Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine

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For over a hundred years, the Supreme Court has struggled to articulate a coherent test for analyzing constitutional challenges based on vagueness. The current formulation of the vagueness test is rooted in due process principles and calls for invalidation of laws when they either (1) fail to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" by the law, or (2) encourage "arbitrary arrests and convictions." Certain aspects of this test suggest that the separation of powers is relevant to the analysis. Nevertheless, it is currently unclear what role this constitutional protection plays.

Recent Supreme Court decisions highlight the lack of guidance that the current due process test provides. This Comment "clarifies" vagueness by analyzing the constitutional purposes of the doctrine and proposing a framework that produces more consistent and predictable results. In particular, this Comment analyzes how due process and separation-of-powers considerations should inform each prong of the modern vagueness test. Borrowing from elements of originalist as well as legal-realist scholarship, the proposed framework, entitled the "Structure and Rights Approach," sets forth a test that reinforces the symbolic importance of both constitutional protections while strengthening the practical application of the test.

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INTRODUCTION

In 2010, the Supreme Court resolved two cases involving the vagueness doctrine. This doctrine permits the Court to strike down legislation that violates due process because it either (1) fails to give "a person of ordinary intelligence fair notice of what is prohibited" (the "fair notice" prong), or (2) is "so standardless that it authorizes or encourages seriously discriminatory enforcement" (the "arbitrary enforcement" prong).[1] In both cases the Court applied this due process test and refrained from invalidating the particular legislation in question. Nevertheless, the two opinions portrayed dramatically different visions of the doctrine, highlighting the inconsistent nature of the Supreme Court's jurisprudence in this area.

In *Holder v Humanitarian Law Project*,[2] decided on June 21, 2010, the Court reversed a lower court decision that held the term "service" in the Intelligence Reform and Terrorism Prevention Act of 2004[3] (IRTPA) was unconstitutionally vague.[4] The Court approached the doctrine narrowly, using as-applied review[5] and focusing only on the fair notice prong of the vagueness test.[6] However, on June 24, 2010, just three days after the *Humanitarian Law Project* decision, the Court painted a very different picture of

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1 *Federal Communications Commission v Fox Television Stations, Inc*, 567 US 239, 253 (2012), quoting *United States v Williams*, 553 US 285, 304 (2008).

2 561 US 1 (2010).

3 Pub L No 108-458, 118 Stat 3638. For the "service" provision, see 18 USC § 2339A(b)(1).

4 *Humanitarian Law Project*, 561 US at 40.

5 For a discussion of the distinction between "as-applied" and "facial" review, see text accompanying notes 24–29.

6 *Humanitarian Law Project*, 561 US at 20.

the doctrine. In *Skilling v United States*,[7] the Court facially reviewed the constitutionality of the federal honest-services statute,[8] analyzing the statute under both prongs of the vagueness test. It ultimately concluded that this statute too was constitutional.[9]

These two cases reveal the foundational uncertainty within the modern vagueness doctrine while also illustrating its consistencies. In terms of consistency, both cases embody modern courts' general acceptance of the possibility for facial review in vagueness challenges. And though the Court used the modern vagueness doctrine's two prongs inconsistently, when read together they demonstrate the doctrine's emphasis on due process as its constitutional justification. At the same time, these two cases, decided within a three-day window, also demonstrate the problems with the modern doctrine's due process foundation. The Court essentially applied two different vagueness doctrines. Both were apparently justified by due process but included an inevitable separation-of-powers influence that the Court did not explicitly recognize. This uncertainty as to the doctrine's constitutional foundation has created ambiguity regarding the doctrine's scope that is emblematic of the Court's guidance on the doctrine generally. Cases such as *Humanitarian Law Project* and *Skilling* have led commentators to liken the doctrine to the "I know it when I see it" test,[10] a process that begins with a conclusion and works backward to find support.[11] Given the lack of clear guidance from the Supreme Court, it is not surprising that lower courts struggle to apply the doctrine.[12]

Many scholars have suggested revisions to make the vagueness test more consistent and predictable.[13] Yet none have

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7 561 US 358 (2010).

8 18 USC § 1346.

9 *Skilling*, 561 US at 412–13. The honest-services statute proscribes fraudulent deprivations of "the intangible right of honest services." 18 USC § 1346.

10 See John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 Denver U L Rev 241, 243 (2002), citing *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart concurring) (using the phrase "I know it when I see it" as applied to the definition of hard-core pornography).

11 Decker, 80 Denver U L Rev at 243 (cited in note 10).

12 See Part III.D for a discussion of *Guerrero v Whitaker*, 705 F3d 1031 (9th Cir 2013), a case in which the Ninth Circuit unknowingly misapplied Supreme Court precedent due to the convoluted nature of the vagueness doctrine.

13 See, for example, Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 Am J Crim L 279, 313 (2003) (suggesting that the arbitrary enforcement prong "be modified to bar only statutes that, in light of the circumstances surrounding their adoption, encourage arbitrary or discriminatory enforcement"); Cristina

analyzed how the two prongs of the current test connect to the doctrine's constitutional purpose. The Supreme Court currently claims the purpose of the vagueness doctrine is due process,[14] which is primarily concerned with treating individuals fairly. Nevertheless, the Court has occasionally referenced the need to constrain law enforcement,[15] which is a separation-of-powers issue.[16] The Court, however, does not explicitly mention the separation of powers in its analysis. By rhetorically invoking due process but implicitly integrating elements of the separation of powers, the Supreme Court conflated two different constitutional purposes in its purportedly unitary due process test. Clarifying the doctrine's constitutional roots and evaluating how they should inform the vagueness analysis is important for understanding how the vagueness doctrine should be applied. The goal of this Comment is to do just that.

More specifically, this Comment analyzes how due process and the separation of powers influence the vagueness doctrine and suggests a framework that clarifies its constitutional purposes. The goal of the proposed framework is to provide a more consistent, objective, and accessible approach for lower courts. Given the exceedingly (and ironically) vague and convoluted nature of the current vagueness test, any clarification will help guide courts in determining when and how to apply the doctrine.

Before diving into the crux of this Comment, it is helpful to define a few terms used throughout. This Comment uses the term "invalidate" to refer to when the Supreme Court strikes down legislation it deems unconstitutional regardless of whether the Court invalidates the entire statute, a provision within the statute, or even a single phrase within a provision.[17] If a law is invalidated, it is not applied in any future case. Invalidation only

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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, 447–49 (2015) (suggesting a merger of the fair notice and arbitrary enforcement prongs and limiting the test to as-applied review); Robert Batey, *Vagueness and the Construction of Criminal Statutes–Balancing Acts*, 5 Va J Soc Pol & L 1, 25–26 (1997) (suggesting the addition of a balancing test to the fair notice and arbitrary enforcement prongs).

14 See *Sessions v Dimaya*, 138 S Ct 1204, 1212 (2018).

15 See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 529–42 (1935); *Cline v Frink Dairy Co*, 274 US 445, 457–58 (1927); *United States v L. Cohen Grocery Co*, 255 US 81, 90–91 (1921). See also Goldsmith, 30 Am J Crim L at 284–85 (cited in note 13).

16 See also text accompanying note 74.

17 See Note, *The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U Pa L Rev 67, 86 (1960). The law of severance, which determines whether an enactment will be invalidated in whole or in part, is beyond the scope of this Comment.

occurs when the Supreme Court performs "facial" review. That is, when the Court reviews a law to determine whether it is "totally invalid and incapable of any constitutional application."[18] Unlike a facial challenge, which allows an attack on the enactment itself, an "as applied" challenge attacks an application of the enactment to a particular defendant.[19] If an "as applied" challenge succeeds, the enactment will simply not be applied to that particular defendant.

As *Humanitarian Law Project* and *Skilling* demonstrate, the Court has not been consistent when selecting what type of review applies in vagueness cases. Even so, courts tend to apply facial review in this context. For this reason, this Comment focuses on facial review as the prevailing modern standard used by courts.[20] The proposed framework, however, suggests the type of review should depend on which constitutional protection (due process or the separation of powers) is in play.[21]

Part I of this Comment evaluates the constitutional purpose of the vagueness doctrine and argues that the vagueness test should clarify the due process and separation-of-powers components of the analysis. Part I.A looks to the current application of the doctrine in two seminal vagueness cases, *Papachristou v City of Jacksonville*[22] and *Sessions v Dimaya*,[23] to show the problematic nature of the current test. Part I.B describes the conceptual and practical differences between due process and separation of powers in order to highlight why this distinction matters. Part I.C analyzes early American cases and writings, revealing that vagueness was originally understood to violate *both* due process and the separation of powers. This Section argues that due process grew out of the separation of powers, which explains the overlapping nature of these concepts in current cases, as well as the modern Court's eventual favoring of due process in the current doctrine. Part I.D then compares *Papachristou* to early American cases and commentaries, revealing that the arbitrary enforcement prong of the current test may actually be a "hybrid" protection implicating

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18 Decker, 80 Denver U L Rev at 275 (cited in note 10).

19 Id at 280.

20 For a discussion of the distinction between as-applied and facial review in the vagueness context, see Lockwood, 65 Syracuse L Rev at 433–47 (cited in note 13).

21 See Part III.

22 405 US 156 (1972).

23 138 S Ct 1204 (2018).

both due process and the separation of powers. This Section argues the current formulation of the test confuses due process and separation-of-powers elements and thus needs to be clarified.

Part II evaluates the practical issue of when and how to invalidate a vague law—what this Comment refers to as the "how vague is too vague" question. This question is closely related to whether a law should be reviewed facially or as applied, as only facial review leads to invalidation. The Court's precedent provides two conflicting approaches to determining "how vague is too vague." These approaches provide the basis for a recurring debate among certain members of the Court. Articulating the minority approach, Justice Clarence Thomas has maintained that invalidation is inappropriate unless a law is vague in all applications.[24] Justice Thomas explains that facial review should be applied only when asking whether there is an "unmistakable core" of behavior prohibited by the statute.[25] In all other circumstances, Justice Thomas believes that the Court should take a case-by-case approach, reviewing whether the statute was inappropriately applied to a defendant (as-applied review).[26] Articulating the majority approach, Justice Antonin Scalia, joined by the more liberal justices, rejected the idea that facial review is appropriate only when the law is vague in all applications.[27] Instead of an "unmistakable core" dictating when facial review is appropriate, Justice Scalia reviewed all vagueness issues on their face.[28] This broad application of facial review is how the vagueness doctrine is currently applied in the majority of cases.[29]

Part III proposes a three-step framework for evaluating vagueness, described as the "Structure and Rights Approach" for

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24 *City of Chicago v Morales*, 527 US 41, 112 (1999) (Thomas dissenting).

25 *Dimaya*, 138 S Ct at 1250, 1252 (Thomas dissenting) ("[I]f facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague, '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an "unmistakable core" that a reasonable person would know is forbidden by the law.'") (quotation marks omitted), quoting *Morales*, 527 US at 112 (Thomas dissenting). For an elaboration on what Justice Thomas considers an "unmistakable core," see Parts II.A and III.A.

26 *Dimaya*, 138 S Ct at 1250, 1252.

27 *Johnson v United States*, 135 S Ct 2551, 2561 (2015).

28 Id ("If we hold a statute to be vague, it is vague in all its applications (and never mind the reality).").

29 As previously mentioned, the Court has not been consistent in articulating a rationale for why facial review is appropriate in this setting. For a discussion of the different rationales for facial review, see Lockwood, 65 Syracuse L Rev at 433–47 (cited in note 13).

the way in which it distinguishes between the types of constitutional violations. "Structure" represents the separation-of-powers element as it arises from the structure of the Constitution. "Rights" represents the due process element as it arises from the Fifth Amendment. Borrowing elements from originalist analysis as well as from legal realist scholars such as Justice Oliver Wendell Holmes Jr, this test attempts to both accommodate the symbolic value of these constitutional protections and provide a workable framework for taking into account the imperfections of judges. More specifically, the approach addresses vagueness from a practical perspective, attempting to improve the current doctrine but by no means presenting a flawless framework. Rather, the test accounts for imperfection on the part of judges by including a "back stop" in Step Three for laws that may not obviously violate due process or separation of powers but result in arbitrary enforcement nonetheless. Part III.D then takes *Guerrero v Whitaker*,[30] a recently decided Ninth Circuit case, and applies the Structure and Rights Approach to its facts to show how the proposed framework clarifies the doctrine.

I. LOCATING THE SOURCE OF THE VAGUENESS DOCTRINE: DUE PROCESS, SEPARATION OF POWERS, OR BOTH?

A. The Current Vagueness Approach: *Papachristou* and *Dimaya*

This Comment focuses on two prominent Supreme Court decisions as proxies for evaluating the vagueness doctrine. The first case, *Papachristou*, is a landmark decision that provides an example of how the Court applies the doctrine. The second case, *Dimaya* (decided over four decades later), is the Court's most recent ruling applying the vagueness doctrine and highlights the need to rethink the vagueness framework. These opinions further illustrate the modern vagueness doctrine's essential "due process test" character, as neither of these opinions emphasizes a separation-of-powers justification. Rather, the Supreme Court applies the due process test by focusing on (1) a failure to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,"[31] and (2) the encouragement

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[30] 908 F3d 541 (9th Cir 2018).

[31] *Papachristou*, 405 US at 162, quoting *United States v Harriss*, 347 US 612, 617 (1954).

of "arbitrary and erratic arrests and convictions."[32] These factors are known as the fair notice and arbitrary enforcement prongs, and a statute need only meet one to be unconstitutionally vague under the modern test.[33] Although prior versions of the test focused more on fair notice, the Court has come to rely more heavily on arbitrary enforcement.[34] As *Papachristou* and *Dimaya* highlight, the Court has failed to outline sufficient guidelines for application of the vagueness doctrine, causing it to become as imprecise as the laws it seeks to invalidate.[35] The lack of coherent guidance results from the Supreme Court's misattribution of the constitutional purpose for the vagueness doctrine to due process alone. Until the Court explicitly recognizes the role of the separation of powers and integrates that role into the vagueness test, the doctrine will remain confused.

