# VAGUENESS AVOIDANCE

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## INTRODUCTION

It is no secret that legislatures often enact exceedingly broad and indefinite penal statutes[1] that delegate enormous enforcement discretion to prosecutors and police officers.[2] The constitutional void-for-vagueness doctrine promises to provide a check on that practice, at least to the extent sweeping and indeterminate statutory language "fails to give ordinary people fair notice of the conduct it punishes" or "invites arbitrary enforcement."[3] Yet, in most cases presenting such concerns, courts need

[1] F. Andrew Hessick & Carissa Byrne Hessick, Constraining Criminal Laws, 106 Minn. L. Rev. 2299, 2342 (2022) ("[L]egislatures routinely enact broad criminal statutes that sweep in far more conduct than the perceived problem that motivated the law."); Carissa Byrne Hessick & Joseph E. Kennedy, Criminal Clear Statement Rules, 97 Wash. U. L. Rev. 351, 360–61 (2019) (describing legislative incentive to write broad and imprecise laws); Kiel Brennan-Marquez, Extremely Broad Laws, 61 Ariz. L. Rev. 641, 658–59 (2019) ("[O]urs is *not* a world where lawmakers tend to draft well-tailored, proportional statutes. Particularly in the realm of criminal law, the tendency is just the opposite."); Marc A. Levin, At the State Level, So-Called Crimes Are Here, There, Everywhere, 28 Crim. Just. 4, 6 (2013) (highlighting "the deluge of overly broad and vague criminal laws").

The term "penal statutes" refers both to *criminal* statutes and to *civil* statutes that impose some form of penalty on those who violate them. Cf. Wooden v. United States, 142 S. Ct. 1063, 1086 n.5 (2022) (Gorsuch, J., concurring in the judgment) (explaining how the category of "'penal' laws" historically "includ[ed] ones we might now consider 'civil' forfeitures or fines"); Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 Yale L.J. 2446, 2498–500 (2016) (explaining how early courts "often said that penal as well as criminal statutes should be 'construed strictly'" (quoting United States v. Eighty-Four Boxes of Sugar, 32 U.S. (7 Pet.) 453, 462–63 (1833))).

[2] Joel S. Johnson, Vagueness Attacks on Searches and Seizures, 107 Va. L. Rev. 347, 360–61 (2021) [hereinafter Johnson, Vagueness Attacks] (explaining how indeterminate low-level order-maintenance crimes, "coupled with Fourth Amendment precedents . . . , effectively enable police officers to 'search and seize whomever they wish'" (quoting William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842, 855 (2001) [hereinafter Stuntz, Transsubstantive Fourth Amendment])); Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655, 1664–65 (2010) (noting how legislatures "leave determinations of optimal enforcement to the executive[]" and "purposefully avoid the particulars [when drafting criminal statutes], anticipating case-specific, back-end equitable intervention"); Paul H. Robinson & Michael T. Cahill, The Accelerating Degradation of American Criminal Codes, 56 Hastings L.J. 633, 639 (2005) (observing that modern criminal codes "reflect[] a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and the level of punishment" so that "[a]rrest, punishment, and the level of punishment are now determined as much by the ad hoc decision-making of individual law enforcement officials as they are by the legal rules"); see William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 547 (2001) (describing dynamics that lead to indeterminate criminal laws).

[3] Johnson v. United States, 576 U.S. 591, 595 (2015); see also Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (explaining that "the void-for-vagueness doctrine requires that a

not strike down the statute as unconstitutionally vague. Instead, they can typically avoid the vagueness conclusion by narrowly construing the indefinite statutory language. This approach—vagueness avoidance—is common and well documented.[4] But it has never been theorized. This Article takes up that task, articulating a theory of vagueness avoidance as a tool of construction for constraining penal statutes.

Opportunities for its use are many. Each of the last ten Supreme Court Terms, for example, has provided at least one occasion for application of vagueness avoidance.[5]

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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"); Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498 (1982); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926).

[4] See Skilling v. United States, 561 U.S. 358, 405–06 (2010) ("It has long been our practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); Joel S. Johnson, Vagueness and Federal-State Relations, 90 U. Chi. L. Rev. 1565, 1592 (2023) [hereinafter Johnson, Federal-State] ("In the typical federal-law vagueness case, the Supreme Court engages in vagueness avoidance. It narrowly construes the indefinite law to avoid any constitutional vagueness issues."); Shon Hopwood, Clarity in American Criminal Law, 54 Am. Crim. L. Rev. 695, 698 (2017) (noting that the Supreme Court "rarely" invalidates "vague federal criminal laws"); Peter W. Low & Joel S. Johnson, Changing the Vocabulary of the Vagueness Doctrine, 101 Va. L. Rev. 2051, 2087 (2015) (observing that the "usual result" in a federal law vagueness case is for the Supreme Court to "avoid[] the problem by a narrowing interpretation"); Cristina D. Lockwood, Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding a Vagueness Determination in Review of Federal Laws, 65 Syracuse L. Rev. 395, 396–97 (2015) (observing that the Supreme Court has "strive[d] to avoid invalidating federal laws as unconstitutionally vague").

[5] See, e.g., Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (avoiding construction that would give federal aggravated identity theft statute "incongruous breadth" and noting a "concern that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed" (citing Marinello v. United States, 138 S. Ct. 1101, 1106 (2018))); Ruan v. United States, 142 S. Ct. 2370, 2377–78, 2380 (2022) (construing federal drug statute to include a strong scienter requirement, with the effect of narrowing the "vague, highly general language of the regulation defining the bounds of" the proscribed conduct); Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (avoiding construction of the Computer Fraud and Abuse Act that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity"); Kelly v. United States, 140 S. Ct. 1565, 1568 (2020) (avoiding construction of federal fraud statutes that would "criminalize all . . . conduct" that involves "deception, corruption, [or] abuse of power"); Rehaif v. United States, 139 S. Ct. 2191, 2195–96 (2019) (construing the felon firearm statute narrowly to include strong scienter requirement in order to "separat[e] wrongful from innocent acts"); *Marinello*, 138 S. Ct. at 1107–08, 1110 ("'exercis[ing]' interpretive 'restraint'" to reject broad construction of tax obstruction law that would create "fair warning" concerns by "transform[ing] every violation of the Tax Code into [a felony] obstruction charge" (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995))); Salman v. United States, 580 U.S. 39,

To the extent vagueness avoidance has been recognized, however, it has been assumed to be a simple application of ordinary constitutional avoidance.[6] The Court is asked to choose between two or three plausible readings of indeterminate language in a penal statute—each usually having been adopted by some portion of the lower courts—and vagueness concerns are highlighted as a constitutional avoidance reason to reject one reading in favor of another.[7] Yet the ordinary formulations of constitutional avoidance do not capture what occurs when a court engages in vagueness avoidance.[8]

The difference derives from the distinct concepts of ambiguity and vagueness. Ambiguity refers to indeterminacy that arises when a term is open to a "discrete number of possible meanings."[9] It calls for *interpretation* that determines semantic meaning. Ordinary constitutional avoidance canons are triggered by ambiguity, and their application points toward semantic meaning that avoids a constitutional infirmity. But vagueness and related indeterminacies in language are not resolved through interpretation; rather, a vague term is open to practically "innumerable possible meanings" or applications[10] and requires judicial *construction* to determine legal effect. In other words, the court must craft a supplementary rule of decision to be applied to the facts of the case before it. This fundamental difference calls for a distinct conception of vagueness avoidance.[11]

Vagueness and related indeterminacies are ubiquitous in law. But they pose a constitutional concern only in a specific circumstance—namely,

51 (2016) (noting that narrow construction of insider trading statute avoided constitutional vagueness concerns); McDonnell v. United States, 579 U.S. 550, 574, 576–77 (2016) (rejecting "expansive" reading of bribery statute that rendered "outer boundaries" of federal bribery law "shapeless"); McFadden v. United States, 576 U.S. 186, 187, 197 (2015) (adopting a narrow construction of the Controlled Substances Act but declining to rely on vagueness avoidance as a basis for doing so); Burrage v. United States, 571 U.S. 204, 218–19 (2014) (rejecting broad reading that would have violated the principle that criminal laws must be "express[ed] . . . in terms ordinary persons can comprehend").

[6] See, e.g., *McFadden*, 576 U.S. at 196–97 (treating the avoidance of "vagueness concerns" as a simple application of "the canon of constitutional avoidance," a "tool for choosing between competing plausible interpretations of a provision" (citation omitted) (quoting Warger v. Shauers, 574 U.S. 40, 50 (2014))).

[7] See, e.g., supra note 5.

[8] See infra Part II.

[9] Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 38–39 (2010).

[10] Id.

[11] See infra Part I.

when penal statutes contain language so indeterminate that it does not supply a textual basis to define the standard of conduct.[12] That creates a constitutional concern because it effectively delegates the legislative task of defining criminal conduct and, in doing so, invites arbitrary enforcement and fails to provide sufficient notice.[13]

By engaging in vagueness avoidance, courts can usually defuse the delegation threat posed by vague statutory language while also constraining its reach. Because such language typically has some practically identifiable core, courts may legitimately craft a judicial construction of the text that retains only that core while excising its indeterminate penumbra.[14] In doing so, courts do not offend the principle requiring the legislature to define crime and fix punishments,[15] because the narrowing construction hews to the identifiable core within the linguistic meaning of the vague term enacted by the legislature. In such circumstances, that act of constraining the legal effect of the vague term often functions as a form of severance—the court declines to endorse the statute's outer peripheries while simultaneously recognizing that some portion of the statute remains in force and is constitutionally valid.[16]

Engaging in vagueness avoidance in this manner also promotes the legality principle in criminal law by preventing retroactive crime definition through judicial innovation.[17] Those whose conduct falls within the identifiable core have no claim that they lacked notice, and those

[12] See supra note 3.

[13] See United States v. Davis, 139 S. Ct. 2319, 2325 (2019) (explaining that the vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers," and that "[v]ague laws . . . undermine the Constitution's separation of powers" by "threaten[ing] to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide"); Johnson, Federal-State, supra note 4, at 26–27.

[14] See infra Subsection II.B.2; cf. H.L.A. Hart, The Concept of Law 123 (3d ed. 2012) [hereinafter Hart, Concept of Law] (observing that general rules have an "open texture" or "fringe of vagueness" and describing such rules as having a "core of certainty" and a "penumbra of doubt"); H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 606–07 (1958) [hereinafter Hart, Positivism] (distinguishing the "core of settled meaning" from the "penumbra of debatable cases").

[15] Jones v. Thomas, 491 U.S. 376, 381 (1989) (making clear that, as a matter of federal law, "the substantive power to define crimes and proscribe punishments" lies with the "legislative branch of government").

[16] See infra Subsection II.B.2.

[17] John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 189–90 (1985) (describing how the legality principle "forbids the retroactive definition of criminal offenses" through "judicial innovation").

whose conduct falls outside it will not be subject to punishment under the narrowly construed statute.[18]

This conception of vagueness avoidance is not merely an attractive normative principle. It also has a basis in the Supreme Court's decisions. Although the Court has never fully articulated the justifications for vagueness avoidance, it has traditionally been explicit about taking that approach in cases involving federal penal statutes with indeterminate language. In 2010, the Court recognized that "[i]t has long been [its] practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."[19]

In more recent cases, however, the Court has retreated from explicit vagueness avoidance. In these cases of *implicit* vagueness avoidance, the Court still ultimately adopts a narrowing construction of an indeterminate statutory term, but it purports to justify that result on the basis of mere interpretation that determines semantic meaning, rather than expressly relying on vagueness avoidance as a tool of construction.[20] The Court sometimes invokes vagueness concerns in these cases. But when it does so, those concerns are not included as an essential component of its reasoning.[21]

That trend is unfortunate. The Court is treating vagueness avoidance as indistinguishable from ordinary constitutional avoidance, a tool used merely to resolve *ambiguity* when ordinary tools of statutory interpretation are inadequate to recover semantic meaning.[22] The Court thus gives vagueness concerns a significantly diminished role—tacking them on as an extra justification for an already-adopted reading,[23]

[18] See infra Subsection II.B.2.

[19] Skilling v. United States, 561 U.S. 358, 405 (2010); see also United States v. Harriss, 347 U.S. 612, 618 (1954) ("[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. . . . And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." (citation omitted)).

[20] See, e.g., Dubin v. United States, 143 S. Ct. 1557, 1563 (2023); Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021); Kelly v. United States, 140 S. Ct. 1565, 1568–69 (2020); Yates v. United States, 574 U.S. 528, 539–47 (2015) (plurality opinion).

[21] See infra Section III.B.

[22] See infra Section III.B.

[23] See, e.g., McDonnell v. United States, 579 U.S. 550, 576 (2016).

relegating them to dicta,[24] or not even mentioning them at all.[25] Each of those outcomes renders vagueness avoidance less useful as an analytical matter and less forceful as a doctrinal tool, much like the modern form of the rule of lenity that can be used only in the rare case of "grievous ambiguity" after all other interpretive tools have been exhausted.[26]

The practical effect is that the Court's recent decisions rejecting exceedingly broad lower court readings of federal penal statutes[27] do little to deter lower courts from adopting similarly broad constructions in other contexts.[28] Each decision is essentially "ad hoc," providing no widely applicable principles of construction.[29] The lack of controlling principles emboldens prosecutors to continue exploiting indeterminate language in the federal criminal code to "attach criminal penalties to a breathtaking amount of commonplace" conduct.[30] And some lower courts justify those broad applications at the interpretation stage on the basis of the "plain meaning" of the statute's literal text,[31] without any real consideration of whether a plain meaning that is open-ended might pose vagueness

[24] See, e.g., *Van Buren*, 141 S. Ct. at 1661.

[25] See, e.g., Ciminelli v. United States, 143 S. Ct. 1121 (2023); *Kelly*, 140 S. Ct. 1565; *Yates*, 574 U.S. 528 (plurality opinion).

[26] Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)); see Wooden v. United States, 142 S. Ct. 1063, 1083–86 (2022) (Gorsuch, J., concurring in the judgment) (criticizing the weakening of the rule of lenity); Mila Sohoni, Notice and the New Deal, 62 Duke L.J. 1169, 1205 (2013) (observing that the rule of lenity "los[t] its bite" while Justice Frankfurter was on the Court); Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 386; Hessick & Hessick, supra note 1, at 2339 (calling the rule of lenity a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes"); see also Joel S. Johnson, Ad Hoc Constructions of Penal Statutes, 100 Notre Dame L. Rev. (forthcoming 2024) (manuscript at 4) (on file with author) [hereinafter Johnson, Ad Hoc Constructions] (observing that the Supreme Court "*never* firmly relied upon the rule of lenity . . . to justify a narrow construction" of a penal statute over the ten-year period studied).

[27] See supra note 20.

[28] Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 45–49) (explaining how the Court's ad hoc approach to construing penal statutes "gives lower courts license to adopt sweeping constructions of penal statutes").

[29] Id. at 4.

[30] Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021); see also Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 49–51) (explaining that the Court's ad hoc approach "invites broad theories of prosecution").

[31] See, e.g., United States v. Dubin, 982 F.3d 318, 325 (5th Cir. 2020), *aff'd*, 27 F.4th 1021 (5th Cir. 2022) (en banc); see also Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 47) ("[T]he Court's consistent preference for *ad hoc* constructions [of penal statutes] thus likely yields a lower-court preference" for a "simple ordinary-meaning analysis" that leads to "more broad and literalistic constructions in the lower courts.").

concerns. As a result, the Supreme Court's correction of broad lower court readings "has become nearly an annual event."[32]

The Court should change course by disentangling vagueness avoidance from ordinary constitutional avoidance, explicating it as a robust tool of construction for penal statutes. When applying that tool, the Court should clearly identify the core-penumbra framework exhibited by the vague term, looking to clues from the text or other sources for aid in ascertaining the practically identifiable core. Once that core has been identified, the Court should expressly excise the indeterminate penumbra.[33]

Consistent adherence to that approach would provide a replicable framework for lower courts addressing other penal statutes containing indeterminate language and would encourage prosecutors to adopt charging policies that more readily acknowledge hard limits on the scope of federal criminal laws and expressly prohibit prosecutions beyond those limits.

Robust application of vagueness avoidance would also help answer recent calls by commentators for interpretative tools to reduce the breadth and imprecision of criminal law.[34] Those commentators have often focused their energy on arguments in favor of something resembling a more muscular version of the rule of lenity—one that is more frequently triggered by ambiguity and that more often "deliberately favor[s] criminal defendants" in constraining those ambiguous criminal laws.[35] Making that argument, however, requires them to take on a significant methodological fight, contending that modern courts should loosen their modern textualist or purposivist commitment to implementing the will of the legislature—i.e., faithful agency[36]—so as to accommodate an

[32] *Dubin*, 27 F.4th at 1041 (Costa, J., dissenting).

[33] See infra Part IV.

[34] See, e.g., Hessick & Hessick, supra note 1, at 2302–03 (arguing for restoration of the historical practice of construing criminal statutes narrowly); Shon Hopwood, Restoring the Historical Rule of Lenity as a Canon, 95 N.Y.U. L. Rev. 918, 921–24 (2020) (arguing that courts should restore the more robust, historical version of the rule of lenity as a tool for constraining criminal laws); see also Brennan-Marquez, supra note 1, at 656–65 (advocating for due process constraint on overbroad criminal laws that are not necessarily ambiguous or vague).

[35] Hessick & Hessick, supra note 1, at 2303 (advocating for "historic rules of constraint"—namely, "interpret[ing] statutes to reach no further than the text or the purpose" and "treat[ing] broadly written laws as ambiguous and in need of narrowing constructions"); see Hopwood, supra note 34, at 921–24 (specifically arguing for a more robust version of the rule of lenity).

[36] See, e.g., John F. Manning, Response, Deriving Rules of Statutory Interpretation from the Constitution, 101 Colum. L. Rev. 1648, 1651 (2001) (contending that the "faithful agent theory" of interpretation derives from "the best reading of the constitutional structure").

interpretive approach for criminal statutes that gives systemic preference to defendants' liberty interests.[37] That argument has some normative appeal. But it will not likely gain traction in the current faithful-agent paradigm of statutory construction, which views the rule of lenity as inconsistent with the methodological commitment to implementing the legislative will.[38]

Although some scholars debate whether courts should be "faithful agents of the legislature or . . . independent cooperative partners" in interpretation, Kent Greenawalt, Statutory and Common Law Interpretation 20 (2013), the faithful-agent theory is the "conventional" approach. Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 112 (2010).

