Journal of Criminal Law and Criminology

Volume 104 | Issue 1 Article 3

Winter 2014

Criminal Constitutional Avoidance

William W. Berry III

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0091-4169/14/10401-0105
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CRIMINAL CONSTITUTIONAL AVOIDANCE

WILLIAM W. BERRY III*

In United States v. Skilling*, the Supreme Court used the avoidance canon in response to a void-for-vagueness challenge to the federal criminal fraud statute. As explained below, the Court severely restricted the statute's meaning, limiting its proscription against "deprivation of honest services" to bribery and kickbacks.*

This Article argues that, contrary to the Court's decision in Skilling*, the canon of constitutional avoidance is inappropriate in void-for-vagueness cases. This is because such cases do not present statutory ambiguity that requires choosing between competing meanings or interpretations. Instead, void-for-vagueness challenges concern statutes that either have a constitutionally clear meaning (and are not void-for-vagueness) or do not have a constitutionally clear meaning (and are void for vagueness). In other words, this Article claims that the absence of statutory ambiguity—one interpretation that complies with the Constitution and one interpretation that indicates constitutional infirmities—in void-for-vagueness cases makes the use of the avoidance canon improper in such cases.*

Simply put, vague criminal statutes are not inherently ambiguous. Instead of offering a choice between two meanings, they are indefinite, uncertain, and unclear. And, it is not the potential meanings of the vague statute that create constitutional problems; there is only a constitutional problem if there is no ascertainable meaning.

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* Assistant Professor of Law and Beccaria Scholar in Criminal Law, University of Mississippi; D.Phil., Oxford (UK); J.D. Vanderbilt; B.A. Virginia. The author would like to thank Jack Wade Nowlin for insightful discussions about this topic early in the drafting process. The author also thanks Ellen Podgor, Michael Seigel, Shima Baradaran, Lucian Dervan, Katrice Copeland, and Sandra Jordan for helpful suggestions as part of a White Collar Crime Panel at the SEALS Conference. In addition, the author would also like to thank Katherine Kimmel for her excellent research assistance on this Article. Finally, the author would like to express his gratitude to the Northwestern Law students on the *Journal of Criminal Law and Criminology* for their rigorous and thorough editing and Bluebooking help on this Article.

Part I of this Article explores the justifications for the canon of constitutional avoidance. In Part II, this Article describes the Court's void-for-vagueness doctrine and its use of the avoidance canon to circumvent the vagueness question in Skilling*. Part III argues that the use of the avoidance canon in* Skilling *was improper and explains why it is not an appropriate vehicle to respond to void-for-vagueness constitutional challenges to federal criminal statutes. Part IV explores the negative theoretical and practical consequences of applying the avoidance canon to potentially vague statutes. Finally, Part V concludes the Article by outlining a model for applying the avoidance canon to other constitutional questions involving criminal statutes.*

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INTRODUCTION

"[A] resolution to avoid an evil is seldom framed till the evil is so far advanced as to make avoidance impossible."

—Thomas Hardy[1]

The canon of constitutional avoidance and the propriety of its use are again at the center of academic debate[2] following the U.S. Supreme Court's decision to uphold the Patient Protection and Affordable Care Act in *National Federation of Independent Business v. Sebelius*.[3] In affirming the

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[1] THOMAS HARDY, FAR FROM THE MADDING CROWD 145 (Doubleday 1998) (1874).

[2] The canon of constitutional avoidance has been the subject of intense academic debate. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1314–18 (2006); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 72–74; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1946–47 (1997); Ernest A. Young, *Constitutional Avoidance*, *Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551, 1593–99 (2000). *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 276 (1994) (exploring the use of canons in statutory interpretation); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020–22, 1066 (1989) (suggesting public values analysis as a substantive rationale for constitutional avoidance but rejecting the invocation of public values to avoid constitutional doubts when doing so would be "inconsistent with legislative supremacy"); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 399–400 (2005); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832–35 (2001) (calling for the abandonment of the avoidance canon on separation of powers grounds); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004–06 (1994) [hereinafter Kloppenberg, *Avoiding Constitutional Questions*] (offering a critical examination of a subcategory of the avoidance doctrine, the "last resort rule"); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 4 (1996) [hereinafter Kloppenberg, *Avoiding Doubts*] (criticizing the avoidance canon in free speech cases); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (criticizing avoidance techniques); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196, 1239 (2006) (arguing against the use of the avoidance canon in situations where the Executive Branch can interpret the text clearly); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 561–75 (1990) (urging a more transparent constitutional approach to immigration law); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1497–98 (1997) (suggesting the abandonment of the canon of avoidance for an alternative "unconstitutionality" canon); Harry H. Wellington, Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 50 (criticizing application of the avoidance canon).

[3] 132 S. Ct. 2566, 2593–94 (2012).

individual mandate, Chief Justice John Roberts's controlling opinion[4] interpreted the ambiguous language of the statute in order to save the constitutionality of the statute.[5] The four dissenting Justices, on the other hand, argued that Justice Roberts's interpretation contravened Congress's intent by altering the meaning of the plain language of the statute.[6]

When the Court invokes the avoidance canon, the first point of disagreement is whether it constitutes an exercise of judicial restraint.[7] In the context of *Sebelius*, Justice Roberts could argue that he exercised judicial restraint by interpreting the statute such that the Court did not strike it down.[8] The dissenters would argue, though, that interpreting the statute consistently with the plain meaning of its text and Congress's intent exercises judicial restraint, even if that means striking the statute down as unconstitutional.[9]

The second point of contention when the Court uses the avoidance canon is whether there are constitutional norms protected by the canon's use.[10] Such resistance norms[11] provide a penumbral value[12] to underenforced constitutional provisions. Thus, in order to escape the avoidance doctrine, Congress must be clear about its intent to approach constitutional lines.[13] The criticism of using the avoidance canon to give

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[4] The four other Justices in the majority, Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan, joined with Chief Justice John Roberts but also voted to uphold the statute on Commerce Clause grounds. *Id.* at 2617 (Ginsburg, J., concurring).

[5] *Id.* at 2594 (majority opinion). Specifically, Justice Roberts determined that the applicable meaning of the ambiguous "penalty" language was that it constituted a "tax," such that passage of the statute fell under Congress's taxing power. *Id.*

[6] *Id.* at 2651 (joint dissent).

[7] *Id.* at 2579 (majority opinion).

[8] *Id.* at 2593–95.

[9] *Id.* at 2676 (joint dissent).

[10] This justification seems less applicable to the *Sebelius* case, as the saving construction of the statute does not seem to protect any particular constitutional norm.

[11] As explained below, resistance norms are constitutional values, often underenforced, that increase in significance when the Court applies the avoidance doctrine, such that their precise scope becomes undetermined. *See* Young, *supra* note 2, at 1593; discussion *infra* Part II.

[12] A penumbra is a partial shadow between regions of complete darkness and complete illumination, as in an eclipse. In legal terms, a penumbra refers to implied powers that emanate from a specific rule, thus extending the meaning of the rule into its periphery. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

[13] *See* Morrison, *supra* note 2, at 1212; Young, *supra* note 2, at 1606.

value to such norms is that it enables the Judiciary to create a penumbral constitution, exceeding its Article III power.[14]

To be sure, this debate about the avoidance canon is not new.[15] The academic literature concerning the justifications for and the shortcomings of the canon of constitutional avoidance is well developed.[16] But, the academic literature has not explored the application of the avoidance doctrine to criminal statutes as a class.[17] This Article takes a small step in that direction. It explores whether the canon of constitutional avoidance is appropriate in cases involving void-for-vagueness challenges to federal criminal statutes.

