Mezzanine Law: The Case of a Mens Rea Presumption

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Many of the modern challenges of mens rea, the mental state element of crime, stem from the purported ambiguities of legislation.[1] Sometimes the issue involves uncertainty in interpreting a specified mental state—whether, for instance, "willfully" requires an appreciation that one is violating the law, thereby allowing claims of ignorance through a mistake-of-law defense.[2] At other times, a mens rea requirement may raise questions as to its application within a statute, like whether to distribute an explicit mental state across the elements of a crime.[3] But when these interpretive possibilities prove impossible as a matter of language or reason, or when a provision is entirely bereft of any culpable mental state, the issue takes on a distinctly normative character: whether to infer a mental state requirement based on a free-floating presumption in favor of mens rea. The presumption is born of a belief that mens rea is not just a matter of legislative grace in enacting criminal statutes. At the same time, it is tempered by a profound judicial ambivalence about imposing constitutional constraints on criminal culpability. The mens rea presumption thus exists in the space between statutory law and constitutional law, providing an example of what I will call "mezzanine law." This essay sketches the concept and its application to some contemporary problems of culpability.

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1. The concept of mens rea—Latin for a "guilty mind"—has been described using various terms, like "scienter, malice aforethought, guilty knowledge, and the like." Elonis v. United States, 575 U.S. 723, 734 (2015); *see also* Morissette v. United States, 342 U.S. 246, 252 (1952).

2. *See, e.g.*, Bryan v. United States, 524 U.S. 184, 196 (1998); Ratzlaf v. United States, 510 U.S. 135, 141 (1994); Cheek v. United States, 498 U.S. 192, 201 (1991). With this kind of issue, the Court has "recognized that the mental element in criminal law encompasses more than the two possibilities of 'specific' and 'general' intent" under the common law, and that "[t]he required mental state may of course be different for different elements of a crime." Liparota v. United States, 471 U.S. 419, 423 n.5 (1985).

3. *See, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009); United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).

I.

My thoughts on the presumption of mens rea were inspired by a pair of papers—one by Shon Hopwood[4] and the other by Guyora Binder and Brenner Fissell[5]—which I had the opportunity to review for this symposium.[6] Both pieces describe the relevant doctrines as remedies for poor legislative draftsmanship, which effectively delegates to the courts the responsibility to determine the existence, meaning, and application of a mens rea requirement. To some extent, the authors' responses are inquiries into judicial craftsmanship, where statutory interpretation and application are a kind of skilled trade, whose practitioners accept a set of conventions of language and logic to solve the purported problems in a statute. Both papers illuminate this interpretive methodology: A court uses the legal tools at hand, in the style of a judicial artist (or engineer), to resolve a statutory ambiguity or outright absence of mens rea.

The papers can be viewed from a slightly different angle, however, which supports a distinct conception of the role of mens rea in American law. Hopwood hints at this approach when he connects the presumption of mens rea with its jurisprudential cousin, the rule of lenity, noting that both doctrines flow from constitutional due process.[7] Although Hopwood's ultimate goal is to articulate a simpler, more consistent approach to interpreting criminal statutes, his arguments may also provide a sturdier constitutional footing for

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4. *See* Shon Hopwood, *Two Sides of the Same Interpretive Coin: The Presumption of Mens Rea and the Historical Rule of Lenity*, 53 ARIZ. ST. L.J. (forthcoming 2021).

5. *See* Guyora Binder & Brenner Fissell, *Judicial Application of Strict Liability Local Ordinances*, 53 ARIZ. ST. L.J. (forthcoming 2021).

6. The scholarship on mens rea is rich and deep. Among the many articles of the past quarter century, the following are both significant contributions to the literature and particularly relevant to the present discussion: Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109 (2012); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769 (2012); Dan M. Kahan, *Ignorance of Law Is an Excuse–But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753 (2002); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993); Peter W. Low & Benjamin Charles Wood, Lambert *Revisited*, 100 VA. L. REV. 1603 (2014); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999); Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201 (2017); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999); Stephen F. Smith, *"Innocence" and the Guilty Mind*, 69 HASTINGS L.J. 1609 (2018); John S. Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

7. Hopwood, *supra* note 4 (manuscript at 506).

the presumption of mens rea. "The Supreme Court has described principles of mens rea as being 'essential' to the criminal law," Hopwood notes.[8] "And yet it has never held that substantive due process requires a mens rea element."[9]

I could quibble with his latter point—the U.S. Supreme Court did once hold that due process required a particular mental state,[10] though perhaps the exact basis might be described as *procedural* due process—but the singularity of that case still proves the point. Nearly sixty years ago, Herbert Packer offered this droll observation about the Court's then-existing jurisprudence: "Mens rea is an important requirement, but it is not a constitutional requirement, except sometimes."[11] Subsequent accounts have offered similar oxymorons in recapping an incomplete and confounding doctrine.[12] The relationship between mens rea and the U.S. Constitution remains equivocal at best, where the presumption of mens rea has constitutional underpinnings but is not a constitutional command.[13]

This ambiguous link is, to a large extent, a consequence of the gradations found in American law. In their paper, Binder and Fissell discuss the concept of preemption in mens rea analysis, where a local (municipal) offense is deemed invalid either because a state law covering the same conduct requires a different mental state, or because state law on a given subject is so comprehensive as to occupy the field and thereby preclude a strict-liability local offense.[14] The task here is not solely one of judicial craftsmanship in attempting to fill the void left by sloppy legislative drafting. Instead, the animating principle is legal hierarchy, where one law trumps another based on its superior authority.

Together, these ideas—the imperfect relationship between mens rea and the Constitution, and the hierarchy of law in mental state analysis—implicate a basic question for the American legal system. The extent to which a court may interpret and even infer a mens rea element depends upon the powers

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8. *Id.* (manuscript at 508 n.29).

9. *Id.*

10. *See* Lambert v. California, 355 U.S. 225, 228 (1957).

11. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 (1962).

12. *See, e.g.,* Singer & Husak, *supra* note 6, at 859-943 (reviewing Supreme Court cases); *see also infra* Parts II & III (similar).

13. Unless otherwise indicated, references herein to "the Supreme Court" (or "the Court") and "the Constitution" (or "constitutional") are to the U.S. Supreme Court and the U.S. Constitution, respectively. Although this essay focuses on the federal body and federal document, state supreme courts and state constitutions are also critical to mens rea analysis. *See, e.g.*, *infra* note 15 (discussing state court interpretations); *infra* notes 226–41 and accompanying text (discussing a state case); *infra* notes 276–78 (noting state and local law).

14. Binder & Fissell, *supra* note 5 (manuscript at 23–24).

and limits of the judiciary, which, in turn, are derived from a tripartite and federal constitutional system protective of individual rights.

In the first instance, a court's incorporation of a mens rea requirement may rest upon its duty and attendant authority to interpret the language of statutes.[15] In this role, the judiciary is often conceived as a "faithful agent" of lawmakers, drawing upon the language, structure, and history of a statute to discern and apply a legislative judgment on the appropriate mental state(s) of a crime.[16] By employing these tools of statutory construction as part of an "interpretive regime" for reading legislation, the Supreme Court "tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to [a statute's] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities."[17] And by making these rules clear to lawmakers (and their staff), the regime helps ensure the fulfillment of legislative judgments and thereby furthers the judiciary's role as faithful agent of the legislature.

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15. The federal judiciary's authority to interpret federal statutes is grounded in the Constitution's vesting of "the judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," which "extend[s] to all Cases, in Law and Equity, arising under . . . the Laws of the United States." U.S. CONST. art. III, §§ 1–2. Federal courts have the authority to interpret state statutes "where state decisions are in conflict or do not clearly establish what the local law is." Edward Hines Yellow Pine Trs. v. Martin, 268 U.S. 458, 463 (1925). In some cases, federal courts are not required to follow the interpretations of state statutes by state trial courts. *See* King v. Ord. of United Com. Travelers of Am., 333 U.S. 153, 159–62 (1948). But the federal courts, including the U.S. Supreme Court, have no power to interpret a state statute in contravention of the construction given to it by a state's supreme court, or by intermediate appellate courts "unless there is persuasive evidence that the highest state court would rule otherwise." *Id.* at 158.

16. Staples v. United States, 511 U.S. 600, 605 (1994) ("[W]e have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" (quoting United States v. Balint, 258 U.S. 250, 253 (1922))). The prevailing faithful agent model has been both supported and criticized in scholarship. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3–27 (2001) (describing and supporting faithful agent model); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 8–12 (2007) (describing prevalence of faithful agent model); Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 231–39 (2013) (describing debate over faithful agent model). Although the faithful agent model is often associated with the interpretive school known as "textualism," it is perfectly compatible with a rival theory known as "purposivism." While textualism privileges statutory text almost to the exclusion of all else, purposivism is willing to consider other sources of interpretation such as legislative history (*see infra* note 24)—yet both theories envision judges faithfully determining the legislature's intent in passing a statute. The faithful agent model (or at least its textualist version) stands in contradistinction to an approach labeled "dynamic statutory interpretation." *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112–14 (2010); *see also infra* notes 214–216 and accompanying text (describing dynamic statutory interpretation).

17. William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

Alternatively, the judiciary might impose a culpable mental state based on background norms—above all, the common law's mens rea requirement for criminal liability. Statutory gaps are thus resolved not by reference to the legislative text and context but instead by incorporating the historical position of Anglo-American jurisprudence. The most aggressive and potentially far-reaching approach would go further by invoking the Constitution to resolve issues of mens rea. If it's the subject of constitutional judicial review, a culpable mental state is not just a matter of statutory interpretation or a default reliance on the common law and past practices. Rather, the question is whether a constitutional provision demands a culpable mental state. Unlike the construction of statutes as goal-oriented acts, where a court seeks to glean and fulfill the legislative intent in enacting a law, a full-throated constitutional ruling on mens rea does not hinge on a legislature's judgment. A mens rea requirement grounded in the Constitution necessarily trumps any contrary objective of lawmakers.

To be sure, a hard divide among interpretive methodologies is not always possible. Indeed, all three can interact to resolve a single mens rea dispute: A court may find a culpable mental state by applying basic canons of statutory construction, which may be influenced or at least buttressed by common-law principles, which, in turn, may implicate concerns of constitutional law. This intermingling of different methodologies and levels of doctrine presents an intriguing possibility, one unrecognized by modern mens rea analysis, but lingering just below the surface of particular cases: Can a court impose a mens rea element without also holding that either the relevant statute or the Constitution requires as much? In other words, is there a law of culpability that is neither statutory nor constitutional?

As will be discussed below, the presumption of mens rea and the act of inferring a culpable mental state seem to reside within the interstices of the positive law of ordinary statutes and the fundamental law of the Constitution. The result is an instance of "mezzanine law": an intermediate layer of law that addresses issues of mens rea left unresolved by the tools of statutory interpretation, but it does so without invoking the full weight of the Constitution. Part II lays out the conventional understanding of the alternatives, where a culpable mental state may be required either by statutory law or by constitutional law—but that's it, there's no third option—an understanding that has made the Supreme Court hesitant to impose a culpable mental state under the Constitution despite lingering concerns that mens rea should not be relegated to the general scrum of legislative discretion. Part III then describes the ways in which the Court has revealed the constitutional underpinnings of the mens rea presumption without declaring that a culpable mental state is demanded by the Constitution. Part IV provides some thoughts

on the role played by this mezzanine law of mens rea, concluding in Part V with a parting caveat.

II.

To a large extent, the tension in modern mens rea analysis can be traced to the traditional two-tier conception of American law based on the (purported) division between the positive law of statutes (codes, ordinances, etc.) and the fundamental law of the Constitution, at least as these two bodies of law are interpreted by the judiciary.[18] The term *positive law* is loaded—as a matter of history, philosophy, even codification jargon[19]—but here I'm referring to laws enacted by a legislative body (e.g., Congress, state legislature, city council), which "can take whatever form the authors want,"[20] consistent with a general police power[21] or specifically enumerated powers invested in that body (typically by some fundamental law).[22]

The production of positive law can be seen as a purposeful act by a legislative body.[23] A court, in its role as adjudicator of legal conflicts through the interpretation and application of positive law, must discern the legislature's judgment as manifested in a statute's text and as further revealed through various indicators of legislative intent (e.g., the law's structure and any legislative history).[24] But a court's interpretation of positive law can

18. *See infra* notes 243–49 (noting problems with two-track conception).

19. *See* Off. of the L. Revision Couns., *The Term "Positive Law,"* U.S. CODE, https://uscode.house.gov/codification/term_positive_law.htm [https://perma.cc/XP6K-9AUG]; Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (Dec. 17, 2019), https://plato.stanford.edu/entries/legal-positivism/ [https://perma.cc/7CHV-7TNZ]; *Positive Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting that the term positive law "derives from the medieval use of *positum* (Latin 'established'), so that the phrase *positive law* literally means law established by human authority").

20. *Positive Law*, LEXICO, https://www.lexico.com/en/definition/positive_law [https://perma.cc/6LZA-DT8Y].

21. The term "police power" is loaded as well. "The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union," the Supreme Court once noted, but "[i]t is universally conceded to include everything essential to the public safety, health, and morals." Lawton v. Steele, 152 U.S. 133, 136 (1894).

22. *See, e.g.*, U.S. CONST. art. I, § 8 (listing powers delegated to Congress).

23. *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014) ("The dominant mode of statutory interpretation over the past century has been one premised on the view that legislation is a purposive act, and judges should construe statutes to execute that legislative purpose.").

24. The use of a legislative history is controversial, both in scholarship and in case law. *See, e.g.*, Barrett, *supra* note 38, at 112–13; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–07 (1997); William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301–

claim no greater authority than the statute itself, and that interpretation may be rejected or supplanted by a legislative body's enactment of further positive law to the contrary. This is the prevailing model of "legislative supremacy": courts interpreting statutes and other forms of positive law must give effect to the intent of those authorized to make positive law.[25]

By contrast, *fundamental law* is the basic or organic law of a government—in the present case, the Constitution of the United States[26]—that provides the basis for that government and authorizes, directs, regulates, and limits the exercise of governmental power. For various historical, conceptual, and theoretical reasons, fundamental law is considered superior to mere positive law,[27] such that the former trumps the latter when the two

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03 (1998); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 455–56 (1989); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Nonetheless, this essay assumes (but does not litigate) the legitimacy of courts searching the legislative history for evidence of legislative intent to require or dispense with mens rea.