[37] See, e.g., Hessick & Hessick, supra note 1, at 2309, 2314 (observing that, because "textualists and purposivists agree that the role of a court in interpreting statutes is to be a faithful agent of the legislature," courts committed to those methodologies have "not categorically approached the interpretation of criminal statutes differently from the interpretation of other statutes"); see also Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1303 (2018) (finding implementing legislative will to be a common goal among judges).

Some have argued that textualism best advances the legislative will. See, e.g., John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 7 (2001); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 63, 64 (1994); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Court and the Law 3, 17–18 (Amy Gutmann ed., 1997). For a textualist, the legislature's will is faithfully implemented by adhering to statutory text, with the goal of giving effect to its objective meaning. See, e.g., John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–93 (2003) ("[Textualism] ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.").

Others have argued that purposivism better advances legislative will. See, e.g., Henry J. Friendly, Benchmarks 200–01 (1967) (describing interpretation as "the art of proliferating a purpose" (quoting Brooklyn Nat'l Corp. v. Comm'r of Internal Revenue, 157 F.2d 450, 451 (2d Cir. 1946))); Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1113–14 (William N. Eskridge, Jr. & Philip F. Frickey eds., 1994) (arguing that the goal of interpretation is to implement the purpose underlying the law); Roscoe Pound, Spurious Interpretation, 7 Colum. L. Rev. 379, 381 (1907) ("The object of genuine interpretation is to discover the rule which the law-maker intended to establish."). For a purposivist, the primary goal is to implement the "spirit" of the legislative enactment, Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 272 (2020), though statutory text remains key evidence of that sprit. See Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1283–84, 1296 (2020) (showing that purposivists consider text but "are willing to reject a statute's seemingly plain meaning when contrary indications of purpose cut strongly against such meaning").

[38] See infra Section II.C.

A robust conception of vagueness avoidance is more promising. It comports with that methodological commitment,[39] both because it is indisputably rooted in constitutional concerns and because it is not triggered by ambiguity—a type of indeterminacy that can often be resolved through the use of descriptive canons of interpretation and other ways of recovering semantic meaning.[40]

The Article proceeds in four parts. Part I sets the table by distinguishing between several types of linguistic indeterminacy—ambiguity, vagueness, and contestability—and then describing how those categories closely relate to the important legal-process distinction between interpretation and construction. Part II is the heart of the Article. It builds on the interpretation-construction distinction to articulate a theory of vagueness avoidance that stands apart from ordinary constitutional avoidance. Part III then considers the extent to which that theory aligns with the Supreme Court's decisions involving vagueness concerns, highlighting a recent and unfortunate trend toward implicit vagueness avoidance. Part IV argues that the Court should restore a more robust version of explicit vagueness avoidance.

## I. INDETERMINACY AND LEGAL PROCESS

### *A. Types of Indeterminacy*

In everyday speech, the terms "ambiguity" and "vagueness" are often used interchangeably to mean lack of clarity. But the terms also have technical, philosophical meanings that refer to specific types of linguistic indeterminacy.[41] "Ambiguity" is distinct from "vagueness," and both terms are distinct from "contestability."[42] This Section fleshes out these technical meanings.[43]

[39] See infra Section II.C.

[40] See infra Section I.B.

[41] Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 97–98 (2010) [hereinafter Solum, Interpretation-Construction].

[42] Jeremy Waldron, Vagueness in Law and Language: Some Philosophical Issues, 82 Calif. L. Rev. 509, 512 (1994).

[43] For additional background on the distinction between ambiguity and vagueness, see id. at 512–21, 526–29; Kees van Deemter, Not Exactly: In Praise of Vagueness 110–15 (2012); Solum, Interpretation-Construction, supra note 41, at 97–98; see also Jill C. Anderson, Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation, 127 Harv. L. Rev. 1521 (2014) (exploring different sources of ambiguity in language and law).

This exercise is not meant to suggest that the domain of the constitutional void-for-vagueness doctrine is or should be strictly limited to the technical meaning of "vagueness."[44] The doctrine is rightly concerned with any indeterminate language in a legislative enactment that "fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement."[45] Nevertheless, drawing clear distinctions between these types of indeterminacy helps to illuminate constitutional vagueness analysis and to guide judges tasked with applying indefinite statutory language in real-world cases.

*1. Ambiguity.* A word or phrase is ambiguous when it can be used in "more than one sense"[46] such that it is open to a "discrete number of possible meanings."[47]

The word "blue" is ambiguous, for example, insofar as it can be used in reference to a color or in reference to a mood.[48] That ambiguity may obscure the communicative content of phrases such as "[h]is smile was happy and eyes were blue,"[49] because the phrase could be conveying that his eyes are sad or that they are a particular color. Without more context, the sense in which "blue" is being used is unclear.

[44] See Waldron, supra note 42, at 514 ("The fact that philosophers have given 'vagueness' a reasonably precise definition does not at all imply that constitutional lawyers should attach the same meaning to the term.").

[45] Johnson v. United States, 576 U.S. 591, 595 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

[46] Solum, Interpretation-Construction, supra note 41, at 97; see Waldron, supra note 42, at 512 ("An expression *X* is ambiguous if there are [at least] two predicates *P* and *Q* which look exactly like *X*, but which apply to different, though possibly overlapping, sets of objects, with the meaning of each predicate amounting to a different way of identifying objects as within or outside its extension."); see also Lawrence B. Solum & Cass R. Sunstein, *Chevron* As Construction, 105 Cornell L. Rev. 1465, 1472–75 (2020) (describing "a more technical sense [of ambiguity] that limits ambiguity to cases in which a statutory provision has more than one possible linguistic meaning" and noting that "[w]hen a statute is vague, there are borderline cases" distinct from the core cases which do clearly fall under the statute).

[47] Solan, supra note 9, at 38–39 (explaining that a term is ambiguous if it is open to "a discrete number of possible meanings"); Randy E. Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65, 67 (2011) ("*Ambiguity* refers to words that have more than one sense or meaning.").

[48] Waldron, supra note 42, at 512 ("'Blue' is ambiguous for there are two predicates—'blue'(-colored) and 'blue' (melancholy)—which . . . apply to different objects. . . . [T]he application of the first of these predicates is determined by looking at an object's color; the application of the second is determined by looking at the object's mood.").

[49] Id.

Ambiguous words and phrases are common, but context often provides clear clues that aid in ascertaining linguistic meaning.[50]

*2. Vagueness.* A word or phrase is vague when there are difficult, borderline cases to which the indeterminate term may or may not apply,[51] with the result that it is open to practically "innumerable possible meanings" or applications.[52]

The term "tall" is vague, for example, because it refers to height that is greater in some manner than average.[53] When considering the height of adult men, we would say that Stephen Curry (6'2") is tall and that Tom Cruise (5'7") is not. But there are also borderline cases. Is 5'11" tall? How about 5'10"? There is no clear answer. And context clues usually will not resolve the indeterminacy—they simply sharpen where the borderline cases fall within the range of possibilities. In the context of NBA players, for instance, Stephen Curry clearly is not tall; Victor Wembanyama (7'4") clearly is; and Jayson Tatum (6'8") is a borderline case.

The "tall" example illustrates how vagueness most commonly arises—whenever a term with "bivalent logic"[54] is used in relation to objects on a continuum. Height among humans falls on a continuum, but the term "tall" forces us to say that someone *is* or *is not* tall; it offers no middle

[50] See Adil Ahmad Haque, Indeterminacy in the Law of Armed Conflict, 95 Int'l L. Stud. 118, 120 (2019) ("When [ambiguous] terms appear in legal texts, the single meaning they carry may be indicated by their context or illuminated by the object and purpose of the law."); Barnett, supra note 47, at 67.

[51] Solum, Interpretation-Construction, supra note 41, at 98; see Paul Grice, Studies in the Way of Words 177 (1989) ("To say that an expression is vague . . . is presumably, roughly speaking, to say that there are cases . . . in which one just does not know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts."); Waldron, supra note 42, at 513 ("A predicate *P* is vague if there are objects or instances $x_1$, $x_2$, etc. within the domain of the normal application of terms of this kind such that users are characteristically undecided about the truth or falsity of '$x_1$ is *P*,' '$x_2$ is *P*,' and they understand that indecision to be a fact about the meaning of *P* rather than the extent of their knowledge of $x_1$, $x_2$, etc."); Roy Sorenson, Vagueness, Stanford Encyclopedia of Phil. (June 16, 2022), https://plato.stanford.edu/entries/vagueness/ [https://perma.cc/JT5N-WZVF] ("There is wide agreement that a term is vague to the extent that it has borderline cases.").

[52] Solan, supra note 9, at 38–39; see Geert Keil & Ralf Poscher, Introduction to Vagueness and Law: Philosophical and Legal Perspectives 2 (2016) (explaining that vague terms "draw no sharp boundary between their extension and their anti-extension," but instead "tolerate marginal changes" and "admit borderline cases").

[53] Solum, Interpretation-Construction, supra note 41, at 98.

[54] Waldron, supra note 42, at 516. "Bivalent" means "two-valued." Id. at 516 n.16; see also Keil & Poscher, supra note 52, at 2 (observing that vague terms "challenge bivalence, i.e., the view that every sentence or proposition is either true or false").

ground.[55] In these scenarios, there are *easy* cases (e.g., 7'0" and 5'0") and *hard* borderline cases (e.g., 5'10" and 5'11").[56] The set of easy cases that clearly fall within the scope of a vague term can usefully be called the "core" of the term; the set of *hard* borderline cases can usefully be called the "penumbra."[57]

The essence of vagueness that follows the core-penumbra structure—sometimes called "vagueness of degree" or "quantitative vagueness"—is the lack of an exact ending point along some dimension such that the term is "semantically tolerant of marginal changes in the key parameters of [its] application" so as to "give rise to borderline cases."[58] Consider the term "ripe banana" in relation to the fruit's coloring: a yellow banana is clearly ripe; a green banana is clearly not ripe; yet during the process of ripening, the banana passes through shades of color that cannot be clearly classified as green or yellow.[59] Some intermediate shades are borderline cases to which the term "ripe banana" may or may not apply.[60]

[55] Waldron, supra note 42, at 516 n.16 ("Most if not all of our logic depends on our being able to assign just one of two truth values (true or false) to each proposition. So a statement like 'The sky is blue today' is either (1) true or (2) false; there is, in a bivalent framework, no third alternative."); see also id. at 516–17 (providing further examples of vague bivalent terms).

[56] Relatedly, a vague term is subject to the "tolerance principle"—i.e., a small change in an object cannot make the difference in determining whether the term applies. Timothy A.O. Endicott, Vagueness in Law 33 (2000).

[57] See Hart, Concept of Law, supra note 14, at 123 (observing that general rules have an "open texture" or "fringe of vagueness" and describing such rules as having a "core of certainty" and a "penumbra of doubt"); see also Hart, Positivism, supra note 14, at 606–07 (distinguishing the "core of settled meaning" from the "penumbra of debatable cases"). As an aside, the term "open texture" is not synonymous with vagueness. See Frederick Schauer, Constructing Interpretation, 101 B.U. L. Rev. 103, 115 n.39 (2021) ("[O]pen texture is not vagueness but is instead the ineliminable possibility of vagueness for even the most precise (nonvague) of terms." (citing Friedrich Waismann, Verifiability, 19 Proc. Aristotelian Soc'y 119, 123 (Supp. 1945))). For that reason, this Article avoids using the term "open texture" to describe excessive indeterminacy in penal statutes.

[58] Keil & Poscher, supra note 52, at 3 (internal quotation marks omitted).

[59] Cf. id. (giving similar example of a tomato).

[60] Vague terms with the core-penumbra structure also tend to present the problem of "higher-order vagueness"—which occurs when the line between the clear core and the fuzzy penumbra is itself vague. Id.; see Jeesoo Nam, Lenity and the Meaning of Statutes, 96 S. Cal. L. Rev. 397, 429–34 (2022) (exploring the problem of higher-order vagueness in relation to the rule of lenity). To continue with the same example, not only does the term "ripe banana" have borderline cases, but the term "borderline cases of ripe banana" itself has borderline cases. That is, it is uncertain as to whether particular bananas fall on the edge of the core of certainty or on the edge of the penumbra of doubt.

Although the core-penumbra structure is most common, vagueness also sometimes arises in a second, more complex scenario in which a term has many "independent conditions of application, some but not all of which need be satisfied."[61] This more complex variant has sometimes been called "qualitative vagueness" or "combinatorial vagueness."[62] A classic example is the use of the term "game" to describe a wide and varied range of activities—ball games, board games, mind games, etc.—which lack an identifiable feature common to all.[63] Certain subsets of the term share features with other subsets; but no feature is shared by all subsets.[64] It is not clear which features, if any, are necessary or sufficient conditions for the term's application.[65] In this more complex scenario, the core-penumbra framework is less apt, because the various subsets do not fall on a continuum that renders certain subsets *clearly* inside or outside the scope of the term.[66] Rather, the subsets relate to each other through a "complicated network of similarities" that are "overlapping and crisscrossing."[67]

*3. Contestability.* A term is contestable if it is apparent that the term "embodies a normative standard," but there is disagreement about the content of that standard.[68] The term "unreasonable" in the Fourth Amendment is contestable,[69] for example, because it invites a value judgment as to what level of justification is needed for a government

[61] Waldron, supra note 42, at 518.

[62] Keil & Poscher, supra note 52, at 3.

[63] This insight about the term "game" was famously highlighted in Ludwig Wittgenstein, *Philosophical Investigations*, at 31e–32e para. 66 (G.E.M. Anscombe trans., 1974). Other examples include "religion" and "disease." Keil & Poscher, supra note 52, at 3.

[64] See Waldron, supra note 42, at 517–20 (describing this type of vagueness in more detail).

[65] Id. at 519.

[66] Id. at 520–21.

[67] Wittgenstein, supra note 63, at 32e para. 66.

[68] Waldron, supra note 42, at 526; see Endicott, supra note 56, at 47 ("The application of an expression is 'contestable' if people who know all the facts can reasonably disagree about whether the expression applies to something."); Ronald Dworkin, Taking Rights Seriously 103, 135–36 (1977) (distinguishing "contested concepts" from vagueness); Waldron, supra note 42, at 513 ("A predicate *P* is contestable if (1) it is not implausible to regard both 'something is *P* if it is *A*' and 'something is *P* if it is *B*' as alternative explications of the meaning of *P*; and (2) there is also an element *e** of evaluative or normative force in the meaning of *P*; and (3) there is, as a consequence of (1) and (2), a history of using *P* to embody rival standards or principles such as '*A* is *e**' and '*B* is *e**.'").

[69] U.S. Const. amend. IV.

search or seizure, and there is disagreement as to what that value judgment should be.[70]

Importantly, the bare fact that a term *invites* a value judgment does not render it indeterminate.[71] There must also be disagreement in the relevant community as to the correct value judgment.[72] As with vagueness, moreover, context clues cannot ordinarily resolve contestability. Such clues may reduce the possible solutions to the indeterminacy, but some value judgment that is plausible in light of context clues must ultimately be selected to resolve it.[73]

* * *

Notably, an indeterminate term can exhibit various combinations of ambiguity, vagueness, and contestability. Recall that "blue" is ambiguous inasmuch as it can be used in reference to a color or in reference to a mood. Even if context clues resolve the ambiguity by making clear that "blue" refers to a color, the term is nevertheless vague because there are borderline cases—e.g., some shades of turquoise could be classified as blue or green, and some shades of lavender could be classified as blue or purple.[74]

To take another example, consider the term "due process" in constitutional law. It is ambiguous inasmuch as it can refer to "procedural due process" or "substantive due process."[75] And each of those terms is contestable insofar as there is disagreement as to their normative content.[76]

[70] Waldron, supra note 42, at 527.

[71] Id. ("The mere fact that terms like 'unreasonable' . . . invite us to make value judgments does not in itself undermine the determinacy of their meanings. On the contrary, it is part of the meaning of these words to indicate that a value judgment is required, a function which the words perform quite precisely.").

[72] Id. (clarifying that "[t]he problem" that creates indeterminacy "is that we disagree about such value judgments").

[73] Id. at 528.

[74] Id. at 512.

[75] Id.

[76] Some might say, for example, "that 'procedural due process' requires municipal agencies to hold public hearings in response to planning applications; others deny this." Id. And some might say that "substantive due process" includes many fundamental rights, while others might insist on far fewer.

The confluence of complex vagueness and contestability, moreover, yields what has been called "multidimensional vagueness."[77] The term "democracy" is one example: it is unclear what combination of properties, if any, are necessary or sufficient conditions for the term's application; it is also unclear what the normative importance of various properties are relative to others and how the *degree* of one such property might affect that of another.[78]

### *B. The Interpretation-Construction Distinction*

The technical meanings of ambiguity, vagueness, and contestability closely relate to an important distinction concerning legal process—the distinction between interpretation and construction.[79] As Lawrence Solum has observed, the interpretation-construction distinction separates two distinct "stages" in the application or explication of an authoritative

[77] Keil & Poscher, supra note 52, at 4. The term "multidimensional vagueness" is sometimes used as a synonym for complex vagueness. Id. But it is more precise—and more useful—to reserve it for instances in which *both* complex vagueness *and* contestability are present.

[78] See id. ("Not only is it unclear what combination of properties must hold for [the term 'democracy'] to be attributable to a state, it is likewise uncertain to what degree certain properties (such as elections cycles) have to be fulfilled and how excesses in one dimension can offset deficiencies or even absence in others.").

[79] See Lawrence B. Solum, Legal Theory Lexicon: Interpretation and Construction, Legal Theory Blog (Apr. 10, 2022, 9:00 AM), https://lsolum.typepad.com/legaltheory/2022/04/legal-theory-lexicon-interpretation-and-construction.html [https://perma.cc/95WX-9AQ9].

The interpretation-construction distinction has "a long pedigree in legal usage," appearing "in contract law, the law of trusts and wills, patent law, and in constitutional law, as well." Solum, Interpretation-Construction, supra note 41, at 110. It "can be traced back as far as Franz Lieber's 1839 text, *Legal and Political Hermeneutics*." Id. (citing Francis Lieber, Legal and Political Hermeneutics 55–82 (Roy M. Mersky & J. Myron Jacobstein eds., 1970) (1839)). Various scholars across doctrinal areas have recognized it. See, e.g., Restatement (Second) of Contracts § 200 (Am. L. Inst. 1981); 3 Arthur L. Corbin, Corbin on Contracts § 534, at 7–15 (1960); 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.7, at 255–56 (2d ed. 1998); Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 833–38 (1964); Keith A. Rowley, Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between), 69 Miss. L.J. 73, 82–90 (1999); Richard F. Storrow, Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction, 56 Case W. Rsrv. L. Rev. 65, 82–84 (2005).

