NOTE

VAGUENESS AND NONDELEGATION

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The void-for-vagueness doctrine and the nondelegation doctrine share an intuitive connection: when Congress drafts vague statutes, it delegates lawmaking authority to courts and the executive. In three recent cases, the Supreme Court gave expression to this link by speaking of the doctrines using nearly identical vocabulary. Notably, Justice Gorsuch suggested that as the nondelegation doctrine waned during the second half of the twentieth century, vagueness replaced it,—doing much of the doctrinal work that nondelegation would have done otherwise.

This Note tests that historical claim, and in doing so, offers two main contributions. First, it concludes that as a historical matter, Justice Gorsuch tells only part of the story. Although early vagueness doctrine in the late 1800s had strong streaks of nondelegation, vagueness doctrine of the post-New Deal era did not. The latter vagueness instead turned toward protecting individual rights and preventing racial discrimination by state and local governments. Here, nondelegation concerns were absent.

But the Roberts Court has rebooted the early vagueness doctrine that did indeed incorporate nondelegation. Modern vagueness cases thus resemble early vagueness cases. In these cases, absent are questions of individual rights, replaced by a focus on the separation of powers. In effect, there are two vagueness doctrines, one focused on individual rights and another centered around the separation of powers. This Note

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thus offers its second contribution: categorizing the Court's vagueness cases and recognizing the categories for what they are.

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"[O]nce we lift the veil of the void-for-vagueness doctrine, the revelations can be far reaching."[1]

INTRODUCTION

Suppose Congress enacts a statute that reads as follows: "Any person engaging in morally blameworthy conduct or lacking good moral character shall be punished as provided by this Code." Is this statute unconstitutional? If so, why? Is it because of the void-for-vagueness doctrine, under which vague criminal laws violate the Constitution's due process protections? Or is it because of the nondelegation doctrine, under

[1] Risa L. Goluboff, Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights, 62 Stan. L. Rev. 1361, 1387 (2010).

which Congress cannot delegate its Article I legislative power to the executive and judicial branches through unintelligible statutes?

Or is it both?

In three recent U.S. Supreme Court cases, decided within a year of each other, these two relatively dormant doctrines—vagueness and nondelegation—simultaneously reemerged. In *United States v. Davis*[2] and *Sessions v. Dimaya*,[3] the Court struck down provisions in the federal criminal code as void for vagueness, while in *Gundy v. United States*, the Court addressed a nondelegation challenge to Congress's delegation of authority to the Attorney General.[4]

At first glance, vagueness and nondelegation appear more different than alike. The Court has located the nondelegation doctrine in the Constitution's "Vesting Clauses"—the Article I, Article II, and Article III provisions which vest the legislative, executive, and judicial powers in their respective branches—while vagueness doctrine has its roots in fair notice concerns and the Due Process Clauses. Vagueness's most prominent application has been in cases involving state and local vagrancy offenses and status crimes, while the nondelegation doctrine has been employed in largely conservative-libertarian projects aimed to rein in the ever-expanding administrative and regulatory state.

Despite these differences, the two doctrines share an intuitive connection: when legislatures draft vague statutes, they delegate lawmaking authority to other branches of government. The Court gave expression to this link in *Dimaya*, *Davis*, and *Gundy*, describing the two doctrines using starkly similar vocabulary and shedding light on their interrelatedness. In *Dimaya*, Justice Kagan referred to vagueness as the "corollary" of the separation of powers that undergirds the nondelegation doctrine.[5] In his *Dimaya* dissent, Justice Thomas noted that the "Court's precedents have occasionally described the vagueness doctrine in terms of nondelegation."[6] Most notably, in *Gundy*, Justice Gorsuch argued that "most any challenge to a legislative delegation can be reframed as a vagueness complaint," and that the Court's "void-for-vagueness cases became much more common soon after the Court began relaxing its

[2] 139 S. Ct. 2319, 2336 (2019).
[3] 138 S. Ct. 1204, 1223 (2018).
[4] 139 S. Ct. 2116, 2122 (2019).
[5] *Dimaya*, 138 S. Ct. at 1212.
[6] Id. at 1248 (Thomas, J., dissenting).

approach to legislative delegations."[7] That is, as the Court backed away from using the nondelegation doctrine to police Congress's delegation of its legislative power in the second half of the twentieth century, the Court began using vagueness to do the work that nondelegation would have done otherwise.

This Note picks up on the thread that Justice Gorsuch started in *Gundy* and explores the relationship between vagueness and nondelegation. In so doing, this Note offers two main contributions.

First, it concludes that as a historical matter, Justice Gorsuch's claim about vagueness replacing nondelegation tells only part of the story. The Note looks to pre- and post-New Deal doctrinal development of both vagueness and nondelegation to conclude that while the doctrines have *some* overlap, Justice Gorsuch overstated their connection. The Court's vagueness cases from the late 1800s, the early days of the doctrine, did indeed police legislative delegations. But the cases that came after 1937 did not. The Court instead began using vagueness to protect individual rights like free speech. It also wielded vagueness to protect racial minorities from invidious discrimination by state and local police. In these post-New Deal vagueness cases, federal nondelegation concerns were largely absent. This version of vagueness did not replace the nondelegation doctrine, which the Court largely discarded.

Still, the Roberts Court picked up where the early vagueness cases left off; nondelegation again entered the realm of vagueness. In modern vagueness cases, concerns of individual rights and free speech are absent. Also absent are issues of invidious racial discrimination. These cases instead emphasize the proper constitutional role of Congress, the executive, and the judiciary within the federal separation of powers. To the extent that the Court and Justice Gorsuch see an overlap between vagueness and nondelegation, it is this line of cases that they see.

In effect, there are two vagueness doctrines. One comprises the majority of the Court's vagueness cases after the New Deal era, including the landmark case *Papachristou v. City of Jacksonville*. The second has its origins in the earliest vagueness cases. And although this latter doctrine subsided after 1937, the Court has revived it in recent cases like *Dimaya* and *Davis*.

This Note categorizes the Court's vagueness cases into (1) Rights-Based Vagueness and (2) Structure-Based Vagueness. Although both

[7] *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

categories of cases involve due process concerns, they diverge from there. Cases like *Papachristou*, and their emphasis on individual rights and equal protection, comprise Rights-Based Vagueness. In contrast, Structure-Based Vagueness is the vagueness that the Court employs in *Dimaya*, *Davis*, and *Gundy*. In these latter cases, the Court emphasizes nondelegation and the separation of powers. To the extent that vagueness and nondelegation converge, it is in the context of Structure-Based Vagueness. This Note thus offers its second contribution: categorizing the Court's vagueness cases and recognizing the categories for what they are.