25. *See, e.g.*, United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017) (discussing principle of legislative supremacy).

26. This essay refers only to the U.S. Constitution as fundamental law. Each of the American states has a constitution as its fundamental law, which may impact mens rea issues in state statutes and local ordinances. Here, I leave the full implications for another day. *See infra* notes 277–278 and accompanying text.

27. *See generally* Martin Loughlin, *Fundamental Law*, *in* THE POLITICAL DIMENSION OF CONSTITUTIONAL LAW 7 (Miguel Nogueira de Brito & Luís Pereira Coutinho eds., 2020). Under the prevailing conception of fundamental law,

> the 'sovereign people' express their authority by adopting a document that delineates the main institutions, powers and responsibilities of government. The document allocates the sovereign powers of rule between legislative, executive and judicial authorities and includes a catalogue of the basic rights of citizens which governing authorities must respect. In setting out the terms of the governing relationship, this document takes effect as the state's constitution. This innovation, a product of the late-eighteenth century revolutions in North America and France, gives the constitution a sense of higher-order law. In this way modern constitutions acquire the status of fundamental law. The legislature established by the constitution may be able to make laws that regulate social conduct, but the constitution itself is to be regarded as the higher-order law which grants those powers to the legislature. The constitution is fundamental law.
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> This new idea of the constitution as a text adopted in the name of the sovereign people means that, far from there being a body of laws enacted by the sovereign, a hierarchy of laws exists. The 'higher-order' law of the constitution becomes the modern expression of fundamental law.

Id. at 14.

cannot be reconciled.[28] So conceived, fundamental law is insulated from the vagaries of ordinary politics, where "policy is normally justified, for instance, if it would make the community safer by reducing violent crime."[29] Fundamental law is not balanced against routine considerations of social welfare, and, in that sense, it's "a trump over the kind of trade-off argument that normally justifies political action."[30]

The dominance of America's fundamental law is made clear through the so-called Supremacy Clause, a conflict-of-law rule that declares the Constitution "shall be the supreme law of the land; and the judges in every state shall be bound thereby."[31] As the foundation for a legal system, fundamental law is often deemed unchangeable or only subject to modifications achieved through special procedures. When it comes to the Constitution, the arduous nature of the amendment process renders America's fundamental law relatively impervious to textual change.[32]

This potent combination—the U.S. Constitution's supremacy over statutory law (or any other law for that matter) and the difficulty of changing the Constitution—makes the judiciary, especially the U.S. Supreme Court, the dispositive decision-maker on America's fundamental law. The power of the judiciary to "say what the law is"[33]—to interpret both statutes and the Constitution, and to strike down the former if they conflict with the latter—is bolstered by the finality of the Supreme Court's constitutional rulings[34] and

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28. This understanding of fundamental law's trumping function draws upon Ronald Dworkin's renowned theory of rights as trumps. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at ix (1977) ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

29. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 329 (2011).

30. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 31 (2011); *see also* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 28, at 191–92.

31. U.S. CONST. art. VI. Federal statutes and treaty laws made pursuant to the U.S. Constitution are also superior to state law. *Id.*; *see infra* note 279 and accompanying text.

32. U.S. CONST. art. V. Over 232 years, the U.S. Constitution has been amended only twenty-seven times, with twelve of those amendments coming within a few years of the Constitution's enactment, and another three amendments adopted in the wake of the Civil War. *See id.* amends. I–XV. Interestingly, the Constitution's most recent amendment took more than two centuries to be ratified. *See, e.g.*, Richard L. Berke, *1789 Amendment Is Ratified but Now the Debate Begins,* N.Y. TIMES, May 8, 1992, at A1.

33. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819) (holding that state law that conflicts with federal law is void).

34. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("*Marbury v. Madison* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a

furthered by the judiciary's commitment to precedent through the doctrine of stare decisis.[35] As a result of this power, constitutional rulings tend to narrow the universe of potential legislation for Congress and state lawmaking bodies.

A dual-track approach, which conceives the relevant issues as either purely statutory or purely constitutional, is reflected in some of the Supreme Court's cases on mens rea. Given the relative consequences of ruling on statutory versus constitutional grounds, it is unsurprising that many decisions requiring a culpable mental state have relied strictly on statutory interpretation. In such cases, the judiciary can style itself as a legal craftsman engaged in a careful proofreading process bound by the text, structure, and context of a statute. The task can be complex, at times involving concatenated provisions within a statute or even across several statutes—which the Court must stitch together, or read in unison, or compare and contrast—all to decipher the appropriate mens rea for one or more provisions.[36] The relevant tools for statutory interpretation include the rubric of language (e.g., grammatical rules) and the canons of construction, or at least those canons described as semantic or linguistic (e.g., *expressio unius est exclusio*

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permanent and indispensable feature of our constitutional system."); Baker v. Carr, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.").

35. As defined recently by Chief Justice Roberts,

> *Stare decisis* ("to stand by things decided") is the legal term for fidelity to precedent. It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion."

June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) (citations omitted) (first quoting *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019); and then quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69). According to the Court, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). But "[*s*]*tare decisis* is not an inexorable command," particularly in constitutional cases. *Id.* at 828.

36. *See infra* notes 44–45, 133–34, 172 & 222–24 and accompanying text (describing specific statutory schemes involving the incorporation or comparison of provisions). *But see, e.g.*, *infra* notes 134–42 (criticizing incorporation of statutory provisions).

alterius).[37] These tools are substantively neutral and do not put a thumb on the scale in favor of (or against) finding a culpable mental state.[38]

One modern example, *Flores-Figueroa v. United States*, involved a federal identify-theft statute imposing a mandatory sentence on an offender who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[39] Ultimately, the Supreme Court held that the mens rea term "knowingly" applied to "another person," such that the offender must know that the means of identification belonged to someone else.[40] In reaching this conclusion, the *Flores-Figueroa* Court relied heavily on the rules of language: "In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."[41]

Given the statute's text, the most natural grammatical reading of the adverb "knowingly"—which modifies the transitive verbs "transfers, possesses, or uses"—would apply the mens rea of knowledge to an object of the sentence, "another person."[42] The Court's grammar-based interpretation was supported by everyday instances where the term "knowingly" applied to the words that followed: "If we say that someone knowingly ate a sandwich with cheese, we normally assume that the person knew both that he was eating a sandwich and that it contained cheese."[43] This understanding was also consistent with prior cases interpreting the word "knowingly" as applying to all subsequent elements of a crime.

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37. Latin for "the express mention of one thing excludes all others," the *expressio unius* canon "establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.' The maxim is one of longstanding application, and it is essentially an application of common sense and logic." Croft v. Pan Alaska Trucking, Inc., 820 P.2d 1064, 1066 (Alaska 1991) (quoting Puller v. Mun. of Anchorage, 574 P.2d 1285, 1287 (Alaska 1978)). Like all other canons of statutory construction, however, the *expressio unius* canon "is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." United States v. Vonn, 535 U.S. 55, 65 (2002); *see also* Elonis v. United States, 575 U.S. 723, 733–34 (2015) (rejecting application of canon).

38. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010) (describing "linguistic canons," which "apply rules of syntax to statutes" and "pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent").

39. Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009) (quoting 18 U.S.C. § 1028A(a)(1)).

40. *Id.* at 647.

41. *Id.* at 650.

42. *Id.* at 650–51.

43. *Id.* at 651.

The government responded with an intricate argument comparing the present crime of identity theft to a related, linguistically similar statutory provision predicated on terrorism.[44] But the *Flores-Figueroa* Court disassembled the argument, pinpointed its flaws, and then rejected the comparison as inapt.[45] The government also warned that the interpretation would present enforcement difficulties, which, if true, might be worrisome given that the statute's context was not entirely supportive of the majority's interpretation.[46] But neither the alleged problems of enforcement nor any gleanings from the legislative history were "sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that [Congress] wrote."[47]

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44. *Id.* at 651. The two offenses used the exact same language up to the last five words, which are only in the terrorism-based provision: "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person *or a false identification document*." *Id.* at 653 (quoting 18 U.S.C. § 1028A(a)(2)) (emphasis added).

45. As recounted by the *Flores-Figueroa* Court, there were four steps in the government's argument:

> Step One: We should not interpret a statute in a manner that makes some of its language superfluous. Step Two: A person who knows that he is transferring, possessing, or using a "means of identification" "without lawful authority," must know that the document either (1) belongs "to another person" or (2) is [in the government's words] "a false identification document" because "*there are no other choices*." Step Three: Requiring the offender to *know* that the "means of identification" belongs to another person would consequently be superfluous in this terrorism provision. Step Four: We should not interpret the same phrase ("of another person") in the two related sections differently.

Id. at 653–54 (emphasis in original). The Court found two critical flaws in the argument:

> If the two listed circumstances (where the ID belongs to another person; where the ID is false) are the only two circumstances possibly present when a defendant (in this particular context) unlawfully uses a "means of identification," then why list them at all? Why not just stop after criminalizing the knowing unlawful use of a "means of identification"? (Why specify that Congress does not mean the statute to cover, say, the use of dog tags?) The fact is, however, that the Government's reasoning at Step Two is faulty. The two listed circumstances are *not* the only two circumstances possibly present when a defendant unlawfully uses a "means of identification." One could, for example, verbally provide a seller or an employer with a made-up Social Security number, not an "identification *document*," and the number verbally transmitted to the seller or employer might, or might not, turn out to belong to another person. The word "knowingly" applied to the "other person" requirement (even in a statute that similarly penalizes use of a "false identification *document*") would not be surplus.

Id. at 654 (emphasis in original).

46. *Id.* at 656–57.

47. *Id.* at 657.

Each of the Court's arguments in *Flores-Figueroa* portray a craftsman-like vision of statutory interpretation, where the goal is to discern and apply the legislature's judgment embodied in a statute. The underlying judicial tools—the conventions of language, various sources of legislative history, the reasonableness of potential applications, interpretive consistency with related statutes and prior cases—are those of an agent of Congress seeking a statutory interpretation that faithfully effectuates the legislative intent.[48] These tools are part of an interpretive regime that provides guidance and predictability for legislative draftsmen. But none of this reveals a normative predisposition to find a mens rea requirement. Entirely absent from the Court's opinion is any sense that its interpretation constrained Congress. At no time did the Court invoke the Constitution or refer even obliquely to constitutional doctrine. And because the opinion was not compelled or even informed by the Constitution, nothing in *Flores-Figueroa* would prevent Congress from passing legislation that rejects the Court's mens rea interpretation.

This is not true when a mens rea requirement is imposed by the Constitution, due to its superiority to all other law[49] and the finality of the Supreme Court's constitutional rulings.[50] In reaching a particular interpretation of the Constitution, the Court may be craftsman-like in its methodology, using established sources—the text, structure, and original intent of a constitutional provision, as well as the Court's own precedents—all to glean the meaning and application of that provision. But in doing so, the Court is not ascertaining the intent of an institution (particularly Congress) as agents of that institution. Instead, it's divining the meaning and application of a near-sacred text on behalf of "the People."[51] The judicial task is solemn: "[W]e must never forget that it is a *constitution* we are expounding," Chief Justice John Marshall famously admonished, "a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[52] And because the Constitution was made for this uncharted future, the Supreme Court may be wary of placing boundaries on future decision-making through unnecessary constitutional rulings today.[53]

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48. *See id.* at 650–57.

49. *See* U.S. CONST. art. VI (supremacy clause); *see also supra* note 33 and accompanying text.

50. *See supra* note 34 and accompanying text.

51. U.S. CONST. pmbl.

52. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

53. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (Frankfurter, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 530–31 (1884)); *see also infra* notes 205–209 and accompanying text (discussing avoidance doctrine).

The stakes here are far higher than those of mere statutory construction, given the inhibiting effects of constitutional interpretation on the further creation of statutory law. Greater legislative clarity on the absence of a culpable mental state will not save a statute that runs counter to a constitutional interpretation of the Court. At the same time, there are good reasons to worry if mens rea were wholly optional in lawmaking. After all, the normative basis for requiring mens rea is well known and oft repeated in American courtrooms and law school classrooms. The idea that an injurious act must be accompanied by a culpable mental state is "no provincial or transient notion," Justice Robert Jackson wrote in his landmark *Morissette* opinion.[54] Instead, mens rea is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[55]

The Latin maxim *actus non facit reum nisi mens sit rea*—an act does not make one guilty unless his mind is guilty—has been described as one of the best-known principles of the common law and among its most important for criminal liability.[56] The underlying idea may trace back to St. Augustine or even earlier sources,[57] and distinctions among mental states can be seen in the laws of medieval England.[58] By the time of America's founding, mens rea was firmly established in the common law, with Blackstone describing proof of a "vicious will" as an indispensable element of crime.[59] American law duly incorporated the "concurrence of an evil-meaning mind with an evil-doing hand,"[60] not only because of its acceptance by the common law but also for its consistency with a culture of robust individualism.

The concept of mens rea is fully integrated into "our philosophy of criminal law" and is part of "the weights and balances in the scales of justice."[61] As a matter of punishment theory, a culpable mental state is considered an essential component of retributive justice, where the punishment must fit the crime and criminal as gauged by an offender's intention or advertence. Intentionality is also part of common experience and

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54. Morissette v. United States, 342 U.S. 246, 250 (1952); *see infra* notes 125–27 and accompanying text (discussing *Morissette*).

55. *Morissette*, 342 U.S. at 250.

56. *See* Jeremy Horder, *Two Histories and Four Hidden Principles of Mens Rea,* 113 L.Q. REV. 95, 95 (1997); J.W.C. Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 32, 32 (1936).

57. *See* Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922).

58. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 825–37 (1980); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 982–89 (1932).

59. 4 BLACKSTONE, *supra* note 35, at *21.

60. *Morissette*, 342 U.S. at 251.

61. *Id.* at 250, 263.

a folk philosophy of attribution; as Holmes succinctly put it, "even a dog distinguishes between being stumbled over and being kicked."[62] In some cases, scholars predicted that the elimination of mens rea might "so outrage the feelings of the community as to nullify its own enforcement."[63] Although this sort of backlash hasn't occurred,[64] the American public has never fully embraced the idea of crime without mental culpability.

