ARTICLES

Vagueness and Federal-State Relations

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This Article aims to clarify the content of the void-for-vagueness doctrine and defend its historical pedigree by drawing attention to a fundamental aspect of the Supreme Court's vagueness decisions—that vagueness analysis significantly depends on whether the law at issue is a federal or state law. That simple distinction has considerable explanatory power. It reveals that the doctrine emerged in the late nineteenth century in response to two simultaneous changes in the legal landscape—first, the availability of Supreme Court due process review of state penal statutes under the Fourteenth Amendment, and second, a significant shift in how state courts construed those statutes. The federal-state distinction also divides the Court's decisions into two groups with mostly separate concerns. It reveals that separation-of-powers concerns primarily motivate the Court's vagueness decisions involving federal laws, while federalism concerns are the driving force in its vagueness decisions involving state laws. In the vast majority of cases involving a federal law, the Court will narrowly construe the law to avoid vagueness concerns. In cases involving a state law, by contrast, the Court will follow any preexisting state-court construction of the law, however indefinite it may be, with the result that vagueness analysis amounts to a due process limitation on judicial construction. Proper recognition of the federal-state distinction would result in fewer vagueness cases that reach the Supreme Court and more penal laws that are narrowly construed. That would promote the rule of law by increasing the precision of criminal laws and reducing the risk of arbitrary enforcement—the very goals the vagueness doctrine seeks to achieve.

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INTRODUCTION

Trying to make sense of the Supreme Court's void-for-vagueness decisions on their own terms is like watching a 3D movie without proper eyewear. It's a blurry mess. The Court often repeats the refrain that a statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes" or "invites arbitrary enforcement."[1] But that test for vagueness hardly explains the outcomes or rationales of the Court's vagueness cases.[2] Nor does it provide meaningful guidance for future applications of the doctrine.[3] As judges and scholars have long recognized, unconstitutional indefiniteness is "itself an indefinite concept."[4]

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1 Johnson v. United States, 576 U.S. 591, 595 (2015); *see also* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Vill. of Hoffman Ests. v. Flipside, 455 U.S. 489, 498 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926).

2 The Court's "fair notice" and "arbitrary enforcement" language "does not provide a full and rational explanation of the case development in which it appears so prominently." Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74 (1960).

3 As Professor John Jeffries has noted, the language of the doctrine does not furnish a "yardstick" for assessing whether a particular statute is impermissibly indeterminate. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985). The concepts of fair notice and arbitrary enforcement are themselves indeterminate. *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 514 (1994) (noting that "the meaning of [such] phrases is likely . . . both vague and contested").

4 Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); *see also Johnson*, 576 U.S. at 621 (Thomas, J., concurring in the judgment); Michael J.Z. Mannheimer, *Vagueness As Impossibility*, 98 TEX. L. REV. 1049, 1051 (2020); Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV.

For decades, scholars have sought to bring clarity to the vagueness doctrine. Some have argued that the Supreme Court's vagueness decisions are best understood as protecting the rule of law[5] or other independent constitutional values.[6] Others have tried to distill distinct principles animating the doctrine[7] or teased out how vagueness review may vary in different contexts.[8] Yet, for the most part, these analytical critiques have not significantly altered how the Supreme Court articulates the vagueness doctrine: it continues to use the indeterminate language of "fair notice" and "arbitrary enforcement" without much further explication.[9]

2051, 2052–53 (2015). Andrew G. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 282 (2003); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Law*, 80 DENV. U. L. REV. 241, 243 (2002); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 163 (2000).

5 *See* Jeffries, *supra* note 3, at 195, 198, 212–19.

6 Professor Anthony Amsterdam famously theorized, for example, that the vagueness doctrine is used in many cases as "an insulating buffer zone" that protects "the peripheries of several of the Bill of Rights freedoms." Amsterdam, *supra* note 2, at 75. Professor Peter Low and I have argued that, in non-buffer-zone cases, the application of the vagueness doctrine is best understood as protecting two independent constitutional principles of criminal law: that "all crime must be based on conduct," and that "there must be a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied." Low & Johnson, *supra* note 4, at 2053; *see also* Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 659–62 (2019) (arguing that, in many applications, the vagueness doctrine is effectively a "void-for-breadth" doctrine); Arjun Ogale, Note, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 812–13 (2022) (arguing that the Supreme Court's vagueness cases can be categorized into "rights-based" cases and "structure-based" cases).

7 *See, e.g.*, Andrew Jensen Kerr, *Void-for-Vagueness As a Legal Process Contradiction*, 61 U. LOUISVILLE L. REV. 253, 254 (2023) (arguing that the vagueness doctrine should be understood as "a legal process problem" that "integrates [ ] basic moral intuitions about mistake and excuse"); Mannheimer, *supra* note 4, at 1054 (arguing that the vagueness doctrine should be understood as an expression of the common law principle that "a statute cannot compel that the 'impossible . . . be performed'" (quoting Dr. Bonham's Case (1610), 77 Eng. Rep. 646 (K.B.)); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1140–45 (2017) (explicating several distinct principles animating the Supreme Court's vagueness decisions); Goldsmith, *supra* note 4, at 283–94 (similar).

8 Daniel B. Rice, *Reforming Variable Vagueness*, 23 U. PA. J. CONST'L L. 960, 961–67 (2022); *see, e.g.*, Kristen Bell, *The Forgotten Jurisprudence of Parole and State Constitutional Doctrines of Vagueness*, 44 CARDOZO L. REV. 1953, 1956–61 (2023); Matthew G. Sipe, *The Sherman Act and Avoiding the Void-for-Vagueness Doctrine*, 45 FLA. ST. U. L. REV. 709, 732–34, 737–41, 744–48 (2018); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1137–39; Bradley E. Abruzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 361–63 (2012); Jessica A. Lowe, Note, *Analyzing Void-for-Vagueness Doctrine As Applied to Statutory Defenses: Lessons from Iowa's Stand-Your-Ground Law*, 105 IOWA L. REV. 2359, 2378–86 (2020).

9 *See, e.g.*, Beckles v. United States, 137 S. Ct. 886, 892 (2017) (quoting *Johnson*, 576 U.S. at 595); *see also* City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

Justice Clarence Thomas has separately questioned the historical legitimacy of constitutional vagueness review. In two recent cases, he has called the doctrine's history "unsettling"[10] and suggested that, "before the late 19th century," no one "believed that courts had the power under the Due Process Clauses to nullify statutes" on vagueness grounds.[11] Instead, "early American courts, like their English predecessors, addressed vague laws through statutory construction," relying on "the rule of lenity and declin[ing] to apply vague penal statutes on a case-by-case basis."[12] It was not until after the adoption of the Fourteenth Amendment that the constitutional vagueness doctrine "materialized,"[13] Justice Thomas has noted, and it did so alongside—and in light of—substantive due process.[14]

Recently, however, the Supreme Court elaborated on the arbitrary-enforcement branch of the doctrine. Writing for a majority of the Court, Justice Neil Gorsuch explained that the vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers," and that vague laws "undermine the Constitution's separation of powers" by "threaten[ing] to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." United States v. Davis, 139 S. Ct. 2319, 2325 (2019). Long before *Davis*, scholars had pointed out that the vagueness doctrine was at least partially motivated by separation-of-powers concerns. *See* Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1550 (noting that the Court in *Davis* made "explicit" what "was long implicit" by recognizing the separation of powers as a "'pillar[ ]'" of the vagueness doctrine (quoting *Davis*, 139 S. Ct. at 2325)); *see, e.g.*, Low & Johnson, *supra* note 4, at 2085, 2089 (identifying "antidelegation" and "separation of powers" principles in the Court's vagueness decisions); Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1806 (2012) (observing that "vague statutes have the effect of delegating lawmaking authority to the executive" because "any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals, filling the gaps of the legislature's policy goals"); Goldsmith, *supra* note 4, at 283–94 (similar).

10 *Johnson*, 576 U.S. at 613–21 (Thomas, J., concurring in the judgment); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1242–45 (2018) (Thomas, J., dissenting) (questioning the legitimacy of vagueness doctrine under the Due Process Clause).

11 *Johnson*, 576 U.S. at 617 (Thomas, J., concurring in the judgment).

12 *Dimaya*, 138 S. Ct. at 1243 (Thomas, J., dissenting); *see also Johnson*, 576 U.S. at 613–16 (Thomas, J., concurring in the judgment).

Historically, the rule of strict construction "applied to all 'penal' laws—that is, laws inflicting any form of punishment, including ones we might now consider 'civil' forfeitures or fines." Wooden v. United States, 142 S. Ct. 1063, 1086 n.5 (2022) (Gorsuch, J., concurring in the judgment); *see also* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2498–2500 (2016).

13 *Johnson*, 576 U.S. at 617 (Thomas, J., concurring in the judgment).

14 *Id.* at 617–21 (Thomas, J., concurring in the judgment). As Professor Carissa Byrne Hessick has noted, by "drawing parallels" to "substantive due process"—a "controversial" doctrine—Justice Thomas "obviously meant to question the legitimacy of the vagueness doctrine." Carissa Byrne Hessick, Johnson v. United States *and the Future of the Void-for-Vagueness Doctrine*, 10 N.Y.U. J.L. & LIBERTY 152, 162 (2016).

Missing from these discussions is proper recognition of a fundamental aspect of vagueness review in the Supreme Court—that vagueness analysis significantly depends on whether the law at issue is a federal or state law. That distinction is simple, but it has considerable explanatory power. Viewing the Court's vagueness decisions through the lens of the federal-state distinction—and related structural constitutional values and principles of statutory interpretation—brings clarity and structure to the doctrine's origins and applications.[15]

As an historical matter, the federal-state distinction helps to explain why constitutional vagueness review did not emerge until the late nineteenth century—only after the Due Process Clause of the Fourteenth Amendment took force. Before then, the Supreme Court did not engage in due process review of state laws. And as to federal laws, it applied a robust version of the rule of strict construction (a forerunner of the rule of lenity) to ensure that indefinite criminal prohibitions were narrowly construed. State courts likewise strictly construed state criminal prohibitions—reducing the risk of excessively indefinite statutes. But the rule of strict construction fell out of favor around the time the Fourteenth Amendment was adopted. Indeed, many states passed laws abrogating that interpretative approach, authorizing and encouraging state courts to construe criminal prohibitions more broadly. The combination of that change in attitude toward the construction of penal statutes and the new availability of due process review of state laws under the Fourteenth Amendment gave rise to constitutional vagueness challenges to state laws, many of which were successful. Vagueness challenges to federal laws, however, rarely succeeded—underscoring the important role of broad state-court constructions of state laws in early vagueness cases.[16]

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[15] Prior scholarship has noted the significance of the "relationship between the source of law and the court interpreting it." Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 356 n.42 (2021) [hereinafter Johnson, *Vagueness Attacks*]; *see, e.g.*, Low & Johnson, *supra* note 4, at 2079 (noting differences between state-law and federal-law vagueness cases); Amsterdam, *supra* note 2, at 90, 94 & nn.92–97 (noting that "the state-federal distinction is [ ] significant" with respect to "the Supreme Court's own power" to ensure the "probable regularity of exercise of governmental force"); Ogale, *supra* note 6, at 812–16; Emily M. Snoddon, Note, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2313 (2019); Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1556–57 (1981). But this Article is the first to use the federal-state distinction as a heuristic for understanding the Supreme Court's vagueness decisions.

[16] *See infra* Part I.

The federal-state distinction is also a powerful tool for understanding the doctrinal content of the Court's vagueness decisions. Viewing those decisions through that lens reveals that separation-of-powers concerns motivate the Court's vagueness decisions involving federal laws, while federalism concerns are the driving force in its vagueness decisions involving state laws. These two distinct sets of concerns yield two separate doctrines as a functional matter.[17]

In cases involving federal laws, the Court's focus is whether indeterminate statutory language effectively delegates the legislative task of defining prohibited conduct to someone other than the legislature.[18] This antidelegation principle shares some similarities with the administrative law nondelegation doctrine, but the two concepts are not coextensive. The administrative law nondelegation doctrine centers on the relationship between the legislative and executive branches of government in regulatory contexts in which executive agency expertise is needed. It permits the delegation of legislative power to agencies with "an intelligible principle" to guide implementation of a statute.[19] The antidelegation principle animating federal-law vagueness decisions, by contrast, is primarily focused on the relationship between the legislative and judicial branches of government in the specific context of defining crimes and fixing punishments. It is thus rooted not only in the separation of powers, but also in the principle of legality, which prevents courts from retroactively defining conduct that is subject to criminal punishment.[20]

Yet challenges to federal laws in the Supreme Court rarely lead to invalidation on vagueness grounds because of the Court's relationship to the source of law. In virtually all cases, the Court

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17 *See infra* Part II.

18 This Article sometimes refers to breadth, indefiniteness, and vagueness interchangeably. To be sure, these terms are conceptually distinct. *See* Brennan-Marquez, *supra* note 6, at 647–50 (distinguishing between problems of statutory breadth and problems of statutory uncertainty, such as vagueness and ambiguity). But each poses problems of indeterminacy with which the vagueness doctrine is concerned. *See* Waldron, *supra* note 3, at 513–14 (observing that "vagueness," in the doctrinal sense, "refer[s] to any form of indeterminacy that encourages unwarranted discretion or leaves the citizen without reasonable notice of what is required of her").

19 J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). More recently, the Court has invoked the "major questions doctrine," which requires Congress to speak clearly when authorizing agency action in certain "extraordinary cases." West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2608–09 (2022).

20 *See infra* Part II.A. Although separation-of-powers concerns are the focus of the Supreme Court's vagueness analysis, *see infra* text accompanying notes 132–138, sometimes a federalism concern is present as well. *See infra* text accompanying notes 190–192.

engages in vagueness avoidance—narrowly construing the federal law to avoid constitutional vagueness concerns. In practice, then, the Supreme Court's federal-law vagueness analysis amounts to application of a constitutional avoidance canon of statutory construction.[21] Only in rare circumstances in which a narrowing construction is not feasible will the Supreme Court invalidate a federal law for unconstitutional vagueness. In fact, the Court has done so only on two occasions—once in a set of 1920s decisions involving the Lever Act and once in a trilogy of 2010s decisions concerning materially identical "residual clauses" in different penal statutes. On each occasion, the void-for-vagueness result was justified because no narrowing construction was feasible absent impermissible judicial crime-making.[22]

Vagueness cases involving state laws spring from a different source. In these cases, the Supreme Court's vagueness analysis is constrained by a distinctive federalism principle—that it is the province of the highest state court to construe state law.[23] As a result, the Supreme Court will follow any preexisting state-court constructions of indefinite statutory language. If the highest state court has narrowly construed that language to avoid vagueness concerns, there is no constitutional problem. But if the state court of last resort has construed the statute in a way that fails to eliminate vagueness concerns, the Supreme Court will follow that construction and not adopt its own; it is left to determine whether the state statute, so construed, is unconstitutionally vague. The Court's application of the vagueness doctrine to state laws can therefore largely be understood as a due process limitation on state courts' judicial construction of indefinite statutory language.[24]

As a practical matter, recognition of the federal-state distinction should inform the way lower federal courts and state courts

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[21] *See infra* Part II.A.1; *see also* Joel S. Johnson, *Vagueness Avoidance*, 110 VA. L. REV. (forthcoming 2024).

[22] *See infra* Part II.A.2.

[23] When the Supreme Court invokes federalism in the context of reviewing state substantive criminal law, it usually does so as a basis for not recognizing a federal constitutional constraint that would apply to the state law. *See, e.g.*, Brenner Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 490, 501–19 (2017) (demonstrating how federalism has been an "enduring and important" basis for the Court's reluctance to impose constitutional limits on substantive criminal law). Yet when it comes to vagueness, a federalism principle has fueled the development of the constitutional doctrine. *See infra* text accompanying notes 240–267 (observing that the vast majority of cases in which the Court has invalidated a law on a vagueness ground involved a state law).

[24] *See infra* Part II.B.

apply the vagueness doctrine.[25] Lower federal courts considering vagueness challenges to federal laws are caught between two competing separation-of-powers principles. They must first assess whether the federal law, as drafted, violates the separation of powers insofar as it effectively delegates Congress's crime-defining function to another body—judges, police, prosecutors, or juries. If so, the question is whether the court can eliminate that delegation concern through a narrowing construction without violating the separation of powers in a different sense—by exceeding the limits of statutory construction and effectively assuming Congress's crime-defining role.[26] Federal courts should be explicit about the role of vagueness avoidance and the separation-of-powers concerns driving the analysis. They should treat vagueness avoidance as a distinct canon of statutory construction that counsels in favor of narrowly construing indeterminate and overly broad penal statutes,[27] but they should also avoid judicial crime definition itself. Taking this approach will, in most cases, resolve any vagueness issues as a matter of statutory construction.[28] Consistent adherence to this approach would also encourage the Justice Department to adopt charging policies that more readily acknowledge hard limits on the scope of federal penal statutes and expressly prohibit prosecutions beyond those limits.[29]

When addressing state laws, lower federal courts should begin their vagueness analysis by acknowledging the federalism constraint on their ability to determine statutory meaning. They should be clear that, in most cases, the question is whether any prior state-court constructions have exceeded the constitutional limits of judicial construction. When the highest state court has not yet passed on the meaning of the statute, a federal court may attempt to "extrapolate" the allowable meaning of the statutory language. Yet when doing so, it should be careful to adhere to

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25 *See infra* Part III.

26 The era of judicial federal crime definition is over. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 301 n.92 (2021) [hereinafter Hessick & Hessick, *Nondelegation*] (explaining that, "[a]t the Founding, federal judges were widely understood to have the power to create common law crimes" but that "judicial authority to convict in the absence of a statute fell into disfavor").

27 For a detailed theory of vagueness avoidance, see Joel S. Johnson, *Vagueness Avoidance*, *supra* note 15.

28 *See infra* Part III.A.1.

