THE END OF THE PARTY: THE NECESSITY OF APPLYING AN ONTOLOGICAL FRAMEWORK TO THE PARTY-BASED CANONS OF CONSTRUCTION

Comment

Abstract

A Gordian knot ties textualism and the canons of construction. The use of the canons is a central feature of textualism and is said to promote neutral judicial decision-making. But textualists have never effectively rebutted the fundamental critique of the canons—that they can be employed to reach pre-conceived ends. The use of canons, and substantive canons in particular, is even more problematic and interesting questions are raised about their legitimacy in the federal judicial system. Substantive canons frequently favor one party over another and seemingly conflict with the basic role of a neutral judiciary. Where do federal courts draw their authority to use them? Are they creatures of common law? Can the Supreme Court's use of them be given stare decisis effect? This Comment argues that the failure to focus on the ontology of substantive canons and their nature and relative characteristics has led to confusion concerning their application. By focusing on one of the substantive canons—the rule of lenity—and expressing how lenity is a valid rule when applied in the criminal, as opposed to the civil tax context, this Comment demonstrates the value of broadly reevaluating the ontonolgy of the canons of construction and how the current approach should be recalibrated.

I. INTRODUCTION

> "[T]he law cannot hope to sustain its burden of stability, flexibility, and transparency unless it pays scrupulous attention to its own taxonomy. . . . The law simply could not be understood unless it took care to classify itself 'methodically.'"[1]

One issue looms large for textualists of all stripes—Justice Scalia's "new textualism" and its emphasis on the use of the canons of construction.[2] These canons use linguistic presumptions, normative conclusions, and judge-made policies to resolve textual ambiguities with a rule of thumb.[3] As a result of Justice Scalia's efforts, canons have become the closest thing to a doctrine in the field of legislation and statutory interpretation.[4]

At the same time, scholars and jurists have not yet offered a comprehensive explanation that reconciles these canons with Justice Scalia's skepticism for judicial, common lawmaking authority.[5] This oversight is particularly noteworthy given the recent release of Professor Gluck and Judge Posner's survey of circuit judges.[6] One survey question in particular asked about the use of the canons in light of Chevron deference.[7] Some respondents stated that they viewed this canon as a binding legal rule,while others viewed it merely as a guide.[8]

However, this understanding of canons leaves many questions unanswered. If canons are substantive legal rules, then from where do judges derive the legal authority to use them? Can Congress overrule the

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1. Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 3 (2000).

2. *See generally* ANTONIN SCALIA & BRIAN GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); John F. Manning, *Legal Realism & The Canons' Revival*, 5 GREEN BAG 283, 290 (2002) ("Because textualists believe in a strong version of legislative supremacy, their skepticism about actual intent or purpose has predictably inspired renewed emphasis on the canons of interpretation, particularly the linguistic or syntactic canons of interpretation.").

3. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1330 (2018) (describing "linguistic" or "textual" canons as "presumptions about how language is used" and describing "substantive" or "policy" canons as "normative presumptions"). *See generally* William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 538, 552 (2013).

4. Gluck & Posner, *supra* note 3, at 1327 ("To the extent that the field of legislation has 'doctrines,' they are the canons.").

5. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 461 (2000) (Scalia, J., dissenting) ("What today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States.").

6. Gluck & Posner, *supra* note 3, at 1301.

7. *See* Gluck & Posner, *supra* note 3, at 1345 ("[W]hen asked in the very next question about *Chevron* deference—the interpretive rule that courts must defer to reasonable agency interpretations of ambiguous statutes—every interviewed judge told us this rule is binding even if they disagreed with it.").

8. *See id.*

judiciary's use of canons to interpret statutes? Is there a hierarchy of canons such that can resolve conflicts between them? To the extent that "we're all textualists now," this problem has far-reaching implications for statutory interpretation.[9]

This Comment argues that the lack of understanding about the justification for canons stems from the failure of scholars and jurists to engage in legal "ontology."[10] Ontology is the word that Dorf uses to describe a field of legal scholarship that seeks to explain the categories that different legal rules and standards fall into based on their natures and characteristics.[11] This Comment also builds on the approach of ontologists by focusing on one substantive canon: the rule of lenity. This Comment considers whether—and when—it is appropriate for courts to fashion substantive rules in favor of classes of persons.

Following this Introduction, Section II lays out a framework of ontology that will be used throughout this Comment. Section III details the divide between different groups of textualists regarding the application of canons within the ontological framework that is propounded in Section II. Section IV focuses on the long history informing the contemporary rule of lenity and compares the legitimacy of the criminal rule of lenity and its tax law variant. Section V concludes with the point that, while the criminal rule of lenity is a valid exercise of constitutional common lawmaking, aspects of the civil tax rule of lenity may amount to unjustified judicial policymaking. This result comports with the legitimate exercise of post-*Erie* common lawmaking authority.[12]

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9. *See* Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), https://youtube .com/watch?v=dpEtszFT0Tg. Although this Comment discusses Justice Scalia, Judge Barrett, and Justice Kavanaugh at length, the subject of this Comment—the substantive canons and the merits of ontology as an approach—has no partisan valence. Recent empirical work suggests that the textualist interpretation is quite common (although not dominant) in the lower federal courts, regardless of party affiliation. *See* Gluck & Posner, *supra* note 3, at 1308.

10. *See generally* Michael Dorf, *The Ontology of Sovereign Immunity*, DORF ON LAW (May 31, 2018), http://www.dorfonlaw.org/2018/05/the-ontology-of-sovereign-immunity.html ("Ontology is a fancy word for the nature of a thing.").

11. *See id.*; *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 4–7 (2004) (giving an overview of the key works of ontology and concluding that while the discipline may be "endangered," there are signs of a resurgence). This Comment was partially motivated by a desire to demonstrate how an approach using ontology can solve practical interpretative issues. Professor Dorf has rightly argued that courts spend too little time and energy understanding the characteristics of legal doctrine. *See* Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 9 (1998) ("[The Court] should "worry less about finding the 'true' meaning of authoritative texts, and instead . . . focus on providing provisional, workable solutions to the complex and rapidly changing legal problems of our age.").

12. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

II. A FRAMEWORK OF LEGAL ONTOLOGY

Ontology is the word used by Professor Michael Dorf to describe the nature of a thing.[13] The study of Ontology has been used to categorize different legal rules and standards. Using the common language of ontology allows legal scholars to apply the same terms to certain concepts while debating their legitimacy without resorting to linguistic tinkering.[14] It became popular during the 1970s in response to the Warren Court's use of "prophylactic rules."[15] This Comment explains how ontology is the study of legal taxonomy and that, from it, scholars have established three broad categories of legal principles: constitutional adjudication, constitutional common law, and federal common law. Although this Comment is primarily dedicated to exploring the underpinning of canons, it is also meant to draw attention to the merits of ontology.[16]

Further, some argue that the stagnation of ontology in legal academia has been inflamed by jurists who have consciously glossed over many ontological issues.[17] For example, the Supreme Court has largely avoided recognizing expansive common lawmaking authority by making veiled references to "a free-floating principle."[18] This Comment argues for the adoption of an ontological approach precisely because of its usefulness in understanding a host of legal rules and principles.

A. The Post-Erie Federal Common Law

One basic reason that the ontology of substantive canons has never been explained is that they may not have needed much explanation at their inception.[19] Several substantive canons, including those discussed

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13. *See* Dorf, *supra* note 10 ("'Ontology' is a fancy word for the nature of a thing.").

14. *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1147 (2017) ("Once we recognize the importance and ubiquity of the law of interpretation, we can be clearer with ourselves and with each other about what we're doing in any given case—linguistic interpretation, legal reasoning, or judicial invention.").

15. *See* Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 20–22 (1975).

16. *See* Berman, *supra* note 11, at 3 (describing the scholarship around ontology as "endangered" but hopeful for a resurgence in interest).

17. *See* Michael Dorf, *The Supremacy Clause and Federal Common Law*, DORF ON LAW (Apr. 06, 2015, 7:10 AM), http://www.dorfonlaw.org/search?q=constitutional+common+law (explaining that a focus on ontology "exposes how sloppy the Supreme Court itself often is, making pronouncements about what the law requires, often without paying attention to at all to the source and nature of these pronouncements").

18. *See id.* (noting the problems inherent in this approach). Similar rationales have been used by scholars to explain canons; *see, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (giving an originalist argument that "the judicial Power" includes the power of equitable interpretation).

19. This Section should not be interpreted as offering a definitive view of what the scope of the judicial power was at the founding. Previous scholars have sufficiently created uncertainty as

infra, were adopted before the *Erie* conception of judicial power,[20] at a time when there was "a general federal common law" that was accompanied by an expansive equity power.[21]

Before *Erie*, the federal judiciary's conception of legal ontology distinguished "local" and "general" law.[22] The category of local law included a state's statutory laws, as well as the unwritten legal rules specific to that state.[23] The general law consisted of a subset of unwritten rules that drew from "sources that were common to all the states."[24] Furthermore, while a state court's interpretation of its local law was binding on federal courts, federal judges were not confined by a state court's general law interpretation.[25] For any question that federal courts labeled as one under the general law, they could establish their own binding common law.[26]

Accompanying this expansive version of federal judicial power in early American history was the frequent use of federal equity power.[27] Scholars have highlighted several instances where federal courts in the eighteenth and nineteenth centuries practiced equitable interpretation, which allowed judges to depart from the clear text of the statute in favor of a more equitable reading.[28] However, federal courts quickly abandoned this power, viewing it as inconsistent with the "judicial Power of the United States," with regards to the constitutional features of (1) the separation of powers and (2) bicameralism and presentment.[29]

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to Article III's original public meaning. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1670–71 (2001).

20. *See generally* Amy Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117–19 (2010) (listing the rule of lenity, Charming Betsy, avoidance, the presumption against retroactivity, sovereign immunity, and the Indian canons as six of the canons adopted in the first fifty years of the Republic).

21. Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Thompkins*, 54 WM. & MARY L. REV. 921, 924 (2013) (demonstrating that the concept of general common law that existed prior to *Erie* stretched back to the dawn of the Republic, well before Justice Story's opinion in *Swift v. Tyson*).

22. *Id.* at 925.

23. *Id.* ("The 'local' law of a particular state included both its *written* laws (such as the state constitution and statutes enacted by the state legislature) and at least a portion of its *unwritten* laws (such as rules grounded in peculiar local customs and rules about the status of free land and other things with a fixed locality in the state).").

24. *Id.*

25. *Id.* at 927–28 ("[F]ederal judges felt free to exercise independent judgement about the content of state law on 'general' questions.").

26. *Id.*

27. *See* Barrett, *supra* note 20.

28. *See, e.g.*, Eskridge, *supra* note 18, at 1058–84 (detailing the federal court's use of equitable interpretation in statutory cases).

29. Barrett, *supra* note 20, at 114–15 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001)).

William Blackstone is a prevalent voice connecting the general law and the federal judiciary's early claim of equity power.[30] Blackstone argued that unwritten laws are legitimized by their use over time,[31] imbuing courts with a kind of normative lawmaking authority.[32] *Erie Railroad Co. v. Tompkins* commanded a different conception of federal judicial authority;[33] the case has been called a "transcendently significant opinion" because it reframes the scope of separation of powers.[34]

In *Erie*, the Court expressed open support for legal positivism for the first time.[35] The Court established the idea that "the law of a jurisdiction is fundamentally a matter of social facts concerning officials . . . within the jurisdiction."[36] It also concluded that, although the federal judiciary engaged in federal common lawmaking since its creation,[37] the pre-*Erie* concept of general law was unconstitutional because, unlike state courts, federal courts lacked this common lawmaking authority.[38] Although the *Erie* Court held that "[t]here is no federal general common law,"[39] scholars have long understood that there remains a body of specialized federal common law emanating from statutes and treaties.[40] Furthermore, this post-*Erie* form of federal common law is binding on the states through the Supremacy Clause.[41]

After *Erie*, some have argued that the scope of this new federal common law is limited to federal-specific enclaves such as admiralty,

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30. *See* Nelson, *supra* note 21, at 931 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 64).

31. *Id.*

32. *Id.* at 931 n.33 ("The common law is the prototypical example of 'unwritten' law, but that term also encompasses principles of equity jurisprudence and rules that were typically enforced in admiralty.").

33. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

34. Arthur Krock, *In the Nation: A Momentous Decisions of the Supreme Court*, N.Y. TIMES, May 3, 1938, at 22; *see* Nelson, *supra* note 21, at 922. "*Erie* has become the starting point for many modern arguments about federalism and the separation of powers." *Id.*

35. *See generally*, Michael Green, *Erie, Swift, and Legal Positivism*, JURIS. JOTWELL, (Sept. 24, 2012) https://juris.jotwell.com/erie-swift-and-legal-positivism/ (noting that Justice Brandeis rejected Swift in part because it was antithetical to legal positivism).

36. *Id.*; *see Erie*, 304 U.S. at 78.

37. *Erie*, 304 U.S. at 78. Positivists contend that courts prior to *Erie* "were really applying *federal common law*—that is, common law that existed due to social facts about federal officials—even if [they] did not understand the law [they were] applying in those terms. Indeed, that is precisely Brandeis's strategy in *Erie*." Green, *supra* note 35.

38. *Erie*, 304 U.S. at 78; *see* Green, *supra* note 35; *see also* Nelson, *supra* note 21, at 980–82 (explaining the *Erie* Court's constitutional thesis).

39. *Erie*, 304 U.S. at 78.

40. Monaghan, *supra* note 15, at 10, 12 (citing Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964)).

41. *Id.* at 10–11.

foreign affairs, and interstate disputes.[42] It could also be argued that this authority includes "remedial power" and the ability to craft certain defenses to federal statutes.[43] This type of lawmaking function is "interstitial" in nature, which means that it merely fills in the gaps of the positive law that prompts it.[44] For instance, courts use the Religious Freedom Restoration Act (RFRA)[45] to grant religious exemptions to federal statutes;[46] by reading the RFRA as a "generally available presumptive exemption regime," courts are given the authority to grant exemptions where federal law is silent on the issue.[47]

Some scholars have recently begun claiming that substantive canons are a species of federal common law.[48] The implications of this idea are explained throughout this Comment. For now, it is worth noting that, while some canons might fall into the category of federal common law, they simply cannot do so where they enforce principles external to the statute being interpreted. Again, federal common law is properly understood as interstitial; thus, the construction of a federal common law that enforces judge-made policy preferences external to positive law is inconsistent with the *Erie* conception of judicial power and the spirit of new textualism.

B. Constitutional Adjudication vs. Constitutional Common Law

Scholars focusing on legal ontology were primarily concerned with developing a language to understand the rise of new "constitutional" rules that were not dictated by the text of the Constitution. For example, *Miranda v. Arizona* did not fit any prior conception of constitutional

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42. Sasha Volokh, *Federal Common Law: It's Actually Everywhere!*, WASH. POST.: VOLOKH CONSPIRACY (Aug. 28, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/28/federal-common-law-its-actually-everywhere/?noredirect=on&utm_term=.36b6a93cb658.

43. *Id.* Volokh notes that the remedial power was a potential "ground for the validity of the Sentencing Guidelines" in Misretta v. United States. *Id.*; *see* Misretta v. United States, 488 U.S. 361 (1989).

44. *See* Monaghan, *supra* note 15, at 11 (citing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 336–38 (2d ed. 1973)) (describing this power as interstitial and "exercised 'against the background of the total *corpus juris* of the states'").

45. 42 U.S.C.A. 2000bb-4 (1988).

46. Eugene Volokh, *Religious Exemptions, RFRA Carveouts, and "Who Decides?,"* WASH. POST.: VOLOKH CONSPIRACY (Apr. 1, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/01/religious-exemptions-rfra-carveouts-and-who-decides/?utm_term=.bcff4902320d.

47. *Id.*

48. *See, e.g.*, Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013); Jacob Scott *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 346 (2010) (referring to canons as "interpretive common law" but not explicitly placing them within traditional federal common law).

adjudication.[49] In *Miranda*, the Court did not establish the "Miranda Warnings" because the Constitution demanded them directly, but because the warnings are necessary to prevent constitutional violations in the first place. While the Court described these rules in constitutional terms, it expressly recognized Congress or the states could modify the Miranda Warnings when and as they deem appropriate, provided the amended warnings meet the minimum standard established in *Miranda*.[50]

Professor Henry Monaghan coined the term "constitutional common law" to help explain *Miranda* and other decisions from the Warren Court-era.[51] He distinguished between judicial decisions that interpret the Constitution, such as the classic *Marbury v. Madison* style of constitutional adjudication,[52] and rules of constitutional common law that "draw their inspiration and authority from, but [are] not required by, various constitutional provisions."[53] In other words, constitutional common law—as defined by Professor Monaghan—honors the spirit rather than the precise letter of the Constitution. Professor Monaghan explained the existence and characteristics of constitutional common law rules by placing them in context with the greater taxonomy of legal rules and standards.[54]

Constitutional common law can be sorted into one of three "buckets." The first bucket of constitutional common law examines the negative implications of affirmative grants of power.[55] The second bucket consists of inferences drawn from the Constitution's structure.[56] The third bucket contains so-called prophylactic rules, which are impliedly derived from the Constitution to implement an explicit provision.[57] However, it is important to note that Congress can modify

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49. 384 U.S. 436 (1966).

50. *Id.* at 467.

51. Monaghan, *supra* note 15, at 2–3.

52. *See generally* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1365–68 (1973).

53. Monaghan, *supra* note 15, at 3.

54. *See generally* Monaghan, *supra* note 15, at 2–40.

55. The classic example is the Dormant Commerce Clause doctrine, inferred from the grant to Congress of power "[t]o regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3; *see* New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 ("[I]t has long been accepted that the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce."); *see also* Zschernig v. Miller, 389 U.S. 429, 436–41 (1968) (examining state regulation of foreign affairs).

56. *See* Shelby Cty. v. Holder, 570 U.S. 529, 544 (2013) (citations omitted) (inferring an "equal sovereignty" principle among the states from the Constitution's system of federalism).

57. At times, common law is also inferred from grants of jurisdiction in the Constitution. For example, a federal common law of admiralty has been justified by the Constitution's grant of jurisdiction over suits in admiralty. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 381–403 (1970) (finding an act of Congress intended to "achieve uniformity in the exercise of admiralty

the constitutional common law without disturbing the "'finality' aspect of *Marbury*" because constitutional common law does not emanate directly from the Constitution's text;[58] the extent to which Congress can do that though is directly related to the bucket where the rule falls.

Consider the example of the Dormant Commerce Clause: it forbids states from enacting laws that discriminate against or unduly burden interstate commerce. However, as Professor Dorf explains, "because the doctrine is a judicial inference from Congress's Article I Section 8 power, Congress may authorize state laws that, absent such authorization, would violate the Dormant Commerce Clause."[59] Moreover, judicial pronouncements regarding the Dormant Commerce Clause are also displaced when Congress chooses to exercise its interstate commerce power because the Dormant Commerce Clause emanates directly from a constitutionally-granted congressional power.[60] In other words, by its very nature, the Dormant Commerce Clause's ontology gives Congress the authority to displace it. For these reasons, the Court consistently allows Congress to overrule judicial pronouncements regarding the Dormant Commerce Clause.[61]

The prophylactic bucket of constitutional common law rules has more limited interaction with Congress. This bucket acts as a "national floor" for civil liberties, which means that states may experiment freely with their own rules provided those rules do not fall below the Court-prescribed constitutional minimum.[62] The Warren and Burger Courts also determined that Congress could displace these rules, but only if Congress offers an adequate alternative.[63] In effect, this means that

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jurisdiction" and such uniformity "will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in the whole country.'").