The necessity of a guilty mind for criminal culpability is so historically and philosophically grounded, so fully ordained by the common law, so embedded in criminal-law doctrine, as to be tied in some fashion to the concept of due process enshrined in the Constitution.[65] On occasion, the judiciary has even held that a mens rea element is constitutionally required. The chestnut of the field is *Lambert v. California*, which involved a municipal code provision making it a crime for a convicted felon to enter or stay in the city over a given time period without registering with the police.[66] Culpability under the law did not require knowledge of one's duty to register or even proof of the probability of such knowledge.[67] In analyzing the law, the Supreme Court emphasized that failure to register was "wholly passive" and "unaccompanied by any activity whatever, mere presence in the city being the test."[68] The relevant conduct was thus unlikely to "alert the doer to the consequences of his deed," and, in fact, the failure to register may be "entirely innocent."[69] All of this was inconsistent with meaningful notice, which is "[e]ngrained in our concept of due process."[70] The law was thus

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62. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881).

63. *Morissette*, 342 U.S. at 254 n.14 (quoting Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933)).

64. *Cf. infra* note 83 and accompanying text (noting cases upholding strict liability).

65. *See* Hopwood, *supra* note 4 (manuscript at 507–09).

66. Lambert v. California, 355 U.S. 225, 226 (1957). The ordinance provided in relevant part:

> (a) It shall be unlawful for any convicted person to be or remain in the City of Los Angeles for a period of more than five days, without, during such five-day period, registering with the Chief of Police . . . .
>
> (b) Any convicted person who does not reside in the City, but who has a temporary or permanent place of abode outside the City and comes into the City on five occasions or more during any thirty-day period, . . . shall, on or before entering the City on such fifth occasion, register [with the Chief of Police].

Los Angeles, Cal., Code § 52.39(a)–(b), *available in* Appellee's Brief app. A, Lambert v. California, 355 U.S. 225 (1957) (No. 590).

67. *See Lambert*, 335 U.S. at 229.

68. *Id.* at 228–29.

69. *Id.*

70. *Id.* at 228.

unconstitutional without a mens rea element requiring knowledge of the duty to register.[71]

A handful of lower court cases have also concluded that due process requires a culpable mental state. In *United States v. Wulff*, the Sixth Circuit struck down the felony provision of the Migratory Bird Treaty Act, a statute implementing a multinational treaty protecting certain species of migratory birds.[72] As originally enacted, mens rea was not an element of criminal liability—for example, a defendant need not know that a bird is legally protected—and the *Wulff* court refused to read a culpable mental state into the statute.[73] Adopting a standard articulated by then-Judge (and future-Justice) Harry Blackmun,[74] the *Wulff* court held that due process was offended by strict liability for a felony (which "irreparably damages one's reputation") carrying a sentence of up to two years' imprisonment and a $2,000 fine (which was not "a relatively small penalty").[75]

On a few occasions, the judiciary has held that a culpable mental state is constitutionally required for reasons independent of due process, such as a statute's encroachment on First Amendment freedoms. In *Smith v. California*, the Supreme Court struck down an ordinance criminalizing a bookseller's possession of obscene material precisely because it dispensed with a mens rea requirement—specifically, a bookseller's knowledge that particular materials were, in fact, legally obscene and thus constitutionally unprotected.[76] According to the Court, the elimination of this mens rea requirement would chill the freedom of speech and of the press:

> For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to

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71. *Id.* at 227, 229–30.

72. United States v. Wulff, 758 F.2d 1121, 1122 (6th Cir. 1985). The provision provided in relevant part: "(b) Whoever . . . shall . . . (2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both." 16 U.S.C. § 707(b)(2), *quoted in Wulff*, 758 F.2d at 1122.

73. *Id.* at 1124.

74. *See* Holdridge v. United States, 282 F.2d 302, 309 (8th Cir. 1960).

75. *Wulff*, 758 F.2d at 1125; *see also* United States v. St. Pierre, 578 F. Supp. 1424, 1429 (D.S.D. 1983).

76. Smith v. California, 361 U.S. 147, 148–49, 155 (1959). The ordinance provided in relevant part:

> It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in … any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale[.]

Los Angeles, Cal., Code § 41.01.1(2), *quoted in Smith*, 361 U.S. at 148 n.1.

> restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.[77]

The Supreme Court has also imposed a mens rea requirement pursuant to the Eighth Amendment. In *Tison v. Arizona*, the Court considered the constitutional limits on capital punishment for those convicted of murder through the felony-murder rule.[78] In its broadest formulation, the rule allows a defendant who is liable for a predicate felony (e.g., robbery or kidnapping) to be convicted of murder for a death that results from that felony, regardless of his mental state towards the killing (e.g., no intent to kill).[79] This dispensing with mens rea conflicted with modern death-penalty jurisprudence premised on the Eighth Amendment's ban on cruel and unusual punishment, which demands an individualized determination of culpability before imposing a death sentence.[80] According to the *Tison* Court, a critical facet of this determination is the defendant's mental state toward the crime: "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[81] The *Tison* Court then drilled down on the precise mens rea required for capital punishment in the context of felony murder. When harbored by a major participant in the underlying felony, reckless indifference to the value of human life (essentially gross recklessness) "represents a highly culpable mental state" sufficiently "shocking to the moral sense" to justify a death sentence consistent with the Eighth Amendment.[82]

Collectively, the context and caselaw point toward a shared appreciation of mental culpability—as an artifact of history and a characteristic of human experience, as a topic of philosophy and jurisprudence, and, most importantly, as a matter of positive and fundamental law. As for the latter, the decisions in *Lambert*, *Wulff*, *Smith*, and *Tison* go beyond statutory interpretation by faithful agents of the body that created the underlying statute. Again, when a court strikes down a statute because it lacks a (sufficient) mens rea or when it inserts a mental state element because the

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77. *Smith*, 361 U.S. at 153.

78. Tison v. Arizona, 481 U.S. 137, 138 (1987).

79. *See id.* at 149–50.

80. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding "that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

81. *Tison*, 481 U.S. at 156.

82. *Id.* at 157.

Constitution requires as much, the judiciary is serving directly as an agent of the American people, not of Congress or a state legislature, in discerning the meaning and implications of a constitutional provision. And in doing so, a court disempowers lawmakers from adopting a lower mens rea or dispensing with it altogether in like cases. Those last two words do a lot of work, of course—*which cases are alike?*—but the implications are still profound: The judiciary's constitutional interpretation of mens rea will trump any mere statute to the contrary.

This sobering thought has tempered the Supreme Court in its mens rea jurisprudence, which has long tolerated strict liability in regulatory or public-welfare offenses.[83] As it turns out, *Lambert*, *Smith*, and *Tison* are not representative of some larger body of law striking down statutes for lack of mens rea or imposing a mental state because the Constitution demands it. Those few cases, and a smattering of lower court decisions like *Wulff*, comprise the sum total of constitutional doctrine in support of mens rea. Two of the cases—*Smith* and *Tison*—were driven by the Supreme Court's meticulous jurisprudence of free speech and capital punishment, respectively, and even those decisions made clear that they did not presuppose further implications for mens rea.[84] The other cases mentioned, *Lambert* and *Wulff*, can be seen as constitutional oddballs resulting from the peculiar nature of the underlying laws: a strict liability city ordinance that punished two layers of passive activity (being in the city and failing to register), and a treaty-fulfilling statute that criminalized the market for specific migratory birds.

What's more, *Wulff* was flatly rejected by another federal appellate court,[85] and both the Supreme Court and numerous lower courts have acknowledged the very limited application of *Lambert*'s mens rea requirement, "lest it swallow the general rule that ignorance of the law is no excuse."[86] These cases

83. *See, e.g.*, United States v. Freed, 401 U.S. 601, 607 (1971); United States v. Dotterweich, 320 U.S. 277, 280–81 (1943); United States v. Balint, 258 U.S. 250, 254 (1922); United States v. Behrman, 258 U.S. 280, 288 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910).

84. *See* Smith v. California, 361 U.S. 147, 154 (1959) ("We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be."); *Tison*, 481 U.S. at 158 ("Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here.").

85. *See* United States v. Engler, 806 F.2d 425, 433–34 (3d Cir. 1986).

86. United States v. Giles, 640 F.2d 621, 628 (5th Cir. 1981).

fulfill dissenting Justice Frankfurter's "colorful prediction" that *Lambert* will stand as "an isolated deviation from the strong current of precedents—a derelict on the waters of the law."[87] The countercurrent against constitutionalizing mens rea can be detected in still other cases, such as *Montana v. Egelhoff*, which upheld a state law that disallowed any consideration of voluntary intoxication in determining a defendant's mental state.[88] Justice Ginsburg's pivotal concurrence held that the law "encounters no constitutional shoal" as a statutory redefinition of mens rea.[89] "States enjoy wide latitude in defining the elements of criminal offenses, particularly when determining 'the extent to which moral culpability should be a prerequisite to conviction of a crime.'"[90]

In reaching this conclusion, Justice Ginsburg referenced the Supreme Court's decision in *Powell v. Texas*, a constitutional challenge to an alcoholic's conviction for public intoxication.[91] In refusing to constitutionalize a volition requirement—and by implication, a doctrine of mens rea—*Powell* evinced a judicial discomfort in making criminal culpability a constitutional imperative. This concern, which persists to this day, was best expressed in Justice Thurgood Marshall's plurality opinion:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.[92]

This deference to lawmakers is grounded in a pair of structural constraints, each imbedded within the Constitution's text and architecture. The one at stake in *Powell*—federalism—limits the powers of national government and prevents federal interference with the core internal affairs of the individual

87. Texaco, Inc. v. Short, 454 U.S. 516, 537 n.33 (1982) (quoting Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting)).

88. Montana v. Egelhoff, 518 U.S. 37, 56 (1996).

89. *Id.* at 58 (Ginsburg, J., concurring).

90. *Id.* (citations omitted) (quoting Powell v. Texas, 392 U.S. 514, 545 (1968) (Black, J., concurring)).

91. *Powell*, 392 U.S. at 517 (1968) (plurality opinion).

92. *Id.* at 535–36.

states.[93] Federalism was enshrined in the Constitution by specifically enumerating the powers of the federal government,[94] and by declaring that all other powers were "reserved to the States respectively, or to the people."[95] In particular, the Constitution's Framers sought to reserve to the states "the ordinary administration of criminal and civil justice,"[96] an understanding long accepted by the Supreme Court.[97] In noting the boundaries of federal involvement in local criminal justice matters, the Court reiterated that the "[s]tates possess primary authority for defining and enforcing the criminal law," such that constitutional concerns arise with any "significant change in the sensitive relation between federal and state criminal jurisdiction."[98]

Within the federal system, the standards of culpability are likewise thought to be the domain of the national legislature based on a second structural limitation, the separation of powers. The constitutional framework envisioned distinct but coordinate powers divided among the three branches of government—the lawmaking authority of Congress, the law enforcement prerogative of the President, and the adjudicative power of the federal courts—where each branch has "mutual relations" with the others in a system of checks and balances.[99] What the separation of powers did not envision was the judiciary exercising the power to legislate. The Constitution seems pretty

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93. As Madison wrote in *Federalist No. 45*, the powers delegated to the federal government would be "few and defined,"

> exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

94. *See* U.S. CONST. art. 1, §8.

95. U.S. CONST. amend X.

96. THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see infra* notes 122–123 and accompanying text (noting that only a handful of crimes were mentioned in the Constitution). Apparently, it was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or otherwise interfere with the state criminal justice systems. *See, e.g.*, RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983).

97. *See, e.g.*, Cohens v. Virginia, 18 U.S. 264, 426, 428 (1821) (declaring that the federal government "has no general right to punish murder committed within any of the States," and "it is clear that Congress cannot punish felonies generally"); Brown v. Maryland, 25 U.S. 419, 443 (1827) (describing a particular government function as "a branch of the police power, which unquestionably remains, and ought to remain, with the States."); United States v. Lopez, 514 U.S. 549, 566 (1995) (stating that the Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation").

98. *Lopez,* 514 U.S. at 561 n.3 (internal citations omitted).

99. THE FEDERALIST No. 51, at 267 (James Madison) (Clinton Rossiter ed., 1961).

clear on this point: "All legislative Powers herein granted shall be vested in a Congress of the United States."[100] That's *all* powers, not some powers, vested solely in *Congress*, not any other entity.[101] Among other things, the Framers foresaw great dangers "if the power of judging be not separated from the legislative and executive branch."[102] Quoting Montesquieu, James Madison warned that "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator."[103] For reasons related to the separation of powers, the Supreme Court has long held that there is no federal common law of crimes, since the "legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[104]

Today, the principles of federalism and separation of powers are more honored in the breach than in the observance. Most federalism issues have been relegated to the arena of ordinary politics, effectively freeing the federal government of a constitutional constraint on nationalizing areas of public life while giving it a virtual police power over criminal matters, occasionally with a nod to an enumerated power, especially the regulation of interstate commerce.[105] In turn, American legal realism and its descendants have so thoroughly trashed the *judges-don't-make-law* trope that it may be impossible to draw a bright line between legislating and adjudicating.[106] Such criticisms, combined with the rise of the administrative state, have left the separation of powers doctrine a bit toothless, with the Court tolerating a remarkable amount

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100. U.S. CONST. art. I, § 1.

101. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power … is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

102. THE FEDERALIST No. 78, at 402–03 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 47, at 249 (James Madison) (Clinton Rossiter ed., 1961) (describing the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many," as "the very definition of tyranny").

103. FEDERALIST No. 47, *supra* note 102, at 250 (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI, ch. 6 (1748)).

104. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

105. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (holding the Commerce Clause empowers the federal government to prohibit the local cultivation and use of marijuana in compliance with state law); *see also* Gibbons v. Ogden, 22 U.S. 1, 197 (1824) (concluding that states' rights concerns are sufficiently protected by the political process); *cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."). *But see* United States v. Lopez, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act as beyond Congress's interstate commerce power); United States v. Morrison, 529 U.S. 598 (2000) (same for Violence Against Women Act).

106. *See, e.g.*, Thomas O. Sargentich, *Foundations of Separation of Powers*, 87 JUDICATURE 209 (2004).

of power-sharing among the branches of government,[107] including Congress delegating its legislative authority to other bodies.[108] On this issue, the Court has scoffed that there's "more smoke than fire" in "fears for the fundamental structural protections of the Constitution,"[109] a judicial variation on the policeman's warning to "move along, there's nothing to see here." In downplaying the threat to structural values, the Court is undoubtedly mindful that those structures have at times been wielded as both sword and shield for immoral ends—most notoriously, when claims of "states' rights" were offered to protect the institution of slavery and later the regime of Jim Crow.