In *Skilling v. United States*, the Supreme Court used the avoidance canon in response to a void-for-vagueness challenge to the federal criminal fraud statute.[18] As explained below, the Court severely restricted the statute's meaning, limiting its proscription against deprivation of honest services to bribery and kickbacks.[19]

This Article argues that, contrary to the Court's decision in *Skilling*, the canon of constitutional avoidance is inappropriate in void-for-vagueness cases. This is because such cases do not present statutory ambiguity that requires choosing between competing meanings or interpretations. Instead, void-for-vagueness challenges focus on the clarity of statutes and ask

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[14] *See* Posner, *supra* note 2, at 816. The idea is that by using the canon to create a series of implied powers, the Court changes the meaning of the constitutional text by adding rights and powers not inherent in that text.

[15] *See* Vermeule, *supra* note 2, at 1949 n.11. *See generally* sources cited *supra* note 2. The use of the canon remains highly contested, both in terms whether it is ever appropriate, and if so, which situations allow for its use.

[16] *See* sources cited *supra* note 2.

[17] I am indebted to Sara Sun Beale for raising this issue at the close of her entertaining and insightful "term paper" on *Skilling*, which illuminates the core arguments and issues in the case through a hypothetical discussion between two members of a law faculty. *See* Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251 (2010). She closes her article as follows:

> But as noted in my fictional debate, the Supreme Court has not employed the doctrine of constitutional avoidance or the standards for allowing a facial challenge consistently in criminal cases. Examining the Supreme Court's application of these doctrines in criminal cases could illuminate both the doctrines themselves and their implications for the federal criminal justice system. Scholarship of this nature might address a variety of questions. In the criminal justice context, what factors seem to influence the application of these doctrines? Is the Court influenced, *sub silentio*, by certain criminal justice policy concerns? Have the doctrines been employed strategically to advance certain policy objectives, and, if so, what objectives? And how do the criminal cases compare to other distinct groups of cases, such as those concerning regulatory statutes or voting rights? Maybe that should be the next debate.

Id. at 271–72.

[18] 130 S. Ct. 2896, 2928 (2010).

[19] *Id.*

simply whether they are clear enough to satisfy the notice requirements of the Constitution.[20] In other words, this Article claims that, in void-for-vagueness cases, the absence of statutory ambiguity—one interpretation that complies with the Constitution and one interpretation that indicates constitutional infirmities—makes the use of the avoidance canon improper.

Simply put, vague criminal statutes are not inherently ambiguous. Instead of offering a choice between two meanings, they are indefinite, uncertain, and unclear. And, it is not the potential meanings of the vague statute that create constitutional problems; there is only a constitutional problem if there is *no ascertainable meaning*.

Part I of this Article explores the justifications for the canon of constitutional avoidance. In Part II, this Article describes the Court's void-for-vagueness doctrine and its use of the avoidance canon to circumvent the vagueness question in *Skilling*. Part III argues that the use of the avoidance canon in *Skilling* was improper and explains why it is not an appropriate vehicle to respond to void-for-vagueness constitutional challenges to federal criminal statutes. Part IV explores the negative theoretical and practical consequences of applying the avoidance canon to potentially vague statutes. Finally, Part V concludes the Article by outlining a model for applying the avoidance canon to other constitutional questions involving criminal statutes.

I. THE CANON OF CONSTITUTIONAL AVOIDANCE

A. THE DEVELOPMENT OF THE MODERN AVOIDANCE CANON

The canon of constitutional avoidance predates the establishment of judicial review.[21] A substantive canon,[22] its traditional form stated that

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[20] Statutes do not have to be completely clear to satisfy the requirements of the vagueness doctrine. They just must be clear enough to provide adequate notice to citizens of the conduct prohibited by the statute. *See generally* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1 (1997) (discussing the void-for-vagueness doctrine).

[21] Prior to its decision establishing judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court held that the Judiciary Act of 1789 "must, receive a construction, consistent with the constitution" and accordingly interpreted the Act to avoid causing it to exceed Article III limitations on federal court jurisdiction over aliens, Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800); *see also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 29–30 (1985).

[22] A "substantive" or "normative" canon is one that aims to accomplish a stated judicial purpose, here avoiding constitutional decisionmaking as opposed to seeking to ascertain and follow the intent of Congress. *See*, *e.g.*, Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992) (stating that "normative canons may or may not coincide with legislators' values or intentions"); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should*

when deciding "between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act."[23] Under classical avoidance, the court must "reach the issue whether the doubtful version of the statute is constitutional [and conclude that it is not] before adopting the construction that saves the statute from constitutional invalidity."[24]

Over time, however, the Court broadened this classical version of the canon of constitutional avoidance.[25] Because the application of the classical avoidance canon required the Court to make a constitutional determination in deciding whether to apply the canon,[26] the Supreme Court modified the canon in *United States v. Delaware & Hudson Co*.[27] The Court in that case explained that the classical canon in essence required the Court to issue advisory opinions.[28] To apply the classical avoidance canon, the Court first had to decide that one interpretation was unconstitutional. But, because such a determination did not control the outcome of the case—the saving construction did—the decision as to the unconstitutional interpretation became an advisory opinion.[29]

To remedy this defect, the Court broadened the meaning of the canon, explaining that:

> [U]nless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two

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Congress Turn Its Lonely Eyes to You?, 45 VAND. L. REV. 561, 563 (1992) (claiming that normative canons are judicial creations which are driven by policy objectives rather than congressional intent); Young, *supra* note 2, at 1593–99 (explaining that the avoidance canon is best understood as a normative canon).

[23] Blodgett v. Holden, 275 U.S. 142, 147 (1927) (Holmes, J., concurring in the judgment of an equally divided court).

[24] Morrison, *supra* note 2, at 1203 (quoting Clark v. Martinez, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting)); *see also* Vermeule, *supra* note 2, at 1949. Chief Justice John Marshall similarly explained that "an act of Congress ought never to be construed to violate of the law of nations if any other possible interpretation remains . . . ." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[25] *See* Morrison, *supra* note 2, at 1204–07; Vermeule *supra* note 2, at 1948–49.

[26] *See* Morrison, *supra* note 2, at 1204–07; Vermeule *supra* note 2, at 1948–49.

[27] 213 U.S. 366 (1909); *see* Nagle, *supra* note 2, at 1496 (identifying *Delaware & Hudson* as "[t]he true culprit" responsible for the rise of modern avoidance).

[28] United States ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

[29] *Id.* at 407–09; *see also* Kelley, *supra* note 2, at 840–41 (explaining how the Court in *Delaware & Hudson* shifted the avoidance canon to its modern form to avoid advisory opinions).

> constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.[30]

This modern avoidance canon thus requires the Court to choose alternative plausible statutory interpretations not just where one interpretation is unconstitutional but also where one interpretation gives rise to serious constitutional doubts. As the Court explained in a subsequent case, the *Delaware & Hudson* determination meant that, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[31]

Justice Louis Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority* further highlighted the move in the years that followed to cement the modern avoidance canon in the name of judicial deference to the Legislature.[32] The canon increased legislative deference by minimizing the cases in which the Court even reached the question of a statute's constitutionality, much less struck it down.[33] Justice Brandeis explained:

> The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.[34]

Thus, the "cardinal principle" of the modern avoidance canon, "which 'has for so long been applied by [the] Court that it is beyond debate,'" requires merely that the Court make "a determination of serious constitutional *doubt*, and not a determination of *unconstitutionality*."[35]

B. THE JUSTIFICATIONS FOR THE AVOIDANCE CANON

The justifications for the use of the canon fall generally into two categories: judicial restraint and normative justifications.[36] The judicial

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[30] *Del. & Hudson Co.*, 213 U.S. at 408.

