Armed Career Criminal Act — Textualism — Canons of Construction — Wooden v. United States

The Armed Career Criminal Act[1] (ACCA) imposes lengthy sentences on those who possess firearms after committing violent felonies on three or more different "occasions."[2] Last Term, in *Wooden v. United States*,[3] the Supreme Court held that ten burglaries occurring in a single facility on a single night constituted a single occasion.[4] The Court's holding was sensible and unanimous. But two Justices used the case to spar over interpretive philosophy, each endorsing a different "canon of construction." Justice Gorsuch championed the rule of lenity.[5] Justice Kavanaugh critiqued that rule as inferior to the mens rea (guilty mind) presumption.[6] As self-described "textualists," both of these Justices think judges ought to act as "faithful agents." But in *Wooden*, both also relied on moral reasoning inconsistent with faithful agency. That discrepancy highlights an ongoing problem for textualism writ large.

William Wooden robbed ten units of a storage facility in 1997.[7] He pleaded guilty to ten counts of burglary for doing so.[8] On a cold night seventeen years later, a man knocked on his door and asked to speak to his wife.[9] That man, it turned out, was a plainclothes officer named Conway Mason.[10] Once Mason found his way inside — he insists he was invited, which Wooden denies — Mason noticed that Wooden was carrying a rifle and ordered him to drop it.[11] Based on Wooden's prior felonies, federal prosecutors charged him with "being a felon in possession of a firearm and ammunition."[12]

Before trial, Wooden tried and failed to suppress the evidence of his weapons.[13] The Fourth Amendment protects against "unreasonable searches and seizures" by law enforcement.[14] But given Mason's testimony, the government argued that Wooden consented to Mason's

---

1 18 U.S.C. § 924(e).

2 *Id.* § 924(e)(1).

3 142 S. Ct. 1063 (2022).

4 *Id.* at 1069.

5 *See id.* at 1081 (Gorsuch, J., concurring in the judgment).

6 *See id.* at 1076 (Kavanaugh, J., concurring).

7 *Id.* at 1067 (majority opinion).

8 *Id.*

9 United States v. Wooden, 945 F.3d 498, 499 (6th Cir. 2019); *see also* United States v. Wooden, No. 15-CR-12, 2015 WL 13736020, at *4 (E.D. Tenn. Oct. 23, 2015) (report and recommendation of magistrate judge).

10 *Wooden*, 2015 WL 13736020, at *1–2. Mason "could not recall" if he disclosed that he was a police officer. *Id.* at *2.

11 *Id.* at *2, *6.

12 United States v. Wooden, No. 15-CR-12, 2015 WL 7459970, at *2 (E.D. Tenn. Nov. 24, 2015). 18 U.S.C. § 922(g) forbids felons from possessing firearms.

13 *Wooden*, 2015 WL 7459970, at *2–3.

14 U.S. CONST. amend. IV; *see also Wooden*, 2015 WL 13736020, at *1.

search, making it reasonable.[15] Because the district court accepted a magistrate judge's decision to trust Mason, it denied Wooden's motion to suppress.[16] Wooden lost his trial.[17]

At sentencing, prosecutors argued that Wooden's sentence should be governed by the ACCA.[18] Normally, the maximum sentence for Wooden's crime would have been ten years.[19] The ACCA places a *minimum* sentence of *fifteen* years on an individual who illegally possesses a firearm and has three or more convictions for a "violent felony . . . committed on occasions different from one another."[20] Wooden had been convicted of the 1997 storage burglaries, a 1989 aggravated assault, and a 2005 burglary — potentially twelve "occasions."[21] Wooden argued that neither the assault nor the burglaries were "violent felonies" under the ACCA, and that the storage burglaries occurred on a single occasion.[22] The district court tabled whether Wooden's assault was a violent felony, instead orally ruling that his burglaries were, and that each of his ten 1997 burglaries constituted a separate occasion.[23] Wooden appealed his resulting sentence of nearly sixteen years in prison.[24]