58. Monaghan, *supra* note 15, at 15; *see* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution.").

59. Michael C. Dorf, *Affirmative Power to Strip State Courts of Jurisdiction*, 15 n. 39 (Cornell L. Sch. Legal Studies Research Paper Series, Paper No. 18-06) [hereinafter *Affirmative Power*] (citing W&S Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981)) ("Congress may 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'"); *see* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007) (defending the principle that Congress may lift the restrictions of the Dormant Commerce Clause).

60. *See* Dorf, *Affirmative Power*, *supra*, note 59, at 15. Professor Dorf recently speculated that the Supremacy Clause principle pronounced in *Testa v. Katt* operates on similar terms as the Dormant Commerce Clause. *Id.* (citing Testa v. Katt, 330 U.S. 386, 393–94 (1947)).

61. *See* Monaghan, *supra* note 15, at 15 (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946)).

62. Monaghan, *supra* note 15, at 19.

63. *See id.* at 20. With *Miranda v. Arizona*, the Warren Court repeatedly stressed its willingness to substitute the "Miranda Warnings" for sufficient alternative schemes. *See* 384 U.S. 436 (1966); *see also* Brown v. Illinois, 95 S. Ct. 2254, 2260 (1975) (adopting the "prophylactic rule" conception of *Miranda*).

Congress can raise or match the floor for civil liberties, but it cannot lower it.

Constitutional common law has been invoked repeatedly as a potential conception for the legality of some substantive canons. However, scholars have never thoroughly explained this theory or which type of constitutional common lawmaking canons would apply.[64] This outcome likely stems from the status of constitutional common lawmaking in federal courts. Hence, the three-bucket framework is controversial, to say the least; an originalist might disagree with the concept of a prophylactic bucket,[65] while others might take it for granted.[66]

This Comment will examine "valid" canons as one subspecies of constitutional common law, and the consequences of that classification can be significant. If a canon is classified as valid, that canon would not be easily vitiated by congressional action and it would be binding on state courts. A valid canon would be given methodological precedent in lower federal courts, which means stare decisis would apply.

III. CANONISTS VS. TEXTUAL ONTOLOGISTS

So far, this Comment has established three options to help explain the relevance of canons within the constitutional hierarchy: under the federal common law, the constitutional common law, or via constitutional adjudicatory rules. There is some question regarding how to sort canons into this framework, but there is no formulaic approach for doing so; the ontology of each canon must be evaluated individually. While this Comment specifically argues that canons are not a homogenous group,[67] some general sorting principles are identifiable.

Canons of construction can be broken down and classified as either linguistic or substantive. Linguistic, or textual, canons are "presumptions about how language is used."[68] Linguistic canons are less

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64. *See, e.g.*, Barrett, *supra* note 20, at 168; William N. Eskridge, Jr. & Philip Frickey, *Clear Statement Rules as Quasi-Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992).

65. In *Dickerson v. United States*, Justice Scalia fundamentally disagreed with the idea that "this Court has the power not merely to apply the Constitution but to expand, imposing what is regards as useful 'prophylactic restriction upon Congress and the States.'" Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting). He describes it as "an immense and frightening antidemocratic power, and it does not exist." *Id.*

66. Monaghan, *supra* note 15, at 19 ("[T]he affirmative case for recognizing a constitutional common law of individual liberties is a strong one. The Court's history and its institutional role in our scheme of government, in which it defines the constitutionally compelled limits of governmental power, make it a singularly appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees.").

67. *See generally* Barrett, supra note 20 (noting that there are different types of substantive canons).

68. Gluck & Posner, *supra* note 3, at 1330.

controversial and are not the focus of this Comment.[69] Substantive, or policy-oriented, canons apply normative presumptions of legislative intent.[70] Substantive canons can also enforce both constitutional and extraconstitutional values.[71] The strength of substantive canons is variable; some act as tie-breakers for two equally plausible statutory interpretations, while others command an improbable statutory reading in favor of a policy objective.[72]

Jutsice Scalia believed that textualism could not thrive without objective tools of interpretation. As a recent biographer emphasized: "[Justice Scalia] envisioned judges using neutral, language-based tools of interpretation so as not to usurp popular sovereignty and impose their personal value choices on society by judicial fiat."[73] Justice Scalia believed that, in a democratic society, judicial imposition should be limited wherever possible by tools that enforce neutrality, and he championed the use of the canons of construction to do so.[74]

The newfound weight of canons resulting from Justice Scalia's "new textualism" movement brought canons to the forefront of scholarly and judicial attention.[75] The choice among canons is now "the most frequently expressed reason for divisions in statutory Supreme Court cases."[76] Nonetheless, some scholars believe that the Supreme Court has never supplied a hierarchy of interpretive canons.[77] They argue that the Court has never explained where the canons come from,

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69. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: THE FEDERAL COURTS AND THE LAW 29 (1997) (hereinafter A MATTER OF INTERPRETATION) ("Some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway.").

70. *Id.*

71. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 507 (explaining how extraconstitutional enforcement allows for consideration of public values in decision making).

72. *See* Barrett, *supra* note 20, at 117–18 (citing the avoidance canon as an example of the latter and stronger type of canon).

73. RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 5 (2018).

74. *See, e.g.*, SCALIA & GARNER, *supra* note 2; *see also* Manning, *supra* note 2, at 290 ("Because textualists believe in a strong version of legislative supremacy, their skepticism about actual intent or purpose has predictably inspired renewed emphasis on the canons of interpretation, particularly the linguistic or syntactic canons of interpretation.").

75. *See* James J. Brundney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 122 (2008).

76. Gluck & Posner, *supra* note 3, at 1321 (citations omitted).

77. *See, e.g.*, Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1909 (2011) [hereinafter *Intersystemic Statutory Interpretation*] (finding that the legal status of canons is "unresolved" and speculating that the Supreme Court prefers not to delve into the issue).

what power validates their use, or which—if any—are binding on the lower federal courts.[78]

Justice Scalia's efforts to reconcile his love for canons with his hatred for common lawmaking has yielded mixed results. Justice Scalia famously switched from first describing canons as a "judicial power-grab," to later becoming their most ardent proponent.[79] His book on canons lists more than sixty canons,[80] but ironically never grapples with their legal justification.[81] Instead, the book gives scattered and inconsistent hints as to the characteristics of canons; as Professor Gluck points out:

> It contends at one point that the canons are not "law" or even "rules," but contends ten pages later that "statutory interpretation is governed as absolutely by rules as anything else in law." Later the book argues briefly that legislative attempts to enact interpretive rules would "likely . . . be an intrusion upon the courts' function of interpreting laws," a statement that implies that the canons are not common law.[82]

Justice Scalia's emphasis on canons resulted from his desire to limit judicial overreach. However, in attempting to incorporate objective tools of interpretation, Justice Scalia paradoxically emphasized canons that explicitly apply judge-made policies to statutes. Charitably, one might contend that this result demonstrates that Justice Scalia was less concerned with rooting judicial power in external authority than he was with cabining judicial discretion.[83] From this author's perspective though this creates a significant issue for Justice Scalia's followers and textualists generally.

The substantive canons pose an existential threat to textualism because they allow a judge to adopt an interpretation that is different than the plainest reading of a statute's text.[84] This issue cannot be

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78. *Id.*

79. Gluck, *supra* note 48, at 762 (noting that "even though [Justice Scalia] [was] one of the most vocal opponents of federal common law making, he [was] one of the most prolific users of both textual and policy canons."); *see* ANTONIN SCALIA, COMMON LAW COURTS IN A CIVIL LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29 (Ann Gutmann ed., 1997).

80. *See generally* SCALIA & GARDNER, *supra* note 2.

81. *See* Gluck, *supra* note 48, at 762.

82. *Id.*

83. John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 (2017) ("[Justice Scalia's] concern with 'discretion' centered more upon limiting free-form judicial policymaking than upon rooting judicial decisions in legitimate external authority.").

84. *See* Barrett, *supra* note 20, at 123–24 ("Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.").

resolved by labeling canons as proxies of congressional intent because textualists are also inherently suspicious of justifications that hinge on legislative purpose.[85] Textualists further contend that it is nearly impossible to gauge a singular intent from a large pluralistic deliberative body (like Congress) because such intent might not even exist. Alternatively, even if a singular congressional intent does exist, then Congress may anticipate that the Executive branch would be the one enforcing its intent.[86] As argued by Professor William Eskridge: "Most of the substantive canons are hard if not impossible to defend on ordinary-use-of-language or this-is-what-the-legislature-would-want grounds."[87] Thus, this logic naturally leads to the following question: where do judges derive authority to construe a statute according to a principle that is external to the text of the statute itself?[88]

Perhaps the cleanest way to resolve these problems is to write-off substantive canons altogether as non-binding interpretive devices—rules that exist in individual jurists' minds but that have no force in law.[89] However, the release of Professor Gluck's and Judge Posner's new survey of circuit court judges undermines this solution.[90] The survey demonstrates that some judges view the substantive canons as binding regardless of what the Supreme Court says.[91] Even when judges do not believe that canons are binding, the survey shows that they are divided as to why.[92] This is a particularly challenging problem and has led to two emerging concepts among judges and textualists: canonism and textual ontology.

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85. *Id.* at 124 (citing Frank H. Easterbrook, *The State of Madison's Vision of The State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1346–47 (1994); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV 621, 623 (1990); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409 (2003)) ("Textualists cannot justify the application of substantive canons on the ground that they represent that Congress would have wanted, because the foundation of modern textualism is its insistence that congressional intent is unknowable.").

86. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430–31 (2005) (discussing the difficult task of divining congressional intent in the context of the legislative process).

87. William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 682 (1999).

88. *Cf.* Bradley, *supra* note 71, at 484 (asking in the context of the *Charming Betsy* canon: "[W]hy [do] U.S. courts try to construe statutes to avoid inconsistencies with international law. Where do they get the authority to apply such a rule? And why this rule and not others—for example, a rule that federal statutes should be construed so as not to be inconsistent with French law, or Talmudic law, or Plato's 'Laws'?").

89. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1765–66 (2010) (describing this viewpoint).

90. *See generally* Gluck & Posner, *supra* note 3.

91. *See id.*, at 1330, 1344–45 (finding that canons like the rule of lenity and *Chevron* deference are given precedential force by some circuit court judges).

92. Gluck & Posner, *supra* note 3, at 1345 ("But the judges divided over why there is no 'methodological stare decisis' in the federal courts.").

The "canonist" camp attempts to legitimize substantive canons by adopting a broad view of "the judicial Power" granted to federal courts by Article III.[93] This group forgoes a serious focus on the ontology of canons and instead emphasizes their antiquity, essentially ignoring questions of legitimacy. The most prominent canonist is Judge Amy Coney Barrett of the Seventh Circuit Court of Appeals. As a law professor, Judge Barrett offered a general defense of substantive canons in her seminal work on the subject: *Substantive Canons and Faithful Agency*.[94] In it, she argues that the power to use substantive canons is a part of the nebulous "judicial Power of the United States" that Article III grants to federal courts.[95] The only useful limitation that Judge Barrett could find on this power was the "faithful agency" theory, which is the "obligation [of courts] to function as the legislature's faithful agent."[96]

Judge Barrett relies on federal courts' historical propensity for wielding substantive canons as a source of validity.[97] This conception of judicial power was primarily overruled in *Erie*.[98] However, even assuming that this approach is appropriate, Judge Barrett undermines it with the practical limitations that she places on a court's power by stating: "substantive canon[s] [can] not justify a departure from a statute's plain language."[99] Thus, Judge Barrett adopts an originalist approach to validate the broader power to use substantive canons but then places an artificial, ahistorical limitation on that power to make it more palatable.[100] However, as discussed *infra*, in the case of lenity, several canons have been explicitly validated when used by judges to enforce particular policy interests. The "faithful agent" limitation is also empirically inapposite in the realm of substantive canons. A large body of empirical work shows that the faithful agent conception of canons is dubious—courts simply cannot presuppose congressional intent.[101]

Additionally, Judge Barrett focuses on only one-half of the ontological puzzle; her standard of legitimacy relies more on a commitment to legislative supremacy than on the limited powers

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93. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

94. *See generally* Barrett, *supra* note 20.

95. *Id.* at 163.

96. *Id.*

97. *See id.*

98. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Green, *supra* note 35.

99. Barrett, *supra* note 20, at 163.

100. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian* Law, 107 Harv. L. Rev. 381, 406–08 (1993) (describing how the Indian canons had courts construe statutes against Congress's purpose).

101. *See infra* notes 117–21 and accompanying text.

granted to federal courts.[102] Judge Barrett's approach succinctly demonstrates that courts may not use substantive canons to violate legislative supremacy, but it does not validate a court's use of canons in the first place. In other words, the practice is not made constitutional because of its consistency with legislative supremacy, especially if the practice violates the broader arrangement of power established within the Constitution.

While Judge Barrett seems willing to embrace canons that enshrine constitutional values and emphasizes the distinction between those canons and the ones that enforce "extraconstitutional" values (such as equity),[103] she fails to explain why this distinction matters. This contrast is particularly significant if the only limit on the Judicial power is the faithful agent principle. Judge Barrett leaves readers wondering whether canons emanating from constitutional values have a different ontology than those enforcing extraconstitutional values.[104] Are canons representing constitutional values different because they bind the lower federal courts and the state? Do these canons also receive stare decisis effect? Unfortunately, these questions remain unanswered because Judge Barrett ultimately treats both kinds of canons as distinguishable equals.

On the other side that would side with a textualist ontology argument adopt a different approach to canons—a method that cabins judicial discretion. Justice Kavanaugh has synthesized the skepticism of judicial discretion with empirical research that demonstrates the weakness of the faithful agent assertion.[105] He also levies a broader critique of the utility of substantive canons as clear statement rules. In one book review, he wrote:

> In my view, one primary problem stands out. Several substantive principles of interpretation—such as constitutional avoidance, use of legislative history, and *Chevron*—depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make the initial clarity versus ambiguity decision in a settled, principled, or evenhanded way. The upshot is that judges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among a wealth of canons of construction.[106]

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102. *See* Barrett, *supra* note 20, at 110 (framing the issue as one of "faithful agency").

103. *Id.* at 168.

104. *Id.*

105. *See* Loving v. IRS, 742 F.3d 1013, 1019 (Kavanaugh, Circuit Justice, D.C. Cir. 2014) (refusing to apply the rule against superfluities because it makes unrealistic assumptions about congressional drafting).

106. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118–19 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

While best understood as a critique on the utility of canons, Justice Kavanaugh's more skeptical take on canons seems to color his view of the canons' ontological legitimacy. Like Judge Barrett, Justice Kavanaugh recognizes that two tenants of Justice Scalia's legacy are clashing: the emphasis on canons and apprehension of federal common lawmaking authority.

If Judge Barrett prefers to side with canons, it appears that Justice Kavanaugh chooses the opposite; he emphasizes the need to limit judicial common lawmaking authority, and, in *Al-Bihani v. Obama*, he explicitly linked this skepticism to substantive canons.[107] Some critics view Justice Kavanaugh's concurring opinion in *Al-Bihani* as controversial;[108] in it, he went further than the majority to suggest that the D.C. Circuit could not use the *Charming Betsy* canon to interpret the Authorization for Use of Military Force (AUMF).[109] Justice Kavanaugh questioned whether the *Charming Betsy* canon allows courts to extend beyond U.S. statutes to encompass congressional authorizations of war by applying international law norms.[110] In Justice Kavanaugh's opinion, canons are only applicable where courts are specifically delegated interpretive authority, and the authorization of war is dedicated to the executive, not the judiciary. Thus, Justice Kavanaugh argued that "to the extent that there is ambiguity [in an authorization of war] . . . the President—not an international tribunal or international law—is to resolve the ambiguity in the first instance."[111]

Between Judge Barrett and Justice Kavanaugh, the latter has seems to grasp a better concept of the ontology of canons—even if it has not been provided a fully fleshed-out framework. Despite being unaligned with new textualism, the authority to use canons as an aspect of "the judicial Power," as argued by Judge Barrett, knows few limitations that comport with a post-*Erie* notion of the federal common law.[112] Furthermore, Justice Kavanaugh rightly demonstrates that an external authority must validate the use of substantive canons before courts can

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107. *See* Al-Bihani v. Obama, 619 F.3d 1, 10, 17–18 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

108. Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1463 n.67 (2011) (emphasizing that Kavanaugh's approach to *Charming Betsy* was "unprecedented").

109. *Al-Bihani*, 619 F.3d at 10 ("[T]he *Charming Betsy* canon does not authorize courts to employ international-law norms when interpreting a statute like the AUMF that broadly authorizes the President to wage war against a foreign enemy. To begin with, in the post-*Erie* era, the canon does not permit courts to alter their interpretation of federal statutes based on international law norms that have not been incorporated into domestic U.S. law.").

110. *Id.*

111. *Id.*

112. *See* EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 16 (Peter Smith 1963) (1914) ("[A]s to what the [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word.").

use them. For example, Justice Kavanaugh points out that Congress has and does incorporate international law, either expressly or by implication;[113] when it does not do so, the judiciary cannot write it in for Congress. This contrast is important because where the political branches do incorporate international customary law, those norms act with the force of regular federal common law.[114]

If we take Justice Kavanaugh's argument one step further, we see that canons are best viewed as a kind of constitutional common law when they are rooted in constitutional interests.[115] The view of lower federal courts validates this idea that *some* canons are "special" and somehow binding upon them, while simultaneously denying that the Supreme Court's interpretive methodology can bind them.[116] This understanding of canons' ontology is advanced *infra*; because they inherently apply values outside a statute's text, some substantive canons must find a separate source of external validation. When the Constitution validates a canon, it is correctly understood as deriving from the constitutional common law; when political actors validate it, the canon is thus a product of federal common law.

Some legal scholars may opine that most canons are not considered binding on states or lower federal courts, which is an oddity for canons that are considered a component of either federal common law or constitutional common law. However, to the extent that is true, *it is because they find no external validation*. In other words, from the perspective of new textualism, canons that do not draw validation from the political branches *or* the Constitution should be considered impermissible.[117] This Comment partially attempts to prompt a canon-by-canon evaluation of the validity for substantive canons as either federal common law or constitutional common laws—whether in the international, contractual, criminal, or civil context. Concurrently, to the extent that a canon falls in either category, it should be a binding substantive rule on all courts, which would provide consistency in the

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113. *Id.* at 27 ("Congress and the President can and often do incorporate international-law principles into domestic U.S. law by way of a statute . . . or a self-executing treaty.").

114. *See supra* notes 36–41 and accompanying text.

115. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 603 (1992) ("Although most of the constitutionally based canons have weighty precedential pedigrees, their importance and the way they are deployed change over time and reflect an underlying ideology, which includes the Court's view of what is an important constitutional value, the relative importance of different constitutional values, and strategies for implementing those values.").

116. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 89–107 (1961) (arguing that a legal rule is true if it emanates from a person or institution that is recognized as authoritative).

117. *Cf.* Bradley, *supra* note 71, at 507–08 ("This emphasis on values rather than intent does not by itself establish that a particular canon is justified. Defenders admit that such legitimacy depends on whether the values promoted by the canon are proper (and properly applied by judges), and whether they outweigh other values that may be offended by use of the canons.").

application of these specific canons and diminishes the worth that we assign to others.

IV. THE RULE OF LENITY

A. *The Criminal Rule of Lenity*

"The rule of lenity? Do you call it a canon or constitutional principle? . . . I don't know whether to call it a canon or an understanding of a constitutional norm"[118]

This Section explores the history and ontology of the rule of lenity. The rule of lenity is a valuable topic because of the fundamental confusion regarding its role and purpose across many legal fields. This Section also analyzes the value of an ontological approach by exploring the constitutional status of lenity and hence arguing that some applications of lenity are more valid than others.