Papachristou was the first time the Supreme Court cited arbitrary enforcement as a prominent component of the vagueness analysis.[36] The case concerned a vagrancy ordinance in Jacksonville, Florida, which allowed the arrest of individuals for behaviors such as "[n]ightwalking," "loafing," "wandering or strolling . . . without any lawful purpose or object," and "habitually . . . frequenting . . . places where alcoholic beverages are sold

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[32] *Papachristou*, 405 US at 162, citing *Thornhill v Alabama*, 310 US 88 (1940) and *Herndon v Lowry*, 301 US 242 (1937).

[33] See Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 Cardozo Pub L Pol & Ethics J 255, 257–58 (2010); Goldsmith, 30 Am J Crim L at 288, 290 (cited in note 13). See also, for example, *Nova Records, Inc v Sendak*, 706 F2d 782, 789 (7th Cir 1983).

[34] See Goldsmith, 30 Am J Crim L at 288–89 (cited in note 13) (explaining the rise, and eventual preeminence, of the arbitrary enforcement prong); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum L Rev 551, 560–61 (1997) (arguing that the rise in the use of the arbitrary enforcement prong has limited the effectiveness of modern public-order laws); *Kolender v Lawson*, 461 US 352, 358 (1983) (describing that the more important aspect of the doctrine "is not actual notice, but . . . the requirement that the legislature establish minimal guidelines to govern law enforcement"), quoting *Smith v Goguen*, 415 US 566, 574 (1974).

[35] See *Winters v New York*, 333 US 507, 524 (1948) (Frankfurter dissenting) (describing unconstitutional indefiniteness as "itself an indefinite concept"); Mark Kelman, *Interpretative Construction in the Substantive Criminal Law*, 33 Stan L Rev 591, 660 (1981) (noting that judicial review of vagueness is administered "in a very un-rule-like fashion"); Note, 109 U Pa L Rev at 70–71 (cited in note 17) (describing vagueness decisions as habitually lacking informed reasoning).

[36] *Papachristou*, 405 US at 162. See also Goldsmith, 30 Am J Crim L at 288 (cited in note 13). Some scholars contend that the arbitrary enforcement prong was merely "implicit in *Papachristou* and made apparent in subsequent cases." Livingston, 97 Colum L Rev at 604 (cited in note 34).

or served."[37] Performing a facial review of the ordinance, the Court explained that the legislature had cast a net "so all-inclusive and generalized" that it enabled "men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[38] At any given time, a police officer could find any person guilty of at least some behavior described in the statute. Because of this "unfettered discretion" in determining whether an individual was in violation of the law, the ordinance created a regime in which poor people could stand on a public sidewalk only at the whim of a police officer.[39] If applied literally, the prohibition on "'frequenting . . . places where alcoholic beverages are sold or served' would [ ] embrace many members of golf clubs and city clubs," who were likely not being targeted.[40] Because the ordinance was not applied equally to residents of the city, and likely never would be, a unanimous Court struck down the ordinance.[41] The opinion denounced "unfettered discretion"; however, the Court failed to provide a framework for determining how much discretion police should be afforded.[42]

While the Court mentioned the notice prong of the due process test, its reasoning rested primarily on arbitrary enforcement.[43] The formal and shallow nature of the notice requirement may explain this result. For one, the well-settled principle that ignorance of the law is no excuse for violation of the law means that *actual* notice is not required under due process; instead, the court asks whether "a person of ordinary intelligence" would have

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37 *Papachristou*, 405 US at 163–64.

38 Id at 166, quoting *Winters v New York*, 333 US 507, 540 (Frankfurter dissenting). Although rhetorically the Court rests on a due process analysis, this quote shows how, conceptually, the separation of powers sneaks into the reasoning. As will be explained in the next Section, the separation of powers revolves around the need for the legislature to provide clear enforcement guidelines. If the legislature enacts a law that is too broad, the executive and judiciary are left to define what the law actually means, potentially violating the separation of powers. See Part II.B. For more information about how the separation of powers sneaks into the Court's analysis, see text accompanying note 122.

39 See *Papachristou*, 405 US at 168, 170.

40 Id at 164.

41 *Papachristou*, 405 US at 171. Notice how the Court's discussion in *Papachristou* does not focus on the conduct of the actual defendants in the case. Rather, it speaks generally to the issue of determining how to apply the law and the potential for abuse.

42 Id at 168.

43 More than two-thirds of the opinion is dedicated to a discussion of arbitrary enforcement. See id at 164–71.

notice.[44] Further, fair notice does not require criminal statutes to be precise on their face. Rather, judicial construction can clarify facial uncertainty, therefore requiring "a person of ordinary intelligence" to mine legal precedent if they want to anticipate a court's decision.[45] Because of these qualities of the notice requirement, courts interpreting the vagueness doctrine may have come to lean more heavily on arbitrary enforcement.

Papachristou shows how the modern Supreme Court thinks about vagueness: it leans on due process. *Dimaya*, on the other hand, highlights the difficulty of applying the vagueness doctrine framework. The case involved the Immigration and Nationality Act[46] (INA), which rendered deportable "any alien convicted of an 'aggravated felony.'"[47] Performing a facial review, the Supreme Court took issue with a "residual clause" within the INA's definition of "aggravated felony," meant as a catchall for any felony not specifically listed in the statute. The clause covered any offense that, "by its nature, involve[d] a substantial risk that physical force . . . may be used" in the commission of the offense.[48] The question presented was whether the INA's residual clause reached defendant Dimaya's two residential burglary convictions.[49] In a series of earlier cases, the Supreme Court adopted the "categorical approach" in evaluating this residual clause, an approach that requires courts to consider the "ordinary case" of a category of crimes, rather than looking to the actual facts.[50] In *Dimaya*, the Court's task was to determine whether the ordinary case of residential burglary "by its nature" involved a "substantial risk [of] physical force."[51] Before answering this question, however, the Supreme Court facially reviewed the residual clause and invalidated it.[52]

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44 John Calvin Jeffries Jr, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 208–09 (1985).

45 See *Kolender*, 461 US at 355 ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."), quoting *Village of Hoffman Estates v Flipside, Hoffman Estates, Inc*, 455 US 489, 494 n 5 (1982).

46 Pub L No 82-414, 66 Stat 163 (1952), codified as amended at 8 USC § 1101 et seq.

47 *Dimaya*, 138 S Ct at 1210, citing 8 USC § 1227(a)(2)(A)(iii).

48 18 USC § 16(b).

49 *Dimaya*, 138 S Ct at 1211.

50 See id, citing *Leocal v Ashcroft*, 543 US 1, 7 (2004).

51 *Dimaya*, 138 S Ct at 1211, citing *James v United States*, 550 US 192, 208 (2007) and 8 USC § 16(b).

52 *Dimaya*, 138 S Ct at 1213.

Extending a prior decision in which the Court invalidated a similarly worded residual clause in the Armed Criminal Career Act of 1984[53] (ACCA), the Court concluded that two aspects of the INA's residual clause "conspire to make it unconstitutionally vague."[54] First, the residual clause created "uncertainty about how to estimate the risk posed by a crime."[55] This uncertainty underscores the difficulty in determining an imagined "ordinary case" rather than looking to real-world facts: How does one know what the ordinary case of a crime is? Does the ordinary case of witness tampering involve bribing the witness or threatening violence? Should a court limit its inquiry to the ordinary case in a particular city or state as opposed to the ordinary case on a nationwide basis? The residual clause, the Court concluded, offered "no reliable way" to choose between competing accounts.[56]

Second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent felony."[57] Many criminal statutes require courts to apply a "substantial risk" standard to real-world facts. The problem with the INA's residual clause, however, was the application of this standard to a "judge-imagined abstraction" of the ordinary case of a crime, effectively layering two aspects of uncertainty.[58] Neither the "substantial risk" standard nor the "judge-imagined abstraction" principle would be unconstitutional alone. Nevertheless, the Court held that, by combining uncertainty as to how to measure risk with uncertainty as to how much risk it takes to qualify as a

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53 Pub L No 98-473, 98 Stat 2185, codified at 18 USC § 924(e). See *Johnson v United States*, 135 S Ct 2551, 2557 (2015); *Dimaya*, 138 S Ct at 1213 (explaining that applying the holding from *Johnson* to 8 USC § 16(b) was "straightforward").

54 *Dimaya*, 138 S Ct at 1213, quoting *Johnson*, 135 S Ct at 2557–58.

55 *Dimaya*, 138 S Ct at 1213.

56 Id at 1214, quoting *Johnson*, 135 S Ct at 2558.

57 *Dimaya*, 138 S Ct at 1214, quoting *Johnson*, 135 S Ct at 2558.

58 See *Dimaya*, 138 S Ct at 1216, quoting *Johnson*, 135 S Ct at 2558. Take, for example, burglary, which requires entering into a home with the intent to commit a crime. "Entering" may involve forcible entry or not, "crime" may mean theft or murder, and all of this may happen when the "home" is occupied or not. If the "ordinary case" of burglary involves nonforcible entry into a home while someone is currently home with intent to steal jewelry, it is unclear whether this involves a "substantial risk that physical force against the person or property of another may be used." 8 USC § 16(b). In this ordinary case, is the homeowner awake? Does the burglar bring a weapon? All of those questions are answered in real world cases, but they remain unresolved in analyzing the "ordinary case," making it impossible to answer the question of whether the "ordinary case" involves a "substantial risk."

violent felony, the residual clause "produce[d] . . . more unpredictability and arbitrariness than the Due Process Clause tolerates."[59] The Court concluded that the combination of these layers of uncertainty violated both the fair notice and arbitrary enforcement prongs of the modern vagueness doctrine test.[60] The Court did not, however, elaborate on how the residual clause connects to each prong, creating ambiguity for lower courts attempting to apply the test.

In his *Dimaya* dissent, Justice Thomas questioned the Court's use of the vagueness doctrine. As a notorious opponent of substantive due process, Justice Thomas suggested it was not a coincidence that the vagueness doctrine developed concurrently with the idea of due process as a constitutional protection.[61] Referencing both substantive due process and the vagueness doctrine, Justice Thomas described the Court's "bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process."[62] If the vagueness doctrine had any roots in the Constitution, which he doubted, Justice Thomas posited that they would be in the separation of powers rather than due process.[63] He explained, "I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it 'would simply be making up a law—that is, exercising legislative power.'"[64]

Justice Thomas also questioned the practice of facial review. "[I]f the vagueness doctrine has any basis in . . . the Due Process Clause," Justice Thomas suggested "it must be limited to case-by-case challenges to particular applications of a statute."[65] The "case-by-case" approach is essentially synonymous with as-applied review. This view derives from Justice Thomas's belief

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59 *Dimaya*, 138 S Ct at 1216, quoting *Johnson*, 135 S Ct at 2558. While the Court's holding was limited to the INA's residual clause, the question of whether other laws that possess the double uncertainty of a "serious potential risk" standard and "judge-imagined abstraction" principle are unconstitutionally vague remains open. The Ninth Circuit recently suggested that, although the Supreme Court had yet to extend the principle past the residual clause context, the use of the categorical approach as applied to California's felony murder rule was plausibly unconstitutionally vague. See *Henry v Spearman*, 899 F3d 703, 708, 710–11 (9th Cir 2018).

60 *Dimaya*, 138 S Ct at 1223.

61 Id at 1244 (Thomas dissenting).

62 Id.

63 Id at 1248–50 ("[P]erhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically the doctrine of nondelegation.").

64 *Dimaya*, 138 S Ct at 1249 (Thomas dissenting), quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va L Rev 327, 339 (2002).

65 *Dimaya*, 138 S Ct at 1250 (Thomas dissenting).

that as-applied review is more in line with the practice of the early American courts.[66]

Because Justice Thomas is one of the few Supreme Court justices to announce a consistent view of the vagueness doctrine, his arguments are important to evaluate. While this Comment does not focus on originalist analysis, it does evaluate the method of review (facial or as-applied) used by early American courts, as well as which constitutional justifications (due process or separation of powers) these courts used. The modern doctrine's pronounced emphasis on due process, combined with the subtle, inevitable influence of separation of powers, has created a doctrine with unclear scope. Inquiring as to how early courts grounded their vagueness doctrine and drawing out distinctions can inform present day attempts to clarify the vagueness doctrine. If early courts' reasoning is convincing, it may justify adopting certain aspects in the modern vagueness test. But before getting to that discussion, the next Section evaluates why the debate between a due process and separation-of-powers justification even matters.

B. Due Process versus Separation of Powers: Conceptual and Practical Differences

Whether the vagueness doctrine is rooted in due process or the separation of powers determines the scope of the doctrine as well as the underlying analysis. For example, the separation of powers applies only to federal law whereas due process applies to both federal and state law. Which laws the vagueness doctrine can invalidate therefore depends on identifying the doctrine's constitutional source. For this reason, locating these concepts in the Constitution and analyzing the conceptual and practical differences between them is crucial to evaluating the vagueness doctrine generally.

Due process is understood as a fundamental protection against unreasonable government interference depriving individuals of "life, liberty, or property, without due process of the law."[67] This protection is found in the Fifth Amendment, which applies to the federal government, as well as the Fourteenth Amendment, which applies to the states.[68] The separation of powers is the idea

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66 Id. For more information regarding Justice Thomas's argument and whether it is in line with the original meaning of the vagueness doctrine, see Part II.C.