[31] United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

[32] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 354 (1936) (Brandeis, J., concurring); *see also, e.g.*, Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984) (describing avoidance of constitutional questions as "a fundamental rule of judicial restraint").

[33] *See Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (listing cases in which the Court refused to pass on the constitutionality of a statute despite the "insistence of one who has availed himself of its benefits").

[34] *Id.* at 345–46. Justice Brandeis previously outlined seven categories of interpretive principles for the Court to use in interpreting statutes including modern avoidance. *Id.* at 346–48.

[35] Almendarez-Torres v. United States, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

[36] *See, e.g.*, Eskridge, *supra* note 2, at 1020–21; Morrison, *supra* note 2, at 1202, 1212.

restraint theory relies on the idea that the Court should avoid interpretations of statutes that raise constitutional doubts in order to respect, to the greatest degree possible, legislative decisionmaking.[37] As explained below, the judicial restraint justification has become less plausible with the application of the modern canon. In many cases, the modern canon results in the Court engaging in statutory rewriting that looks very little like restraint.[38]

The second primary justification scholars have offered is one of constitutional enforcement of resistance norms.[39] The avoidance canon thus should "give voice to certain normative values,"[40] namely "those embodied in the underlying constitutional provisions that create the constitutional 'doubt.'"[41] Under this justification, the overarching norm of the avoidance canon is restricting Congress's ability to legislate to the outer limits of its constitutional authority without being explicit about its decision to do so.[42]

1. *Judicial Restraint*

Under its initial conception of classical avoidance, the Court emphasized that "[t]his [avoidance] canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."[43] The modern canon likewise rests on the notion that the Court should "minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections."[44]

Professor Trevor Morrison's excellent article on the use of the avoidance canon in the Executive Branch succinctly summarizes this judicial restraint justification for the avoidance canon.[45] He explains:

> The combination of classical avoidance, *Delaware & Hudson*, and *Ashwander* yields the following:

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[37] *See, e.g.*, Eskridge, *supra* note 2, at 1021; Morrison, *supra* note 2, at 1202; Vermeule, *supra* note 2, at 1945.

[38] *See* Schauer, *supra* note 2, at 74 (criticizing the avoidance canon for this reason). The traditional canon sought only to prevent constitutional interpretations, as opposed to avoiding all constitutional doubts, making judicial restraint at least a more plausible justification. *See* Morrison, *supra* note 2, at 1202–03.

[39] Morrison, *supra* note 2, at 1212; Young, *supra* note 2, at 1585.

[40] Young, *supra* note 2, at 1585.

[41] Young, *supra* note 2, at 1551; *see also* Frickey, *supra* note 2, at 450.

[42] *See* Eskridge, *supra* note 2, at 1020–21; Morrison, *supra* note 2, at 1212.

[43] Rust v. Sullivan, 500 U.S. 173, 191 (1991); *see also* FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1924).

[44] Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

[45] Morrison, *supra* note 2, at 1206–07.

> (1) In keeping with their oath to uphold the Constitution, members of Congress are presumed to have intended to legislate within constitutional limits. As faithful agents of the legislature, the federal courts are obliged to honor that legislative intent.
>
> (2) The values of legislative supremacy and judicial restraint, including the interest in mitigating countermajoritarian concerns, direct the courts to avoid, when possible, passing on the constitutionality of federal statutes.
>
> (3) Although the countermajoritarian difficulty is at its most acute when a court actually invalidates a statute as unconstitutional, the avoidance canon cannot be limited only to those circumstances without requiring the courts to offer advisory opinions on constitutional issues.[46]

As Morrison notes, however, scholars have criticized this justification for the modern canon extensively.[47] Professor Frederick Schauer argues, for instance, that when the Court uses the avoidance canon, it may abandon the best interpretation of the statute at issue in favor of any alternative that is "fairly possible," opening the door both for poor interpretation and political activism on the part of the Court.[48] Further, it is easy to see how rewriting a statute (or at least altering its meaning) in the name of avoiding the Constitution does not appear to be an exercise of restraint. Deriving a meaning for a statute that does not flow directly from its text in the name of saving it seems much more like activism than restraint.

Another important criticism of this conception of avoidance is that it allows the Court to look beyond congressional intent in interpreting a statute. The avoidance canon does not appear to demonstrate judicial restraint when it results in the Court's interpretation superseding the intent of Congress. This appearance of activism is damaging, even if the Court's reason for doing so is to avoid the Constitution and not to advance a contrary normative approach to the one Congress adopted in passing the statute.[49]

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[46] *Id.* (footnote omitted). Professor Philip Frickey has similarly explained:

> Descriptively, the classic justifications for the canon are that it promotes judicial restraint by allowing judges to avoid the "delicate process of constitutional adjudication" and its concomitant counter-majoritarian difficulties; it coincides with the probable congressional intent preferring the ongoing validity of some version of the statute to invalidity as the result of judicial review; and it encourages a healthy, cooperative attitude between the Court and Congress by "remanding" issues for careful congressional deliberation consistent with the members' oath of office to uphold the Constitution, thereby illuminating the issue not only for Congress but also the Court if the issue ever returns to it.

Frickey, *supra* note 2, at 446 (footnotes omitted).

[47] *See* Morrison, *supra* note 2, at 1208–11.

[48] *See* Schauer, *supra* note 2, at 84–86.

[49] *See, e.g.*, Suzanna Sherry, *A Summary of Why We Need More Judicial Activism*, 16 GREEN BAG 2D 449, 452 (2013); Howard M. Wasserman, *Reappropriating Judicial Activism*, 16 GREEN BAG 2D, 463–64 (2013).

2. *Resistance Norms*

A second justification for the avoidance canon is its ability to give a voice to underenforced constitutional norms. Professor Ernest Young provides a robust account of this justification, describing it as a rule that is "designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to certain normative values."[50] These values are the ones that give rise to the constitutional doubt. Young's account explains that, in some cases, the avoidance canon can provide a penumbral expression of an underenforced constitutional norm.[51] In other words, the canon protects the norm by avoiding an interpretation of a statute that approaches the norm unless Congress has clearly stated intent to the contrary.

William Eskridge has similarly explained that, understood in this context, the avoidance canon "makes it harder for Congress to enact constitutionally questionable statutes and forces legislators to reflect and deliberate before plunging into constitutionally sensitive issues."[52] The canon thus protects the constitutional norm by preventing Congress from approaching the line between what is constitutional and unconstitutional, unless Congress clearly articulates its intention to legislate to the edge of that boundary.[53]

The resistance norm account of the canon provides a more defensible justification than the judicial restraint account. First, the criticism of the canon that it undermines Congress's statutory intent carries less weight if the goal of the canon is to protect constitutional norms from congressional infringement.[54] Second, Judge Richard Posner's argument that the avoidance canon promotes the development of a penumbral constitution "[b]ecomes just a restatement of the canon's point, not an indictment of it."[55]

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[50] Young, *supra* note 2, at 1585; *see also* Morrison, *supra* note 2, at 1212 (highlighting the same concept).

[51] Young, *supra* note 2, at 1585.

[52] ESKRIDGE, *supra* note 2, at 286; *see also* Morrison, *supra* note 2, at 1216 (highlighting the same idea).

[53] ESKRIDGE, *supra* note 2, at 286. A possible analogy here would be to a new dating relationship in which neither member of the couple has defined the extent of the relationship (or its boundaries with reference to dating others). The relationship might have a greater perceived reality (penumbral presence) as long as the couple does not have a "define-the-relationship" (DTR) conversation. In other words, the Supreme Court, in this context, will avoid pressing the issue unless Congress insists on defining the relationship, that is, the scope of the constitutional provision.