A traditional articulation of lenity holds that "penal statutes should be strictly construed against the government."[119] Lenity has been referenced as early as the sixteenth century,[120] but it only "became a general rule of conscious application" in the seventeenth century.[121] In employing lenity, the English courts attempted to "limit the brutality of English criminal law."[122] Capital punishment for frivolous crimes pervaded the criminal code; for instance, a conviction for "being in the company of gypsies" could be punished by a trip to the gallows.[123]

Judge Barrett noted that "lenity was not grounded in any fiction about Parliament's presumed intent."[124] This point potentially extends

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118. *See* Gluck & Posner, *supra* note 3, at 1366 (quoting an interview with a federal appellate judge identified as "Post Scalia Canonist/Moderate Textualist #2").

119. *The New Rule of Lenity*, 119 HARV. L. REV. 2420 (2006) (quoting 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §59:3, at 125 (6th ed. 2001)).

120. Barrett, *supra* note 20, at 128 (citing SAMUEL E. THORNE, PREFACE TO A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDINGE OF STATUTES, at v (Samuel E. Thorne ed., Lawbook Exchange, Ltd. 2003) (1942)).

121. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 750 (1935).

122. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 897 (2004) (*citing* Hall, *supra* note 121, at 748–51).

123. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 714 (2017) (citing LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 at 10–11 (1948)).

124. Barrett, *supra* note 20, at 129; *see* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751 (1935) (going so far as to describe the rule of lenity's origins as "a veritable conspiracy for administrative nullification"); *see also* Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 200 (1994) (concluding that in this time period, lenity applied "even when the language of the statute was 'clear'").

to the earliest application of lenity in American courts,[125] when judges applied it as part of their "school[ing] in the English tradition."[126] It also underlines the incongruence between lenity and the faithful agency theory. However, what began as a bold attempt to minimize "legislative blood lust" has evolved to embody the constitutionally-mandated separation of powers,[127] while simultaneously remaining independent from any fiction that lenity accurately expresses congressional will. Although Judge Barrett is aware of today's constitutional justifications for the rule of lenity,[128] she did not sufficiently distinguish lenity from the other canons.[129] Her analysis also failed to capture why the substantive basis for lenity is unique compared to other canons.

Today's constitutional justifications for lenity make lenity "special"—at least in the minds of lower federal court judges.[130] This *special* designation means that courts can—and should— distinguish lenity from other canons.[131] Yet, to properly evaluate that distinction, we must go further than Judge Barrett's interpretation of the faithful agent principle. One cannot distinguish lenity from other canons by merely asking if "the faithful agent must carefully consider" whether canons embody substantive positive law or not.[132] It also cannot be differentiated by acknowledging that lenity is "interpretive precedent."[133] The real project is removing lenity entirely from the "rule of thumb" category,[134] and integrating it into the more substantial and binding field of the constitutional common law.

In arguing that lenity has a more robust substantive basis than other canons, this Section will analyze the leading rationales for the rule of lenity: the longevity of lenity, its reinforcement on the constitutional

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125. *Id.* at 129 n.91 (pointing to *In re* Bray, 4 F. Cas. 37 (D.S.C. 1794) (No. 1819) as the first application of lenity in the federal courts).

126. *Id.* at 129.

127. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985); *see The New Rule of Lenity*, *supra* note 119, at 2425–26.

128. Barrett, *supra* note 20, at 134 n.103 (quoting United States v. Wilson, 28 F. Cas. 699, 709 (C.C.E.D. Pa. 1830)).

129. *Id.* at 178 (arguing that to be recognized as being based in the constitution, a canon must "be connected to a reasonably specific constitutional value" and "must actually promote the value it purports to protect" but failing to meaningfully distinguish the canons on this basis).

130. Gluck & Posner, *supra* note 3, at 1331–32.

131. The main Indian canon of construction is beyond the scope of this article, but this author believes it stands as the epitome of an illegitimate canon because of its lack of grounding in positive law. Accordingly, a discussion of the Indian canons likely warrants its own comment and analysis.

132. Barrett, *supra* note 20, at 181.

133. Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 182 (2018).

134. Barrett, *supra* note 20, at 109 ("Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way: it directs that courts interpret ambiguous penal statutes in favor of the defendant.").

structure, and its reflection of due process and general notice principles. It will conclude by arguing that the law should view lenity through its two foundational values. First, lenity serves the purpose of reinforcing constitutional structures and limiting overreach by the judiciary. Second, lenity acts as an essential safeguard for notice as a constitutional principle. In short, by serving positive law concepts without being explicitly prescribed by the constitution, lenity is best understood as a doctrine of the constitutional common law.

1. Longevity

In re Bray was the first federal case to introduce the rule of lenity in the United States.[135] It was presented with little explanation or reasoning, as if the rule transcended justification.[136] The language in *Bray* captures one of the most commonly invoked rationalizations for lenity—that, "by virtue of its assumed familiarity based on its centuries-old pedigree," lenity was a widely accepted concept at the time of the country's founding.[137] Capturing the unspoken conclusion to *Bray*'s premise, Judge Barrett argues that history "casts valuable light on the problem of substantive canons" because "their long pedigree makes it difficult to dismiss their use as inconsistent" with the Constitution.[138]

Judge Barrett's answer is unsatisfying for two reasons—first, because the modern conception of lenity has morphed so greatly from its origins,[139] and second, as Judge Barrett acknowledges, it fails to refute the argument that substantive canons "were invalid *ab initio*."[140] The second problem is particularly vexing for a longevity-based justification for lenity and Judge Barrett's historical rationale for the canons more generally. The explanation that using substantive canons is "consistent with historical practice" does not demonstrate why a modern textualist should support canons that were originally premised on "promoting policies external to the statute."[141] Further, the idea that canons are a "closed set" is also unconvincing,[142] given that "the practice

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135. 4 F. Cas. 37, 38 (D.S.C. 1794) (No. 1819) ("[B]ut is a penal law and must be construed strictly."); *see* Barrett, *supra* note 20, at 129.

136. *See Bray*, 4 F. Cas. at 38 (drawing a conclusion on how penal laws should be construed without considering congress's intent or other interpretive tools).

137. 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, 946 (2013).

138. Barrett, *supra* note 20, at 128.

139. *The New Rule of Lenity*, *supra* note 119 (describing the evolution of the traditional rule of lenity into the modern variants).

140. Barrett, *supra* note 20, at 160–61.

141. *Id.* at 182.

142. *Id.* at 161.

of adopting new canons" or "adjusting old ones" has persisted into the modern-day.[143]

The most convincing answer to this problem coincides with the "background assumptions" argument that focuses on the more functional aspect of lenity's longevity.[144] Even those who occasionally criticize substantive canons, such as Justice Scalia,[145] will "often create an exception for lenity" based on its longevity.[146] Justice Scalia believed that "once [canons] have been long indulged, they acquire a sort of prescriptive validity" based on the presumption that "the legislature . . . has them in mind when it chooses its language."[147] Accordingly, textualists who aim to reconcile lenity with faithful agency assume that "all drafters know and draft in accordance with the rule [of lenity]."[148] Although this logic is applied categorically to canons, it should apply to lenity in particular because it is one of the "oldest interpretive rules" in the Anglo-American legal system.[149]

Nevertheless, like most judicial assumptions regarding legislative behavior, this logic appears to be deeply flawed. A recent survey found that most congressional drafters cannot even identify the rule of lenity by name.[150] A similar study found that congressional staffers "did not view canons as a central factor in drafting legislation" and concluded that it was unlikely drafters had any "systemic mechanism or practice" for integrating canons into legislation.[151] Ultimately, the surveys demonstrate the "hit-or-miss quality [of] predict[ing] the application of canons."[152] Notwithstanding this inconsistency, lenity's storied history is frequently deployed by courts to justify its application.[153] Consequently, the historical justification for lenity could be applied to

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143. *Id.* at 162–63.

144. *Id.* at 160.

145. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION, *supra* note 69, at 27–28.

146. *Id.* at 9; *see* Gluck & Bressman, *supra* note 137, at 946.

147. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1990).

148. Gluck & Bressman, *supra* note 137, at 946.

149. *Id.*

150. *Id.* at 946–47; *see* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Legislative Case Study*, 77 N.Y.U. L. REV. 575 (2002) (stating that canons of interpretation are known but not used "as a central factor in drafting legislation").

151. Nourse & Schacter, *supra* note 150, at 600–01.

152. *Id.* at 602.

153. Johnson v. United States, 135 S. Ct. 2551, 2567–68 (2015) (Thomas, J., concurring) (discussing the early history of lenity at length while arguing for its application over the void for vagueness doctrine); Abramski v. United States, 573 U.S. 169, 203–05 (2014) (Scalia, J., dissenting) (calling lenity a "foundational principle"); Bell v. United States, 349 U.S. 81, 83 (1955) (declaring that lenity is "a presupposition of our law").

almost all substantive canons and does little to help explain the rule's distinctive ontology.[154]

2. Constitutional Structure & Notice[155]

Having acknowledged that lenity is—like the substantive canons generally—a judicial invention, it is remarkable how quickly the American court system changed its justifications.[156] In *The Adventure,* Chief Justice Marshall began the long project of imbuing lenity with constitutional or quasi-constitutional rationales.[157] The Chief Justice wrote:

> *The maxim, that penal laws are to be construed strictly, has never been understood, by me at least, to imply, that the intention of the legislature, as manifested by their words, is to be overruled*; but that in cases where the intention is not distinctly perceived, where, without violence to the words or apparent meaning of the act, it may be construed to embrace or exclude a particular case, where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail; especially in cases where the act to be punished is in itself indifferent, and is rendered culpable only by positive law. *In such a case, to enlarge the meaning of words, would be to extend the law to cases to which the legislature had not extended it, and to punish, not by the authority of the legislature, but of the judge.*[158]

Marshall thus began the long project of rehabilitating lenity for the new republican form of government in America. He emphasized its constitutional underpinnings and argued that without lenity, the judiciary might be creating crimes from the bench, which would be in

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154. *See* Barrett, *supra* note 20, at 128–29 ("[T]he rule of lenity was not grounded in any fiction about Parliament's presumed intent; rather, it was unabashedly grounded in a policy of tenderness for the accused. In fact, lenity is commonly acknowledged to have been a mechanism that English judges employed to counter the brutality of then-existing criminal law."); *see also id.* at 125–53 (detailing the use of several of the substantive canons within decades of the founding or earlier).