In recent years, the interpretation-construction distinction "reentered general legal theory in the context of debates over constitutional practice via the work of what are sometimes called the 'New Originalists,' particularly Keith Whittington and Randy Barnett." Solum, Interpretation-Construction, supra note 41, at 100 (first citing Keith E. Whittington, Constitutional Construction (1999); then citing Keith E. Whittington, Constitutional Interpretation (1999); and then citing Randy E. Barnett, Restoring the Lost Constitution (2004)). But the distinction is broadly applicable: it applies any time "an authoritative legal text is applied or explicated." Id.

legal text.[80] The first stage—interpretation—is the process of "discover[ing] the linguistic meaning or semantic content of the legal text."[81] The second stage—construction—is "the process that gives a text legal effect . . . [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text."[82]

To be sure, practicing lawyers and judges routinely refer to both stages as "interpretation."[83] And doing so usually makes no material difference.[84] In the words of William Baude and Stephen Sachs, "the inferential step from ascribed meaning to legal effect is usually uncontroversial."[85] From these frequent instances of easy translation from semantic meaning to legal effect emerges "a standard picture of interpretation"—the view that our legal norms can be explained merely "by pointing to the ordinary communicative content of our legal texts."[86]

The standard picture is adequate for many situations.[87] But sometimes the relationship between ascribed semantic meaning and legal effect is

[80] Solum, Interpretation-Construction, supra note 41, at 95–96.

[81] Id. at 96.

[82] Id. The interpretation-construction distinction presupposes a more fundamental distinction between a legal text's semantic content (i.e., linguistic meaning) and its legal content (i.e., doctrinal explication or application). See id. at 98–99.

[83] See William Baude & Stephen Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1085–86 (2017) ("Lawyers and judges often use 'interpretation' to mean two different things at once. We 'interpret' a written text, seen as a set of marks on paper, to find out the meaning of its language. And we also 'interpret' the same text, now seen as a legal object . . . to find out its legal content—the changes it works in the law by its adoption or enactment. . . . Sometimes this second step, of identifying a legal content and significance, goes by the name of 'construction.'"); Kent Greenawalt, Constitutional and Statutory Interpretation, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 268, 274 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004) (noting that lawyers often "speak of the meaning of a statute as conforming with how a statute should be applied"); see also Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 4 (1896) (acknowledging differences between interpretation and construction before noting that "[i]n practice, however, both courts and text-writers are in the habit of using the two terms . . . as synonymous or interchangeable").

[84] Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 483 (2013) (noting that "[n]othing hangs on the terminology").

[85] Baude & Sachs, supra note 83, at 1086.

[86] Id. (citing Mark Greenberg, The Standard Picture and Its Discontents, *in* 1 Oxford Studies in Philosophy of Law 39, 48 (Leslie Green & Brian Leiter eds., 2011)).

[87] Some, however, are skeptical that the standard picture *ever* adequately describes the process of interpretation. See, e.g., Cass R. Sunstein, There Is Nothing That Interpretation Just Is, 30 Const. Comment. 193, 193 (2015) (arguing that "there is nothing that interpretation 'just is'"); Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1307 (2015) (arguing that "[i]n hard

more complicated than the standard picture suggests.[88] In those circumstances, adherence to the interpretation-construction distinction clarifies the analysis.

Indeterminate statutory language is one such setting. In that context, *interpretation* yields "the linguistic meaning of statutory texts" by looking to various indicia of that meaning,[89] such as statutory context, rules of grammar, dictionaries, and usage norms embodied in descriptive canons of statutory interpretation. These descriptive canons—e.g., the rule against superfluity, *noscitur a sociis*, *ejusdem generis*, etc.—are heuristics that point judges "to facts about the way language works and to reliable procedures for making inferences about linguistic meaning."[90] In looking to such sources, the interpretive process remains "value neutral," or at most "thinly normative," in the sense that it aims to ascertain the linguistic meaning of the text rather than to apply normative theories about what the law should be.[91]

Ambiguity in statutory language is one recurring problem to which interpretation responds.[92] And the process of interpretation can usually cure ambiguity by looking to indicia of linguistic meaning, though occasional instances of "irreducible" ambiguity arise.[93]

cases, the meaning of statutory and constitutional provisions does not exist as a matter of prelegal linguistic fact").

[88] Baude & Sachs, supra note 83, at 1088 (observing that there are "serious cracks in the [standard picture]," including that our legal system regularly "appl[ies] rules and conventions . . . that don't track any coherent theory of linguistic meaning").

[89] Solum, Interpretation-Construction, supra note 41, at 100–01.

[90] Id. at 113; Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. 515, 516 (2023) (explaining that "descriptive" canons—sometimes called "linguistic" or "semantic" canons—are rules of thumb that capture "generalizations about how particular linguistic constructions are used and understood by competent speakers of English"); see Baude & Sachs, supra note 83, at 1087 (explaining that "canons like *noscitur a sociis* and *ejusdem generis*" reflect "our shared expectations and understandings" of linguistic meaning). Importantly, descriptive canons are just "rule[s] of thumb that summarize a general linguistic regularity." Solum, Interpretation-Construction, supra note 41, at 113. In any given case, other evidence of linguistic meaning could justify deviating from a descriptive canon. Id.

[91] Solum, Interpretation-Construction, supra note 41, at 104.

[92] Cf. id. at 101–02 (describing recurring "interpretative problem types," including ambiguity, that arise in the context of constitutional interpretation).

[93] Cf. id. at 102 (describing the relationship between interpretation and ambiguity in the context of the Constitution).

Vagueness and contestability are typically irreducible at the interpretation stage.[94] Evidence of linguistic meaning does not ordinarily dictate how a court should define the scope of a vague term in borderline cases or how it should fill the normative content of a contestable term.

While the process of interpretation yields the semantic content of statutory language, the process of construction "gives legal effect" to it by "translat[ing]" it "into doctrine."[95] When there is irreducible linguistic indeterminacy—and resolving that indeterminacy is necessary to resolve the case—construction must look to "something else" to "finish the job" of determining legal effect.[96] Thus, while interpretation is mostly "value neutral" insofar as it ascertains only linguistic meaning, construction is necessarily a normative enterprise.[97]

That does not mean, however, that different judges will simply follow their own normative preferences. Rather, the process of construction can be bound by well-settled normative principles, often embodied in substantive canons of construction that may have the force of law.[98] A judge faced with irreducible ambiguity in a criminal statute, for instance, may apply the rule of lenity in order to construe the statute narrowly in favor of the defendant.[99]

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[94] See id. at 106 & n.24 ("Interpretation discerns linguistic meaning, but when a text is vague, then the output of interpretation . . . is vague."); Haque, supra note 50, at 126 (explaining that "truly vague terms" entail a "shift from the interpretation of legal texts to the construction of mediating doctrines to give determinate effect to a legal rule whose correct application is indeterminate over some range of cases").

[95] Solum, Interpretation-Construction, supra note 41, at 103; see also Baude & Sachs, supra note 83, at 1086 (describing "construction" as "find[ing] out [a written text's] legal content—the changes it works in the law by its adoption or enactment").

[96] Baude & Sachs, supra note 83, at 1093.

[97] Solum, Interpretation-Construction, supra note 41, at 104 ("[W]e cannot tell whether a construction is correct or incorrect without resort to legal norms . . . [which must themselves] be justified by some kind of normative argument.").

[98] See Baude & Sachs, supra note 83, at 1083–84 (arguing that "extracting legal content from a written instrument needn't involve much direct normative judgment" because "preexisting rules . . . determine the legal effect of written instruments"); see also Eidelson & Stephenson, supra note 90, at 517 (explaining that "substantive" canons—sometimes called "normative" or "policy-based" canons—"are nonlinguistic considerations that weigh in favor of particular legal results").

[99] Muscarello v. United States, 524 U.S. 125, 138 (1998) (explaining that the rule of lenity may be "applie[d] only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended" (alterations omitted) (internal quotation marks omitted) (quoting United States v. Wells, 519 U.S. 482, 499 (1997))); Staples v. United States, 511 U.S. 610, 619 n.17 (1994) (explaining how, under the rule of lenity, "an ambiguous criminal statute is to be construed in favor of the accused").

To see how the interpretation-construction distinction relates to the distinction between ambiguity and vagueness (or contestability), consider an example. Suppose a legislature enacts a statute that increases punishment for certain violent crimes committed against "a child." The term "child" is, by itself, both ambiguous and vague.[100]

It is ambiguous insofar as it could refer to "offspring" (i.e., someone's child) or to an "immature human" (i.e., not an adult). That ambiguity could very likely be resolved at the interpretation stage through contextual clues and ordinary tools of statutory interpretation. For example, if the broader statutory context makes clear that the statute addresses situations in which individuals commit crimes against their prospective heirs, the semantic meaning of "child" is very likely to be offspring (and the statute may well apply when the victim is fully grown). Alternatively, the broader statutory context might make clear that the semantic meaning of the term "child" is an immature human.

Even if the semantic meaning of the term "child" were properly interpreted in that latter sense, however, it would still be indeterminate. Absent some further guidance, the term would remain vague because borderline cases of immaturity persist: an eleven-year-old likely is not mature; but a fifteen-year-old or sixteen-year-old might be. That vagueness is irreducible at the interpretation stage because it is part of the term's semantic meaning; a court applying the statute in a borderline case will be required to draw the line somewhere as an act of judicial construction.

In determining where to draw that line, the court may elect to apply a norm of construction, such as a substantive canon. Given that the vague term appears in a criminal statute, the rule of lenity would seem a likely candidate. But that substantive canon is not available because (in its modern form[101]) it is triggered only by "grievous *ambiguity*"[102]—not irreducible *vagueness*.

The next Part articulates a tool of construction that is fit for vagueness. But before turning to that solution, a final note on the interpretation-construction distinction deserves mention. The description of the

[100] See Sorenson, supra note 51 (identifying "child" as a term that is both ambiguous and vague).

[101] A historical predecessor to lenity—the rule of strict construction—was sometimes applied to vague terms. See Johnson, Federal-State, supra note 4, at 1576–77 (providing example of an English court applying the rule of strict construction to vague term).

[102] *Muscarello*, 524 U.S. at 139 (emphasis added) (quoting *Staples*, 511 U.S. at 619 n.17).

distinction so far has conveyed a two-step process in which a court *first* engages in interpretation to ascertain linguistic meaning and *then* engages in construction to determine legal effect. But that order of operations is not an inevitable consequence of the interpretation-construction distinction. Although most scholars have assumed it to be so,[103] the analytical division between interpretation and construction does not entail sequencing—let alone a particular order of that sequence. It may be that construction should be understood to precede interpretation, with the normative tools of construction structuring the application of the descriptive tools of interpretation.[104] Or perhaps the two should be understood as occurring simultaneously in a complementary fashion.[105] As will become clear, these possibilities have significant practical implications for vagueness avoidance.

## II. A THEORY OF VAGUENESS AVOIDANCE

Courts should approach indeterminate language in penal statutes in light of the constitutional vagueness doctrine. They can do so by engaging in vagueness avoidance—narrowly construing indeterminate language to guard against constitutional vagueness infirmities. In practice, courts commonly take this approach.[106] But it has not been adequately theorized. To the extent vagueness avoidance is acknowledged, it is often assumed to be a simple application of one of the ordinary canons of constitutional

[103] As Gregory Klass has noted, when Leiber first introduced the interpretation-construction distinction in 1839, he "employ[ed] . . . a 'supplemental' conception of interpretation and construction," under which "interpretation alone sometimes suffices to determine a text's legal effect" and "construction is necessary only when interpretation either runs out or runs up against a higher-order rule." Gregory Klass, Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right, 18 Geo. J.L. & Pub. Pol'y 13, 19 (2020). Solum has recently advanced the same ordering in the context of constitutional law. Id. at 22 (citing Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 499 (2013)). Klass, by contrast, has suggested that the ordering should be exactly the opposite—that "relevant rules of construction determine what counts as the correct approach to interpretation." Klass, supra, at 22.

[104] Cf. Klass, supra note 103, at 22 (suggesting that "rules of construction, which call for legal and political justifications rather than philosophical-linguistic ones, precede and structure legal interpretation").

[105] Cf. Schauer, supra note 57, at 108 ("When the words or phrases to be interpreted are technical and not ordinary language, and thus simply cannot be interpreted as ordinary language, the basic point of the distinction between interpretation and construction—the idea that *legal* goals and principles enter into the process at the construction stage—disappears.").

[106] See, e.g., infra Part III.

avoidance.[107] That assumption is unfortunate. Accounts of ordinary constitutional avoidance do not capture what occurs when a court engages in vagueness avoidance. The failure to recognize vagueness avoidance as a distinct concept is a missed opportunity.

### *A. Ordinary Constitutional Avoidance*

Avoidance has been called the "preeminent canon of federal statutory construction."[108] And the Supreme Court has at times referred to it as an "axiom of statutory interpretation"[109] and a "cardinal principle" of construction.[110] But the term "avoidance" in fact refers to many separate doctrines and norms of judicial decision-making.[111] Two avoidance canons of construction are relevant here. The first is the classical "unconstitutionality" canon; the second is the more modern "constitutional questions" canon.[112]

Under the well-settled unconstitutionality canon, if one reading would render a statute unconstitutional, the court should adopt a plausible

[107] See, e.g., Johnson, Federal-State, supra note 4, at 1571 (characterizing vagueness avoidance as the "application of a constitutional avoidance canon of statutory construction"); see also Sessions v. Dimaya, 138 S. Ct. 1204, 1252 (2018) (Thomas, J., dissenting, joined in part by Kennedy & Alito, JJ.) (noting that, if a specific interpretation of a statute would render it "unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation"); McFadden v. United States, 576 U.S. 186, 196–97 (2015) (treating the avoidance of "vagueness concerns" as a simple application of "the canon of constitutional avoidance," a "tool for choosing between competing plausible interpretations of a provision" (quoting Warger v. Shauers, 574 U.S. 40, 50 (2014))); Skilling v. United States, 561 U.S. 358, 406–07 (2010) (discussing the need "to avoid constitutional difficulties by adopting a limiting interpretation if such a construction is fairly possible" (alteration omitted) (quoting Boos v. Barry, 485 U.S. 312, 331 (1988))).

[108] Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1948 (1997) (observing that "the Supreme Court invoked a version of [avoidance] even before" it "established . . . judicial review" in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); see also Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (reasoning that the Judiciary Act of 1979 "must[] receive a construction, constituent with the constitution" and accordingly interpreting the Act to avoid violating Article III constraints on federal court jurisdiction over aliens).

[109] Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 466 (1989).

[110] Crowell v. Benson, 285 U.S. 22, 62 (1932).

[111] See Vermeule, supra note 108, at 1948 ("[T]he term 'avoidance' is used to denote not one doctrine but many."). Indeed, Justice Brandeis famously articulated seven distinct types of avoidance in judicial decision-making in a concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

[112] Caleb Nelson, Avoiding Constitutional Questions Versus Avoiding Unconstitutionality, 128 Harv. L. Rev. F. 331, 331–33 (2015); see Vermeule, supra note 108, at 1949.

alternative reading that would save it.[113] The unconstitutionality canon is justified on the commonsense assumption that legislatures do not generally intend to enact statutes that will be held unconstitutional.[114] That justification supports viewing the unconstitutionality canon as a canon of *interpretation*—i.e., a rule of thumb that seeks to recover linguistic meaning conveyed through the use of given statutory language.[115]

The constitutional questions canon is more controversial.[116] It counsels that, if one reading would merely raise serious constitutional questions, the court should adopt a plausible reading that would effectively avoid those questions.[117] Rote application of the canon is subject to the criticism

[113] See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); see also Vermeule, supra note 108, at 1945 n.2 (describing this as a "saving" construction, rather than a limiting or narrowing construction, because it could potentially be broader than the unconstitutional construction).

[114] See Nelson, supra note 112, at 336 ("If two readings of a statute are both fairly possible, and if members of the enacting legislature would have thought that they lacked the authority to establish Interpretation #1 (or that courts probably would so hold), that fact might normally be some evidence that members of the enacting legislature had Interpretation #2 in mind instead.").

[115] See id. at 336–39; cf. Solum, Interpretation-Construction, supra note 41, at 101–02 (discussing the use of historical linguistic facts when interpreting constitutional text).

[116] Compare Gomez v. United States, 490 U.S. 858, 864 (1989) (referring to the constitutional questions canon as "settled policy"), with Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, *in* Benchmarks 196, 209–12 (1967) (criticizing the constitutional questions canon), and Frank H. Easterbrook, Do Liberals or Conservatives Differ in Judicial Activism?, 73 U. Colo. L. Rev. 1401, 1405–06 (2002) (same). See also John Copeland Nagle, *Delaware & Hudson* Revisited, 72 Notre Dame L. Rev. 1495, 1496 (1997) (discussing calls to abandon the avoidance principle); Lisa A. Kloppenberg, Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns, 30 U.C. Davis L. Rev. 1, 3–7 (1996) (critiquing the Court's use of the constitutional questions canon in the context of free speech cases); Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 74 (suggesting that the constitutional questions canon leads to strained statutory interpretation as intrusive as the problems it seeks to avoid); Richard A. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 815–16 (1983) (criticizing the constitutional questions canon).

[117] See Nelson, supra note 112, at 331, 334; Reno v. Flores, 507 U.S. 292, 314 n.9 (1993); Nagle, supra note 116, at 1496–97; see also Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))).