[54] Morrison, *supra* note 2, at 1209.

[55] *Id.* at 1213; *see also* Posner, *supra* note 2, at 816.

C. THE AMBIGUITY ASSUMPTION OF THE AVOIDANCE CANON

Importantly, the avoidance canon is a substantive canon.[56] This means that it serves to protect the substance—the underlying values—of the Constitution. The Supreme Court has described the canon as follows: "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[57]

Underlying this basic framing of the canon is the understanding that it exists to resolve disputed questions of statutory meaning. The avoidance canon thus exists to put a thumb on the scale in favor of the interpretation that avoids the constitutional problem.

The decision of whether to invoke the canon arises where there is a latent statutory ambiguity. Without an open question of statutory interpretation, the avoidance canon is not relevant to the Court's decisionmaking. Whenever the Court invokes the canon, it thus *presumes* (1) an open question of what a statute means based on ambiguous language that suggests two or more possible meanings, and (2) one of the possible meanings raises doubts as to the constitutionality of the statute.

II. VAGUENESS AND CONSTITUTIONAL AVOIDANCE

A. THE CONSTITUTIONAL PROHIBITION AGAINST VAGUENESS

The precise origins of the constitutional prohibition against vagueness are not clear, as the concept was initially primarily a principle of construction focusing on notice.[58] Notice encompasses the idea that a potential offender must have a reasonable opportunity to know what potential behavior is criminal.[59] As Justice Oliver Wendell Holmes, Jr.

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[56] *See, e.g.*, Young, *supra* note 2, at 1593–96 (explaining that the avoidance canon is best understood as a normative canon).

[57] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[58] Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263–64 (2010); Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 275 (1948) ("Neither *The Federalist* nor the records of debates of the Constitutional Convention and the ratifying conventions indicate that the concept was considered a serious issue, if an issue at all.").

[59] *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205–06 (1985) ("At least within the political tradition of liberal democracy, the essentiality of notice seems obvious, and the perceived unfairness of punishment without warning requires no explication."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588 (2001) ("A necessary condition of any

explained in *Nash v. United States*, "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."[60]

Over time, this limiting construction became a part of the due process requirements of the Fifth and Fourteenth Amendments. As the Court indicated, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[61] And the Court applied this doctrine to criminal statutes: "[n]o one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[62]

At the heart of the constitutional prohibition against vagueness is the concept of fair notice. As the Court has explained, "[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition."[63] Nonetheless, the Court has never required perfect clarity to survive a vagueness challenge. Rather, the prohibition only requires a statute "to provide a person of *ordinary intelligence* fair notice of what is prohibited,"[64] as the Court has "eschewed the idea of perfect clarity or mathematical certainty."[65]

To satisfy due process, then, "a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."[66] This standard allows for facial

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free society is the ability to avoid going to prison; one has that ability only if one can know what behavior will lead to prosecution and punishment.").

[60] Nash v. United States, 229 U.S. 373, 377 (1913) (quoting Justice David Brewer's opinion from when he sat in the circuit court in Tozer v. United States, 52 F. 917, 919 (E.D. Mo. 1892)). Justice Holmes qualified this statement with respect to the Sherman Act, noting: "But apart from the common law as to restraint of trade . . . the law is full of instances where a man's fate depends upon his rightly estimating, that is, as the jury subsequently estimates it, some matter of degree." *Id.*; *see also* Lockwood, *supra* note 58, at 268.

[61] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); s*ee also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); Lockwood, *supra* note 58, at 268–69.

[62] *Lanzetta*, 306 U.S. at 453; *see also* Lockwood, *supra* note 58, at 267 (explaining the significance of the Court's statement and application of the vagueness doctrine in *Lanzetta*).

[63] Screws v. United States, 325 U.S. 91, 103–04 (1945); *see also* Lockwood, *supra* note 58, at 269 (finding this quote from the Court in *Screws* a "repeated reference").

[64] Lockwood, *supra* note 58, at 270 (emphasis added) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

[65] *Id.* at 271.

[66] Kolender v. Lawson, 461 U.S. 352, 357 (1983) (numbering added).

and as-applied challenges, depending on the statute at issue.[67] The *Skilling* case provides an example of the latter.[68]

B. *UNITED STATES V. SKILLING*

In June 2010, the U.S. Supreme Court decided *United States v. Skilling*, one of a triumvirate of cases[69] concerning the scope of the then-effective federal criminal "honest-services" fraud statute.[70] This statute defined the "scheme or artifice to defraud" language of the federal mail and wire fraud statute[71] as depriving another of "the intangible right of honest services."[72] In *Skilling*, former Enron executive Jeffrey Skilling challenged his federal criminal conviction under the honest-services fraud statute[73] because, among other things, he claimed that the statute was unconstitutionally vague as applied to his conduct.[74]

The Court, however, avoided the constitutional issue altogether, holding that "the intangible right of honest services" included only bribery and kickbacks.[75] Clearly not a textual reading of the statutory language,[76] the Court instead relied on its review of the cases decided under the prior honest-services fraud statute[77] that the Court had struck down twenty years earlier in *McNally v. United States*.[78] The Court reasoned that Congress's adoption of the honest-services statute at issue, 18 U.S.C. § 1346, sought to include the types of crimes, namely bribery and kickbacks, that had been brought under the prior statute.[79] This approach required a strained reading

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[67] *See, e.g.*, Lockwood, *supra* note 58, at 286–87.

[68] *See generally* United States v. Skilling, 130 S. Ct. 2896 (2010).

[69] The Court's decision in *Skilling* largely resolved the similar issues petitioners raised in *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam), and *Black v. United States*, 130 S. Ct. 2963 (2010).

[70] *See* 18 U.S.C. § 1346 (2010).

[71] *Id.* §§ 1341, 1343.

[72] *Id.* § 1346.

[73] Skilling also challenged the voir dire procedure, the process of selecting jurors, but the Court held that the voir dire challenge was without merit. *Skilling*, 130 S. Ct. at 2918–23.

[74] Skilling's alleged deprivation of honest services consisted of his misleading Enron shareholders concerning information about the company and its financial health. *Id.* at 2907–08.

[75] *Id.* at 2928.

[76] As indicated above, the relevant statutory language provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

[77] 18 U.S.C. § 1341 (1987).

[78] 483 U.S. 350, 360 (1987) (holding that the mail fraud statute was "limited in scope to the protection of property rights" and "[i]f Congress desires to go further, it must speak more clearly than it has").