29 *See infra* Part III.A.1.

state-law indicia of statutory meaning, including relevant state canons of statutory construction.[30]

State courts should likewise be cognizant of the federal-state distinction when presented with vagueness challenges. How state courts choose to address such challenges is, of course, largely a question of state law that is within their control. But many state courts engage in some form of "lockstepping," under which the content of state constitutional rights is equivalent to that of their federal constitutional analogs. In the vagueness context, reflexive lockstepping can lead to a significant error if state courts are not attuned to the federal-state distinction. When articulating the vagueness doctrine, state courts often rely on Supreme Court vagueness decisions involving *state* laws. While that is appropriate to the extent state courts are articulating the content of the *federal* constitutional vagueness doctrine as applied to state laws, they should regard it as inappropriate when articulating the content of the vagueness doctrine under their own state constitutions. In that context, the proper analog for a lockstepping state court should be the body of Supreme Court vagueness decisions involving *federal* laws. In other words, state interests would be better served if vagueness analysis under state constitutions were driven by *state* separation-of-powers principles. In most cases, this approach would likely yield a narrowing construction that eliminates vagueness concerns. A vagueness challenge to the law would remain only in cases where state separation-of-powers principles or other state-law principles of construction precluded an effective narrowing construction.[31]

If lower federal courts and state courts regularly adverted to the federal-state distinction, fewer vagueness cases would reach the Supreme Court, and more penal laws would be narrowly construed. That would promote the rule of law by increasing the precision of penal laws and reducing the risk of arbitrary enforcement—the very goals the vagueness doctrine is meant to achieve.

The Article proceeds in three parts, each offering new insights about the vagueness doctrine in light of the federal-state distinction. Part I recounts the history of the vagueness doctrine through the lens of the federal-state distinction. Part II explicates the doctrinal implications of the federal-state distinction, arguing that the Supreme Court's federal-law vagueness cases should be

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[30] *See infra* Part III.A.2.

[31] *See infra* Part III.B.

understood as separate from its state-law vagueness cases. Part III contends that recognition of the federal-state distinction as a prominent feature of vagueness analysis should have important but different practical effects in lower federal courts and in state courts.

I. ORIGINS OF THE VAGUENESS DOCTRINE

Justice Thomas has questioned the legitimacy of the vagueness doctrine on the grounds that it did not emerge as a constitutional limitation until the late nineteenth century and was developed alongside substantive due process decisions recognizing certain fundamental rights.[32] He is correct that the Court has employed the doctrine for instrumental purposes. As Professor Anthony Amsterdam famously observed, the Court has used the vagueness doctrine to create an "insulating buffer zone of added protection" for certain constitutional freedoms at various times,[33] including *Lochner*-era economic liberties, the First Amendment, and privacy rights.[34] But the doctrine cannot be reduced to those instrumental uses.[35] Nor do those uses tell us whether the doctrine consists of independent and legitimate constitutional principles.

Contrary to Justice Thomas's suggestion, the fact that the constitutional vagueness doctrine did not appear until the late nineteenth century does not undermine its legitimacy. The Supreme Court recognized and developed the doctrine around that time in response to two significant and interrelated changes to the legal landscape—first, the availability of Supreme Court due process review of state penal statutes under the Fourteenth Amendment, and second, a significant shift in how state courts construed those statutes.

Justice Thomas has correctly observed that "early American courts, like their English predecessors, addressed vague laws

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[32] *See supra* text accompanying notes 10–14; *Johnson*, 576 U.S. at 617–21 (Thomas, J., concurring in the judgment).

[33] Amsterdam, supra note 2, at 75.

[34] *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 390 (1979) (abortion rights); Thornhill v. Alabama, 310 U.S. 88, 96–100 (1940) (First Amendment freedoms); Int'l Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223 (1914) (economic liberty); *see also* Amsterdam, *supra* note 2, at 85, 74–75 nn.38–40.

[35] *See* Low & Johnson, *supra* note 4, at 2059 (observing that the buffer-zone theory does not explain all vagueness cases).

through statutory construction," not constitutional law.[36] But the availability of due process review under the Fourteenth Amendment brought an important structural change: it enabled federal courts to review state penal statutes, but the meaning of those statutes was effectively fixed by any judicial constructions that had already been imposed by the highest state court.[37] That put the Supreme Court in a bind. Unlike with federal statutes, the Court could not simply construe overly broad and indefinite language narrowly.[38] It was stuck with whatever state-court construction already existed, no matter how broad and indefinite that construction might have been. What is more, a sharp shift in the nineteenth century away from a strict-construction approach increased the likelihood that the judicial constructions the Supreme Court inherited from state courts would be excessively indefinite.[39] These new circumstances presented questions about indeterminate statutory language and state-court judicial constructions of that language that the Court had never before needed to answer.

Rather than turn a blind eye to ineffective state court judicial constructions of penal statutes, the Court held that state statutes, so construed, were unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.[40] Unlike in its substantive due process decisions, the Court did not announce any unenumerated fundamental rights when invalidating statutes on vagueness grounds.[41] Nor did it foreclose any substantive legislation options to regulate particular conduct. Instead, the Court held that the penal statutes, as construed by state courts, violated due process because they "offered no standard of conduct" that was "possible to know."[42] The open-ended state-court constructions of the statutes did not define prohibited conduct in advance, but instead effectively left that task to post hoc judgments by police, prosecutors, and juries.

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[36] Sessions v. Dimaya, 138 S. Ct. 1204, 1243 (2018) (Thomas, J., dissenting) (citing Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 274–79 (1948)); *see also Johnson*, 576 U.S. at 613–15 (Thomas, J., concurring in the judgment).

[37] *See infra* text accompanying notes 102–103.

[38] *See infra* text accompanying notes 240–242.

[39] *See infra* text accompanying notes 76–101, 107–109.

[40] *See infra* text accompanying notes 105–122.

[41] *See* Low & Johnson, *supra* note 4, at 2056 (explaining that constitutional vagueness review is equivalent to rational basis review).

[42] Am. Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 661–62 (1915).

This Part tells that story. It begins by describing the common law rule of strict construction, which required narrow construction of indefinite penal statutes, and the subsequent weakening of that rule at both the federal and state level. It then explains how, on the heels of that shift in attitude toward the construction of penal statutes, the Supreme Court faced vagueness challenges to state penal statutes that had already been broadly construed by state courts. It was in that particular context that the vagueness doctrine was born and developed. The significance of those factors specific to state-law vagueness challenges is underscored by the Supreme Court's treatment of early vagueness challenges to federal laws: although such challenges were frequently brought, the Court invalidated only one federal law for vagueness during the twentieth century.[43]

A. Strict Construction of Penal Statutes

1. Reign of strict construction.

At common law, courts dealt with indeterminate penal statutes through "a rule of strict construction,"[44] which emerged in reaction to the vast number of crimes that had become capital offenses in England.[45] The practical reach of the death penalty for these offenses had previously been limited by the "benefit of clergy" defense,[46] a medieval doctrine that enabled defendants to avoid capital punishment by reciting a few passages from the Bible.[47] As literacy rose and more defendants could take advantage of that defense,[48] a series of statutes abrogated the benefit-of-clergy doctrine.[49] Courts responded by "invent[ing] strict construction to stem the march to the gallows."[50]

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43 *See infra* text accompanying notes 123–125.

44 *Johnson*, 576 U.S. at 613 (Thomas, J., concurring in the judgment).

45 Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–51 (1935); *see also* Shon Hopwood, *Clarity in American Criminal Law*, 54 AM. CRIM. L. REV. 695, 714 (2017); 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 10–11 (1948) (identifying several capital offenses under English criminal law).

46 Mullaney v. Wilbur, 421 U.S. 684, 692 (1975).

47 *Id.* at 692; Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 87 (1998); *see* Hopwood, *supra* note 45, at 714; Hall, *supra* note 45, at 749.

48 Solan, *supra* note 47, at 87.

49 *See* Radzinowicz, *supra* note 45, at 10–11; Solan, *supra* note 47, at 87.

50 Jeffries, *supra* note 3, at 198.

In a typical application of the rule of strict construction, an English court would narrowly construe indefinite statutory language to avoid imposition of the death penalty in a particular case. In one instance noted by William Blackstone, an English court construed a statute denying the benefit of clergy to "those who are convicted of stealing horses" as *not* applying to someone who stole only one horse.[51] The statute was ambiguous—it could cover those who steal any number of horses (including one), or it could cover only those who steal multiple horses.[52] Although the legislature likely intended the first interpretation, the second was also fairly possible.[53] Following the strict-construction approach, the court seized upon that possibility, narrowly construing the statute to avoid the harsh punishment it prescribed.[54]

Sometimes, English courts applying strict construction went further—not just narrowly construing ambiguous statutory language to avoid application to particular facts, but treating vague statutory language as devoid of meaning altogether. In one such instance, an English court addressed a statute prohibiting the "stealing [of] sheep, or other cattle."[55] At the time, the ordinary meaning of the term "cattle" was open-ended, "encompass[ing] all '[b]easts of pasture; not wild nor domestick.'"[56] The catch-all phrase "other cattle" was therefore not merely ambiguous—that is, its position after the word "sheep" left it open only to "a discrete number of possible meanings"[57]—but vague in that "cattle" had practically "innumerable possible meanings."[58] The English court dealt with that vague language by effectively striking it from the statute on the ground that it was "much too loose."[59]

Across the Atlantic, early American courts "routinely" applied the rule of strict construction to penal statutes late into the

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51 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765); Solan, *supra* note 47, at 87.

52 Solan, *supra* note 47, at 88 (analyzing Blackstone's example in more detail).

53 *Id.*

54 *Id.* at 87–88.

55 BLACKSTONE, *supra* note 51, at 87 (emphasis omitted).

56 *Johnson*, 576 U.S. at 614 n.2 (Thomas, J., concurring in the judgment) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 286 (4th ed. 1773)).

57 LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 38 (2010).

58 *Id.* at 39. For a fuller discussion of the distinction between ambiguity and vagueness in statutory language, see Johnson, *Vagueness Avoidance*, *supra* note 21, at *10–15 (distinguishing ambiguity from vagueness and contestability).

59 BLACKSTONE, *supra* note 51, at 87; Solan, *supra* note 47, at 87–88.

nineteenth century.[60] Federal courts applied the rule to federal penal statutes, with the Supreme Court acknowledging it as early as 1795.[61] In one early case, Chief Justice John Marshall explained that the rule was based on "the plain principle that the power of punishment is vested in the legislative, not in the judicial department."[62] He elaborated that "the legislature, not the Court," was "to define a crime [ ] and ordain its punishment."[63] But he clarified that, unlike English courts, federal courts should apply the rule of strict construction only when statutory language is ambiguous.[64]

Until the twentieth century, the Supreme Court continued to apply this version of the rule of strict construction—narrowly construing a federal penal statute when the plain text left a "reasonable doubt" as to its meaning.[65] In circumstances of "statutory indeterminacy," then, "federal courts saw themselves [as] engaged in construction" of statutory language[66] that sought to avoid "mak[ing] every doubtful phrase" in a penal statute "a drag-net for penalties."[67] In taking that approach, early federal courts applied the rule of strict construction in a way that "reinforce[d]" the separation of powers.[68]

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60 Hessick & Hessick, *Nondelegation*, *supra* note 26, at 304 n.107 (2021); *see* F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2329–2332 & nn.151–62 (2022) [hereinafter Hessick & Hessick, *Constraining*] (identifying early state courts that applied the rule of strict construction); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 129–130 & nn.91–92 (2010) (describing how "American judges applied the principle of lenity from the start"); Hall, *supra* note 45, at 748 (noting "hundreds of cases stating and usually applying the common-law rule of strict construction of penal statutes"); *see also* Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: "What a Long Strange Trip It's Been"*, 28 GEO. MASON L. REV. 49, 57 n.42 (2020) (collecting early state cases).

61 *See* United States v. Lawrence, 3 U.S. 42, 45 (1795) (strictly construing a treaty between the United States and France, which had "introduced" a new "highly penal" remedy for addressing desertion); *see also* Hessick & Hessick, *Constraining*, *supra* note 60 at 2334 & nn.171–72.

62 United States v. Wiltberger, 18 U.S. 76, 95 (1820).

63 *Id.*

64 *Id.* at 95–96 ("Where there is no ambiguity in the words, there is no room for construction."); *see* Barrett, *supra* note 60, at 131–33 (arguing that early federal courts "modified" the rule of strict construction "to render its use consistent with" the U.S. norm of "faithful agency" by applying it "only in the event of ambiguity").

65 United States v. Hartwell, 73 U.S. 385, 396 (1867); *see, e.g.*, Ballew v. United States, 160 U.S. 187, 197 (1895); Sarlls v. United States, 152 U.S. 570, 576 (1894); United States v. Reese, 92 U.S. 214, 219 (1875); Harrison v. Vose, 50 U.S. 372, 378 (1850).

66 *Johnson*, 576 U.S. at 616 (Thomas, J., concurring in the judgment).

67 *Harrison*, 50 U.S. at 378.

68 *Barrett*, *supra* note 60, at 133–34.

During that period, the rule of strict construction gained traction in the state courts as well. But their approach was not always so limited. Although most state-court applications mimicked the Supreme Court's narrow construction of ambiguous federal penal statutes in favor of the defendant,[69] other applications resembled the approach of English courts that had deemed open-ended language in penal statutes void.[70]

One such case was *State v. Mann*.[71] There, the Oregon Supreme Court held in 1867 that a poker game was not a "gambling device" within the meaning of a state statute that criminally prohibited "set[ting] up" or "us[ing]" any "gambling device[ ] of whatever name or nature adopted, devised, or designed for the purpose of playing any game of chance for money, etc."[72] Although the court began its analysis by articulating a statutory-construction rationale for not applying the statute to the particular facts of the case,[73] it ultimately went further—concluding that the statute was "void" because the term "gambling devices" had "no settled and definite meaning."[74] Under "a well settled rule of law," the court explained, criminal punishment "for doing an act" was permissible only if "the words used in the statute" provide "sufficient certainty" that the statute covers that act.[75]

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69 *See, e.g.*, Bunfill v. People, 39 N.E. 565, 567 (Ill. 1895); Myers v. Connecticut, 1 Conn. 502, 504–05 (1816); State v. Boon, 1 N.C. 191, 192–97 (1801).

70 *See, e.g.*, McConvill v. Mayor & Alderman of Jersey City, 39 N.J.L. 38, 43–44 (1876) (holding that an ordinance forbidding the driving of "any drove or droves of horned cattle" through public places was "bad for vagueness and uncertainty in the thing forbidden" given the "indetermina[cy]" of the term "drove"); State v. Mann, 2 Or. 238, 240–41 (1867) (holding a statute that prohibited "gambling devices" was "void" because "the term has no settled and definite meaning"); Jennings v. State, 16 Ind. 335, 336 (1861) (holding that statute prohibiting "public indecency" was void for vagueness).

71 2 Or. 238 (1867).

72 *Id.* at 240.

73 *Id.* at 240–41 (noting that a poker game is "the result produced by the use of [a gambling] device"—not the device itself—and that the statute seemed to cover only "something *tangible*" that can be "adapted, devised, or designed for the purpose of playing a game of chance for money").

74 *Id.* at 241.

75 *Id.* (emphasis omitted). It has been suggested that the void-for-vagueness rationale in *Mann* was "dictum" inasmuch as the court had already explained that "the statute could and should be read narrowly." Mannheimer, *supra* note 4, at 1074–75. But the Oregon Supreme Court made clear that the lower court had "err[ed]" because the statute was "void" as a result of its indeterminacy. *Mann*, 2 Or. at 241. And in response to the decision, the state legislature enacted a replacement statute. *See* State v. Coats, 74 P.2d 1102, 1114 (Or. 1938) (Bailey, J., concurring) (observing that, soon after *Mann* "ruled that [the earlier statute] . . . was unconstitutional," the legislature "passed an act to prevent and punish gambling"); State v. Soriano, 684 P.2d 1220, 1230 (Or. Ct. App. 1984) ("In 1867, the Oregon Supreme Court held [a] section of the gambling laws void for vagueness. The

2. Decline of strict construction.

In the mid-nineteenth century, however, attitudes toward strict construction began to shift at both the state and federal levels.

In the states, many legislatures passed statutes abrogating the rule of strict construction,[76] because that rule was viewed as an impediment to efforts to implement criminal policy through legislation.[77] The most common form of these enactments was a "fair construction" statute[78] providing that "[t]he rule of the common law that penal statutes are to be strictly construed[ ] has no application" and that all statutes in the criminal code "are to be construed according to the fair import of their terms."[79] Some state legislatures went further, passing laws requiring penal statutes to be "liberally construed" to effectuate "the true intent and meaning of the legislature."[80] Courts in most of these states "consistently applied" the statutes from the time of their enactment.[81]

1868 legislature then re-enacted the laws with changes to answer the court's concern." (citing *Mann*, 2 Or. at 238)).

76 Hall, *supra* note 45, at 752–54 & nn.26–29 (identifying nineteen states that abrogated the rule of strict construction in the mid-nineteenth century and early twentieth century); *see also* Thumma, *supra* note 60, at 65–82.

77 *See* 3 SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:7 (8th ed. 2018) ("The common law rule of strict construction routinely frustrated legislative efforts to implement criminal law policy. Consequently, legislatures began directly to abrogate or modify the old rule."); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 384 ("'[T]he disinclination of courts and lawyers to give penal statutes any wider application than the letter required' was severely constraining the power of legislators 'to make improvements in the definition of old crimes.'" (quoting ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 143 (Holt, 1930))).