Some have suggested that the constitutional questions canon has "superseded" the constitutionality canon. See Neal Kumar Katyal & Thomas P. Schmidt, Active Avoidance: The Modern Supreme Court and Legal Change, 128 Harv. L. Rev. 2109, 2117 (2015);

that it does not necessarily accord with legislative intent.[118] For that reason, Caleb Nelson has argued that, before applying the constitutional questions canon, a judge should "do a lot more work," such as "ask[ing] whether members of the enacting legislature would have been aware of the reasons for doubting the constitutionality of one interpretation" and, "[if] so, . . . whether [they] would have cared."[119] As Frederick Schauer has observed, such analysis generally will not support avoidance.[120] In most cases, then, the constitutional questions canon should not be treated as a canon of *interpretation* that helps to ascertain intended semantic meaning; rather, it should typically be used, if at all, only at the construction stage as a normative "tiebreaker" for when indeterminacy is irreducible using ordinary tools of statutory interpretation.[121]

Importantly, both constitutional avoidance canons are triggered by ambiguity: a court will not consider applying either unless it first determines that the statutory language can be fairly understood to have two or more discrete semantic meanings, one of which is unconstitutional or raises serious constitutional questions.[122] In such circumstances, the

Vermeule, supra note 108, at 1949. To be sure, the Supreme Court sometimes conflates the two canons. See, e.g., Off. of Sen. Mark Dayton v. Hanson, 550 U.S. 511, 514 (2007); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). But as Caleb Nelson has observed, the "lower federal courts and (especially) the state courts continue to refer specifically to the canon about avoiding unconstitutionality." Nelson, supra note 112, at 332. And the modern Supreme Court has distinguished between the two canons insofar as it has "indicated that the canon about avoiding unconstitutionality takes precedence over the canon about avoiding constitutional questions." Id.; see Edmond v. United States, 520 U.S. 651, 658 (1997) (concluding that judges must not construe a federal statute "in a manner that would render it clearly unconstitutional" if "another reasonable interpretation [is] available," even if that other interpretation entails reading a different federal statute to raise "a constitutional question"); see also Rust v. Sullivan, 500 U.S. 173, 190–91 (1991) (describing the two canons as related but distinct).

[118] For example, the legislature could intend to test constitutional limits.

[119] Nelson, supra note 112, at 335.

[120] Schauer, supra note 116, at 92–93.

[121] Nelson, supra note 112, at 336.

[122] See, e.g., Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) (explaining that "the canon of constitutional avoidance 'comes into play only when, after application of ordinary textual analysis, the statute is found to be susceptible of more than one construction'" (quoting Clark v. Martinez, 543 U.S. 371, 385 (2005))); United States v. Palomar-Santiago, 141 S. Ct. 1615, 1622 (2021) (noting that the "canon [of constitutional avoidance] 'has no application in the absence of statutory ambiguity'" (quoting United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2011))); Nielsen v. Preap, 139 S. Ct. 954, 972 (2019) (same); Jennings v. Rodriguez, 138 S. Ct. 830, 848 (2018) (plurality opinion) (similar); see also *Clark*, 543 U.S. at 395 (Thomas, J., dissenting) (observing that "traditional avoidance" applies in the context of "ambiguous" statutory language); Richard M. Re, Narrowing

canons "function[] as *a means of choosing between*" available alternatives.[123]

### *B. Distinguishing Vagueness Avoidance*

In theory, the ordinary constitutional avoidance canons are trans-substantive, applying equally in the face of any potential constitutional infirmity. But because they are understood to be triggered by ambiguity, they are not adequate tools in the context of constitutional vagueness concerns. The process of construing indeterminate statutory language to avoid unconstitutional vagueness calls for a distinct conception of vagueness avoidance.

#### *1. Unconstitutional Vagueness*

In fleshing out that conception, the place to start is the void-for-vagueness doctrine itself. The Supreme Court often repeats the refrain that a penal statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct that it punishes" or is "so standardless that it invites arbitrary enforcement."[124] But as scholars and jurists have long recognized, that test for vagueness is "itself an indefinite concept."[125] The doctrinal language does not furnish a "yardstick" for assessing whether a particular statute is impermissibly indeterminate,[126] because the

Supreme Court Precedent From Below, 104 Geo. L.J. 921, 933 (2016) (noting that "avoidance" is "thought to be legitimate only if the relevant source of law is ambiguous"); Vermeule, supra note 108, at 1945 (observing that avoidance applies to "ambiguous" statutes).

[123] *Clark*, 543 U.S. at 385.

[124] Johnson v. United States, 576 U.S. 591, 595 (2015) (quoting Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

[125] Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); see also *Johnson*, 576 U.S. at 621 (Thomas, J., concurring in the judgment) ("It has long been understood that one of the problems with holding a statute 'void for indefiniteness' is that 'indefiniteness' . . . is itself an indefinite concept." (quoting *Winters*, 333 U.S. at 524)); Michael J.Z. Mannheimer, Vagueness as Impossibility, 98 Tex. L. Rev. 1049, 1051 (2020); Low & Johnson, supra note 4, at 2052–53; Andrew G. Goldsmith, The Void-for-Vagueness Doctrine in the Supreme Court, Revisited, 30 Am. J. Crim. L. 279, 282 (2003); Debra Livingston, Gang Loitering, the Court, and Some Realism About Police Patrol, 1999 Sup. Ct. Rev. 141, 163; John F. Decker, Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Law, 80 Denv. U. L. Rev. 241, 243 (2002).

[126] Jeffries, supra note 17, at 196.

concepts of "fair notice" and "arbitrary enforcement" are themselves indeterminate.[127]

To understand constitutional vagueness analysis, it is useful to begin with the relationship between the source of legislation and the court tasked with applying it.[128] A federal court's vagueness analysis of a federal law, for example, is distinct from its vagueness analysis of a state law.[129] The main difference is that a federal court has more freedom to construe a federal statute than it does a state statute. Because the highest state court has the last word on the meaning of a state statute, a federal court will follow any preexisting state court construction of the indeterminate statutory language and arguably must follow statutory construction principles of state law.[130] Conversely, a state court will follow any preexisting authoritative federal court construction of a federal law.[131]

The focus here is on the most straightforward scenario, instances when the legislation at issue comes from the same sovereign as the court that is applying it. In particular, a federal court engaged in vagueness analysis of a federal penal statute is primarily concerned with whether the effect of the indeterminate statutory language is to delegate the legislative task of defining prohibited conduct to a body other than the legislature.[132] The Supreme Court has long made clear that, as a matter of federal law, "the substantive power to define crimes and proscribe punishments" lies with the "legislative branch of government."[133] That longstanding anti-

[127] Waldron, supra note 42, at 514 (noting that "the meaning of [such] phrases is likely . . . both vague and contested"); see also Anthony G. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 74 (1960) (observing that the Court's fair notice and arbitrary enforcement language "does not provide a full and rational explanation of the case development in which it appears so prominently").

[128] See Johnson, Federal-State, supra note 4, at 1589.

[129] Compare id. at 1589–606 (describing the Supreme Court's vagueness analysis of federal laws), with id. at 1606–14, 1653 (describing the Court's vagueness analysis of state laws).

[130] Id. at 1606.

[131] Id. at 1618.

[132] Id. at 1607.

[133] Jones v. Thomas, 491 U.S. 376, 381 (1989); see Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("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

delegation principle is rooted both in the separation of powers and in the principle of legality,[134] which "forbids the retroactive definition of criminal offenses" through "judicial innovation."[135] An indeterminate federal penal statute threatens the anti-delegation principle by effectively delegating the crime-defining responsibility to another body, whether that be police officers, prosecutors, jurors, or ultimately, judges.[136] The Court emphasized this very point the first time it held a federal law unconstitutionally vague.[137]

### *2. Avoiding Vagueness Through Construction*

The delegation threat posed by vague statutory language can almost always be avoided through judicial construction.[138] Because most vague statutory terms have some practically identifiable core, a court may legitimately craft a judicial construction of the text that encompasses that

jurisdiction of the offence."); see also Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("It cannot be too often emphasized that a basic difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.").

Judicial crime creation is still permitted, however, in some states. See Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 Va. L. Rev. 965, 980–82 (2019) (noting that more than a dozen states permit judicial crime creation). But even in those states, courts "ordinarily use that authority to convict for the same discrete group of uncodified crimes," rather than create new crimes through judicial fiat. Id. at 982.

[134] Johnson, Federal-State, supra note 4, at 1590. To the extent the anti-delegation principle is rooted in the separation of powers, it "shares some similarities with the administrative law nondelegation doctrine." Id. Yet the two concepts are importantly distinct. Id. "The administrative law nondelegation doctrine focuses on the relationship between the legislative and executive branches of government in regulatory contexts in which executive agency expertise is needed," requiring "Congress to provide 'an intelligible principle' to guide implementation of a statute." Id. (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). By contrast, "[t]he antidelegation principle animating federal-law vagueness decisions . . . is primarily focused on the relationship between the legislative and judicial branches of government in the specific context of defining crimes and fixing punishments." Id. at 1590.

[135] Jeffries, supra note 17, at 189–90.

[136] See Johnson, Federal-State, supra note 4, at 1590; see also Carissa Byrne Hessick, Vagueness Principles, 48 Ariz. St. L.J. 1137, 1143–45 (2017); Low & Johnson, supra note 4, at 2053–54; Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1806 (2012); Goldsmith, supra note 125, at 284–85.

[137] See United States v. L. Cohen Grocery Co., 255 U.S. 81, 92 (1921) (observing that an indefinite federal law is unconstitutionally vague when it impermissibly "delegate[s] legislative power").

[138] See Johnson, Federal-State, supra note 4, at 1590.

core while excising the penumbra of borderline cases.[139] That enables the court to save a portion of the statute while respecting the anti-delegation principle.

Vagueness avoidance in this manner accords with the legality principle that forbids retroactive crime definition through judicial innovation.[140] When a court adopts a narrowing construction based on an identifiable core of the vague term, those whose conduct falls outside that core will not be subject to punishment under the narrowly construed statute. And those whose conduct falls within it have no viable claim that they lacked notice that the statute covered their conduct or were subject to arbitrary enforcement.[141]

The act of engaging in vagueness avoidance to adopt a narrowing construction also respects the separation of powers. It does not offend the principle requiring the legislature to define crime and fix punishments, because the narrowing construction tracks the practically identifiable core within the linguistic meaning of the vague term enacted by the legislature.[142] In such circumstances, the act of constraining the legal effect of the vague term to its core often functions as a form of severance.[143]

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[139] See supra text accompanying notes 57–60. The term "practically identifiable core" accounts for the problem of "higher-order vagueness"—i.e., when the line between the core and penumbra is itself vague. See supra note 60. Although it may not be theoretically possible to identify the precise line separating the core from the penumbra, it is generally possible as a practical matter to be reasonably accurate. The term "practically identifiable core" can also accommodate instances where terms with complex vagueness or multidimensional vagueness have a core that can be identified as a practical matter in light of contextual clues, even though those types of vagueness do not necessarily involve a continuum.

For a justification of vagueness avoidance based on the faithful-agent theory of statutory construction, see infra text accompanying notes 163–74.

[140] See Jeffries, supra note 17, at 189–90.

[141] The traditional as-applied limitation on vagueness challenges captures this insight. See infra text accompanying notes 143–49.

[142] Vagueness avoidance therefore is *not* a remedial tool by which a court rewrites the statute. Cf. Eric S. Fish, Constitutional Avoidance as Interpretation and as Remedy, 114 Mich. L. Rev. 1275, 1279 (2016) (arguing that constitutional avoidance can be understood as a remedy by which judges can "change a statute's meaning by creatively reinterpreting it to render it constitutionally valid").

[143] Cf. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2209 (2020) ("[T]he 'traditional' rule is that 'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.' " (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685 (1987))); see William Baude, Severability First Principles, 109 Va. L. Rev. 1, 14 (2023) (observing that traditional avoidance was "functionally equivalent" to repugnancy-displacement theory of severability); see also Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924) (explaining that a "statute bad in part is not

This severability aspect of vagueness avoidance is another feature that distinguishes it from general constitutional avoidance. Ordinary constitutional avoidance can apply in various contexts that do not neatly lend themselves to a severance comparison.[144] Vagueness avoidance, by contrast, is functionally equivalent to severance so long as the vague term follows the core-penumbra framework: a court engaging in vagueness avoidance declines to apply the statute to the case before it while simultaneously recognizing that some portion of the statute remains in force and is constitutionally valid.[145]

But vagueness avoidance amounts to true severance only when a court engaged in vagueness avoidance concludes that the statute *does not apply* to the case before it—i.e., when it concludes that the facts at hand fall outside the clear core of the statute. When a court instead determines that the particular factual scenario falls within the statute's core, it need not decide where exactly to draw the line separating the core from the vague peripheries of the statutory language. Yet even in those scenarios, the court is engaging in a form of vagueness avoidance. In fact, it is doing so on multiple levels: the court neither reaches the question whether the statute is unconstitutionally vague nor resolves the predicate issue of how

necessarily void in its entirety"); Loeb v. Columbia Twp. Trs., 179 U.S. 472, 490 (1900) ("[O]ne section of a statute may be repugnant to the Constitution without rendering the whole act void." (quoting Treasurer of Fayette Cnty. v. People's & Drovers' Bank, 25 N.E. 697, 702 (Ohio 1890))); Kevin C. Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 739 (2010) (observing that a "partial unconstitutionality" conclusion can result when only "some applications of [a] statute" are invalid); John Copeland Nagle, Severability, 72 N.C. L. Rev. 203, 207 (1993) ("The severability question asks whether a court's holding that part of a statute is invalid causes the remainder of the statute to be invalidated as well."); Robert L. Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 95–96, 96 nn.95–96 (1937) (noting that a court can save a statute by engaging in avoidance or severability).

[144] Nelson, supra note 112, at 338–39 n.33 (observing that, in the context of the traditional constitutional avoidance, a statutory term can be subject "to two discrete interpretations, neither of which is wholly subsumed by the other"; the "narrower interpretation" of the statutory term can be "a subset of the other," but one that is "significantly narrower than the constitution requires"; or the narrower interpretation poses a constitutional infirmity because it is "*too narrow*"); see also id. ("Because of the variety of both statutory language and constitutional problems, the canon about avoiding unconstitutionality is not functionally identical to the presumption of severability.").

[145] Cf. Vermeule, supra note 108, at 1951 ("Severance proper . . . occurs when a court finds the application of the statute to the case at hand to be constitutionally invalid. In this situation, the court will presume that other applications of the statute may be separated from the invalid applications and left in force."); see also Nagle, supra note 143, at 208–09 (describing various contexts in which severability analysis occurs).

the statutory language ought to be construed to avoid vagueness concerns. Both questions remain for a future case.

Courts have traditionally addressed factual scenarios that implicate a vague term's core by using an as-applied limitation on vagueness challenges—the rule that one "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."[146] Notably, a ruling on the basis of that limitation presupposes that the statutory language has a core that *can be* distinguished from its indeterminate peripheries. But such a ruling specifies only that the particular conduct at issue falls within that core; it provides no further guidance for other factual contexts as to where exactly the line is between the statute's core and penumbra.

The as-applied limitation on vagueness challenges can be understood as a form of "*jus tertii* severance," a lesser form of severability that occurs when a litigant for whom the application of a statute is constitutionally valid attempts "to assert . . . the rights of third parties[ ]by claiming that other applications embraced by the statute are unconstitutional and that the court should therefore invalidate the statute as a whole."[147] Because courts have not traditionally permitted such claims,[148] they need not engage in actual severance in these circumstances. Yet, as noted, the mere act of preventing these claims itself presupposes a core of the statute that is severable from its penumbra: "If the statute had to stand or fall in its entirety, the court would be obliged to adjudicate the constitutionality of every application of the statue, because the statute could not be applied *even to the litigant at hand* if any of its applications were unconstitutional."[149] Thus, although instances of vagueness avoidance that follow this pattern do not amount to true severance, they do constitute a form of *jus tertii* severance.

[146] Holder v. Humanitarian L. Project, 561 U.S. 1, 18–19 (2010) (quoting Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495 (1982)).

[147] Vermeule, supra note 108, at 1951.

[148] See, e.g., New York v. Ferber, 458 U.S. 747, 767 (1982); Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219–20 (1912). There are some exceptions to the restriction on *jus tertii* severance, such as the First Amendment overbreadth doctrine, which permits a party to challenge the law on the ground that it violates the free speech rights of others. See United States v. Raines, 362 U.S. 17, 21–22 (1960); Note, Standing to Assert Constitutional *Jus Tertii*, 88 Harv. L. Rev. 423, 423 (1974).

[149] Vermeule, supra note 108, at 1951; see also Robert A. Sedler, The Assertion of Constitutional *Jus Tertii*: A Substantive Approach, 70 Calif. L. Rev. 1308, 1323 (1982) ("[A] nonseverable law which is unconstitutional as to some cannot ever be validly applied.").

Consider again the hypothetical statute increasing punishment for certain violent crimes committed against a "child." Recall that, even assuming principles of interpretation make clear that the linguistic meaning of the ambiguous term "child" is immature human, the term is still vague and calls for construction in borderline cases. A court engaging in vagueness avoidance would identify the term's practically identifiable core and then craft a supplemental rule to distinguish the core from the term's vague peripheries. That, of course, requires a normative judgment on the part of the court. But vagueness avoidance provides a principled approach for making that judgment.

In the context of this hypothetical, a court might sensibly determine that the term "child" clearly encompasses anyone twelve years of age or younger, that it clearly excludes anyone that is at least eighteen years of age, and that all ages in between are borderline cases. If the case before the court involves a victim who falls within the range of borderline cases, vagueness avoidance would counsel in favor of construing the statute in a manner that limits its application to core cases—i.e., those with victims twelve years of age or younger. Based on that limiting construction, the court would hold that the statute does not apply in the borderline case.

If, however, the case before the court involves a victim who falls within the core, the court need not include as part of its holding a definitive construction of the statutory term. The court need only hold that, whatever the statute's precise contours, it clearly applies in the case at hand. Although such a holding presupposes that the statutory term has a core that can be distinguished from its indeterminate peripheries, it does not provide precise and complete explication of the core-penumbra distinction for future guidance. The court thus merely engages in a form of *jus tertii* severance to reject the litigant's vagueness challenge on an as-applied basis.

### *3. The Domain of Vagueness Avoidance*

A question remains as to the domain of vagueness avoidance,[150] whether it applies only when indeterminate statutory language would in fact be unconstitutionally vague if left unconstrued (similar to the unconstitutionality canon), or also when the indeterminate statutory

[150] For a discussion of the domain of the vagueness doctrine itself, see Daniel B. Rice, Reforming Variable Vagueness, 23 U. Pa. J. Const. L. 960 (2021).

language *might* be unconstitutionally vague if left unconstrued (similar to the constitutional questions canon).

It may be tempting to resist the question—to insist that there is no such thing as *potentially* vague statutory language. Language either is or is not vague; any differences are in the degree of vagueness, rather than differences in kind. And so the question whether to apply vagueness avoidance will arise only when there is in fact some degree of vagueness that remains following the interpretation stage of the legal process.