[79] *Skilling*, 130 S. Ct. at 2906.

of the prior cases to conclude that honest services *only* applied to bribery and kickbacks.[80]

The *Skilling* Court based its decision to avoid the constitutional issue on the long-held canon of constitutional avoidance.[81] As described above, this substantive canon mandates that, in cases where two plausible interpretations of a statute exist and one interpretation will raise serious doubts as to the constitutionality of the statute, the Court should choose the alternative interpretation.[82] The Court explained that "[i]n urging invalidation of § 1346, Skilling swims against our case law's current, which requires us, if we can, *to construe*, not condemn, Congress' enactments."[83] Citing *Civil Service Commission v. Letter Carriers*, the Court emphasized the strong presumption against striking down federal statutes on vagueness grounds.[84]

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[80] In fact, the pre-McNally cases included a wide variety of actions under the rubric of "deprivation of honest services" that did not involve kickbacks or bribes. *See generally, e.g.*, Badders v. United States, 240 U.S. 391 (1916) (mail fraud); United States v. Starr, 816 F.2d 94 (2d Cir. 1987) (same); United States v. Newman, 664 F.2d 12 (2d Cir. 1981) (same); United States v. Bronston, 658 F.2d 920 (2d Cir. 1981) (same); United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980) (employee depriving employer of his right to loyal and honest services via mail and wire fraud); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (depriving the people of a state their right to honest and faithful execution of the duties of the governor via mail fraud); United States v. Louderman, 576 F.2d 1383 (9th Cir. 1978) (impersonating an officer or employee of the United States); United States v. Brown, 540 F.2d 364 (8th Cir. 1976) (extorting payments for apartment rentals); United States v. O'Malley, 535 F.2d 589 (10th Cir. 1976) (wire fraud); United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976) (defrauding shareholders of a corporation through incomplete proxy statements); United States v. Bush, 522 F.2d 641 (7th Cir. 1975) (effort by city official to deprive citizens of Chicago of honest services via mail fraud); United States v. Keane, 522 F.2d 534 (7th Cir. 1975) (mail fraud); United States v. States, 488 F.2d 761 (8th Cir. 1973) (election fraud); Blachly v. United States, 380 F.2d 665 (5th Cir. 1967) (mail fraud); Gregory v. United States, 253 F.2d 104 (5th Cir. 1958) (same).

[81] *See, e.g.*, United States ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 389 (1909) ("[E]ven if such unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts."); *see also* discussion *supra* Part I.A.

[82] A companion doctrine is the severability doctrine, which addresses when the Court should permit the statute to survive by striking down only the unconstitutional part of the statute. *See, e.g.*, United States v. Booker, 543 U.S. 220, 226–27, 265 (2005) (holding that the Sentencing Reform Act violated the Sixth Amendment but could be preserved by severing the portion of the Act that made the Sentencing Guidelines "mandatory"). For an interesting discussion of the relationship between the avoidance canon and the doctrine of severability, see Vermeule, *supra* note 2, at 1946–47.

[83] *Skilling*, 130 S. Ct. at 2928 (emphasis added) (citation omitted).

[84] *Id*. (citing U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973)).

Interestingly, in *Letter Carriers*, the Court considered whether the phrase "political activity" was unconstitutionally vague.[85] The *Letter Carriers* Court, in upholding the statute, construed the statute by citing to the federal regulations promulgated by the Civil Services Commission that defined the permissible and impermissible "political activities."[86] Unlike in *Skilling*, where the Court used common law precedents as the basis for interpreting the statute, the *Letter Carriers* Court applied a federal regulation to explain the meaning of a vague statute. In other words, the Court did not avoid the vagueness issue in *Letter Carriers*. Instead, it decided it.

Nonetheless, the *Skilling* Court used *Letter Carriers* as its basis for construing the honest-services statute such that it was no longer vague.[87] Ironically, the Court did not have to "construe" the statute by limiting its meaning; it simply had to determine whether the statute was too vague to decide whether Skilling's conduct fell within its meaning. The consequence of applying this canon in *Skilling* was that the Court essentially rewrote the statute. The language "deprivation of the intangible right to honest services," which had previously covered a wide variety of conduct, now applies only to bribery and kickbacks.[88] This legislative-type decisionmaking in the name of avoiding potential doubts about the constitutionality of the statute raises questions about the propriety of the canon of constitutional avoidance itself. Indeed, many commentators have criticized the use of the canon of constitutional avoidance, and even those who support its use suggest that the Court should apply it narrowly.[89]

Despite the criticism of the canon, if restricting the statute to cover only bribery and kickbacks was one of several possible meanings of "honest services," then the Court's use of the avoidance canon would have been consistent with its prior usage. Instead, the meaning of the phrase "honest

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[85] *Letter Carriers*, 413 U.S. at 568.

[86] *Id.* at 575–77.

[87] *Skilling*, 130 S. Ct. at 2930.

[88] Indeed, federal prosecutors have long enjoyed the simplicity and flexibility of this language in prosecuting fraud cases and have likewise considered it to be a valuable prosecutorial weapon. *See, e.g.*, Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980) (referring to the mail fraud statute as the "true love" of white-collar prosecutors).

[89] *See, e.g.*, Kelley, *supra* note 2, at 832–35 (calling for the abandonment of the avoidance canon on separation of powers grounds); Kloppenberg, *Avoiding Constitutional Questions*, *supra* note 2, at 1004–06 (offering a critical examination of a subcategory of the avoidance doctrine, the "last resort rule"); Kloppenberg, *Avoiding Doubts*, *supra* note 2, at 4 (criticizing the avoidance canon in free speech cases); Manning, *supra* note 2, at 228 (criticizing avoidance techniques); Morrison, *supra* note 2, at 1196, 1239 (arguing against the use of the avoidance canon in situations where the Executive Branch can interpret the text clearly).

services" contained no ambiguity; no competing meanings of the phrase existed. Indeed, the issue in the case was not what "honest services" meant or included. The issue was whether the term "honest services" was too vague to have any intelligible meaning at all. And the Court "avoided" this constitutional question by rewriting the statute and changing its meaning.[90]

III. "CRIMINAL" CONSTITUTIONAL AVOIDANCE

Having explained the relevant background of the avoidance canon and its use in *Skilling*, this Part argues that its use in *Skilling* was improper, and more broadly, that any use in criminal cases with vagueness challenges is improper. Specifically, by confusing the concepts of vagueness and ambiguity, the *Skilling* Court abdicated its role as a court while simultaneously and improperly engaging in the role of a legislature. For the same reasons, the canon is improper in all vagueness cases.

A. VAGUENESS, NOT AMBIGUITY

The central shortcoming of the Court's decision in *Skilling* is the Court's confusion of the concepts of vagueness and ambiguity. As discussed above, the ambiguity that gives rise to the potential use of the avoidance canon occurs where statutory language has two (or more) possible meanings, one of which is constitutionally infirm. The Court can then apply the canon by choosing the meaning that does not create the constitutional issue, or alternatively, by resolving the constitutional problem on the merits.

In *Skilling*, though, the question before the Court was whether the federal fraud statute (prohibiting deprivation of honest services) was, as applied, void-for-vagueness. There were not two competing meanings of "honest services" to choose between in applying the statute. Rather, the question concerned whether the statutory language provided adequate notice concerning the criminal nature of Skilling's conduct. Skilling argued that the "deprivation of honest services" prohibition did not clearly give notice of what conduct violated the statute, and thus as applied, was void-for-vagueness under the requirements of the Due Process Clause. Skilling did not claim that any particular substantive application or interpretation of the statutory language resulted in the statute's unconstitutionality. Instead, the application of the statute created the constitutional problem. Its scope

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[90] Federal prosecutors have pursued a countless number of cases under the "honest-services" doctrine that had nothing to do with bribery or kickbacks. *See supra* note 80 (providing numerous pre-*McNally* cases where this occurred). Indeed, before *Skilling*, the government had prosecuted many crimes under the prior statutory regime that did not involve bribery or kickbacks. *See id.*

was indefinite, according to Skilling, such that it was difficult to ascertain a clear limit on what conduct fell under the statute and what conduct did not.

The proper choice before the Court, then, was whether Skilling was correct on the merits of his constitutional claim that the statute was impermissibly vague. There was no question of ambiguity in the statute and thus no opportunity to consider whether the avoidance canon should apply. Put another way, interpreting the scope of the statute *was the constitutional question*. To question whether the Constitution applied to Skilling's argument was disingenuous. The analytical move the Court made, then, was to ignore the question before it and rewrite the statute to remove the constitutional question. This is certainly a very different enterprise than choosing between two possible interpretations of a statute. As explained in more detail below, this interpretation resulted both in the Court abdicating its role as a court and improperly acting as a legislature.