The American Law Institute would later take the same approach in the Model Penal Code, which provides that "when the language [of a Code provision] is susceptible to differing constructions it shall be interpreted to further the general purposes [of the Code] and the special purposes of the particular provision involved." Model Penal Code § 1.02(3). The language reflects a deliberate rejection of "[t]he ancient rule that penal law must be strictly construed . . . because it unduly emphasized only one aspect of the problem" associated with statutory indeterminacy—namely, fair notice to potential offenders. 1 AM. L. INST., MODEL PENAL CODE AND COMMENTARIES 32–33 (1985).

78 *See* Jeffries, *supra* note 3, at 204 n.41 (characterizing the New York version as the "original" fair-construction statute).

79 COMM'RS OF THE CODE, THE PENAL CODE OF THE STATE OF NEW YORK § 10 (1865); Hall, *supra* note 45, at 754 (noting that the New York fair-construction statute was representative of the "most common" type of statute abrogating strict construction).

80 Hall, *supra* note 45, at 754 (quoting the applicable Arkansas, Colorado, and Illinois statutes).

81 *See id.* at 756; *see also id.* at 756 n.41 (identifying "California, Idaho, Illinois, Kentucky, Minnesota, North Dakota, Oregon, South Dakota, Texas (court of criminal appeals), and Utah" as jurisdictions in which courts "consistently applied" the statutes from their enactment). In a minority of jurisdictions with anti-strict-construction statutes, courts

That change in the state-court construction of penal statutes affected outcomes.[82] Under the old strict-construction regime, a court confronting an ambiguous statute with two plausible meanings would simply choose the narrower one.[83] But a court confronting the same statute under the new fair-construction or liberal-construction regime would choose the broader construction if the relevant indicia of statutory meaning favored that conclusion, however slightly.[84] In the context of open-ended and indeterminate statutes, moreover, the change removed a tool for easily imposing narrowing constructions. That made courts more likely to adopt broad constructions of such statutes or, sometimes, to declare them void altogether.

Consider again *Mann*, the gambling-device case. The Oregon Supreme Court decided that case just three years after the state legislature had abrogated the rule of strict construction.[85] Recall that, before holding the gambling-device statute "void" for lack of "definite meaning," the court laid out a potential narrowing construction of the statute.[86] The opinion itself does not explain why the court ultimately rested its holding on the broader void-for-indefiniteness rationale, rather than the narrow construction. But the then-recent fair-construction statute may provide a clue. At the time of *Mann*, the Oregon Supreme Court had not yet expressly acknowledged that the fair-construction statute had abrogated the rule of strict construction.[87] Presumably, however, the

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continued to apply the old rule for decades. *See id.* at 755–56 & nn.39–40 (noting that, as of 1935, the common law rule of strict construction "still prevail[ed] generally, in spite of statutes embodying legislative canons of construction, in Arkansas, Colorado, Iowa, Nebraska, Nevada, and Washington").

82 *See, e.g.*, State v. Malusky, 230 N.W. 735, 737–39 (N.D. 1930) (rejecting strict construction of statutory phrase "offense involving moral turpitude" in light of statute abrogating rule of strict construction); State v. Johnson, 210 N.W. 353, 355 (S.D. 1926) (relying on state anti-strict-construction statute to distinguish federal decisions construing similar statutory terms).

83 *See, e.g.*, State v. Lovell, 23 Iowa 304, 305 (1867) (adopting narrow construction); Myers v. State, 1 Conn. 502, 504–05 (1816) (same).

84 *See, e.g.*, *Maxwell v. People*, 41 N.E. 995, 997–98 (Ill. 1895) (adopting broad construction of penal statute in light of liberal-construction statute); *People v. Soto*, 49 Cal. 67 (1874) (adopting broad construction of penal statute in light of fair-construction statute).

85 The Oregon Supreme Court decided *Mann* in 1867, 2 Or. 238, three years after the Oregon legislature had abrogated strict construction. Hall, *supra* note 44, at 753 n. 27.

86 *Mann*, 2 Or. at 240–41.

87 The Oregon Supreme Court did not acknowledge applicability of the fair-construction statute until 1879. *See* State v. Brown, 7 Or. 186, 194 (1879) (recognizing that the fair-construction statute had abrogated the rule of strict construction); *see also* Hall, *supra* note 45, at 772.

Mann court knew of its existence[88] and may have elected the void-for-indefiniteness rationale to sidestep knotty questions about the fair-construction statute's validity and scope.[89] If the gambling-device statute was "void" for lack of "definite meaning,"[90] the court could avoid addressing whether its proposed narrow construction comported with the fair-construction statute.

That reading of *Mann* illustrates an important point about the relationship between statutory construction and vagueness decisions. When penal statutes must be *fairly* or *liberally* construed—rather than strictly construed—the result will more often be broad and indefinite constructions. Put another way, a fair-construction approach remains neutral as to the permissibility of exceedingly indefinite penal statutes; a liberal-construction approach may even favor open-ended constructions. Neither approach guards against a legislature that uses excessively indefinite language in penal statutes to create a broad and indeterminate net of criminal liability. Some other tool is needed to address that concern.

Around the same period, federal courts also began to dilute the rule of strict construction. At the turn of the twentieth century, as federal statutes became more complex—and the regulatory state began taking shape—federal courts became more comfortable looking to a broader range of materials, including legislative history, to determine legislative intent.[91] And by the time of the New Deal, commentators were taking direct aim at the rule of strict construction,[92] characterizing it as judicial "casuistry" that undermined legislative intent and threatened "the immediate safety of society."[93]

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88 Indeed, the state argued that, in construing the gambling-device statute, "[t]he intention of the legislature must be carried out," *Mann*, 2 Or. at 240, language that is consistent with the fair-construction statute.

89 *See* Hall, *supra* note 45, at 754–56 (noting some early resistance to statutes abrogating the rule of strict construction).

90 *Mann*, 2 Or. at 241.

91 *See* Solan, *supra* note 47, at 97–101. The shift is reflected in a marked change in the content of a leading statutory-interpretation treatise from its first edition to its second edition. *Compare* 1 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 380 (1891) (giving no interpretative role to legislative history), *with* 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 879–80 (2d ed. 1904) (discussing the use of evidence gained from congressional proceedings as evidence of legislative intent).

92 *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1203 (2013); *see, e.g.*, Hall, *supra* note 45, at 762–63 ("[T]here is no sound reason for a general doctrine of strict construction of penal statutes, and *prima facie* all such should have as liberal a construction as statutes generally."); JOHN BARKER WAITE, THE CRIMINAL LAW IN ACTION 320–21 (1934) (arguing that the rule impeded implementation of reform-oriented approaches to punishment that focused on deterrence and incapacitation).

93 Waite, *supra* note 92, at 16, 320.

When Justice Felix Frankfurter joined the Supreme Court in 1939, a diminished view of strict construction came with him.[94] Justice Frankfurter led the charge against the rule's application to federal statutes, but he did so in an "indirect way"[95]—by moving it to "the end of the interpretative process," with the result that courts would invoke it only after trying to resolve ambiguity by looking to a statute's "text, structure, purpose, and legislative history."[96] As a marker of this shift, Justice Frankfurter called the new diminished approach the rule of "lenity."[97] So reformulated and renamed, the rule of lenity "began to lose its bite."[98] As Professor Dan Kahan has observed, "[r]anking lenity 'last' among interpretive conventions [has] all but guarantee[d] its irrelevance."[99]

The Supreme Court continues to adhere to the diminished version of the rule of lenity.[100] If anything, the modern Court has made the rule weaker—often restricting its application to instances in which "grievous ambiguity" remains following the use of all other interpretative tools.[101]

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94 *See* Solan, *supra* note 47, at 102; Sohoni, *supra* note 92, at 1204.

95 Sohoni, *supra* note 92, at 1204.

96 Hopwood, *supra* note 45, at 717; *see* Secs. & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943); *see also* United States v. Brown, 33 U.S 18, 25 (1948) (making clear that strict construction would not trump "common sense" or "evident statutory purpose"); United States v. Gaskin, 320 U.S. 527, 529–30 (1944) (making clear that the rule had no weight when its application would cause "distortion or nullification of the evident meaning and purpose of the legislation").

97 *See* Bell v. United States, 349 U.S. 81, 83 (1955); *see also* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1995 n.233 (2015) (identifying *Bell* as the first time "lenity" was used in place of "strict construction"); *Solan*, *supra* note 47, at 103 ("[Justice] Frankfurter may not have invented the rule [of lenity], but he apparently did name it."); *see also* Wooden v. United States, 142 S. Ct. 1063, 1082 (2022) (Gorsuch, J., concurring in the judgment) ("The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'"(quoting The Adventure, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812))).

98 *See* Sohoni, *supra* note 92, at 1205.

99 Kahan, *supra* note 77, at 386; *see* Hessick & Hessick, *Constraining*, *supra* note 60, at 2339 (characterizing the rule of lenity as a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes").

100 *See, e.g.*, United States v. Davis, 139 S. Ct. 2319, 2333 (2019); United States v. Castleman, 572 U.S. 157, 173 (2014); Muscarello v. United States, 524 U.S. 125, 139 (1998); Moskal v. United States, 498 U.S. 103, 108 (1990).

101 *Muscarello*, 524 U.S. at 139 (quoting Staples v. United States, 511 U.S. 610, 619 n.17 (1994)); *see also Wooden*, 142 S. Ct. at 1083–86 (2022) (Gorsuch, J., concurring in the judgment) (criticizing the weakening of the rule of lenity).

B. Emergence of Vagueness Doctrine

The shift away from strict construction was one of two key factors contributing to the emergence of the Supreme Court's constitutional vagueness doctrine in the late nineteenth and early twentieth centuries.[102] The adoption of the Fourteenth Amendment in 1868 was the other. That amendment allowed for *federal* court due process review of *state* penal statutes.[103] As Professors Nathan Chapman and Michael McConnell have explained, courts in the late nineteenth century understood the Due Process Clause of the Fourteenth Amendment at least to permit review of state legislation to ensure, among other things, a "strict separation of the judicial from the legislative power."[104]

Litigants soon began raising due process vagueness challenges to state penal statutes. Those arguments made their way to the Supreme Court in the late nineteenth and early twentieth centuries.[105] And in its 1914 decision in *International Harvester*

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[102] As already noted, the new attitude toward penal statutes made it more likely that courts would either construe them more broadly or, as in *Mann*, declare them void for indefiniteness on unspecified grounds. *See supra* text accompanying notes 76–101.

[103] Chapman & McConnell, *supra* note 9, at 1726.

[104] *Id.* at 1727–29 (observing that "[c]ourts used separation-of-powers logic to invalidate legislative acts under a variety of constitutional provisions," including "the Ex Post Facto and Bill of Attainder Clauses" of the Federal Constitution and, as relevant, various clauses of state constitutions). Constitutional scholars debate whether the original meaning of due process under the Fourteenth Amendment was coextensive with that of the Fifth Amendment or whether it went further in permitting substantive review of state laws. *Compare id.* at 1726 (arguing that "[a]ntebellum courts applied due process to state legislative acts in a way that was essentially consistent with pre-1791 due process"), *with* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 482–84 (2010) (arguing that the Fourteenth Amendment's Due Process Clause was understood to be more expansive). That debate exceeds the scope of this Article. The key point here is the uncontroversial proposition that Due Process Clause of the Fourteenth Amendment enabled federal courts to review state statutes that "operated to deprive specific persons of liberty," such as penal statutes. Chapman & McConnell, *supra* note 9, at 1726.

[105] The Court first encountered the due process vagueness argument in cases involving state laws concerning railroad rates and liquor sales. *See* Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 450 (1904) (rejecting argument that an Ohio statute violated due process by effectively "vest[ing] legislative power in the judiciary" through the use of indefinite statutory terms on ground that the statutory terms at issue were "pretty well known"); Stone v. Farmers' Loan & Tr. Co., 116 U.S. 307, 336–37 (1886) (rejecting the argument that Mississippi statute was "so inconsistent and uncertain as to render it absolutely void on its face"); *see also* Hopwood, *supra* note 45, at 720 (identifying these cases as the first vagueness challenges in the Supreme Court). The Court's first indication that it might be open to a vagueness argument came in *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 108–11 (1909) (rejecting due process vagueness challenge and distinguishing lower-court cases invalidating penal statutes that "make[ ] guilt depend not upon standards fixed by law, but upon what a jury might think").

Co. v. Kentucky,[106] the Court invalidated a state penal statute on a vagueness ground for the first time.

International Harvester illustrates the centrality of Fourteenth Amendment due process review and the decline of strict construction in the Supreme Court's early applications of the constitutional vagueness doctrine. The case concerned a prosecution under Kentucky price-fixing statutes.[107] Writing for a majority of the Court, Justice Oliver Wendell Holmes explained that the Supreme Court was bound by a state-court construction of those statutes,[108] which made it a crime for separate commercial buyers or sellers of goods to "make any combination . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article."[109] Kentucky courts had construed the term "real value" to mean the "market value under fair competition, and under normal market conditions."[110] Notably, in so construing the statutes, the Kentucky courts were unable to follow the rule of strict construction because the Kentucky legislature had abrogated that rule decades earlier.[111]

Justice Holmes concluded that the state-court construction of "real value" rendered the statutory scheme unconstitutional.[112]

In more recent vagueness cases, the Supreme Court has repeatedly quoted dictum from the 1875 decision in *Reese*, when articulating the vagueness doctrine. *See Reese*, 92 U.S. at 221:

> It would certainly be dangerous 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, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

See Dimaya, 138 S. Ct. at 1212 (quoting *Reese*'s dictum); Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983) (same); Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (same). But *Reese* was not a vagueness case. It involved federal penal statutes prohibiting interference with the right to vote, which could have been read in one of two ways. *See Reese*, 92 U.S. at 218, 221. The Court adopted the broader reading and then held that the statutes exceeded Congress's enforcement power under Section 2 of the Fifteenth Amendment. *Id.* at 220; *see* Mannheimer, *supra* note 4, at 1088 n.272; Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2352 (2003).

106 234 U.S. 216 (1914).

107 *Id.* at 219, 221.

108 *Id.* ("regard[ing]" the state-court construction of the statutes "as the established construction").

109 *Id.* at 221.

110 *Id.* at 222 (quoting lower-court cases).

111 *See* Hall, *supra* note 45, at 753 & n.26 (noting that in 1852 the Kentucky legislature abrogated the rule of strict construction); *id.* at 756 & n.41 (noting that Kentucky courts "consistently applied [the] liberalizing statute[ ] from [its] adoption").

112 *Int'l Harvester*, U.S. 234 at 222–23.

The unadorned term "value," Justice Holmes explained, is a real-world "fact" that would generally be "easy to ascertain."[113] But the Kentucky courts had construed the term to require merchants to engage in a counterfactual inquiry about an "imaginary world," asking what an article's value would be under hypothetical "normal market conditions" in the absence of the combination at issue and any other unusual occurrences.[114] Because that judicial construction left merchants "guess[ing] at [their] peril,"[115] Justice Holmes reasoned, it violated "the fundamental principles of justice embraced in the conception of due process,"[116] providing "no standard of conduct" that was "possible to know."[117]

Justice Holmes's analysis is telling. It makes clear that the vagueness defect arose not from the words of the statutes themselves, but from the state court's construction of them. If the Kentucky courts had construed the statutory language in a way that provided a concrete standard of conduct on which criminality depended, there would have been no vagueness issue.[118] And if the Kentucky courts had still been operating under a strict-construction regime, that outcome would have been more likely. But the Kentucky legislature had abrogated strict construction decades earlier.[119] Operating within the new fair-construction regime, the Kentucky Court of Appeals adopted a broad and indeterminate construction that failed to set an ascertainable standard of conduct. As a federal court, the Supreme Court understood itself as bound by that state-court construction of state statutory law; it could ask only whether the state statutes, so construed, violated the recently adopted Fourteenth Amendment.[120]

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113 *Id.* at 222.

114 *Id.* at 221–22.

115 *Id.* at 222–23.

116 Collins v. Kentucky, 234 U.S. 634, 638 (1914) (related case describing *International Harvester* rationale).

117 *Am. Seeding Mach. Co.*, 236 U.S. at 661-62 (related case describing *International Harvester* rationale).

118 *See* Mannheimer, *supra* note 4, at 1104 (suggesting that, if the state-court construction had "hinged criminal liability on too far a deviation from the value of an article, the scheme might have been sustained").

119 *See supra* note 81.

120 *See* Minnesota v. Prob. Ct., 309 U.S. 270 (1940) ("For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."); Supreme Lodge, K.P. v. Meyer, 265 U.S. 30, 32 (1924) (noting that it is "axiomatic" that "we must accept th[e] decision of highest court of the state fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein, . . . even [if] it [does] not agree with our own opinion."); Leffingwell v. Warren, 67 U.S. 599, 603 (1862) ("The construction given to a

A federalism principle thus limited the Court's options in *International Harvester*. The Court could not do what it had previously done when faced with indefinite language in a federal penal statute—namely, strictly construe it to ensure that a "doubtful phrase" would not become "a drag-net for penalties."[121] The preexisting state-court construction of the state statutes controlled.

Virtually all of the Court's early vagueness cases involved the same federal-state relationship. Indeed, with one exception, every case from 1914 until 1964 in which the Court invalidated a statute on a constitutional vagueness ground involved a state penal law that had already been construed at the state level.[122] The sole exception was the 1921 decision in *United States v. Cohen Grocery Co.*,[123] the only instance during that fifty-year period in which the Court invalidated a *federal* law on a constitutional vagueness ground.[124] That near-perfect pattern of state-law cases similar to

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State Statute by the highest judicial tribunal of such state[ ] is regarded as a part of the Statute, and is binding upon the Courts of the United States as the text.").

121 *Harrison*, 50 U.S. at 378 (quoting *Shackford*, 27 F. Cas. at 1039); *see supra* note 81 (collecting examples of strict construction of federal penal statutes).