That may be correct in a technical sense, but not as a practical matter. Recall that the constitutional vagueness doctrine is concerned not simply with technical vagueness—but with other types and combinations of indeterminacy as well.[151] There may therefore be instances when some mix of ambiguity, contestability, and perhaps even breadth prompt fair-notice and arbitrary-enforcement concerns that sound in unconstitutional vagueness. In those circumstances (which may not neatly track the core-penumbra structure of a technically vague term), some variation of vagueness avoidance may be permissible to address *potential* vagueness concerns. As with the constitutional questions canon, however, there may be good reasons to relegate that version of vagueness avoidance to a fail-safe function applicable only after other tools have been exhausted.[152] In the context of actual vagueness with a core-penumbra structure, by contrast, the vagueness-avoidance canon should be front and center as a tool of construction.

### *C. Vagueness Avoidance and Modern Methodology*

A robust and distinct conception of vagueness avoidance would help answer the recent calls of commentators for interpretive tools to reduce the breadth of criminal laws.[153] Those commentators have tended to focus their energy on an argument in favor of a stronger version of the rule of lenity that more often "deliberately favor[s] criminal defendants."[154] That

[151] See supra text accompanying notes 44–45, 74–78.

[152] Cf. Nelson, supra note 112, at 335–36 (suggesting that courts can use the constitutional questions canon as a tiebreaker "when their ordinary tools for identifying a statute's intended meaning leave them in equipoise between two readings").

[153] See, e.g., Hessick & Hessick, supra note 1, at 2303 (arguing for a restoration of the historical practice of construing criminal statutes narrowly); Hopwood, supra note 34, at 921, 924 (arguing that courts should restore the more robust, historical version of the rule of lenity as a tool for constraining criminal laws).

[154] Hessick & Hessick, supra note 1, at 2303 (advocating for "historic rules of constraint"—namely, "interpret[ing] statutes to reach no further than the text or the purpose" and "treat[ing]

argument, however, requires taking on a significant methodological fight. It entails a loosening of the modern textualist or purposivist commitment to implementing the will of the legislature—i.e., faithful agency[155]—in order to accommodate an interpretive approach that gives systematic preference to criminal defendants' liberty interests.[156]

That approach has some normative appeal. But it is unlikely to gain traction in the current faithful-agent paradigm of statutory construction. More than a century ago, courts and legislatures began deliberately weakening the rule of lenity,[157] precisely because it was viewed as a form of judicial activism inconsistent with the modern methodological commitment to implementing the legislative will.[158] And ever since

broadly written laws as ambiguous and in need of narrowing constructions"); see Hopwood, supra note 34, at 924 (specifically arguing for a more robust version of the rule of lenity).

[155] See, e.g., Manning, supra note 36, at 1651 (contending that the "faithful agent theory" of interpretation derives from "the best reading of the constitutional structure").

[156] See, e.g., Hessick & Hessick, supra note 1, at 2309, 2314 (observing that, because "textualists and purposivists agree that the role of a court in interpreting statutes is to be a faithful agent of the legislature," courts committed to those methodologies have "not categorically approached the interpretation of criminal statutes differently from the interpretation of other statutes"); Gluck & Posner, supra note 37, at 1303 (finding implementing legislative will to be a common goal among judges).

[157] Starting in the mid-nineteenth century, attitudes toward a more robust historic version of the rule of lenity began to shift at both the state and federal levels. See Johnson, Federal-State, supra note 4, at 1580.

At the state level, many legislatures passed statutes expressly abrogating the rule of lenity, see Livingston Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 752–53, 753 nn.26–27, 754 nn.28–29 (1935) (identifying nineteen states that abrogated the rule of strict construction in the mid-nineteenth century and early twentieth century), because it had become "viewed as an impediment to efforts to implement criminal policy through legislation." Johnson, Federal-State, supra note 4, at 1580. The most common form of these enactments was a "fair construction" statute providing that "[t]he rule of the common law that penal statutes are to be strictly construed[] has no application" and that all statutes in the criminal code "are to be construed according to the fair import of their terms." N.Y. Penal Law § 10 (1865); see Jeffries, supra note 17, at 204 n.41 (characterizing the New York version as the "original" fair construction statute); Hall, supra, at 754 (noting that the New York fair construction statute was representative of the "most common" type of statute abrogating strict construction); see also Johnson, Federal-State, supra note 4, at 1580 n.77 (noting that "[t]he American Law Institute would later take the same in approach in the Model Penal Code").

At the federal level, as federal statutes grew more complex—and the regulatory state began taking shape—around the turn of the twentieth century, "federal courts became more comfortable looking to a broader range of materials, including legislative history, to determine legislative intent." Id. at 1582; see Solan, supra note 9, at 100–01.

[158] By the New Deal period, commentators were characterizing the rule of lenity as judicial "casuistry" that undermined legislative intent. See, e.g., John Barker Waite, Criminal Law in Action 16, 320 (1934); see also Mila Sohoni, supra note 26, at 1203 ("At the time of the New Deal, commentators were less than enamored of the rule of lenity.").

Justice Frankfurter joined the Supreme Court in 1939, the Court has adhered to a diminished view of the rule of lenity, with the result that federal courts may invoke it only after trying to resolve ambiguity by looking to a statute's "text, structure, [and legislative] purpose."[159] As Dan Kahan has observed, because lenity is now "[r]ank[ed] . . . 'last' among interpretive conventions," it is essentially "irrelevan[t]."[160] The modern Court has gone further, suggesting that application of the rule of lenity is limited to instances in which "grievous ambiguity" remains following the use of all other interpretative tools.[161]

Given that history, reinstatement of an updated, more muscular version of the rule of lenity seems unlikely, though Justice Gorsuch has recently voiced some support for that approach.[162] A robust conception of vagueness avoidance, by contrast, is consistent with the modern methodological commitment to implementing legislative will. While the rule of lenity is a substantive canon triggered by ambiguity that can otherwise be resolved through the use of ordinary tools of interpretation that recover semantic meaning, vagueness avoidance is a rule of construction rooted in constitutional values and triggered by indeterminate language that cannot be resolved through the use of those tools.

[159] Hopwood, supra note 4, at 717; see United States v. Castleman, 572 U.S. 157, 172–73 (2014) ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute . . . ." (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010))); Muscarello v. United States, 524 U.S. 125, 138–39 (1998) ("To invoke the rule [of lenity], we must conclude that there is a 'grievous ambiguity.'" (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994))); Moskal v. United States, 498 U.S. 103, 108 (1990) (reserving lenity for instances in which "a reasonable doubt persists about a statute's intended scope" after employing traditional methods of interpretation); United States v. Brown, 333 U.S. 18, 25 (1948) (making clear that the rule of lenity would not trump "common sense" or "evident statutory purpose"); United States v. Gaskin, 320 U.S. 527, 529–30 (1944) (noting that the rule had no weight when its application would cause "distortion or nullification of the evident meaning and purpose of the legislation").

[160] Kahan, supra note 26, at 386; see Hessick & Hessick, supra note 1, at 2339 (characterizing the rule of lenity as a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes").

[161] *Muscarello*, 524 U.S. at 139 (quoting *Staples*, 511 U.S. at 619 n.17).

[162] Over the two most recent Terms, in two separate concurring opinions, Justice Gorsuch has advocated for a more muscular conception of lenity. See Bittner v. United States, 143 S. Ct. 713, 724–25 (2023) (arguing for a conception of lenity more robust than the Court's modern formulation); Wooden v. United States, 142 S. Ct. 1063, 1086–87 (2022) (Gorsuch, J., concurring in the judgment) (similar). Justice Sotomayor joined his concurring opinion in part in *Wooden*, and Justice Ketanji Brown Jackson joined him in *Bittner*. Presumably, then, there are as many as three votes on the current Court for a more robust conception of lenity.

Vagueness avoidance thus stands apart from the category of substantive canons triggered by ambiguity—a category that both Justice Barrett and Justice Kavanaugh view as suspect for different reasons. Indeed, as properly conceptualized, vagueness avoidance comports with the faithful-agent textualism of Justice Barrett and largely responds to Justice Kavanaugh's concerns.

For Justice Barrett, the application of substantive canons is often in "tension" with her commitment to faithful-agent textualism.[163] In her view, substantive canons "pose[] a significant problem of authority" when a court applies one of them "to strain statutory text," because the court is "us[ing] something other than the legislative will as its interpretive lodestar, and in doing so, it acts as something other than a faithful agent."[164] Yet, for Justice Barrett, "[s]ubstantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute" arising from ambiguity in statutory language.[165] In that circumstance, according to Justice Barrett, Congress has effectively "delegated resolution of statutory ambiguity to the courts," and "it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it."[166] In that scenario, "a judge applying a [substantive] canon" does "not deviat[e] from her best understanding of Congress's instructions"; rather, "the best understanding of Congress's instructions is that Congress left the problem to her."[167] In addition, as Justice Barrett has explained, the faithful-agent theory is more amenable to substantive canons that are "[c]onstitutionally inspired" because such canons "promot[e]" a "set of norms that have been sanctioned by a super-majority as higher law."[168]

The implication of Justice Barrett's view of faithful agency is that substantive canons triggered by ambiguity should typically be used sparingly, much like the modern form of the rule of lenity that is used only in the rare case of "grievous ambiguity" after all other tools have

[163] Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (noting that "strong-form" substantive canons "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning" (quoting Barrett, supra note 36, at 123–24)).

[164] Barrett, supra note 36, at 110.

[165] Id. at 123.

[166] Id.

[167] Id.

[168] Id. at 168.

been exhausted.[169] For the faithful-agent textualist, reliance on a substantive canon is permitted *only after* other interpretive tools have been used to recover semantic meaning. Yet in those rare instances when substantive canons are needed to resolve persistent ambiguity, the faithful-agent textualist is willing to apply them on the premise that Congress has effectively "delegated resolution of [that] ambiguity to the courts."[170]

The same dynamic occurs every time Congress includes vague language in a statute,[171] except that vague language *cannot* be resolved through ordinary tools of interpretation.[172] But because most vague statutory terms have some practically identifiable core,[173] a court acting as a faithful agent may legitimately craft a judicial construction of the text that encompasses that core while excising the penumbra of borderline cases. By retaining the core, the court is giving legal effect to the legislative will to prohibit the conduct within that core. And by excising the indeterminate periphery, the court is "promoting" a "[c]onstitutionally inspired . . . set of norms that have been sanctioned by a super-majority as higher law."[174]

A robust conception of vagueness avoidance should also be attractive to Justice Kavanaugh, who is suspicious of substantive canons to the extent their application depends on an "ambiguity trigger" that is too easy for judges to manipulate.[175] An ambiguity trigger requires a judge to determine that the statutory language is ambiguous, rather than clear, before applying a substantive canon.[176] That poses a "major problem," according to Justice Kavanaugh, because "ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis."[177] The

[169] Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

[170] Barrett, supra note 36, at 123.

[171] Indeed, the constitutional issue posed by vague language is that it delegates *too* much—by delegating the crime-defining responsibility of Congress to another body, whether that be police officers, prosecutors, jurors, or ultimately, judges. See supra text accompanying notes 132–37.

[172] See supra text accompanying notes 94–96.

[173] See supra text accompanying notes 139–40.

[174] Barrett, supra note 36, at 168.

[175] See Wooden v. United States, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring) (citing Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2136–39 (2016)).

[176] Kavanaugh, supra note 175, at 2135–36.

[177] *Wooden*, 142 S. Ct. at 1075–76 (Kavanaugh, J., concurring).

looser that trigger is permitted to be, the greater the manipulability problem.[178] Even when ambiguity is established, Justice Kavanaugh questions substantive canons triggered by "front-end ambiguity," especially when the ambiguity can be resolved through less controversial tools of interpretation that resolve semantic meaning.[179]

Justice Kavanaugh has singled out constitutional avoidance as a substantive canon that should be "jettison[ed]," both because its ambiguity trigger is "so uncertain"[180] and because its application "can sometimes look more like judicial abdication—a failure to confront the constitutional question raised by the statute as written—than judicial restraint."[181] Inasmuch as "Congress may have wanted to legislate right up to the constitutional line but didn't know where it was," he has noted, Congress may have selected indeterminate language and "trusted the courts" to identify the exact line.[182] The application of constitutional avoidance poses a problem, in Justice Kavanaugh's view, because it keeps courts from actually probing the constitutional line.[183] That is especially true of the constitutional questions canon, which counsels courts to adopt a plausible reading that would avoid an alternative reading that merely raises serious constitutional questions.[184]

Justice Kavanaugh advocates for a different approach—one where courts first determine the "best reading" of the statute and then deviate from that reading only if it violates a settled rule of interpretation, including some substantive canons, or if it is clearly unconstitutional.[185] If the best reading turns out to be unconstitutional, according to Justice Kavanaugh, judges should say so and then "determine the appropriate remedy by applying proper severability principles."[186] Because the best-reading approach would do away with initial ambiguity determinations, it would seem to apply in the face of any indeterminacy.[187]

A distinct conception of vagueness avoidance responds to Justice Kavanaugh's concerns. In fact, the process of applying vagueness

[178] Id. at 1076.
[179] Id. at 1075.
[180] Kavanaugh, supra note 175, at 2146.
[181] Id.
[182] Id.
[183] Id.
[184] See supra note 117; Kavanaugh, supra note 175, at 2146.
[185] Kavanaugh, supra note 175, at 2148.
[186] Id.
[187] Id. at 2144.

avoidance shares some similarities with his best-reading approach. Vagueness avoidance requires courts to define the statute's practically identifiable core,[188] which can be determined by reference to the linguistic meaning of the vague term, before engaging in construction to sever the vague peripheries from that core. That process is not so different from the process of determining the "best reading" of indeterminate statutory language by relying on tools of interpretation before considering whether to deviate from that reading on the basis of substantive canons. And excising the statute's vague peripheries through construction is functionally similar to applying severability principles,[189] which appears to align with Justice Kavanaugh's best-reading approach.[190]

Still, vagueness avoidance requires some threshold determination of clarity. But the task of identifying vagueness or contestability in statutory language is less prone to outcome-driven manipulation because the vagueness trigger typically unlocks far less discretion. A court that has deemed statutory language ambiguous unlocks two or more possible interpretations that need not overlap—giving the judge significant discretion in choosing one over another for policy reasons. A court that has deemed statutory language vague, by contrast, opens a range of possible constructions; yet wherever the line is drawn within that range, roughly the same core will be retained. The debate is over marginal differences along the continuum of borderline cases rather than wholesale differences in meaning.

### *D. Limits of Vagueness Avoidance*

In the vast majority of cases, vagueness avoidance is an effective tool for saving a portion of an indeterminate statute from unconstitutional vagueness.[191] But it occasionally falls short. In those instances, the nature of the indeterminate language or some other factor makes an unconstitutional vagueness conclusion unavoidable, because no narrowing construction is feasible without offending the rule against judicial crime-making.

*1. Complex Vagueness.* One scenario where vagueness avoidance can be inadequate is when vague statutory language does not follow the core-

[188] See supra text accompanying notes 138–40.
[189] See supra text accompanying notes 143–49.
[190] Kavanaugh, supra note 175, at 2148.
[191] See supra note 138 and accompanying text.

penumbra structure. Recall that this rare type of vagueness arises when a term has many "independent conditions of application, some but not all of which need be satisfied,"[192] and that a classic example is the use of the term "game" to describe a variety of activities lacking an identifiable feature common to all.[193]

Suppose, for example, that a city ordinance says, "no games in the park."[194] The term "games" is vague in the more complex sense insofar as it could describe a wide and varied range of activities—ball games, card games, board games, guessing games, video games, word games, counting games, mind games, etc. But absent more detail, the ordinance provides no guidance as to which subset or subsets of games it seeks to proscribe. In the terms of the constitutional vagueness doctrine, it "fails to give ordinary people fair notice of the conduct it punishes" and "invites arbitrary enforcement."[195] Depending on the whims of a particular officer, the ordinance could be enforced against persons engaging in activities as benign as doing a crossword puzzle or playing "I Spy" with a child.[196]

Because the vague term "game" does not fall on a continuum—and the core-penumbra framework is not apt—vagueness avoidance offers a less principled basis for construing the term. Absent some other contextual clues that enable identification of a core subset of games, a court is left to draw arbitrary lines between certain types of games based on its own normative judgment as to what makes for good policy in public parks. But doing so in a way that provides useful guidance would be difficult given the many types of games that relate to each other through a "complicated network of similarities" that are "overlapping and criss-crossing."[197]

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[192] Waldron, supra note 42, at 518.

[193] See supra text accompanying notes 63–67.

[194] This, of course, is a modification of Hart's famous "no vehicles in the park" example. See Hart, Positivism, supra note 14, at 607.

A municipal ordinance in Long Beach, California, uses the term "game" in this very manner. It prohibits all persons from "play[ing] or engag[ing] in any game except in those places designated for that purpose" in "any public park [or] public beach." Long Beach, Cal., Ordinance § 16.16.010(g) (2024), https://library.municode.com/ca/long_beach/codes/municipal_code?nodeId=TIT16PUFAHILA_ CH16.16 PABE [https://perma.cc/V8FP-V79H].

[195] Johnson v. United States, 576 U.S. 591, 595 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

[196] See Johnson, Vagueness Attacks, supra note 2, at 360–61 (explaining how broad and indeterminate low-level order-maintenance crimes, "coupled with Fourth Amendment precedents . . . effectively enable police officers to 'search and seize whomever they wish'" (quoting Stuntz, Transsubstantive Fourth Amendment, supra note 2, at 855)).

[197] Wittgenstein, supra note 63, at 36e para. 66; cf. Mannheimer, supra note 125, at 1054 (reframing the defect with truly vague statutes as a problem of impossibility insofar as they

As a doctrinal matter, the fact that the term "game" calls for arbitrary line drawing serves as proof that the term is unconstitutionally vague—that is, it violates the anti-delegation principle by effectively delegating the legislative task of defining prohibited conduct to a body other than the legislature.[198] Unlike vague terms with the core-penumbra structure, a complex vague term lacks a practically identifiable core that lends itself to a saving construction. Yet, sometimes, context clues enable a court to identify a core that can be used as a basis for vagueness avoidance.

*2. Irresolvable Contestability.* Another scenario where vagueness avoidance often cannot save a statute from unconstitutional vagueness occurs when the term is exceedingly contestable. To take an extreme example, imagine a penal statute that prohibits "doing morally bad things."[199] The term "morally bad" is plainly contestable because it embodies a normative standard about which there is disagreement. Indeed, it is perhaps the *most* contestable term insofar as it purports to draw a line between all that is moral and all that is immoral. Without some further guidance from the legislature, the court is left to give content to the term "morally bad" by manufacturing its own test for determining what counts. The court cannot resolve the contestability of the term without engaging in the legislative task of defining the prohibited conduct. Because that violates the anti-delegation principle, the term is unconstitutionally vague. Vagueness avoidance provides no cure.

effectively "require conformity with either unknowable facts or the entirely subjective impressions of third parties").

