SUPREME COURT OF THE UNITED STATES

No. 99–5716

FLOYD J. CARTER, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 12, 2000]

JUSTICE THOMAS delivered the opinion of the Court.

In *Schmuck* v. *United States*, 489 U. S. 705 (1989), we held that a defendant who requests a jury instruction on a lesser offense under Rule 31(c) of the Federal Rules of Criminal Procedure must demonstrate that "the elements of the lesser offense are a subset of the elements of the charged offense." *Id.*, at 716. This case requires us to apply this elements test to the offenses described by 18 U. S. C. §§2113(a) and (b) (1994 ed. and Supp. IV). The former punishes "[w]hoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . any . . . thing of value belonging to, or in the . . . possession of, any bank . . . ." The latter, which entails less severe penalties, punishes, *inter alia*, "[w]hoever takes and carries away, with intent to steal or purloin, any . . . thing of value exceeding $1,000 belonging to, or in the . . . possession of, any bank . . . ." We hold that §2113(b) requires an element not required by §2113(a)– three in fact– and therefore is not a lesser included offense of §2113(a). Petitioner is accordingly prohibited as a matter of law from obtaining a lesser included offense instruction on the offense described by §2113(b).

I

On September 9, 1997, petitioner Floyd J. Carter

donned a ski mask and entered the Collective Federal Savings Bank in Hamilton Township, New Jersey. Carter confronted a customer who was exiting the bank and pushed her back inside. She screamed, startling others in the bank. Undeterred, Carter ran into the bank and leaped over the customer service counter and through one of the teller windows. One of the tellers rushed into the manager's office. Meanwhile, Carter opened several teller drawers and emptied the money into a bag. After having removed almost $16,000 in currency, Carter jumped back over the counter and fled from the scene. Later that day, the police apprehended him.

A grand jury indicted Carter, charging him with violating §2113(a). While not contesting the basic facts of the episode, Carter pleaded not guilty on the theory that he had not taken the bank's money "by force and violence, or by intimidation," as §2113(a) requires. Before trial, Carter moved that the court instruct the jury on the offense described by §2113(b) as a lesser included offense of the offense described by §2113(a). The District Court, relying on *United States* v. *Mosley*, 126 F. 3d 200 (CA3 1997),[1] denied the motion in a preliminary ruling. At the close of the Government's case, the District Court denied Carter's motion for a judgment of acquittal and indicated that the preliminary ruling denying the lesser included offense instruction would stand. The jury, instructed on §2113(a) alone, returned a guilty verdict, and the District Court entered judgment pursuant to that verdict.

The Court of Appeals for the Third Circuit affirmed in an unpublished opinion, relying on its earlier decision in *Mosley*. Judgment order reported at 185 F. 3d 863 (1999).

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[1]We granted certiorari in *Mosley* to address the issue that we resolve today, *Mosley* v. *United States*, 523 U. S. 1019 (1997), but dismissed the petition in that case upon the death of the petitioner, 525 U. S. 120 (1998) *(per curiam)*.

While the Ninth Circuit agrees with the Third that a lesser offense instruction is precluded in this context, see *United States* v. *Gregory*, 891 F. 2d 732, 734 (CA9 1989), other Circuits have held to the contrary, see *United States* v. *Walker*, 75 F. 3d 178, 180 (CA4 1996); *United States* v. *Brittain*, 41 F. 3d 1409, 1410 (CA10 1994). We granted certiorari to resolve the conflict, 528 U. S. 1060 (1999), and now affirm.

II

In *Schmuck*, *supra*, we were called upon to interpret Federal Rule of Criminal Procedure 31(c)'s provision that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged." We held that this provision requires application of an elements test, under which "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." 489 U. S., at 716.[2] The elements test requires "a textual comparison of criminal statutes," an approach that, we explained, lends itself to "certain and predictable" outcomes. *Id.*, at 720.[3]

Applying the test, we held that the offense of tampering with an odometer, 15 U. S. C. §§1984 and 1990c(a) (1982 ed.), is not a lesser included offense of mail fraud, 18 U. S. C. §1341. We explained that mail fraud requires two elements– (1) having devised or intending to devise a

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[2] By "lesser offense," *Schmuck* meant lesser in terms of magnitude of punishment. When the elements of such a "lesser offense" are a subset of the elements of the charged offense, the "lesser offense" attains the status of a "lesser *included* offense."