B. THE COURT ABDICATING ITS ROLE AS A COURT

In choosing to employ the canon of constitutional avoidance in the context of void-for-vagueness cases like *Skilling*, the Court abdicates its role as a court. As a court, its primary role is to resolve cases or controversies.[91] As indicated above, Skilling's primary claim was that the vagueness of the statutory language violated his due process right to notice. Given the alleged vagueness of the statutory language, the Court's proper role was to determine the constitutional acceptability of its application to Skilling's conduct.

Dating back to *Marbury v. Madison*, the interpretation of the Constitution and its application to federal statutes has been at the heart of the Court's judicial review.[92] Judicial review, however, provides the Court with a number of different legitimate options to resolve cases, and in using these options, the Court must balance a number of competing interests when assessing whether a statute is unconstitutionally vague.[93] For instance, the defendant's interest in receiving notice is much greater when the criminal statute proscribes conduct that is *malum prohibitum*[94] as opposed to conduct that is *malum in se*.[95] The Court can also limit the

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[91] U.S. CONST. art. III, § 2, cl. 1.

[92] *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 (2003).

[93] *Id.* at 919–20.

[94] *Malum prohibitum* conduct is conduct that is illegal because the state decides it is so. BLACK'S LAW DICTIONARY 1045 (9th ed. 2009). This conduct is a crime "merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.*

[95] *Malum in se* conduct is conduct that is illegal because it is an evil unto itself. *See id.* at 1045 ("A crime or an act that is inherently immoral, such as murder, arson, or rape.").

impact of a challenge to the statute by resolving the challenge "as applied" instead of in a facial manner. As a result, the statute can be vague as to some acts but not others.[96] The Court certainly could have adopted such an approach in *Skilling*. Further, in situations where the need for notice falls below the need for criminal enforcement in a particular area, the Court can apply the void-for-vagueness standard narrowly, limiting its scope.

But when the Court uses the avoidance canon to skirt the constitutional claim and there is no other claim related to the statute, the Court is abdicating its role. In *Skilling*, the defendant was not asking the Court to determine the meaning of the statute; he wanted the Court to assess whether the statute itself, as constituted, satisfied one of the basic requirements of criminal statutes: absence of vagueness.

To make this clear, it is helpful to contrast the void-for-vagueness claim with the rule of lenity. The rule of lenity requires courts to construe ambiguous criminal statutes in favor of the defendant.[97] Thus, where a federal criminal statute's language leaves it susceptible to several competing meanings, the court that follows the rule of lenity will choose the one most favorable to the defendant. The ambiguity is construed against the drafter—the government. By contrast, there is no substantive interpretation of the statutory text in the context of vagueness. The court does not determine whether specific conduct *falls under* the criminal statute; it assesses whether *the level of specificity* in the statute's language is sufficient.

Unlike lenity, then, the court's task is not to determine the meaning of the statute. Instead, it is to determine whether the specificity of a statute (or lack thereof) allows one to adequately determine its meaning. Adopting a presumption against striking down federal statutes on vagueness grounds, as the Court has,[98] is an acceptable approach to statutory interpretation. Ignoring the question of vagueness entirely, and thereby eschewing its role as a court, is not.

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[96] *See* Lockwood, *supra* note 58, at 286–91 (discussing the Court's developing doctrine with respect to "as-applied" and "facial" vagueness challenges).

[97] *See* Muscarello v. United States, 524 U.S. 125, 138 (1998) (declining to apply the rule of lenity); Evans v. United States, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting) ("[T]he rule of lenity compels adoption of the narrower interpretation."); McNally v. United States, 483 U.S. 350, 375 (1987) (finding the rule of lenity inapplicable).

[98] *See, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 33, 36 (1963) (finding not vague the Robinson-Patman Act, which makes it a federal crime to sell goods at "unreasonably low prices" in order to destroy competitors, and finding that a "strong presumptive validity . . . attaches to an Act of Congress"); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 247 (2002) (stating that an "elementary, but critical, point in this type of challenge is that courts begin their analysis with the *presumption* that the statute under attack is valid").

C. THE COURT ACTING AS A LEGISLATURE

In addition to failing to fulfill its role as a court, the Supreme Court's decision in *Skilling* also resulted in it adopting another branch's role, acting as a legislature. This is probably the most troubling part of the Court's decision. Certainly, the Supreme Court—and all courts for that matter—engage in rulemaking on a number of different levels. Courts have a long history of deciding common law cases and extrapolating new rules from prior cases.

When interpreting statutes, the courts likewise enjoy wide latitude to determine the meaning of legislative language. This freedom of interpretation has led the courts, in many cases, to go far beyond the plain textual language to ascertain its meaning, often considering such other indicia as legislative intent, legislative purpose, underlying policy considerations, and other comparable provisions or laws.[99] The result of this dynamic statutory interpretation is often the court significantly adding to or subtracting from the plain meaning of the statutory text. The Supreme Court itself has often engaged in such interpretive exercises such that the final product appears to constitute a rewriting of the statute, at least in the sense that its meaning is different from its plain language.[100]

Such an interpretation, though, is an acceptable exercise of judicial review, because there are limits on the Court's exercise of this discretion. The Court's policy choices cannot exist apart from the case or controversy. Indeed, the statutory language and the question before the Court cabin its discretion to engage in ad hoc rewriting of federal statutes. In the *Skilling* case specifically and in the void-for-vagueness context more generally, however, the Court is not engaging in the exercise of statutory interpretation when it uses the avoidance canon. Rather, it is engaged in the legislative activity of rewriting a statute.

The decision to use the avoidance canon in *Skilling* resulted in the Court making a normative judgment about the content of the statute rather than assessing its vagueness as written. The normative judgment concerned which kinds of conduct ought to be criminal. In saving bribery and kickbacks, the Court did not assess whether the many other types of prosecutions previously brought under the statute were part of the statute.

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[99] *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1096–99 (2001) (discussing the importance of context in interpreting statutory texts); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353–62 (1990) (explaining the relationship between and hierarchy of these interpretive tools).

[100] *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 510 (1959); Machinists v. Street, 367 U.S. 740, 784-85 (1961).

Instead, it concluded that it could clearly define bribery and kickbacks, and as a result, those acts survived. In doing so, though, the Court legalized much of the previously criminal conduct under the statute. For instance, many kinds of fraud involving intangible self-dealing where one uses gifts and services to curry favor from organizations or politicians while failing to disclose one's interests are no longer criminal.[101]

Even more troubling, though, was that the Court did not carefully consider as a matter of policy whether such acts ought to be criminal. Perhaps to mask the legislative exercise it undertook or simply because it lacked the inclination to explore its policy choices, the Court nonetheless rewrote a federal criminal statute largely without policy explanation. Its purported justification, Congress's pre-*McNally* intent, falls short on two accounts. First, it is clear that Congress intended the statute to be more than a limit on bribery and kickbacks because the prior cases said so,[102] and it did not amend the legislation during the next twenty-one years. Second, there was no ambiguity about what Congress intended to regulate—honest services. If Congress had only intended to restrict bribery and kickbacks under the statute, it could easily have said so.

Further, the question before the Court was not what the scope of "honest services" was; rather, it was whether one could identify the scope at all. The paradigm shift by the Court reflected its activist posture of acting as a legislature, not a court. Finally, there is nothing to indicate *Skilling* was a special case. Indeed, two other identical cases, *Weyhrauch* and *Black*, were on the docket.[103] Rather, the distinction between ambiguity and vagueness extends to all void-for-vagueness challenges.