[198] See supra text accompanying notes 132–37.

[199] See Johnson, Federal-State, supra note 4, at 1598 (arguing that a court could not "avoid striking down as vague a federal statute prohibiting 'doing bad things' "). The hypothetical statute prohibiting "doing morally bad things" is not so different from the statute that renders noncitizens "deportable" on the basis of multiple prior "crimes involving moral turpitude," 8 U.S.C. § 1227(a)(2)(A)(ii), the language of which has been criticized as "meaningless." Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring in the judgment); see also Garcia-Meza v. Mukasey, 516 F.3d 535, 536 (7th Cir. 2008) (calling the moral turpitude statute "notoriously baffling"); Partyka v. Att'y Gen., 417 F.3d 408, 409 (3d Cir. 2005) (referring to the moral turpitude statute as an "amorphous morass"); Jennifer Lee Koh, Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude, 71 Stan. L. Rev. Online 267, 272, 279 (2019) (observing that, when applying "moral turpitude," the Board of Immigration Appeals has made "strong, but loosely supported, proclamations regarding what it views as morally reprehensible behavior," and identifying the vagueness doctrine as a potential fix); cf. Edward R. Roybal, Void for Vagueness: State Statutes Proscribing Conduct Only for a Juvenile, 1 Pepp. L. Rev. 1, 1 (1973) (arguing that the language of a California juvenile court statute was vague inasmuch as it allowed for the commission of juveniles on the basis of their being "in danger of leading an . . . immoral life").

The irresolvable contestability of the term "morally bad" is plain. But in other contexts, it will not be so obvious. One clue, however, may be the existence of prior, failed attempts to construe the term in a way that provides a standard that is both sufficiently tied to the text and administrable in actual cases.[200]

*3. Constraining Factors.* A third scenario that shows the limits of vagueness avoidance occurs when some constraining factor hinders the court's ability to adopt a saving construction.

This most often occurs when the source of the legislative enactment differs from that of the court interpreting it—i.e., a state law and a federal court, or vice versa.[201] In such circumstances, the court's discretion to construe the statutory text is constrained by a distinctive federalism principle—that it is the province of state courts to determine the meaning of state law and that of federal courts to determine the meaning of federal law.[202] If, for example, a preexisting state court construction of an indeterminate state law fails to eliminate vagueness concerns—or exacerbates them—then a federal court (even the Supreme Court) will follow that construction and not use vagueness avoidance to adopt its own.[203]

In these instances, it is not the nature of the statutory language itself that impedes vagueness avoidance. Rather, some constraining factor prevents the court from adopting a feasible vagueness-avoidance construction.

## III. VAGUENESS AVOIDANCE AT THE SUPREME COURT

This Part considers the extent to which the theory of vagueness avoidance just articulated aligns with the Supreme Court's vagueness decisions. It divides those decisions into three sets: explicit vagueness avoidance; implicit vagueness avoidance; and unavoidable vagueness.

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[200] See, e.g., United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 91, 93 (1921) (invalidating for vagueness a federal law after concluding that no narrowing construction was feasible given the "persistent" and "painstaking attempts" of lower court judges to arrive at one without success); *Johnson*, 576 U.S. at 598 (citing *Cohen Grocery* for the proposition that "the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness" (quoting *Cohen Grocery*, 255 U.S. at 91)); see also Johnson, Federal-State, supra note 4, at 1602–05 (describing this aspect of *Cohen Grocery* and *Johnson* in more detail).

[201] See Johnson, Federal-State, supra note 4, at 1587 (noting that nearly "all of the Court's early vagueness cases" exhibited this "federal-state relationship").

[202] See id. at 1608.

[203] Id.

The first two sets cover the many instances in which the Court has successfully engaged in vagueness avoidance when faced with vague or otherwise indeterminate federal statutes. Traditionally, the Court has done so in a way that is mostly consistent with the theory of vagueness avoidance: it was *explicit* about crafting a narrowing construction of vague and indeterminate language, and it crafted that construction on the basis of a practically identifiable core within the compass of the statute.

In recent years, however, the Court has retreated from explicit vagueness avoidance. In this second set of cases, the Court still adopts a narrowing construction of an indeterminate statutory term. But it purports to justify that result on the basis of *interpretation* that determines semantic meaning, rather than expressly relying on vagueness avoidance. These cases can nonetheless be understood as examples of *implicit* vagueness avoidance.[204]

The final set consists of instances of unavoidable vagueness, cases in which the Court invalidates a statute as unconstitutionally vague after determining that vagueness avoidance is not feasible. Each case in this set can be explained on the basis of at least one of the limits on vagueness avoidance already identified.

### *A. Explicit Vagueness Avoidance*

When faced with indeterminate language in a federal penal statute, the Court has traditionally engaged in vagueness avoidance.[205] The Court does so *explicitly* when it flags the vagueness concerns posed by indeterminate statutory language and then narrowly construes the statute to avoid those concerns. In adopting a narrowing construction, the Court effectively severs the vague peripheries of the statutory language while maintaining a practically identifiable core. By doing so, the Court has explained, it is "exercis[ing] restraint in assessing the reach of a federal

[204] See, e.g., Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (avoiding construction of federal aggravated identity theft statute that would have "read[] incongruous breadth" into the statute and posed "fair warning" concerns); Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (avoiding construction of Computer Fraud and Abuse Act that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity"); Kelly v. United States, 140 S. Ct. 1565, 1568 (2020) (avoiding construction of federal fraud statutes that would "criminalize all . . . conduct" that involves "deception, corruption, [or] abuse of power").

[205] Johnson, Federal-State, supra note 4, at 1591 ("[V]agueness challenges to federal laws in the Supreme Court rarely lead to invalidation on vagueness grounds. In nearly all cases, the Court narrowly construes the federal statute to avoid vagueness concerns."); see id. at 1591 n.137 (collecting examples).

criminal statute" in light of "concern that 'a fair warning should be given . . . of what the law intends to do if a certain line is passed.'"[206]

*1.* Screws v. United States

An early example of explicit vagueness avoidance is *Screws v. United States*.[207] That 1945 decision involved a federal criminal statute punishing any person who "under color of any law . . . willfully subjects" anyone "to the deprivation of any rights . . . secured or protected by the Constitution."[208] The statutory text appeared to "incorporate by reference a large body of changing and uncertain" judicial decisions on the contours of various constitutional rights.[209] The Court observed that the literal semantic meaning of that language "provide[d] no ascertainable standard of guilt" but instead "referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited."[210]

To avoid that vagueness concern, the Court narrowly construed the statute to apply only to violations of constitutional rights that had been clearly established at the time of the defendant's conduct. Writing for a plurality of the Court,[211] Justice Douglas justified that construction by focusing on the statutory term "willfully," reasoning that the "requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* save[d] the Act from any charge of

[206] United States v. Aguilar, 515 U.S. 593, 600 (1995) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)); see also Marinello v. United States, 138 S. Ct. 1101, 1108, 1110 (2018) ("'exercis[ing]' interpretive 'restraint'" to reject broad construction of tax obstruction law that would create "fair warning" and "fairness" concerns by "transform[ing] every violation of the Tax Code into [a felony] obstruction charge" (quoting *Aguilar*, 515 U.S. at 600)); Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005) ("exercis[ing] restraint" in rejecting broad construction of obstruction statute that would criminalize "innocuous" acts of persuasion).

[207] 325 U.S. 91 (1945); see Williams v. United States, 341 U.S. 97, 101 (1951) (citing *Screws* for the proposition that "a close construction" of an indefinite law "will often save [it] from vagueness that is fatal"); see also Skilling v. United States, 561 U.S. 358, 412 (2010) (citing *Screws* to support narrowing construction); United States v. Lanier, 520 U.S. 259, 267 (1997) (same).

[208] *Screws*, 325 U.S. at 93 (plurality opinion) (quoting 18 U.S.C. § 242 (formerly 18 U.S.C. § 52 (1940))).

[209] Id. at 96.

[210] Id. at 95, 96.

[211] Justice Douglas wrote for only four Justices, id. at 92, but two other Justices agreed with the proposition that the statute should be narrowly construed to "cover[] violations of the Constitution that were well-established at the time the state officials acted." Low & Johnson, supra note 4, at 2093 n.188.

unconstitutionality on the grounds of vagueness."[212] In other words, once a judicial decision had established that a specific type of conduct violated the Constitution, a standard of conduct was ascertainable and could be willfully violated. In adopting that narrow construction, the Court limited the statute's application to its practically identifiable core—clearly established constitutional rights—while effectively severing the statute's vague peripheries.

*2.* Skilling v. United States

More recently, the Court engaged in explicit vagueness avoidance in *Skilling v. United States*,[213] a 2010 case concerning the text and history of the mail and wire fraud statutes.

The text of the mail fraud statute applies to "[w]hoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do," engages in various acts involving the use of the mails.[214] In 1987, in *McNally v. United States*,[215] the Court adopted a narrow construction of that statute that encompassed only the protection of property rights, rejecting an open-ended interpretation that would have encompassed a theory of honest-services fraud.[216] Before *McNally*, the theory of honest-services fraud "was well-entrenched and had a long pedigree" in the lower federal courts.[217] But its peripheries were indeterminate.[218] After the Court explicitly declined to adopt the honest-services theory in *McNally*,

[212] *Screws*, 325 U.S. at 103 (plurality opinion) (emphasis added). Notably, it was not "the presence of a bad purpose or evil intent alone" that saved the statute from vagueness, but rather the fact that the constitutional right had been "made definite by decision or other rule of law." Id.; see Low & Johnson, supra note 4, at 2093–94 (explaining that "[w]hat saved the statute [in *Screws*] was not its mens rea but the clarification of its actus reus" through clearly established law).

[213] 561 U.S. 358 (2010).

[214] 18 U.S.C. § 1341.

[215] 483 U.S. 350 (1987).

[216] See id. at 360 (refusing to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of . . . good government for local and state officials").

[217] Low & Johnson, supra note 4, at 2087 n.156; see also *McNally*, 483 U.S. at 355 (noting that McNally's conviction was based "on a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government"). For a survey of the types of cases in which the theory was applied from the 1940s through the 1980s, see id. at 362–64 nn.1–4 (Stevens, J., dissenting).

[218] Low & Johnson, supra note 4, at 2087 n.156.

Congress responded by enacting an honest-services fraud statute, which attempted to resurrect one of the "intangible rights" encompassed by the pre-*McNally* lower court case law by providing that mail and wire fraud include "scheme[s] . . . to deprive another of the intangible right of honest services."[219]

The question in *Skilling* was how the Court would react to Congress's rejection of *McNally* when addressing whether the new honest-services statute covered a self-enrichment scheme based on a misrepresentation of a corporation's financial performance.[220] Writing for a majority of the Court, Justice Ginsburg recognized the "force" of the argument that the honest-services statute was unconstitutionally vague.[221] Although the pre-*McNally* decisions had consistently applied the fraud statute to bribery or kickback schemes, she explained, "there was considerable disarray over the statute's application to conduct outside that core category."[222] She observed that a more expansive construction "would raise the due process concerns underlying the vagueness doctrine."[223] Thus, "[t]o preserve the statute without transgressing constitutional limitations," the Court "pare[d] . . . down" the honest-services statute, construing it to cover "*only* the bribe-and-kickback core of the pre-*McNally* case law."[224]

The effect of adopting that narrow construction was to sever the vague peripheries of the honest-services statute while maintaining a practically identifiable core. Yet, unlike in *Screws*, the text of the statute provided no basis for drawing that core-penumbra distinction.[225] The Court in *Skilling*

[219] 18 U.S.C. § 1346; see Cleveland v. United States, 531 U.S. 12, 19–20 (2000) (explaining that, following *McNally*, Congress enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had [previously] protected"—"the intangible right of honest services").

[220] Skilling v. United States, 561 U.S. 358, 368–69 (2010).

[221] Id. at 405.

[222] Id. *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982), was an example of a pre-*McNally* lower court decision that had contributed to that disarray. See Jeffries, supra note 17, at 238–42 (criticizing *Margiotta* as setting forth "indefinite standards for application of the intangible-rights theory of mail fraud"); *Skilling*, 561 U.S. at 416–20 (Scalia, J., concurring in part and concurring in the judgment) (describing *Margiotta* along with other decisions to show the disarray in the body of pre-*McNally* lower court case law).

[223] *Skilling*, 561 U.S. at 408.

[224] Id. at 404, 408–09.

[225] Justice Scalia pointed this out in his concurring opinion. Id. at 423 (Scalia, J., concurring in part and concurring in the judgment). He took the view that, although narrowing constructions are permissible when based on a statute's text, the bribery-and-kickbacks limiting construction was impermissible because it had no textual basis. Id. This reflects a

instead based the distinction on the pre-*McNally* case law, which Congress had attempted to reinstate when enacting the honest-services statute.[226] *Skilling* thus suggests that, at least in some circumstances, the core-penumbra distinction can be drawn by reference to clues beyond bare text, such as background judicial precedent.[227]

### *B. Implicit Vagueness Avoidance*

In a recent line of cases, the Court has moved away from explicit vagueness avoidance. In these cases, the Court still adopts a narrowing construction, but it purports to rest its result on tools of *interpretation* that determine semantic meaning, rather than expressly relying on vagueness avoidance as a tool of construction.[228] The Court sometimes invokes vagueness concerns. But those concerns are not treated as an essential component of its reasoning. Nevertheless, these cases can be understood

disagreement not with vagueness avoidance itself—but with the scope of permissible source materials on which a court may rely when construing the statute.

[226] Id. at 405 (majority opinion); see also id. at 423 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that Congress attempted to reinstate pre-*McNally* case law by enacting the honest-services statute).

[227] More recently, in *Percoco v. United States*, 143 S. Ct. 1130 (2023), the Court relied on the "teaching" of *Skilling* to hold that a private citizen cannot be convicted of honest-services fraud on the theory that the citizen had a "special relationship . . . with the government" and had "dominated and controlled . . . governmental business." Id. at 1133, 1135, 1137; see id. at 1137 (rejecting the special-relationship theory because it gave the statute "an uncertain breadth that raises 'the due process concerns underlying the vagueness doctrine' " (quoting *Skilling*, 561 U.S. at 408)).

[228] See, e.g., Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (avoiding construction of federal aggravated identity theft statute that would have "read[] incongruous breadth" into the statute and posed "fair warning" concerns); Ruan v. United States, 142 S. Ct. 2370, 2377–78, 2380 (2022) (construing federal drug statute to include a strong scienter requirement, with the effect of narrowing the "vague, highly general language of the regulation defining the bounds of" the proscribed conduct without explicitly invoking constitutional vagueness concerns); Kelly v. United States, 140 S. Ct. 1565, 1568 (2020) (avoiding construction of federal fraud statutes that would "criminalize all . . . conduct" that involves "deception, corruption, [or] abuse of power"); Yates v. United States, 574 U.S. 528, 540 (2015) (plurality opinion) (narrowly construing federal statute without mentioning vagueness concerns or the constitutional avoidance canon); see also Anita S. Krishnakumar, Passive Avoidance, 71 Stan. L. Rev. 513, 536–40 (2019) (characterizing *Yates* as "a case that squarely implicates the avoidance canon, and one in which we would expect to see some discussion of the need to avoid a serious vagueness problem").

The Court's disavowal of vagueness avoidance is part of a broader trend toward "passive avoidance"—i.e., narrowly construing statutes to avoid constitutional concerns without admitting that it is doing so. See id. at 520–21. That trend might be a response to a "spate of negative commentary that followed [the Court's] prominent use of the avoidance canon" during an earlier period. Id. at 521.

as examples of implicit vagueness avoidance that signal a preference for rejecting a vague and open-ended construction of a federal criminal statute when a narrower alternative is plausible.

*1.* McDonnell v. United States

An early sign of the shift from explicit to implicit vagueness avoidance occurred in *McDonnell v. United States*.[229] In that 2016 case, the Court vacated a former Virginia governor's federal bribery conviction under the Hobbs Act and the honest-services fraud statute. The question before the Court concerned the scope of the term "official act" under the federal bribery statute.[230]

McDonnell's lead argument before the Supreme Court was that "statutory construction" of the "vague corruption laws" should "be undertaken in the shadow of [constitutional principles]," including the due process requirement reaffirmed in *Skilling* that penal statutes provide "'sufficient definiteness' so that 'ordinary people can understand what conduct is prohibited.'"[231] In light of those concerns, McDonnell argued, the "official act" requirement should be limited to acts that "direct[] a particular resolution of a specific governmental decision" or that pressure an official to do so.[232]

The government argued that, because the relevant statutory language was "intentionally broad," the "official act" requirement should encompass "*any* decision or action, on *any* question or matter, that may at *any time* be pending, or which may by law be brought before *any* public official, in such official's official capacity."[233] That proposed reading, the Court noted, "encompasse[d] nearly any activity by a public official."[234]

Writing for a unanimous Court, Chief Justice Roberts rejected the government's expansive reading of the "official act" requirement. But in doing so, he gave vagueness avoidance a diminished role. The Chief Justice focused his energy on using ordinary tools of statutory

[229] 136 S. Ct. 2355 (2016).

[230] Id. at 2361.

[231] Brief for the Petitioner at 21–22, *McDonnell*, 136 S. Ct. 2355 (No. 15-474) (quoting *Skilling*, 561 U.S. at 402); see also id. at 23 (arguing that the vagueness-avoidance principles of *McNally* and *Skilling* should "guide the analysis here").

[232] Id. at 44, 51.

[233] Brief for the United States at 20–21, *McDonnell*, 136 S. Ct. 2355 (No. 15-474) (internal quotation marks omitted).