Recognizing Structure-Based Vagueness for what it is has important implications. Identifying this category adds analytical clarity to the literature on the intersection of vagueness and nondelegation, which to this point has remained cursory and underdeveloped. It further offers insight into how a vagueness doctrine that was previously wielded to address racial discrimination by local police has transformed into a vagueness doctrine that seemingly only has purchase in challenges to federal *malum prohibitum* crimes. This Note thus adds to the realist literature that views vagueness doctrine as a doctrinal makeweight, which can be reshaped to serve broader and unrelated judicial values and priorities.

Identifying Structure-Based Vagueness has practical consequences too. Structure-Based Vagueness offers common ground to criminal justice reformers and immigrant rights advocates on the one hand, and conservative-libertarians interested in curbing the power of the federal government on the other. By employing the rhetoric of separation of powers in their vagueness arguments, criminal justice reformers and immigrant rights advocates can win meaningful progressive victories from a Court enamored with nondelegation. Moreover, Structure-Based Vagueness offers a limiting principle to opponents of a more aggressive nondelegation doctrine. By tying Structure-Based Vagueness and its nondelegation component to their underlying rationales, skeptics of the nondelegation doctrine can cabin its application to only criminal and penal laws, reducing the potentially harmful impact that a more rigid doctrine would have on environmental, labor, and other economic regulations.

This Note proceeds in four Parts. Part I provides a brief summary of the vagueness and nondelegation doctrines and canvasses literature that addresses their intersection. It then summarizes the Court's decisions in *Dimaya*, *Davis*, and *Gundy* and draws out Justice Gorsuch's specific

claim about the relationship between vagueness and nondelegation. Part II inspects the historical trajectory of both doctrines, beginning just before the *Lochner* era and ending with today's Roberts Court. It uses this history to challenge Justice Gorsuch's claim. Part III then categorizes vagueness into its two conceptions—Rights-Based Vagueness and Structure-Based Vagueness. Part IV explores the theory behind Structure-Based Vagueness and identifies future applications. A brief conclusion follows.

I. A PRIMER ON VAGUENESS AND NONDELEGATION

A. Vagueness

The vagueness doctrine originates from the Due Process Clauses of the Fifth and Fourteenth Amendments.[8] A "basic principle" of due process is that a penal statute is void for vagueness "if its prohibitions are not clearly defined."[9] The vagueness doctrine has two aspects. To pass constitutional muster, criminal statutes must provide "ordinary people [with] 'fair notice' of the conduct" the statutes prohibit.[10] Additionally, criminal statutes must "provide standards to govern the actions of police officers, prosecutors, juries, and judges" to guard against "arbitrary or discriminatory law enforcement."[11]

A seminal case illustrating the vagueness doctrine is *Papachristou v. City of Jacksonville*.[12] The defendants in *Papachristou* were charged under a Jacksonville vagrancy ordinance which encompassed a variety of quality-of-life violations, including being a "wanton and lascivious person[]" and "strolling around from place to place without any lawful purpose or object."[13] The Court invalidated the ordinance as unconstitutionally vague because it gave no fair notice to those it regulated and placed "unfettered discretion" in the hands of law

[8] U.S. Const. amend. V ("[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . . ."); id. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[9] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[10] *Dimaya*, 138 S. Ct. at 1212 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).

[11] Id.

[12] 405 U.S. 156 (1972).

[13] Id. at 156–58, 156 n.1. The statute at issue was Jacksonville Ordinance Code § 26–57. Although such vagrancy laws had been "ubiquitous and presumptively legitimate for centuries," the Court ushered their quick demise in *Papachristou*. Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s, at 4 (2016).

enforcement.[14] *Lanzetta v. New Jersey* is another helpful example.[15] *Lanzetta* involved a status crime. A New Jersey statute declared "[a]ny person not engaged in any lawful occupation, known to be a member of any gang . . . to be a gangster."[16] The Court held the statute facially unconstitutional, deeming its terms "so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."[17]

B. Nondelegation

The Vesting Clauses of Articles I, II, and III "vest" the legislative, executive, and judicial powers in Congress, the President, and the federal courts, respectively.[18] They also provide the constitutional basis for the nondelegation doctrine. Although the Constitution has no express nondelegation clause,[19] the Court has inferred from the Vesting Clauses that the "separate branches should perform the distinct tasks of legislation, administration, and adjudication," and that "the powers of one branch of government should not be wholly delegated to another."[20] This nondelegation doctrine has its roots in early liberal constitutional theory. In describing the nature of legislative power, John Locke argues that the "Legislative neither must nor can transfer the Power of making Laws to

[14] *Papachristou*, 405 U.S. at 168.

[15] 306 U.S. 451 (1939).

[16] Id. at 452.

[17] Id. at 458. Specifically, the Court took issue with the ambiguous and undefined term "gang." Id. at 457.

[18] U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress . . . ."); see also id. art. II, § 1 (vesting executive power in the President); id. art. III, § 1 (vesting judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

[19] In contrast, some state constitutions contain specific clauses prohibiting the delegation of power from one branch to another. See, e.g., S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other"); see also Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 415 (2017) (noting that nondelegation clauses are explicit in most state constitutions in contrast with the Federal Constitution).

[20] Peter H. Aranson et al., A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 2–3 (1982); see also Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative.").

any Body else."[21] Locke's theory finds expression in the Federalist Papers, in which Madison cites Montesquieu's "science of politics"[22] to emphasize the "necessary partition of power among the several departments."[23]

The test for whether a federal statute unconstitutionally delegates legislative power comes from *J.W. Hampton & Co. v. United States*.[24] There, the Court held that a delegation of legislative power is acceptable as long as Congress provides within the statute "an intelligible principle" to guide executive officers in implementing the law.[25]

Despite the fixation within the legal academy about the exact contours of the nondelegation doctrine,[26] the Supreme Court has only twice used the doctrine to invalidate federal statutes. Both cases involved provisions in the National Industrial Recovery Act. In *Panama Refining Co. v. Ryan*, the Court struck down Section 9(c) of the law, which gave the President unilateral authority to prohibit the transportation of petroleum and petroleum products in interstate commerce.[27] That provision failed the intelligible principle test because Congress provided "no standard," "no rule," and "no policy" to guide the executive's regulating oil transportation.[28] And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated Section 3, which allowed the President to promulgate "codes of fair competition" regulating various trades and industries.[29] Since *Schechter Poultry* and *Panama Refining*, the Court has

[21] John Locke, Two Treatises of Government 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (emphasis omitted).

[22] The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[23] The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961); see also Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory 53 (1976) (noting that the rule of law is characterized by institutional autonomy, in that "the distinction between state and society is complemented by a contrast within the state itself among legislation, administration, and adjudication").