The Sixth Circuit affirmed.[25] Writing for the court, Judge Readler[26] began with the Fourth Amendment. "[G]iven the district court's front-row view of the evidentiary proceedings," the Sixth Circuit accepted its dispositive finding that Wooden invited Mason inside.[27] Then Judge Readler turned to the ACCA. The Sixth Circuit had recognized "at least three indicia that offenses are separate" under the ACCA: whether (1) one can discern the first offense's end from the second's start; (2) the offender could have stopped after the first offense; and (3) the offenses occurred in separate locations.[28] To Judge Readler, "Wooden's argument [came] up short, no matter the metric."[29] First, Wooden physically left one storage unit before entering another, so chronological borders were clear.[30] Second, there was "no reason why it would have been

---

[15] *See Wooden*, 2015 WL 13736020, at *5.
[16] *See Wooden*, 2015 WL 7459970, at *2–3.
[17] United States v. Wooden, 945 F.3d 498, 500 (6th Cir. 2019).
[18] *See id.* at 500–01.
[19] *See Wooden*, 142 S. Ct. at 1068 (citing 18 U.S.C. § 924(a)(2)).
[20] 18 U.S.C. § 924(e)(1).
[21] *Wooden*, 945 F.3d at 500–01.
[22] *Id.* at 501.
[23] *See id.*; Reply Brief of the Appellant William Wooden at 10, *Wooden*, 945 F.3d 498 (No. 19-5189).
[24] *Wooden*, 142 S. Ct. at 1068.
[25] *Wooden*, 945 F.3d at 500.
[26] Judges Gilman and Kethledge joined Judge Readler.
[27] *Wooden*, 945 F.3d at 502 (citing United States v. Lawrence, 735 F.3d 385, 436, 438 (6th Cir. 2013)).
[28] *Id.* at 504 (quoting United States v. Hill, 440 F.3d 292, 297 (6th Cir. 2006)).
[29] *Id.* at 505.
[30] *See id.*

impossible for Wooden to call it a night after the first burglary."[31] Finally, third, each of the ten units "was its own location."[32]

Considering only the ACCA issue,[33] the Supreme Court reversed and remanded.[34] Writing for the majority, Justice Kagan[35] swiftly rejected the government's framework. The government would have defined an occasion as occurring at the moment when a single offense's elements were satisfied.[36] But that "leaves ordinary language behind."[37] Justice Kagan asked "how an ordinary person . . . might describe Wooden's ten burglaries — and how she would not. The observer might say: 'On one occasion, Wooden burglarized ten units in a storage facility.' By contrast, she would never say: 'On ten occasions, Wooden burglarized a unit in the facility.'"[38] Justice Kagan also pointed out that the ACCA "contains *both* a three-offense requirement *and* a three-occasion requirement," the latter of which would be redundant on the government's definition.[39]

Instead, the majority crafted a "multi-factored" inquiry.[40] First, on timing, offenses "committed close in time" often share an occasion.[41] Second, on proximity, "the further away crimes take place, the less likely they are components of the same criminal event."[42] And third, on character, "[t]he more similar . . . the conduct" constituting the crimes, "the more apt they are to compose one occasion."[43] Each consideration favored Wooden: he committed identical crimes on one night in one place.[44]

The majority bolstered its analysis with legislative history. Until 1988, the ACCA had no occasions clause.[45] That is, its penalty scheme applied whenever an offender met a convictions requirement.[46] But when prosecutors tried to enhance one Samuel Petty's sentence because of six felonies he had committed during one restaurant robbery, the

[31] *Id.*

[32] *Id*. Before concluding, Judge Readler also dismissed as forfeited a new claim — raised only in Wooden's reply brief — that the government failed to prove Wooden *knew* he was a convicted felon, which Wooden argued was "an essential element" of his charge. *Id.* at 506.

[33] Wooden v. United States, 141 S. Ct. 1370, 1370 (2021) (mem.); Petition for Writ of Certiorari at 1, *Wooden*, 142 S. Ct. 1063 (No. 20-5279). The Court agreed to hear the ACCA "occasions" issue to resolve a circuit split, *Wooden*, 142 S. Ct. at 1068, though Wooden had petitioned the Court to hear his Fourth Amendment claim as well, *see* Petition for Writ of Certiorari, *supra*, at 1.