[234] *McDonnell*, 136 S. Ct. at 2367.

interpretation to determine semantic meaning.[235] Most of his analysis of the term "official conduct" reads as if the Court were merely facing an issue of *ambiguity*—a choice between two discrete possible meanings of that term. He summarized the government's broad reading of the term and McDonnell's narrower reading and then relied on dictionaries, a descriptive canon of interpretation, and prior precedent to conclude that the narrower reading was correct.[236] The Court thus held that the term "official act" encompassed only discrete actions "involv[ing] a formal exercise of governmental power."[237]

Only after arriving at that conclusion on the basis of interpretation did Chief Justice Roberts go on to note that the government's "expansive" reading "would raise significant constitutional concerns," including vagueness concerns.[238] He explained that the "standardless sweep" of the government's reading would render the "outer boundaries" of federal bribery "shapeless," leaving public officials "subject to prosecution, without fair notice, for the most prosaic interactions."[239] The "more constrained" construction the Court adopted "avoid[ed] this 'vagueness shoal.'"[240]

The structure of the Court's analysis in *McDonnell* would be expected in a case involving one of the ordinary canons of constitutional avoidance, which are triggered by ambiguity. In such cases, the Court often seeks to resolve ambiguity using other tools of interpretation before turning to constitutional avoidance; it then states constitutional avoidance as an *additional* reason to adopt one reading over another—sometimes a dispositive reason.[241]

Vagueness, by contrast, cannot be resolved merely through interpretative tools that recover semantic meaning; it calls for construction. And a court recognizing that difference would prominently feature vagueness avoidance as an indispensable part of its analysis. The

[235] See id. at 2368–72.

[236] Id. at 2368 (relying on dictionary definitions of statutory terms); id. at 2369 (relying on the descriptive canon of interpretation that presumes "that statutory language is not superfluous" (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 299 n.1 (2006))); id. at 2370 (citing United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999)) (relying on a prior decision interpreting the relevant statute).

[237] Id. at 2371–72.

[238] Id. at 2372–73.

[239] Id. at 2373.

[240] Id. (quoting Skilling v. United States, 561 U.S. 538, 368 (2010)).

[241] See supra note 121 and accompanying text.

Court's analysis in *McDonnell* thus appears to reflect a conception of vagueness avoidance that equates it to an ordinary constitutional avoidance canon triggered by ambiguity.

*2.* Van Buren v. United States

The Court's 2021 decision in *Van Buren v. United States*[242] may be the clearest example of implicit vagueness avoidance. In that case, the Court addressed a provision of the Computer Fraud and Abuse Act ("CFAA") covering anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer."[243] Writing for a six-Justice majority, Justice Barrett narrowly construed "exceeds authorized access" to encompass only "access[ing] a computer with authorization but then obtain[ing] information located in particular areas of the computer—such as files, folders, or databases—that are off limits."[244] Justice Barrett based that conclusion solely on interpretive tools that yielded a semantic meaning that was narrow in scope.[245]

Justice Barrett went on to note that the narrow reading of the statute avoided "attach[ing] criminal penalties to a breathtaking amount of commonplace computer activity."[246] But she went out of her way to state that the Court's decision did not rest on "constitutional avoidance," because "the text, context, and structure" of the CFAA sufficiently supported the narrowing construction.[247] The potential "fallout" of a broader reading of the statute merely "underscore[d] [its] implausibility," Justice Barrett insisted, like "extra icing on a cake already frosted."[248] The majority opinion also expressly disclaimed application of the rule of lenity for the same reason.[249]

If we are to take the opinion's disclaimer of vagueness avoidance at face value, the several paragraphs that follow—which detail how a broader reading of the CFAA would have transformed "millions of

[242] 141 S. Ct. 1648 (2021).
[243] 18 U.S.C. § 1030(a)(2)(C).
[244] *Van Buren*, 141 S. Ct. at 1662.
[245] Id. at 1654–60.
[246] Id. at 1661.
[247] Id.
[248] Id. (quoting Yates v. United States, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).
[249] Id.

otherwise law-abiding citizens [into] criminals"[250]—would be mere dicta superfluous to the result.

But perhaps the disclaimer should not be taken at face value. The briefs and oral argument transcript suggest that vagueness concerns helped drive the narrowing construction. Van Buren and multiple amici curiae argued at length in their briefs that the statute should be narrowly construed to avoid vagueness concerns.[251] And during oral argument, Van Buren highlighted the "vagueness problem," and Justice Sotomayor (who joined Justice Barrett's majority opinion) called the statute "dangerously vague."[252]

What, then, explains the majority's express disavowal of vagueness avoidance as a basis for adopting the narrow construction? The answer seems to be an aversion to relying on substantive canons to justify narrow constructions of penal statutes,[253] perhaps because of broader methodological commitments.[254] As already noted, two of the six Justices in the *Van Buren* majority—Justice Kavanaugh and Justice Barrett herself—have separately expressed general skepticism of substantive canons. For Justice Barrett, the application of substantive canons is often in tension with her commitment to faithful-agent textualism.[255] For Justice Kavanaugh, substantive canons are suspect when their application depends on an "ambiguity trigger" that is unduly manipulable by judges.[256] The express disavowal of vagueness avoidance in *Van Buren* thus may have been at least partially motivated by a broader desire to avoid applying substantive canons triggered by ambiguity, premised on a

[250] Id. at 1661.

[251] See Brief for Petitioner at 38, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Petitioner at 8–9, 22, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Petitioner at 6–9, *Van Buren*, 141 S. Ct. 1648 (No. 19-783).

[252] Transcript of Oral Argument at 23, 48, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); see also Joel S. Johnson, Dealing with Dead Crimes, 111 Geo. L.J. 95, 138 n.320 (2022) (identifying *Van Buren* as an example of passive avoidance).

[253] See Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 3) (finding that, over a ten-Term period, the Court typically relied on ad hoc and "statute-specific" rationales to justify narrow constructions of penal statutes, rather than relying on substantive canons, especially those triggered by ambiguity).

[254] Id. at 39–42 (suggesting that the Justices' methodological commitments might be causing them to avoid reliance on substantive canons).

[255] Barrett, supra note 36, at 110; see also supra text accompanying notes 163–74.

[256] See Wooden v. United States, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring) (citing Kavanaugh, supra note 175, at 2136–39); supra text accompanying notes 175–90.

misguided conflation of vagueness avoidance with ordinary constitutional avoidance.

### *C. Unavoidable Vagueness*

The final category—unavoidable vagueness—consists of cases that exceed the limits of vagueness avoidance, instances in which the Court is unable to adopt a narrowing construction to save the indeterminate statute from a vagueness conclusion. Every case in this category can be explained by one or more of the three limits on vagueness avoidance—complex vagueness, irresolvable contestability, and constraining factors.

Constraining factors are the most prominent limit on vagueness avoidance. Nearly all cases in which the Court has struck down a law as unconstitutionally vague involved a particular type of constraining factor—the federalism principle that gives *state* courts the final say on the meaning of a state law. In fact, with only two exceptions, in every situation in which the Court has struck down a law as unconstitutionally vague, that law was a state law previously construed by a state court.[257] An unconstitutional vagueness conclusion was unavoidable because the Court viewed itself as bound by the preexisting state court construction of the state statute and could not engage in vagueness avoidance.[258]

The two contexts in which the Court held a federal statute unconstitutionally vague are, first, a set of cases in the 1920s concerning the Lever Act and, second, a trilogy of decisions in the 2010s involving materially identical statutory language in three different penal statutes increasing punishment on the basis of prior convictions. Each time, the Court's vagueness conclusion was a product of at least one of the limits on constitutional avoidance.

[257] See Johnson, Federal-State, supra note 4, at 1587 & n.122 (collecting cases and observing that "with one exception, every case from 1914 until 1964 in which the Court invalidated a statute on a constitutional vagueness ground involved a *state* penal law that had already been construed at the state level" (emphasis added)); id. at 1599–600 (noting that the Court has "invalidate[d]" a federal law "on a constitutional vagueness ground" on "only two occasions" "[i]n the more than one hundred years in which the Court has recognized the constitutional vagueness doctrine").

[258] Id. at 1606 (explaining that the Court's "vagueness analysis in every state-law case is constrained by a distinctive federalism principle—that it is the province of the highest state court to construe the state law").

*1.* United States v. Cohen Grocery

The unavoidable-vagueness conclusion in *United States v. L. Cohen Grocery Co.*—the lead case in the set involving the Lever Act—resulted from irresolvable contestability. That case concerned a section of the Act that made it a crime "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[259] Writing for a majority of the Court, Chief Justice White observed that the statutory phrase "unjust or unreasonable rate or charge" provided no "ascertainable standard of guilt," forbade "no specific or definite act," and invited "the widest conceivable inquiry."[260] An "attempt to enforce" the statute, he explained, "would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable *in the estimation of the court and the jury*."[261] To uphold the literal "text of the statute" would be to allow Congress to "delegate legislative power."[262]

Chief Justice White acknowledged the Court's general duty to uphold federal statutes, if possible, by avoiding constitutional issues through judicial construction.[263] But he concluded that no such narrowing construction was feasible,[264] noting the "painstaking attempts" of lower court judges and administrative officers to arrive at one.[265] Treating those "persistent" yet unsuccessful "efforts . . . to establish a standard" through construction as evidence of vagueness, the Court held the statute unconstitutionally vague.[266]

[259] Food Control and District of Columbia Rents (Lever) Act, ch. 80, § 2, 41 Stat. 297, 298 (1919).

[260] United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921). The Court reaffirmed the result of *Cohen Grocery* in the companion cases. See Johnson, Federal-State, supra note 4, at 1600 & n.199. And several years later, the Court extended the holding of *Cohen Grocery* in the context of a civil suit. See A.B. Small Co. v. Am. Sugar Refin. Co., 267 U.S. 233, 238–42 (1925).

[261] *Cohen Grocery*, 255 U.S. at 89 (emphasis added).

[262] Id. at 92.

[263] Id. at 92–93 (noting that the Court was "not forgetful of [its] duty to sustain the constitutionality of the statute if ground can possibly be found to do so").

[264] Id. at 88 (rejecting construction that did not "embrace" charged conduct).

[265] Id. at 89–90, 90 n.1. Chief Justice White also distinguished other contexts in which a "standard" for construction could be derived from "the text of the statutes involved or the subjects with which they dealt." Id. at 92.

[266] Id. at 91, 93; see Johnson v. United States, 576 U.S. 591, 598 (2015) (citing *Cohen Grocery* for the proposition that "the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness" (quoting *Cohen Grocery*, 255 U.S. at 91)).

In other words, the Court treated the repeated and failed attempts of lower courts to engage in vagueness avoidance as a clue that the indeterminate statutory language suffered from irresolvable contestability that vagueness avoidance could not cure.

*2.* Johnson v. United States

The second set of federal laws involving unavoidable vagueness arose in a trilogy of cases between 2015 to 2019 that concerned materially identical statutory language.[267] *Johnson v. United States*[268] was the first and most significant. It presented all three limits on vagueness avoidance.

*Johnson* concerned the Armed Career Criminal Act, which increases the statutory minimum for felons convicted of possessing a firearm who have three prior convictions for "violent felon[ies]" committed on different occasions.[269] The Act defines "violent felony" as an offense punishable by more than a year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another"; "is burglary, arson, or extortion, [or] involves use of explosives"; or "*otherwise involves conduct that presents a serious potential risk of physical injury to another*."[270] The issue in *Johnson* was whether the last clause—the so-called "residual clause"—encompassed a prior state conviction for possession of a short-barreled shotgun.[271]

The facts giving rise to Johnson's shotgun conviction suggested that the circumstances of the offense did in fact "involve[] conduct that present[ed] a serious potential risk of physical injury to another."[272] But the Court was kept from considering those facts because of *Taylor v.*

[267] *Johnson*, 576 U.S. at 593–94, 606 (voiding for vagueness the residual clause in the Armed Career Criminal Act, which increased the mandatory minimum sentence for certain offenders who had previously committed offenses that "involve[d] conduct that presents a serious potential risk of physical injury to another"); see also United States v. Davis, 139 S. Ct. 2319, 2325–36 (2019) (applying *Johnson* to void for vagueness the materially identical residual clause of 18 U.S.C. § 924(c)); Sessions v. Dimaya, 138 S. Ct. 1204, 1210–16 (2018) (applying *Johnson* to void for vagueness the similarly worded residual clause in the Immigration and Nationality Act's definition of "aggravated felony").

[268] 576 U.S. 591.

[269] 18 U.S.C. § 924(e)(1).

[270] Id. § 924(e)(2)(B) (emphasis added).

[271] 576 U.S. at 595.

[272] 18 U.S.C. § 924(e)(2)(B)(ii). Johnson had possessed the shotgun during a drug sale in a public parking lot, putting innocent bystanders at risk of harm. See *Johnson*, 576 U.S. at 642 (Alito, J., dissenting).

*United States*,[273] a prior decision requiring a "categorical approach" for determining whether a crime qualifies as a "violent felony" under the statute.[274] The categorical approach mandated that courts "look only to . . . the statutory definition of the prior offense"[275] and not to "delv[e] into particular facts disclosed by the record of conviction."[276]

In *Johnson*, the categorical approach functioned as a constraining factor on the Court's ability to engage in vagueness avoidance. It required the Court to "assess[] whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'"[277]

Viewing the language of the residual clause through the lens of the categorical approach also gave rise to a complex-vagueness issue. Writing for a majority, Justice Scalia identified two features of the residual clause that "conspire" to render it "shapeless."[278] These two features functioned much like "independent conditions of application" that caused the statutory language to depart from the core-penumbra structure of more straightforward vagueness.[279] First, the residual clause "le[ft] grave uncertainty about how to estimate the risk posed by a crime," because it tethered that assessment "to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," without providing any "reliable way to choose between" the various "competing accounts" of the ordinary case.[280] Second, the residual clause gave inadequate guidance "about how much risk it takes for a crime to qualify as a violent felony" in the context of the "judge-imagined abstraction."[281]

Finally, the residual clause appeared to have a lurking problem of irresolvable contestability. By the time of *Johnson*, the Court had attempted to construe the residual clause on four prior occasions yet had been unable to arrive at a workable construction.[282] Relying on *Cohen*

[273] 495 U.S. 575 (1990).
[274] Id. at 600–02.
[275] Id. at 602.
[276] Shepard v. United States, 544 U.S. 13, 17 (2005) (citing *Taylor*, 495 U.S. at 602).
[277] *Johnson*, 576 U.S. at 596 (quoting Begay v. United States, 553 U.S. 137, 141 (2008)).
[278] Id. at 597, 602.
[279] See Waldron, supra note 42, at 518.
[280] *Johnson*, 576 U.S. at 597–98.
[281] Id. at 598.
[282] See Low & Johnson, supra note 4, at 2106 ("About all that could be said with confidence about these [prior four] cases was that two offenses were [within the residual clause] and two were [not].").

*Grocery*, Justice Scalia reasoned that "the fail[ure] to establish any generally applicable test" in these "'persistent efforts'" served as "evidence of vagueness."[283] As he had put it in his dissent in the last of those four cases, each new effort by the Court to apply the statute had been "less predictable and more arbitrary than the last" and had "demonstrated" that the residual clause was "too vague to yield 'an intelligible principle.'"[284]

## IV. TOWARDS MORE ROBUST VAGUENESS AVOIDANCE

Part III showed how the theory of vagueness avoidance is consistent with the Supreme Court's decisions involving unavoidable vagueness and explicit vagueness. It also described how the Court's recent trend toward implicit vagueness avoidance departs from that theory. This Part argues that the Court should restore a more robust version of explicit vagueness avoidance as its own canon of construction.

The basic defect with the trend toward implicit vagueness avoidance is that the Court's analysis in those cases is based on a conception of vagueness avoidance that is indistinguishable from any other type of constitutional avoidance.[285] In ordinary constitutional avoidance cases, the Court relies on constitutional avoidance to resolve *ambiguity*—the choice between two or more discrete alternative understandings of semantic meaning—and it tends to do so only after first attempting to cure that ambiguity using other ordinary tools of statutory interpretation.[286]

The upshot for cases involving vagueness concerns is that the Court merely tacks on those constitutional concerns as an extra justification for an already-adopted reading of a statute (as in *McDonnell v. United*

The prior cases were decided over a four-year period between 2007 and 2011. See James v. United States, 550 U.S. 192, 211–12 (2007) (holding that the residual clause covers attempted burglary counts); *Begay*, 553 U.S. at 139–40 (holding that the residual clause covers driving under the influence); Chambers v. United States, 555 U.S. 122, 123–24 (2009) (holding that the residual clause does not cover failure to report for penal confinement); Sykes v. United States, 564 U.S. 1, 3–4 (2011) (holding that the residual clause covers vehicular flight from law enforcement).

[283] *Johnson*, 576 U.S. at 598 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 91 (1921)); see id. ("[The] Court's repeated attempts and . . . failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy."); id. at 601–02 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.").

[284] *Sykes*, 564 U.S. at 34 (Scalia, J., dissenting) (citation omitted).

[285] See supra text accompanying notes 21–25.

[286] See supra text accompanying notes 122–23.

*States*),[287] relegates the vagueness concerns to dicta that is inessential to the reading adopted by the Court (as in *Van Buren v. United States*),[288] or does not even mention them at all.[289] The latter two options are increasingly likely given that at least two members of the Court have serious qualms about relying on constitutional avoidance canons triggered by ambiguity.[290] And the trend's logical endpoint is to render vagueness avoidance less useful as an analytical matter and less forceful as a doctrinal tool—much like the modern form of the rule of lenity.[291]

The practical effect is that the Court's recent decisions rejecting exceedingly broad lower court readings of federal penal statutes[292] do not deter lower courts from adopting similarly broad constructions in other contexts. Each of the Court's decisions is essentially ad hoc, providing no broadly applicable principles of construction.[293] The lack of controlling principles emboldens prosecutors to continue exploiting indeterminate language in the federal criminal code to "attach criminal penalties to a breathtaking amount of commonplace" conduct.[294] And some lower courts justify those broad applications at the interpretation stage on the basis of the "plain meaning" of the statute's literal text,[295] without any

[287] See supra text accompanying notes 229–41.

[288] See supra text accompanying notes 242–49.

[289] E.g., Ciminelli v. United States, 143 S. Ct. 1121, 1127–29 (2023); Kelly v. United States, 140 S. Ct. 1565, 1572–74 (2020); Yates v. United States, 574 U.S. 528, 539–49 (2015) (plurality opinion).

[290] See supra notes 253–56 and accompanying text.

[291] See supra text accompanying notes 22–26.

[292] See, e.g., Dubin v. United States, 143 S. Ct. 1557, 1563 (2023); Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021); *Kelly*, 140 S. Ct. at 1568–69; *Yates*, 574 U.S. at 539–47 (plurality opinion).

[293] See Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 45–49) (explaining how the Court's ad hoc approach to construing penal statutes "gives lower courts permission to adopt sweeping constructions of penal statutes").