That said, the underlying constitutional values are hardly worthless. There are non-nefarious reasons to support these values, of course—the horizontal and vertical distribution of powers is the Constitution's antidote to tyranny—all of which may come into play in criminal law through the petty tyrannies of criminal justice actors, with consequences that can't be easily dismissed as trivial. Consider the professed benefits of federalism—particularly pluralistic decision-making and local experimentation—which are impeded by federal interference with state criminal justice systems, which, in turn, are animated by norms that vary by jurisdiction.

In a pluralistic society such as ours, citizens in different jurisdictions are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers are more likely to be attuned to such preferences, given their closeness to constituents and the greater opportunity of citizens to be involved in state and local government, including the legal system.[110] Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice.[111] And should individuals find unbearable the local or state approach to crime—let's say they're disturbed by the proliferation of strict liability offenses—federalism allows them to vote with their feet, so to speak, by moving to another county or state.

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107. As interpreted, the separation of powers is only concerned about the accumulation of otherwise constitutionally diffuse powers in a single branch or an assault on the authority and independence of a coordinate branch. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 382–83 (1989).

108. In particular, Congress may delegate its authority to other government bodies so long as it provides an "intelligible principle" for those bodies to follow in exercising the delegated power. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

109. *Mistretta*, 488 U.S. at 393.

110. *Cf.* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

111. In the oft-repeated words of Justice Louis Brandeis, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

By contrast, to the extent the Court interprets the Constitution to require certain aspects of criminal law like mens rea, the democratically accountable lawmakers in state legislatures and in Congress are thereby limited in their ability to develop penal codes in light of fresh information, greater expertise and scientific studies, and new or enhanced threats to public safety. While federalism and the separation of powers create multiple layers of government, all duty-bound to the people rather than to each other,[112] the constitutionalization of substantive criminal law generates a potentially suffocating level of uniformity imposed by an unelected and politically unaccountable judiciary.

This is an instance of the (in)famous "counter-majoritarian difficulty."[113] The American system of government is premised on majoritarianism: Popular will, typically expressed through democratically elected representatives, must generally prevail. When a court carries out the decisions reached by elected lawmakers, without introducing any free-verse policymaking, that court acts in keeping with majoritarianism and, in fact, its methodology may even promote representative democracy.[114] When a court invokes the Constitution to strike down legislation, however, it exerts a power superior to that of the people's politically accountable representatives. Resolving this tension has been an obsession of constitutional scholars for decades, producing various justifications for constitutional judicial review.[115] Most emphasize that the Constitution is not a document solely concerned with majority rule, and, in fact, many provisions in the Bill of Rights were intended to thwart majoritarian-based decision-making.[116] Some constitutional provisions seem fairly straightforward and require little in the way of interpretation,[117] while others are "open-ended," providing little textual guidance as to their meaning.

Constitutional issues of mens rea fall in the latter category. The First Amendment freedom of speech doesn't indicate whether it protects obscene materials, and it certainly doesn't state that the inclusion of a culpable mental

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112. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *Lopez*, 514 U.S. at 553.

113. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1962); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 4–8 (1980).

114. *See* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 226 (2013).

115. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

116. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1203 (1991); *see also, e.g.*, U.S. CONST. amends. I, II.

117. *See* U.S. CONST. art. II, § 1, cl. 5 (requiring President be at least thirty-five years old); *see also* ELY, *supra* note 113, at 13 (discussing presidential age requirement).

state will save an otherwise unconstitutional law.[118] The Eighth Amendment doesn't say what types of penalties should be deemed "cruel and unusual," and, of course, it contains nothing on mens rea and capital punishment.[119] Even more ambiguous is "due process of law,"[120] which begs the questions of what process is due, as a procedural matter, and, more controversially, whether due process might include rights more substantive in nature (e.g., "privacy").[121] In fact, the constitutional text itself mentions just a handful of crimes,[122] only one of which is defined in any detail.[123] Lacking a clear textual basis in the Constitution and haunted by concerns of handicapping the political branches in the area of criminal culpability, the Supreme Court has been unsurprisingly reticent to say that mens rea is constitutionally required.

III.

The judiciary's lack of interpretive confidence that the Constitution demands mens rea has not precluded the Court from articulating, with some circumspection, a presumption of mens rea that injects culpable mental states in statutory voids.[124] The seminal decision on the presumption of mens rea, *Morissette v. United States*, involved a federal statute that made it a crime to "knowingly convert[ ]" (i.e., steal) government property.[125] Ultimately, the Court interpreted the term "knowingly" as requiring not only the intent to exercise dominion over the property but also knowledge that it belonged to the government[126]—an understanding that could have been reached through

118. *See* U.S. CONST. amend. I; Smith v. California, 361 U.S. 147 (1959); *supra* notes 76–77 and accompanying text.

119. *See id.* amend. VIII; Tison v. Arizona, 481 U.S. 137 (1987); *supra* notes 78–82 and accompanying text.

120. *See id.* amends. V, XIV § 2; Lambert v. California, 355 U.S. 225 (1957) *supra* notes 66–71 and accompanying text.

121. *See* Griswold v. Connecticut, 381 U.S. 479, 483–86 (1965) (articulating constitutional right to privacy). *But see, e.g.*, ELY, *supra* note 113, at 18 (famously critiquing substantive due process as "a contradiction in terms—sort of like 'green pastel redness'"); *cf*. *infra* notes 150–52 (discussing meaning of due process).

122. *See* U.S. CONST. art. I, §8, cl. 6 (counterfeiting); *id.* art. I, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations).

123. *See id.* art. III, §3 (treason); *see also infra* note 149 (discussing Treason Clause).

124. For a critique of the presumption of mens rea, see Johnson, *supra* note 6, at 777–86.

125. Morissette v. United States, 342 U.S. 246, 248 (1952) (quoting 18 U.S.C. § 641). Specifically, the statute punishes anyone who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof." *Id.* at 248 n.2.

126. *Id.* at 270–71.

the traditional tools of statutory interpretation. Justice Jackson's *Morissette* opinion went beyond the construction of an explicit mens rea term, though, when it declared that "mere omission" from a statute "of any mention of intent" does not dispense with a mens rea requirement.[127] Frankly, it seems hard to imagine a firmer rejection of textualism in statutory interpretation. This robust understanding of the mens rea presumption is best seen when a mental state element is entirely absent from a statute or when the application of a mental state term requires strained linguistic maneuvers.

In the 1921 case *Baender v. Barnett*, the Supreme Court inserted a culpable mental state into a counterfeiting statute that was entirely silent on mens rea because the lack of a culpable mental state "works manifest injustice or infringes constitutional safeguards."[128] The Court described its decision as a matter of "reasonable sense," quoting cases that sought "sensible construction" of statutory language to avoid "grave doubts" as to a law's constitutionality.[129] But the referenced cases involved interpretation of the actual words of a statute,[130] not the introduction of terms nowhere to be found in the law's text—a judicial act that has more than a passing resemblance to lawmaking. The absence of mens rea isn't some "scrivener's error,"[131] where the judiciary is correcting a draftsman's mistake consistent with the plain language of the statute and the legislature's clear intent. In *Baender*, the alleged legislative intent to include a mental state element was at odds with the fact that Congress obviously knew how to incorporate a culpable mental state if it had wanted to do so, since an earlier version of the counterfeit statute did contain an explicit mens rea.[132]

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127. *Id.* at 263.

128. Baender v. Barnett, 255 U.S. 224, 226 (1921). The statute punishes someone:

> [who], without lawful authority, makes any die, hub, or mold, or any part thereof, either of steel or plaster, or any other substance, in likeness or similitude, as to the design, or the inscription thereon, of any die, hub, or mold designated for coining or making of any of the genuine gold, silver, nickel, bronze, copper, or other coins coined at the mints of the U.S.; or
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> [who], without lawful authority, possesses any such die, hub, or mold, or any part thereof, or permits the same to be used for or in aid of the counterfeiting of any such coins of the U.S.

18 U.S.C. § 487.

129. *Baender*, 255 U.S. at 226 (first quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868); and then quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

130. *See Kirby*, 74 U.S. at 485–86 (interpreting "knowing and wil[l]fully"); *Jin Fuey Moy*, 241 U.S. at 402 (interpreting "any person not registered").

131. *See, e.g.*, Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co., 621 S.E.2d 114, 118–19 (Va. 2005).

132. *Baender*, 255 U.S. at 225–27.

A century later, in *Rehaif v. United States*, the Supreme Court interpreted a federal statutory provision criminalizing firearms possession by illegal aliens to require a mens rea of knowledge because a different federal statute punishes with up to ten years' imprisonment anyone who "knowingly violates" the first statutory provision.[133] As dissenting Justice Samuel Alito pointed out, the transplantation of the word "knowingly" from one statute to another requires this mens rea to perform "a jump of Olympian proportions, taking off from [its statutory origin], sailing backward over more than 9,000 words in the U.S. Code, and then landing—conveniently—at the beginning" of the provision in question.[134] The editing necessary to reach the Court's conclusion would look something like this (with insertions in bold and deletions in strikethrough):

> **Whoever knowingly** . . . ~~It is unlawful for any person . . . who~~, being an alien **who** … is illegally or unlawfully in the United States**,** . . . ~~to~~ possess**es** in or affecting commerce, any firearm or ammunition . . . **commits a crime punishable by** ~~shall be~~ fine~~d~~ as provided in this title, imprison**ment**~~ed~~ for not more than 10 years, or both.[135]

Though it's hard to imagine Congress intended this particular reading, the *Rehaif* Court seemed unbothered by the word salad it tossed. To convert a "garbled conglomeration into intelligible prose," the judicial editor would need to make substantive decisions that ought to be left to the legislative authors.[136] This type of normative reworking of statutes requires an appeal to higher law, and yet the majority made no claim that the Constitution requires a particular mental state. On this point, Justice Alito was quick to remind the Court, "[W]e have never held that the Due Process Clause requires *mens rea* for all elements of all offenses, and we have upheld the constitutionality of some strict-liability offenses in the past."[137]

The *Rehaif* Court acknowledged that the legislative history was "at best inconclusive,"[138] and the majority's interpretation was not meaningfully

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133. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019). The first statute provides in relevant part: "It shall be unlawful for . . . an alien . . . illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(5). The second statute states: "Whoever knowingly violates [*inter alia*, 18 U.S.C. § 922(g)] shall be fined . . . , imprisoned not more than 10 years, or both." 18 U.S.C. § 924(a)(2).

134. *Rehaif*, 139 S. Ct. at 2203 (Alito, J., dissenting).

135. *See id.* 2203–04 (providing and discussing editing options).

136. *Id.* at 2203.

137. *Id.* at 2211–12.

138. *Id.* at 2199 (majority opinion).

bolstered by lower court precedents on the statute. To the contrary, Justice Alito began his dissent by noting that the decision "casually overturns" an interpretation that had "been adopted by every single Court of Appeals to address the question" and had "been used in thousands of cases for more than 30 years."[139] To Justice Alito's mind, the interpretive moves were those of "a sleight-of-hand artist at a carnival"—"What a magic trick!"[140] Whether this criticism is fair,[141] Justice Alito is surely right that something more was going on here than purely non-constitutional statutory interpretation.

When a mens rea requirement appears out of linguistic thin air, in the absence of textual support or beyond the ken of any reasonable understanding of grammatical conventions, it provides indirect proof that the statute is being influenced by the gravity of some external body of law. Obviously, that law is not statutory, since the insertion of a culpable mental state is supported by neither the text and context of the underlying statute nor any rules of construction that are normatively agnostic towards mens rea. The body of law is also not the Constitution—at least to the extent that what makes a Supreme Court decision "constitutional" is that the Constitution demands the outcome that the decision announces and the statute disregards.[142] In this case, the *Rehaif* decision makes no claim that a mental state element is required by some constitutional provision.

Instead, the body of law that supports a presumption of mens rea lies somewhere between the purely positive law of statutes and the seemingly inexorable law of the Constitution. The presumption could be classified as a case of "quasi-constitutional law," which protects constitutional values that are un(der)enforced by established doctrine.[143] Metaphorically, mens rea

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139. *Id.* at 2203 (Alito, J., dissenting).

140. *Id.* at 2203–04.

141. Justice Alito takes the petitioner (i.e., the defendant) to task for pressing his ultimately successful claim on statutory interpretation. "The push for us to grant review was based on the superficially appealing but ultimately fallacious argument," Alito wrote, where the provisions in question "are arbitrarily combined in the way that petitioner prefers, then, presto chango, they support petitioner's interpretation." *Id.* at 2201, 2204. This is the judicial version of passive-aggressive behavior: whether or not the petitioner's interpretation "moves in the manner of a sleight-of-hand artist at a carnival," Alito's real beef is with his colleagues for adopting that interpretation.

142. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting).

143. In their study of quasi-constitutional law, William Eskridge and Philip Frickey describe the Supreme Court's defense of otherwise unprotected constitutional values by instituting clear statement rules, which, in their "super-strong" form, "establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem." William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1994); *see also id*. at 595 n.4 (similar), 611–29 (describing the development of clear statement rules and super-strong

resides at a mezzanine floor of law, an intermediate level between the ground floor of statutes and the upper floor of the Constitution. Like mezzanine floors in some building, which are partially open to the levels above and below, mezzanine law stands in full view of the traditional two tiers of law but is unrecognized formally as a full-fledged floor (think of the numbering of elevator buttons, where the "M" for mezzanine lies between floors "1" and "2").

The notion of an intermediate level of law for judicial review speaks to a jurisprudential skepticism about the ability of the courts to cleave an important issue in one fell swoop, neatly dividing it into two categories or opposing halves. The inevitable pursuit of a third option was famously undertaken in equal protection doctrine, where a new intermediate level of review offered a conceptual halfway point between the poles of strict scrutiny (which was "strict in theory and fatal in fact") and rational basis review (which offered "minimal scrutiny in theory and virtually none in fact").[144] This basic desire for another possibility besides the extremes, one imbued with a sort of *in-between-ness*, applies equally to the idea of mezzanine law and its approach to the problems of mental culpability.