IV. CONSEQUENCES OF MISUSING THE AVOIDANCE DOCTRINE

A. THEORETICAL CONSEQUENCES

As this Part demonstrates, the avoidance canon cannot meet its goals when applied to potentially vague criminal statutes. The issue of vagueness is different from ambiguity, and so applying the canon in this context creates a paradigm shift with ironic consequences. Indeed, not only does applying the avoidance canon to vagueness challenges undermine its goals, but applying the vagueness doctrine itself also better achieves those same goals.

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[101] *See* Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After* Skilling, 2011 WIS. L. REV. 27, 55 (2011).

[102] *See* 18 U.S.C. § 1341 (2010) (defined in 1988 by 18 U.S.C. § 1346 in response to the Court's holding in *McNally*); *see also* cases mentioned *supra* note 80.

[103] *See generally* Black v. United States, 130 S. Ct. 2963 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).

1. *Misusing the Avoidance Canon Undermines Its Goals*

When the Court applies the avoidance canon to vague statutes, it undermines the purposes of the canon itself in two ways. First, to the extent that the Court attempts to exercise judicial restraint, it does not achieve that purpose. Applying the avoidance doctrine to vagueness statutes will often result in the Court rewriting the statute in the name of saving it. The Court in *Skilling* avoided the vagueness question by limiting the meaning of "honest services" to bribery and kickbacks and excluded all other forms of honest services. It is clear that the Court's use of the canon changed the meaning of the statute, legalizing formerly illegal behavior.[104] The apparent value of avoiding the constitutional question of vagueness as indicum of judicial restraint also is not present here. The Court did not defer to Congress by finding a means to avoid striking down a federal criminal statute. Circumscribing the meaning of a potentially vague provision, by definition, does not preserve its meaning. Rather, by narrowing the meaning of a vague statute in the name of avoidance, the Court struck down at least part of the statute. In essence, the application of the avoidance canon to vague statutes such as that in *Skilling* actually decides the constitutional issue the Court seeks to avoid by discarding some possible meanings of the statute when it limits (and often rewrites) its scope.[105] The decision to limit honest-services fraud to bribery and kickbacks was, at its heart, a determination that other potential types of honest services were too vague to remain part of the statute. The Court's exercise of avoidance, then, had the effect of deciding the constitutional issue by drawing a line between what was constitutionally clear enough (bribery and kickbacks) and what was unconstitutionally vague (all other interpretations of "honest services").

Second, the use of the avoidance canon with potentially vague statutes does not achieve its goal of giving penumbral value to underenforced constitutional norms. To the contrary, applying the avoidance canon in this context undermines the resistance norm purpose entirely. The constitutional value of notice—being aware of the scope of a criminal statute—does not increase by the Court avoiding the question of where to draw the line as to vagueness. Instead, by failing to define the constitutional line as to the level of specificity required in a criminal statute,

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[104] *See* Sheyn, *supra* note 101.

[105] *See, e.g.*, Milavetz, Gallop & Milavetz v. United States, 130 S. Ct. 1324, 1333 (2010) (choosing not to apply avoidance to a vagueness question and explaining that "[t]he avoidance canon . . . is a tool for choosing between competing plausible interpretations of a statutory text," and that "[i]n applying that tool, we will consider only those constructions of a statute that are fairly possible" (internal quotation marks and citations omitted)).

the Court minimizes the underlying value—the notice of the scope of the criminal prohibition. The penumbral purpose of the avoidance canon seeks to do just the opposite. Notice, however, is not a value to which one accords meaning by avoiding definition. By leaving the answer to the constitutional question—is the statute too vague?—unanswered, the application of the avoidance canon diminishes the constitutional value of notice.

By avoiding the constitutional question in *Skilling* and simply rewriting the statute, the Court has not provided Congress with any guidance on how specific it must be when it attempts to rewrite the honest-services fraud statute to include other types of conduct besides bribery and kickbacks. As a result, the value of notice (the required level of specificity) loses force because Congress does not know how far notice must extend.

Ironically, then, the consequence of applying the avoidance canon for the constitutional value at issue is that the value here (notice) does not become any more of an impediment to Congress's construction of the statute than before. This is because notice is a value that increases with definition, not ambiguity. In other words, notice is valuable to a citizen *when* it is specific and clear. Being on notice of an ambiguous criminal prohibition is unhelpful precisely because the ambiguity inhibits the ability of a citizen to understand, and thus be on notice of, the proscribed behavior.[106]

2. *Vagueness Better Achieves the Goals of Avoidance*

The Supreme Court's reliance on the avoidance doctrine for addressing the constitutionality of criminal statutes becomes perhaps even more disturbing when one considers that the vagueness doctrine itself better achieves the two goals of the avoidance canon: judicial restraint and penumbral protection of underenforced constitutional norms. In other words, the Court can better achieve the goals of the avoidance canon by choosing not to apply it to potentially vague criminal statutes.

The vagueness doctrine better achieves these goals in two ways. First, answering the question of whether a statute is vague achieves a greater degree of judicial restraint than does applying the avoidance canon. If the Court upholds the statute as providing the required degree of constitutional specificity, then the statute remains intact, demonstrating more restraint than rewriting the statute. Although counterintuitive, striking down the statute as vague also exercises more judicial restraint than rewriting it. Declaring the statute unconstitutional delineates the scope of specificity required, but allows Congress to determine how close it wants to go to the

[106] *See, e.g.*, Jeffries, *supra* note 59, at 205–12; Stuntz, *supra* note 59, at 588.

constitutional line. In *Skilling*, for example, Congress and not the Court would then decide what specific conduct constitutes "honest services."

Another way to understand this idea is in the context of potentially vague statutes. Avoiding the constitutional question in this context requires the Court to define the substance of the statute, and in most cases, to limit its scope. Addressing the constitutional question of vagueness, on the other hand, simply requires the Court to set the boundary for the acceptable level of specificity, leaving the substance to the discretion of Congress. Indeed, the Court better achieves the purpose of judicial restraint by deciding the vagueness question.

Second, the Court can better preserve the penumbral value of potentially vague statutes by deciding the vagueness question, not avoiding it. According the value of notice more significance means giving it greater definition, not less. If the Court upholds the statute, the Court provides Congress with an example of a statute that satisfies the specificity requirement, defining what constitutes acceptable notice. On the other hand, if the Court strikes down the statute, it sets a floor as to the constitutional value of notice. The value of notice, then, gains more constitutional force *because* it has greater definition—the minimum level of specificity becomes a prerequisite for all statutes. Addressing the vagueness question, then, achieves the penumbral goal of the avoidance canon. It gives greater scope and significance to the constitutional value at issue—fair notice.

B. PRACTICAL CONSEQUENCES

In addition to failing to achieve its constitutional and philosophical goals, the avoidance canon also has unfortunate practical consequences when it is applied to potentially vague criminal statutes. One of the most significant of these is that formerly criminal conduct becomes legal under the statute. After *Skilling*, for instance, many types of fraud formerly under the scope of the statute,[107] particularly in the intangible services context, fall outside of the scope of federal law and, for all practical purposes, have become legal.

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[107] *Compare* 18 U.S.C. § 1341 (prohibiting devising "any scheme or artifice to defraud" in a provision separate from fraud to obtain money or property but not defining "deprivation of honest services" as such), *with* 18 U.S.C. § 1346 (adding a separate provision defining fraud as "deprivation of honest services"); *see also* Judge Pamela Mathy, *Honest Services Fraud After* Skilling, 42 ST. MARY'S L.J. 645, 666–70 (2011) (noting that § 1346 was Congress's "legislative fix" in response to *McNally*).