[294] *Van Buren*, 141 S. Ct. at 1661; see also Johnson, Ad Hoc Constructions, supra note 26 (manuscript at 49–51) (explaining that the Court's ad hoc approach "invites broad theories of prosecution").

[295] E.g., United States v. Dawson, 64 F.4th 1227, 1235–37, 1239 (11th Cir. 2023) (adopting broad construction based on "plain meaning" as informed by dictionaries and rejecting lenity); United States v. Fischer, 64 F.4th 329, 3–36 (D.C. Cir. 2023) (adopting broad construction on basis of "unambiguous . . . ordinary or natural meaning" as informed by dictionaries); United States v. Taylor, 44 F.4th 779, 788 (8th Cir. 2022) (adopting broad construction based on "natural[]" meaning as informed by dictionaries); United States v. Lumbard, 706 F.3d 716, 722–23 (6th Cir. 2013) (adopting broad construction on basis of the statute's "ordinary and natural meaning" as informed by a dictionary (quoting In re Carter, 553 F.3d 979, 986 (6th Cir. 2009))); United States v. Desposito, 704 F.3d 221, 226–27 (2d Cir. 2013) (adopting broad construction based on "ordinary meaning" as informed by dictionaries); see also Johnson, Ad

real consideration of whether a plain meaning that is open-ended might pose vagueness concerns. Splits as to the scope of federal statutes thus routinely emerge from the federal courts of appeals, and the Supreme Court's correction of broad lower court readings of criminal statutes "has become nearly an annual event."[296]

Consider the Court's decision in *Dubin v. United States* from last Term.[297] The case concerned the scope of the federal aggravated identity theft statute, which increases the penalty for anyone who, "during and in relation to" the commission of an enumerated predicate felony, "knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person."[298]

The en banc Fifth Circuit adopted a broad construction of the indeterminate statutory term "uses" that captured any person who recites another's name while committing a predicate crime, regardless whether the person has authority to do so or whether doing so was instrumental to the commission of the predicate crime.[299] The Fifth Circuit based that broad reading on the "plain meaning of 'use,'" as reflected in dictionary definitions indicating that the term is essentially synonymous with "'to employ."[300] Because those definitions supplied "plain meaning," the court noted, the statutory analysis was "relatively straightforward."[301] There was no consideration of whether that "plain" reading might nonetheless pose vagueness concerns irreducible at the interpretation stage—or whether context clues might provide a basis for narrowly construing the term "use" to encompass only prototypical identity theft scenarios. The Fifth Circuit's holding in *Dubin* solidified a circuit split, prompting the Supreme Court to grant certiorari.

Hoc Constructions, supra note 26 (manuscript at 47) ("[T]he Court's consistent preference for *ad hoc* constructions [of penal statutes] likely yields a lower-court preference" for a "simple ordinary-meaning analysis" that leads to "more broad and literalistic constructions in the lower courts.").

[296] United States v. Dubin, 27 F.4th 1021, 1041 (5th Cir. 2022) (en banc) (Costa, J., dissenting) (providing examples), *vacated*, 143 S. Ct. 1557 (2023).

[297] 143 S. Ct. 1557 (2023).

[298] 18 U.S.C. § 1028A(a)(1) (emphasis added).

[299] *Dubin*, 27 F.4th at 1022 (en banc) (per curiam) (adopting rationale of panel opinion); see United States v. Dubin, 982 F.3d 318, 325–26 (5th Cir. 2020), *aff'd*, 27 F.4th 1021 (5th Cir. 2022) (en banc), *vacated*, 143 S. Ct 1557 (2023).

[300] *Dubin*, 982 F.3d at 325 (first citing Oxford Dictionary of English (3d ed. 2010); and then citing Black's Law Dictionary (10th ed. 2014)).

[301] Id. at 325.

Dubin's merits brief made several arguments in support of a narrow construction, including a version of vagueness avoidance.[302] And I submitted an amicus brief arguing for a narrow construction of the statute based on the theory of vagueness avoidance advanced in this Article.[303] The amicus brief noted that Congress had enacted the statute as part of the Identity Theft Penalty Enhancement Act[304] and had given the statute the title "Aggravated identity theft,"[305] strongly conveying a goal of increasing punishment when the unconsented use of another's identity is instrumental to the commission of a predicate crime.[306] The amicus brief argued that the Court should treat that "clearly identifiable legislative goal" as "establish[ing] the core of the term 'uses' in [the statute]," and that the Court should explicitly "employ vagueness avoidance to adopt a narrow construction of the term that captures only that core . . . while excising its indeterminate peripheries."[307]

During oral argument, four Justices raised vagueness concerns. Justice Sotomayor observed that "[v]agueness is a problem" that "permeates th[e] statute."[308] Justice Gorsuch referred to the possibility of relying on a "vagueness"-based "canon" when construing the statute.[309] He later repeatedly asked the government about the "vagueness problem" posed by the statutory text.[310] Justice Jackson voiced concern that the government's broad reading of the statute was "vague."[311] And Justice Kavanaugh noted that "the elements in the statute" were "vague,"

[302] Brief for Petitioner at 3, 37–42, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10) (arguing for a narrow construction to avoid constitutional vagueness concerns).

[303] Brief for Professor Joel S. Johnson as Amicus Curiae Supporting Petitioner at 3–16, *Dubin*, 143 S. Ct. 1557 (No. 22-10) (making a vagueness-avoidance argument based on an earlier draft of this Article).

[304] Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275, 118 Stat. 831 (2004).

[305] 18 U.S.C. § 1028A.

[306] Brief for Professor Joel S. Johnson as Amicus Curiae Supporting Petitioner at 15–16, *Dubin*, 143 S. Ct. 1557 (No. 22-10).

[307] Id. at 16. That approach comports with the faithful-agent theory because the labels Congress used strongly indicate a desire to increase the penalty for crimes involving identity theft. And excising the fuzzy outer reaches of the term "use"—which would encompass much conduct that bears little resemblance to paradigmatic identity theft—"promot[es]" a "[c]onstitutionally inspired . . . set of norms that have been sanctioned by a super-majority as higher law," Barrett, supra note 36, at 168, including fair notice, protection from arbitrary enforcement, and anti-delegation.

[308] Transcript of Oral Argument at 39, 42, *Dubin*, 143 S. Ct. 1557 (No. 22-10).

[309] Id. at 52.

[310] Id. at 67–68, 70–72.

[311] Id. at 62.

suggesting that "the title" of the statute was "a helpful clue" for "where to draw the line."[312]

In the end, the Court narrowly construed the statute. But it did not explicitly rely on vagueness avoidance when doing so. Writing for an eight-Justice majority, Justice Sotomayor construed the term "uses" and "in relation to" as applying only when "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal."[313] To justify that "targeted reading" confined to the "core" of identity theft, she relied on the statute's text and title, statutory context, and a descriptive canon of interpretation.[314] Only after justifying the narrow construction on those bases did she flag vagueness-like concerns presented by "the staggering breadth of the Government's reading."[315] She noted that the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute" and has "prudently avoided reading incongruous breadth into opaque language in criminal statutes" out of "concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed."[316] But she also explicitly diminished the significance of those concerns to the Court's holding, treating them as a "final clue" that would only factor in "[i]f more were needed" (beyond ordinary-meaning analysis) and making clear immediately thereafter that the Court was not holding that avoidance of those concerns was a "dispositive" basis for the narrow construction.[317]

Justice Gorsuch did not join the majority opinion in *Dubin*. He wrote an opinion concurring in the judgment, taking the view that the statute's vagueness issues could not be avoided through judicial construction.[318] In his view, the statute's text was open to "an uncountable number of ways in which an individual could 'us[e]' the 'means of identification' of another to commit fraud" and "no obvious neutral rule exist[ed] to

[312] Id. at 80.
[313] *Dubin*, 143 S. Ct. at 1563.
[314] Id. at 1564–67, 1569–72.
[315] Id. at 1572.
[316] Id. (alteration in original) (internal quotation marks omitted) (citations omitted).
[317] Id. at 1572–73.
[318] Id. at 1575–77 (Gorsuch, J., concurring).

separate those 'uses' that violate [the statute] from others that do not."[319] He thus concluded that the aggravated identity theft statute was "not just an 'ambiguous' statute," but "a vague statute" that did "'not satisfactorily define the proscribed conduct' at all."[320] And he did not think the majority's narrowing construction provided a cure, predicting that "the issues that have long plagued lower courts w[ould] persist" and "someday . . . find their way back" to the Court.[321]

It may be that Justice Gorsuch simply viewed the aggravated identity theft statute as a rare instance of complex vagueness for which vagueness avoidance is inadequate.[322] But it is also possible that he sees the act of engaging in vagueness avoidance as illegitimate judicial crime-making. Once a court determines that statutory text is vague, he may think, all it may do is void the statute and send the issue back to the legislature for re-drafting.[323] That view would seem to align with Justice Gorsuch's skepticism of the severability doctrine as a form of judicial overreach,[324] to the extent vagueness avoidance can be understood as a form of severance.[325]

Neither *Dubin* opinion amounted to explicit vagueness avoidance. The majority's rationale is another recent example of implicit vagueness avoidance. And Justice Gorsuch's rationale is an example of unavoidable vagueness (and perhaps also a rejection of vagueness avoidance altogether). Ultimately, *Dubin* was a missed opportunity to recognize

[319] Id. at 1577; see id. at 1574 ("Depending on how you squint your eyes, you can stretch (or shrink) [the statute's] meaning to convict (or exonerate) just about anyone. Doubtless, creative prosecutors and receptive judges can do the same.").

[320] Id. at 1577 (quoting Decker, supra note 125, at 260–61).

[321] Id.

[322] See supra text accompanying notes 192–98.

[323] In another concurring opinion issued the same Term as *Dubin*, Justice Gorsuch took the view that the honest-services fraud statute was vague and could not be cured by a limiting construction, explaining that "[t]he Legislature must identify the conduct it wishes to prohibit" in a way that is "knowable in advance—not a lesson to be learned by individuals only when . . . the judge debuts a novel charging instruction." Percoco v. United States, 143 S. Ct. 1130, 1139, 1142 (2023) (Gorsuch, J., concurring in the judgment); see id. at 1142 (urging the Court to "decline further invitations to invent rather than interpret th[e] law").

[324] See, e.g., Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., concurring in part and dissenting in part) (expressing "doubt[]" as to the Court's "authority to rewrite the law" using the "modern severability doctrine," in part because of the "separation of powers questions" it raises).

[325] See supra text accompanying notes 143–49.

vagueness avoidance as a distinct canon of construction and to justify a narrow construction using that canon.[326]

In future cases, the Court should take an explicit vagueness-avoidance approach. That requires disentangling vagueness avoidance from ordinary constitutional avoidance. As already explained, unlike ordinary constitutional avoidance, vagueness avoidance is not triggered by mere ambiguity—but by various combinations of vagueness, contestability, and perhaps even breadth.[327] And those problems of indeterminacy typically cannot be resolved simply through the use of ordinary tools of interpretation that recover semantic meaning; they call instead for *construction*—the act of crafting a supplemental rule that determines the precise limits of the legal effect of the indeterminate language.[328]

Importantly, the Court need not defer the process of *construction* until after it completes the interpretive work of determining semantic meaning. Recognition of the interpretation-construction distinction does not entail a two-step sequence of engaging in interpretation before engaging in construction.[329] As soon as the Court determines that statutory language poses actual vagueness concerns,[330] it may justifiably begin the process of construction before or in conjunction with the process of interpretation.[331] In these circumstances, vagueness avoidance as a rule of construction should "structure legal interpretation."[332] Reliance on vagueness avoidance in that manner could, for example, assist the Court in choosing between which of two competing canons of *interpretation* should be applied to the relevant statutory language.

This conception of vagueness avoidance offers the Court an escape from the recurring pattern in which it corrects the sweeping readings of penal statutes adopted by lower courts on the basis of a vague or

[326] See supra text accompanying notes 285–96.

[327] See supra text accompanying notes 44–45, 74–78.

[328] See supra text accompanying notes 95–97.

[329] See supra text accompanying notes 103–05.

[330] In the event that some mix of ambiguity, contestability, and perhaps even breadth raises potential vagueness concerns, see supra text accompanying notes 151–52, it may be more appropriate to relegate vagueness avoidance to a fail-safe function that is applicable only after other tools have been exhausted. Cf. Nelson, supra note 112, at 335–36 (arguing that the constitutional questions canon should be relegated to a fail-safe function).

[331] Cf. William Baude & Ryan D. Doerfler, The (Not So) Plain Meaning Rule, 84 U. Chi. L. Rev. 539, 543–44, 549 (2017) (arguing that "the relevance of information"—such as legislative history, statutory titles, and substantive canons—should not turn on whether text is perceived to be "plain" or "clear").

[332] Klass, supra note 103, at 22.

indeterminate term's literal "plain meaning."[333] Following that approach would not only resolve statutory questions in Supreme Court cases such as *Dubin*, but it would also provide a replicable framework for lower courts addressing other penal statutes containing indeterminate language. It would make clear that, in such cases, wooden "plain meaning" statutory analysis is incomplete—that construction is necessary to address vagueness concerns and that the process of construction may require looking to materials beyond the statutory text.[334]

Consistent and explicit application of vagueness avoidance in this manner may also change how the government approaches federal penal statutes. The Justice Department generally advocates for broad readings of indeterminate federal criminal laws,[335] often with a promise not to bring unexpected prosecutions. In *Van Buren*, for instance, the government argued that its expansive reading of a provision of the CFAA did not pose any fair notice or arbitrary enforcement concerns, because the Department's charging policy dissuaded its lawyers from bringing "real-world prosecution[s]" based on the outer reaches of the Act.[336] Similarly, in *Dubin*, the government took the position that "prosecutors w[ould] act responsibly" under a "sweeping reading" of the statute.[337]

As I have previously noted, "[p]romises like that are empty."[338] In fact, the charging policy cited in *Van Buren* merely stated that a federal prosecution under the CFAA "*may* not be warranted" in the absence of certain "factors."[339] Such discretionary language (which can be changed at any point) does not meaningfully restrain prosecutorial authority.[340]

[333] See supra text accompanying notes 31–32.

[334] Cf. Baude & Doerfler, supra note 331, at 539, 543–44, 549 (criticizing the use of "plain meaning" analysis as a way to restrict consideration of evidence of a statute's meaning).

[335] See, e.g., Brief for the United States at 20–26, McDonnell v. United States, 579 U.S. 550 (2016) (No. 15-474) (arguing for a broad reading of "official act" under the federal bribery statute).

[336] Brief for the United States at 42, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783).

[337] Dubin v. United States, 143 S. Ct. 1557, 1573 (2023).

[338] Johnson, Federal-State, supra note 4, at 1616.

[339] Memorandum from the Att'y Gen. to the U.S. Att'ys & Assistant Att'y Gens. for the Crim. & Nat'l Sec. Divs. 1, 4–5 (Sept. 11, 2014) (emphasis added), https://www.justice.gov/criminal/criminal-ccips/file/904941/dl?inline [https://perma.cc/EZH9-S7RP].

[340] Discretionary charging policies do not prevent prosecutors in lower federal courts to argue for broad readings of federal criminal statutes. Before *Van Buren v. United States*, for example, the government repeatedly argued for a reading of the CFAA so broad that it encompassed any internet user who violated a website's written terms of service. See, e.g., Indictment at 2, 11, United States v. Swartz, No. 11-cr-10260 (D. Mass. dismissed Jan. 14,

Even if it did, it would not resolve vagueness concerns. The Supreme Court has repeatedly made clear that an overly broad statutory construction cannot be justified "on the assumption that the Government will 'use it responsibly.'"[341] Consistent and explicit rejection of those readings on a vagueness-avoidance basis would encourage charging policies that acknowledge hard limits on the scope of federal criminal laws.

## CONCLUSION

Vagueness avoidance is a powerful tool of construction for constraining the reach of penal statutes.

This Article has articulated a theory of vagueness avoidance that is distinct from ordinary constitutional avoidance. The difference flows from the distinction between ambiguity and vagueness and its legal process implications.

Vagueness avoidance is triggered by the presence of constitutional vagueness concerns—which arise when a penal statute contains language so indeterminate that it does not supply a sufficient textual basis to define the standard of conduct, thereby effectively delegating the legislative task of crime definition. Courts can usually defuse that delegation threat by engaging in vagueness avoidance. Because such language typically has some practically identifiable core, courts may legitimately craft a judicial construction of the text that captures only that core while excising the indeterminate peripheries.

In doing so, a court does not offend the principle requiring the legislature to define crime and fix punishments. In such circumstances, the act of constraining the legal effect of the vague term to its core often functions as a form of severance—declining to apply the statute to the case before it while recognizing that some portion of the statute remains in force and constitutionally valid.

Engaging in vagueness avoidance in this manner also promotes the legality principle in criminal law by preventing retroactive crime definition through judicial innovation. And it is consistent with the

2013), ECF No. 2; United States v. Lowson, No. 10-cr-00144, 2010 WL 9552416, at *7 (D.N.J. Oct. 12, 2010); United States v. Drew, 259 F.R.D. 449, 467 (C.D. Cal. 2009).

[341] Marinello v. United States, 138 S. Ct. 1101, 1109 (2018) (quoting McDonnell v. United States, 579 U.S. 550, 576 (2016)).

modern methodological commitment to implementing legislative will through construction.

This conception of vagueness avoidance is rooted in Supreme Court case law. The Court has traditionally been explicit about taking that approach in cases involving federal penal statutes with indeterminate language. In a recent line of cases, however, the Court has retreated from explicit vagueness avoidance. In these cases of *implicit* vagueness avoidance, the Court still ultimately adopts a narrowing construction of an indeterminate statutory term, but it purports to justify that result on the basis of *interpretation* that determines semantic meaning, rather than on expressly relying on vagueness avoidance. That recent trend is unfortunate. It treats vagueness avoidance as indistinguishable from ordinary constitutional avoidance and worthy of little weight in the process of construction.

The Court should change course by disentangling vagueness avoidance from ordinary constitutional avoidance, making clear that vagueness avoidance is its own robust rule of construction. And when applying vagueness avoidance, the Court should be explicit, where possible, about identifying the core-penumbra framework exhibited by the vague term, looking to clues from the text or other sources for assistance in ascertaining the practically identifiable core. Once that core has been ascertained, the Court should expressly excise the indeterminate penumbra.

Adherence to that approach would provide a ready tool of construction that can be used to reduce the breadth and imprecision of criminal laws.