122 *See* Wright v. Georgia, 373 U.S. 284, 293 (1963) (voiding for vagueness a Georgia penal statute that had been "construed to punish conduct which cannot be constitutionally punished"); Edwards v. South Carolina, 372 U.S. 229, 234, 237–38 (1963) (voiding for vagueness a South Carolina penal statute in light of state-court construction); Cramp v. Bd. of Pub. Instruction of Orange Cnty., 368 U.S. 278, 285–88 (1961) (voiding for vagueness a Florida penal statute in light of state court's "authoritative interpretation"); Winters v. New York, 333 U.S. 507, 518–20 (1948) (voiding for vagueness New York penal statute in light of "the gloss put upon" it by state court); *Thornhill*, 310 U.S. at 96–100 & n.9 (voiding for vagueness an Alabama penal statute as "authoritatively construed" by state courts and noting that no state-court "construction" had "narrow[ed]" its scope); Lanzetta v. New Jersey, 306 U.S. 451, 457–58 (1939) (voiding for vagueness a New Jersey penal statute in light of state-court construction); Herndon v. Lowry, 301 U.S. 242, 261–63 (1936) (voiding for vagueness a Georgia penal statute "as construed" by state courts); Smith v. Cahoon, 283 U.S. 553, 556 (1931) (voiding for vagueness a state penal statute because state-court construction "create[d] . . . [a] lack of appropriate certainty"); Stromberg v. California, 283 U.S. 359, 369 (1931) (voiding for vagueness a California penal statute "as authoritatively construed" by state court); Cline v. Frink Dairy Co., 274 U.S. 445, 453–54, 457, 465–66 (1927) (voiding for vagueness a state penal statute in light of state-court construction); Connally v. Gen. Constr. Co., 269 U.S. 385, 394–95 (1926) (voiding for vagueness a state penal statute in light of state-court construction that did "not [ ] remove the obscurity"); *see also* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 229–32, 242–43 (1932) (invalidating an Oklahoma penal statute challenged in federal court in light of state commission's construction).

123 255 U.S. 81 (1921).

124 For a discussion of *Cohen Grocery*, see *infra* text accompanying notes 196–212. On two other occasions during this period, the Court declined to enforce federal statutes because of vague statutory language, but it did so on a federal common law basis. *See* United States v. Cardiff, 344 U.S. 174, 176–77 (1952) (declining to enforce an excessively indefinite federal statute without striking it down as unconstitutionally vague); United States

International Harvester strongly suggests that the emergence of the constitutional vagueness doctrine in the Supreme Court was driven by the combination of the shift toward broad construction in the states and the availability of due process review under the Fourteenth Amendment.

That understanding is supported by the Supreme Court's persistent reluctance to invalidate *federal* laws on constitutional vagueness grounds. Apart from the federal statute in *Cohen Grocery*, the Court did not invalidate a single federal law on a constitutional vagueness ground until 2015.[125] Instead, when faced with a potentially vague federal law, the Court virtually always did precisely what it could not do in the state-law cases—impose its own narrowing construction to avoid any vagueness concerns.[126]

It was no accident that the Court's reliance on narrowing constructions of federal laws to avoid vagueness concerns roughly coincided with the Court's transformation of the rule of strict construction into the far weaker rule of lenity.[127] With the rule of lenity relegated to "the end of the interpretive process,"[128] any constitutional concerns—including vagueness concerns—that might bear on the meaning of statutory language necessarily preceded lenity in the hierarchy of statutory-construction tools. As a functional matter, then, the constitutional vagueness doctrine often seems to have filled the role previously played by the rule of strict

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v. Evans, 333 U.S. 483, 495 (1948) (same); *see also* Amsterdam, *supra* note 2, at 86 & n.92, 67 n.2 (identifying *Cardiff* and *Evans* as non-constitutional decisions).

[125] The Court finally invalidated a federal criminal statute on a vagueness ground in its 2015 decision in *Johnson*, 576 U.S. at 597; *see* Hopwood, *supra* note 45, at 721–23 (noting that none of the twelve statutes invalidated on vagueness grounds from 1960 to 1990 were federal criminal laws and that, between 1990 and 2015, the Court "considered and rejected vagueness challenges to a number of federal criminal laws").

In a 2012 decision, the Court had relied on vagueness principles of fair notice to conclude that a federal agency's imposition of civil penalties violated due process when the regulation prohibiting the conduct at issue was not in place at the time of the conduct. *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 567 U.S. 239, 253–59 (2012) (concluding that, in light of a post hoc change in policy, the defendants were not afforded fair notice). But the Court did not void the statute for vagueness in that decision.

[126] *See, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32–36 (1963) (rejecting a vagueness challenge to a federal statute in light of the Court's narrowing construction); Scales v. United States, 367 U.S. 203, 223 (1961) (same); United States v. Harriss, 347 U.S. 612, 620–24 (1954) (same); Williams v. United States, 341 U.S. 97, 104 (1951) (same); Jordan v. De George, 341 U.S. 223, 232 (1951) (same); Dennis v. United States, 341 U.S. 494, 515–16 (1951) (same); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 412–13 (1950); Screws v. United States, 325 U.S. 91, 102–05 (1945) (same); United States v. Ragen, 314 U.S. 512, 523–25 (1942) (same); Kay v. United States, 303 U.S. 1, 8–9 (1938) (same).

[127] *See supra* text accompanying notes 94–98.

[128] Hopwood, *supra* note 45, at 717.

construction: when addressing indefinite language in a federal penal statute, the Court could raise the red flag of constitutional vagueness concerns and then construe the statute narrowly in the name of avoiding those concerns.[129]

II. TWO VAGUENESS DOCTRINES

The federal-state distinction is useful not only as an historical tool for understanding the origins and development of the constitutional vagueness doctrine, but also as an analytical tool for making sense of the doctrinal content contained in the Supreme Court's vagueness decisions. Over the years, scholars have offered various helpful descriptive accounts of that content.[130] The federal-state distinction is not meant to replace those accounts. Instead, it supplements and refines them by drawing attention to a threshold feature of vagueness analysis—the source of law at issue. That feature distinguishes, in simple yet fundamental terms, between two sets of vagueness cases in the Supreme Court: those involving federal laws and those involving state laws. In doing so, the federal-state distinction sheds much light on how the vagueness doctrine is and should be operationalized. Separation-of-powers concerns are the primary motivation for the Court's vagueness analysis in federal-law cases, while federalism drives the analysis in state-law cases. These two distinct sets of structural concerns yield two separate doctrines as a functional matter.[131]

A. Vagueness Cases Involving Federal Laws

When the Supreme Court addresses an overly broad and indefinite federal law, the central concern is whether the law's effect is to delegate the legislative task of defining prohibited conduct to a body other than the legislature.

Since the early nineteenth century, the Court has made clear that, as a matter of federal law, "the substantive power to define

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[129] *See infra* text accompanying notes 139–192; *see also Wooden*, 142 S. Ct. at 1075–76 (Kavanaugh, J., concurring) (arguing that "th[e] concern for fair notice is better addressed by other doctrines that protect criminal defendants against arbitrary or vague federal criminal statutes," rather than the "rule of lenity"); *id.* at 1086 (Gorsuch, J., concurring in the judgment) (observing that the rule of lenity and the vagueness doctrine both "spring from similar aspirations" to "protect fair notice and the separation of powers" and that, "[f]rom time to time and for historically contingent reasons, one or another of these doctrines has . . . gone out of fashion").

[130] *See supra* notes 5–9.

[131] *See* Ogale, *supra* note 6, at 812–16 (drawing a similar, though not identical, distinction between two sets of vagueness decisions).

crimes and prescribe punishments" lies with the "legislative branch of government."[132] An excessively indefinite federal penal statute threatens that longstanding separation-of-powers principle by effectively delegating the task of defining crimes to another body, whether that be police officers, prosecutors, or ultimately judges and jurors.[133] Indeed, as early as *Cohen Grocery*—the first decision invalidating a federal law for vagueness—the Court has emphasized that a vague federal law impermissibly "delegate[s] legislative power."[134]

This antidelegation principle shares some similarities with the administrative law nondelegation doctrine, but the two concepts are not coextensive. The administrative law nondelegation doctrine focuses on the relationship between the legislative and executive branches of government in regulatory contexts in which executive agency expertise is needed. It requires Congress to provide agencies with "an intelligible principle" to guide implementation of a statute.[135] The antidelegation principle animating federal-law vagueness decisions, by contrast, is primarily focused on the relationship between the legislative and judicial branches of government in the specific context of defining crimes and fixing punishments. It is thus rooted not only in the separation of powers, but also in the principle of legality, which "forbids the retroactive definition of criminal offenses" through "judicial innovation."[136]

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[132] Jones v. Thomas, 491 U.S. 376, 381 (1989); *see* Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."); United States v. Bass, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."); United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime[ ] and ordain its punishment."); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); *see also* Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature.").

[133] *See* Hessick, *supra* note 7, at 1143–45; Low & Johnson, *supra* note 4, at 2053–54; Chapman & McConnell, *supra* note 9, at 1806; Goldsmith, *supra* note 4, at 284–86.

[134] United States v. Cohen Grocery Co., 255 U.S. 81, 92 (1921).

[135] J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928). More recently, the Court has invoked the "major questions doctrine," which requires Congress to speak clearly when authorizing agency action in certain "extraordinary cases." West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2608–09 (2022).

[136] *See* Jeffries, *supra* note 3, at 189–90; *see also* Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO L.J. 95, 115–17 (2022) (describing the principle of legality in more detail).

As already noted, however, vagueness challenges to federal laws in the Supreme Court rarely lead to invalidation on vagueness grounds. In nearly all cases, the Court narrowly construes the federal statute to avoid vagueness concerns.[137] In practice, then, the Court's vagueness analysis of a federal law almost always amounts to constitutional avoidance.[138] Only in rare circumstances where a narrowing construction is not feasible will the Court invalidate a federal law for unconstitutional vagueness.

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[137] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 247–48 (2010); Holder v. Humanitarian L. Project, 561 U.S. 1, 20–25 (2010); United States v. Williams, 553 U.S. 285, 306–07 (2008); Posters 'n' Things, Ltd. v. United States, 511 U.S. 513, 525–26 (1994); Chapman v. United States, 500 U.S. 453, 467–68 (1991); Boos v. Barry, 485 U.S. 312, 329–32 (1988); United States v. Batchelder, 442 U.S. 114, 118-23 (1979); Smith v. United States, 431 U.S. 291, 308–09 (1977); Buckley v. Valeo, 424 U.S. 1, 40–44 (1975); United States v. Powell, 423 U.S. 87, 93 (1975); Parker v. Levy, 417 U.S. 733, 754–57 (1974); United States v. Vuitch, 402 U.S. 62, 71–72 (1971); *see also supra* note 126 (collecting earlier examples).

[138] *See* Skilling v. United States, 561 U.S. 358, 405 (2010) ("It has long been the Court's practice, [ ] before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."). For a detailed theory of vagueness avoidance, see Johnson, *Vagueness Avoidance*, *supra* note 21.

When construing a statute to avoid vagueness concerns, the Court effectively applies a version of one of two canons of statutory construction—the "unconstitutionality" canon or the "constitutional questions" canon. *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331–33 (2015); *see also Skilling*, 561 U.S. at 406 (referring to cases involving both canons). Under the well-settled unconstitutionality canon, if one construction would render a statute unconstitutional, the court should adopt any plausible construction that would save it. *See* Parsons v. Bedford, Breedlove, & Robeson, 28 U.S. 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the [C]onstitution."); Mossman v. Higginson, 4 U.S. 12, 14 (1800) (reasoning that the Judiciary Act of 1979 "must[ ] receive a construction, consistent with the constitution" when interpreting the Act to avoid violating Article III constraints on federal court jurisdiction over aliens). That canon rests on the commonsense assumption that legislatures do not generally intend to enact statutes that will actually be held unconstitutional. *See* Nelson, *supra*, at 336:

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

See also Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 814–15 (1983) (justifying the unconstitutionality canon on the ground that "legislators would rather not have the courts nullify their effort entirely unless the interpretation necessary to save it would pervert the goals of the legislature in enacting it").

Under the more controversial doubts canon, if one construction would raise serious constitutional questions, the court should adopt any plausible construction that would effectively avoid those questions. *See* Reno v. Flores, 507 U.S. 292, 314 n.9 (1993); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring):

With that in mind, the Court's federal-law constitutional vagueness cases are usefully divided into two types—first, typical vagueness-avoidance cases in which the vagueness doctrine functions as a rule of statutory construction that counsels in favor of narrowly construing statutes, and second, exceptional cases in which the Court holds the law unconstitutionally vague because of improper delegation that judicial construction cannot fix.

1. Typical cases: vagueness avoidance.

In the typical federal-law vagueness case, the Supreme Court engages in vagueness avoidance.[139] It narrowly construes the indefinite law to avoid any constitutional vagueness issues.[140] The Court's vagueness analysis thus functions as a rule of construction not so different from the historical rule of strict construction.[141]

The Court's 1945 decision in *Screws v. United States*[142] is a paradigmatic vagueness-avoidance case. It involved a federal criminal statute that punished any person who "under color of any law . . . will-fully subjects" anyone "to the deprivation of any rights . . . secured or protected by the Constitution."[143] The statutory text appeared to "incorporate by reference a large body of

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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.

See Nelson, *supra*, at 331 (noting criticism of the constitutional questions canon).

[139] For a theoretical account of vagueness avoidance, see Johnson, *Vagueness Avoidance*, *supra* note 21.

[140] *See* Hopwood, *supra* note 45, at 698 (noting that the Supreme Court "rarely . . . strike[s] [ ] down" "vague federal criminal laws"); Low & Johnson, *supra* note 4, at 2087 (observing that "the usual result" in a federal-law vagueness case is for the Supreme Court to "avoid[ ] the problem by a narrowing interpretation"); Cristina D. Lockwood, *Creating Ambiguity in the Void for Vagueness Doctrine by Avoiding Vagueness Determination in Review of Federal Laws*, 65 SYRACUSE L. REV. 395, 396–97 (2015) (observing that the Supreme Court has "strive[n] to avoid invalidating federal laws as unconstitutionally vague"); *see also supra* notes 125–127.

[141] Writing for a majority of the Court in *United States v. Lanier*, 520 U.S. 259 (1997), Justice David Souter made a similar connection between the vagueness doctrine and the canon of strict construction. *See id.* at 266 (referring to the canon of strict construction as "a sort of 'junior version of the vagueness doctrine'" (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968))); *see also* Wooden v. United States, 142 S. Ct. 1063, 1084 & n.3 (2022) (Gorsuch, J., concurring in the judgment) (citing several vagueness-avoidance cases as examples of the Court effectively "employing" the rule of strict construction "in slightly different words").

[142] 325 U.S. 91 (1945).

[143] *Id.* at 92–93 (plurality opinion) (quoting 18 U.S.C. § 52 (1946) (codified as amended at 18 U.S.C. § 242)).

changing and uncertain law"—namely, decisions on the meaning and scope of various constitutional rights.[144] Read literally, that language "provide[d] no ascertainable standard of guilt" but instead "referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited."[145]

To avoid that vagueness concern, the Court narrowly construed the statute to apply only to violations of constitutional rights that had been clearly established at the time of the defendant's conduct. Writing for a plurality of the Court,[146] Justice William Douglas justified that construction by focusing on the statutory term "willfully," reasoning that the "requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* save[d] the Act from any charge of unconstitutionality on the grounds of vagueness."[147] In other words, once a judicial decision had established that a specific type of conduct violated the Constitution, there was an ascertainable standard of conduct that could be willfully violated. As the Court later put it, *Screws* stands for the proposition that "a close construction" of an excessively indefinite federal law "will often save [it] from vagueness that is fatal."[148]

A more recent example of vagueness avoidance is *McDonnell v. United States*.[149] In that 2016 case, the Court vacated a former Virginia governor's federal bribery conviction under the Hobbs

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144 *Id.* at 96.

145 *Id.* at 95–96.

146 Justice Douglas wrote for only four Justices, *Screws*, 325 U.S. at 92, but two other Justices agreed with the proposition that the statute should be narrowly construed to "cover[ ] violations of the Constitution that were well-established at the time the state officials acted." Low & Johnson, *supra* note 4, at 2093 n.188.

147 *Screws*, 325 U.S. at 103 (emphasis added). Notably, it was not "the presence of a bad purpose or evil intent alone" that saved the statute from vagueness, but rather the fact that the constitutional right had been "made definite by decision or other rule of law." *Id.*; *see* Low & Johnson, *supra* note 4, at 2093–94 nn.188–92 (explaining that "[w]hat saved the statute [in *Screws*] was not its mens rea but the clarification of its actus reus" through clearly established law).

148 Williams v. United States, 341 U.S. 101 (1951); *see also Skilling*, 561 U.S. at 412 (citing *Screws* for narrowing construction); United States v. Lanier, 520 U.S. 259, 267–70 (1997) (same).

149 579 U.S. 550 (2016). The federal bribery statute makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly" to demand, seek, receive, accept or agree "to receive or accept anything of value" in return for being "influenced in the performance of any official act." 18 U.S.C. § 201(b)(2). An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may be law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

Act[150] and the honest-services fraud statute.[151] The question before the Court concerned what acts constituted an "official act" within the definition of the federal bribery statute.[152] The government argued that "nearly any activity by a public official" qualified.[153] Writing for a unanimous Court, Chief Justice John Roberts explained that the "standardless sweep" of the government's broad reading rendered the "outer boundaries" of federal bribery "shapeless," leaving public officials "subject to prosecution, without fair notice, for the most prosaic interactions."[154] The Court thus adopted a "more constrained" construction that "avoid[ed] this 'vagueness shoal.'"[155] The Court construed the term "official act" to encompass only discrete actions "involv[ing] a formal exercise of governmental power."[156]

Most vagueness-avoidance cases follow the pattern of *Screws* and *McDonnell*. That is, the Court explicitly flags the vagueness concerns posed by a broad reading of the federal statute and then narrowly construes the statute to avoid the issue. But two variations deserve mention.