The presumption of mens rea—grounded in both criminal law theory and human experience, and carrying the collective weight of the common-law tradition and centuries of practice—takes the remarkable position that the absence of a culpable mental state should not be read as rejecting it. The elimination of mens rea is "generally disfavored," the Court has noted, and "[c]ertainly far more than the simple omission . . . is necessary to justify dispensing with an intent requirement."[145] A mental state element may be implied into an otherwise silent statute, Justice Jackson wrote in *Morissette*,

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clear statement rules); *see also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (articulating a theory of constitutional implementation that recognizes the gap between the Constitution's meaning and its enforcement). My notion of mezzanine law shares a certain affinity with the concept of quasi-constitutional law, particularly as it is explicated by Joseph Kennedy in his important article, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 763 (2002), which makes the case for "a quasi-constitutional canon of statutory interpretation that simply requires clear evidence of congressional deliberation about the punishment to be imposed on offenders whose moral culpability is not clear." While I am (perhaps too) ponderous about the very idea of mezzanine law/quasi-constitutional law—as a concept and as a theory that both solves and creates problems—Professor Kennedy's work is, to its credit, far more programmatic in approach and pragmatically specific in implementation.

144. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see* Hawkins v. Superior Court, 822 Cal.3d 584, 595–603 (1978) (Mosk, J., concurring) (quoting Gunther and describing development of intermediate scrutiny); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES ch. 9 (6th ed. 2019) (reviewing equal protection doctrine).

145. United States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978).

because a legislative body "presumably knows and adopts the cluster of ideas" embodied in mens rea doctrine.[146]

This presumption of mens rea is not a substantively neutral rule of statutory construction, wielded as an interpretive tool of the judiciary qua faithful agent of a legislature. A court would have no need for such a presumption if the legislative intent to include a culpable mental state were clear from the law's text and structure, the conventions of language, and the legislative history. Rather, the elimination of a culpable mental state is deemed "[s]uch a manifest impairment of the immunities of the individual" that the judiciary should be wary of imposing strict liability on its own initiative.[147] So understood, the mens rea presumption is not the stuff of mere positive law in statute but is instead affected by some higher normative principle. Under the two-tier conception of American law, this gravitational influence can only be attributed to the fundamental law of the Constitution. Indeed, the justifications for a mens rea presumption seem to be derived from constitutional law.

As mentioned earlier,[148] the textualist case is not particularly strong. In *Morissette*, Justice Jackson pointed out that "treason—the one crime deemed grave enough for definition in our Constitution itself—requires not only the duly witnessed overt act of aid and comfort to the enemy but also the mental element of disloyalty or adherence to the enemy."[149] This one direct textual connection seems far too strained to provide sufficient scaffolding for any larger project, at times leaving the full weight of textual justification on the epically underdefined term "due process of law."[150] The resulting concerns about the use and abuse of the Due Process Clauses might be mitigated by the connection between due process and the common law,[151] and the latter's full-throated commitment to mens rea.[152] Ultimately, however, the constitutional foundation for a mens rea presumption must be built upon the Supreme Court's interpretive decisions and resulting doctrine.

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146. Morissette v. United States, 342 U.S. 246, 263 (1952).

147. *Id.*

148. *See supra* notes 117–23 and accompanying text.

149. *Id.* at 265; *see* U.S. CONST. art. III, § 3, cl. 1 (treason clause).

150. U.S. CONST. amend. V; *id.* amend. XIV § 2; *see supra* notes 120–121 and accompanying text (mentioning problems with due process).

151. The concept of due process traces back to the Magna Carta, which guaranteed that life, liberty, and property could not be taken away without a trial consistent with the "law of the land." *See e.g.*, Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring) (discussing Magna Carta); *see also* Chambers v. Florida, 309 U.S. 227, 236 (1940). Since America's founding, this principle has been understood as requiring "the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting).

152. *See supra* notes 54–65 and accompanying text (discussing background of mens rea).

As it turns out, this task is far less daunting then constructing a purely textual case for the presumption. In fact, the Court has interlineated culpability all over the Constitution through its review of different aspects of the criminal justice system. The aforementioned handful of constitutional cases requiring mens rea in substantive criminal law—*Lambert*, *Smith*, *Tison*, and a few lower court decisions—can be matched by Supreme Court decisions on issues of constitutional criminal procedure. In fact, the Court has created a virtual mens rea scheme for assessing the constitutionality of various actions taken against suspects, detainees, defendants, and inmates.

In policing, the Court has recognized that mental culpability plays a role in search-and-seizure law by recognizing, *inter alia*, an exception to the exclusionary rule based on a police officer's "good faith."[153] The law of confessions is also affected by an officer's mental state, which helps to determine whether his words or actions should count as interrogation under *Miranda*,[154] for instance, or whether he deliberately elicited an incriminating

153. This exception effectively forgives a Fourth Amendment violation resulting from police reliance on an apparently valid warrant, statute, precedent, court record, or even a database maintained by law enforcement itself. *See* United States v. Leon, 468 U.S. 981 (1984) (warrant); Illinois v. Kruss, 480 U.S. 340 (1987) (statute); Davis v. United States, 564 U.S. 229 (2011) (precedent); Arizona v. Evans, 514 U.S. 1 (1995) (court database); Herring v. United States, 555 U.S. 135 (2009) (police database). In the latter case, the Court held that the exclusionary rule's application "turns on the culpability of the police," with evidentiary suppression required only in cases of "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 137, 144. The exception seems to fly in the face of the Court's claim that "[s]ubjective intentions play no role in ordinary … Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Scott v. United States, 436 U.S. 128, 138 (1978) ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action as long as the circumstances, viewed objectively, justify that action."). For other examples of mental state analysis in Fourth Amendment law, see Brendlin v. California, 551 U.S. 249, 254–55 (2007) ("A person is seized by the police … when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement '*through means intentionally applied*.'") (citation omitted); Colorado v. Bertine, 479 U.S. 367, 376 (1987) (upholding inventory search because there was "no showing that the police chose to impound [the vehicle in question] in order to investigate suspected criminal activity"); Franks v. Delaware, 438 U.S. 154, 155–56, 171 (1978) (requiring allegations of deliberate falsehoods or a reckless disregard for the truth in order to challenge factual claims made in a warrant affidavit); Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (noting that the suppression of a confession obtained after an illegal arrest may depend on the "the purpose and flagrancy" of that arrest).

154. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court sketched out the now-famous admonitions that must be provided by law enforcement ("You have the right to remain silent . . . .") and waived by a suspect prior to custodial interrogation. As a trigger for *Miranda*, the Court defined interrogation to include "any words or actions on the part of the police … that the police should know are reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). After claiming that this test "focuses primarily on the perceptions

response in violation of the Sixth Amendment.[155] The intention of a government actor is also relevant to various egalitarian claims—allegations of racial profiling or selective prosecution, for example—that hinge upon the actor's purpose to discriminate against a given individual.[156] Culpability requirements likewise limit claims of mistreatment or neglect by correctional staff or allegations of intolerable conditions of confinement in jails and prisons, which require proof of an intent to punish a pretrial detainee[157] or evidence of recklessness toward a risk of harm to a convicted inmate.[158] And under the doctrine of qualified immunity, a government official is not liable for his unlawful conduct unless it violated "clearly established statutory or constitutional rights of which a reasonable person would have known"[159]—essentially a (gross) negligence standard—which protects "all but the plainly incompetent or those who knowingly violate the law."[160]

The foregoing examples are offered not out of approval. Color me skeptical of using mens rea to excuse otherwise unlawful searches and

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of the suspect, rather than the intent of the police," the Court noted that an officer's intentions and his knowledge about the suspect "may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* at 301–02 & nn.7–8.

155. The Sixth Amendment right to counsel prohibits law enforcement from "deliberately and designedly" eliciting an incriminating response from an accused defendant. Brewer v. Williams, 430 U.S. 387, 399 (1977); *see also* Massiah v. United States, 377 U.S. 201 (1964) (establishing standard). Although the deliberate-elicitation standard is not violated when government obtains confessions "by luck or happenstance," Maine v. Moulton, 474 U.S. 159, 176 (1985), the Sixth Amendment bars the police from purposefully eliciting an incriminating statement from the accused or obtaining the same by knowingly creating or exploiting an encounter with the accused. *See id.*; Kuhlmann v. Wilson, 477 U.S. 436 (1986); United States v. Henry, 447 U.S. 264 (1980).

156. Allegations of racial profiling and selective prosecution brought under the Equal Protection Clause (or, for the federal government, the Fifth Amendment's Due Process Clause)—as well as Eighth Amendment claims of prejudice in capital punishment—all require proof that a policy or action's discriminatory impact on a given individual was motivated by a discriminatory purpose against that person. *See* United States v. Armstrong, 517 U.S. 456, 464–67 (1996); McCleskey v. Kemp, 481 U.S. 279, 292–99 (1987). According to the Court, "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *McCleskey*, 481 U.S. at 298 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

157. Brought under the Due Process Clause, allegations by pretrial detainees must show that the challenged (in)action was done with "an expressed intent to punish." Bell v. Wolfish, 441 U.S. 520, 538 (1979). This purpose can be inferred when the (in)action "appears excessive in relation to [an] alternative purpose assigned [to it]." *Id.*

158. Farmer v. Brennan, 511 U.S. 825, 839 (1994) (quoting MODEL PENAL CODE § 2.02(2)(c)).

159. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

160. Malley v. Briggs, 475 U.S. 335, 341 (1986).

seizures, and perhaps even more skeptical of the Court's crafting a qualified immunity doctrine out of whole cloth to limit liability for constitutional violations. Instead, the examples provide further evidence that mental culpability matters a great deal in constitutional review of American criminal justice. Intentionality, advertence, and neglect are not foreign to the Constitution; rather, the concept of mental culpability is applied liberally across the Court's doctrine.

In justifying its caselaw, the Court has drawn connections between the mens rea presumption and certain constitutional values. The presumption shares the concern for innocence that animates important due process doctrines, especially the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the government obligation to disclose exculpatory evidence.[161] This attentiveness to innocence also underpins specific constitutional provisions, like the Sixth Amendment rights to compel witness testimony and to confront adverse witnesses.[162] What's more, the Supreme Court cases are legion in stressing the importance of mens rea in separating wrongful conduct from innocent acts, with the presumption in favor of a culpable mental state applying "to each of the statutory elements that criminalize otherwise innocent conduct."[163]

As Professor Hopwood argued persuasively,[164] the presumption of mens rea also has a connection with the constitutionally based rule of lenity, which calls for ambiguities in criminal statutes to be construed in favor of the accused. In *Liparota v. United States*, the Court opined that "requiring *mens rea* is in keeping with our longstanding recognition" of the rule of lenity and

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161. *See* In re Winship, 397 U.S. 358 (1970) (presumption of innocence and proof beyond a reasonable doubt); Brady v. Maryland, 373 U.S. 83 (1963) (duty to disclose exculpatory evidence).

162. *See* U.S. CONST. amend. VI; Coy v. Iowa, 487 U.S. 1012 (1988) (right to confront adverse witnesses); Taylor v. Illinois, 484 U.S. 400 (1988) (right to compulsory process); *see also* Herrera v. Collins, 506 U.S. 390, 398–99 (1993) (citing constitutional provisions that "have the effect of ensuring against the risk of convicting an innocent person"); *id.* at 417 (assuming without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim").

163. United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); *see also* Cheek v. United States, 498 U.S. 192, 199–200 (1991); Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994); Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019); Elonis v. United States, 575 U.S. 723, 737 (2015); Staples v. United States, 511 U.S. 600, 610 (1994); Liparota v. United States, 471 U.S. 419, 425–26 (1985); United States v. Bailey, 444 U.S. 394, 406 n.6 (1980); United States v. U.S. Gypsum Co., 438 U.S. 422, 436–37 (1978); Morissette v. United States, 342 U.S. 246, 250–51 (1952). The connection between mens rea and innocence is major theme in the literature. *See, e.g.*, Michaels, *supra* note 6, at 829–66; Singer & Husak, *supra* note 6, 861–904; Wiley, *supra* note 6, at 1022–56.

164. Hopwood, *supra* note 4 (manuscript at 509).

its objective of "ensur[ing] that criminal statutes will provide fair warning concerning conduct rendered illegal."[165] The *Liparota* decision—which involved the distribution of a mental state element in a food-stamp-fraud statute—relied upon both concerns of innocence and the rule of lenity in employing the presumption of mens rea.[166] By applying an explicit mental state element to the phrase "not authorized" by law, the Court required that a defendant know his handling of food stamps was unlawful,[167] thereby ensuring the statute would not penalize someone who "'altered' [food stamps] by tearing them up, and 'transferred' them by throwing them away"[168]—a ruthless interpretation that could trap the innocent.

Another justification for the mens rea presumption focuses not on a statute's scope but instead on the punishment it carries. On several occasions, the Supreme Court has applied a presumption of mens rea due to the severity of sentence prescribed by statute.[169] In *Staples v. United States*, the relevant statutory provision criminalized the unregistered possession of firearms, including a "machinegun," but it was silent as to the mens rea for a violation.[170] In holding that a defendant must know of a firearm's properties as a machinegun (i.e., it normally fires more than one shot with each trigger pull), the Court emphasized the "potentially harsh penalty" of up to ten years' imprisonment for violating the statute.[171] "Historically, the penalty imposed under a statute has been a significant consideration in determining whether

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165. *Liparota*, 471 U.S. at 427; *see also Ratzlaf*, 510 U.S. at 148–49; *U.S. Gypsum Co.*, 438 U.S. at 437; *Rehaif*, 139 S. Ct. at 2212 (Alito, J., dissenting); Smith v. United States, 508 U.S. 223, 239–41 (1993).

166. *Liparota*, 471 U.S. at 419–20.

167. *Id.* at 433–44.

168. *Id.* at 427.

169. *See* Staples v. United States, 511 U.S. 600, 616–17 (1994) (taking into consideration the "harsh" mandatory minimum sentence when ruling the presumption of mens rea was not rebutted); *Rehaif*, 139 S. Ct. at 2197 ("[T]hey carry a potential penalty of 10 years in prison that we have previously described as 'harsh.'"); United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). The relationship between culpable mental states and punishment severity is another important theme in mens rea scholarship. *See, e.g.*, Kennedy, *supra* note 6, at 754–835; Serota, *supra* note 6, 1202–29; Smith, *supra* note 6, at 1612–71.