155. *See* Barrett, *supra* note 20, at 181 ("[A]n inquiry must be undertaken . . . [to] identify [if] a constitutional hook is enough to justify treating a canon as one that advances a constitutional value.").

156. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (1992); *see* Newland, *supra* note 124, at 200–01 ("Although the United States inherited the concept of the strict construction of penal statutes from the English common law, the American judicial system transformed its underlying rationales. The original force for the development of lenity soon became irrelevant as the use of capital punishment declined, but lenity developed new significance in relation to the American governmental structure."); *see also* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 88 (1998) ("[American] courts do not subscribe to the naked lenity.").

157. The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812), *rev'd*, 12 U.S. 221, 3 L. Ed. 542 (1814).

158. *Id.* at 204 (emphasis added).

sharp violation of the separation of powers. In doing so, Marshall was effectively inverting lenity's historical justification, declaring that a canon originally premised on mitigating the aims of a legislature could also be justified as a limitation on the lawmaking power of the federal judiciary.

In *United States v. Wiltberger*, the Chief Justice conceded that his conception of lenity was "a modification of the ancient maxim," but argued that it was still consistent with the principle that "it is the legislature, not the Court, which is to define a crime."[159] Nonetheless, Marshall chose to apply lenity despite "the extreme improbability" that Congress meant to effectuate the Court's limited interpretation of the statute in question.[160] This conflict with congressional intent seems to undermine Chief Justice Marshall's earlier disclaimer that lenity cannot "overrule" the legislature.[161] Specifically, he criticized exhaustive attempts to conform statutory text to a particular purpose or to analogize the crime at hand to "the reason or mischief of a statute."[162] The Chief Justice also articulated—but failed to explain—a second defense for the rule of lenity: "the tenderness of the law for the rights of individuals."[163] Instead of highlighting lenity's longevity or the structures it serves, this statement focused on the individual defendant. This early defense of lenity provided an association for the rule with later constitutional principles of due process, notice, and fairness.[164]

The new Americanized rationale quickly filled the theoretical gap exposed by the switch to a constitutional system and by the decline of the gallows. Professor Shon Hopwood points out that "by the end of the nineteenth century, treatise writers had settled justifications for the rule" that "reflected a strong preference in favor of individual liberty and against excessive punishments."[165] The historical view of "the rule [of lenity] protected [constitutional] values by narrowly construing a statute anytime the plain meaning of the statutory language and context was reasonably open to question, especially in cases where the punishment was thought particularly harsh."[166]

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159. 18 U.S. 76, 95 (1820).

160. *Id.* at 105.

161. *The Adventure*, 1 F. Cas. at 204.

162. *Wiltberger*, 18 U.S. at 96.

163. *Id.* at 95.

164. *See* Hopwood, *supra* note 123, at 731–33 (explaining that a criminal clear-statement rule provides potential offenders with fair notice of specific conduct that is criminalized and reduces arbitrary prosecution); *see also The New Rule of Lenity*, *supra* note 119, at 2424–25 (arguing that the rule of lenity is necessary to ensure criminals have been provided with fair notice of criminal liability).

165. Hopwood, *supra* note 123, at 716–17.

166. *Id.* at 717 (quotations omitted).

In *McBoyle v. United States*,[167] Justice Holmes, writing for the Court, reaffirmed the principle regarding fair notice and due process, stating:

> 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.[168]

This articulation for notice as a justification for the rule of lenity is a pragmatic one. It is based on providing some minimum level of warning and is unlike the goal of *actual notice*, which, although rarely seriously endorsed by authorities, is commonly bemoaned by critics.[169] Under this theory, lenity is most closely related to the prophylactic rules sporadically created by the Court.[170]

But for all the innovations of Chief Justice Marshall and his successors, the contortions of *Wiltberger* foreshadowed the problems that bedevil the rule of lenity today. For example, what tools should be used to determine whether a statute is ambiguous?[171] How ambiguous must a statute be to invoke the rule?[172] To what degree can a crime in question be compared with (or crammed into) "the reason or mischief of a statute?"[173] Unfortunately, the modern Court has done little to alleviate this confusion.

In *United States v. Granderson*,[174] the Court used "text, structure, and history" in an attempt to illuminate the meaning of a Delphic probation statute.[175] Writing for the Court, Justice Ginsburg noted that the rule of lenity should control because the Government had failed to establish that its interpretation of the statute was "unambiguously correct."[176] Though the decision enjoyed a seven-to-two margin, the

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167. 283 U.S. 25 (1931).

168. *Id.* at 27 (emphasis added).

169. *See* Hopwood, *supra* note 123, at 731–32 (arguing that actual notice requires clear criminal laws prescribing prohibitive actions, however criminals are unlikely to consult a statute before committing a crime).

170. Monaghan, *supra* note 15, at 20–21.

171. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 298, 305–09 (1992) (featuring a debate between Justice Souter—insisting for the majority that lenity should only be invoked after legislative history has been consulted—and Justice Scalia, who argued in his concurrence that lenity may be invoked after a finding of textual ambiguity).

172. Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 102 (2016).

173. United States v. Wiltberger, 18 U.S. 76, 96 (1820).

174. 511 U.S. 39 (1994).

175. *Id.* at 54.

176. *Id.* (referencing United States v. Bass, 404 U.S. 336, 347–49 (1971)).

Court was far from unified in its application of lenity. In his concurrence, Justice Kennedy explained that analyzing the "text and structure of the statute" would render the rule of lenity "unnecessary."[177] The dissenters, Justices Rehnquist and Thomas, argued that "lenity should not be applied"[178] unless "'a grievous ambiguity or uncertainty'" remains.[179]

These separate articulations of lenity go beyond mere semantics. Instead, they mark different standards as to how much ambiguity must exist within a statute before lenity is used to resolve vaguery in a defendant's favor.[180] The unambiguously correct standard is "by far the most defendant-friendly formulation of lenity" because the government must conclusively show that the defendant's actions fall under the statute and that Congress intended for the defendant's actions to be punished.[181] Conversely, the grievous ambiguity articulation "leads to the most stringent application" of lenity.[182] As the name implies, ambiguity, absurdity, or injustice must be *glaring*; and a court will often exhaust every alternative tool before it invokes lenity.[183]

This is far from a binary choice; the Court has also articulated "reasonable doubt" and "no more than a guess" standards.[184] The Court employed the former in *Moskal v. United States*,[185] where the majority found that no "reasonable doubt persist[ed]" because "'the language and structure, legislative history, and motivating policies' of the statute" cured any ambiguity.[186] Dissenting, Justice Scalia, joined by Justices O'Connor and Kennedy, contended that "'before a man can be punished" under a penal statute, the prosecution must show that his conduct "plainly and unmistakably" falls under that statute.[187] Under this

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177. *Id.* at 69.

178. *Id.* at 70 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

179. *Id.* at 70–71 (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)).

180. *See generally* Ortner, *supra* note 172 (detailing the different standards for ambiguity in the employment of lenity).

181. Ortner, *supra* note 172, at 106–07; *see* Lockhart v. United States, 136 S. Ct. 958, 977 (2016) (Kagan, J., dissenting) ("[T]he rule of lenity insists that courts side with the defendant 'when the ordinary canons of construction have revealed no satisfactory construction.' At the very least, [lenity] should tip the scales in Lockhart's favor, because nothing the majority has said shows that the modifying clause in [the statute] *unambiguously* applies to only the last term in the preceding series." (citations omitted)).

182. Ortner, *supra* note 172, at 117.

183. Chapman v. United States, 500 U.S. 453, 463 (1991) ("The rule of lenity . . . is not applicable unless there is a 'grievous ambiguity or uncertainty in the language and structure of the Act,' such that even after a court has 'seized every thing from which aid can be derived,' it is still left with an ambiguous statute." (first quoting Huddleston v. United States, 415 U.S. 814, 831 (1974); and then quoting United States v. Bass, 404 U.S. 336, 347 (1971))).

184. *See generally* Ortner, *supra* note 172, at 108–17.

185. 498 U.S. 103 (1990).

186. *Id.* at 108 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

187. *Id.* at 131 (quoting United States v. Gradwell, 243 U.S. 476, 485 (1917)).

standard, the Court has also stated that a court should not invoke lenity unless it can offer only "a guess as to what Congress intended."[188]

This smorgasbord of rules is confusing; Daniel Ortner's *The Merciful Corpus* convincingly argues that lower courts struggle to make sense of these differing directives.[189] Moreover, a choice from among these standards is outcome-determinative,[190] and the Court's constant flip-flopping between articulations allows judges to choose the standard that provides the most personally satisfying resolution.[191] For example, in granting lenity to a defendant whose probation was revoked for possessing a controlled substance, Justice Ginsburg cited the unambiguously correct standard.[192] However, in a later case, she cited the grievous ambiguity standard and *withheld* lenity to a defendant convicted for the unlawful possession of a firearm.[193]

This says nothing of other doctrinal disputes, such as whether courts may consult legislative history before invoking lenity.[194] For example, in *Hayes*, the Court held that the rule of lenity did not apply because the statute was not "grievously ambiguous" enough to warrant the invocation of the rule.[195] Meanwhile, Justice Scalia's dissent argued that *Hayes* was "a textbook case for application of the rule of lenity."[196] He argued that because of the "fair warning" justification for lenity, it "'is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.'"[197] Finding nothing in *Hayes* to depart from this general principle, he concluded: "If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the majority."[198]

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188. DePierre v. United States, 564 U.S. 70, 88–89 (2011) (quoting Reno v. Koray, 515 U.S. 50, 65 (1995).