67 US Const Amend V.

68 US Const Amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of the law.").

that each branch of the federal government has limited powers that are not to be transgressed.[69] This principle is not found in any one clause, but grows out of the clauses vesting distinct powers in the executive, judicial, and legislative branches.[70]

Conceptually, locating the constitutional source of vagueness clarifies whom the doctrine aims to protect. For example, due process concerns individuals being treated fairly, rather than an offense against the public generally.[71] Either the individual was not given fair notice of the conduct that was prohibited by the statute[72] or the individual was arbitrarily targeted by law enforcement.[73]

In contrast, the separation of powers prevents the legislature from failing to do its job and, in this sense, from committing an offense against the public at large. When Congress enacts a vague statute, law enforcement (executive branch) and judges (judicial branch) define what conduct is prohibited, essentially taking on the role of local and state legislatures.[74] Although this is convenient and salutary in some circumstances,[75] "[c]ourts are the branch least competent to provide long-range solutions" for social

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69 See Philip B. Kurland, *The Rise and Fall of the 'Doctrine' of Separation of Powers*, 85 Mich L Rev 592, 593 (1986).

70 See US Const Art I, § 1 (vesting all legislative powers in Congress); US Const Art II, § 1, cl 1 (vesting all executive power in the president); US Const Art III (vesting all judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

71 Decker, 80 Denver U L Rev at 246, 280–83 (cited in note 10).

72 See, for example, *Grayned v City of Rockford*, 408 US 104, 108 (1972); *Cline v Frink Dairy Co*, 274 US 445, 465 ("[I]t will not do to hold an average man to the peril of an indictment . . . [when] neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result [of his action]."); *Connally v General Construction Co*, 269 US 385, 391 (1926) ("[A] statute . . . so vague that men of common intelligence must guess at its meaning . . . violates the first essential of due process of law.").

73 See, for example, *Shuttlesworth v City of Birmingham*, 382 US 87, 90 (1965) ("Literally read . . . the second part of [the ordinance in question] says that a person may stand on a public sidewalk . . . only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.").

74 See *Grayned*, 408 US at 108–09; Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 Cal L Rev 1441, 1472 (2004).

75 Judicial activism is salutary in circumstances when legislation cuts down or encroaches on political or civil rights. See *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938). For additional commentary on the value of judicial activism, see Clint Bolick, *The Proper Role of "Judicial Activism"*, 42 Harv J L & Pub Pol 1, 13–14 (2019); Rebecca Adelman and Amanda Haynes Young, *Judicial Activism: Just Do It*, 24 Memphis St U L Rev 267, 267–68 (1994).

problems.[76] Because the Constitution vests Congress alone with the legislative power, vague statutes can consequently be an unconstitutional delegation.

What makes certain legislative delegations unconstitutional is that they circumvent the democratic process. Under the Constitution, the adoption of new laws is supposed to be "the product of an open and public debate among a large and diverse number of elected representatives."[77] Federal judges, however, act "in the comparatively obscure confines of cases and controversies."[78] Allowing legislators to delegate difficult policy choices to the judiciary effectively insulates those legislators from political backlash and prevents the general public from holding those who make decisions accountable.[79]

There is a difference between constitutional and unconstitutional vagueness. Under the separation of powers, a vague statute may be constitutional so long as there are sufficient guidelines to cabin judicial and executive discretion. Since the Founding, courts have clarified the meaning of statutes over time as they applied their terms to specific cases.[80] But when a law is "so devoid of content that a court tasked with interpreting it 'would simply be making up a law,'" vagueness becomes unconstitutional.[81] However, courts must still keep in mind that there is no

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76 Kmiec, 92 Cal L Rev at 1472 (cited in note 74), quoting *Columbus Board of Education v Penick*, 443 US 449, 488 (1979) (Powell dissenting). See also Jeffries, 71 Va L Rev at 190–97 (cited in note 44) (noting that courts are politically incompetent to define crime in particular); Jamin B. Raskin, *Overruling Democracy: The Supreme Court vs. the American People* 1–5 (Routledge 2003); Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 Minn L Rev 837, 843–46 (1955).

77 See *Dimaya*, 138 S Ct at 1228.

78 Id, citing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 151 (Bobbs-Merrill 1st ed 1962).

79 See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 529–31, 537.

80 See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich L Rev 239, 309–10 (1989); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U Chi L Rev 519, 526 (2003). An example of the Court clarifying the meaning of a statute over time is the Sherman Antitrust Act. Early in the twentieth century, the constitutionality of the Act was repeatedly challenged. In a series of cases, the Supreme Court narrowed the meaning of the Act so as to avoid invalidation. See *Waters-Pierce Oil Co v Texas*, 212 US 86, 96 (1909); *Standard Oil Co of New Jersey v United States*, 221 US 1, 30 (1911); *United States v American Tobacco Co*, 221 US 106, 142 (1911).

81 *Dimaya*, 138 S Ct at 1249 (Thomas dissenting), quoting Lawson, 88 Va L Rev at 339–40 (cited in note 64) (which provides as an example of a statute "devoid of content" a statute that requires "goodness and niceness").

such thing as a perfectly clear statute.[82] Because courts can converge on a law's meaning over time, it is important to allow a statute to percolate in the courts before deeming it unconstitutionally vague, despite the fact that this might produce unclear standards and give courts little guidance.[83]

Practically, locating the constitutional source of the vagueness doctrine could alter when and to which laws the doctrine applies. First, locating the doctrine's constitutional roots could change how the effect of a statute figures into the analysis. Due process targets the deprivation of life, liberty or property. Thus, a law that does *not* involve deprivation but is nonetheless arbitrarily enforced could not be invalidated on due process grounds. In contrast, the separation of powers does not have any such textual limitation and therefore would potentially justify invalidation of a larger set of laws.

Second, locating the constitutional source of the vagueness doctrine could determine whether classifying a statute as either federal or state is relevant. While due process restricts both federal and state governments, the separation of powers applies only to the federal government. As a result, a federal court cannot invalidate a state law on separation-of-powers grounds. Conversely, a federal court can invalidate a state or local law on due process grounds.[84] Thus, if the vagueness doctrine is rooted solely in the separation of powers, the fact that the separation of powers generally only limits federal action would decrease the scope of the vagueness doctrine.

C. Early Conceptions of Vagueness: Vagueness Violates Both Due Process and Separation of Powers

The following Section looks at how early American courts and scholars considered vagueness. The aim is not to provide an exhaustive account,[85] but rather to observe and evaluate a way of

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[82] See *Ward v Rock Against Racism*, 491 US 781, 794 (1989) ("[P]erfect clarity and precise guidance have never been required."); *Grayned*, 408 US at 110 ("[W]e can never expect mathematical certainty from our language.").

[83] For a discussion of the legal realist concept of "percolation," see notes 176–79 and accompanying text.

[84] For example, in *Papachristou*, the Court invalidated a local city ordinance on due process grounds. *Papachristou*, 405 US at 171.

[85] This Section focuses on cases representative of their respective legal eras. These cases were cited in a debate between Justices Neil Gorsuch and Clarence Thomas regarding whether the current interpretation of the vagueness doctrine is in line with the original meaning of the Constitution. See generally *Dimaya*, 138 S Ct 1204. See also *Johnson*,

thinking about vagueness that differs from the due process–focused modern test. The following analysis reveals that the early sources considered both due process and the separation of powers when evaluating vagueness. This Section, as well as the next, argues that the two constitutional protections are actually related and the role that each plays in the vagueness analysis should be clarified. The early cases illuminate how the practical and conceptual differences between due process and the separation of powers discussed in Part I.B can help clarify the doctrine. The analysis also reveals that in early cases, the vagueness doctrine was used in an as-applied manner, rather than with the facial review that courts typically use today.

The earliest reported vagueness case is *The Enterprise*,[86] decided in 1810.[87] Although not explicitly stated, a close analysis of this case reveals both due process and separation-of-powers considerations. The Circuit Court for the District of New York held that, while ignorance of the law is no excuse for its violation, "if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it."[88] In other words, an individual cannot be accountable under a law unless it fairly describes the prohibited conduct (notice), which ensures due process. The court continued, "[N]o man should be stripped of a very valuable property . . . unless it be very clear that such high penalties have been annexed by law to the act which he has committed."[89] This phrase parallels the Fifth and Fourteenth Amendment in that it describes prerequisites for depriving an individual of liberty or property.[90] As such, it is fair to infer that the court considered due process as a reason to not apply the vague law to the defendant.

In regard to the separation of powers, the court in *The Enterprise* stated that "[i]f no sense can be discovered for [the words of

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135 S Ct at 2563–75 (Thomas concurring in the judgment). Because this Comment does not attempt to define the original meaning of the vagueness doctrine, the details of that debate are beyond the scope of this Comment. This originalist question was virtually nonexistent prior to *Dimaya's* antecedent case, *Johnson*. As a result, there is limited scholarship discussing any of the cases cited in this Section.

86 8 F Cases 732 (CC D NY 1810).

87 See *Dimaya*, 138 S Ct at 1225–26 (Gorsuch concurring in part and in the judgment).

88 *The Enterprise*, 8 F Cases at 734.

89 Id at 734–35.

90 US Const Amend V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); US Const Amend XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

a statute] . . . [a] court had better pass them by as unintelligible and useless, than to put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed."[91] This language implicitly recognizes the judiciary's role as interpreter rather than "creator" of the law. The phrase "had better" suggests the court is warning of the consequences involved in interpreting unintelligible statutes. The proceeding reference to what "the legislature may never have designed" implies that this is the negative consequence. That is, the problem with interpreting vague laws is that the court imports meaning the legislature may not have intended. By suggesting that the judiciary's solution is to "pass them by as unintelligible and useless," the court essentially assumes that unintelligible laws are not justiciable. Similar to judicial inaction when a plaintiff lacks standing or presents a political question, the quotation implies that courts should refrain from attempting to elucidate the vague provision and commenting on the merits of the case. Unlike its approach under the standing and political question doctrines, however, the court continued to apply sufficiently clear portions of the law, in effect ignoring the vague provision. In contrast to *Papachristou* and *Dimaya*, in which the Court invalidated the vague provisions for all future cases, the court in *The Enterprise* refused to apply the vague provision as it applies to this defendant, keeping the law on the books for future cases.

United States v Sharp[92] is another early federal case that referenced both due process and separation of powers in refusing to apply the statutory phrase "endeavour[ ] to make a revolt."[93] Like in *The Enterprise*, the court appears to review the law as applied to this defendant and, therefore, does not strike down the law like the Supreme Court did with the facial review in *Papachristou* and *Dimaya*. Describing fair notice, the court explained that clear criminal laws ensure "all men, subject to their penalties, . . . know what acts it is their duty to avoid."[94] The court concluded that without a clear meaning of "revolt," it could not submit the case to a jury, "however strong the evidence may be."[95] The court further supported its conclusion by expressing separation-of-powers concerns:

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91 *The Enterprise*, 8 F Cases at 735.

92 27 F Cases 1041 (CC D Pa 1815).

93 Id at 1042.

94 Id at 1043.

95 Id.

> I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by, making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature.[96]

This quote highlights the "natural repugnance" to the concept of arbitrarily "fix[ing]" a crime upon individuals when there is not sufficient guidance from the legislature. If the crime was not "intended by the legislature," the judge essentially becomes the creator of the law, violating the separation of powers and leading to arbitrary adjudications. In addition to providing notice of "what acts it is [one's] duty to avoid," these excerpts show a multifaceted conception of vagueness that prevented courts from applying vague statutes on *both* due process and separation of powers grounds. The court does not specify whether due process and separation of powers are both necessary or sufficient for refusing to apply the statute to the defendant. Nevertheless, the court's opinion in *Sharp* shows that vagueness can be conceptualized both ways. Consequently, if one believes that both due process and separation-of-powers considerations are important constitutional protections in evaluating statutes' clarity, the modern vagueness test should transparently reflect the role each plays in the analysis, rather than focusing mostly on due process concerns. This transparency about constitutional foundations would clarify the scope of the doctrine, making it easier for courts to apply it predictably.

The writings of early American scholars and their British influences also provide constitutional context for the vagueness doctrine. James Madison, for example, described how laws that are "so incoherent that they cannot be understood" effectively "poison[ ] the blessing of liberty."[97] He indicated that in such instances "[i]t [would] be of little avail to the people that the laws are made by men of their own choice."[98] Madison suggested that vague laws threaten democracy by separating the people from the lawmaking process, an issue previously discussed in Part I.B.[99] He further described the issue with vague laws in his Report on the Virginia Resolutions during the Alien and Sedition Act controversy:

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96 *Sharp*, F Cases at 1043.

97 Federalist 62 (Madison), in *The Federalist* 415, 421 (Wesleyan 1961) (Jacob E. Cooke, ed).

98 Id.

99 See notes 77–79 and accompanying text.

> If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect[,] it would follow[ ] that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.[100]

Madison here describes both separation-of-powers and due process concerns. A law that is "so incoherent that [it] cannot be understood" both provides inadequate notice to defendants—a due process violation—and is meaningless until law enforcement decides how to apply, and judges how to interpret, enigmatic separation-of-powers constraints.[101]

William Blackstone, a scholar who heavily influenced the Framers, highlighted how British courts handled vagueness in his seminal treatise on British law.[102] Blackstone described an eighteenth-century British court's handling of a vague law that made "stealing sheep, or other cattle" a felony.[103] Because the term "cattle" was expansive at the time and included wild animals, the court decided the statute failed to provide adequate notice of what was included and, as a result, refused to apply the term "cattle."[104] The court's actions subsequently led the legislature to modify the statute to explicitly include "bulls, cows, [and] oxen . . . by name."[105] Blackstone's example implicates both due process and the separation of powers. The court explicitly referenced due process through the idea of notice. Implicitly, the example embodies the separation-of-powers principle: it shows the court did not have the capacity to alter the law and relied on the legislature to subsequently make the modification. Like the early American cases, this British court did not apply facial review and invalidate the statute, but rather looked to the facts of the case, performed as-applied review, and refused to apply the vague portion (the term "cattle") to the case before it.