170. *Staples*, 511 U.S. at 600. One statute includes machineguns within the meaning of "firearm" and then defines a machinegun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(a)–(b). A second statute requires registration of a firearm in "a central registry of all firearms in the United States … known as the National Firearms Registration and Transfer Record." *Id.* § 5841. A third statute provides in relevant part: "It shall be unlawful for any person … to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." *Id.* § 5861(d). A fourth statute punishes the possession of an unregistered firearm with a fine of up to $10,000, imprisonment for up to 10 years, or both. *Id.* § 5871.

171. *Staples*, 511 U.S. at 616.

the statute should be construed as dispensing with *mens rea*."[172] The *Staples* Court pointed out the tension of imposing severe punishment without a culpable mental state in a system that normally requires mens rea and only tolerates its absence in certain low-level offenses carrying small penalties.[173] A presumption of mens rea was further supported by decisions that "questioned whether imprisonment was compatible with the reduced culpability required for [some] regulatory offenses," as well as by reviewers of early cases who "argued that offenses punishable by imprisonment . . . must require *mens rea*."[174]

The basis for presuming mens rea due to punishment severity might be the common law and the tradition of American cases. But it might also be justified by the Constitution's articulated concern about penalties, particularly the Eighth Amendment prohibitions on excessive fines and on cruel and unusual punishment.[175] The text and context reveal that sentence harshness has constitutional implications, including repercussions for mens rea requirements, as demonstrated by at least a few cases.[176] Although a product of the Court's intense regulation of capital punishment, the culpable mental state imposed by *Tison* provides indirect constitutional support for the presumption of mens rea.[177] Together, the rule of lenity and concerns of innocence and severe punishment provide an indirect connection between the Constitution and the mens rea presumption.

Other cases provide a more direct relationship between mens rea and constitutional law. On a number of occasions, the Supreme Court has recognized that a mens rea requirement may alleviate or mitigate a statute's unconstitutional vagueness under the Due Process Clauses.[178] In *Posters 'N' Things, Ltd. v. United States*, the Court inserted a culpable mental state into

172. *Id.*

173. *Id.* at 616–18.

174. *Id.* at 617.

175. U.S. CONST. amend. VIII; *see also* U.S. CONST. amend. V (prohibiting putting someone twice "in jeopardy of life and limb" for the same crime); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment requires jury fact-finding for increases in maximum sentences).

176. *See supra* notes 78–82 and accompanying text.

177. *See* Tison v. Arizona, 481 U.S. 137, 156–58 (1987).

178. *See* Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994); McFadden v. United States, 576 U.S. 186, 197 (2015); Screws v. United States, 325 U.S. 91, 101–02 (1945). According to the Court, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

a federal statute criminalizing the distribution of drug paraphernalia.[179] By requiring that a defendant know an item was likely to be used with illegal drugs, the crime's scope was made sufficiently clear by due-process standards.[180] A half-century earlier, the Court had found that a culpable mental state cures the "constitutional vice" and "essential injustice" of trying an individual for a crime of which he was unaware, pursuant to a statute that provides insufficient warning of what is prohibited.[181] As a matter of vagueness doctrine, "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."[182]

The Court's cases on statutes affecting association and speech provide further evidence of the constitutional basis for a mens rea presumption. In *Scales v. United States*, the Court inserted culpable mental states into a federal statute prohibiting involvement in an organization that advocates the violent overthrow of American government.[183] By requiring knowledge of the organization's illegal advocacy and the specific intent to further that advocacy, the Court's statutory interpretation ensured that a defendant's participation was "sufficiently substantial to satisfy the concept of personal guilt" and the "presumably constitutional[ ] standards of criminal

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179. *Posters 'N' Things*, 511 U.S. at 513. The underlying statute made it a crime for anyone

> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia; (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or (3) to import or export drug paraphernalia.

Id. at 546 (quoting 21 U.S.C. § 857(a)). The crime is punishable by up to three years of imprisonment and a fine of $100,000. *Id.* (noting penalties under 21 U.S.C. § 857(b)).

180. *Id.* at 526.

181. *Screws*, 325 U.S. at 101–02. The interpretation in *Screws* had the insalubrious effect of protecting those who violate people's civil rights under color of law. *See id.* at 104–05; *see also supra* notes 159–60 and accompanying text (discussing qualified immunity doctrine).

182. *Screws*, 325 U.S. at 102.

183. Scales v. United States, 367 U.S. 203, 205, 228 (1961). The statute provided in relevant part:

> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any [government in the United States] by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof [shall] be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

18 U.S.C. § 2385.

imputability."[184] The mens rea requirement also ensured that the statute punished "a purposeful form of complicity in a group engaging in . . . forbidden advocacy" and therefore did "not cut deeper into the freedom of association" than permissible under First Amendment doctrine.[185] The presumption of mens rea can also protect the freedom of expression. In *United States v. X-Citement Video*, the Court construed the term "knowingly" in a child pornography statute to require knowledge that one of the performers participating in sexually explicit conduct was a minor.[186] A culpable mental state "expand[ed] the child pornography statute to its full constitutional limits" consistent with free speech.[187]

An interpretation of mens rea may even impact the Sixth Amendment right to trial by jury. In *Cheek v. United States*, the Supreme Court held that the term "willfully" in two federal tax crimes requires that a defendant knew that he had a duty to pay income taxes.[188] "Knowledge and belief are characteristically questions for the factfinder, in this case the jury," wrote the *Cheek* Court in finding it legally erroneous to instruct the jury that a belief

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184. *Scales*, 367 U.S. at 225, 228.

185. *Id.* at 229.

186. United States v. X-Citement Video, Inc., 513 U.S. 64, 77–78 (1994). Among other things, the statute punished anyone who:

> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; [or]
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct[.]

18 U.S.C. § 2252.

187. *X-Citement Video*, 513 U.S. at 74.

188. Cheek v. United States, 498 U.S. 192, 201 (1991). The felony provision provides in relevant part: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof … shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. § 7201. The misdemeanor provision provides in relevant part: "Any person required under this title . . .or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution." *Id.* § 7203.

about one's duty to pay must be objectively reasonable.[189] "[F]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision."[190]

To be clear, none of the above cases explicitly ruled that the Constitution demands a particular mens rea. Remember, the Supreme Court has only thrice ruled that a culpable mental state is an inexorable constitutional requirement. Likewise, as Justice Jackson conceded in *Morissette*, "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."[191] Still, an opinion presuming mens rea may find support in those few cases that have held that constitutional doctrine does, in fact, require a mental state element. The Court's interpretation in *X-Citement Video*, for instance, relied upon the conclusion in *Smith v. California* that an obscenity statute dispensing with mens rea violated the First Amendment.[192] Ultimately, by applying a culpable mental state that comports with the Constitution, the Supreme Court recognized the constitutional underpinnings of the mens rea presumption without triggering the consequences of a constitutional ruling. The mezzanine law of mens rea is thus more than the mere positive law of statutes but less than the fundamental law of the Constitution.

IV.

The foregoing can be described as a mirage. Arguably, the presumption of mens rea is, in fact, fulfilling the legislative intent by refusing to assume that lawmakers would dispense with a culpable mental state. As such, the presumption might be "considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway."[193] The presumption's impact might be minimized further by describing it as less of a substantive canon than a semantic (or linguistic) one, serving as a type of gap-filler or default rule to resolve bona fide statutory ambiguities.[194] When several interpretations of a statute's mens rea are equally plausible, the

189. *Cheek*, 498 U.S. at 203.

190. *Id.*

191. Morissette v. United States, 342 U.S. 246, 260 (1952).

192. *See X-Citement Video, Inc.*, 513 U.S. at 73 (discussing Smith v. California, 361 U.S. 147 (1959)).

193. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997).

194. *See, e.g.*, Barrett, *supra* note 38, at 109–10, 117–18, 123, 177. As Justice Barrett noted, "The distinction between linguistic and substantive canons is not always crisp, for canons that ostensibly advance substantive values are sometimes rationalized as functionally linguistic." *Id.* at 120.

presumption can act as a tie breaker in favor of finding a culpable mental state.

To the extent that it does more than this, the presumption might still be rationalized by the long tradition of mens rea. As discussed earlier, the presumption's historical and theoretical pedigree lies in the common law, which the courts have relied upon when giving meaning to statutory terms.[195] "The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity," Justice Antonin Scalia wrote in his tract on interpretation[196]—and the same could be said of the presumption of mens rea. These common law-based rules of statutory interpretation might be cabined to a now-closed set of assumptions marked by their endurance and continuing impact on the reasoning of lawyers and judges.[197]

But the Court has applied the presumption even where no text supports a particular mental state and the ordinary tools of statutory construction do not yield a mens rea requirement. In these cases, the presumption is not so much a revelation of what lawmakers actually intended or even a proxy for that legislative purpose, but instead a pronouncement of what lawmakers *should* have intended in enacting a statute. This is the application of a normative principle quite apart from positive law, and, as just discussed, the Court's references to constitutional doctrine suggest a source of the principle. The Constitution's gravity influences the mens rea presumption without pulling it within the orbit of constitutional doctrine.

Likewise, the common law cannot provide the entire justification for a mens rea presumption, as evidenced by cases applying the presumption in spite of another common-law rule "deeply rooted in the American legal system"—ignorance of the law is no excuse.[198] When the Supreme Court requires that a defendant know of a law's requirements, the presumption stands in opposition to the common-law rule that a mistake of law is no defense to criminal prosecution.[199] And as the Court opined in *Lambert*, the rejection of one common-law rule for another in conducting mens rea analysis can be driven by constitutional limits on legislation.[200]

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195. *See* Evans v. United States, 504 U.S. 255, 259 (1992) (quoting Taylor v. United States, 495 U.S. 575, 592 (1990)) ("[i]t is a familiar 'maxim that a statutory term is generally presumed to have its common-law meaning'").

196. SCALIA, *supra* note 193, at 29.

197. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2474 (2003); Barrett, *supra* note 38, at 110–12, 159–63.

198. *Cheek*, 498 U.S. at 199; *see supra* text accompanying notes 85–87.

199. *See Cheek*, 498 U.S. at 199; Lambert v. California, 355 U.S. 225, 228 (1957).

200. *See Lambert*, 355 U.S. at 228 (finding that "due process places some limits on [the] exercise" of the common-law "rule that 'ignorance of the law will not excuse'" (quoting Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910))).

The presumption of mens rea lies somewhere between purely statutory law and purely constitutional law. In holding that a culpable mental state cannot be dispensed with lightly, the presumption reveals its constitutional footing. But the remedy of *Lambert*, *Smith*, and *Wulff*—striking down statutes for lack of a mens rea—is strong constitutional medicine, disempowering a legislature from adopting a lower mens rea standard than announced by the judiciary. As mentioned earlier, the counter-majoritarian nature of such rulings can generate angst in a Court doubtful of its role in setting criminal policy[201] and generally skeptical of its abilities to regulate substantive criminal law.[202] The mens rea presumption navigates the space between positive law, which is the sole province of legislatures, and fundamental law, the interpretation of which is left largely to the judiciary. By incorporating a culpable mental state into a statute, this mezzanine law represents a normative position as to what a legislature should do; yet by not insisting that the implied mens rea limits what a legislature can do, the mezzanine law demonstrates its distinction from the demands of a full-fledged constitutional ruling.

In a fascinating article on statutory interpretation, Amy Coney Barrett argued that substantive canons that depart from a statute's best interpretation in favor of a merely plausible one were nonetheless permissible so long as the canons protect constitutional values.[203] According to then-Professor, now-Justice Barrett, these constitutionally inspired canons

> have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms that have been sanctioned by a super-majority as higher law. They do less violence to the legislative bargain because legislators can anticipate their potential effect on statutory interpretation and modify their language accordingly. The grounding of these canons in the Constitution thus renders their effect on statutes both more predictable and more democratically legitimate than that of open-ended doctrines. . . .
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> Moreover, a canon's grounding in the Constitution provides a potential justification for the way in which its application causes a judge to deviate somewhat from her ordinary obligation of faithful agency. . . . In the context of statutory interpretation, . . . the judicial duty to enforce the Constitution qualifies, though it does not trump,

201. *See supra* text accompanying notes 92–115; *see also* Ewing v. California, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment))).

202. *See supra* text accompanying notes 115–21.

203. *See* Barrett, *supra* note 38, at 163–64, 169, 174, 181.

> the obligation of faithful agency. In other words, the duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms.[204]

Conceived along these lines, the mezzanine law of a mens rea presumption can serve a variety of purposes. By applying the presumption, the judiciary can avoid the uncomfortable position of either declaring that a culpable mental state is of no constitutional moment and can be dispensed with willy-nilly, or conversely holding that mens rea is constitutionally required regardless of a legislature's assessment of the felt needs of society. Mezzanine law thus skirts the edge between constitutional and statutory law, and the challenge of demarcating lines between the two. This enterprise shares more than a passing resemblance to the Supreme Court's so-called "avoidance doctrine," which contains a series of rules that serve to sidestep questions of constitutionality, thereby helping to resolve cases without invoking the jurisprudential sledgehammer of invalidating statutes as unconstitutional.[205] One of the rules of the avoidance doctrine holds that if the constitutionality of a statute is in serious doubt, the judiciary should first ascertain whether it's possible to construe the statute in a way that avoids the constitutional question.[206]

The avoidance doctrine responds to the judiciary's anxieties in "telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment."[207] As articulated by the Court, the doctrine recognizes "the delicacy" of reviewing legislation for constitutionality, given the "comparative finality" of constitutional rulings; "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority"; and the need "for each to keep within its power, including the courts."[208] Consistent with these objectives and the concerns raised by constitutionalizing mens rea, the Supreme Court has occasionally relied upon the avoidance doctrine to justify the imposition of a culpable mental state.[209] In doing so, the Court recognizes the importance of mens rea as a principle of criminal law without declaring that a mental state element is inevitably required as a sort of constitutional handcuff on lawmakers.

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204. *Id.* at 168–69.

205. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring); Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944); Rescue Army v. Mun. Ct., 331 U.S. 549, 570–71 (1947).

206. *See Ashwander*, 297 U.S. at 346–48 (articulating the "last resort" rule).