[24] 276 U.S. 394, 409 (1928).

[25] Id.

[26] Compare Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1722 (2002) (arguing that the nondelegation doctrine is not grounded in constitutional text, structure, or standard originalist sources), with Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298–99 (2003) (arguing that the nondelegation principle finds support in Locke's writing and the Constitution).

[27] 293 U.S. 388, 405–06, 433 (1935).

[28] Id. at 430.

[29] 295 U.S. 495, 540–43 (1935) ("In view of the . . . few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the

yet to wield the nondelegation doctrine to strike down a statute. The deferential intelligible principle test has become somewhat of a judicial rubber stamp on congressional delegations of lawmaking authority.[30]

But the deference seems to be approaching its limit. In *Gundy v. United States*, the Court rejected a nondelegation challenge to the federal Sex Offender Registration and Notification Act's ("SORNA") provision authorizing the Attorney General to specify whether the Act applied to pre-enactment offenders.[31] Justice Gorsuch, along with two other Justices, dissented. He criticized the statute for "endow[ing] the nation's chief prosecutor with the power to write his own criminal code."[32] And although Justice Alito did not join Justice Gorsuch's dissent, he added that "[i]f a majority of [the] Court were willing to reconsider [its nondelegation doctrine approach]" he would support that effort.[33] Justice Kavanaugh joined the Court after *Gundy*, and in a recent statement from denial of certiorari, he hinted that he would provide the fifth vote to revive the doctrine and do away with the tepid intelligible principle test, replacing it with something else.[34]

C. The Doctrines Revisited

To the casual eye, vagueness and nondelegation appear dissimilar both in origin and in practice. While vagueness is a rights-focused doctrine with origins in the Due Process Clauses of the Fifth and Fourteenth Amendments, the nondelegation doctrine is a structural, separation of powers principle inferred from the Vesting Clauses. Vagueness challenges and nondelegation challenges also arise in different contexts. Prominent vagueness cases, like *Papachristou* and *Lanzetta*, target state and local "street-cleaning"[35] statutes that invite arbitrary and abusive

government of trade and industry throughout the country, is virtually unfettered."); see also id. at 553 (Cardozo, J., concurring) ("This is delegation running riot.").

[30] Whittington & Iuliano, supra note 19, at 380 (footnotes omitted) ("Every few years, a court of appeals invokes [nondelegation] to strike down a federal statute. The Supreme Court inevitably grants certiorari and overturns the appellate decision, holding that the statute is a constitutional delegation of legislative authority.").

[31] 139 S. Ct. 2116, 2129–30 (2019).

[32] Id. at 2131 (Gorsuch, J., dissenting).

[33] Id. (Alito, J., concurring in the judgment).

[34] Paul v. United States, 140 S. Ct. 342, 342 (2019). Justice Barrett's approach to the nondelegation doctrine is still unclear.

[35] John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 216 (1985).

enforcement and chill First Amendment freedoms.[36] Meanwhile, literature on nondelegation focuses on the expansion of the administrative and regulatory state.[37] Litigants most frequently employ the doctrine to challenge federal economic regulations.[38]

Despite these differences, scholars have noted that vagueness and nondelegation share a common vocabulary. In a seminal exposition of the vagueness doctrine in 1960, Anthony Amsterdam canvasses the Court's cases to systematize and bring clarity to the vagueness doctrine.[39] He points out that the Court had at times invoked the separation of powers in vagueness cases, "predicated upon the proposition that it is improper for Congress to pass the lawmaking job to the judiciary."[40]

More recent scholarship also notes the doctrines' similarities, but gives only superficial treatment to the scope of their interrelatedness. Professors Nathan Chapman and Michael McConnell make the case that as an original matter, due process was "bound up with the *division of the authority* to deprive subjects of life, liberty, or property between *independent political institutions*."[41] Chapman and McConnell use this separation of powers principle to explain the Court's vagueness cases. They argue that "[v]ague 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."[42] Similarly, Professor Cass Sunstein briefly connects the void-for-vagueness doctrine to the nondelegation doctrine's "intelligible principle" test. He notes that both tests serve to promote rule-of-law values like "provid[ing] fair notice to affected citizens" and

[36] See, e.g., City of Chicago v. Morales, 527 U.S. 41, 47–64 (1999) (invalidating on vagueness grounds a local ordinance prohibiting "loitering in any public place with one or more persons").

[37] See generally Philip Hamburger, Is Administrative Law Unlawful? 1–12 (2014) (arguing that administrative law is unconstitutional); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1233–49 (1994) (arguing that the modern administrative state is fundamentally inconsistent with the Constitution's structure).

[38] See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001) (rejecting a nondelegation challenge to a statute authorizing the EPA to set air quality standards necessary to protect public health).

[39] Anthony Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 74–76 (1960).

[40] Id. at 67–68 n.3.

[41] Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1681 (2012) (emphasis added).

[42] Id. at 1806.

"disciplin[ing] the enforcement discretion of unelected administrators and bureaucrats."[43] Other commentators have made similar points.[44]

The Supreme Court gave its own account of the connection between vagueness and nondelegation in a trio of recent cases—*Sessions v. Dimaya*,[45] *Gundy v. United States*,[46] and *United States v. Davis*.[47] In 2018, the Court decided *Sessions v. Dimaya*.[48] Under the Immigration and Nationality Act (INA), any non-citizen convicted of an "aggravated felony" after entering the United States is deportable.[49] The list of offenses qualifying as an "aggravated felony" includes any "crime of violence" as defined by 18 U.S.C. § 16.[50] At issue in *Dimaya* was Section 16(b), the "residual clause" of the crime of violence statute, which covers any felony that "by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense."[51] The Court invalidated the provision as void for vagueness, concluding that it "failed to provide fair notice" and "invited arbitrary enforcement."[52] Expressing the Court's vagueness concerns using nondelegation vocabulary, Justice Kagan's plurality opinion called vagueness doctrine the "*corollary of the separation of powers*—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[53] Although Justice Thomas dissented, he too speculated that "perhaps the vagueness doctrine is really a way to

[43] Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 320 (2000).

[44] See F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281, 334–36 (2021); Emily M. Snoddon, Comment, Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine, 86 U. Chi. L. Rev. 2301, 2304 (2019) (noting that vagueness doctrine has at times invoked both due process and separation of powers); Peter W. Low & Joel S. Johnson, Changing the Vocabulary of the Vagueness Doctrine, 101 Va. L. Rev. 2051, 2053 (2015); Jeffries, supra note 35, at 189, 201; Andrew E. Goldsmith, The Void-for-Vagueness Doctrine in the Supreme Court, Revisited, 30 Am. J. Crim. L. 279, 285 (2003).