First, the Court sometimes fails to recognize—or even disavows—that constitutional vagueness concerns have helped push it toward a narrowing construction.[157] In *Van Buren v. United States*,[158] for instance, the Supreme Court addressed a provision of the Computer Fraud and Abuse Act[159] (CFAA) covering anyone who "intentionally accesses a computer without authorization or

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150 18 U.S.C. § 1951.

151 18 U.S.C. § 201.

152 *McDonnell*, 579 U.S. at 555.

153 *Id.* at 566.

154 *Id.* at 576.

155 *Id.* (quoting *Skilling*, 561 at 368).

156 *Id.* at 574.

157 *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (narrowly construing federal aggravated identity theft statute, with the effect of avoiding the "fair warning" concerns posed by "the staggering breadth of the [government's] reading," without explicitly relying on constitutional vagueness concerns); Ruan v. United States, 142 S. Ct. 2370, 2377–78, 2380 (2022) (construing a federal drug statute to include a strong scienter requirement, with the effect of narrowing the "vague, highly general language of the regulation defining the scope of" the proscribed conduct, without explicitly relying on constitutional vagueness concerns); Yates v. United States, 574 U.S. 528, 549 (2015) (plurality opinion) (construing federal statute narrowly without mentioning vagueness concerns or the constitutional avoidance canon); *see also* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 536–39 (2019) (characterizing *Yates* as "a case that squarely implicates the avoidance canon, and one in which we would expect to see some discussion of the need to avoid a serious vagueness problem").

158 141 S. Ct. 1648 (2021).

159 18 U.S.C. § 1030.

exceeds authorized access, and thereby obtains . . . information from any protected computer."[160] Writing for a majority of the Court, Justice Amy Coney Barrett narrowly construed the phrase "exceeds authorized access" to encompass only "access[ing] a computer with authorization but then obtain[ing] information located in particular areas of the computer—such as files, folders, or databases—that are off limits."[161] She noted that the narrowing construction avoided "attach[ing] criminal penalties to a breathtaking amount of commonplace computer activity."[162] But Justice Barrett expressly stated that the Court's decision did not rest on "constitutional avoidance," because "the text, context, and structure" of the CFAA sufficiently supported the narrowing construction.[163] That disavowal of vagueness avoidance is part of broader trend, which Professor Anita Krishnakumar has called "passive avoidance," in which the current Court narrowly construes statutes to avoid constitutional issues without admitting that it is doing so.[164] Indeed, despite Justice Barrett's disclaimer, vagueness avoidance likely helped to drive the narrowing construction in *Van Buren*: petitioner and multiple amici curiae argued at length in their briefs that the statute should be narrowly construed to avoid vagueness concerns;[165] and during oral argument, the petitioner highlighted the "vagueness problem," and Justice Sonia Sotomayor (who joined Justice Barrett's majority opinion) called the statute "dangerously vague."[166]

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160 18 U.S.C. § 1030(a)(2)(C).

161 *Van Buren*, 141 S. Ct. at 1662.

162 *Id.* at 1661.

163 *Id.* In *Van Buren* in particular, the majority's disavowal of the avoidance canon may have been partly motivated by Justice Barrett's general skepticism of substantive canons of construction, see Barrett, *supra* note 60, at 121–24 (describing the general "tension" between substantive canons and faithful agency), and Justice Brett Kavanaugh's (a member of the *Van Buren* majority) skepticism of canons that rely on ambiguity to "trigger" application, see *Wooden*, 142 S. Ct. at 1075–76 (Kavanaugh, J., concurring) (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136–39 (2016)).

164 Krishnakumar, *supra* note 155, at 518–21; *see also id.* at 521, 563–65 (suggesting that the Court's turn toward passive avoidance might be a response to a "spate of negative commentary that followed its prominent use of the avoidance canon" during an earlier period).

165 *See* Brief for Petitioner at *36–40, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Amicus Curiae Brief of Orin Kerr at *8–9, 22, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Amicus Curiae Brief of Reports Comm. for Freedom of the Press et. al at *6–18, *Van Buren*, 141 S. Ct. 1648 (No. 19-783).

166 Transcript of Oral Argument at *23, 48, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); *see also* Johnson, *Dead Crimes*, *supra* note 136, at 138 n.320 (identifying *Van Buren* as an example of passive avoidance).

Second, Congress has sometimes sent a strong signal that a broadly worded statute should not be narrowly construed. The question in that scenario is whether, despite the signal from Congress, the Court should still engage in vagueness avoidance.

One such case was *Skilling v. United States*,[167] which concerned the language and history of the mail and wire fraud statutes. By its terms, the mail-fraud statute applies to "[w]hoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do," engages in various acts involving the use of the mails.[168] In 1987, in *McNally v. United States*,[169] the Court adopted a narrow construction of the mail fraud statute that covered only the protection of property rights, rejecting an open-ended reading that would have encompassed a theory of honest-services fraud—i.e., the failure of state and local government officials, private employees, or public officials to adhere to fiduciary obligations to the public, to employers, or to stockholders.[170] Before *McNally*, the theory of honest-services fraud "was well-entrenched and had a long pedigree" in the lower federal courts.[171] But its peripheries were uncertain, and some then-recent lower-court decisions had only added to that uncertainty.[172] The Supreme Court had never endorsed the honest-services theory,[173]

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167 561 U.S. 358 (2010).

168 18 U.S.C. § 1341.

169 483 U.S. 350 (1987).

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

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

172 *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 127 (2d Cir. 1982) (holding that a *private citizen* owed a fiduciary duty to provide honest services to the *public* on account of his de facto substantial political power—namely, that he was "deeply involved in governmental affairs" and "dominated the administration of several basic governmental functions"); *see* Jeffries, *supra* note 3, at 239–40 (observing that *Margiotta* "extend[ed]" the uncertainty of the honest-services theory by ushering in an "ill-defined prospect of criminal liability for influential private citizens whose participation in the political process f[ell] short of civics-books standards," thereby "broadly delegat[ing] enforcement authority to federal prosecutors to determine . . . which private citizens [were] sufficiently influential" to have an honest-services duty akin to that of public officials).

173 Low & Johnson, *supra* note 4, at 2087 n.156.

and it explicitly declined the invitation to do so in *McNally*. Congress responded to *McNally* by enacting an honest-services fraud statute, which attempted to resurrect some of the "intangible rights" encompassed by the pre-*McNally* lower-court case law by providing that mail and wire fraud include "scheme[s] . . . to deprive another of the intangible right of honest services."[174]

The question in *Skilling* was how the Court would react to Congress's rejection of *McNally* when addressing whether the new honest-services statute covered a self-enrichment scheme based on a misrepresentation of a corporation's financial performance.[175] Writing for a majority of the Court, Justice Ruth Bader Ginsburg recognized the "force" of the argument that the honest-services statute was unconstitutionally vague.[176] Although the pre-*McNally* decisions had consistently applied the fraud statute to bribery or kickback schemes, she explained, "there was considerable disarray over the statute's application to conduct outside that core category."[177] She observed that construing the statute broadly to reach a "range of offensive conduct" broader than bribery and kickbacks "would raise [vagueness] concerns."[178] Thus, "[t]o preserve the statute without transgressing constitutional limitations," the Court "pare[d] . . . down" the honest-services statute, construing it to cover "*only* the bribe-and-kickback core of pre-*McNally* case law."[179]

Justice Antonin Scalia concurred in the judgment but disagreed with the majority's vagueness-avoidance approach.[180] Joined by Justices Thomas and Anthony Kennedy, Justice Scalia wrote separately to explain why the Court should have struck down the honest-services statute as unconstitutionally vague.[181] In his view, the majority's approach fixed one constitutional problem by creating another: by transforming the honest-services prohibition into

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174 18 U.S.C. § 1346; *see* Cleveland v. United States, 531 U.S. 12, 19–20 (2000) (explaining that, following *McNally*, Congress enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had [previously] protected"—"the intangible right of honest services").

175 *Skilling*, 561 U.S. at 368–69.

176 *Id.* at 405.

177 *Id. Margiotta* was one of the many pre-*McNally* lower-court decisions that had contributed to that disarray. *See supra* note 170; *Skilling*, 561 U.S. at 416–20 (Scalia, J., concurring in part and concurring in the judgment) (describing *Margiotta* along with other decisions to show the disarray in the body of pre-*McNally* lower-court case law).

178 *Skilling*, 561 U.S. at 408.

179 *Id.* at 404, 408–09.

180 *Id.* at 415 (Scalia, J., concurring in part and concurring in the judgment).

181 *See id.* at 415–27.

a bribe-and-kickback prohibition, the Court had effectively assumed "the power to define new federal crimes," a power beyond the Court's constitutionally prescribed role.[182] Although narrow constructions are permissible when supported by the statutory text, Justice Scalia explained, nothing in the text of the honest-services statute supported the majority's bribe-and-kickback limitation.[183] As a result, he concluded, the majority had not merely narrowly construed statutory language; it had rewritten it, thereby violating a separation-of-powers limitation on its role.[184]

Justice Scalia's argument carries substantial weight. The Court's ability to adopt a narrow construction of an indeterminate statute to avoid vagueness concerns must have some limit. The Court could not, for example, avoid striking down as vague a federal statute prohibiting "doing bad things" by manufacturing its own discrete list of "bad things." That would be judicial crime-making, in violation of the longstanding federal-law principle that "the substantive power to define crimes" lies solely with the "legislative branch of government."[185]

But contrary to Justice Scalia's conclusion, the *Skilling* majority did not reach that limit when it narrowly construed the honest-services statute. While the statutory text did not provide a clear basis for limiting the honest-services statute to bribery and kickbacks, the pre-*McNally* case law did provide one.[186] And Congress had plainly attempted to reinstate the pre-*McNally* case law when

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[182] *Id.* at 415, 422–23; *see also supra* note 155. Scalia also expressed the view that the vagueness-avoidance approach did not really fix the vagueness problem. *See Skilling*, 561 U.S. at 421–22. For a fuller discussion of Scalia's concerns about the statute's vagueness, see Low & Johnson, *supra* note 4, at 2090–92.

[183] *Skilling*, 561 U.S. at 423 (Scalia, J., concurring in part and concurring in the judgment).

[184] *Id.* ("I certainly agree with the Court that we must, if we can, uphold rather than condemn, Congress's enactments. But I do not believe that we have the power, in order to uphold an enactment, to rewrite it." (quotation marks and citations omitted)).

[185] *Jones*, 491 U.S. at 381; *see supra* note 132 (collecting cases). Professor Eric Fish has argued that there need not be such a limit on the Court's application of constitutional avoidance to the extent it can be recharacterized as a remedy, rather than a means of statutory interpretation. *See* Eric S. Fish, *Constitutional Avoidance As Interpretation and As Remedy*, 114 MICH. L. REV. 1275, 1279 (2016) (arguing that constitutional avoidance, conceptualized as a remedy, would "allow judges to actually change a statute's meaning by creatively reinterpreting it to render it constitutionally valid"). But in the context of federal penal statutes, Fish's remedial approach would at least sometimes seem to violate the separation-of-powers principle prohibiting judicial crime-making. *Jones*, 491 U.S. at 381.

[186] *Skilling*, 561 U.S. at 405; *see also id.* at 423 (Scalia, J., concurring in part and concurring in the judgment) (recognizing that Congress attempted to reinstate pre-*McNally* case law by enacting the honest-services statute).

it enacted the honest-services statute.[187] Looking to that case law to distinguish a "core" from indeterminate peripheries was a legitimate means of statutory construction, because it at least preserved a well-delineated group of prior lower-court decisions that Congress clearly had in mind when drafting the statutory language.[188] The Court did not pull a limitation out of thin air; it derived one from the very body of law the statutory text meant to incorporate by reference. That approach was similar to what the Court had done in *Screws*, when it narrowly construed a statutory reference to a body of case law to apply only to the subset of that case law that was clearly established.[189]

McNally and *Skilling* illustrate an additional point about the Court's vagueness analysis of federal laws. Although separation-of-powers concerns are the focus of that analysis, sometimes a federalism concern is present as well. When the *McNally* Court initially rejected the broader honest-services construction of the statute, it did so in part to avoid a construction that would "involve the [federal government] in setting standards of . . . good government for local and state officials" (or the counterpart standards for corporate executives and private employees).[190] "If Congress desire[d] to go further" than "the protection of property rights," the Court reasoned, it would need to "speak more clearly."[191] Against that backdrop, *Skilling* likewise reflects a reluctance to read the honest-services statute as a significant intrusion into an area traditionally regulated by state law absent a clear statement from Congress.[192]

2. Exceptional cases: vagueness as impermissible delegation.

Although Justice Scalia's opinion in *Skilling* did not command a majority, his rationale points toward an exception to the general vagueness-avoidance approach. In rare instances, the Supreme Court does not narrowly construe a federal statute to avoid vagueness concerns but instead invalidates it on a constitutional vagueness ground. In the more than one hundred years in which

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187 *See supra* text accompanying notes 171–173.

188 *Skilling*, 561 U.S. at 407–09.

189 *See supra* text accompanying notes 143–148.

190 *See McNally*, 483 U.S. at 360.

191 *Id.*

192 Low & Johnson, *supra* note 4, at 2089; *see id.* 2088–91 (describing the federalism aspects of *McNally* and *Skilling* in more detail).

the Court has recognized the constitutional vagueness doctrine, the Court has taken this approach on only two occasions.[193] The first was a set of cases in the 1920s concerning the Lever Act.[194] The second was a trilogy of decisions in the 2010s involving materially identical statutory language in three different penal statutes that increased punishment on the basis of prior convictions.[195] On each occasion, the void-for-vagueness result was justified for precisely the reason Justice Scalia expressed in *Skilling*—because no narrowing construction was feasible without engaging in impermissible judicial crime-making.

United States v. Cohen Grocery is the lead case in the set involving the Lever Act.[196] A section of that Act made it a crime "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[197] Writing for a majority of the Court, Chief Justice Edward White observed that the statutory phrase "unjust or unreasonable rate or charge" provided no "ascertainable standard of guilt," forbade "no specific or definite act," and invited "the widest conceivable inquiry."[198] He explained that an "attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable *in the estimation of the court and jury*."[199] To uphold the literal "text of the statute," he reasoned, would be to allow Congress to "delegate legislative power."[200]

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193 As already noted, the Court has also occasionally declined to enforce a vague federal statute on common law grounds. *See supra* note 124. It has also relied on vagueness principles of fair notice to conclude that a federal agency's imposition of civil penalties violated due process because the regulation prohibiting the conduct at issue was not in place at the time of the conduct. *See supra* note 125.

194 7 U.S.C. § 341; *see infra* text accompanying notes 196–212.

195 *See infra* text accompanying notes 213–239.

196 *Cohen Grocery* was "one of several cases" before the Court involving the constitutionality of the same statute. *Id.* at 81; *see* Tedrow v. A.T. Lewis & Son Dry Goods Co., 255 U.S. 98, 99 (1921); Oglesby Grocery Co. v. United States, 255 U.S. 108, 108–09 (1921); Weeds, Inc. v. United States, 255 U.S. 109, 110–11 (1921); Kinnane v. Detroit Creamery Co., 255 U.S. 102, 104 (1921).

197 Food Control and the District of Columbia Rents Act, ch. 80 § 2, 41 Stat. 297, 298 (1919) (referring to what is commonly known as the Lever Act).

198 *Cohen Grocery*, 255 U.S. at 89. The Court reaffirmed the result of *Cohen Grocery* in the companion cases. *See supra* note 196. And several years later, the Court extended the holding of *Cohen Grocery* in the context of a civil suit. *See* S.B. Small Co. v. Am. Sugar Refin. Co., 267 U.S. 233, 238–42 (1925).

199 *Cohen Grocery*, 255 U.S. at 89 (emphasis added).

200 *Id.* at 92.

Chief Justice White acknowledged the Court's general duty to uphold federal statutes if possible by avoiding constitutional issues through judicial construction.[201] But he concluded that no such narrowing construction was feasible,[202] noting the "painstaking attempts" of lower-court judges and administrative officers to arrive at one.[203] Treating those "persistent" yet unsuccessful "efforts . . . to establish a standard" through construction as evidence of vagueness, the Court held the statute unconstitutionally vague.[204]

Justice Mahlon Pitney, joined by Justice Louis Brandeis, concurred in the judgment but disagreed with the majority's rationale.[205] Justice Pitney argued that the statute should be narrowly construed not to extend to the charged conduct.[206] He recognized that the statutory provision's precise meaning was "not altogether evident."[207] But in his view, statutory context suggested that it did not encompass the charged conduct.[208] In so arguing, Justice Pitney invoked both the rule of strict construction and the principle of constitutional avoidance.[209] This modest approach prefigured Justice Brandeis's famous concurring opinion in *Ashwander v. Tennessee Valley Authority*,[210] in which he advocated for constitutional avoidance more generally.[211]

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

[202] *See id.* at 88 (rejecting the argument that the statute could be read not to "embrace the matters charged").

[203] *Id.* at 89–90 & n.1. Chief Justice White also distinguished other contexts in which a "standard" for construction could be derived from "the text of the statutes involved or the subject with which they dealt." *Cohen Grocery*, 255 U.S. at 92.

[204] *Id.* at 90–91, 93; *see Johnson*, 576 U.S. at 598 (citing *Cohen Grocery* for the proposition that "the failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness").

[205] *Cohen Grocery*, 255 U.S. at 93 (Pitney, J., concurring).

[206] *Id.*

[207] *Id.* at 96.