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[100] James Madison, *The Report of 1800*, in David B. Mattern, J.C.A. Stagg, and Jeanne K. Cross, eds, 14 *The Papers of James Madison* 303, 324 (UVA 1991).

[101] Federalist 62 (Madison), in *The Federalist* 415, 421 (cited in note 97).

[102] See William Blackstone, 1 *Commentaries on the Laws of England* 88 (Clarendon 1769). See also *Dimaya*, 138 S Ct at 1225 (Gorsuch concurring in part and in the judgment).

[103] Blackstone, 1 *Commentaries on the Laws of England* at 88 (emphasis omitted).

[104] Id.

[105] Id.

The use of as-applied review by early British and American courts was not a strategic choice connected to the constitutional purpose of the doctrine. More likely, the use of the "case-by-case" approach[106] is explained by the fact that courts had an entirely different conception of judicial review than courts do today.[107] For this reason, there is no significant link between the dual conception of vagueness in the early courts' analysis and the decision to use as-applied review.[108]

Overall, the early cases and scholarship provide convincing support for a conception of the vagueness doctrine that is rooted in *both* due process and separation of powers. These cases highlight the need for a vagueness doctrine that both ensures the legislature delineates sufficient guidelines for applying the law (the separation of powers) and ensures individuals have fair notice of what the law requires (due process). Scholarship showing that due process originally grew out of the separation of powers further supports this conception of vagueness.

Professors Nathan Chapman and Michael McConnell, two prominent constitutional law scholars, suggest that the origin of both due process and separation of powers in the Anglo-American legal tradition is the Magna Carta.[109] The Magna Carta provided that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers [or] by the law of the land."[110] By outlining procedures required before deprivation of liberty, the Magna Carta explicitly references due process. However, its separation-of-powers concept is subtler. The idea is that the Crown must convince an independent body of decision-makers that a defendant's conduct violated either the common law or a statute enacted by

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106 See *Dimaya*, 138 S Ct at 1243 (Thomas dissenting).

107 See text accompanying notes 147–53.

108 Similarly, the prevailing use of facial review in modern courts does not appear to be linked to the constitutional purpose for the doctrine. In fact, the Supreme Court has been unable to set forth a consistent rationale for why facial review is proper in this context. See Lockwood, 65 Syracuse L Rev at 433 (cited in note 33). In contrast, the proposed Structure and Rights Approach links the use of facial and as-applied review to the constitutional purpose at each step of the test, which will help courts to clarify the scope of the doctrine and apply it consistently in future cases. See Part III.

109 The Magna Carta was an agreement between King John of England and a group of barons in 1215 to "restor[e] precious common law rights" to the people. See Mary Ziegler, *The Conservative Magna Carta*, 94 NC L Rev 1653, 1654–55 (2016).

110 Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L J 1672, 1682 (2012), quoting Magna Carta ch 29, reprinted and translated in A.E. Dick Howard, *Magna Carta: Text and Commentary* 43 (UVA 1964).

Parliament before restricting his or her liberty.[111] Chapman and McConnell argue that it is through this institutional coordination restricting the Crown that the principle which evolved into the modern separation of powers entered English law.[112]

In further support of due process and separation of powers' interconnected nature within the vagueness context is the idea that the Bill of Rights serves as an additional protection for rights implicit in the Constitution. Some scholars suggest that the Bill of Rights was promulgated in response to fears that the new federal government might abuse some of its granted powers.[113] Despite Alexander Hamilton's suggestion that additional protection was unnecessary because Congress had not been given any rights-infringing powers, the Bill of Rights was nevertheless enacted to guard the protections that were not considered safe under the Articles of the Constitution.[114] In this way, due process can be thought of as an extension of and additional protection for the separation of powers.

A close analysis of the Supreme Court's modern arbitrary enforcement jurisprudence also reveals this close link between due process and the separation of powers. In *Kolender v Lawson*,[115] a case invalidating a California loitering statute, the Court stated that "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained . . . [it would] substitute the judicial for the legislative department."[116] This language implicitly suggests that the arbitrary enforcement prong of the modern, due process–focused vagueness test contains elements of the separation of powers, namely ensuring the legislature outlines sufficient guidelines for application.[117] The arbitrary enforcement prong also has elements of due process, as it is concerned with the unfair

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111 Chapman and McConnell, 121 Yale L J at 1683 (cited in note 110).

112 Id at 1682–84.

113 William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L J 1738, 1793–94 (2013).

114 Id at 1754–55. See also Federalist 84 (Hamilton), in *The Federalist* 575, 579 (cited in note 97) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall be restrained, when no power is given by which restrictions may be imposed?").

115 461 US 352 (1983).

116 Id at 358 n 7, quoting *United States v Reese*, 92 US 214, 221 (1876).

117 For clarification on the idea that the modern due process–focused test does not exclude elements of separation of powers, see id.

nature of arbitrarily targeting individuals.[118] In this way, the arbitrary enforcement prong may actually be a "hybrid" constitutional protection, incorporating both due process and separation-of-powers elements into the analysis.[119] The modern due process test conflates these constitutional purposes, giving contradictory messages as to the doctrine's scope.[120] In order to provide consistent guidance, the Court must delineate how each principle specifically influences the vagueness test. This recognition of the multifaceted and interconnected conception of vagueness serves as the foundation for the proposed vagueness framework in Part III.

To summarize, the early cases and scholarship provide examples of how due process and the separation of powers can fit together in a vagueness analysis. Although these cases do not specify whether a violation of either is sufficient or if both are necessary, the courts clearly discuss the relevant considerations of fair notice and arbitrary enforcement, as well as judicial legislation (that is, judges creating the law). Scholars who have studied the relationship between due process and separation of powers suggest the two are related, which helps one understand how these early courts articulated the two considerations. Rather than applying facial review that results in invalidating an unconstitutionally vague law, these early courts evaluated the vague provisions as applied to the defendants before them. In this sense, the provisions could be considered constitutional as applied to a different defendant. The next Section compares the early courts' consideration of vagueness to *Papachristou* to provide insight helpful for clarifying the current test.

D. Reanalyzing *Papachristou*

Reevaluation of *Papachristou* in light of the above analysis reveals two important differences between the current and early use of the vagueness doctrine. First, the constitutional protections justifying the vagueness doctrine differ. The early cases understood vagueness could violate both due process and the separation of powers. The current doctrine, however, only mentions due process, although separation of powers elements seem to slip

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[118] See text following note 83.

[119] For a more elaborate discussion of the "hybrid" nature of the arbitrary enforcement prong, see Part I.D.

[120] To understand how due process and the separation of powers affect the scope of the vagueness doctrine, see Part I.B.

into the analysis through the arbitrary enforcement prong.[121] The Court may have adopted a due process approach because of the increased scope of this protection compared to the separation of powers. The separation-of-powers analysis applies to federal laws. Since *Papachristou* involved a city ordinance, the separation of powers would not justify striking down the ordinance. A court hoping to apply the doctrine across federal and state law would need to ground its use in due process. If both constitutional protections are in play, however, it is even easier to bring vagueness challenges because invalidation is possible regardless of the effect (deprivation) or type (federal versus state) of law. In this sense, a court hoping to broadly apply the vagueness doctrine should not limit itself to a due process or separation-of-powers analysis.

Second, the conception of due process is different in early vagueness analyses. The early cases described only fair notice concerns whereas *Papachristou* also emphasized the role of arbitrary enforcement.[122] Review for arbitrary enforcement allows the Court to evaluate statutes that are so flexible that law enforcement or judges can apply them in an arbitrary fashion. Conceptually, the arbitrary enforcement prong has a separation-of-powers flavor. In theory, this prong signals when Congress has failed to provide adequate standards for application, therefore delegating its duty to the other branches. The Supreme Court, however, has never explicitly considered the separation of powers' influence in this prong. Rather, the Court seems to jam these separation-of-powers considerations into the due process framework, conflating the two constitutional purposes. Because due process and the separation of powers differ in their scope and application, analyzing separation-of-powers considerations within the modern due process framework convolutes the doctrine and results in inconsistent decisions. This result is exacerbated by the fact the Court has never articulated a test for identifying arbitrary enforcement. Together, these factors cause confusion over how courts should apply the prong.

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[121] See *Papachristou*, 405 US at 165; *Morales*, 527 US at 56.

[122] Compare *The Enterprise*, 8 F Cases at 734–35, with *Papachristou*, 405 US at 170–71; *Morales*, 527 US at 65 (O'Connor concurring) ("[T]he more important aspect of the vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'").

This analysis highlights how arbitrary enforcement is actually a "hybrid" problem that violates both due process and separation of powers. On the one hand, arbitrary enforcement unfairly targets certain individuals, constituting a due process violation. On the other hand, arbitrary enforcement can result from a law with insufficient standards for guidance, which raises separation-of-powers concerns. The current vagueness doctrine categorizes arbitrary enforcement as a due process violation. But this hybrid nature of arbitrary enforcement suggests that it should be reanalyzed to acknowledge its mixed constitutional purpose. Such a reconceptualization would allow courts to directly engage with the doctrine's underlying purposes and thus identify a more predictable, coherent scope for its application.[123]

The differences between early and modern applications of vagueness highlight how the Court has shifted the vagueness framework to apply in circumstances it deems appropriate. The Court may downplay the separation-of-powers elements of the test given the limitation this constitutional purpose has on the doctrine's scope. In this way, the Court rhetorically depends on due process but incorporates conceptual elements of the separation of powers, leading to confusion regarding the doctrine's application and scope. Such manipulations have accompanied an increasing necessity to protect individuals from discriminatory enforcement, both on a national and state level. They also explain why the vagueness test has developed the "I know it when I see it" quality that prevents consistent and principled application. In this way, the Court's precedent has become incoherent for lower courts to follow, making it necessary to more clearly reconceptualize the doctrine. Part III seeks to do just that.

II. DETERMINING WHEN AND HOW TO INVALIDATE A STATUTE: HOW VAGUE IS TOO VAGUE?

After establishing that due process and separation of powers should allow courts to invalidate legislation,[124] there is still a question of how vague a law must be in order to invalidate it and

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[123] As will be explained in Part III, the hybrid status of arbitrary enforcement warrants separate treatment from both due process and the separation of powers. Given the convoluted nature of the current doctrine, an explicit checklist of constitutional considerations would help judges apply the doctrine more consistently. A separation could remind a judge of the doctrine's hybrid nature, making her less likely to conflate the analysis of its individual parts.

[124] See Parts I.A–C.

how to measure vagueness. I call this the "how vague is too vague" question. Inherent in the determination of how vague a law must be in order to invalidate it is the consideration of whether to apply facial or as-applied review. As previously mentioned, only facial review results in invalidation. Thus, in answering "how vague is too vague," this Part evaluates whether facial or as-applied review is appropriate.

Part II.A describes modern approaches to evaluating "how vague is too vague." Part II.B addresses the problems inherent in both approaches as they are currently conceived. Part II.C then looks to how early American cases determined how and when to invalidate a law. The early cases are not presented to offer a depiction of the correct vagueness analysis. Rather, they are used to compare and contrast the original method with the current one. By juxtaposing these methods, this Part identifies aspects of both approaches that actually aid the vagueness analysis and then incorporates these traits into the new framework proposed in Part III.

A. The Modern Approaches

In *Johnson v United States*,[125] the case preceding *Dimaya* that invalidated the Armed Career Criminal Act's (ACCA) residual clause, Justices Thomas and Scalia disagreed on the question of how vague a law must be in order to invalidate it. Justice Thomas thought vagueness challenges were inappropriate "[i]f any fool would know that a particular category of conduct would be within the reach of the statute."[126] Justice Thomas explained that "if there is an unmistakable core that a reasonable person would know is forbidden by the law," it is inappropriate to invalidate the law for all cases.[127] This theory of the "unmistakable core" requires a law to be vague in all applications before a court invalidates it. According to Justice Thomas, a law is reviewed facially to determine whether a core exists. If there is no core, the law should be invalidated. If a core exists, however, Justice

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[125] 135 S Ct 2551 (2015).

[126] *City of Chicago v Morales*, 527 US 41, 112 (1999) (Thomas dissenting), quoting *Kolender*, 461 US at 370–71 (White dissenting). *Morales* was a predecessor vagueness case to *Johnson* in which Justice Thomas fully explained his "unmistakable core" conception of vagueness. In *Johnson*, Justice Thomas adopts the same reasoning without much added explanation. See *Johnson*, 125 S Ct at 2573 (Thomas concurring in the judgment).

[127] *Morales*, 527 US at 112 (Thomas dissenting), quoting *Kolender*, 461 US at 370–71 (White dissenting).

Thomas suggested judges evaluate on an as-applied basis whether a behavior falls within the core.[128] In *Dimaya*, this would mean first determining whether the residual clause had an "unmistakable core" of behavior through facial review, then whether Dimaya's offense of residential burglary fit within that core. Justice Thomas suggested that limiting this second step to as-applied review is in line with the rule of lenity, which dictates that penal statutes should be construed strictly in favor of the defendant.[129] If the defendant did not have fair notice, the law would not apply to him, but according to Justice Thomas, there is no need to invalidate the provision for future cases.

Justice Scalia, on the other hand, rejected the conception that a law is constitutional "merely because there is some conduct that clearly falls within the provision's grasp."[130] Instead of an "unmistakable core," Justice Scalia relied on fair notice and arbitrary enforcement to determine when a statute should be invalidated.[131] Refusing to define precise rules for when the doctrine applies, Justice Scalia's approach is the predominant vagueness framework, which suggests facial review and invalidation—rather than Justice Thomas's as-applied approach—is always appropriate for vagueness analysis.