[3] A defendant must also satisfy the "independent prerequisite . . . that the evidence at trial . . . be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck*, 489 U. S., at 716, n. 8 (citing *Keeble* v. *United States*, 412 U. S. 205, 208 (1973)). In light of our holding that petitioner fails to satisfy the elements test, we need not address the latter requirement in this case.

scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts). The lesser offense of odometer tampering, however, requires the element of knowingly and willfully causing an odometer to be altered, an element that is absent from the offense of mail fraud. Accordingly, the elements of odometer tampering are not a subset of the elements of mail fraud, and a defendant charged with the latter is not entitled to an instruction on the former under Rule 31(c). *Schmuck, supra*, at 721–722.

Turning to the instant case, the Government contends that three elements required by §2113(b)'s first paragraph are *not* required by §2113(a): (1) specific intent to steal; (2) asportation; and (3) valuation exceeding $1,000. The statute provides:

> "§2113. Bank robbery and incidental crimes
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> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .
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> . . . . .
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> "Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> "(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> "Whoever takes and carries away, with intent to

> steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

A "textual comparison" of the elements of these offenses suggests that the Government is correct. First, whereas subsection (b) requires that the defendant act "with intent to steal or purloin," subsection (a) contains no similar requirement. Second, whereas subsection (b) requires that the defendant "tak[e] and carr[y] away" the property, subsection (a) only requires that the defendant "tak[e]" the property. Third, whereas the first paragraph of subsection (b) requires that the property have a "value exceeding $1,000," subsection (a) contains no valuation requirement. These extra clauses in subsection (b) "cannot be regarded as mere surplusage; [they] mea[n] something." *Potter* v. *United States*, 155 U. S. 438, 446 (1894).

Carter urges that the foregoing application of *Schmuck*'s elements test is too rigid and submits that ordinary principles of statutory interpretation are relevant to the *Schmuck* inquiry. We do not dispute the latter proposition. The *Schmuck* test, after all, requires an exercise in statutory interpretation before the comparison of elements may be made, and it is only sensible that normal principles of statutory construction apply. We disagree, however, with petitioner's conclusion that such principles counsel a departure in this case from what is indicated by a straightforward reading of the text.

III

We begin with the arguments pertinent to the general relationship between §§2113(a) and (b). Carter first contends that the structure of §2113 supports the view that subsection (b) is a lesser included offense of subsection (a).

He points to subsection (c) of §2113, which imposes criminal liability on a person who knowingly "receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank . . . in violation of *subsection (b)*." (Emphasis added.) It would be anomalous, posits Carter, for subsection (c) to apply– as its text plainly provides– only to the fence who receives property from a violator of subsection (b) but not to the fence who receives property from a violator of subsection (a). The anomaly disappears, he concludes, only if subsection (b) is always violated when subsection (a) is violated– *i.e.*, only if subsection (b) is a lesser included offense of subsection (a).

But Carter's anomaly– even if it truly exists– is only an anomaly. Petitioner does not claim, and we tend to doubt, that it rises to the level of absurdity. Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 509–511 (1989); *id.*, at 527 (SCALIA, J., concurring in judgment). For example, it may be that violators of subsection (a) generally act alone, while violators of subsection (b) are commonly assisted by fences. In such a state of affairs, a sensible Congress may have thought it necessary to punish only the fences of property taken in violation of subsection (b). Or Congress may have thought that a defendant who violates subsection (a) usually– if not inevitably– also violates subsection (b), so that the fence may be punished by reference to that latter violation. In any event, nothing in subsection (c) purports to redefine the elements required by the text of subsections (a) and (b).

Carter's second argument is more substantial. He submits that, insofar as subsections (a) and (b) are *similar* to the common-law crimes of robbery and larceny, we must assume that subsections (a) and (b) require the *same* elements as their common-law predecessors, at least absent Congress' affirmative indication (whether in text or legislative history) of an intent to displace the common-

law scheme. While we (and the Government) agree that the statutory crimes at issue here bear a close resemblance to the common-law crimes of robbery and larceny, see Brief for United States 29 (citing 4 W. Blackstone, Commentaries *229, *232); accord, *post*, at 4–6, that observation is beside the point. The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law, and Carter does not point to any such term in the text of the statute.