[208] *Id.* at 93–96. In particular, Justice Pitney noted that the same statute separately prohibited conspiring "to exact excessive prices for any necessaries"; by negative implication, he argued, the phrase at issue—"to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"—necessarily meant something else. *Id.* at 94–96. That latter phrase, Justice Pitney suggested, referred to "the fixing of compensation for *services*, rather than the price at which goods are to be sold." *Cohen Grocery*, 255 U.S. at 95 (Pitney, J., concurring) (emphasis added).

[209] *Id.* at 95.

[210] 297 U.S. 288 (1936).

[211] *Id.* at 346–48. Justice Brandeis advocated for various principles of constitutional avoidance, including the proposition:

> [w]hen 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

The opinions in *Cohen Grocery* could be viewed as the reverse of those in *Skilling*. In *Skilling*, the majority looked to indicia beyond the statutory text in order to adopt a narrowing construction that saved the statute from vagueness, while Justice Scalia took the view that such a construction was illegitimate. In *Cohen Grocery*, the majority took Justice Scalia's approach, while Justice Pitney was willing to consider a broader range of indicia of statutory meaning to arrive at a narrowing construction.

But the vagueness-avoidance approach available in *Cohen Grocery* differed in an important respect. Although the narrowing construction advanced by Justice Pitney and Justice Brandeis would have placed the particular charged conduct outside the statute's scope, it would not have resolved the indeterminacy in the statute. Questions would have remained in other cases about what constituted an "unjust or unreasonable rate or charge."[212] Nor was there any previously established body of case law that could serve as a confining referent. The Court thus would have inevitably faced the same indeterminate language—and the same delegation issue—in a future case. Rather than await that case, the Court understandably resolved the issue in the case before it.

The second set of federal laws invalidated on constitutional vagueness grounds came nearly a century later, in a trilogy of decisions from 2015 to 2019 that involved materially identical statutory language in the context of three different penal statutes that fixed punishment based on prior convictions.[213]

> Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id. at 348 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

[212] That concern was likely particularly salient to the majority given that *Cohen Grocery* was "one of several cases" before the Court involving the constitutionality of the same statute. *Id.* at 81; *see supra* note 196. While most of these cases simply reaffirmed the holding of *Cohen Grocery*, one also applied the rationale of *Cohen Grocery* to invalidate a separate provision in the same statute prohibiting conspiracy to exact excessive prices. *See Weeds*, 255 U.S. at 111.

[213] Johnson v. United States, 576 U.S. 591, 597, 606 (2015) (voiding for vagueness the residual clause in the Armed Career Criminal Act, which increased the mandatory minimum sentence for certain offenders who had previously committed offenses that "involve[d] conduct that presents a serious potential risk of physical injury to another" (quoting 18 U.S.C. § 924(e)(2)(B)); *see also Davis*, 139 S. Ct. at 2326–36 (applying *Johnson* to void for vagueness materially identical residual clause of 18 U.S.C. § 924(c)); *Dimaya*, 138 S. Ct. at 1210–16 (applying *Johnson* to void for vagueness materially identical residual clause in the Immigration and Nationality Act's statutory definition of "aggravated felony").

The first and most significant of the set for present purposes is *Johnson v. United States*,[214] which concerned a provision of the Armed Career Criminal Act.[215] That provision increased the statutory minimum for felons convicted of possessing a firearm who had had three prior convictions for "violent felon[ies]" committed on different occasions.[216] It defined "violent felony" as an offense punishable by more than a year in prison that "has as an element the use, attempted use, or threatened use of physical force against the person of another"; "is burglary, arson, or extortion, involves use of explosives"; or "otherwise involves conduct that presents a serious potential risk of physical injury to another."[217] The issue in *Johnson* was whether the provision's last clause—the so-called "residual clause"—encompassed a prior state conviction for possession of a short-barreled shotgun.[218]

The facts giving rise to Johnson's shotgun conviction suggested that the circumstances of the offense did in fact "involve conduct that present[ed] a serious potential risk of physical injury to another."[219] But the Court was precluded from considering those facts because of *Taylor v. United States*,[220] a prior decision in which the Court had required a "categorical approach" for determining whether a crime qualifies as a "violent felony" under the statute.[221] The categorical approach directs courts to "look only to . . . the statutory definition of the prior offense"[222] for which the defendant was convicted and not to "delv[e] into particular facts disclosed by the record of conviction."[223] A court must "assess[ ] whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'"[224] That ensures that defendants are not punished for facts

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214 576 U.S. 591 (2015).

215 *Id.* at 593.

216 18 U.S.C. § 924(e).

217 18 U.S.C. § 924(e)(2)(B).

218 *Johnson*, 576 U.S. at 594.

219 18 U.S.C. § 924(e)(2)(B). Johnson had possessed the shotgun during a drug sale in a public parking lot, putting innocent bystanders at risk of harm. *See Johnson*, 576 U.S. at 642 (Alito, J., dissenting).

220 495 U.S. 575 (1990).

221 *Id.* at 599–602.

222 *Id.* at 602.

223 Shepard v. United States, 544 U.S. 13, 16–17 (2005) (citing *Taylor*, 495 U.S. at 602).

224 *Johnson*, 576 U.S. at 596 (quoting Begay v. United States, 553 U.S. 137, 141 (2008)). In some circumstances, a sentencing court applies a "modified categorical approach" to crimes that are "divisible" inasmuch as they create multiple versions of the same crime by setting out elements in the alternative; under that approach, a court may

that the jury has not found beyond a reasonable doubt, in compliance with the Sixth Amendment requirement articulated in *Apprendi v. New Jersey*.[225]

Constrained by the categorical approach, the Court in *Johnson* held that the residual clause was unconstitutionally vague. Writing for a majority of the Court, Justice Scalia identified two features of the residual clause that "conspire[d]" to render it impermissibly "shapeless."[226] First, the residual clause "le[ft] grave uncertainty about how to estimate the risk posed by a crime," because it tethered that assessment "to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," without providing any "reliable way to choose between" the various "competing accounts" of the ordinary case.[227] Second, the residual clause gave inadequate guidance "about how much risk it takes for a crime to qualify as a violent felony" in the context of the "judge-imagined abstraction."[228]

Justice Scalia recognized the possibility of a vagueness-avoidance approach.[229] But by the time of *Johnson*, the residual clause had previously come before the Court in four separate cases, and the Court had failed to craft a workable construction.[230] Relying on *Cohen Grocery*, Justice Scalia reasoned that "the fail[ure] to

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consult a limited set of record documents in the record to determine the crime charged. *See* Descamps v. United States, 570 U.S. 254, 260–61 (2013).

[225] 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *see Shephard*, 544 U.S. at 24–26 (observing that the categorical approach ensures compliance with *Apprendi*).

[226] *Johnson*, 576 U.S. at 597, 602.

[227] *Id.* at 597–98; *see also supra* text accompanying notes 107–118.

[228] *Johnson*, 576 U.S. at 598.

[229] *Id.* at 598–602.

[230] *See* Low & Johnson, *supra* note 4, at 2106–07 ("About all that could be said with confidence about these [prior four] cases was that two offenses were [within the residual clause] and two were [not].").

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

establish any generally applicable test" in these "persistent efforts" served as "evidence of vagueness."[231] As he had put it in his dissent in the last of those four cases, each new effort by the Court to apply the statute had been "less predictable and more arbitrary than the last" and had "demonstrated" that the residual clause was "too vague to yield 'an intelligible principle.'"[232]

The phrase "intelligible principle" comes directly from the nondelegation doctrine in administrative law.[233] Justice Scalia's use of that phrase thus seems to suggest that the fundamental defect with the residual clause was a delegation concern: by enacting indeterminate language, Congress had effectively delegated the task of defining the standards for determining whether the risk posed by a particular category of offense was enough to count as a "violent felony" under the statute.[234]

Notably, however, the delegation concern arose only because of the Court's own prior "handiwork"[235]—the categorical approach, which precluded any construction that allowed courts to account for particular conduct of particular defendants.[236] But the Court arguably could not abandon its commitment to the categorical approach because it was thought to be required by *Apprendi* and the Sixth Amendment.[237] As Justice Brett Kavanaugh later put it, the *Johnson* Court "was between a rock and a hard place," because "the categorical approach would have led to Fifth Amendment vagueness concerns," while abandoning that approach and "applying a conduct-specific approach would have led to Sixth Amendment jury-trial concerns."[238] That limitation on the Court's ability to construe the statute played an essential role in the Court's invalidation of the residual clause at issue in *Johnson* as

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[231] *Johnson*, 576 U.S. at 598, 600 (quoting *Cohen Grocery*, 255 U.S. at 91)) ("[T]his Court's repeated attempts and repeated failures to craft a principled and objective standard of the residual clause confirm its hopeless indeterminacy."); *id.* at 601–02 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.").

[232] *Sykes*, 564 U.S. at 34 (Scalia, J., dissenting) (quoting *id.* at 15 (majority opinion)).

[233] *See supra* text accompanying notes 18–20.

[234] *Sykes*, 564 U.S. at 28–29, 34 (Scalia, J., dissenting).

[235] *Johnson*, 576 U.S. at 631 (Alito, J., dissenting).

[236] *See* Johnson, *Vagueness Attacks*, *supra* note 15, at 374 (characterizing the categorical approach as "the lynchpin for a successful vagueness challenge" in *Johnson* because it "made it significantly harder—indeed, impossible—for the Court to adopt a viable narrowing construction of the residual clause").

[237] *See supra* note 224. Justice Samuel Alito argued in his dissent that the Court should abandon the categorical approach for residual-clause issues in order to cure the vagueness problem. *See Johnson*, 576 U.S. at 632–35 (Alito, J., dissenting).

[238] *Davis*, 139 S. Ct. at 2351 (Kavanaugh, J., dissenting).

well as the materially identical residual clauses at issue in subsequent cases.[239]

B. Vagueness Cases Involving State Laws

Much like the Supreme Court's federal-law vagueness analysis was constrained by the categorical approach in *Johnson*, its vagueness analysis in every state-law case is constrained by a distinctive federalism principle—that it is the province of the highest state court to construe the state law.

The Court will follow any preexisting state-court constructions of the statutory language at issue.[240] If the highest state court has narrowly construed the language in an effective manner—i.e., engaged in successful vagueness avoidance—then there is no constitutional vagueness issue. But if the state-court construction fails to eliminate vagueness concerns—or, worse, *creates* them[241]—the Supreme Court will follow that construction and will not adopt its own. It will determine only whether the state statute, so construed, is unconstitutionally vague.

In the event that the relevant state court has not yet passed upon the state law under review, the Supreme Court still may not construe the state law as it would a federal statute; rather, it may only "extrapolate" on the meaning of the statute that the state court would likely adopt. In all state-law scenarios, therefore, the Court's vagueness analysis is constrained by a federalism principle that prevents the Court from adopting its own narrowing construction to avoid vagueness concerns.

The central role of state-court constructions not only shows how federalism restricts the Court's analysis; it also hints at the content of constitutional vagueness doctrine. In state-law cases, the vagueness doctrine can largely be understood as a due process

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239 *Id.* at 2327 (concluding that the categorical approach applied to materially identical residual clause); *Dimaya*, 138 S. Ct. at 1211, 1223 (same).

240 *See* Kolender v. Lawson, 461 U.S. 352, 355 (1983) ("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 Vill. of Hoffman Ests. v. Flipside, 455 U.S. at 494 n.5)); Wainwright v. Stone, 414 U.S. 21 (1973) ("The judgment of federal courts as to the vagueness or not of a state statute must be made in light of prior state constructions of the statute."); Winters v. New York, 333 U.S. 507, 514 (1948) ("Th[e] [state-court] construction fixes the meaning of the statute for this case.").

241 *See, e.g.*, *Int'l Harvester*, 234 U.S. at 222–23.

limitation on open-ended judicial construction of statutory language.[242] That limitation—like the antidelegation principle in the federal-law context—is rooted in the principle of legality insofar as it prevents "the retroactive definition of criminal offenses" through "judicial innovation."[243] As Professor Peter Low and I have explained, the vagueness doctrine promotes the principle of legality by protecting two independent constitutional requirements of criminal law—the substantive requirement that "all crime must be based on conduct,"[244] and the process requirement that "there must be a defensible and predictable correlation between the established meaning of a criminal prohibition and the conduct to which it is applied."[245] The vagueness doctrine protects the first principle—the conduct requirement—by ensuring that a penal law punishes based on behavior, not on status.[246] And it protects the second principle—the correlation requirement—by preventing judicial constructions that are so open-ended that they effectively enable state courts to define criminal conduct after the fact and enable police to define crimes in the moment.[247] State-court constructions that do not respect one or both of these requirements are unconstitutionally vague, while those that adhere to both principles usually are not constitutional vagueness concerns.[248]

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[242] *See* Aaron-Andrew P. Bruhl, *Solving Statutory Interpretation's* Erie *Problem*, 98 NOTRE DAME L. REV. 61, 85 (2022) ("The Constitution imposes some constraints on interpretive approaches.").

Recognition that a federal court's vagueness analysis of state law amounts to a due process limitation on open-ended constructions of state law has an important implication for the vagueness doctrine's domain. It means that a federal court may apply the doctrine not only to the substantive state penal statutes themselves, but also to state statutes that codify rules of construction in an excessively indeterminate manner. *See, e.g.*, Isaacson v. Brnovich, 610 F. Supp. 3d 1243, 1253 (D. Ariz. 2022) (applying the vagueness doctrine to a state statute that codified an indeterminate rule of statutory construction).

[243] *See* Jeffries, *supra* note 3, at 189–90.

[244] Low & Johnson, *supra* note 4, at 2053; *see* Robinson v. California, 370 U.S. 666–67 (1962) (recognizing a constitutional conduct requirement).

[245] Low & Johnson, *supra* note 4, at 2053; *see* Bouie v. City of Columbia, 378 U.S. 347, 352–54 (1964) (recognizing a correlation requirement).

[246] Low & Johnson, *supra* note 4, at 2060; *see id.* at 2080–81 (identifying *Lanzetta* as an example of a state-law vagueness decision protecting the conduct requirement).

[247] *See id.* at 2064–65, 2081–86 (identifying *Papachristou* as an example of a state-law vagueness decision protecting the correlation requirement).

[248] Occasionally, in "buffer zone" cases, concerns related to Bill of Rights freedoms may trigger a vagueness conclusion. *See* Amsterdam, *supra* note 2, at 75.

1. Successful state-court constructions.

The first category of state-law vagueness cases comprises instances in which the highest state court has adopted a narrow construction that resolves any vagueness concerns—that is, instances of successful state-court vagueness avoidance.[249]

In *Ward v. Illinois*,[250] for example, the Court addressed a vagueness challenge to an Illinois criminal statute forbidding the sale of "obscene" materials.[251] The statute provided that "[a] thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."[252] The Illinois Supreme Court had previously construed the statute as covering specific materials, including the specific type of materials Ward had sold.[253] Writing for the majority, Justice White deemed that dispositive, reasoning that the "binding" state-court construction gave "detailed meaning to the Illinois law" and gave Ward "notice that the statute purports to ban the kind of materials he sold."[254]

In other words, regardless of the actual words of the statute, the statute was not unconstitutionally vague because the state court had successfully construed it in a way that concretely defined specific conduct. The U.S. Supreme Court understood itself to be bound by that construction and was satisfied that it respected due process.

Wainwright v. Stone[255] adds a wrinkle to the analysis. That 1973 decision concerned a Florida criminal statute proscribing "the abominable and detestable crime against nature, either with

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[249] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 629–31 (1984) (holding that a state statute was not vague in light of state-court construction); Ward v. Illinois, 431 U.S. 767, 771–73 (1977) (same); *Wainwright*, 414 U.S. at 22–24 (same); Zicarelli v. New Jersey, 406 U.S. 472, 476–77 (1972) (same); Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (same); Minnesota v. Prob. Ct. of Ramsey Cnty., 309 U.S. 270, 274 (1940) (same); Miller v. Strahl, 239 U.S. 426, 431, 434 (1915) (same); Omaechevarria v. Idaho, 246 U.S. 343, 345–46, 348 (1918) (holding a state statute not vague and reciting same rationale set forth in state-court decision); *see also* Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91–92 (1965) (noting that a state-court construction saved an ordinance from vagueness but reversing the conviction that had preceded that judicial construction).

[250] 431 U.S. 767 (1977).

[251] *Id.* at 770.

[252] *Id.* (quoting ILL. REVISED STAT., ch. 38, § 11–20(a)(1) (1975)).

[253] *Id.* at 771.

[254] *Id.* at 772–73.

[255] 414 U.S. 21 (1973).

mankind or beast."[256] The defendants had been convicted of violating that statute by engaging in oral and anal sex.[257] Before their convictions, Florida courts had consistently construed the broad and indeterminate statutory language to apply to those acts.[258] But after their convictions had become final, the Florida Supreme Court reversed course, holding that the unadorned statutory text was unconstitutionally vague and could not be applied to the same conduct.[259]

Stone was a collateral proceeding. The U.S. Supreme Court rejected the defendants' vagueness challenge in a three-page, per curiam opinion.[260] It began by explaining that "[t]he judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute,"[261] and that the federal court "'must take the statute as though read precisely as the highest court of the State has interpreted it.'"[262] Vagueness challenges must be rejected, the Court noted, when the state court has construed a "statute . . . to forbid identifiable conduct," as that construction effectively "'puts these words in the statute as definitely as if it had been so amended by the legislature.'"[263] The Court reasoned that the pre-conviction state-court construction had done exactly that, and that the post-conviction state-court decision invalidating the state law for vagueness did not apply because the Florida Supreme Court had expressly held that decision not to be retroactive.[264] The Court explained that a state "may make a choice for itself between the principle of forward operation and that of relation backward" and "may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."[265]

Stone demonstrates the strength of the federalism constraint on the Supreme Court's vagueness analysis in state-law cases. A

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256 FLA. STAT. § 800.01 (1973).

