utterance would form its inner core. Here, we would look for the meaning of "work" or "fun" using tools like dictionaries or corpus linguistics. One layer out, we can consider the word in its immediate context by considering its role in the utterance taken as a whole. This steps up a level of generality from individual words to whole sentences. The "whole text" rule operates at this level of context and counsels interpreting a word so that it harmonizes with the rest of the statute.[113] Out another layer, and we can notice the identity of a speaker and ask whether it affects the meaning of what they said. Finally, we can step further out and consider evidence about what that speaker's intention was in making the utterance. Here, context includes inquiring into why the speaker made the utterance to begin with and we can ask whether our interpretation of the utterance aligns with a reasonable intention that can be attributed to the speaker. The broadest understanding of context

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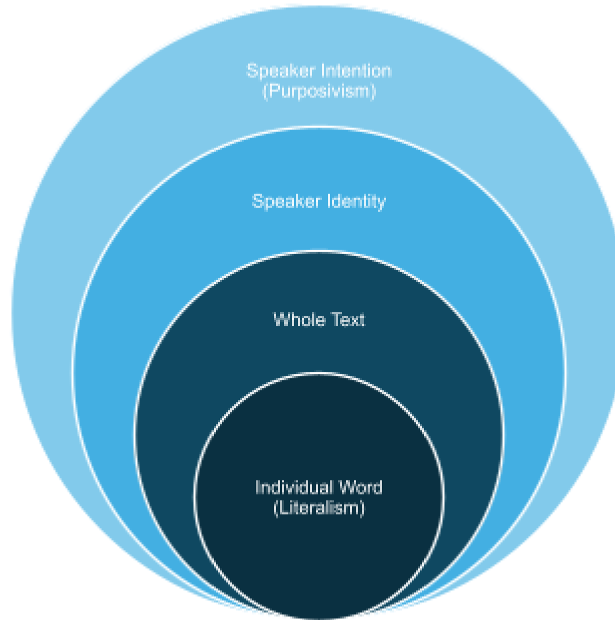
[112] Scalia & Garner, *supra* note 5, at 356 ("Adhering to the *fair meaning* of the text (the textualist's touchstone) does not limit one to the hyperliteral meaning of each word in the text."); Caleb Nelson, *What Is Textualism?*; 91 VA. L. REV. 347, 348 (2005) ("no 'textualist' favors isolating statutory language from its surrounding context").

[113] *See* Scalia & Garner, *supra* note 5, at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

reflects what could be called purposivism, or the Blackstonian inquiry into the mischief that a statute was intended to solve.[114] For illustration, consider the following diagram:



Between sheer literalism and expansive purposivism, there is a grey area of linguistic context where it becomes less certain whether its judicially appropriate to take notice of the contextual evidence surrounding an utterance or legislative act. The judgment about how far to look beyond the words of the utterance balances the fact that individual words are usually under-determinative of meaning with the concern that too broad a conception of context is speculative and open to manipulation to reach a preferred outcome. The important question for any textualist, then, is how far beyond each word judicial notice of context should extend.

Barrett's hypothetical expands the boundary of context beyond the "whole text" approach to textual analysis. Consider that her hypothetical requires interpretive notice of who the speaker is and their relative authority over the listener. Barrett's hypotheticals trade on the power imbalance between the babysitter and a parent, taking notice of "'[t]he context in which the principal and agent interact,' including their '[p]rior dealings,' industry 'customs and usages,' and 'the nature of the

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[114] *See generally* Samuel L. Bray, *The Mischief Rule* 109 GEO. L.J. 967 (2021) (discussing the purposivism of Hart and Sacks and comparing Blackstone's inquiry into a statute's "reason and spirit").

principal's business or the principal's personal situation.'"[115] Here, context extends well beyond what was said to who is speaking. Barrett accepts that a change in who the instruction is spoken to can determine whether the trip to the amusement park is authorized. She grants that "we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent."[116] As such, consideration of the speaker's relationship to the listener is necessary to reach the outcome of the hypothetical as the same utterance made to a grandparent would yield a different result.

These considerations are carried out in the administrative context by taking notice of the speaker's identity—Congress—and taking notice of Congress's role in the constitutional structure.[117] Barrett's hypothetical may even incorporate more extrinsic contextual evidence of speaker intention as she accepts "other clues" of the parent's meaning such as leaving amusement park tickets on the counter, showing the babysitter where the suitcases are, and budgeting two thousand dollars for the weekend.[118] Such considerations ring surprisingly atextual as they evince what makes sense to attribute to the speaker's intention.[119] Regardless, the contextual features that trigger a narrow interpretation here are drawn from considerations outside of the express language of the utterance.