This limited scope of the canon on imputing common-law meaning has long been understood. In *Morissette* v. *United States*, 342 U. S. 246 (1952), for example, we articulated the canon in this way:

> "[W]here Congress borrows *terms* of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed *word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.*, at 263 (emphasis added).

In other words, a "cluster of ideas" from the common law should be imported into statutory text only when Congress employs a common-law *term*, and not when, as here, Congress simply describes an offense analogous to a common-law crime without using common-law terms.

We made this clear in *United States* v. *Wells*, 519 U. S. 482 (1997). At issue was whether 18 U. S. C. §1014—which punishes a person who "knowingly makes any false statement or report . . . for the purpose of influencing in any way the action" of a Federal Deposit Insurance Corporation insured bank "upon any application, advance, . . .

commitment, or loan"— requires proof of the materiality of the "false statement." The defendants contended that since materiality was a required element of "false statement"-type offenses at common law, it must also be required by §1014. Although JUSTICE STEVENS in dissent thought the argument to be meritorious, we rejected it:

> "[F]undamentally, we disagree with our colleague's apparent view that any term that is an element of a common-law crime carries with it every other aspect of that common-law crime when the term is used in a statute. JUSTICE STEVENS seems to assume that because 'false statement' is an element of perjury, and perjury criminalizes only material statements, a statute criminalizing 'false statements' covers only material statements. By a parity of reasoning, because common-law perjury involved statements under oath, a statute criminalizing a false statement would reach only statements under oath. It is impossible to believe that Congress intended to impose such restrictions *sub silentio*, however, and so *our rule on imputing common-law meaning to statutory terms does not sweep so broadly*." 519 U. S., at 492, n. 10 (emphasis added; citation omitted).[4]

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[4]The dissent claims that our decision in *United States* v. *Wells*, 519 U. S. 482 (1997), is not in point because we went on in *Wells* to discuss the evolution of the statute (specifically, a recodification of numerous sections), which revealed Congress' apparent care in retaining a materiality requirement in certain sections while omitting it in others, such as the one before us in *Wells*. According to the dissent, a similar statutory evolution is not present here. See *post*, at 13. But, even assuming the dissent is correct in this latter regard, the holding in *Wells* simply cannot be deemed to rest on our discussion of the statute's evolution. Rather, we characterized that discussion as supporting a result we had already reached on textual grounds. See 519 U. S., at 492 ("Statutory history confirms the natural reading").

Similarly, in *United States* v. *Turley*, 352 U. S. 407 (1957), we declined to look to the analogous common-law crime because the statutory term at issue– "stolen"– had no meaning at common law. See *id.*, at 411–412 ("[W]hile 'stolen' is constantly identified with larceny, the term was never at common law equated or exclusively dedicated to larceny" (internal quotation marks omitted)).

By contrast, we have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law. In *Neder* v. *United States*, 527 U. S. 1 (1999), for example, we addressed whether materiality is required by federal statutes punishing a "scheme or artifice to defraud." *Id.*, at 20, and 20–21, nn. 3–4 (citing 18 U. S. C. §§1341, 1343, 1344). Unlike the statute in *Wells*, which contained no common-law term, these statutes did include a common-law term– "defraud." 527 U. S., at 22. Because common-law fraud required proof of materiality, we applied the canon to hold that these federal statutes implicitly contain a materiality requirement as well. *Id.*, at 23. Similarly, in *Evans* v. *United States*, 504 U. S. 255, 261–264 (1992), we observed that "extortion" in 18 U. S. C. §1951 was a common-law term, and proceeded to interpret this term by reference to its meaning at common law.

Here, it is undisputed that "robbery" and "larceny" are terms with established meanings at common law. But neither term appears in the text of §2113(a) or §2113(b).[5] While the term "robbery" does appear in §2113's title, the title of a statute "[is] of use only when [it] shed[s] light on

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[5] Congress could have simply punished "robbery" or "larceny" as some States have done (and as Congress itself has done elsewhere, see, *e.g.*, 18 U. S. C. §§2112, 2114, 2115), thereby leaving the definition of these terms to the common law, but Congress instead followed the more prevalent legislative practice of spelling out elements of these crimes. See 2 W. LaFave & A. Scott, Substantive Criminal Law §8.11, p. 438, n. 6 (1986).

some ambiguous word or phrase'" in the statute itself. *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 528–529 (1947) (modifications in original)). And Carter does not claim that this title illuminates any such ambiguous language. Accordingly, the canon on imputing common-law meaning has no bearing on this case.