189. *See generally* Ortner, *supra* note 172, at 107–20.

190. *See id.* at 120. Ortner's survey of lower court opinion yielded results on how often lenity is invoked for all four standard. *Id.* Of twenty-seven cases, the invocation of the unambiguously correct standard resulted in a 70% rate in favor of lenity, while 87% where resolved against lenity under the grievous ambiguity standard. *Id.* at 107–08, 119.

191. *Compare* the outcome in *infra*, note 192, *with infra*, note 193.

192. United States v. Granderson, 511 U.S. 39, 54, 56–57 (1994).

193. United States v. Hayes, 555 U.S. 415, 429 (2009).

194. *See* United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring) ("In my view it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.").

195. *Hayes*, 511 U.S. at 429.

196. *Id.* at 436 (Scalia, J., dissenting).

197. *Id.* (quoting Crandon v. United States, 494 U.S. 152, 160 (1990)).

198. *Id.* at 437.

3. Ontology & Reinvigoration

Lenity's place in modern federal jurisprudence could be debated endlessly; even if one does not consider modern lenity "a watered-down version . . . that departs from historical practice,"[199] it is difficult to deny that confusion abounds. At least partially due to this doctrinal vaguery, some have noted (and many with glee)[200] that lenity "has lately fallen out of favor with both courts and commentators."[201] Blame is primarily assigned to the "way that courts apply the rule inconsistently, or even randomly."[202]

Professor Gluck's and Judge Posner's interviews with federal appellate judges provide a helpful starting point.[203] They sampled forty-seven penal statutory construction cases that were later granted certiorari.[204] Their research shows that approximately one-fifth of appellate judges considered applying lenity—this is remarkable because judges generally view lenity as a "special" canon, reserved for judicial application under unique circumstances.[205] The survey strengthens this idea because judges are peculiarly qualified for this task; they are the ones who are left to grapple with the byzantine state of the lenity doctrine and the complicated task of resolving "the vast majority of statutory interpretation cases."[206] The judges surveyed were split on the basis for lenity's exceptional status: some "believe[] [this] doctrine derive[s] [its] special status simply because the Supreme Court said [it does],"[207] while others believe the source embodies "constitutional principles."[208]

Even judges who "find most canons useful only as post-hoc window dressing" acknowledge that lenity is distinct from other canons in terms of mandatory application.[209] Some even argue that lenity is "not [a] canon but rather [is] substantive law."[210] In contrast with other canons, they describe lenity as an "'actual rule[]' . . . [that is]

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199. Hopwood, *supra* note 123, at 698.

200. *The New Rule of Lenity*, *supra* note 119, at 2420.

201. Price, *supra* note 122, at 885.

202. *The New Rule of Lenity*, *supra* note 119, at 2420.

203. Gluck & Posner, *supra* note 3, at 1300.

204. *Id.*

205. *Id.* at 1331; Rabb, *supra* note 133, at 186.

206. Rabb, *supra* note 133, at 186.

207. Gluck & Posner, *supra* note 3, at 1331–32.

208. *Id.* at 1345.

209. *Id.* at 1331.

210. *Id.* at 1332. "Even among these judges, however, there were execptions for certain canons. One judge said the exceptional doctrines—the ones that are indeed binding—are the ones based on 'constitutional principles.' Another judge signled out a few canons—namely, lenity, preemption, and avoidance— as 'rule[s] of law, not . . . interpretive principle[s]" to which he would defer." *Id.* at 1345 (alterations in original).

mandator[ily] appli[ed]."[211] The latter observation is particularly striking because many of the same judges believe that "the Supreme Court could *not* control lower-court interpretive methodology."[212]

Combined with the justifications for lenity, these reflections point toward several conclusions. First, many judges associate lenity with a more authentic substantive basis than that of the other canons.[213] Second, Supreme Court jurisprudence regarding lenity is generally viewed as binding, unlike its decisions on linguistic and other substantive canons.[214] Third, the surveyed judges believe that lenity's substantive basis flows from the Constitution or, more semantically, from the Court's decisions concerning the Constitution. Fourth, those Supreme Court decisions have, at least since *Wiltberger*, justified lenity by inferring it from both the structure of the Constitution and the principle of due process.

The similarities between Professor Monaghan's constitutional common law and the surveyed judges' conception of lenity is striking.[215] Again, although the Constitution does not explicitly demand lenity, it is construed through its due process and notice requirements.[216] Said another way, the rule of lenity operates interstitially to fill the gap between the Constitution's lack of a penal clarity standard,[217] and the obvious constitutional implications of persecutions under ambiguous laws.[218] Further, as detailed *infra*, some scholars have argued that lenity can be "gleaned by implication from the federal structure of the United States."[219]

If lenity were a mere interpretive tool, surely it would not command the respect and adherence of so many appellate court judges. The Supreme Court "seems to accept, and perhaps prefers, the unresolved legal status" of the canons and does not "treat its

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211. *Id.* at 1331–32. (alteration in original).

212. *Id.* (emphasis added).

213. *See generally id.* at 1321–32 (contrasting the warm reviews of lenity with the approximately one third of surveyed judges that use canons for persuasive effect, and twenty-six of forty-two who believe that some canons are at least somewhat helpful in arriving at a decision).

214. *See id.* at 1343 ("[M]ost of the judges . . . interviewed did not view the Court's *interpretive methodology* as binding on them or as precedential." (emphasis added)).

215. *See id. See generally* Monaghan, *supra* note 15.

216. *Id.* at 13. "The Constitution is no less susceptible to interpretation through a consideration of its text, structure and purpose than are statutes." *Id.* (citations omitted).

217. *See generally* U.S. Const. amend. V; U.S. Const. amend. XIV, §1.

218. *Cf.* Sykes v. United States, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting) (quoting United States v. Batchelder, 442 U.S. 114, 123 (1979)) ("What does violate the Constitution is approving the enforcement of a sentencing statute that does not 'give a person of ordinary intelligence fair notice' of its reach."), *overruled by* Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

219. *Id.* at 14.

interpretive pronouncements as law."[220] This state of affairs has inevitably filtered down to the appellate court level, where many use them to affect "intellectual-sounding" opinions but feel that "they [are] not bound to use" canons and frequently "disparage them."[221] In contrast, despite the rule's unsettled doctrine, lower courts oscillate between conflicting Supreme Court formulations of lenity.[222] While it is unclear whether the Court is conscious of this, the lower federal courts seem to regard the Supreme Court's musings on lenity as binding law, more akin to the constitutional common law used in *Miranda* than to the strategic use of linguistic or substantive canons.[223]

By reemphasizing lenity's constitutional justifications and properly categorizing the rule under the constitutional common law, the Court could resolve many of lenity's doctrinal woes and reinvigorate the ancient maxim. For instance, the Court could craft a floor for penal clarity, or otherwise choose which of its articulations most accurately reflects the minimum standards inferable from the Constitution.[224] This would provide linguistic clarity as to (1) the exact contours of the constitutional right to notice;[225] (2) the practicable level of ambiguity that does not give fair notice to a defendant;[226] and (3) the tools a court may use to assess a statute's level of ambiguity. Through this process, the Court could resolve the debate over legislative history by asking whether certain legislative documents clear the constitutionally-inferred floor for proper notice. In doing so, the Court would provide a binding answer and more clarity to lenity jurisprudence for the lower courts, and lower courts could finally begin the process of disentangling meritless canons from the truly substantive ones.

B. The Tax Rule of Lenity

Concluding that the criminal applications of lenity are legitimate does not end the inquiry or sufficiently clarify canon doctrine. As a further example of this Comment's ontological methodology and the necessity of clarifying the status of the canons, it is necessary to ask where and how the rule of lenity's application might be illegitimate.

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220. Gluck, *Intersystemic Statutory Interpretation*, *supra* note 77, at 1909.

221. Gluck & Posner, *supra* note 3, at 1330, 1334.

222. *See, e.g.*, Hosh v. Lucero, 680 F.3d 375, 383 (4th Cir. 2012) (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998) (declining to invoke lenity under the grievous ambiguity standard).

223. *See* Miranda v. Arizona, 384 U.S. 436, 439–44, 458–62, 486–91 (1966).

224. *See* Monaghan, *supra* note 15, at 32–33 (arguing that the Court has created a common law rule based on constitutional interpretation to avoid a "particularized inquiry").

225. For instance, it could inform lower courts by delineating the requirement for *constructive notice* from the theory of *actual notice*.

226. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931).

Simply put, the ontological project should not be limited to differentiating between legitimate canons that embody the constitutional common law and those that advance impermissible judicial policymaking. A thorough determination must specifically consider when the use of a generally acceptable canon strays from its constitutionally-sanctioned end.

Perhaps as a result of its longevity, lenity has found uses in fields far removed from its traditional application. The rule of lenity's application in tax law might seem a natural application, given the criminal liability attached to violations of the tax code.[227] However, lenity's firmly established place in the tax field raises unique issues,[228] but in this context, it presents another opportunity to examine the inherent conflicts between canons and other concepts. Lenity's application as to tax law provides another example of the need for a hierarchal ranking and distinction between conflicting doctrines. For instance, many tax code provisions are "dual enforcement statutes," meaning that they carry "both civil and criminal consequences."[229] To the extent that violations trigger criminal consequences, lenity's application fits within the constitutional common law framework detailed in Section III(A) of this Comment. However, the "Supreme Court has applied the [tax] rule of lenity to resolve not only criminal cases," in line with its historical use but also "civil cases where the statute in question could be used as a basis for criminal prosecution."[230] The basic motive for applying lenity is the Court's preference for consistency in

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227. *See, e.g.*, Geraldine Szott Moohr, *Introduction: Tax Evasion As White Collar Fraud*, 9 HOUS. BUS. & TAX L. J. 208, 210 (2009) ("The criminal tax provisions form a quite complete criminal code that is independent of the generally applicable white collar offense found in Title 18 of the United States Code.").