[34] *Wooden*, 142 S. Ct. at 1074.

[35] Justice Kagan was joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kavanaugh. She was joined in part by Justices Thomas, Alito, and Barrett. Justice Gorsuch concurred in the judgment.

[36] *Wooden*, 142 S. Ct. at 1069.

[37] *Id.* at 1070.

[38] *Id.* at 1069.

[39] *Id.* at 1070 (citing 18 U.S.C. § 924(e)(1)).

[40] *Id.*

[41] *Id.* at 1071.

[42] *Id.*

[43] *Id.*

[44] *See id.*

[45] *Id.* at 1072.

[46] *Id.*

Solicitor General "confessed error," arguing to the Court that this was inconsistent with the ACCA's purpose of targeting repeat offenders.[47] Congress added the occasions clause "to prevent future Pettys" — like Wooden — "from being sentenced as career criminals."[48]

Justice Gorsuch concurred in the judgment.[49] He argued that "the key to this case . . . [lies] in the rule of lenity. Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty."[50] Justice Gorsuch first noted lenity's pedigree. It "appeared in English courts" and was "widely recognized . . . in the Republic's early years."[51] Lenity also has a close relationship to due process (it "enforce[s] the fair notice requirement")[52] and the separation of powers ("laws restricting liberty require the assent of the people's representatives").[53] Woven through Justice Gorsuch's opinion are notable hints at lenity's moral force. For example, the opinion echoed Chief Justice Marshall's sentiment that lenity protects "the tenderness of the law for the rights of individuals."[54]

Justice Kavanaugh concurred, writing separately to address Justice Gorsuch.[55] Because "ambiguity is in the eye of the beholder," applying lenity more broadly could spur "significant inconsistency, unpredictability, and unfairness in application."[56] For that reason, it should apply only when a statute is "grievously ambiguous," as some Supreme Court cases have suggested.[57] Justice Kavanaugh instead argued that a mens rea presumption could solve the "important concern . . . about fair notice in federal criminal law."[58] This presumption requires the government to demonstrate that a defendant broke the law with a specific state of mind (*which* state of mind remains variable and unclear[59]), as long as the statute does not say otherwise.[60] The presumption serves the constitutional value of fair notice and the "principle that an act is not

---

[47] *Id.* at 1072 (citing Petty v. United States, 798 F.2d 1157, 1159–60 (8th Cir. 1986) (per curiam), *vacated*, 481 U.S. 1034 (1987); Brief for the Petitioner add. at 30a–31a, *Wooden* (No. 20-5279)).

[48] *Id.* at 1073.

[49] *Id.* at 1079 (Gorsuch, J., concurring in the judgment). Justice Sotomayor joined most of Justice Gorsuch's opinion.

[50] *Id.* at 1081.

[51] *Id.* at 1082.

[52] *Id.*

[53] *Id.* at 1083.

[54] *Id.* at 1082 (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

[55] *See id.* at 1075 (Kavanaugh, J., concurring).

[56] *Id.* at 1076.

[57] *Id.* at 1075 (citing, for example, Shaw v. United States, 137 S. Ct. 462, 469 (2016)).

[58] *Id.*

[59] *See The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 191, 333–35 (2015) (discussing the various approaches suggested in *Elonis v. United States*, 575 U.S. 723 (2015), where a criminal statute was silent on mens rea).