1. *Not Covered by Statute*

As indicated above, the Court in *Skilling* limited the definition of "deprivation of honest services" to bribery and kickbacks. In the name of protecting the statute, the Court sacrificed much of its content. If "deprivation of honest services" only includes bribery and kickbacks, a wide variety of previously criminal conduct now remains unreachable by prosecutors.[108] The most obvious example of previously criminal conduct are breaches of fiduciary duties or undisclosed self-dealing where the conduct does not directly involve money or property.[109] In practice, such breaches of fiduciary duties or undisclosed self-dealing occur when individuals use gifts or services to gain favor.[110] Specifically, this method of persuasion accompanies a failure to disclose financial interests in certain entities. This is particularly true where the funneling of business to those entities happens by virtue of particular position or status.[111]

Of course, a number of issues remain in terms of delineating the scope of such criminal liability—i.e., when such behavior rises to the level of fraud. The relationship forming the basis of the fiduciary duty, the level of intent required to show honest-services fraud, and whether actual economic harm is necessary to establish a claim are all crucial issues that must be part of any new honest-services fraud statute.[112] Regardless of where one comes down at the margins, it is clear that one consequence of *Skilling* is to inhibit prosecution of behavior formerly deemed fraudulent.

2. *Not Covered by States*

Many of the behaviors outlined above are clearly illegal or, at the very least, have a history of being criminalized in the United States. The federal legalization of many types of fraud resulting from *Skilling* might not be a problem if state criminal law adequately regulated such conduct. Unfortunately, states lack two ingredients—appropriate state statutes and prosecutorial resources—needed to prosecute criminal behavior that now

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[108] *See Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's* Skilling *Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 13, 15 (2010) (statement of Professor Samuel Buell, Duke University School of Law) (arguing that the securities, mail, and wire fraud statutes do not reach "serious, novel forms of intangible harm" such as self-dealing).

[109] *Id.*; Sheyn, *supra* note 101, at 31.

[110] *See, e.g.*, *In re* Lampe, 665 F.3d 506, 521 (3d Cir. 2011).

[111] Sheyn, *supra* note 101, at 55.

[112] *Id.*

falls outside of the federal honest-services statute.[113] Partially because the honest-services fraud statute has been in place for twenty-five years and partially for other reasons discussed below, many states do not have sophisticated fraud statutes that punish "intangible services" fraud cases. Indeed, those states that follow the Model Penal Code do not even have mail or wire fraud provisions.[114]

The issue of prosecutorial resources is also a significant impediment to state law enforcement filling the void left by *Skilling*. First, state prosecutors lack the expertise and experience of federal prosecutors in working on honest-services fraud cases. From a lack of opportunity and exposure, state prosecutors in many cases would have a significant learning curve in prosecuting white-collar fraud cases. The extra resources needed to develop this expertise also make states unlikely to successfully fill the gap left by *Skilling*.

Second, most honest-services prosecutions involve state or local officials.[115] As a result, the incentive for local and state prosecutors to pursue such cases is far less than that of the federal government. When investigating and prosecuting corruption cases, it is better that outside individuals perform the prosecutorial function. If the cases do not involve bribery and kickbacks, the state prosecutors may be in the politically uncomfortable position of prosecuting their fellow state government employees. This is perhaps even truer in smaller communities where prosecuting a company that employs most of the residents would be political suicide. The incentives for local prosecutors to pursue white-collar crimes, like honest-services fraud, often become diminished in light of local political realities.

3. *Congressional Barriers to Reform*

One common response to *Skilling* is that Congress can remedy the harm caused by the use of the avoidance canon by simply passing a revised version of the statute. While this is perhaps true as a theoretical matter, there are a number of obstacles to a simple congressional remedy. First, because the Court did not strike down the statute or otherwise provide any indication as to what language would satisfy the void-for-vagueness constitutional requirement, Congress does not have clear guidance on how

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[113] There is, for instance, no general fraud provision in the Model Penal Code, upon which many state criminal codes are based. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 746–47 (1999).

[114] *See id.*

[115] *See generally* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225 (1997) (exploring the federalism tensions related to prosecution of state and local officials in mail fraud cases).

to remedy the statute without creating the same constitutional problem again. Indeed, Congress attempted to fix a vagueness problem when it passed the current version of the statute in response to the Supreme Court's 1987 decision in *United States v. McNally*.

Second, because the Court failed to provide any guidance as to the scope of the prohibition against void-for-vagueness in *Skilling*, Congress will have a difficult time identifying the level of specificity required for a new statute to pass constitutional muster. The use of the canon, then, only exacerbates the difficulty of defining this type of fraud, given its inherently intangible nature.

Finally, and perhaps more disconcerting, the current atmosphere of gridlock, including the previously common use of the filibuster in the Senate, makes the likelihood of passing a new statute slim. Indeed, the Congress has held hearings about how to respond to *Skilling* but has not been able to pass a new statute.[116]

V. A NEW MODEL FOR THE AVOIDANCE CANON

Given this Article's central argument that the Court should not apply the avoidance canon to void-for-vagueness challenges to federal criminal statutes, the question remains whether there are other constitutional challenges to criminal statutes for which the Court should avoid the avoidance canon. Certainly, a complete investigation of the avoidance canon's applicability to various constitutional challenges to criminal statutes is beyond the scope of the Article. Nonetheless, this Article concludes by suggesting some guiding principles for ascertaining whether to apply the canon to federal criminal statutes.

At the heart of the problem of applying the avoidance canon to void-for-vagueness constitutional challenges was that, as explained in Part IV above, doing so undermines the canon's goals. The corollary principle is also true—answering the constitutional question better serves the goals of the canon. To the extent, then, that one views the goals of the avoidance canon as important in deciding how the Court ought to address constitutional issues, such goals ought to drive the use of the canon. In other words, in deciding whether the avoidance canon is an appropriate tool to use in evaluating a federal criminal statute, the Court should ask whether using the canon would accomplish its aims.

In practice, the Court should assess whether it could advance the interests of judicial restraint better by using the avoidance canon or avoiding it. With an ambiguous statute, as indicated above, this inquiry can cut both ways. Nonetheless, the Court must inquire as to what approach

[116] *Id.* at 49–51.

(using the canon or not) would best advance the underlying value. Second and perhaps more important is the penumbral value of using the avoidance canon to give broader meaning to underenforced constitutional norms. The avoidance canon accomplishes this, of course, by leaving the statute's meaning ambiguous and not articulating the applicable constitutional limit on Congress. Part of this calculus would include the degree to which one could characterize that norm as underenforced. The more underenforced the norm, the stronger the case for applying the avoidance canon.

This model, then, advocates using the goals of the canon to determine whether application is appropriate with respect to a particular constitutional challenge. When applying the canon serves the purposes of judicial restraint and providing penumbral value to constitutional norms, its application is thus appropriate. When use of the canon does not serve these purposes, or even worse, undermines these purposes, the Court should not use the avoidance canon.

CONCLUSION

In light of the clear difference between statutory vagueness and ambiguity, the Article advanced the argument that courts should not use the canon of avoidance to address questions of vagueness. Using the *Skilling* case as an example, the Article demonstrated the harm created when a court confuses questions of vagueness with questions of ambiguity. Further, the Article demonstrated the adverse theoretical and political consequences of misusing the canon and described their resulting conclusions, the most ironic of which is that the best way to achieve the purposes of the canon is to avoid the avoidance canon altogether. Tying the application of the canon to the purposes it purports to achieve will prevent the Court from undermining the important goals of the canon through its misuse.