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The Rule of Lenity as a Rule of Federalism

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The rule of lenity as a rule of federalism

Today's Supreme Court decisions included three interesting (aren't they all?) statutory interpretation cases: *Chamber of Commerce v. Whiting* (preemption and Arizona immigration regulation), *U.S. v. Tinklenberg* (Speedy Trial Act), and *Fowler v. U.S.* (federal statute against witness tampering). Here I will highlight *Fowler*. In an opinion concurring in the judgment, Justice Scalia advocated an interpretation of the statute that was more favorable to the criminal defendant than the interpretations advanced by either the majority or the dissent; he reached this result in part by citing the rule of lenity. That he should take a pro-defendant position here should not really be very surprising to people who pay attention to these sorts of cases. The thing I instead want to point out is the way his opinion weaves together lenity and federalism.

The rule of lenity -- the rule that unclear criminal statutes should be construed in favor of the defendant -- is typically justified on notice/Due Process grounds or separation-of-powers grounds. But in federal courts, there is an additional potential justification, namely that lenity can help prevent excessive federal encroachment on state criminal law. As Scalia's opinion contends, a broad reading of the statute at issue threatens to turn lots and lots of murders of witnesses into federal crimes. That would hardly be the end of the world, but it would read the statute to sweep beyond the core of the federal interest. (I don't claim to be making a new discovery here in pointing out the lenity/federalism overlap: *McNally v. U.S.* is sometimes cited as another example of this phenomenon.)

Before Prawf Rick Hills [points it out](#), I suppose I should concede that, whatever interest it might hold, this discussion was going on in a concurrence. The rest of the Court didn't find much use for lenity.

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