[45] 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

[46] 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

[47] 139 S. Ct. 2319, 2323 (2019).

[48] 138 S. Ct. 1204.

[49] 8 U.S.C. § 1227(a)(2)(A)(iii).

[50] *Dimaya*, 138 S. Ct. at 1211 (quoting 8 U.S.C. § 1101(a)(43)(F)).

[51] Id. (quoting 18 U.S.C. § 16(b)).

[52] Id. at 1223 (plurality opinion) (citing Johnson v. United States, 576 U.S. 591, 599–601 (2015)).

[53] Id. at 1212 (emphasis added) (citing Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983)).

enforce the separation of powers—specifically, the doctrine of nondelegation."[54]

In his concurrence, Justice Gorsuch expounded more fully on these nondelegation concerns. "Vague laws invite arbitrary power," he started, critiquing vague laws for "leav[ing] judges to their intuition and the people to their fate."[55] Turning to separation of powers concerns, Justice Gorsuch cited the Article I Vesting Clause, observing that "[a]lthough . . . vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers."[56] In almost-explicit nondelegation terms, he noted that the "Constitution assigns '[a]ll legislative Powers' in our federal government to Congress," and thus that "legislators may not 'abdicate their responsibilities for setting the standards of the criminal law,'"[57] either by "leaving to judges the power to decide 'the various crimes includable in [a] vague phrase,'"[58] or by "transfer[ring] legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions."[59] Concluding his descriptive account of the vagueness doctrine, Justice Gorsuch declared that the more important aspect of vagueness doctrine is not due process, but is instead "keep[ing] the separate branches within their proper spheres."[60]

A year later, the Court decided *United States v. Davis*.[61] The defendant in *Davis* was charged under 18 U.S.C. § 924(c), which authorizes extra penalties for those who use, carry, or possess a firearm in connection with a "crime of violence." The statutory definition of "crime of violence" in Section 924(c) includes a residual clause identical to the one at issue in

[54] Id. at 1248 (Thomas, J., dissenting) (citing Chapman & McConnell, supra note 41, at 1806).

[55] Id. at 1223–24 (Gorsuch, J., concurring in part and concurring in the judgment).

[56] Id. at 1227.

[57] Id. (alteration in original) (first quoting U.S. Const. art. I, § 1; and then quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

[58] Id. (alteration in original) (quoting Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)).

[59] Id. at 1228 (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

[60] Id. A *Harvard Law Review* comment published shortly after the Court decided *Dimaya* expressed concern about the invocation of separation of powers in the Court's vagueness analysis. Leading Case, Sessions v. Dimaya, 132 Harv. L. Rev. 367, 372–73 (2018). Specifically, the comment critiqued this "separation-of-powers-based vagueness doctrine" because of the risks of "exposing [the Court] to the charge of Lochnerism." Id. at 373. This Note pushes back against that argument. See infra Part IV.

[61] 139 S. Ct. 2319 (2019).

Dimaya.[62] Justice Gorsuch, writing for the Court, reprised his nondelegation concerns despite deciding the case on vagueness grounds. Claiming that vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers," and that "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges," the Court invalidated this residual clause too.[63]

The same week as the *Davis* decision, the Court rejected a nondelegation challenge in *Gundy v. United States*.[64] Justice Gorsuch dissented, making a bold and loosely supported claim about the relationship between vagueness and nondelegation. He claimed that although the Court had not specifically invalidated a statute under the nondelegation doctrine since 1935, it had continued to police improper legislative delegations using other doctrines: "We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names."[65] As nondelegation became unavailable to do its intended work, the "hydraulic pressures of our constitutional system" shifted the responsibility to other doctrines, including vagueness.[66] Rounding out his claim about "hydraulic pressures," he opined that it is

> little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations. Before 1940, the Court decided only a handful of vagueness challenges to federal statutes. Since then, the phrase 'void for vagueness' has appeared in our cases well over 100 times.[67]

According to Justice Gorsuch, as the post-New Deal Court backed away from using the nondelegation doctrine to police Congress's delegation of its legislative power, the Court began using vagueness to do the work that nondelegation would have done instead.[68]

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[62] 18 U.S.C. § 924(c)(3)(B) ("[T]he term 'crime of violence' means an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.").

[63] *Davis*, 139 S. Ct. at 2325, 2336 (first citing *Dimaya*, 138 S. Ct. at 1212–13 (plurality opinion); and then citing Kolender v. Lawson, 461 U.S. 352, 357–58, 358 n.7 (1983)).

[64] 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

[65] Id. at 2137–38, 2141 (Gorsuch, J., dissenting).

[66] Id. at 2141–42.

[67] Id.

[68] See Rick Pildes, Vagueness Doctrine, Delegation Doctrine, and Justice Gorsuch's Opinion Today in US v. Davis, Balkinization (June 24, 2019, 12:10 PM), https://balkin.blogspot.com/2019/06/vagueness-doctrine-delegation-doctrine.html [https://perma.cc/BQ59-M8

II. ON HYDRAULIC PRESSURES

Justice Gorsuch's claim of "hydraulic pressures" tells only part of the story. Although the separation of powers might have played a role in the origins of vagueness doctrine, it is not true that vagueness owes the "equal debt"[69] to the separation of powers that it does to the Due Process Clauses. Nor is it true that vagueness occupied the doctrinal space that nondelegation would have, had it not been relegated to the status of a moribund doctrine in the second half of the twentieth century. Moreover, Justice Gorsuch's claim raises some practical issues. By arguing that "most any challenge to a legislative delegation can be reframed as a vagueness complaint,"[70] he implies that the two doctrines are coterminous. But this seems inaccurate. If the two doctrines are coterminous, it is difficult to explain why the doctrines have had different purchase with different Justices on the Court. A couple of hypotheticals illustrate the distance between the two doctrines: When Congress passes a clear, but very broad, statute granting agencies vast statutory authority to promulgate criminal rules, do vagueness concerns really apply to the clear statute? And on the flipside, do *federal* separation of powers concerns really apply to vague statutes enacted by *state* and *local* governments?

At a superficial level, Justice Gorsuch's claim is somewhat true. The early history of the vagueness doctrine suggests that vagueness owes its origin to both due process and the separation of powers. One could read the Court's first vagueness case, which includes a heavy dose of separation of powers rhetoric, as a nondelegation case instead. Moreover, the vagueness doctrine of the *Lochner* era was certainly tinted with nondelegation. During this era, the Court aggressively invalidated economic regulations using doctrines like vagueness, nondelegation, and economic substantive due process interchangeably. The *Lochner* Court blurred the lines between the doctrines and obscured their individual constitutional foundations.