207. Rust v. Sullivan, 500 U.S. 173, 224 (1991) (O'Connor, J., dissenting).

208. *Rescue Army*, 331 U.S. at 571.

209. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 69, 78 (1994); Cheek v. United States, 498 U.S. 192, 203 (1991); Screws v. United States, 325 U.S. 91, 98 (1945).

Likewise, the mezzanine law of mens rea may serve as a medium for interaction between the judiciary and lawmakers.[210] As just mentioned, application of the avoidance doctrine shows respect for legislatures as bodies grounded in and circumscribed by the Constitution.[211] For sure, "it is the responsibility of [the Supreme] Court to act as the ultimate interpreter of the Constitution."[212] But that definitive authority in constitutional interpretation is not necessarily a function of judicial superiority at the task. As Justice Jackson famously said about the Court, "We are not final because we are infallible, but we are infallible only because we are final."[213] The Court's self-awareness of its role in constitutional interpretation leaves room for other bodies, including legislatures, to play a part in discerning the Constitution's meaning. In fact, constitutional issues confront various governmental actors on a daily basis, and the navigation of these issues represents those actors' understandings of the Constitution.

While the idea of interbranch dialogue poses a challenge to the staid model of courts as faithful agents, mezzanine law presents no issue of legitimacy for supporters of "dynamic statutory interpretation."[214] Under this approach, a judge acts not as an agent of lawmakers when construing statutes but instead as a collaborative partner with legislative bodies. A principal exponent of dynamic interpretation, William Eskridge, has argued that the Constitution contemplated lawmaking powers that were shared among the branches of government and not concentrated in a legislature alone. "Even in the lawmaking arena where Congress has primacy … over statutes, the structure of the Constitution contemplates ongoing policy creation as interactive and dynamic rather than unitary and static."[215] In the ensuing interpretive process, the judiciary also serves as a non-political defender of important public values, including those inspired by the Constitution.[216]

So conceived, the Supreme Court is only one player in a process to discern the meaning and application of the Constitution, sharing interpretive duties not only with other courts but also with legislatures. The resulting interaction among these bodies can be seen as a form of "dialogue" among the judicial and political branches. This dialogue is not unlike interpersonal

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210. *See generally* Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000) (analyzing interbranch dialogue).

211. *See* U.S. CONST. art. I (powers delegated to Congress); *id.* art. VI (supremacy clause); *id.* amend. X (protecting federalism).

212. Powell v. McCormack, 395 U.S. 486, 549 (1969).

213. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

214. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

215. ESKRIDGE, *supra* note 214, at 113.

216. *See* Barrett, *supra* note 38, at 110, 116–17.

communication, where one party (usually a legislature) suggests a solution to a given problem (by enacting a statute) and the other party (usually the judiciary) critiques the solution (via a case decision) against important background principles (especially the Constitution). Whether the dialogue continues depends on whether and how the parties can respond to one another. If the Supreme Court declares that a statute is unconstitutional for lack of a (particular) mens rea, it not only voids that statute but also stifles future legislation or contrary judicial opinions, effectively ending further discussion on the issue. But when the judiciary inserts a culpable mental state pursuant to the mezzanine law of a mens rea presumption, it allows and even encourages further dialogue.

The conversation-halting nature of a constitutional ruling is demonstrated by the Sixth Circuit's decision in *Wulff*, which, as you will recall, struck down a provision of the Migratory Bird Treaty Act for lack of mens rea.[217] Congress explicitly recognized that "[t]he effect of this decision is that the felony provisions are meaningless within the 6th Circuit and uncertainty now exists throughout the rest of the country."[218] Finding this to be unacceptable, Congress pursued what it believed to be the only available option: capitulation to the demands of *Wulff* by adding a mental state of "knowingly" to the statute.[219] In theory, federal lawmakers might have pressed the issue further by "reenacting" the underlying provision to make it pellucidly clear that Congress disagrees with the *Wulff* decision and instead adopts the approach taken by another circuit court.[220] There's even a historical example in Congress's enactment of a statute purporting to govern custodial interrogation in direct contravention of the Court's then-recent *Miranda* decision.[221] But ginning up this type of statutory retort may be too complicated and exhausting in a given legislative cycle, where each issue has limited political capital to burn in a very busy congressional world.

By comparison, the Supreme Court's decision in *Ratzlaf v. United States* suggests how the presumption of mens rea might allow for further, modest dialogue.[222] That case involved a statutory scheme making it illegal to structure monetary transactions to evade a financial institution's reporting

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217. United States v. Wulff, 758 F.2d 1121, 1125 (6th Cir. 1985).

218. S. REP. NO. 99-445, at 16 (1986).

219. Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, § 501, 100 Stat. 3582, 3590 (codified at 16 U.S.C. § 707(b)).

220. *See* United States v. Engler, 806 F.2d 425 (3d Cir. 1986).

221. *See* 18 U.S.C. § 3501, *struck down by* Dickerson v. United States, 530 U.S. 428 (2000); *see also infra* notes 255–60 and accompanying text (discussing *Dickerson*). For the statute's history, see Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. §3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999).

222. *See* Ratzlaf v. United States, 510 U.S. 135 (1994).

obligations.[223] The *Ratzlaf* Court interpreted the mental state element "willfully" as requiring that a defendant know that his conduct was unlawful.[224] Seen as an instance of the mezzanine law of mens rea, the Court was able to express the importance of a culpable mental state without declaring it to be a constitutional mandate. Congress responded with legislation "to correct the recent Supreme Court holding in *Ratzlaf*," thereby "restor[ing] the clear Congressional intent that a defendant need only have the intent to evade the reporting requirement."[225] Now, at this point, the conversation is at an end unless the judiciary is willing to invoke the Constitution. But whether any judicial reply takes the road less traveled of constitutionally required mens rea or instead the more conventional route of deference to congressional judgments on criminal culpability, the Court's original interpretation did nothing to foreclose further action.

Perhaps the best example of institutional dialogue on mens rea involved interactions between a state legislature and state supreme court, as well as among state courts and the federal judiciary. As originally enacted, a Florida statute criminalizing possession of illegal drugs lacked an explicit mens rea requirement.[226] In a 1996 case, the Florida Supreme Court applied the presumption of mens rea to interpret the statute to require "guilty

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223. *Id.* at 136. One statutory provision, 31 U.S.C. § 5313(a), imposed various reporting requirements on individuals and institutions when they are involved in certain financial transactions. A second statute provided in relevant part: "No person shall for the purpose of evading the reporting requirements of [31 U.S.C. §] 5313(a) with respect to such transaction … structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." 31 U.S.C. § 5324(a)(3). A third statute provided in relevant part: "A person willfully violating [*inter alia*, 31 U.S.C. § 5324] shall be fined not more than $250,000, or [imprisoned] for not more than five years, or both." 31 U.S.C. § 5322(a), *quoted in Ratzlaf*, 510 U.S. at 140.

224. *Ratzlaf*, 510 U.S. at 146–50.

225. H.R. REP. NO. 103-438, at 22 (1994); *see* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2254 (codified as amended at 31 U.S.C. § 5324).

226. Florida Comprehensive Drug Abuse Prevention and Control Act, ch. 73-331, § 13, 1973 Fla. Laws 783, 800 (codified at FLA. STAT. § 893.13(6)). The statute provided in relevant part:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, [or, for certain marijuana offenses, a felony of the first degree or a misdemeanor of the first degree].

FLA. STAT. § 893.13(6)(a)–(c) (1996).

knowledge," that is, knowledge of the illicit nature of the relevant drug.[227] Drawing heavily from the U.S. Supreme Court's mens rea jurisprudence, the state high court concluded that the Florida legislature could not have intended to dispense with a culpable mental state, pointing to the construction of similar laws, as well as the potential liability of innocent individuals and the severe punishment under the state's drug possession statutes. "[I]f the legislature had intended to make criminals out of people who were wholly ignorant of the offending characteristics of items in their possession, and subject them to lengthy prison terms, it would have spoken more clearly to that effect."[228] In 2002, this interpretation was affirmed and extended to require a special jury instruction on knowledge upon a defendant's request.[229] But the Florida Supreme Court rejected a government claim that lack of knowledge of the drug's illicit nature should be an affirmative defense rather than an element of the crime. "Nowhere has the legislature provided for such an affirmative defense."[230]

The state legislature responded only a few months later with a statute declaring that the Florida Supreme Court cases "were contrary to legislative intent" and then stating unequivocally that "knowledge of the illicit nature of a controlled substance is not an element" of the state's drug statutes.[231] At the same time, the legislature adopted the argument that "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense," adding further that "possession of a controlled substance . . . shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance."[232]

Several of the state's lower appellate courts upheld the new statute against constitutional challenges,[233] but a federal district court found that the statute's elimination of mens rea violated due process and was not cured by making lack of knowledge an affirmative defense.[234] Less than a year later, the Florida Supreme Court upheld the statute as constitutional, finding that it did not impinge on the exercise of some constitutionally protected right like the

227. *See* Chicone v. State, 684 So. 2d 736, 743–44 (Fla. 1996). The case also applied the presumption of mens rea to a statute criminalizing possession of drug paraphernalia. *See id*. at 737 (ruling on FLA. STAT. § 893.147)

228. *Chicone*, 684 So. 2d at 743.

229. Scott v. State, 808 So. 2d 166, 172 (Fla. 2002).

230. *Chicone*, 684 So. 2d at 744.

231. FLA. STAT. § 893.101(1)–(2) (2021).

232. *Id.* § 893.101(2)–(3).

233. Harris v. State, 932 So. 2d 551, 552 (Fla. Dist. Ct. App. 2006); Burnette v. State, 901 So. 2d 925, 928 (Fla. Dist. Ct. App. 2005); Taylor v. State, 929 So. 2d 665, 665 (Fla. Dist. Ct. App. 2006); Wright v. State, 920 So. 2d 21, 24–25 (Fla. Dist. Ct. App. 2005); Lanier v. State, 74 So. 3d 1130, 1131 (Fla. Dist. Ct. App. 2011).

234. Shelton v. Sec'y, Dep't of Corr., 802 F. Supp. 2d 1289, 1297–98 (M.D. Fla. 2011).

freedom of speech, as was the case in *Smith* and, to some extent, *X-Citement Video*; nor did the law implicate *Lambert* since it didn't criminalize passive and essentially innocent conduct like the failure to register.[235] Any lingering constitutional concerns were "obviated by the statutory provision that allows a defendant to raise the affirmative defense of an absence of knowledge."[236]

A month later, this interpretation was accepted by a federal appellate court panel, reversing the federal district court opinion as inconsistent with the deferential standard of federal habeas corpus.[237] Although "the Florida Supreme Court's decision upholding the [statute] under the Due Process Clause does not bind [a federal appellate court], it illustrates that five Justices of the Florida Supreme Court agree that no U.S. Supreme Court precedent renders the [law] as amended unconstitutional."[238] Agreeing with the Florida Supreme Court, the panel held that *Lambert* and other U.S. Supreme Court decisions were distinguishable, "especially considering that Florida's elimination of mens rea was only partial" due to the affirmative defense of lack of knowledge.[239]

Subsequently, the statute was subjected to indirect scrutiny via a congressional statute that increases punishment in federal court based on prior state convictions for a "serious drug offense."[240] Defendants argued that convictions under the Florida statute could not count as serious drug offenses given the statute's elimination of mens rea, as compared to almost all other drug-possession statutes in the United States, which require knowledge of a drug's illicit nature.[241] In 2020, however, the U.S. Supreme Court rejected this claim, noting that the argument "overstates Florida's disregard for *mens rea*," since "a defendant unaware of the substance's illicit nature can raise that unawareness as an affirmative defense, in which case the standard jury instructions require a finding of knowledge beyond a reasonable doubt."[242]

All told, this interaction illustrates how the mezzanine law of mens rea facilitates both interbranch and intrabranch dialogue, albeit with some complexity: A state statute was (1) interpreted by the state supreme court to

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235. State v. Adkins, 96 So. 3d 412, 419–21 (Fla. 2012) (discussing U.S. Supreme Court cases). Under the federal habeas corpus statute, a petitioner (i.e., criminal defendant) is only entitled to relief on a claim that was adjudicated in a state court decision if that case was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

236. *Adkins*, 96 So. 3d at 422.

237. Shelton v. Sec'y, Dep't of Corr., 691 F.3d 1348, 1355–56 (11th Cir. 2012).

238. *Id.* at 1354.

239. *Id.* at 1354–55.

240. 18 U.S.C. § 924(e)(1)–(2)(A).

241. *See Adkins*, 96 So. 3d at 423 n.1 (Pariente, J., concurring in result).

242. Shular v. United States, 140 S. Ct. 779, 787 (2020).

require a culpable mental state pursuant to the mens rea presumption, which was (2) countered by the state legislature's statutory rejection of that interpretation and the creation of a new mens rea-based affirmative defense, which was then (3) upheld by the state supreme court due in large part to the presence of the affirmative defense—an understanding that was initially (4) rebuffed by a federal district court but then (5) accepted by a federal appellate court, which rejected the district court's interpretation in favor of the state court's ruling, all of which was (6) accepted by the U.S. Supreme Court. In this way, the presumption of mens rea spurred dialogue between the state legislature and state judiciary, as well as among the state and federal courts, concerning the appropriate mens rea for the statute in question.

This conversation was made possible by the nature of mens rea as mezzanine law, the application of which allowed for a legislative response that can be viewed as a relatively nuanced compromise: The rejection of the state court's interpretation mitigated by the creation of a mens rea-based affirmative defense, which was limited, in turn, by a permissive presumption that a possessor knows of the illicit nature of the substance. When the state supreme court upheld the new statute, the conversation seemed to be at an end, until a federal district court rejected that decision and struck down the statute. Although it invoked the Constitution, the district court's opinion was not a conversation stopper, as state courts and federal appellate courts were allowed to respond due to federalism's tolerance of modest and usually temporary discrepancies in constitutional interpretation and the judicial hierarchy of the federal courts within a geographically apportioned system. The mezzanine law of mens rea thus allowed an interpretation that was, if not correct, at least well discussed.

V.