[60] *See Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring) (citing Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019)).

culpable unless the mind is guilty."[61] It also has a long history: "[A]s Justice Robert Jackson remarked," the presumption is "universal and persistent in mature systems of law."[62]

Justice Barrett concurred in part and concurred in the judgment, challenging the majority's legislative history.[63] In her view, not enough evidence tied the occasions clause to Petty's case or to the Solicitor General's brief therein.[64] Further, that brief attributed certain goals to the ACCA that Congress never ratified, so it was not authoritative.[65]

Justice Sotomayor concurred in the majority opinion and joined most of Justice Gorsuch's opinion.[66] She wrote separately to emphasize that the "[un]clarity of the record below . . . underscore[s] the Government's failure to carry its burden."[67]

Wooden sparks many questions,[68] but two of its concurrences stand out. Neither Justice Gorsuch's rule of lenity nor Justice Kavanaugh's mens rea presumption is rooted in the text of the ACCA, even though both Justices are "textualists." It is not new for textualists to rely on certain kinds of extratextual factors — so-called "substantive canons of construction." But the defenses that textualists have developed for the substantive canons cannot justify the *Wooden* concurrences. This raises two questions: whether textualists can honestly claim not to read values onto text, and whether faithful agents can use the canons as people actually want them used.

According to its patron saint Justice Scalia, textualism is the theory that "[t]he text is the law, and it is the text that must be observed."[69] In short, textualism relies on two foundations. First, courts should be the "faithful agents" of either Congress or the people.[70] Second, focusing on

---

[61] *Id.*

[62] *Id.* (citing Morissette v. United States, 342 U.S. 246, 250 (1952)).

[63] *Id.* at 1076–77 (Barrett, J., concurring in part and concurring in the judgment). Justice Thomas joined Justice Barrett.

[64] *See id.* at 1077.

[65] *See id.* at 1078–79.

[66] *Id.* at 1074 (Sotomayor, J., concurring); *id.* at 1079 (Gorsuch, J., concurring in the judgment).

[67] *Id.* at 1074 (Sotomayor, J., concurring).

[68] For example, will judges find guidance in the Court's approach? Does the ACCA occasions clause inquiry violate the Fifth or Sixth Amendment? *See id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment).

[69] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 22 (Amy Gutmann ed., new ed. 2018).

[70] *E.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) ("The root of the textualist position is . . . in straightforward faithful agent theory."); Amy Coney Barrett, Essay, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("While textualists have not fully developed the point, they view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."). Note that many purposivists and process-based theorists at least claim this premise as well. *See* Manning, *supra*, at 9; Barrett, *supra*, at 2208.

"the final wording of a statute" is the best way to act as a faithful agent.[71] Among other things, that means no personal values in the courtroom.[72] Textualism has many critics,[73] though it thrives in modern courts.[74] For their parts, Justices Gorsuch and Kavanaugh are proud textualists.[75]

But Justice Gorsuch's rule of lenity and Justice Kavanaugh's mens rea presumption look like they import values into text. In Justice Gorsuch's own words, lenity stands for the principle that "where uncertainty exists, the law *gives way* to liberty."[76] And English courts developed the rule of lenity precisely to override harsh sentences imposed by statute.[77] The mens rea presumption is similar. It allows judges to add conditions to enacted text in order to "*protect* criminal defendants *against* arbitrary or vague . . . *statutes*."[78] Indeed, the opinion that paved the way for the modern mens rea presumption called it "instinctive" — depicting it as a natural (perhaps moral?) demand on judges, not a textual one.[79]

It's not just Justices Gorsuch and Kavanaugh. According to multiple studies, textualists regularly use such "substantive canons of construction."[80] These are extratextual "principles and presumptions that judges

---

71 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 74 (2006) (briefly explaining why faithful agency may require a focus on text); *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (explaining that "the Court employs the fairly blunt presumption that a statute's 'plain meaning' accurately expresses [legislative] intent," and arguing that such plain meaning is "the only relevant expression" thereof).

72 *See, e.g.*, NEIL M. GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019). Besides, perhaps, whatever values convince the judge to prioritize text.

73 *See, e.g.*, Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment*: *Which Textualism?*, 134 HARV. L. REV. 265, 265–66 (2020) ("The academic indictment of textualism was almost in." *Id.* at 265.). *Compare, e.g.*, Manning, *supra* note 70, at 126 (defending textualism), *with, e.g.*, Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 290–94 (2019) (attacking it on multiple grounds).