XF] ("[T]he recent juxtaposition of today's *Davis* decision and last week's *Gundy* case brings out in a striking way how much Justice Gorsuch, at least, sees a fundamental commonality between vagueness and non-delegation doctrines centered around concerns about congressional abdication and the separation of powers.").

[69] *Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

[70] *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

But a closer inspection of what happened next tells a different story than the one that Justice Gorsuch laid out in *Sessions v. Dimaya*, *United States v. Davis*, and *Gundy v. United States*. As explained more fully in Section II.B, after 1937, as nondelegation and economic substantive due process took a backseat and the Court began deferring to economic regulations, vagueness took on a life of its own. While the old vagueness served as a tool for the *Lochner* Court's aggressive judicial review of economic regulation, post-1937 vagueness became a prophylactic tool for the Court to address racialized policing, enforce equal protection of the law, and protect First Amendment rights. Rather than use vagueness doctrine to police *federal* separation of powers concerns, the Court used it to create a protective buffer zone around fundamental constitutional rights by invalidating *state* and *local* "street-cleaning" statutes. This new and inventive application of the vagueness doctrine was not a replacement for the nondelegation doctrine, which by and large fell by the wayside. Although the Court did occasionally raise nondelegation-based arguments in vagueness cases after 1937, those arguments did little doctrinal work. For the most part, the Court relied on the rather distinct fear of arbitrary, racialized, and unequal enforcement of the law. Only recently has the Court again let nondelegation do independent work in its vagueness analysis.

A. From Reese *to the* Lochner *Era*

The Court's first vagueness case spoke in stark nondelegation terms. In *United States v. Reese*,[71] the Court considered a challenge to the Enforcement Act of 1870, which penalized election officers for denying qualified citizens the right to vote.[72] The Court invalidated two operative provisions in the statute because they were outside Congress's Fifteenth Amendment powers.[73] "Penal statutes ought not to be expressed in language so uncertain," the Court explained, because "[e]very man should

[71] 92 U.S. 214 (1875). Interestingly, the Court in *Reese* does not refer to due process—or to a "vagueness doctrine"—at all. The fully formed vagueness doctrine was still nascent in 1875. Indeed, this case should be properly understood as a Fifteenth Amendment congressional powers case. See id. at 217–18 ("It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment."). Still, *Reese* has become part of the canon of vagueness cases. See Goldsmith, supra note 44, at 280 n.1 ("The Supreme Court's first void-for-vagueness case appears to have been *United States v. Reese* . . . .").

[72] Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[73] *Reese*, 92 U.S. at 220–22.

be able to know with certainty when he is committing a crime."[74] But beyond this reference to the statute's vagueness, the Court also used the vocabulary of nondelegation:

> 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 the government.[75]

Reese, a canonical vagueness case, was nondelegation-adjacent.

From the vagueness doctrine's conception in *Reese* and through the rest of the *Lochner*[76] era until 1937, the Court used vagueness almost exclusively to invalidate civil and criminal laws regulating the economy.[77] Just as it did in *Reese*, this "economic vagueness" dovetailed with other *Lochner*-era doctrines like nondelegation and substantive due process. The Court armed itself with a broad arsenal of tools to choose from to "enact Mr. Herbert Spencer's Social Statics."[78] Occasionally, these tools would stand on their own feet and the Court would decide cases exclusively based on one doctrine or the other. But in several other cases, the Court drew from strands of different doctrines, blurring their analytical boundaries and using them somewhat interchangeably.

Recall the Court's *Lochner*-era substantive due process cases. In *Adkins v. Children's Hospital of the District of Columbia*, the Court famously invalidated a minimum wage law in Washington, D.C., for

[74] Id. at 220.

[75] Id. at 221 (emphasis added).

[76] Lochner v. New York, 198 U.S. 45, 52–57 (1905) (holding that a labor law restricting employees from working more than sixty hours per week violated the "right of contract" under the Due Process Clause of the Fourteenth Amendment).

[77] Amsterdam, supra note 39, at 74 n.38 ("The void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation."). Litigants did raise vagueness challenges to non-economic laws, but they did so unsuccessfully. For example, in *Mahler v. Eby*, the petitioner challenged a statute which authorized the Labor Secretary to deport non-citizens of certain classes if he found them to be "undesirable residents of the United States," arguing both that the law "delegated legislative power to an executive officer" and that "the criterion . . . that the persons to be deported should be 'undesirable residents of the United States,' was so vague and uncertain that it left the liberty of the [non-citizen] to the whim and caprice of an executive officer in violation of due process . . . ." 264 U.S. 32, 37 (1924). The Court refused to involve itself in the delegation issue in the deportation context and brushed off the vagueness argument too. Id. at 37–41.

[78] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

constraining the "constitutional liberty of contract."[79] But that case also pulled on strands of vagueness. As an additional reason to nullify the statute, the Court reasoned that "[t]he standard furnished by the statute for the guidance of the [wage-setting] board is so vague as to be impossible of practical application with any reasonable degree of accuracy."[80] As Dean Risa Goluboff notes, "void for vagueness had often stood in for substantive due process during the *Lochner* [e]ra."[81]

Consider also the cases in which the Court blurred the boundary between nondelegation and economic vagueness. In *United States v. L. Cohen Grocery Co.*, the Court scrutinized a statute which prohibited charging "any unjust or unreasonable rate . . . in handling or dealing in or with any necessaries."[82] Although nominally a vagueness case, the Court was concerned about the statute delegating legislative power to courts and juries, allowing them to give meaning to those indeterminate terms.[83] *Cline v. Frink Dairy Co.* was another vagueness case with nondelegation undertones.[84] In that case, the Court again expressed concerns that the issue that the statute would ask the jury to decide would be "legislative, not judicial."[85] And vice versa: the two most prominent nondelegation cases—*A.L.A. Schechter Poultry Corp. v. United States*[86] and *Panama Refining Co. v. Ryan*[87]— were also tinted with vagueness. Professor Sohoni argues that both of these landmark decisions "faulted the vagueness of the statutes under attack," and that vagueness thus "formed a component or a backstop" to these holdings.[88]

The Court thus used these doctrines almost interchangeably in cases involving economic laws, reframing them to fit under one doctrine or

[79] 261 U.S. 525, 539, 560–62 (1923).

[80] Id. at 555.

[81] Goluboff, supra note 13, at 101; see also Mila Sohoni, Notice and the New Deal, 62 Duke L.J. 1169, 1182 (2013) [hereinafter Sohoni, Notice] ("Considerations of vagueness formed a component or a backstop to many of the pre-New Deal Court's most notorious holdings."); Johnson v. United States, 576 U.S. 591, 618–19 (2015) (citation omitted) (Thomas, J., concurring in the judgment) ("During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, . . . the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activity.").