IV

We turn now to Carter's more specific arguments concerning the "extra" elements of §2113(b). While conceding the absence of three of §2113(b)'s requirements from the text of §2113(a)– (1) "intent to steal or purloin"; (2) "takes *and carries away*," *i.e.*, asportation; and (3) "value exceeding $1,000" (first paragraph)– Carter claims that the first two should be deemed implicit in §2113(a), and that the third is not an element at all.

A

As to "intent to steal or purloin," it will be recalled that the text of subsection (b) requires a specific "intent to steal or purloin," whereas subsection (a) contains no explicit *mens rea* requirement of any kind. Carter nevertheless argues that such a *specific intent* requirement must be deemed implicitly present in §2113(a) by virtue of "our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 70 (1994).[6] Properly

[6]This interpretive principle exists quite apart from the canon on imputing common-law meaning. See, *e.g.*, *X-Citement Video*, 513 U. S., at 70 (applying presumption in favor of scienter to statute proscribing the shipping or receiving of visual depictions of minors engaging in sexually explicit conduct, without first inquiring as to the existence of a common-law antecedent to this offense); *Staples* v. *United States*, 511 U. S. 600

applied to §2113, however, the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of *general intent*— that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation).

Before explaining why this is so under our cases, an example, *United States* v. *Lewis*, 628 F. 2d 1276, 1279 (CA10 1980), cert. denied, 450 U. S. 924 (1981), will help to make the distinction between "general" and "specific" intent less esoteric. In *Lewis*, a person entered a bank and took money from a teller at gunpoint, but deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism. Though this defendant knowingly engaged in the acts of using force and taking money (satisfying "general intent"), he did not intend permanently to deprive the bank of its possession of the money (failing to satisfy "specific intent").[7] See generally 1 W. LaFave & A. Scott, Substantive Criminal Law §3.5, p. 315 (1986) (distinguishing general from specific intent).

The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary

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(1994) (similar).

[7]The dissent claims that the *Lewis* Court determined that the jury could have found specific intent to steal on the facts presented, and thus disputes our characterization of the case as illustrating a situation where a defendant acts only with general intent. *Post*, at 10 (citing *Lewis*, 628 F. 2d, at 1279). The dissent fails to acknowledge, however, that the *Lewis* court made this determination only because some evidence suggested that, if the defendant had not been arrested, he would have kept the stolen money. *Ibid.* The *Lewis* court, implicitly acknowledging the possibility that some defendant (if not Lewis) might unconditionally intend to turn himself in after completing a bank theft, proceeded to hold, in the alternative, that §2113(a) covers a defendant who acts only with general intent. See *ibid.*

to separate wrongful conduct from "otherwise innocent conduct." *X-Citement Video, supra,* at 72. In *Staples* v. *United States,* 511 U. S. 600 (1994), for example, to avoid criminalizing the innocent activity of gun ownership, we interpreted a federal firearms statute to require proof that the defendant knew that the weapon he possessed had the characteristics bringing it within the scope of the statute. *Id.*, at 611–612. See also, *e.g.*, *Liparota* v. *United States,* 471 U. S. 419, 426 (1985); *Morissette,* 342 U. S., at 270–271. By contrast, some situations may call for implying a specific intent requirement into statutory text. Suppose, for example, a statute identical to §2113(b) but without the words "intent to steal or purloin." Such a statute would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his. Reading the statute to require that the defendant possess general intent with respect to the *actus reus*– *i.e.*, that he know that he is physically taking the money– would fail to protect the innocent actor. The statute therefore would need to be read to require not only general intent, but also specific intent– *i.e.*, that the defendant take the money with "intent to steal or purloin."