257 *Stone*, 414 U.S. at 22.

258 *Id.* (citing Delaney v. State, 190 So.2d 578 (Fla. Sup. Ct. 1966)).

259 *Id.* at 23 (citing Franklin v. State, 257 So.2d 21, 24 (Fla. 1971)); *cf.* Toby Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 924 (2006) (describing "transitional moments" in which the law changes between two proceedings in a manner that affects a defendant's rights).

260 *Stone*, 414 U.S. at 22–24.

261 *Id.* at 22.

262 *Id.* at 22–23 (quoting *Minnesota*, 309 U.S. at 273).

263 *Id.* at 23 (quoting *Winters*, 333 U.S. at 514).

264 *Id.* at 22–24.

265 *Stone*, 414 U.S. at 24 (quoting Great N. R. Co. v. Sunburst Oil & Refin. Co., 287 U.S. 358, 364 (1932)).

state court's prior vagueness-avoidance construction can preclude the Supreme Court from vacating a conviction under state law on a vagueness ground, even when the state court ends up rejecting its earlier narrowing construction and declaring the statute void for vagueness as a prospective matter. The question of retroactivity of the state-court decision, like the construction of the statute, is a question of state law. The Supreme Court will not override the state court's answers to those questions; it will ask only whether they create constitutional infirmities. In *Stone*, the state court's precedents created no such issues, because the prior state-court construction was in place before the defendants had been convicted, and it effectively construed the indeterminate statute in a manner that gave concrete guidance as to what conduct was criminally prohibited.[266]

Cases like *Ward* and *Stone* are rare. The category of state-court vagueness-avoidance cases in the Supreme Court is small relative to other categories of state-law vagueness cases.[267] Does that suggest that state courts often do not effectively engage in vagueness avoidance when faced with excessively broad statutory language? Perhaps. But the small size of this category may be deceptive. It may be more likely that, in many instances, a state court's vagueness-avoidance construction so plainly cures the vagueness problem that there is no constitutional vagueness question worthy of Supreme Court review.

2. Unsuccessful state-court constructions.

The most recognizable type of state-law vagueness case before the Supreme Court involves an unsuccessful state-court construction. That is, the highest state court has construed the statute in a manner that fails to eliminate vagueness concerns. In these situations, the Supreme Court will adhere to that construction. The unsuccessful state-court construction thus forces the Court to determine that the state law, so construed, is so indeterminate that it violates due process.

As already noted, *International Harvester*—the first case in which the Court held that a law was unconstitutionally vague—illustrates how unsuccessful state-court constructions constrain the Court and force a vagueness determination.[268] Recall that the

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[266] *Id.* at 22–23.

[267] *Compare supra* note 249, *with infra* note 291.

[268] *See supra* text accompanying notes 106–117.

Supreme Court treated as binding a state-court construction that had defined the term "real value" as entailing a counter-factual inquiry about hypothetical "normal market conditions" in an "imaginary world."[269] That state-court construction violated due process because it left merchants "guess[ing] at [their] peril,"[270] as it provided "no standard of conduct that [was] possible to know."[271] The Court's vagueness conclusion can thus be understood as a limitation on the state court's ability to construe the statute: a judicial construction that fails to identify prohibited conduct in a predictable manner violates due process.

As already noted, circumstances similar to *International Harvester* led to every instance before 1964 in which the Supreme Court voided a state law for vagueness.[272] And since that time, most of the Court's invalidations of state laws on vagueness grounds have likewise followed unsuccessful state-court constructions.[273]

Most recently, in *City of Chicago v. Morales*,[274] the Court addressed a city ordinance that made it a crime for "a person [that a police officer] reasonably believes to be a criminal street gang member loitering in any public place with one or more persons" to "not promptly obey" the officer's order "to disperse . . . from the area."[275] The term "loiter" was defined as "to remain in any one place with no apparent purpose."[276] The Illinois Supreme Court

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269 *Int'l Harvester*, 234 U.S. at 222.

270 *Id.* at 222–23.

271 Am. Seeding Mach. Co. v. Kentucky, 236 U.S. 660, 661–62 (1915) (related case describing *International Harvester* rationale).

272 *See supra* text accompanying notes 116–121; *see also supra* note 122 (collecting cases).

273 *See, e.g.*, *Morales*, 527 U.S. at 61; Gentile v. Nevada, 501 U.S. 1030, 1036–37, 1048–49 (1991); *Kolender*, 461 U.S. at 355–58; Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 621–23 & n.6 (1976); Smith v. Goguen, 415 U.S. 566, 570–71 & 573 n.6 (1974); Rabe v. Washington, 405 U.S. 313, 315–16 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 157–58 & n.2, 163 (1972); Palmer v. City of Euclid, 402 U.S. 544, 545–46 & n.* (1971); Coates v. City of Cincinnati, 402 U.S. 611, 612–14 (1971); Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 686–87 (1968)); Rabeck v. New York, 391 U.S. 462, 462 n.* (1968) (citing Ginsberg v. New York, 390 U.S. 629, 631–32 n.1 (1968)); Giaccio v. Pennsylvania, 382 U.S. 399, 403–04 (1966). State-court constructions have also produced vagueness conclusions in Eighth Amendment cases. *See* Richmond v. Lewis, 506 U.S. 40, 47–48, 52 (1992) (holding that the death penalty violated the Eighth Amendment because a statutory aggravating factor, as construed by state court, was vague); Maynard v. Cartwright, 486 U.S. 356, 360–64 (1988) (same).

274 527 U.S. 41 (1999).

275 *Id.* at 47 n.2 (quoting CHI. MUN. CODE § 8-4-015 (1992)).

276 *Id.* (quoting CHI. MUN. CODE § 8-4-015 (1992)).

had held that "loitering" was the triggering conduct for the offense,[277] and that the ordinance provided "absolute discretion to police officers to decide what activities constitute loitering."[278]

In a majority opinion authored by Justice John Paul Stevens, the U.S. Supreme Court concluded that the broad state-court construction rendered the ordinance unconstitutionally vague.[279] The Court explained that it "ha[d] no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."[280] That state-court construction violated due process because it effectively enabled any city officer "to order at his whim any person standing in a public place with a suspected gang member to disperse."[281]

3. No state-court construction.

Sometimes, the Supreme Court is asked to address the constitutional vagueness question before the highest state court has had an opportunity to construe the state law at issue. This often, but not always, occurs in the context of a pre-enforcement challenge to a newly enacted state law in federal court.[282] Even in the absence of a state-court construction, a federalism constraint limits the Supreme Court's ability to construe the state law. The Court may not simply employ the same vagueness-avoidance approach it typically uses in the federal-law context; rather, the

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277 City of Chicago v. Morales, 687 N.E.2d 53, 60 (Ill. 1997).

278 *Morales*, 527 U.S. at 63.

279 *Id.* at 61. For a fuller discussion of why that vague language was unconstitutional, see Low & Johnson, *supra* note 4, at 2096–98.

280 *Morales*, 527 U.S. at 61. In dissent, Justice Scalia argued that the "absolute discretion" portion of the state court's opinion was not a *construction* of the ordinance, but rather a "*characterization*." *Id.* at 92 (Scalia, J., dissenting). That enabled Justice Scalia "to read the ordinance as punishing the act of disobeying an order to disperse that was bounded by sufficient qualifying criteria as not to offend vagueness standards." Low & Johnson, *supra* note 4, at 2098 (citing *Morales*, 527 U.S. at 89–90, 92–93)). In a separate dissenting opinion, Justice Thomas, joined by Chief Justice William Rehnquist and Justice Scalia, read the Chicago ordinance in essentially the same way. *See Morales*, 527 U.S. at 98–115 (Thomas, J., dissenting). Regardless whether those reclassification efforts were warranted, they are proof positive that state-court *constructions* play a significant role in the Supreme Court's vagueness analysis of state laws.

281 *Morales*, 527 U.S. at 65–66 (O'Connor, J., concurring in part and concurring in the judgment).

282 *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 481–82 (1965). Even if a federal court enjoins a statute on a vagueness ground in such a context, however, the state court remains free to adopt a narrowing construction, after which the injunction can be lifted; if the construction successfully resolves the vagueness concern, prosecutions may then proceed—subject to fair warning limits—even for conduct committed prior to the limiting construction. *See id.* at 491 & n.7.

Court must attempt to "extrapolate" the meaning the highest state court would likely give to the state law.

The Court addressed this scenario in *Grayned v. City of Rockford*.[283] That case arose on direct appeal of a conviction—not a pre-enforcement challenge—under a city anti-noise ordinance prohibiting a person near a school from "willfully mak[ing] . . . any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class."[284] The Illinois Supreme Court had concluded that the ordinance was not impermissibly vague, but it had done so without "elaborat[ing] on [its] meaning."[285]

Writing for a majority of the U.S. Supreme Court, Justice Thurgood Marshall explained that when the highest state court has not provided a judicial construction of a state statute, the Supreme Court "must 'extrapolate its allowable meaning.'"[286] He characterized "[e]xtrapolation" as a "delicate task" given that the Court lacks the power "to construe and narrow state laws"[287] and is thus "relegated" to the text of the statute itself, state-court constructions of analogous statutes, and "perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it."[288] On the basis of those limited materials, Justice Marshall explained, the Court must attempt to predict the meaning the highest state court would likely give to the unconstrued state law.[289] In such circumstances, the Court can sometimes—as in *Grayned*—extrapolate a meaning that narrows the broadly worded statute and avoids vagueness concerns.[290] Other times,

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283 408 U.S. 104 (1972).

284 *Id.* at 107–08 (quoting ROCKFORD CODE OF ORDINANCES, ch. 28, § 19.2(a)).

285 *Id.* at 109–110.

286 *Id.* at 110 (quoting Garner v. Louisiana, 368 U.S. 157, 174 (1961) (Frankfurter, J., concurring in the judgment)).

287 *Id.* (citing United States v. 37 Photographs, 402 U.S. 363, 369 (1971)).

288 *Grayned*, 408 U.S. at 110.

289 *See id.* at 111–12 (concluding that the highest state court "would interpret" the city ordinance at issue in a particular narrow manner); *see also* Fox v. Washington, 236 U.S. 273, 277 (1915) (noting that state courts are "presumed" to construe state laws in a way that "avoid[s] doubtful constitutional questions").

290 *See, e.g.*, *Grayned*, 408 U.S. at 110–12 (extrapolating narrow meaning that avoided vagueness concerns); Cameron v. Johnson, 390 U.S. 611, 616 (1968) (extrapolating meaning from the plain text that avoided vagueness concerns); Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 48–49 (1966) (extrapolating meaning from a state agency's authority to promulgate regulations to avoid vagueness concerns); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 501 (1925) (extrapolating meaning from a state-court construction of "substantially the same" statute to avoid vagueness concerns); *see also* Young v. Am. Mini Theatres, 427 U.S. 50, 61 (1976) (rejecting a vagueness challenge and noting that the indeterminate city ordinance could "readily [be] subject to a narrowing construction by the

however, the Court is unable to do so based on the limited materials available to it under state law.[291]

While the federalism constraint is weaker in this category of state-law cases, it is still a constraint. For that reason, the Court is more likely to invalidate unconstrued state laws than it is federal laws that it can freely construe.[292]

III. IMPLICATIONS FOR LOWER COURTS

As the last two Parts have shown, the federal-state distinction is a powerful tool for understanding the historical origins of the constitutional vagueness doctrine and for making sense of the content of that doctrine in the Supreme Court's decisions. But the federal-state distinction also has implications for state courts and lower federal courts. This Part highlights some of them.

Proper recognition of the federal-state distinction should inform how lower federal and state courts engage in vagueness analysis. On a basic level, courts should be sure they are looking to the correct body of Supreme Court decisions in particular contexts. Federal courts considering constitutional vagueness challenges to state laws should apply Supreme Court decisions involving state laws. But state courts considering such constitutional vagueness challenges should instead look to Supreme Court decisions involving *federal laws*, because those decisions allow for vagueness avoidance. Likewise, federal courts considering federal constitutional challenges to federal laws should look to that body of Supreme Court decisions.

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state courts"); McGowan v. Maryland, 366 U.S. 420, 428–29 (1961) (concluding that a state statute was not unconstitutionally vague based on its plain text).

[291] City of Akron v. Ctr. for Reprod. Health, 425 U.S. 416, 451–52 & n.45 (1983) (voiding for vagueness an unconstrued provision of a city ordinance); Colautti v. Franklin, 439 U.S. 379, 390–401 (1979) (voiding for vagueness an unconstrued provision of state law); Gooding v. Wilson, 405 U.S. 518, 524–28 (1972) (voiding for vagueness an unconstrued state law); Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 597–604 & n.9 (1967) (voiding for vagueness an unconstrued state law); *Dombrowski*, 380 U.S. at 491 (enjoining enforcement of a state law on a vagueness ground where no narrowing construction was "readily apparent"); Baggett v. Bullitt, 377 U.S. 360, 371–72, 375–76 (1964) (voiding for vagueness an unconstrued state law, and "doubt[ing]" that any state-court construction could save the law from vagueness).

[292] *Compare supra* note 291, *with supra* text accompanying notes 250–259.

A. Lower Federal Courts

1. Federal laws.

When addressing vagueness challenges to federal laws in light of the federal-state distinction, federal courts should be explicit about the role of vagueness avoidance and the separation-of-powers concerns driving the analysis. They should treat vagueness avoidance as a distinct tool of statutory construction that counsels in favor of narrowly construing indeterminate penal statutes to prevent improper delegation of defining prohibited conduct to a body other than the legislature.[293] In these respects, the lower federal courts should mimic the approach I recommend for the Supreme Court.[294]

That approach would, in nearly all cases, resolve any vagueness issues as a matter of statutory construction.[295] As a functional matter, this will often resemble application of the historical rule of strict construction. But because vagueness avoidance is arguably more clearly rooted in constitutional law, it may have a stronger claim to legitimacy than does that common law rule.[296]

Consistent and explicit adherence to the vagueness-avoidance approach in the lower federal courts would have significant knock-on effects. As an initial matter, it would reduce the number of Supreme Court cases involving federal-law vagueness challenges. Such a case typically results from a circuit split that includes some set of federal courts of appeals that has adopted an open-ended reading of indeterminate statutory language. The petition for a writ of certiorari in *McDonnell*, for example, emphasized a split among the federal courts of appeals concerning the breadth and indeterminacy of the term "official act" under the federal bribery statute.[297] If all of the courts of appeals had engaged in vagueness avoidance, Supreme Court intervention likely would not have been needed.

More importantly, consistent and explicit application of vagueness avoidance in the lower federal courts may change how

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[293] *See* Johnson, *Vagueness Avoidance*, *supra* note 21, at *22–33, *57–64.

[294] *See supra* Part II.A.

[295] *See* Williams v. United States, 341 U.S. 97, 101 (1951) (explaining that "a close construction" of an indeterminate federal statute "will often save [it] from vagueness that is fatal").

[296] *See* Barrett, *supra* note 60, at 112, 168 ("[T]he connection [of a substantive canon of construction] to the Constitution provides a potential justification for their deviation from the norm of faithful agency.").

[297] *See* Petition for Cert. at *18–26, *McDonnell*, 579 U.S. 550 (No. 15-474).

the Justice Department approaches federal penal statutes. When the language of such statutes is indeterminate, the Justice Department tends to advocate for broad readings,[298] often with a promise not to abuse the laws through unexpected enforcements. In *Van Buren*, for example, the government argued that a broad reading of a provision of the CFAA did not pose any fair-notice or arbitrary-enforcement concerns, because the Department's charging policy dissuaded its lawyers from bringing "real-world prosecutions" based on the outer reaches of the Act.[299]

Promises like that are empty. Indeed, the charging policy the government cited in *Van Buren* stated merely that a federal prosecution under the CFAA "*may* not be warranted" in the absence of certain "factors."[300] Such discretionary language—which the government can unilaterally modify at any point—does not meaningfully restrain prosecutorial authority.[301] Even if it did, it would not resolve vagueness concerns: as the Supreme Court has repeatedly made clear, an overly broad statutory construction cannot be justified "on the assumption that the Government will 'use it responsibly.'"[302] Consistent and explicit rejection of such readings on a vagueness-avoidance basis would encourage charging policies that acknowledge hard limits on the scope of federal penal statutes and expressly prohibit prosecutions beyond those limits.

Sometimes, of course, vagueness avoidance cannot save indeterminate statutory language. But as the Supreme Court's federal-law vagueness cases show, these instances are rare.[303] Lower federal courts should therefore proceed with caution when considering whether to invalidate a federal law for vagueness. For guidance,

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

[299] Brief for Respondent at *42, *Van Buren*, 141 S. Ct. 1648 (No. 19-783).

[300] Memorandum from the Att'y Gen. to the U.S. Att'ys and Assistant Att'ys Gen. for the Crim. and Nat'l Sec. Divs., Intake and Charging Policy for Computer Crime Matters 1, 4–5 (Sept. 11, 2014) (emphasis added).

[301] Indeed, discretionary charging policies do not prevent prosecutors in lower federal courts from arguing for broad readings of federal criminal statutes. Before *Van Buren*, for example, the government repeatedly argued for a reading of the CFAA so broad that it encompassed any internet user who violated a website's written terms of service. *See, e.g.*, Indictment, United States v. Swartz, 1:11-cr-10260 (D. Mass. July 14, 2011); United States v. Lowson, 2010 WL 9552416, at *7 (D.N.J. Oct. 12, 2010); United States v. Drew, 259 F.R.D. 449, 467 (C.D. Cal. 2009).

[302] Marinello v. United States, 138 S. Ct. 1101, 1109 (2018) (quoting *McDonnell*, 136 S. Ct. at 2372–73); *see also Dubin*, 143 S. Ct. at 1573 (quoting the same language from *McDonnell*).