[82] 255 U.S. 81, 86 (1921) (quoting Lever Act of 1919, ch. 80, § 2, 41 Stat. 297, 298).

[83] Id. at 89–91.

[84] 274 U.S. 445, 457–59 (1927) (considering separation of powers concerns in finding a criminal statute unconstitutionally vague under the Due Process Clause).

[85] Id. at 457.

[86] 295 U.S. 495 (1935).

[87] 293 U.S. 388 (1935).

[88] Sohoni, Notice, supra note 81, at 1182.

another. *Schechter Poultry*, a case about Congress delegating the power to enact "codes of fair competition" to the executive,[89] could have been framed instead as a violation of the right to contract. And *Adkins* could be understood not as a case about the substantive due process right to contract,[90] but as a case about delegating power to set the minimum wage to the wage-setting boards that were at issue in the case. This is not universally true, of course. For instance, a clear law prohibiting employers from forbidding their employees to join unions would not have been invalidated as unconstitutionally vague, but would have been struck down for violating due process freedom to contract.[91] But the broader point—that the doctrines served the same end and were cross-referenced frequently—still stands.

The rise and success of substantive due process, vagueness, and nondelegation during the same period display the *Lochner* Court's willingness to craft different doctrines to apply to different facts to achieve the same end—the occasional invalidation of economic legislation. But in particular, and most important, the Court frequently invoked and wielded separation of powers concerns in *Lochner*-era vagueness cases. At least during the *Lochner* era then, the "hydraulic pressures of our constitutional system" were distributed evenly on both nondelegation and vagueness. The pressures were also specifically targeted to economic regulation. At this point in time, vagueness indeed was a "corollary of the separation of powers."[92]

B. The New Vagueness

The tides changed after the "switch in time that saved nine" in 1937, which ushered in an era of constitutional transformation, characterized by judicial deference to congressional authority and an explosion in federal regulatory activity.[93] The Court performed an about-face on its substantive due process cases, repudiating *Adkins* in *West Coast Hotel Co. v. Parrish*.[94] The Court did not explicitly reject the nondelegation

[89] *Schechter Poultry*, 295 U.S. at 530–31.
[90] Adkins v. Child.'s Hosp. of D.C., 261 U.S. 525, 545 (1923).
[91] See, e.g., Coppage v. Kansas, 236 U.S. 1, 20–26 (1915).
[92] Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).
[93] See G. Edward White, The Constitution and the New Deal 198–99 (2000).
[94] 300 U.S. 379, 400 (1937). This case, in which the Court overruled its decision in *Adkins*, is widely considered to have ended the *Lochner* era and marked the beginning of the "New Deal Court."

doctrine, but it sounded its death knell by tolerating broad delegations of power under the intelligible principle standard, despite the delegations providing almost no meaningful standards to guide executive enforcement.[95] *Economic* vagueness suffered a similar fate.[96]

But as the Court retreated wholesale from policing delegations of legislative power and encroachments on economic liberty, vagueness took a turn of its own. Although it remained nominally the same, both the ends it served and its doctrinal substance received a makeover.

Rather than serving to satisfy the *Lochner* Court's economic agenda, vagueness became a tool for litigants to attack laws that chilled protected First Amendment freedoms, like the right to free speech and assembly. To be sure, such free speech challenges were made before the "switch in time," but were largely unsuccessful.[97] But just as the Court reversed course by rejecting economic vagueness challenges, it began accepting vagueness challenges on the basis of free speech when it had not before.

In *Winters v. New York*, the Court considered a New York state statute[98] that criminalized obscene materials, including "stories of bloodshed and lust [which would] incite to crime against the person."[99] The Court invalidated the statute as void for vagueness because it was "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech."[100] Justice Frankfurter would later point out that

[95] See, e.g., Yakus v. United States, 321 U.S. 414, 418, 420, 423 (1944) (rejecting a challenge to the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, which delegated to the Office of Price Administration the power "to promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act' ").

[96] See Amsterdam, supra note 39, at 74 n.38 ("The void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation. . . . Since the advent of the New Deal Court, by contrast, there has been one economic vagueness case . . . .").

[97] See, e.g., Fox v. Washington, 236 U.S. 273, 275–78 (1915) (rejecting a vagueness challenge to a statute that prohibited printing and circulating material that advocated for a "disrespect for law"); Mutual Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 245–46 (1915) (defending the broad delegation of movie-censorship authority to a state agency as practically necessary and unlikely to result in abuse); see also Johnson v. United States, 576 U.S. 591, 619 n.5 (2015) (Thomas, J., concurring in the judgment) ("Vagueness challenges to laws regulating speech during this period were less successful."); Amsterdam, supra note 39, at 74 n.38 ("Vagueness contentions in free speech cases received short shrift [in the era of economic vagueness]. . . .").

[98] 333 U.S. 507, 508–09 (1948).

[99] Id. at 514.

[100] Id. at 509, 519–20.

such "vague, undefinable powers" were suspect because they had "stultifying consequences on the creative process of literature and art."[101] Professor Herbert Packer, noting how the Court shifted away from vagueness's nondelegation rationale toward a free speech rationale, argues that "the vagueness doctrine has been most frequently and most stringently invoked" in cases in which the government "has been perceived as impinging on constitutionally protected values such as freedom of speech and of the press" and that "[v]agueness is bad . . . not because it is as a general proposition wrong for the legislature to give away its offense-defining power to the law enforcement agencies . . . but because it is wrong to do so when certain values . . . (like freedom of speech) seem to be threatened by the delegation."[102] Vagueness became an "instrumental doctrine rather than one having independent force,"[103] a tool for the Court to create an "insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[104]

Vagueness would undergo another makeover soon after. After using vagueness to target statutes that encroached on free speech rights, the Court refocused vagueness on "street-cleaning" statutes—"local ordinances directed against some form of public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties."[105] These "street-cleaning" statutes punished quality-of-life offenses and were aimed at "mak[ing] at-risk neighborhoods more livable and less amenable to disorder."[106]

[101] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 531 (1952) (Frankfurter, J., concurring); see also NAACP v. Button, 371 U.S. 415, 432–33 (1963) ("Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity."); Watkins v. United States, 354 U.S. 178, 205 (1957) (indicating that vagueness considerations are even more important when constitutional liberties are at stake); Smith v. California, 361 U.S. 147, 150–51 (1959) (stating that statutes can be constitutionally deficient when they have the "collateral effect of inhibiting the freedom of expression").

[102] Herbert L. Packer, The Limits of the Criminal Sanction 94 (1968); see also Smith v. Goguen, 415 U.S. 566, 573 & n.10 (1974) (noting that in free speech vagueness cases, "the doctrine demands a greater degree of specificity than in other contexts," such as those "dealing with purely economic regulation").