B. Problems with the Modern Approaches

A close analysis of these approaches reveals that both are flawed. Justice Thomas's approach (invalidation only when a law lacks an "unmistakable core") risks judges transforming the statute into something that was never intended by the legislature. Because Justice Thomas provides no guidance as to what constitutes an "unmistakable core," judges may develop conflicting methods for determining and applying the test. This flexibility allows judges to cherry-pick aspects of the statute that they like, or think are clear, and those that they dislike, or think are vague. Because every judge may have a different interpretation of these issues, the same federal offense prosecuted before different judges may result in conflicting adjudications.

Inconsistent adjudications are always possible when there is judicial discretion. However, the multitude of inconsistencies are

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128 *Johnson*, 135 S Ct at 2567–68 (Thomas concurring in the judgment).

129 Id at 2567.

130 Id at 2561 (majority).

131 Id at 2557.

greater when a law has little to no interpretative guidance. A law may be vague and difficult to apply despite the presence of a "core" set of behaviors that obviously fall within it. For this reason, Justice Thomas's approach forces courts to rule on exact parameters of conduct once a "core" is established. This approach leads to a legal code in which everything is specified in extreme detail and many courts potentially disagree on those details. Given the current era of prolific litigation, the Supreme Court does not have the capacity to continually decide how the law applies to various permutations of facts.[132] As a result, many of these conflicts will never be resolved.

Conflicting decisions in the lower courts were precisely what led the Supreme Court to invalidate the ACCA's residual clause in *Johnson*. For example, when evaluating whether conspiracy constituted a violent felony under the ACCA's residual clause, some judges looked only at the dangers posed by the "simple act of agreeing [to commit a crime]," whereas other judges considered the probability that the "agreement [would] be carried out."[133] Another example of an ACCA circuit conflict involved statutory rape: some courts concentrated on the age difference between the perpetrator and victim, while others did not.[134] The *Johnson* Court highlighted that the most salient aspect of these splits was "not division about whether the residual clause cover[ed] this or that crime (even clear laws produce close cases); it [was], rather, pervasive disagreement about the nature of the inquiry one [was] supposed to conduct and the kinds of factors one [was] supposed to consider."[135]

The "unmistakable core" approach to vagueness does not solve this problem. In both *Johnson* and *Dimaya*, Justice Thomas insinuated that the residual clause contained an "unmistakable core" but did not elaborate on what behavior was included within

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[132] See William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 St Louis U L J 1, 2–6 (1984). Justice William Rehnquist argues that the decision-making capacity of the Supreme Court is too low to ensure uniformity and to superintend the lower courts. Id. He suggests the Court "simply is not able or willing, given the other constraints upon its time, to review all the decisions that result in a conflict in the applicability of federal law." Id at 5.

[133] Compare *United States v Whitson*, 597 F3d 1218, 1222 (11th Cir 2010), with *United States v White*, 571 F3d 365, 370–71 (4th Cir 2009).

[134] Compare *United States v Daye*, 571 F3d 225, 230–32 (2d Cir 2009), with *United States v McDonald*, 592 F3d 808, 813–15 (7th Cir 2010).

[135] *Johnson*, 135 S Ct at 2560.

that core or how a court should consider that question.[136] Because Justice Thomas's approach prevents invalidation if an "unmistakable core" exists, the Supreme Court would need to continually resolve discrepancies over what crimes were covered as well as what factors to consider when making that determination, which it arguably does not have the capacity to do. Justice Thomas seems to suggest that, in locating an "unmistakable core" and not invalidating the law, he is protecting the legislature's will; ironically, courts may instead give inconsistent meaning to the law, likely missing the legislature's purpose all together. Repeated instances of arbitrary enforcement and conflicting adjudications violate the separation of powers.[137] In these scenarios, judges are effectively creating, rather than interpreting, the law.

Although Justice Scalia's approach of invalidation regardless of an "unmistakable core" avoids the problem of judicial legislation, his framework nonetheless upsets the separation of powers by failing to give *any* effect to an act of Congress. If the statute is reviewed facially and invalidated in whole or in part on the first determination of vagueness, judges will not have the interpretative flexibility that leads to conflicting results. When a law is invalidated, however, any intent Congress may have had is eviscerated. The power to strike down statutes provides courts with "open-ended authority to oversee . . . legislative choices,"[138] leading to a usurpation of "rules that were traditionally left to the democratic process."[139] In this way, both approaches upset the separation of powers. Justice Thomas's approach upsets the separation of powers because when judges interpret a statute without adequate guidance they are likely to misconstrue the will of Congress. Justice Scalia's approach upsets the separation of powers by eviscerating the will of Congress all together.

In this way, Justice Scalia's approach conflicts with the interpretative canon of avoidance, which urges courts to avoid construing a statute in an unconstitutional manner.[140] Invalidating a

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136 See id at 2568, 2573 (Thomas concurring in the judgment) (agreeing with the Government that "there will be straightforward cases under the residual clause"); *Dimaya*, 138 S Ct at 1252 (Thomas dissenting).

137 See note 96 and accompanying text for an explanation of the manner by which repeated arbitrary enforcement leads to a violation of the separation of powers.

138 *Kolender*, 461 US at 374 (White dissenting).

139 *Dimaya*, 138 S Ct at 1245 (Thomas dissenting).

140 See *Ashwander v Tennessee Valley Authority*, 297 US 288, 346–48 (1936) (Brandeis concurring):

vague law that has an "unmistakable core" violates the avoidance canon because the Court could instead adopt an as-applied approach, refusing to apply the statute to the particular defendant but avoiding the law's unconstitutionality. Although as-applied review can, in theory, lead to a separation-of-powers violation through conflicting adjudications, the Court's role is to resolve such conflicts.[141] Even if the Supreme Court may not have the capacity to resolve all of the conflicts that result from a vague law,[142] some would argue as-applied review is preferable because it avoids the separation-of-powers problem that judicial legislation creates.

As Justice Scalia articulates, the benefit of the current approach is that invalidation can signal Congress to revise and clarify the ambiguity. Blackstone described this effect when Parliament modified the cattle statute after courts refused to apply it.[143] Although Blackstone's example involves as-applied rather than facial review,[144] the British legislature was perhaps more attuned to the moves of the courts compared to current legislatures. The current proliferation of litigation makes it difficult for legislatures to keep up with the multiplicity of court decisions refusing to extend a statute to a particular circumstance on an as-applied

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> 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.

141 The Supreme Court's Rule 10 sets out the considerations governing review on certiorari. The rule expressly recognizes that certiorari may be granted where a circuit court or a state court of last resort "has entered a decision in conflict with" another court on "an important federal question." See Sup Ct R 10(a)–(b). Further, Justice Sandra Day O'Connor has stated:

> [O]ne of the Supreme court's most important functions—and perhaps *the* most important function—is to oversee the systemwide elaboration of federal law, with an eye toward creating and preserving uniformity of interpretation. . . . I breach no confidence in saying that the most commonly enunciated reason for granting review in a case is the need to resolve conflicts among other courts over the interpretation of federal law.

Sandra Day O'Connor, *Our Federalism*, 35 Case W Res L Rev 1, 5 (1984). For additional information on the Court's special emphasis on resolving conflicts among lower courts see Margaret Meriwether Cordray and Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash U L Q 389, 436–37 (2004).

142 See note 132 and accompanying text.

143 Blackstone, 1 *Commentaries on the Laws of England* at 88 (cited in note 102).

144 See notes 102–05 and accompanying text.

basis. In contrast, facial review resulting in invalidation is a dramatic action that sends a clear message to the legislature. After the Supreme Court struck down the vagrancy statute in *Papachristou*, for example, many local governments amended their laws in an attempt to make them constitutional.[145] Cities no longer prohibited simply wandering around but instead imposed additional elements, such as when an individual obstructs others from passing or when an individual constitutes a threat to public safety.[146] In this light, invalidating a statute may be more "democratic" since invalidation may prompt congressional action and, as a result, elected officials will modify the law rather than appointed judges.

C. Early Conceptions of Vagueness: As-Applied Review and Refusal to Apply

Early courts applied the vagueness doctrine in a manner more similar to Justice Thomas's conception. Justice Thomas believes that vagueness should be dealt with through the rule of lenity, which dictates that penal statutes should be construed strictly in favor of the defendant.[147] He suggests that, rather than striking down laws as unconstitutionally vague, courts should "simply refuse[ ] to apply them in individual cases" according to this rule.[148]

The early cases and scholarship, discussed in Part I.C, support Justice Thomas's conclusion in a number of ways. First, Blackstone's cattle statute appeared under a section entitled "penal statutes must be construed strictly."[149] This heading implicates the rule of lenity as it states the rule's meaning. Second, the early cases involved criminal statutes.[150] Because the rule of lenity applies only to criminal cases, this may indicate that early courts applied the vagueness doctrine through the vehicle of the

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[145] See Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Cal L Rev 379, 387–89 (1995); Joel D. Berg, Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chi Kent L Rev 461, 471–72, 499–503 (1993).

[146] See Poulos, 83 Cal L Rev at 387–89 (cited in note 145). Some of these laws have been invalidated as unconstitutional in a similar fashion as the law at issue in *Papachristou*. See, for example, *Morales*, 527 US at 41. Nevertheless, these legislatures continue to rewrite them to prevent unconstitutionality. See Andrew D. Leipold, *Targeted Loitering Laws*, 3 U Pa J Const L 474, 475–77 (2001).

[147] See note 129 and accompanying text.

[148] *Johnson*, 135 S Ct at 2568.

[149] Blackstone, 1 *Commentaries on the Laws of England* at 88 (cited in note 102).

[150] See *Sharp*, 27 F Cases at 1043; *The Enterprise*, 8 F Cases at 734.

rule of lenity. Third, the early cases show that, even when a judge refused to apply a vague law in one case, the law was not invalidated for future cases. For example, Justice Bushrod Washington, who in 1815 refused to "recommend to the jury, to find the prisoners guilty of making . . . a revolt" in *Sharp*,[151] had no problem supplying a "judicial definition" of the phrase in a subsequent case in 1826, *United States v Kelly*.[152] While this point does not go to the rule of lenity specifically, Justice Thomas used these cases to conclude that vagueness determinations were made only on an individual, as-applied basis in early America.[153]

Although early courts performed as-applied rather than facial review, modern changes in the legal landscape might still justify facial review, and thus invalidation, in certain circumstances. For one, the concept of judicial review has transformed. Antebellum courts understood judicial review as a "refusal to give a statute effect as operative law in resolving a case" (the result of as-applied review) rather than "strik[ing] down" legislation (the result of facial review).[154] Courts grew to be more comfortable with facial review, including the invalidation of laws, and its use is widely accepted in modern times.[155] This transformation of judicial review suggests that the reason early courts did not invalidate vague statutes had nothing to do with the vagueness doctrine. In this light, Justice Thomas's qualms seem to be not with the doctrine itself, but with the modern conception of judicial review.[156] Nothing about the vagueness doctrine in particular warrants a departure from the practice of striking down unconstitutional legislation, which is now accepted.

The use of precedent is an additional change that partially accounts for the difference in how early courts addressed constitutional violations. The current conception of precedent—that prior decisions not only provide authority for later decisions, but actually may bind subsequent courts—is of "relatively recent

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[151] *Sharp*, 27 F Cases at 1043.

[152] 24 US 417, 418 (1826).

[153] *Johnson*, 135 S Ct at 2568 (Thomas concurring in the judgment).

[154] See Kevin C. Walsh, *Partial Unconstitutionality*, 85 NYU L Rev 738, 756 (2010).

[155] See id at 755–57 (cited in note 154). See also *National Federation of Independent Business v Sebelius*, 567 US 519, 538 (2012) ("And there can be no question that it is the responsibility of the Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits."), citing *Marbury v Madison* 5 US (1 Cranch) 137, 1175–76 (1803).

[156] See *Morales*, 527 US at 111 (Thomas dissenting) (criticizing the plurality's use of the "disfavored mechanism of a facial challenge on vagueness grounds").

origin."[157] This development may explain why Justice Washington refused to apply the statute criminalizing "endeavoring to make a revolt" in *Sharp*, but not in the subsequent case of *Kelly*. Because the legal landscape has changed, the as-applied approach urged by Justice Thomas may not be persuasive in all contexts. This is because as-applied review requires judges to continually analyze cases that perhaps will inevitably be deemed vague by the Supreme Court due to prior inconsistent determinations. Rather than require judges to perform this analysis repeatedly, facial review and invalidation of the law may be warranted. Further, as explained in Part II.B, as-applied review gives courts more interpretive flexibility that can be abused to aid their own political preferences. If courts do not eventually converge on a law's meaning, that flexibility becomes problematic.

In sum, the modern vagueness doctrine is in disarray. The current framework fails to acknowledge a separation-of-powers component, thus confusing the role of arbitrary enforcement. Early cases and writings helpfully illustrate why the vagueness doctrine should remain rooted in both due process and separation of powers rather than mostly due process. However, these early sources provide little practical guidance on how to reformulate the modern doctrine because they depend on an outdated understanding of the judiciary and precedent. The following Part proposes a solution: a new framework for the vagueness doctrine that clarifies the role of due process and the separation of powers and combines elements of both Justice Thomas's and Justice Scalia's approaches. Combining these elements will achieve a modern vagueness doctrine that both recognizes the importance of due process and the separation of powers and can actually function within the modern understanding of judicial power and precedent. This new doctrine will also address the flaws present in the approaches of Justice Thomas and Justice Scalia by accounting for both the potential for judicial abuse and the need to accommodate the will of the legislature.

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[157] See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand L Rev 647, 659–81 (1999).