In contrast, all the context needed to support my lenity hypothetical is contained within the express utterance itself. The hypothetical turns on an ambiguous condition (what counts as "work"?), followed by an express consequence of either a punishment or reward. The presence of a punishment in the rule is what triggers a narrower interpretation. All the context needed to trigger the narrowing interpretation is contained within the utterance itself without any need of other clues. The same goes for criminal statutes enacted by Congress which expressly define the proscribed behavior and set forth a punishment. The rule of lenity uses contextual features contained within the statute as background context to interpret an ambiguous condition and counsels that ambiguities be strictly construed when the statute contains a criminal punishment. This inference requires no broader conception of context than the whole text

[115] *Biden v. Nebraska*, 143 S. Ct. at 513 (Barrett, J., concurring) (quoting Restatement (third) of Agency § 2.02, Comment *e*).
[116] *Id.* at 514.
[117] *Id*. at 515 ("Because the Constitution vests Congress with '[a]ll legislative Powers,' a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch." (quoting Art. I, § 1)).
[118] *See id.* at 514.
[119] *See* Tobia, Daniel E. Walters, & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1222–24 (2024) ("The ability for judges to appeal, with little restraint, to "common sense" and "context," calls to mind Scalia's fears about non-textualist judging: "personal discretion to do justice" as the judges saw fit." (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989))).

rule as it uses one portion of the statute to interpret another. Contrast this with the major questions doctrine, which requires judicial notice of who is speaking and their role in the constitutional structure to trigger strict construction. A conception of linguistic context that is broad enough to support the major questions doctrine must then also support lenity.

CONCLUSION

The aim of this note is to reestablish parity between the rules of statutory construction in the criminal and administrative contexts. The Court currently embraces the major questions doctrine, a clear statement rule protecting industries from major agency regulation under ambiguous authorizing statutes, but denies criminal defendants the benefit of the doubt when ambiguous criminal statutes threaten incarceration. While textualism disfavors substantive canons that militate against the best reading of statutory text, there is no good textualist reason for the disparity between these interpretive regimes.

If one agrees with Justice Gorsuch that the major questions doctrine is justified as a substantive canon that protects the separation of powers, then the same can be said of lenity. The major questions doctrine works to preserve Congress's power to make structural economic decisions, and lenity works to preserve its authority to decide when the state may deprive its citizens of liberty. This can be analogized to Justice Gorsuch's treatment of major questions as a clear statement rule that protects legislative supremacy. Both interpretive rules are on a par as substantive canons that protect constitutional values. Endorsing this rationale for major questions undermines the Court's reasons for relegating lenity to situations of grievously ambiguous statutes. Both lenity and major questions could be treated as clear statement rules that apply at the outset of statutory interpretation to raise the standard of clarity Congress must meet in constitutionally sensitive areas.

But, if one instead agrees with Justice Barrett that the major questions doctrine is justified as a common-sense rule of linguistic interpretation, then again, the same can be said of lenity. Both lenity and the major questions doctrine can be said to reflect ordinary judgments about how a statute should be understood in context. The major questions doctrine takes notice of the relationship between Congress and administrative agencies; lenity responds to the presence of a criminal sanction. Ordinary speakers construe delegations and punishments narrowly as a matter of ordinary linguistic practice and so applying the doctrines is a permissible way of reaching the best reading of the statutory text. On this understanding of both doctrines, they are not treated as clear statement rules that trump reasonable readings of the statute, but rather as one of a plurality of interpretive tools the courts

may use to disambiguate a statute. Importantly, recognizing this analogy would bring a substantial shift in the Court's current treatment of lenity. If lenity helps a court interpret a statute the same as an ordinary person would, it poses no particular danger to textualism. Applying lenity then becomes another tool that the courts may use to reach the best reading of statutory language that reflects our ordinary linguistic practices. Since lenity wouldn't pull against the best reading of the text, there would be no reason to relegate it to tie-breaker status when the other tools failed.

However the Court comes to understand the justifications of the major questions doctrine, the same justification is available for lenity. If the major questions doctrine is understood as a clear statement rule, that warrants applying lenity it in its traditional strong form that can trump other interpretive evidence. If the major questions doctrine is understood as a commonsense interpretive rule that helps the court understand a statute in its context, the same can be said for lenity, which should then apply with equal priority to other interpretive tools. In either case, there is no longer a reason for the Court to treat lenity with particular suspicion only to be invoked in situations of grievous ambiguity. All this goes against the accepted view of lenity as a canon that exchanges the best reading of the text for mercy for the accused. The Court's increased usage of the major questions doctrine suggests new grounds for lenity and how criminal defendants may reclaim the benefit of the doubt before a textualist court.