[103] Packer, supra note 102, at 94.

[104] Amsterdam, supra note 39, at 75.

[105] Jeffries, supra note 35, at 215–16.

[106] Josh Bowers, What if Nothing Works? On Crime Licenses, Recidivism, and Quality of Life, 107 Va. L. Rev. 959, 972 (2021) (citing George L. Kelling & James Q. Wilson, Broken Windows: The Police and Neighborhood Safety, The Atlantic (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/NQ5V-XXFZ]).

Papachristou v. City of Jacksonville, the seminal vagueness case, involved the quintessential street-cleaning statute—a vagrancy law.[107] The Court invalidated it because it allowed Jacksonville police to arbitrarily discriminate against "poor people, nonconformists, dissenters, [and] idlers."[108] And in *Kolender v. Lawson*, the Court held that a statute requiring loiterers to provide "credible and reliable" identification when stopped by police was unconstitutionally vague.[109] Occasionally, street-cleaning vagueness would intersect with free speech vagueness, but the Court eventually began handling free speech issues under the overbreadth doctrine.[110]

The ends to be achieved were not the only aspect of vagueness doctrine that changed. Indeed, the substance of the doctrine itself was reformulated. The Court analyzed pre-1937 vagueness cases using a combination of fair notice, nondelegation, and economic liberty rationales.[111] But post-1937 vagueness cases dropped nondelegation and economic liberty reasoning altogether. And although the fair notice rationale remained present in these "new vagueness" cases, the more significant factor instead became the threat of arbitrary, racialized, and discriminatory enforcement by local police and prosecutors—a factor that was absent in vagueness analysis before 1937.

Thin strands of the arbitrary and discriminatory enforcement factor ran through a few earlier cases.[112] But the Court did not explicitly delineate this factor until it decided *Papachristou*, in which it received its fullest

[107] 405 U.S. 156, 156 (1972).

[108] Id. at 170–71.

[109] 461 U.S. 352, 353–54 (1983); see also Smith v. Goguen, 415 U.S. 566, 581–82 (1974) (invalidating a flag contempt law on vagueness grounds); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (striking down a law that proscribed annoying others in public); Gooding v. Wilson, 405 U.S. 518, 527–28 (1972) (finding unconstitutional a law that prohibited use of language "tending to cause a breach of the peace").

[110] See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 114–15 (1972) (noting that "overbroad laws, like vague ones, deter privileged activity").

[111] See supra Section II.A.

[112] See, e.g., United States v. Screws, 325 U.S. 91, 104–05 (1945) (plurality opinion) (upholding the validity of a criminal statute but observing that the constitutionality of such statutes depends in part on a law enforcement official's ability to "know with sufficient definiteness" what is being criminalized); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 288 (1961) (internal quotation marks omitted) (reaffirming that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory").

treatment.[113] There, the Court said that a law is void for vagueness not only when it fails to give a person of ordinary intelligence fair notice that his conduct is prohibited, but also when "it encourages *arbitrary and erratic arrests and convictions*."[114]

In formulating this factor, the Court cited to two cases,[115] *Thornhill v. Alabama*[116] and *Herndon v. Lowry*,[117] neither of which were decided based on fears of arbitrary enforcement. Where did this factor come from? The most plausible explanation is that as the Court shifted the ends that its tool served—first to address laws inhibiting free speech and then to invalidate street-cleaning statutes—it modified the tool itself so it could cleanly carry out the job.

Papachristou is telling. The Court repeatedly criticized vagrancy statutes for "making easy the roundup of so-called undesirables" and eroding certain "amenities of life" that "encourage[] lives of high spirits rather than hushed, suffocating silence."[118] Then, reasoning backwards, the Court invalidated the vagrancy law at issue because it allowed for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[119] In later cases, the Court began "elevat[ing] the new prong to greater importance than its more senior counterpart[,]" which was fair notice.[120] In *Kolender v. Lawson*, the Court called the risk of arbitrary enforcement "the more important aspect of the vagueness doctrine,"[121] and it decided *City of Chicago v. Morales*[122] "on this prong alone."[123]

[113] Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972); see also Goldsmith, supra note 44, at 288 ("The danger of arbitrary enforcement first appeared as a component of vagueness analysis equal in prominence to the threat of lack of notice in 1972 in *Papachristou v. City of Jacksonville*."); Alfred Hill, Vagueness and Police Discretion: The Supreme Court in a Bog, 51 Rutgers L. Rev. 1289, 1307–08 (1999) (framing *Papachristou* as equally concerned with lack of notice and potential for discriminatory or arbitrary enforcement).

[114] *Papachristou*, 405 U.S. at 162 (emphasis added).

[115] Id.

[116] 310 U.S. 88, 101–02 (1940) (striking down statute as facial violation of the First and Fourteenth Amendments).

[117] 301 U.S. 242, 262–64 (1937) (also striking down state statute primarily on First and Fourteenth Amendment grounds).

[118] *Papachristou*, 405 U.S. at 164, 171.

[119] Id. at 170 (quoting *Thornhill*, 310 U.S. at 97–98).

[120] Goldsmith, supra note 44, at 289.

[121] 461 U.S. 352, 358 (1983).

[122] 527 U.S. 41 (1999).

[123] Goldsmith, supra note 44, at 289.

Dean John Jeffries refers to this prong of the vagueness test as the "rule of law" prong.[124] He argues that the Court developed this prong to ensure "the constraint of arbitrariness in the exercise of government power."[125] Jeffries also recognizes that this prong of the test was "new and inventive,"[126] tying into the Court's broader notions of fundamental *equality*.[127]

The Court's ultimate goal in crafting the formal prong, then, was to address the "single most potent concern at issue"—"discrimination based on race or ethnicity."[128] Although the formal rule of law and substantive equality were not necessarily linked, Jeffries argues that in contemporary American society and the American constitutional tradition of equal protection, the two shared a close relationship. "[I]nhibiting racial discrimination in law enforcement [was] very much a part of what the rule of law," and, in turn, the arbitrary and discriminatory enforcement prong of vagueness, "[was] all about."[129] Vagueness—and its second prong in particular—became an equality principle, protecting minorities against arbitrary discrimination.[130]

Jeffries persuasively argues that "the needs to inhibit arbitrary and discriminatory enforcement and to avoid . . . lack of notice explain the great majority of invalidations under the vagueness doctrine."[131] But Jeffries's argument lacks a necessary qualification. These rationales may have explained "new and inventive vagueness"—molded to protect free expression and fundamental equality—but shed little light on pre-1937 "old vagueness" in which fears of racially discriminatory enforcement and equal protection were absent altogether.