In this case, as in *Staples,* a general intent requirement suffices to separate wrongful from "otherwise innocent" conduct. Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring, as *Staples* did, general intent– *i.e.*, proof of knowledge with respect to the *actus reus* of the crime. And once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking– even by a defendant who takes under a good-faith claim of right– falls outside the realm of the "otherwise innocent." Thus, the presumption in favor of scienter does not justify reading a

specific intent requirement– "intent to steal or purloin"– into §2113(a).[8]

Independent of his reliance upon the presumption in favor of scienter, Carter argues that the legislative history of §2113 supports the notion that an "intent to steal" requirement should be read into §2113(a). Carter points out that, in 1934, Congress enacted what is now §2113(a), but with the adverb "feloniously" (which all agree is equivalent to "intent to steal") modifying the verb "takes." Act of May 18, 1934, ch. 304, §2(a), 48 Stat. 783. In 1937, Congress added what is now §2113(b). Act of Aug. 24, 1937, ch. 747, 50 Stat. 749. Finally, in 1948, Congress made two changes to §2113, deleting "feloniously" from what is now §2113(a) and dividing the "robbery" and "larceny" offenses into their own separate subsections. 62 Stat. 796.

Carter concludes that the 1948 deletion of "feloniously" was merely a stylistic change, and that Congress had no intention, in deleting that word, to drop the requirement that the defendant "feloniously" take the property– that is, with intent to steal.[9] Such reasoning, however, misun-

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[8] Numerous Courts of Appeals agree. While holding that §2113(a)'s version of bank robbery is not a specific intent crime, these courts have construed the statute to contain a general intent requirement. See *United States* v. *Gonyea*, 140 F. 3d 649, 653–654, and n. 10 (CA6 1998) (collecting cases).

[9] Relatedly, Carter argues that, even if a sensible Congress might have deleted "feloniously," the 1948 Congress did not adequately explain an intention to do so in the legislative history to the 1948 Act. He points to the House Report, which states that Congress intended only to make "changes in phraseology." H. R. Rep. No. 304, 80th Cong., 1st Sess., A135 (1947). Carter further suggests that the phraseology concern with "feloniously" was that Congress in the 1948 codification generally desired to delete references to felonies and misdemeanors in view of the statutory definition of those terms in the former 18 U. S. C. §1. Carter fails, however, to acknowledge that the House Report does not give that reason for the deletion of "feloniously" from §2113, even

derstands our approach to statutory interpretation. In analyzing a statute, we begin by examining the text, see, *e.g., Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 475 (1992), not by "psychoanalyzing those who enacted it," *Bank One Chicago, N. A.* v. *Midwest Bank & Trust Co.*, 516 U. S. 264, 279 (1996) (SCALIA, J., concurring in part and concurring in judgment). While "feloniously" no doubt would be sufficient to convey a specific intent requirement akin to the one spelled out in subsection (b), the word simply does not appear in subsection (a).

Contrary to the dissent's suggestion, *post*, at 9–11, this reading is not a fanciful one. The absence of a specific intent requirement from subsection (a), for example, permits the statute to reach cases like *Lewis*, see *supra*, at 11, where an ex-convict robs a bank because he wants to be apprehended and returned to prison. (The Government represents that indictments on this same fact pattern (which invariably plead out and hence do not result in reported decisions) are brought "as often as every year," Brief for United States 22, n. 13.) It can hardly be said, therefore, that it would have been absurd to delete "feloniously" in order to reach such defendants. And once we have made that determination, our inquiry into legislative motivation is at an end. Cf. *Bock Laundry Machine Co.*, 490 U. S., at 510–511.[10]

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though it explicitly does so in connection with the simultaneous elimination of similar language from other sections. See, *e.g.*, H. R. Rep. No. 304, *supra*, at A67 ("References to offenses as felonies or misdemeanors were omitted in view of definitive section 1 of this title") (explaining revisions to 18 U. S. C. §751). As is often the case, the legislative history, even if it is relevant, supports conflicting inferences and provides scant illumination.

[10] Carter claims further support in *Prince* v. *United States*, 352 U. S. 322 (1957), for his view that §2113(a) implicitly requires a specific "intent to steal." But *Prince* did not discuss the elements of that subsection, let alone compare them to the elements of subsection (b).

B

Turning to the second element in dispute, it will be recalled that, whereas subsection (b) requires that the defendant "tak[e] and carr[y] away the property," subsection (a) requires only that the defendant "tak[e]" the property. Carter contends that the "takes" in subsection (a) is equivalent to "takes and carries away" in subsection (b). While Carter seems to acknowledge that the argument is at war with the text of the statute, he urges that text should not be dispositive here because nothing in the evolution of §2113(a) suggests that Congress sought to discard the asportation requirement from that subsection.