74 *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 & n.11 (2018). One prominent casebook cites a number of studies showing that "over the last quarter-century the Supreme Court and the federal courts of appeals . . . have placed greater emphasis on the text." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 163–64 (2d ed. 2013). Even Justice Kagan once famously said that "we're all textualists now." Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), https://youtu.be/dpEtszFToTg [https://perma.cc/UA47-7ANH].

75 *See, e.g.*, GORSUCH WITH NITZE & FEDER, *supra* note 72, at 128 (making a "[c]ase for [t]extualism"); Emily Bazelon & Eric Posner, Opinion, *Who Is Brett Kavanaugh?*, N.Y. TIMES (Sept. 3, 2018), https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html [https://perma.cc/ND9F-G4X6] (explaining that Justice Kavanaugh calls himself a textualist).

76 *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment) (emphasis added).

77 *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129 (2010); Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 925 (2020).

78 *Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring) (emphases added).

79 Morissette v. United States, 342 U.S. 246, 251 (1952).

80 *E.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6 (2005) (finding that, in close cases, the Court uses substantive canons to reach conservative results more often than liberal ones); Anita S. Krishnakumar,

have created to protect important background norms."[81] How do textualists respond to the apparent inconsistency between text and canon? In *Wooden*, they contended that the canons' extratextual values were unique: "ancient,"[82] "deeply rooted,"[83] and around "for centuries."[84] But a value's age does not make it textual.

The real question is whether canons "fit with the most basic textualist assumptions"[85] — for one, that judges should act as faithful agents of Congress. Few have actually answered this question. Then-Professor Barrett wrote that "no one ha[d]"[86] before she did, though related arguments from Dean John Manning and Professors William Baude and Stephen Sachs deserve attention.

Manning's defense of canon use came first. He argues that canons reveal "clear social meaning"[87] by "acknowledg[ing] . . . established (but unstated) assumptions shared by the relevant linguistic community."[88] To the textualist, these assumptions may supply only "*semantic context* — evidence that goes to the way a reasonable person would use language," rather than "*policy context* — evidence that suggests the way a reasonable person would address the mischief being remedied."[89] On this view, a judge's mens rea presumption can be valid if, and only if, it is a pure estimation of how an average lawyer would understand a law's text. Put differently, valid substantive canons are *really* linguistic ones. They reflect the way people use language, never "invit[ing] the court to make adjustments" given a case's substance.[90]

Justice Barrett came second. She describes "[c]anons as [c]onstitutional [i]mplementation."[91] She writes that "[c]onstitutionally inspired canons might be explained as an outgrowth of the power of judicial review" — with judges acting "as faithful agents *of the Constitution*," not of Congress.[92] Accordingly, judges may use canons as "'stop and think' measures" to spotlight "the constitutional implications of [Congress's]

Reconsidering Substantive Canons, 84 U. CHI. L. REV. 825, 847, 849 tbl.1 (2017) (finding that 11.7% of Justice Thomas's opinions, 11% of Justice Scalia's opinions, and 13.8% of Justice Alito's opinions relied on substantive canons from 2005 to 2011). Professor Anita Krishnakumar makes a compelling argument that textualists' *main* extratextual "escape valve" is precedent. *See* Krishnakumar, *supra*, at 886–87.

[81] Krishnakumar, *supra* note 80, at 833.

[82] *Wooden*, 142 S. Ct. at 1085 (Gorsuch, J., concurring in the judgment).

[83] *Id.* at 1076 (Kavanaugh, J., concurring).

[84] *Id.* at 1086 n.6 (Gorsuch, J., concurring in the judgment). Justice Scalia similarly thought lenity was "validated by sheer antiquity." Scalia, *supra* note 69, at 29.

[85] Manning, *supra* note 70, at 125.

[86] Barrett, *supra* note 77, at 110.

[87] Manning, *The Absurdity Doctrine*, *supra* note 71, at 2471.

[88] *Id.* at 2470.

[89] Manning, *What Divides Textualists from Purposivists?*, *supra* note 71, at 76.

[90] Manning, *The Absurdity Doctrine*, *supra* note 71, at 2471.

[91] Barrett, *supra* note 77, at 168.