III. THE STRUCTURE AND RIGHTS APPROACH: COMBINING SEPARATION OF POWERS AND DUE PROCESS INTO A THREE-PART TEST

This Part proposes a new framework for evaluating vague laws: a three-step analysis called the "Structure and Rights Approach."[158] Step One asks whether the law violates the separation of powers, Step Two asks whether the law violates due process, and Step Three evaluates arbitrary enforcement (the "hybrid" due process and separation of powers protection).

Although a law can be unconstitutional for violating any one of these steps, the proposed approach combines the analysis into a single test and requires judges to proceed sequentially. One reason for the conjunctive quality of this framework is that ex ante determinations about whether a law implicates separation of powers, due process, or arbitrary enforcement can be difficult. This difficulty is evident from the current cases in which the Court describes separation of powers elements when conducting a due process analysis.[159] Separating out the three considerations into distinct steps allows judges to move through a checklist. In this way, the proposed approach avoids eliding or confusing potentially relevant analysis by sequentially proceeding from lenient to stricter steps. The Structure and Rights Approach also accounts for the conceptual overlap between the separation of powers and due process in the arbitrary enforcement step.[160] Arbitrary enforcement deserves its own step despite the fact that the two other steps encompass its component parts (due process and separation of powers) given the history of the Court misunderstanding the influence of this prong.[161]

While reintroducing the role of separation of powers might make the Structure and Rights Approach seem stricter than the current test, the addition makes it no harder for a law to survive judicial scrutiny. Any law that fails the lenient separation-of-powers step inherently fails under the current test as well. The purpose of the proposed approach is not to make the test harder

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158 The name Structure and Rights derives from the two constitutional purposes of the vagueness doctrine. "Structure" represents the separation-of-powers element while "Rights" represents the due process element.

159 See note 46.

160 For a discussion of the conceptual overlap between the separation of powers and due process, see Parts I.C–D.

161 For additional discussion of why arbitrary enforcement deserves its own prong, see Part III.C.

to overcome. Rather, the purpose is to make the judicial analysis more coherent and disciplined, accounting for the reality of judicial abuse. In doing so, the approach attempts to prevent the "I know it when I see it" reasoning of the current approach and make the test more accessible to lower courts.

In the following Sections, the proposed framework draws on originalist as well as legal-realist ideas. The originalism elements are extensions of the discussions in Parts I.C and II.C. The proposed framework uses the originalist ideas about separation of powers and due process to embrace the symbolic importance of these constitutional protections. Understanding the origin and evolution of these protections helps inform the limits of the vagueness doctrine.

The legal-realist analysis, on the other hand, derives primarily from the revolutionary ideas of Justice Holmes. More specifically, many of the elements of the proposed framework are inspired by Justice Holmes's famous line that "[t]he life of the law has not been logic: it has been experience."[162] Taking into account how prior decisions can help inform how future cases should be resolved, the proposed framework addresses vagueness from a practical perspective.[163]

A. Step One: Evaluating Separation of Powers through an "Unmistakable Core"

Step One, the separation of powers analysis, is adapted from Justice Thomas's "unmistakable core" principle.[164] Because the separation of powers constrains only federal law or laws created under a state constitution with a comparable provision, the first task is to determine whether this analysis is necessary. A court looking at the facts of *Johnson* or *Dimaya* would complete this first step by noting that the INA and ACCA are both federal statutes and, therefore, the separation of powers is in play. If, however, the case involved a state law and that state constitution did not include a separation of powers protection, the court would move to Step Two without evaluating the separation of powers.

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[162] Oliver Wendell Holmes Jr, *The Common Law* 1 (Little, Brown 1881).

[163] For an example, see text accompanying notes 154–56 regarding the modern use of precedent.

[164] See notes 127–29 and accompanying text.

If the court determines that this step is relevant, it then reviews the law facially, asking whether it is vague in all applications. More specifically, the court determines if there is an "unmistakable core" of behavior that "any fool would know . . . [is] within the reach of the statute."[165] This approach supplements Justice Thomas's concept of an "unmistakable core" by proposing judicial consensus as evidence that a law is not vague. If there is any behavior that courts agree "any fool would know" is within the statute, then an "unmistakable core" exists and the court should continue to Step Two. However, if there is no behavior that courts agree is within the statute, as measured by lack of judicial consensus, then no "unmistakable core" exists and the law should be invalidated.[166] If a law violates the separation of powers at this stage, there is no need to proceed to the due process and arbitrary enforcement steps.

This approach is adapted from the qualified-immunity context. Qualified immunity prevents government actors from being held personally liable for constitutional violations unless the violation was of "clearly established law."[167] In cases involving qualified immunity, a circuit split is considered a strong point in favor of the government official.[168] As Professor William Baude notes, "When judges disagree, that might be a clue that the legal question is hard and the materials are ambiguous."[169] Inconsistent adjudications can violate the separation of powers. If judges cannot agree on any application of a law, surely this is evidence that the law is unconstitutionally vague.

The extreme nature of a separation-of-powers violation justifies invalidation at the first step. When a law provides no guidance as to what behavior might fall within its "unmistakable core," law enforcement and courts must create its meaning to apply it. In this scenario, invalidation of the offending provision sends an indication to Congress that it must better specify the conduct prohibited, preventing judicial legislation. Because the

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165 *City of Chicago v Morales*, 527 US 41, 112 (1999) (Thomas dissenting), quoting *Kolender*, 461 US at 370 (White dissenting).

166 See generally Eric A. Posner and Adrian Vermeule, *The Votes of Other Judges*, 105 Georgetown L J 159 (2016) (offering a theory for how to consider decisions by other judges). But see generally William Baude and Ryan D. Doerfler, *Arguing with Friends*, 117 Mich L Rev 319 (2018) (arguing the consideration of other judges' decisions should depend on shared methodology).

167 See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal L Rev 45, 46 (2018).

168 Id at 75.

169 Id at 74.

Constitution allows for flexibility in interpreting the law, this step is purposefully weak to allow the law to develop.[170]

According to the Structure and Rights Approach, the residual clause in *Johnson* has an "unmistakable core." The ACCA lists "threatened use of physical force" as a trigger but also includes the residual clause, which incorporates behavior that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[171] The separation-of-powers question is whether there is a behavior "any fool would know" does not involve the "threatened use of physical force" yet still presents a "serious potential risk of physical injury." In *Johnson*, the Government listed a number of obviously dangerous crimes, such as providing material support for terrorism[172] and producing chemical weapons.[173] The Government explained that whether these crimes fell within the ACCA's residual clause had not yet been the subject of reported appellate decisions.[174] Under this Comment's proposed framework, these examples would constitute undisputed cases and establish an "unmistakable core."

Johnson highlights how low the bar is for this step. The analytical task of identifying a behavior that does not involve the "threatened use of physical force" yet still presents a "serious potential risk of physical injury" is more difficult than the judicial consensus suggests. Even the example provided by the Government, providing material support for terrorism, is suspect.[175] Nevertheless, the Structure and Rights Approach takes the fact of judicial consensus, or at least the lack of judicial disagreement, as evidence that the law is not vague at this stage without questioning the underlying rationale for the judges' shared reasoning. While not questioning the rationale may make the analysis seem

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170 See Richard H. Fallon Jr, *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv L Rev 1275, 1323 (2006) (noting that "many background norms are too vague to permit application until they have been further specified").

171 18 USC § 924(e)(2)(B).

172 18 USC § 2339B(a)(1).

173 18 USC § 229(a). See Supplemental Brief for the United States, *Johnson v United States*, No 13-7120, *8–9, 44 (US filed March 20, 2015) (Supplemental Brief).

174 See Supplemental Brief, *8–9, 44 (cited in note 173).

175 Providing material support for terrorism arguably does not present a "serious potential risk of physical injury." The act of providing support is not in and of itself physically dangerous. Rather, the potential for injury is contingent on carrying out the act of terrorism. It is possible that, had the Supreme Court not invalidated the residual clause in *Johnson*, judicial consensus would have waned and the statute would come to violate the separation of powers according to the Structure and Rights Approach. In this way, the more evidence there is of a law's ambiguity, the more likely it will eventually be invalidated.

incomplete, the goal is to provide courts with enough time to converge on a law's meaning. The separation of powers is violated when conflicting adjudications suggest insufficient guidelines for application. Mere difficulty in discovering a law's meaning should not alone be sufficient to invalidate a law or else all laws would be subject to invalidation. In addition, this approach encourages objectivity because the opinion of any one judge is not determinative.

The concept of giving courts time to converge on a law's meaning is borrowed from the legal realist idea of percolation.[176] Percolation is defined as the "period of exploratory consideration and experimentation by lower courts before the Supreme [C]ourt ends the process with a nationally binding rule."[177] Professor Carolyn Shapiro, for example, describes how the Court typically allows several lower courts to consider a legal problem before granting certiorari.[178] This "percolation" time gives the Court the benefit of considering the judgments of a number of jurists across a range of circumstances.[179] Shapiro explains that this percolation time sometimes makes involvement by the Court unnecessary because the "appropriate level of uniformity" may arise without its interference.[180]

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176 See Samuel Estreicher and John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 NYU L Rev 681, 716 (1984) (understanding percolation as "the independent evaluation of a legal issue by different courts"). See also Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L Rev 505, 524 (2013); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging versus Error Correction in the Supreme Court*, 63 Wash & Lee L Rev 271, 331–32 (2006).

177 Estreicher and Sexton, 59 NYU L Rev at 716 (cited in note 176).

178 Shapiro, 63 Wash & Lee L Rev at 331–32 (cited in note 176).

179 Id. A number of Supreme Court justices have lauded the benefits of percolation. See *McCray v New York*, 461 US 961, 963 (1983) (Stevens respecting denial of cert) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."); *Arizona v Evans*, 514 US 1, 23 n 1 (1995) (Ginsburg dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). See also Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 Harv L Rev 4, 65–67 (1998) (defending the benefits of percolation). But see William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla St U L Rev 1, 11 (1986) (discussing the drawbacks of percolation); Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflict Cases: Percolation or Procrastination?*, 54 U Pitt L Rev 861, 882–92 (1993) (arguing that percolation does not lead to better statutory decisions).

180 Shapiro, 63 Wash & Lee L Rev at 332 (cited in note 176).

In a similar way, the Structure and Rights Approach gives the lower courts time to converge on a law's meaning. During a law's infancy or as it is applied to new circumstances, lower courts may initially struggle to apply it consistently. If these inconsistencies persist, review by the Court is appropriate because inconsistent adjudications are indicative of insufficient guidelines for interpretation (a separation of powers violation). Over time, however, these inconsistencies may resolve themselves, making review by the Court unnecessary. Inspired by legal realists like Professor Shapiro and Justice Holmes, the Structure and Rights Approach accounts for this percolation period, giving a law time to find its meaning.

Because of this step's flexibility, it is difficult to identify any law that violates the separation of powers under this approach. That is, it is unlikely that all applications of a law will result in judicial disagreement. The *Johnson* Court explicitly rejected this "vague in all applications" approach because of its leniency toward statutes.[181] The proposed framework, however, balances the test by incorporating two additional steps (due process and arbitrary enforcement) that act as backstops for laws that may be unconstitutionally vague but do not violate the separation of powers at the first step.

While the leniency of this step may make it seem superfluous, its place in the Structure and Rights Approach is important to remind judges of the role that the separation of powers plays in the vagueness analysis. As seen in *Papachristou* and more recent cases, the Supreme Court has conflated the due process and separation of powers analysis, leading to difficulties in determining the doctrine's scope. This step helps remind the judge of the purpose for each prong which will, in turn, help create more consistent analysis.

B. Step Two: Evaluating Due Process through Fair Notice

Step Two, the due process analysis, combines elements of Justice Thomas's case-by-case approach and the current test's notice prong.[182] Here, a court asks whether a reasonable person

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[181] See *Johnson*, 135 S Ct at 2560–61.

[182] The Supreme Court focuses on whether a statute (1) fails to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," (the fair notice prong) and (2) encourages "arbitrary and erratic arrests and convictions" (the arbitrary enforcement prong). *Papachristou*, 405 US at 162, citing *Herndon v Lowry*, 301 US 242, 257 (1937). See notes 31–32 and accompanying text.

would have notice that the defendant's conduct fell within the statute. Rather than looking abstractly at the statute as the current vagueness test does, the Structure and Rights Approach considers the facts of the case. In *Dimaya*, for example, a court would ask whether a reasonable person would know residential burglary fell within the residual clause's understanding of "violent felony." If the answer is no, a judge should refuse to apply the statute to the given conduct but should not invalidate the statute. Since the law is not invalidated, even if a due process violation occurs, a judge should continue to the arbitrary enforcement analysis in Step Three to determine whether repeated application of the law in a number of cases suggests invalidation is appropriate.

The as-applied nature of this step involves looking to the facts of the case and draws inspiration from Justice Thomas's approach as well as early courts' narrow consideration of vagueness challenges. This method of review is preferable to the facial review approach taken by the *Papachristou* and *Dimaya* Courts considering that due process focuses on individual fairness.[183] Just because a reasonable person does not consider one behavior to fall within a statute, it does not mean that she would feel the same about a different behavior. A court's role is to interpret the statute and differentiate between these cases. The current approach prevents the court from fulfilling this duty by allowing invalidation of a statute regardless of an "unmistakable core." While as-applied review leaves more room for judges to abuse their interpretive powers by cherry-picking, the Structure and Rights Approach provides protection against such abuse through the second backstop, arbitrary enforcement (Step Three). In this way, the proposed framework cures the "fundamental flaw" described by Justice Thomas and explained in Part II.B.[184]

The Structure and Rights Approach deviates from Justice Thomas's approach by differentiating between fair notice and the "unmistakable core." After identifying an "unmistakable core," Justice Thomas asked whether the defendant's conduct fit within that *core*. In contrast, the Structure and Rights Approach asks whether the defendant had fair notice that the conduct fell within

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[183] Decker, 80 Denver U L Rev at 280–83 (cited in note 10). See note 29 and accompanying text for a description of the modern preference for facial review in the vagueness context despite a lack of consistency from the Supreme Court.