But, again, our inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members. Congress is certainly free to outlaw bank theft that does not involve asportation, and it hardly would have been absurd for Congress to do so, since the taking-without-asportation scenario is no imagined hypothetical. See, *e.g.*, *State* v. *Boyle*, 970 S. W. 2d 835, 836, 838–839 (Mo. Ct. App. 1998) (construing state statutory codification of common-law robbery to apply to defendant who, after taking money by threat of force, dropped the money on the spot). Indeed, a leading treatise applauds the deletion of the asportation requirement from the elements of robbery. See 2 LaFave & Scott, Substantive Criminal Law §8.11, p. 439. No doubt the common law's decision to require asportation also has its virtues. But Congress adopted a different view in §2113(a), and it is not for us to question that choice.

C

There remains the requirement in §2113(b)'s first paragraph that the property taken have a "value exceeding $1,000"– a requirement notably absent from §2113(a). Carter, shifting gears from his previous arguments, con-

cedes the textual point but claims that the valuation requirement does not affect the *Schmuck* elements analysis because it is a *sentencing factor*, not an element. We disagree. The structure of subsection (b) strongly suggests that its two paragraphs– the first of which requires that the property taken have "value exceeding $1,000," the second of which refers to property of "value not exceeding $1,000"– describe distinct offenses. Each begins with the word "[w]hoever," proceeds to describe identically (apart from the differing valuation requirements) the elements of the offense, and concludes by stating the prescribed punishment. That these provisions "stand on their own grammatical feet" strongly suggests that Congress intended the valuation requirement to be an element of each paragraph's offense, rather than a sentencing factor of some base §2113(b) offense. *Jones* v. *United States*, 526 U. S. 227, 234 (1999). Even aside from the statute's structure, the "steeply higher penalties"– an enhancement from a 1-year to a 10-year maximum penalty on proof of valuation exceeding $1,000– leads us to conclude that the valuation requirement is an element of the first paragraph of subsection (b). See *Castillo* v. *United States*, *ante*, at __ (slip op., at 7); *Jones*, 526 U. S., at 233. Finally, the constitutional questions that would be raised by interpreting the valuation requirement to be a sentencing factor persuade us to adopt the view that the valuation requirement is an element. See *id.*, at 239–252.

The dissent agrees that the valuation requirement of subsection (b)'s first paragraph is an element, but nonetheless would hold that subsection (b) is a lesser included offense of subsection (a). *Post*, at 14–16. The dissent reasons that the "value *not* exceeding $1,000" component of §2113(b)'s *second* paragraph is not an element of the offense described in that paragraph. Hence, the matter of value does not prevent §2113(b)'s second paragraph from being a lesser included offense of §2113(a). And if a de-

fendant wishes to receive an instruction on the first paragraph of §2113(b)– which entails more severe penalties than the second paragraph, but is a more realistic option from the jury's standpoint in a case such as this one where the value of the property clearly exceeds $1,000– the dissent sees no reason to bar him from making that election, even though the "value exceeding $1,000" element of §2113(b)'s first paragraph is clearly absent from §2113(a).

This novel maneuver creates a problem, however. Since subsection (a) contains no valuation requirement, a defendant indicted for violating that subsection who requests an instruction under subsection (b)'s first paragraph would effectively "waive . . . his [Fifth Amendment] right to notice by indictment of the 'value exceeding $1,000' element." *Post,* at 16. But this same course would not be available to the prosecutor who seeks the insurance policy of a lesser included offense instruction under that same paragraph after determining that his case may have fallen short of proving the elements of subsection (a). For, whatever authority defense counsel may possess to waive a defendant's constitutional rights, see generally *New York* v. *Hill,* 528 U. S. ___ (2000), a prosecutor has no such power. Thus, the prosecutor would be disabled from obtaining a lesser included offense instruction under Rule 31(c), a result plainly contrary to *Schmuck*, in which we explicitly rejected an interpretive approach to the Rule that would have permitted "the defendant, by in effect waiving his right to notice, . . . [to] obtain a lesser [included] offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction," 489 U. S., at 718.

* * *

We hold that §2113(b) is not a lesser included offense of §2113(a), and therefore that petitioner is not entitled to a

jury instruction on §2113(b). The judgment of the Third Circuit is affirmed.

It is so ordered.