[92] *Id.* at 169 (emphasis added).

policies."[93] This view is importantly narrow. To prevent sweeping but facially Constitution-based decisions, Justice Barrett endorses only canons that protect "concrete" values and that apply to "a narrow category of legislation."[94] This theory does qualify the judge's role as a faithful agent of Congress, but only to serve the Constitution.[95] Because that same Constitution grounds faithful agent theory in the first place,[96] textualists may be amenable to Justice Barrett's approach.

Finally, Baude and Sachs argue that "the canons stand on their own authority as a form of common law."[97] On this view, judges should be faithful agents of the "*law*," first and foremost.[98] And while the valid law champions text, it also includes "distinct rules of unwritten law."[99] Baude and Sachs therefore evaluate canons not on "an ability to make the legal system work better . . . [but] according to the appropriate theory of determining unwritten law."[100] To be fair, Baude and Sachs stay quiet about that determination, leaving open whether a judge's "general concern for equity" is valid "unwritten law."[101] But, first, both authors elsewhere seem skeptical this is so.[102] Second, any version of their argument that does recognize the concern for equity would be hard to call a textualist one. And third, most importantly, even if Baude and Sachs do accept the concern for equity as a valid part of law, they would permit a judge to consider it only as a *means of agency* to law, not as a first-order source of judgment. For these reasons, Baude and Sachs's theory cannot support a judge who values equity in the first instance, especially insofar as their theory serves textualists.

None of these frameworks justifies the *Wooden* concurrences — at least if those concurrences are taken at face value.[103] To start, neither Justice Gorsuch nor Justice Kavanaugh framed his inquiry as a semantic one, as Manning would require. Instead, both *separated* the act of interpreting a statute's text from the act of applying a canon. Besides writing that "the law *gives way* to liberty,"[104] Justice Gorsuch observed

---

[93] *Id.* at 175.

[94] *Id.* at 179.

[95] *See id.* at 177.

[96] *See* Manning, *supra* note 70, at 5.

[97] William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017).

[98] *See id.* at 1093 (emphasis added). Some textualists may not welcome this approach, but it is a significant modern theory of faithful agency and at least textualism-adjacent.

[99] *Id.* at 1106.

[100] *Id.* at 1127.

[101] *Id.* at 1122.

[102] *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) ("Our higher-order practices point toward textualism and originalism."); Stephen E. Sachs, Essay, *Originalism Without Text*, 127 YALE L.J. 156, 166 (2017) ("[T]he broad agreement that text is centrally important to originalism can be explained by the fact that, in our society and with our history, the text *is* centrally important."). Their view of unwritten law seems narrow.

[103] A separate question is whether the frameworks are coherent whatsoever.

[104] *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in the judgment) (emphasis added).

that lenity applies "[w]here the traditional tools of statutory interpretation yield no clear answer."[105] Justice Kavanaugh noted that the mens rea presumption may apply when a "criminal statute *does not contain* a 'willfulness' requirement."[106] Read closely, the concurrences do not conceptualize substantive canons as helping judges "interpret" what a text "contains," but as helping them decide cases *after* they do so.[107]

The concurrences face a similar problem with Baude and Sachs. To satisfy them, each Justice would have needed to support his preferred canon in the first instance for its legal or historical, rather than its functional or moral, superiority. But that's not what they did. Justice Gorsuch wrote that lenity is rich "in age *and wisdom*,"[108] and that its rejection would be an "instrumen[t] of tyranny"[109] making Americans "slaves to their magistrates."[110] Justice Kavanaugh, too, favored the mens rea presumption because a "concern for fair notice is *better addressed*" by it.[111] Meanwhile, nowhere did the Justices write that they expressed normative concerns only because the law instructed them to, as perhaps Baude and Sachs could accept (though, again, a textualist could not). Unless the Justices' extensive normative writing is rhetorical flourish alone, Manning, Baude, and Sachs can't endorse their work.