[184] The "fundamental flaw" being that when judges are forced to interpret a law that does not provide sufficient guidance, they are essentially "making up the law" themselves, therefore frustrating the separation of powers. See notes 63–64 and 80–83 and accompanying text.

the *statute*. Justice Thomas might respond that the two approaches essentially ask the same question because any conduct that fails fair notice would fall outside the "unmistakable core." The fair notice inquiry, however, is substantively different: there are circumstances in which a behavior may fall outside the "unmistakable core" because "any fool" may not know that the conduct fell within the statute, yet the statute does not violate fair notice because a "reasonable person" would know that the conduct fell within the statute. Would a reasonable person not understand the residual clause encompassed more than just the extreme of providing material support for terrorism? The Structure and Rights Approach clarifies the vagueness inquiry by separating the two questions. Step One addresses "any fool" and Step Two addresses a "reasonable person." Although reasonable people might disagree on what conduct falls outside the "unmistakable core" while still knowing that the "unmistakable core" does not include all behaviors, the court's job is to interpret the law to determine what a reasonable person *should know*.[185]

The crux of the second step's due process analysis is determining what a reasonable person should know the statute covers. Naturally, this is a difficult inquiry. Reasonable person standards are inherently messy and often result in judicial disagreement. Fortunately, judges have guidance from the uncountable reasonable person standards used in the tort, contract, and criminal contexts.[186]

Unlike Step One, in which judicial disagreement signals a violation of the separation of powers, such disagreement is less concerning for the due process analysis in Step Two. Due process concerns how an individual was treated, not whether the legislature provided sufficient guidelines. It is for this reason that the Court has suggested in the criminal context that the "existence of conflicting cases" makes a ruling against the defendant "reasonably foreseeable."[187] Because the law allows for flexibility in interpretation, courts should not be concerned with every disagreement that might arise in applying Step Two. Instead, the Structure and Rights Approach provides guidelines for invalidation when judges

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[185] See *United States v International Minerals & Chemical Corp*, 402 US 558, 562 (1971) (noting the maxim that "ignorance of the law is no excuse").

[186] See Kevin P. Tobia, *How People Judge What is Reasonable*, 70 Ala L Rev 293, 298 (2018). For a discussion of how the reasonableness standard applies in the constitutional setting, see generally Brandon L. Garrett, *Constitutional Reasonableness*, 102 Minn L Rev 61 (2017).

[187] See *United States v Rodgers*, 466 US 475, 484 (1984).

fail to agree on any behavior (Step One) or when the multiplicity of disagreements indicates subpar guidelines for application (Step Three).

Under this more nuanced understanding of notice, due process will always be violated when the separation of powers is violated. If a statute is vague in all applications, it must also be vague as applied to the particular conduct in question. This explains why the proposed framework is no stricter than the current test. The interplay makes sense if due process arises out of the separation of powers.

C. Step Three: Evaluating the "Hybrid" Role of Arbitrary Enforcement

Step Three is adapted from the arbitrary enforcement prong of the current vagueness test, readjusting that prong to reflect its "hybrid" nature.[188] Arbitrary enforcement is hybrid because of the confluence of due process and separation of powers considerations implicated in its analysis. This stage is distinct from Steps One and Two because the court is to consider *both* whether the legislature provided sufficient guidelines for enforcement and interpretation (separation of powers) and whether the defendant was treated unfairly (due process), rather than isolating each consideration. Although the separation of powers is reserved for federal laws, this step is performed on all laws because due process, which restricts both states and the federal government, is a consideration in Step Three.

Arbitrary enforcement warrants separate treatment from both due process and the separation of powers because of its hybrid nature. As mentioned, due to the convoluted nature of the current doctrine, an explicit checklist of constitutional considerations will help judges more consistently apply the doctrine. If the arbitrary enforcement prong remains in the due process analysis, the separation-of-powers elements of arbitrary enforcement may not be adequately recognized. Likewise, if analyzed entirely within the separation-of-powers prong, the significance of the due process elements may be undermined. Separating out each purpose for the doctrine (due process, separation of powers, and the hybrid arbitrary enforcement) allows judges to move through the checklist and better ensure no element is conflated or forgotten.

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[188] See notes 122–23 and accompanying text.

At this stage, a court should determine whether prior application of the law evidences arbitrary enforcement and whether this history suggests insufficient guidelines for application. Under the Structure and Rights Approach, the defendant has the initial burden in making a prima facie showing of arbitrary enforcement. To do so, the defendant must provide evidence of judicial disagreement on how to apply the statute. Unlike Step One, which requires judicial disagreement on all applications, any form of judicial disagreement will suffice at this stage. A defendant can also fulfill the prima facie showing by providing evidence of arbitrary law enforcement actions, such as statistics that one population of people is burdened more heavily than another. This alternative route is important because a law can be enforced arbitrarily even without conflicting adjudications—for example, by being enforced against "vaguely undesirable [people] in the eyes of the police and prosecution" rather than all offending citizens.[189]

Putting the burden on the party challenging a law is typical in the constitutional setting. The Structure and Rights Approach eases this burden by requiring only a prima facie showing in order to shift the burden to the government. This more lenient standard is necessary given the difficulty a given defendant will have finding evidence of arbitrary enforcement. Because the government is likely in a better position to find this information, the Structure and Rights Approach lightens the requirement.

Upon a preliminary showing of arbitrary enforcement, the burden of proof shifts to the government to explain why the law can be applied in a nonarbitrary fashion despite evidence to the contrary. The vaguer a law is, the more conflicting adjudications and inappropriate law enforcement action the government will need to refute. In this way, the burden-shifting framework acts as a sliding scale. If the government does not satisfy its burden of explaining why the law is not arbitrary, the court should invalidate the statute. The Structure and Rights Approach adopts this burden-shifting framework for a similar reason it institutes a prima facie showing requirement. That is, the government is in a better position to defend inconsistent adjudications given its access to statistical information than a defendant is to challenge it.

The ACCA's residual clause, which was evaluated in *Johnson*, provides an example of when the Structure and Rights Approach would invalidate a law at Step Three. Although the

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[189] *Papachristou*, 405 US at 166.

clause contained an "unmistakable core" (Step One)[190] and provided fair notice that defendant's behavior fell within the law (Step Two),[191] the conflicting methods of determining how conspiracy and statutory rape fit within the clause revealed a lack of appropriate guidelines (Step Three). As the *Johnson* Court acknowledged, "the failure of 'persistent efforts . . . to establish a standard'" provides evidence of vagueness.[192] Invalidating the law at this stage protects against judicial legislation and sends a signal to Congress to improve guidelines for application. The approach also accommodates the avoidance doctrine by asking courts to interpret the limits of an "unmistakable core" when possible, thus attempting to give effect to the meaning of the legislature.[193]

The ways in which the proposed role of arbitrary enforcement differs from the modern test's arbitrary enforcement prong cures the "fundamental flaw" of judicial legislation.[194] The current test reviews the law facially, looking at the statute's text to determine whether sufficient guidelines for enforcement exist. Basing the analysis solely on the *potential* for arbitrary enforcement allows for invalidation of almost any law because discretion is an important aspect of enforcement.[195] This abstract quality in the current vagueness test's arbitrary enforcement prong grants the judiciary broad power and creates uncertainty.[196]

In contrast to the unpredictability of the current approach, the Structure and Rights Approach creates more consistency by requiring parties to show evidence of arbitrary enforcement. The law is still reviewed facially in the sense that the court is not limited to the facts of the case and may look at enforcement in all contexts. Nevertheless, the requirement of evidence avoids the "I know it when I see it" quality of the current test by providing

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190 See Part III.A.

191 Although the fair notice discussion in *Dimaya* revolved around the burglary example used in the INA's residual clause, the Supreme Court deemed the language in the INA and ACCA residual clauses sufficiently similar. See *Dimaya*, 138 S Ct at 1218–21. Thus, behaviors that fell within the INA's residual clause would also fall within the ACCA's.

192 *Johnson*, 135 S Ct at 2558, quoting *United States v L. Cohen Grocery Co*, 255 US 81, 91 (1921).

193 See note 140 and accompanying text.

194 See Part II.B (describing the fundamental flaws of judicial abuse and evisceration of the will of the legislature).

195 See Lockwood, 8 Cardozo Pub L Pol & Ethics J at 297–98 (cited in note 33).

196 See id at 298.

judges with real, rather than hypothetical, circumstances to consider. For example, in *Papachristou*, rather than hypothesize about the potential for the vagrancy ordinance to result in arbitrary enforcement, the Structure and Rights Approach requires some preliminary evidence that the law is actually being enforced against members of golf clubs as well as patrons of pool halls.

Although requiring the defendant to produce evidence of arbitrary enforcement may not seem to help defendants, this approach actually favors them. The defendant-friendly aspect results from the burden-shifting framework. After the defendant has provided *any* evidence of arbitrary enforcement, the government must explain why the law is not actually being enforced arbitrarily or how they will correct such arbitrary enforcement moving forward. For example, the government might provide evidence that while the *Papachristou* ordinance was previously enforced only against frequenters of pool halls, there have been changes in enforcement practices that show the law is now being enforced against all populations of violators. Alternatively, the government might propose an enforcement policy that will prevent such arbitrary enforcement in the future, such as patrolling practices that target both locations similarly and document such interactions. This will provide data to better inform a court's decision in a future case. The government will explain that, while the law has the *potential* for arbitrary enforcement, the *reality* is that it currently is not enforced in a problematic way, or will not be in the future. In many cases, the government will have a hard time overcoming this burden. The better the evidence of arbitrary enforcement, the more difficult it will be for the government to prove its burden, facilitating invalidation of the laws shown to be most problematic. In this way, the proposed approach does not disadvantage defendants; rather, it helps them by placing the burden on the government, the party most likely to have enforcement statistics.

The goal of the proposed approach is to give a law time to find its meaning before invalidating it for vagueness. After a law is enacted, it will be applied by law enforcement officers who arrest individuals suspected of violating the law and by courts determining whether the law was actually violated by the suspect. Repeated application of the law may reveal that law enforcement officers apply the law arbitrarily or that courts do not agree on the law's meaning, resulting in conflicting adjudications. These conflicting adjudications or arbitrary law enforcement targeting

can be indications of subpar standards for guidance. Nevertheless, the problem may fix itself over time: higher courts may issue guidance on how to narrowly read a law, the Supreme Court may resolve conflicting adjudications, or law enforcement may institute practices that lead to more principled enforcement.

If the constitutionality of a law is challenged on vagueness grounds, the proposed approach encourages courts not to invalidate a law unless there are signs that the law cannot, or will not, be applied in a principled fashion in the future. As mentioned, it is the government's burden to explain why courts will converge on a law's meaning or why the police will stop enforcing the law arbitrarily. If not convinced of this probability, courts are then justified in invalidating the law under the Structure and Rights Approach. Requiring evidence of the arbitrary enforcement or conflicting adjudications restrains judges from invalidating laws whose meaning may solidify or whose enforcement will straighten out over time.

Courts should be wary of invalidating statutes when the difficulty in applying a law results not from the language of the statute but from the Court's interpretation. *Johnson* is an example of the Court interpreting the ACCA in a way that results in invalidation. In *Johnson,* the Government could have explained that the difficulty with the residual clause was not the statute itself but the Court's adoption of the categorical approach.[197] Through the canon of avoidance, a court then evaluates whether an alternative interpretation would save the statute. As Justice Samuel Alito suggested in dissent, the Court could have eliminated the categorical approach, deciding instead whether the facts of Johnson's case constituted a "violent felony."[198] The Supreme Court, however, decided that an alternative interpretation that saved the statute from being unconstitutionally vague was not plausible based on the statutory text: "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[199] Thus, Justice Alito's solution would violate the will of the legislature and result in impermissible judicial legislation. The Court concluded the only alternative was to invalidate the residual clause.

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[197] As mentioned in Part I.A, the categorical approach requires courts consider the "ordinary case" of a particular crime, rather than looking to the actual facts of a case.

[198] See *Johnson*, 135 S Ct at 2578–80 (Alito dissenting).

[199] Id at 2562, quoting *Taylor*, 495 US at 600.

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To summarize, the Structure and Rights Approach includes three steps. Step One evaluates the separation of powers and reviews a law facially to determine whether an "unmistakable core" of the law exists. More specifically, a court asks whether there is a behavior that "any fool would know" is included within a statute, looking to judicial consensus as an indicator. Step Two evaluates due process in the form of fair notice. This step uses as-applied review and looks to whether the particular defendant in the case had fair notice that his behavior fell within the statute. Step Three evaluates arbitrary enforcement, the hybrid due process and separation of powers protection. Here, the court reviews a law facially and asks the party challenging the law to provide evidence that the law has been applied arbitrarily in any context. The challenger can provide such evidence in the form of inconsistent adjudications or arbitrary law enforcement action. Upon a preliminary showing of arbitrary enforcement, the burden switches to the Government to explain why the law can be applied consistently despite evidence to the contrary. The next Section applies this approach to a recent decision.

D. Applying the Structure and Rights Approach: Analyzing *Guerrero v Whitaker*

This Section analyzes a recent Ninth Circuit vagueness decision, highlighting the difficulty in applying the current test and how the proposed framework facilitates the inquiry. The INA provides that refugees are not protected from deportation if they have been convicted of a "particularly serious crime" which renders them a danger to the community.[200] In *Guerrero v Whitaker*,[201] a Ninth Circuit panel rejected the argument that the phrase "particularly serious crime," was unconstitutionally vague.[202] The case involved a native of Mexico who had been convicted of possessing heroin. The question was whether that conviction qualified as "particularly serious."[203] Because the current

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[200] 8 USC § 1231(b)(3)(B).