228. *See, e.g.*, Eidman v. Martinez, 184 U.S. 578, 583 (1902) (citations omitted) ("It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language."); *see also* Bowers v. N.Y. & Albany Lighterage Co., 273 U.S. 346, 350 (1927) (citations omitted) ("The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."). Confusingly, this rule is sometimes termed the "pro-taxpayer presumption," perhaps to connote its unique application to civil penalties or a unique historical foundation. *See generally Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?*, NEV. LAW., APR. 2002, at 15; Steve R. Johnson, *The Canon That Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 525, n. 52 (2003) ("It is not always clear whether decisions in criminal tax cases are our maxim, the rule of lenity, or some other defendant protective-rule."). However, due to its functional similarity and identical justifications, this Comment accepts the equally widespread position that the principle is a mere permeation of the general rule of lenity. *See generally* Andy S. Grewal, *Why Lenity Has No Place in the Income Tax Laws*, 81 Mo. L. Rev. 1045 (2016).

229. Grewal, *supra* note 228, at 1046.

230. Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905, 910 (2007) (citing Clark v. Martinez, 543 U.S. 371 (2005); Leocal v. Ashcroft, 543 U.S. 1 (2004); United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992); Crandon v. United States, 494 U.S. 152 (1990)).

interpreting civil and criminal applications for dual enforcement statutes.[231]

In *Thompson/Center Arms*,[232] the Court justified its application of lenity by pointing to the fact that the National Firearms Act's "criminal applications . . . carr[ied] no additional requirement of willfulness,"[233] which was not contained in the civil provisions. Thus, the theory appears to be that because of the "criminal nature of the [National Firearms Act]," lenity applies "to all [of its] definitions."[234] Writing in dissent, Justice Stevens found that the Court's "mechanical" application of lenity strayed from its core constitutional justification.[235] Although Justice Stevens stated that "the main function of the rule of lenity is to protect citizens from the unfair application of ambiguous penal statutes," he nonetheless believed that possibility of a citizen being "subject[ed] to punishment [under the National Firearms Act] without fair notice" was "extremely remote."[236]

To illustrate his point, Justice Stevens emphasized the procedural separation of the criminal and civil penalties within the National Firearms Act. Justice Stevens argued that the Court could articulate a construction of the statute that would "entirely remove the risk of criminal liability in the future."[237] In the case at hand, the respondent had been advised as to the Government's interpretation of the National Firearms Act when there was only a "tax liability of $200 . . . at stake."[238] Thus, according to Justice Stevens, the respondent had fair notice. In sum, Justice Stevens faulted the Court for "treat[ing] the case as though it were a criminal prosecution."[239] A more appropriate analysis, in his view, would show deference to "the Government's interpretation of an important regulatory statute."[240]

The dissent presaged the conflict between lenity and agency deference, which has become a constant critique regarding the use of

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231. *Leocal*, 543 U.S. at 11–12 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citing United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–518 (1992)).

232. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505 (1992).

233. *Id.* at 517–18.

234. Stephen P. Halbrook, FIREARMS LAW DESKBOOK: RULE OF LENITY § 6:2, Westlaw (database updated Nov. 2018). To determine when a statute is criminal in nature, the Court exclaimed that if a statute has "criminal applications" it is criminal in nature, because "we know of no other basis for determining when the essential nature of the statute is 'criminal.'" *Id.* (citing U.S. v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 (1992)).

235. *Thompson/Ctr. Arms Co.*, 504 U.S. at 525–26 (Stevens, J., dissenting).

236. *Id.* at 525–26.

237. *Id.*

238. *Id*. at 526.

239. *Id.*

240. *Id.*

lenity in civil tax cases in the years after *Thompson/Center Arms*.[241] At the core of the issue is the fact that "judicial review of agency interpretation of law in the civil context follows an entirely different, almost opposite, path from the rule of lenity."[242] There are differing views as to the exact level of deference that a court owes an agency in the civil tax context. However, it is practically indisputable that where "Congress's intent is not clear and a statute is ambiguous, judicial review emphasizes deference to the government to one degree of another."[243]

The divide extends beyond mere function; courts bring entirely different mindsets to the applications of lenity and deference.[244] Courts applying lenity tend to "emphasize conclusive resolution of statutory meaning" by choosing the more lenient of the susceptible interpretations.[245] Conversely, when applying deference, courts focus on "an assumption of interpretive flexibility on the part of executive branch or agency officials."[246] Accordingly, ambiguity is not to be stamped out by the courts because the ambiguity itself offers a necessary "opportunity for agency policy choice" that comports with the implied delegation manifested by Congress when it purposely drafts a law ambiguously.[247]

These differing theories can be neatly separated where the criminal and civil realms remain separate;[248] after all, agency deference is not applicable to the interpretation of purely criminal statutes.[249] Still, even beyond the field of tax law, lenity's infiltration of the civil space creates obvious tension.[250] With the absence of a clear hierarchy of legal principles and the Court's lenity jurisprudence lacking ontological clarity,[251] it appears that judges are free to apply either lenity or agency deference at will to meet their preferred ends. The existence of such a conflict undermines Justice Scalia's call for a neutral system of

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241. *See* Grewal, *supra* note 228, at 1049; *see also* Hickman, *supra* note 230, at 920–21.

242. Hickman, *supra* note 230, at 913.

243. *Id.*

244. *Id.* at 916.

245. *Id.* at 916–17.

246. *Id.* at 917.

247. *Id.*

248. *Id.* at 918. (citations omitted).

249. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

250. *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1 at 11–12, n. 8 (2004) (applying lenity to an immigration deportation statute).

251. *See generally The New Rule of Lenity*, *supra* note 119.

interpretation—textualism's most noble pursuit—and opens the way for the kind of dueling canon usage bemoaned by Llewellyn.[252]

The best way to defuse this conflict is to accept lenity's ontological purpose as a prophylactic measure for notice,[253] and, correspondingly, its lack of justification in the civil context.[254] Justice Stevens's concerns and general critique regarding the lack of notice in the civil enforcement setting is strongest where—as in the tax setting—an agency interpretation provides citizens with adequate constructive notice that specified conduct falls within a prohibition of the statute.[255] In writing for the majority of the Court for a different case,[256] Justice Stevens accepted a similar rationale by refusing to endorse lenity's control concerning a longstanding agency interpretation that was promulgated through notice-and-comment proceedings.[257]

Aside from the substance of his attempt to distinguish that case from *Thompson/Center Arms*,[258] Justice Stevens's method of differentiating the dangers of civil interpretations relative to criminal ones could prevent unhelpful conflicts of fundamentally irreconcilable doctrines. Thus, acknowledging that the Court has often "approach[ed] due process quite differently in its criminal and civil decisions" and questioning whether lenity has any place in the latter seems preferable,[259] even if it means undermining the majority's opinion in *Thompson/Center Arms*. To start the conversation, though, a focus on lenity's ontology allows for a larger discussion on its place in the

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252. HASEN, *supra* note 73, at 5. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399 (1950).

253. *See supra* Section III.

254. *See generally* Grewal, *supra* note 228.

255. *See* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, at 525–26 (1992) (Stevens, J., dissenting); *see also* Hickman, *supra* note 230, at 922. ("If fair warning is the Court's primary concern in deciding when to apply the rule of lenity, then the line the Court drew between lenity and [agency] deference in *Sweet Home* is a logicial one. . . . [W]hen an agency promulgates regulatory language interpreting a statute it administers, then unless the regulation exceeds the scope of the agency's mandate or is procedurally flawed, the regulation will carry the same legal force as the statute.").

256. Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995).

257. *Id.* at 703–04.

258. *Id.* at 704 n.18 ("We have never suggested that 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 'harm' regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them."). The absence of notice-and-comment rulemaking in *Thompson/Center Arms*, at least as a proxy for constructive notice, seems dubious since the respondent has been warned by Bureau of Alcohol, Tobacco, and Firearms that their products fell under the National Firearms Act. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 508 (1992).

259. Niki Kuckes, *Civl Due Process, Criminal Due Process*, 25 YALE LAW & POL. REV. 8, 14 (2006).

hierarchy of deterministic interpretive devices, particularly in contexts where it conflicts with other fundamentally opposed legal doctrines.

V. CONCLUSION

Despite the importance of the canons of construction to new textualism, the previous efforts to explain and validate their use have failed to focus on ontology. This Comment has attempted to fill that gap by exploring two applications of a single substantive canon—the rule of lenity. This Comment expanded on the better of these approaches to encourage a hierarchal ordering of the canons. For instance, lenity may rightly have a determinative effect in criminal cases, but in the civil context, a traditional respect for congressional will should triumph. Outside of what this analysis says about the canon itself, though, it would also be helpful if lenity is considered and evaluated when it comes into conflict with another canon or principle.

A better understanding of lenity is achievable by conceptualizing it as akin to a prophylactic rule springing from constitutional notions of due process and proper notice. The Supreme Court validates this understanding and the rule of lenity is rightly given priority by lower court judges. Through its many rulings and analyses on the subject, the Court places lenity firmly in the category of the constitutional common law. Accordingly, lenity should be considered a methodological precedent and should be binding on state courts that interpret federal law, at least when applied in the criminal context.

The applications used in this Comment is suitable for a host of other legal rules and methodologies. The most important point this Comment makes is that using a common language of ontology allows legal commentators to sidestep the tired textualist/purposivist debate and move toward a more noble goal: the implementation of a more neutral interpretive scheme. This Comment also demonstrates that it is incumbent on textualists to grapple with different legal rules and standards vigorously. Textualism sprang forth from the skepticism of unfettered judicial policymaking.[260] At the same time, it is self-defeating and paradoxical to adopt legal tools for objectivity if they are predicated on a boundless conception of judicial power.

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260. *See* HASEN, *supra* note 73.