By describing the basis and roles for the mens rea presumption as a form of mezzanine law, I do not mean to suggest that this conception of mens rea or the general idea of mezzanine law represents an unmitigated good. There is a reason the two-tier understanding of American law is embraced to this day, and it has to do with the nature of judicial review in a democratic system of separated powers and federalism. As discussed, the Supreme Court's role in statutory interpretation is to discern a legislature's intent, since the creation

of statutes is left to Congress through the separation of powers[243] or to the states through federalism.[244]

By contrast, the Court's role in interpreting the Constitution is to divine its meaning on behalf of the American people, who are the ultimate source of the Constitution's authority.[245] In applying that interpretation to federal and state statutes, the Court must determine whether a statute is "repugnant to the [C]onstitution."[246] If it is, "the [C]onstitution, and not such ordinary act, must govern the case to which they both apply," wrote Chief Justice Marshall in *Marbury v. Madison*, because "the [C]onstitution is superior to any ordinary act of the legislature."[247] In such cases, the Court must declare that "a law repugnant to the [C]onstitution is void," a ruling that binds "courts, as well as other departments."[248] This understanding, which has reigned ever since Marshall put it into words, tolerates the counter-majoritarian consequences of judicial review as a function of the Court's duty to interpret the Constitution and the supremacy of constitutional law over mere statutory law.[249] But it does not imagine another level of law: There's the Constitution, and then there's all other law.

Mezzanine law is neither. It is not enacted by a democratically accountable political body, but instead flows from history, philosophy, and the values embodied in the Constitution. But mezzanine law is also not the Constitution, as it lacks any significant textual basis or support in the original intent of any constitutional provision. Most of all, mezzanine law does not require the Court to declare void a statute "repugnant" to mezzanine law itself, and it does not bind "other departments." In this light, mezzanine law might be seen as super-legislation standing above statutes or instead semi-constitutional law inferior to the real Constitution. Either way, mezzanine law provides the judiciary a means to check federal or state lawmakers without directly invoking the Constitution.

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243. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); *id.* § 8 (listing the specific powers of Congress).

244. *See id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *supra* note 24 and accompanying text.

245. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695–97 (1976) ("The ultimate source of authority in this Nation, Marshall said, is not Congress, not the states, not for that matter the Supreme Court of the United States. The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it."); *supra* note 51 and accompanying text.

246. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 138 (1803).

247. *Id.* at 178.

248. *Id.* at 180 (emphasis omitted).

249. *See supra* notes 33–35, 113 and accompanying text.

Skepticism of this entire endeavor is definitely in order. Justice Scalia voiced concern about "the use of certain presumptions and rules of construction that load the dice for or against a particular result."[250] The already difficult job of discerning what a statute means using objective criteria is made nearly impossible by placing "a thumb of indeterminate weight" on the interpretive scales.[251]

> How "narrow" *is* the narrow construction that certain types of statute are to be accorded; how clear does a broader intent have to be in order to escape it? Every statute that comes into litigation is to some degree "ambiguous"; how ambiguous does ambiguity have to be before the rule [or presumption] applies? . . . There are no answers to these questions, which is why these artificial rules increase the unpredictability, if not the arbitrariness, of judicial decisions. Perhaps for some of the rules that price is worth it. . . .
>
> But whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it.[252]

The presumption of mens rea certainly loads the dice of interpretation, but maybe this is less galling because it's done out of partiality for the Constitution.[253] "[C]ourts are not limited to a black-and-white, yes-or-no choice about a statute's constitutionality," Justice Barrett argued. "[T]hey possess a limited power to push a statute in a direction that better accommodates constitutional values."[254] Whatever its merits, this rationale is still unlikely to mollify skeptics. If Justice Scalia was dubious about dice-loading in statutory interpretation, he appeared downright disdainful of using the Constitution as an excuse for crooked dice.

Like a few other doctrines such as the Court's *Miranda* jurisprudence, the presumption of mens rea as mezzanine law has "constitutional underpinnings"[255] and serves as a "prophylactic"[256] rule that buttresses the Constitution. But its rejection "is *not* a violation of the Constitution"[257] and

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250. SCALIA, *supra* note 193, at 27.

251. *Id.* at 28.

252. *Id*. at 28–29.

253. *See supra* notes 203–04 and accompanying text.

254. Barrett, *supra* note 38, at 181.

255. Dickerson v. United States, 530 U.S. 428, 440 n.5 (2000); *see also id*. at 446, 454 (Scalia, J., dissenting).

256. *See, e.g., id.* at 437–38, 438 n.2 (majority opinion); *id*. at 446, 450–54, 457 (Scalia, J., dissenting).

257. *Id.* at 445.

does not "*require*[ ] the result that the [rule] announces and the statute ignores."[258] In a scathing opinion, Justice Scalia described the Court's apparent ability to disregard the intent of popularly accountable lawmakers—not because the Constitution demands it, but because the statute violates a judge-made prophylactic rule that itself is not demanded by the Constitution—as "an immense and frightening antidemocratic power" that "arrogates to itself prerogatives reserved to the representatives of the people."[259] To Justice Scalia's mind, "[t]his is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people."[260]

The point is well taken to the extent that mezzanine law provides a backdoor means for courts to achieve what they could not do directly through constitutional doctrine.[261] Since this circumvention may be insufficiently subtle to survive open scrutiny, it might only compound the counter-majoritarian difficulty of judicial review by effectively driving constitutional interpretation underground (or at least *in camera*) without reducing the overall level of counter-majoritarian activity by the courts.[262] Such activity might even increase when camouflaged as mere statutory interpretation, at least if it liberates the courts to construe statutes contrary to the apparent legislative intent and under circumstances where it would never strike down a statute as unconstitutional.[263]

In turn, easy legislative override may prove illusory when government is politically divided (e.g., a Republican-led state legislature and a Democratic governor with veto power) or when ordinary legislation is limited by a super-majority mechanism (e.g., the classic filibuster in the U.S. Senate).[264] In such cases, any daylight between mezzanine law and the Constitution may disappear, an outcome that should alarm in proportion to one's doubts about the constitutional basis for a particular expression of mezzanine law.[265] The problem is only exacerbated when mezzanine law fails to accommodate

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258. *Id.* at 454

259. *Id.* at 446, 454.

260. *Id.* at 465.

261. *See, e.g.*, Eskridge & Frickey, *supra* note 143, at 629–45 (detailing potential flaws in quasi-constitutional law); *see also* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1302 (1998) (critiquing constitutional regulation of substantive criminal law).

262. *See* Eskridge & Frickey, *supra* note 143, at 596–97, 612, 629 (noting shift away from activist constitutional interpretation and toward activist statutory interpretation).

263. *See id*. at 636–37.

264. *See id*. at 639–40; *see also* Barrett, *supra* note 38, at 175.

265. *See* Eskridge & Frickey, *supra* note 143, at 640–45 (detailing concerns about the norms protected by quasi-constitutional law); *see also* Barrett, *supra* note 38, at 177–79 (describing concerns about line between constitutional and extraconstitutional values).

important gradations within a given doctrine, such as the different levels of mens rea (e.g., the Model Penal Code's tetrad of purpose, knowledge, recklessness, and negligence).[266]

As discussed, however, the presumption of mens rea does have a number of genuine connections to constitutional law—through its incorporation of certain common law principles, through its relationship to several constitutional doctrines, and through its connection to various constitutional values.[267] Moreover, judges who invoke the presumption are perfectly capable of differentiating among degrees of mental culpability and ultimately determining which level of mens rea will suffice.[268] And unlike the precise

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266. MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1985); *see also supra* note 2 (noting distinctions in mens rea).

267. *See supra* Part III.

268. Consider, for instance, the various approaches taken in *Elonis v. United States*, 575 U.S. 723 (2015), which addressed mental culpability in a federal ban on threatening communications: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c). The *Elonis* Court relied upon the mens rea presumption to require proof that the defendant was aware of the threatening nature of his communication—mere negligence would not do—but the majority refused to address whether recklessness would suffice or instead proof of knowledge or purpose was required. *See Elonis*, 575 U.S. at 740–42. To Justice Alito, this was an abdication of the Court's responsibility. "While this Court has the luxury of choosing its docket, lower courts and juries are not so fortunate. They must actually decide cases, and this means applying a standard." *Id.* at 743 (Alito, J., concurring in part and dissenting in part). Alito then made the case that recklessness was enough:

> I agree with the Court that we should presume that an offense like that created by § 875(c) requires more than negligence with respect to a critical element like the one at issue here. . . . Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.
>
> Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. . . . And when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.
>
> There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable. Indeed, this Court has held that "reckless

target of Justice Scalia's ire—the Supreme Court's *Miranda* jurisprudence[269]—the mezzanine law of mens rea binds federal and state actors only in the loosest sense. It's not a command, it's a presumption that might be rebutted by a statute's text or context and can be overridden by subsequent legislation.[270] As suggested in the previous part, a court's invocation of the mens rea presumption may even encourage institutional dialogue rather than squelch responses, by prompting lawmakers to

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> disregard for human life" may justify the death penalty. Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.

Id. at 744–46 (citations omitted). Dissenting Justice Thomas likewise criticized the majority for its failure to resolve a lower court conflict over the appropriate mental state. *See id*. at 750–51 (Thomas, J., dissenting). Thomas then claimed that the underlying crime only required proof of general intent:

> General intent divides those who know the facts constituting the *actus reus* of this crime from those who do not. For example, someone who transmits a threat who does not know English—or who knows English, but perhaps does not know a threatening idiom—lacks the general intent required under § 875(c). Likewise, the hapless mailman who delivers a threatening letter, ignorant of its contents, should not fear prosecution. A defendant like Elonis, however, who admits that he "knew that what [he] was saying was violent" but supposedly "just wanted to express [him]self," acted with the general intent required under § 875(c), even if he did not know that a jury would conclude that his communication constituted a "threat" as a matter of law.
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> . . . .
>
> . . . Requiring general intent in this context is not the same as requiring mere negligence. . . . [G]eneral intent under § 875(c) prevents a defendant from being convicted on the basis of any fact beyond his awareness. In other words, the defendant must *know*—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the *actus reus* of the offense.
>
> But general intent requires *no* mental state (not even a negligent one) concerning the "fact" that certain words meet the *legal* definition of a threat. That approach is particularly appropriate where, as here, that legal status is determined by a jury's application of the legal standard of a "threat" to the contents of a communication. And convicting a defendant despite his ignorance of the legal—or objective—status of his conduct does not mean that he is being punished for negligent conduct.

Id. at 755–57 (citations omitted). Whether one agrees with the *Elonis* majority's approach (purpose or knowledge), or instead the approaches taken by Alito (recklessness) or Thomas (general intent), the Justices surely have the wherewithal to think through and decide these issues.

269. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

270. *See, e.g.*, Eskridge & Frickey, *supra* note 143, at 596 n.4, 597, 637–38 (noting differences between presumptions and clear statement rules).

(re)consider the constitutional values at issue and to (re)affirm that the absence of a culpable mental state wasn't an oversight by legislative drafters.

When the courts are confronted by a troubling strict liability crime or mistake-of-law claim or transitive application of a single mental state, the presumption of mens rea allows the judiciary to put the issue to the legislature. The presumption operates as a sort of "stop and think" measure that presses lawmakers to contemplate the constitutional consequences of their decisions,[271] essentially asking them: *Are you really sure you want to forego a culpable mental state here? Why don't you think about it and get back to us?* Through the medium of mezzanine law, the courts can address lawmakers on mens rea issues "without having to trundle out the heavy artillery of constitutional law."[272]

The enterprise need not be undemocratic, so long as lawmakers have a meaningful opportunity to override a judicial interpretation and the courts ultimately bow to the will of politically accountable bodies. Unlike *Miranda*'s prophylactic rule, which withstood a congressional override,[273] judicial applications of the mens rea presumption have been successfully superseded by legislation[274]—an outcome that must be possible in order to steer clear of Justice Scalia's devastating critique of *Miranda*. Mezzanine law thus offers one means to escape the dueling dualism of constitutional law versus statutory law and the resulting pressure it places on drawing the line between the two.[275]

More generally, the two-track conception of American law has never been entirely consistent with the modern legal landscape. Each American state is a sovereign government with its own constitution, which may have implications for mens rea that trump inconsistent state statutes,[276] which, as Binder and Fissell demonstrate,[277] trump inconsistent local laws.[278] All of this

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271. *See* Barrett, *supra* note 38, at 175.

272. United States v. Wilson, 159 F.3d 280, 293 (7th Cir. 1998) (Posner, C.J., dissenting).

273. Dickerson v. United States, 530 U.S. 428, 436-38, 444 (2000) (finding that Congress attempted to overrule *Miranda* but concluding that it could not do so).

274. *See supra* notes 223–242 and accompanying text.

275. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974) ("[T]his kind of all-or-nothing approach to the [Constitution] puts extraordinary strains upon the process of drawing its outer boundary lines."). For a critique of the trumping character of constitutional law, see Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

276. *See, e.g.*, People v. Estreich, 75 N.Y.S.2d 267, 270 (N.Y. App. Div. 1947) (striking down state statute based on, inter alia, state constitution).

277. Binder & Fissell, *supra* note 5 (manuscript at 21).

278. It's actually more intricate than this, since there are several layers of law below state statutes: rules promulgated by statewide agencies, which trump city or county charters, which trump local ordinances, which trump rules promulgated by local agencies.

nonfederal law may be trumped not only by the U.S. Constitution, but also by U.S. treaties, federal statutes, and even the rules of federal agencies.[279] The American legal system's elaborate hierarchy poses all sorts of possibilities for conflicts of law and questions of preemption. This thicker reality complicates, in perhaps interesting and important ways, the points made in this essay.

My tighter focus on the U.S. Constitution's impact on federal and state statutes, as well as a few local ordinances, is done for the sake of simplicity (and page space), given that most Supreme Court decisions on mens rea doctrine have involved conflicts between, on the one hand, the Constitution and the Court's interpretive powers, and, on the other hand, a series of federal and state statutes and local ordinances. The far more complex picture of American law—containing multiple floors in a virtual high-rise of legal authority, and implicating constitutional values which at times are hard to discern and may even conflict—should be incorporated into further assessments of the existence and basis of mezzanine law, as well as its potential advantages and disadvantages. For now, it's enough to identify and conceptualize the basic phenomenon of mezzanine law, expressed as a presumption of mens rea, and then open the floor for discussion.

279. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236–37 (1796) (noting that U.S. treaties are supreme to state law); Geier v. Am. Honda Motor Co., 529 U.S. 861, 866–67 (2000) (holding federal administrative regulations supreme to state law).