[201] 908 F3d 541 (9th Cir 2018).

[202] Id at 545.

[203] *Guerrero v Whitaker*, 742 Fed Appx 293, 293 (9th Cir 2018).

test evaluates vagueness in a facial, rather than as-applied, manner, the Ninth Circuit wrote separate opinions for the vagueness and merits determinations.[204]

In its vagueness opinion, the panel suggested that the residual clauses in *Johnson* and *Dimaya* were problematic not because the terms were "uncertain in isolation" but because "the uncertainty had to be applied to an idealized crime."[205] The panel concluded that, while "[m]any statutes provide uncertain standards, . . . so long as those standards are applied to real-world facts, the statutes are almost certainly constitutional."[206] In contrast to the residual clause, the "particularly serious crime" provision in *Guerrero* applied to "real-world facts" and, therefore, was not unconstitutionally vague. In coming to this conclusion, the panel recognized it was overruling its prior precedent, *Alphonsus v Holder*,[207] which had adopted the "unmistakable core" principle as its approach to vagueness.[208] The panel reasoned that such an approach was "clearly irreconcilable" with *Johnson*'s rejection of the notion that "a vague provision [could be] constitutional merely because . . . some conduct . . . clearly falls within [its] grasp."[209]

The Ninth Circuit's *Guerrero* decision illustrates the difficulty of applying the current vagueness test for a number of reasons. First, the court claimed *Johnson* overruled *Alphonsus* and its "unmistakable core" reasoning. As mentioned in Part I.A and Part II, *Johnson* was the predecessor case to *Dimaya* that ruled the ACCA's residual clause and the use of the categorical approach was unconstitutionally vague. Specifically, the Court held that, because of the combination of uncertainty as to how to measure risk and how much risk it takes to qualify as a violent felony, "the residual clause produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates."[210] In *Johnson*, Justice Thomas urged the Court to adopt the "unmistakable core" approach to vagueness and avoid holding the clause unconstitutional.[211] However, the *Johnson* Court emphasized that its precedents, which long predated *Alphonsus*, prevented the adoption of

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204 See id; *Guerrero*, 908 F3d at 542.

205 *Guerrero*, 908 F3d at 545.

206 Id.

207 705 F3d 1031 (9th Cir 2013).

208 Id at 1041–43.

209 *Guerrero*, 908 F3d at 544, quoting *Johnson*, 135 S Ct at 2561.

210 *Johnson*, 135 S Ct at 2558.

211 Id at 2573 (Thomas concurring in the judgment).

the "unmistakable core" approach in the first place.[212] The fact that the Ninth Circuit's existing "unmistakable core" approach violated Supreme Court precedent without the Ninth Circuit knowing shows how convoluted the Court's precedent is.

Second, after rejecting the "unmistakable core" approach in *Guerrero*, the Ninth Circuit seemingly violated Supreme Court precedent. The suggestion that "so long as [ ] standards are applied to real-world facts, the statutes are almost certainly constitutional"[213] squarely contradicts cases such as *Papachristou*. Determining whether a defendant "frequent[ed] . . . places where alcoholic beverages [were] sold" does not involve an abstract determination.[214] Nevertheless, the *Papachristou* Court deemed the vagrancy ordinance unconstitutionally vague.[215] The fact that the current vagueness test allowed the Ninth Circuit to overlook this line of precedent is troublesome.

Third, while the Ninth Circuit referenced the Court's current two-pronged vagueness test, it did not explain how that test applies to the "particularly serious crime" provision of the INA. Rather, the court spent the majority of its analysis comparing the provision's uncertainty to the uncertainty in the residual clause. This approach mirrors what the Supreme Court typically does. The Court rarely explains how to apply the vagueness test. Instead, the Court cites the test's two prongs and then its conclusion without documenting how the two connect.[216] *Guerrero* illustrates that without additional guidance, lower courts are not sure how to apply the test and tend to rely on aspects of Supreme Court precedent that conflict with other decisions, as was the case in *Guerrero*.

Applying the Structure and Rights Approach to *Guerrero* aids the vagueness analysis by providing steps with analytical guidance for a court to move through. First, the "particularly serious crime" provision is a federal law that the court should evaluate at Step One. The provision has an "unmistakable core" and, therefore, does not violate the separation of powers at this preliminary stage. The statute itself lists aggravated felonies as a group of per

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[212] See id at 2560–61 (majority), citing *United States v L. Cohen Grocery Co*, 255 US 81, 89 (1921) (striking down a law prohibiting grocers from charging an "unjust or unreasonable rate . . . —even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable").

[213] *Guerrero*, 908 F3d at 545.

[214] *Papachristou*, 405 US at 164.

[215] Id at 171.

[216] See generally *Johnson* 135 S Ct 2551; *Dimaya*, 138 S Ct 1204.

se "particularly serious crimes."[217] The fact that there is judicial consensus as to whether first-degree murder, for example, qualifies as an aggravated felony for the purposes of the "particularly serious crime" provision is sufficient to pass this step. Note that at this stage, the court should not be concerned with evaluating the defendant's particular behavior (heroin possession), but with determining whether *any* behavior fits within the "unmistakable core."

Because there is an "unmistakable core," the court should continue to Step Two, evaluating due process concerns through fair notice. The Board of Immigration Appeals (BIA) has previously announced that drug trafficking offenses, including heroin possession, are per se "particularly serious crimes."[218] Because actual notice is not required and the BIA's per se determination makes clear that a reasonable person would know heroin possession was a "particularly serious crime," Guerrero had fair notice and his due process rights were not violated. Notice how this step looks to the actual facts of the case rather than evaluating the statute abstractly.

Because Guerrero had fair notice, the court should proceed to the third and final step of the Structure and Rights Approach, evaluating arbitrary enforcement—the hybrid separation of powers and due process protection. Here, the party challenging the law would present evidence of arbitrary enforcement, either by conflicting adjudications or law enforcement targeting a particular population. Either of these routes is sufficient; a challenger need not show evidence of both but is free to do so should it exist.[219] Upon the presentation of *any* evidence, the burden switches

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[217] 8 USC § 1231(b)(2)(B)(iv). The fact that the legislature can delineate per se crimes that constitute the "unmistakable core" shows how lenient the separation-of-powers step is. In theory, the legislature could enact a law saying it is illegal to do "bad stuff" and specify that murder was included in the definition of "bad stuff." Murder would constitute the "unmistakable core" of the "bad stuff" statute, preventing invalidation at Step One of the Structure and Rights Approach. Although it appears the "bad stuff" statute may give law enforcement "unfettered discretion" as in *Papachristou*, the courts may narrow the meaning of the "bad stuff" statute over time, preserving its constitutionality. This is essentially what happened with the Sherman Antitrust Act. See note 80. Additionally, Steps Two and Three protect due process and separation-of-powers principles by ensuring that the "bad stuff" statute would not pass constitutional muster if applied in an unconstitutional manner. For further discussion of the leniency of this step and why it is not problematic, see text accompanying note 181. A special thanks to my classmate Joseph Begun for proposing the concept of a "bad stuff" statute.

[218] See *In re Y-L-*, 23 I & N Dec 270, 276 (AG 2002).

[219] See note 189 and accompanying text.

to the party supporting the law to explain why the law is not arbitrary and can be applied in a principled manner. At this stage, the parties are not bound by the facts of the case but should consider whether previous application of the law in any context evidences subpar interpretative standards.

In the case of the INA's "particularly serious crime" provision, the defendant would describe the current circuit split (conflicting adjudications) to meet the threshold showing. The Third Circuit has held that the language of 8 USC § 1231(b)(3)(B)(ii) makes clear that a crime cannot be "particularly serious" unless it is an aggravated felony.[220] The BIA and the majority of the circuits, however, have held that the language of the statute allows the attorney general to designate crimes as particularly serious regardless of their classification as aggravated felonies.[221] Guerrero would emphasize that the split is not just "division about whether the [provision] covers this or that crime . . . it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider."[222] This was the aspect of the residual clause that the *Johnson* Court repeatedly emphasized. The alternative route would be for Guerrero to show evidence that the law is enforced disproportionately against a particular population, as was the case in *Papachristou*. In this case, however, there is no such evidence.

Having fulfilled this threshold showing, the government would then be responsible for explaining why the provision provides adequate guidance for enforcement (separation of powers) as well as fair notice to individuals (due process) rather than being so standardless that its application results in impermissible "creation" of the law. In *Guerrero*, the Government would point to the shallow nature of the circuit split and suggest that the Third Circuit is merely an outlier. The Third Circuit's brief discussion of whether the "particularly serious crime" exception is limited to

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[220] *Alaka v Attorney General of the United States*, 456 F3d 88, 104–05 (3d Cir 2006).

[221] See *In re N-A-M-*, 24 I & N Dec 336, 337 (BIA 2007), affd 587 F3d 1052, 1056 (10th Cir 2009); *Delgado v Holder*, 648 F3d 1095, 1102–05 (9th Cir 2006); *Gao v Holder*, 595 F3d 549, 556 (4th Cir 2010); *Nethagani v Mukasey*, 532 F3d 150, 155–57 (2d Cir 2009); *Ali v Achim*, 468 F3d 462, 469–70 (7th Cir 2006), cert granted, 551 US 1188 (2007), cert dismissed, 552 US 1085 (2007). The writ was dismissed due to settlement with the government on a separate claim. See Michael McGarry, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 BC L Rev 209, 212 n 23 (2010).

[222] *Johnson*, 135 S Ct at 2560.

aggravated felonies supports this position, and the majority of circuits agree.[223] This suggests that the circuit split may resolve itself with time when the Third Circuit eventually considers the legal question through the framework of agency deference.

A court would then weigh the arguments and decide whether the provision was so standardless that either the separation of powers (judicial/executive legislation) or due process (fair notice) was violated by the conflicting adjudications (arbitrary enforcement). In *Guerrero*, a court would likely deem invalidation of the "particularly serious crime" provision premature. Unlike the residual clause, courts are not disagreeing on a host of issues that indicate difficulty understanding what factors to consider when applying the law, as was the case with the residual clauses in *Johnson* and *Dimaya*. Rather, one circuit disagrees with all others about how to define a particular aspect of the statute.

An issue arises, however, when the standards for guidance laid out by a statute are so vague that virtually every aspect of the law must be considered by the Supreme Court. The ACCA's residual clause is an example of such a provision. The Supreme Court granted certiorari and heard oral argument in at least seventeen cases, all of which involved different issues regarding the ACCA's residual clause.[224] These repeated difficulties in applying the residual clause were clear evidence that the law was unconstitutionally vague. In contrast, the Court has not heard oral argument in any case concerning the INA's "particularly serious crime" provision.[225] This is an indication that invalidation is premature. In other words, more percolation time is necessary to determine whether invalidation may be appropriate in a later case. Until there is evidence that the Supreme Court must continually reanalyze the statute in order to resolve recurring splits, invalidation is inappropriate.

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[223] See *Alaka*, 456 F3d at 104–05; Brief for the Respondents in Opposition, *Ali v Achim*, No 06-1346, *16 (US filed July 11, 2007). For further analysis of the circuit split, see McGarry, 51 BC L Rev at 221–25 (cited in note 221).

[224] A Westlaw search conducted in October 2019 lists seventeen Supreme Court cases including "ACCA" and "residual clause."

[225] A Westlaw search conducted in October 2019, lists two Supreme Court cases including "particularly serious crime" and "INA." See generally *Sale v Haitian Centers Council, Inc*, 509 US 155 (1993) (mentioning the use of "particularly serious crime" in a US treaty); *INS v Aguirre-Aguirre*, 526 US 416 (1999) (briefly mentioning the use of "particularly serious crime," but not resolving its meaning).

As exhibited by the application of the Structure and Rights Approach to *Guerrero*, the proposed framework brings the abstract exercise of the current vagueness test back to reality, asking judges to look at prior court decisions and the actual facts of the case to determine whether a vague provision is unconstitutional. In doing so, the approach reconnects the vagueness framework to its constitutional purpose of protecting both the separation of powers and due process as well as providing predictable and accessible guidance to lower courts.

CONCLUSION

A careful analysis of the Supreme Court's vagueness doctrine reveals that vagueness has become unanchored from its constitutional principles and unworkable for lower courts to apply. While the current approach focuses on due process with its two-pronged notice and arbitrary enforcement test, early courts and scholars considered vagueness as equally based on due process and separation of powers. This Comment argues that the conceptual and practical bases for the early commentators' conception of the doctrine are sound and accordingly suggests that separation of powers be formally reincorporated into the vagueness test. Although there is an element of separation of powers present in the arbitrary enforcement prong of the current test, clarifying the role of each constitutional concept is important for defining the limits of the doctrine.[226] Such clarification is necessary given the criticisms that the test is subjective and difficult to apply, which are demonstrated by *Guerrero*.[227]

The proposed Structure and Rights Approach disentangles the separation of powers and due process elements and orders them in a three-part framework. Each constitutional concept—separation of powers, due process, and the hybrid of arbitrary enforcement—receives its own step. Moving through these steps sequentially guides courts in determining which, if any, constitutional protection is violated by a vague statute. In doing so, the framework provides a test that is more predictable and consistent than the "I know it when I see it" quality of the current test. In

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[226] See Goldsmith, 30 Am J Crim L at 281–83 (cited in note 13) (describing how the Supreme Court "has often issued sweeping and contradictory statements on the subject" of the vagueness doctrine).

[227] See note 56.

this way, the proposed approach minimizes the extent of constitutional violations and facilitates effective review of vagueness decisions.