[303] *See supra* Part II.A.

they should look to *Cohen Grocery* and *Johnson*—rather than Supreme Court cases involving state laws.

Cohen Grocery and *Johnson* suggest that a federal court should invalidate a federal law for vagueness only if a narrowing construction is not feasible—that is, if construing the statute to avoid vagueness concerns would amount to judicial crime-making.[304] Those decisions also suggest that the infeasibility of vagueness avoidance can be established through repeated unsuccessful attempts to adopt a narrowing construction.[305] It can also result from some constraining factor that restricts the court's ability to construe the indeterminate statutory language.[306] Short of one of those conditions, vagueness avoidance is virtually always the better path.

2. State laws.

When addressing state laws, lower federal courts should begin their vagueness analysis by acknowledging the federalism constraint on their ability to determine statutory meaning. Their first task is to determine the statute's meaning, as understood by the state courts. That entails following existing state-court constructions of the statute and the methodology that state courts would use to construe it. If there is a preexisting state-court construction, the vagueness question for the federal court is whether that prior state-court construction exceeds the constitutional limits of judicial construction.

In instances where the highest state court has not yet passed on the meaning of the statute, a federal court may attempt to extrapolate the allowable meaning of the statutory language. When doing so, the court faces a choice-of-law question under *Erie Railroad Co. v. Tompkins*[307] as to whether federal interpretive rules or state interpretative rules apply. As Professor Aaron-Andrew Bruhl has explained, federal courts should typically look to state-law interpretive principles,[308] including state-law versions

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304 *See supra* Part II.B.

305 *See Johnson*, 576 U.S. at 598, 600 (concluding that prior failed attempts to adopt a narrow construction served as "evidence of vagueness"); *Cohen Grocery*, 255 U.S. at 88–90 & n.1 (concluding that a narrowing construction was not feasible in light of the "painstaking attempts" of courts and administrative officers to arrive at one).

306 *See, e.g.*, text accompanying notes 221–228 (explaining how the categorical approach constrained the *Johnson* Court's ability to engage in vagueness avoidance).

307 304 U.S. 64 (1938); *see* Bruhl, *supra* note 242, at 83.

308 Bruhl, *supra* note 242, at 68–83; *see also id.* at 79 (observing that lower federal courts in fact generally "apply state interpretive methods to state statutes").

of constitutional avoidance.[309] Because all states recognize some version of the constitutional avoidance canon,[310] the federal court's extrapolation may end up resembling the vagueness-avoidance approach it would take when addressing a federal law. But the court may not jump straight to that result. It cannot ignore other state-law indicia pointing toward a broader construction. To the extent possible, however, federal courts should rely on state-law constitutional avoidance canons to save indeterminate state statutes from vagueness concerns.

If for some reason the federal court does not think it can effectively construe the statute in a way that avoids vagueness concerns, it should consider certifying the interpretative question to the relevant state court.[311] Indeed, in some rare instances, Article III could conceivably preclude a federal court from adopting a particular judicial construction that a state court could adopt. In such circumstances, the federal court could certify the statutory-construction question to the state court as a means of avoiding a vagueness conclusion.

B. State Courts

The federal-state distinction should also guide state-court applications of the vagueness doctrine to state laws. In particular, when applying the Supreme Court's vagueness decisions, state courts should be cognizant of which type of law those decisions involved.

Most state courts engage in some form of "lockstepping"—the tendency to interpret state constitutions "in reflexive imitation of the federal courts' interpretation of the Federal Constitution."[312]

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309 *See id.* at 117–20 (explaining that a federal court's "decision to use anything other than the state [law] version of the avoidance canon should be rare").

310 *Id.* at 117; *see also* Nelson, *supra* note 138, at 332 & n.12 (noting that "state courts continue to refer specifically to the canon about avoiding unconstitutionality").

311 *See* Bruhl, *supra* note 242, at 120 ("[If] a federal court feels incapable of . . . the task of wielding avoidance as a state court might, the best course will often be to certify to state court to give that court the opportunity to produce a saving construction the federal court does not think it could announce."); *see also* Tunick v. Safar, 209 F.3d 67, 75–76 (2d Cir. 2000) (suggesting that sometimes a federal court may not be able to determine whether the state court could effectively employ the constitutional avoidance canon).

312 JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS 174 (2018); *see also* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 n.80 (2011) (noting that, "to this day, most state courts adopt federal constitutional law as their own" and "'tend to follow whatever doctrinal vocabulary is used by the United States Supreme Court, discussed in the law reviews, and taught in the law schools'" (quoting Hans A.

As Chief Judge of the Sixth Circuit Jeffrey Sutton has explained, "[t]he issue arises when the Federal Constitution and a state constitution contain an identical or similarly worded guarantee"—e.g., due process—"and a litigant invokes both."[313] State courts typically "handle such cases by considering the federal constitutional claim first, after which they summarily announce that the state provision means the same thing."[314]

In the vagueness context, reflexive lockstepping can lead to a significant error if state courts are not attuned to the federal-state distinction. When articulating the vagueness doctrine, state courts often rely on Supreme Court vagueness decisions involving *state* laws.[315] While that is appropriate to the extent state courts are articulating the content of the *federal* constitutional vagueness doctrine as applied to state laws, they should regard those decisions as inapposite as to whether they may engage in vagueness avoidance and as to the content of the *state* constitutional vagueness doctrine, which may be more or less robust than the federal constitutional vagueness doctrine.[316] In that context, the proper analog for a lockstepping court is the body of Supreme Court vagueness decisions involving *federal* laws—a set of decisions dominated by vagueness avoidance.[317]

The Illinois Supreme Court's decision in *Morales* provides a clear example of the lockstepping error.[318] Recall that the city ordinance in *Morales* made it a crime for a person "to not promptly obey" a police officer's order to "disperse . . . from [an] area" if the person was "loitering in any public place with one or more persons" and was someone the officer "reasonably believe[d] to be a

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Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984))).

313 SUTTON, *supra* note 312, at 174.

314 *Id.*

315 *See, e.g.*, State v. Stark, 802 N.W.2d 165, 170–71 (S.D. 2011) (citing *Morales*, 527 U.S. at 56, 58 n.26, 62–63); State v. Doe, 231 P.3d 1016, 1027 (Idaho 2010) (citing *Kolender*, 461 U.S. at 357); Commonwealth v. Hicks, 596 S.E.2d 74, 79 (Va. 2004) (citing *Morales*, 527 U.S. at 53–55); City of Chicago v. Morales, 177 Ill.2d 440, 449 (1997) (citing *Kolender*, 461 U.S. at 357, and *Grayned*, 408 U.S. at 108); Akron v. Rowland, 618 N.E.2d 138, 144–45 (Ohio 1993) (citing *Grayned*, 408 U.S. at 108–09; *Shuttlesworth*, 382 U.S. at 90–91).

316 *See* Bell, *supra* note 8, at 1956 ("Most state constitutions have more robust doctrines of separation of powers than the U.S. Constitution, and therefore one would expect state constitutional doctrines of vagueness to be more robust than the federal analog.").

317 *See supra* Part II.A.

318 *Morales*, 177 Ill.2d at 448–59.

criminal street gang member."[319] The term "loiter" was defined as "to remain in any one place with no apparent purpose."[320]

The Illinois Supreme Court began its analysis of that statute by reciting principles from the U.S. Supreme Court's vagueness decisions involving state laws—noting in particular that the Supreme Court had repeatedly invalidated "broadly worded" loitering and vagrancy laws on vagueness grounds.[321] Against that backdrop, the Illinois Supreme Court construed the city ordinance as making "loitering" the triggering conduct for the offense[322] and as providing "absolute discretion to police officers to decide what activities constitute loitering."[323] So construed, the Illinois Supreme Court concluded, the ordinance was unconstitutionally vague.[324]

That outcome could have been averted through vagueness avoidance. As Justice Scalia later explained in his dissent in *Morales*, the ordinance could have been fairly construed as punishing not the conduct of loitering, but the act of disobeying an order to disperse that was bounded by sufficient qualifying criteria as not to offend vagueness standards.[325] Rather than construe the statute in that way, however, the Illinois Supreme Court grouped the ordinance with other state loitering and vagrancy laws that the U.S. Supreme Court had previously deemed unconstitutionally vague and construed it accordingly. In doing so, the Illinois Supreme Court failed to give sufficient attention to the federal-state distinction.[326]

Proper recognition of that distinction should yield state-court vagueness analysis of state laws that is driven by *state* separation-of-powers principles.[327] The usual result should be a narrowing construction that eliminates any vagueness concerns.[328] To be

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319 *Id.* at 445–46 (quoting CHI. MUN. CODE § 8-4-015 (1992)).

320 *Id.* at 446 (quoting CHI. MUN. CODE § 8-4-015 (1992)).

321 *Id.* at 449–51 (citing *Kolender*, 461 U.S. at 357; *Papachristou*, 405 U.S. at 161–63; *Shuttlesworth*, 382 U.S. at 90).

322 *Id.* at 451.

323 *Morales*, 177 Ill.2d. at 457.

324 *Morales*, 527 U.S. at 61–64.

325 *Id.* at 92–93 (Scalia, J., dissenting); *see also id.* at 98–115 (Thomas, J., dissenting) (reading the ordinance in essentially the same way).

326 Similarly, in *Akron v. Rowland*, 618 N.E.2d 138 (Ohio 1993), the Ohio Supreme Court relied on Supreme Court cases involving state laws when rejecting a narrowing construction of a loitering ordinance that would have saved it from vagueness. *Id.* at 144–45.

327 *See* Bell, *supra* note 8, at 1956 ("Most state constitutions have more robust doctrines of separation of powers than the U.S. Constitution[.]").

328 *See, e.g.*, *Stark*, 802 N.W.2d at 169–71 (reciting the state-law principle that laws should "be construed so as not to violate the [C]onstitution" and narrowly construing a

sure, in states that have abrogated the rule of strict construction, penal statutes will more often be broadly construed in a way that presents vagueness problems.[329] But those problems can often be avoided if state courts—and the litigants appearing before them—engage in vagueness avoidance under their state-law rules of constitutional avoidance.[330] Consistent adherence to that approach would make it less likely that state-law vagueness cases reach the U.S. Supreme Court.

Consider the Oregon Supreme Court's decision in *State v. Brantley*.[331] The case involved an Oregon statute that made it a crime for "any person [ ], with intent to injure or defraud any one, [to] falsely make, alter, forge, or counterfeit" certain specified documents, such as a "note, certificate, or other evidence of debt[,] . . . contract, charter, letters patent, deed, lease, bill of sale, will, testament, bond, writing obligatory. . . [.]"[332] The statute also covered anyone who, with intent to defraud, "knowingly utter[ed] or publish[ed] as true or genuine any such false, altered, forged, or counterfeited record, writing, instrument[,] or *matter whatever*."[333]

The State argued that the term "matter whatever" should be read broadly to include any forged document, even those not specifically listed earlier in the statute.[334] The Oregon Supreme Court rejected that broad construction because it would have rendered the statute unconstitutionally vague.[335] The court noted that the Oregon legislature had abrogated the rule of strict construction.[336] But it nevertheless concluded that adopting the broad and open-ended construction proposed by the State would be "'dangerous,'" because it would amount to an "enlargement of a statute by construction."[337] Put another way, the open-ended reading of the statutory language would have effectively enabled judicial crime

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loitering ordinance to avoid vagueness (internal quotation marks and citations omitted) (quoting State v. Martin, 674 N.W.2d 291, 296 (S.D. 2003))); *Doe*, 231 P.3d at 1021, 1029–30 (construing a curfew ordinance in a way that avoided vagueness concerns, and noting a state-law "obligat[ion] to attempt to interpret the ordinance in a manner that upholds its constitutionality"); *see also* McJunkins v. State, 10 Ind. 140, 145–46 (1858) (narrowly construing a statute prohibiting "public indecency" in light of vagueness concerns).

329 *See infra* text accompanying notes 341–347.

330 *See supra* note 311.

331 271 P.2d 668 (Or. 1954).

332 *Id.* at 671 (quoting OR. REVISED STAT. § 165.105 (1953)).

333 *Id.* (emphasis added) (quoting OR. REVISED STAT. § 165.105 (1953)).

334 *Id.*

335 *Id.* at 671–72.

336 *Brantley*, 271 P.2d at 672.

337 *Id.* (quoting United States v. Wiltberger, 18 U.S. 76, 96 (1820)).

definition, in violation of state separation-of-powers principles; the court thus adopted a narrowing construction to preserve the statute's constitutionality.[338]

State courts usually can and should engage in vagueness avoidance in that manner. But in some rare instances, a state law will be so open-ended that a narrowing construction will not be feasible without engaging in judicial crime-making.[339] In those scenarios, to the extent judicial crime-making is not permitted under state separation-of-powers principles,[340] the court should invalidate the law on state-law grounds.

The Arkansas Supreme Court's 1885 decision in *Ex parte Jackson*[341] provides an early illustration. That case involved a penal statute prohibiting acts "injurious to the public morals."[342] And it arose after the Arkansas legislature had abrogated the rule of strict construction.[343] Perhaps for that reason, the Arkansas Supreme Court did not even attempt a narrowing construction. It instead concluded that the statute was "null" on the ground that a crime cannot "be defined in so vague a fashion."[344] The court reasoned that the statute yielded a "standard of crime" that was "ever varying" and dependent "upon the moral idiosyncrasies of the individuals who compose the court and jury."[345] In effect, the court explained, the statute asked courts to be "instruments of moral reform," making criminal liability depend upon whatever "moral sentiment which might happen to prevail" following the

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338 *Id.*

339 *See supra* text accompanying notes 71–75 (describing *Mann*).

340 Although the era of judicial crime-making has long passed under federal law, *see* Hessick & Hessick, *Nondelegation*, *supra* note 26, at 301–02 n.92, a minority of states continue to permit judicial crime creation, see Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 980–81 (2019) (noting that more than a dozen states permit judicial crime creation). But even in those states, courts "ordinarily use that authority to convict for the same discrete group of uncodified crimes," rather than create *new* crimes through judicial fiat. *Id.* at 982. The majority of state constitutions, moreover, "have more robust doctrines of separation of powers than the U.S. Constitution." Bell, *supra* note 8, at 1956.

341 45 Ark. 158 (1885).

342 *Id.* at 164 (emphasis omitted) (quoting ARK. REVISED STAT., ch. 44, § 7 (1844)).

343 In 1838, the Arkansas legislature enacted a statute requiring penal statutes to be "liberally construed." Hall, *supra* note 45, at 753, 772 (quoting ARK. STAT. §§ 9728, 9729). But it is unclear whether, at the time of *Ex parte Jackson*, the Supreme Court of Arkansas was aware of the liberal-construction statute. Indeed, by that time, the court had invoked the rule of strict construction without reference to the liberal-construction statute on several occasions. *See, e.g.*, Stout v. State, 43 Ark. 413, 415 (1884); Grace v. State, 40 Ark. 97, 99 (1882); Hughes v. States, 6 Ark. 131, 134 (1845).

344 *Jackson*, 45 Ark. at 164.

345 *Id.*

act's commission.[346] The court concluded that "[t]he constitution, which forbids *ex post facto* laws," does "not tolerate" that result.[347]

It is unclear whether the *Ex parte Jackson* court was referring to the federal or state constitution.[348] But given that the U.S. Supreme Court had not yet recognized a *federal* constitutional vagueness doctrine, the decision can be fairly understood as resting on a state constitutional basis.[349] On that reading, the court's stated rationale reflects an antidelegation principle: the state court was precluded from manufacturing a fixed "standard of crime" because crime "defin[ition]" was the task of the state legislature.[350]

CONCLUSION

The federal-state distinction is simple. But it is a powerful tool for understanding the vagueness doctrine.

Viewing the Supreme Court's vagueness decisions through the lens of that distinction explains why the constitutional doctrine did not emerge until the late nineteenth century. It was a product of the availability of due process review under the Fourteenth Amendment and a simultaneous rise in broad state-court constructions of state penal statutes.

As a doctrinal matter, the distinction usefully divides the Supreme Court's decisions into two groups with separate motivating principles. Separation-of-powers principles motivate the Court's vagueness decisions involving federal laws, while a federalism constraint on the interpretation of state laws is the driving force in its vagueness decisions involving those laws. In the vast majority of cases involving federal law, the Supreme Court engages in vagueness avoidance through statutory construction. And in cases involving state law, the vagueness doctrine can be largely understood as a due process limitation on state judicial power to adopt open-ended constructions of state penal laws.

These insights should not only bring clarity to how scholars and the Supreme Court articulate the doctrine, but they should

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346 *Id.*

347 *Id.* (emphasis in original); *see* Mannheimer, *supra* note 4, at 1079 (characterizing *Ex parte Jackson* as a "true vagueness case").

348 Both the federal constitution and the Arkansas constitution forbid *ex post facto* laws. *See* U.S. CONST. art. 1, § 10; ARK. CONST. art. 2, § 17 (1874).

349 In addition, earlier mentions of the "constitution" in the opinion clearly referred to the state constitution. *See Jackson*, 45 Ark. at 160–62 (referring repeatedly to the Arkansas Supreme Court's authority under the state constitution).

350 *Id.* at 164.

also help guide applications in lower federal courts and state courts. Long before reaching the Supreme Court, most vagueness challenges can and should be resolved through a narrowing construction—of federal statutes by lower federal courts and of state statutes by state courts. Laws should be voided for vagueness only in rare situations in which a narrowing construction is not feasible or where a federal court is bound to follow state legal principles that yield an excessively indefinite construction.

Proper recognition of the federal-state distinction would result in fewer vagueness cases that reach the Supreme Court and more penal laws that are narrowly construed. That would promote the rule of law by increasing the precision of penal laws and by reducing the risk of arbitrary enforcement—the very goals the vagueness doctrine is meant to achieve.