The question is closer with Justice Barrett. She permits normative reasoning when it is motivated by the Constitution. And Justices Gorsuch and Kavanaugh did tie their canons to constitutional values.[112] But that isn't enough — even on the charitable premise that the concurrences considered only the Constitution, rather than morality.[113] Specifically, both fail Justice Barrett's test by invoking nonspecific constitutional themes that affect a wide range of legislation. Justice Gorsuch supported lenity by citing the exceptionally broad tenets of "fair notice and the separation of powers," proposing to read all "penal" laws (not just criminal ones) with a thumb on the scale.[114] He wrote, for example, that "[l]enity works to enforce the fair notice requirement by ensuring that . . . *liberty always prevails* over ambiguous laws."[115] Justice Kavanaugh also

---

[105] *Id.* at 1085–86.

[106] *Id.* at 1076 (Kavanaugh, J., concurring) (emphasis added).

[107] *See id.* at 1075; *id.* at 1084 (Gorsuch, J., concurring in the judgment); *see also* Barrett, *supra* note 77, at 117 (acknowledging that substantive canons "promote policies external to a statute").

[108] *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring in the judgment) (emphasis added) (quoting United States v. Mann, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718)).

[109] *Id.* (alteration in original) (quoting THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[110] *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *371 (1769)).

[111] *Id.* at 1076 (Kavanaugh, J., concurring) (emphasis added).

[112] *See supra* notes 52–53, 61 and accompanying text.

[113] Why, for example, does each Justice talk about the functional superiority of his canon?

[114] *Wooden*, 142 S. Ct. at 1086 & n.5 (Gorsuch, J., concurring in the judgment).

[115] *Id.* at 1082 (emphasis added).

phrased the mens rea requirement as "one solution" to a "fair notice problem."[116]

Justice Barrett rejects exactly these kinds of proclamations: "'Fairness' is a nebulous value susceptible to many different interpretations and applicable across a wide range of legislation."[117] Her concern is that when judges are permitted to craft "one solution" to "fair notice," especially when that solution affects many laws, they do not act like *agents*.[118] Instead, they act like a judge who uses a personal "canon" of reading employment laws to favor laborers, insisting that she does so to enforce the constitutional value of equal protection for oppressed groups. Textualists generally condemn such behavior. Maybe this is why Justice Barrett's scholarship is lukewarm on the rule of lenity,[119] and why she declined to join Justice Gorsuch or Justice Kavanaugh in *Wooden*.

If the *Wooden* concurrences are inconsistent with faithful agency, two conclusions follow. First, "textualist" judges should not dismiss explicit concerns over equity as different in kind from their own. Maybe textualists have reasons to import only "ancient" values into their decisions, but those reasons are brought to the text, not found in it. This admission forces textualists to engage with the reasons cutting against them — reasons for adding new values to the judge's toolbox. Second, faithful agency (at least in the textualist's sense[120]) might be an unwanted ideal. It requires judges to throw away the canons as people probably want them used. For example, faithful agency would make lenity a tool of *language* or *history* rather than *fairness*. That even Justices Gorsuch and Kavanaugh demanded more from their canons shows how counterintuitive and unkind faithful agency can be. And of course, faithful agency's alternatives come in a variety of flavors, all of which respect enacted text.[121] The point is just that judges shouldn't stick their heads in the sand, or like modern textualists, pretend to.

---

116 *Id.* at 1076 (Kavanaugh, J., concurring).

117 Barrett, *supra* note 77, at 179.

118 *See id.* at 179–80.

119 *See id.* at 178.

120 It is a question for another day whether a purposivist's faithful agency suffers from the same problems. It may not insofar as it allows judges discretion in realizing a law's purpose.

121 For a taste, compare Fallon, *supra* note 73, at 311–12, advancing a kind of functionalism, with William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997)), critiquing faithful agency from within originalism, and Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 918, advocating for a "canons-based approach" that limits judges' significant individual discretion while not utilizing faithful agency. To address concerns that these theories ignore democratically enacted text, see Fallon, *supra* note 73, at 312, which argues that, "[f]or reasons involving the moral legitimacy of law, courts should hesitate to deviate too far from broadly shared perceptions of statutes' meanings."