One additional point bears noting. Similar to how economic vagueness had a flavor of *Lochner*-ian substantive due process, both free speech and

[124] Jeffries, supra note 35, at 212.
[125] Id.
[126] Id. at 195 n.15.
[127] Id. at 213.
[128] Id. at 213–14.
[129] Id.; see also Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 Harv. C.R.-C.L. L. Rev. 301, 315 (1987) (arguing that a breakdown of the rule of law allows for "structureless processes [that] affirmatively increase the likelihood of prejudice").
[130] See generally Tammy W. Sun, Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine, 46 Harv. C.R.-C.L. L. Rev. 149 (2011) (discussing how the void-for-vagueness doctrine evolved from one focused on process and fair notice to one focused on the substantive principle of equality and unequal enforcement).
[131] Jeffries, supra note 35, at 216.

street-cleaning vagueness occasionally sounded in personal-autonomy-centered substantive due process. For example, vagueness challenges in cases like *Lanzetta v. New Jersey*[132] and *Lambert v. California*[133] targeted vagrancy laws because they punished status, and not conduct.[134] This distinction between status and conduct "evinced confusion about where procedural due process ended, substantive due process began, and how both the status/conduct distinction and the void-for-vagueness doctrine fit within the two."[135]

Critics of substantive due process had good reason to believe that the Court was merely devising new rights under the guise of vagueness. In *Lewis v. City of New Orleans*, Justice Blackmun observed in dissent that vagueness doctrine "quietly and steadily [has] worked [its] way into First Amendment parlance much as substantive due process did for the 'old Court' of the 20's and 30's."[136] The critique from Justice Blackmun was warranted. The free speech and street-cleaning vagueness cases had a streak of the substantive due process reasoning present in some *Lochner*-era cases like *Adkins*.[137] To an extent, the new vagueness cases that used the rhetoric of substantive due process were a continuation of the old vagueness cases that did the same, even though the particular rights at issue—economic liberty versus personal autonomy rights—were different.

C. New Vagueness and Nondelegation

Recall that before 1937, vagueness and nondelegation were closely connected. The Court frequently used nondelegation reasoning in deciding vagueness cases. But just as nondelegation standing alone became a dead letter after 1937,[138] vagueness infused with nondelegation also faded away. Indeed, "[a]s the doctrine of arbitrary enforcement rose

[132] 306 U.S. 451, 452, 458 (1939).
[133] 355 U.S. 225, 229 (1957).
[134] Goluboff, supra note 13, at 101.
[135] Id.
[136] 415 U.S. 130, 136 (1974) (Blackmun, J., dissenting).
[137] 261 U.S. 525, 545–46 (1923). The "new vagueness" has also been wielded on occasion to protect abortion rights. See, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 451–52 (1983).
[138] See, e.g., Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in part and dissenting in part) (noting that the nondelegation doctrine, "which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes").

in importance, the focus on maintaining the separation of powers waned."[139] "Waned" is putting it lightly. Nondelegation did little to no work in the Court's vagueness cases after 1937, although it was present in name occasionally.

In 1939, the Court decided *Lanzetta* on vagueness grounds but only mentioned the fair notice rationale, leaving out concerns about improperly delegated legislative authority.[140] And in *Papachristou*, the Court said that the problem of arbitrary enforcement is *not* that it gives courts the power to "pick and choose" the meaning of vague laws, but that it "increase[s] the arsenal of the police" to discriminate against undesirables.[141] Similarly**,** in *Interstate Circuit, Inc. v. City of Dallas*, the Court held that a censorship law was void for vagueness not because it allowed a censor board to determine the meaning of the law, but because the law let the board regulate erratically and arbitrarily according to personal preferences within the meaning of that broad law.[142]

The Court did occasionally pick up on earlier threads of nondelegation and integrate them into its later vagueness cases. But by and large, these separation of powers concerns played a rhetorical and inconsequential role and were a distraction from the bigger picture. In *Grayned v. City of Rockford*, the Court rejected a vagueness challenge to an anti-noise ordinance by applying the standard two-part vagueness test—notice and discriminatory enforcement.[143] Playing old tapes, the Court said "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution."[144] But this aside was a distraction, given that the Court's scrutiny was not toward the perils of the delegation itself. It was instead on the perils of the *side-effects* of delegation—"the

[139] Goldsmith, supra note 44, at 288. In a recent article, Professor Mannheimer cites Andrew Goldsmith's article to support the claim that the "nondelegation rationale has achieved predominance over the notice rationale." Michael J. Zydney Mannheimer, Vagueness as Impossibility, 98 Tex. L. Rev. 1049, 1057 (2020). But the article misreads Goldsmith. Goldsmith argues that the *arbitrary enforcement* rationale was elevated above notice and distinguishes the arbitrary enforcement rationale from the nondelegation rationale. Goldsmith, supra note 44, at 288–89.

[140] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[141] Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972).

[142] 390 U.S. 676, 682–86 (1968).

[143] 408 U.S. 104, 108–09 (1972).

[144] Id.

attendant dangers of arbitrary and discriminatory application."[145] Similarly, in *Kolender*, the Court said that a vague law "necessarily 'entrust[s] lawmaking to the moment-to-moment judgment of the policeman.'"[146] But the Court's real concern was the fear of "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[147] In any event, despite the Court's skepticism about entrusting lawmaking to the police, there was no real risk of legislative authority being delegated in *Kolender*.[148] Professor Hessick similarly notes that the Court has used the nondelegation rationale in only "a small handful of [vagueness] cases."[149] Within those handful, Professor Hessick refers to *Cohen* and *Reese*, both decided pre-1937, and *Grayned*, discussed *supra*.[150] The nondelegation rationale thus did no work. The likely explanation for this rationale's demise is that the Court discarded the rationale as it changed the circumstances in which it applied the vagueness doctrine.

The demise of vagueness's nondelegation rationale seems inevitable when placed in proper context. Because the Court was using vagueness primarily to address state and local laws that infringed on free speech or created opportunities for discrimination, using nondelegation would have raised a simple conceptual question. Why would a *federal* separation of powers principle—that Congress should not delegate its authority to federal courts and the executive—decide whether *state* and *local* lawmakers inappropriately delegated legislative authority to other branches of *state* and *local* government?[151] The Court has repeatedly suggested that the Federal Constitution does not dictate the structure that

[145] Id. at 109; see Goldsmith, supra note 44, at 288–89 ("*Grayned*'s emphasis on the evil of the possible result, rather than on the evil of violating the separation of powers itself, demonstrated the transformation in the Court's vagueness doctrine.").

[146] 461 U.S. 352, 360 (1983) (alteration in original) (internal quotation marks omitted) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)). The Court also cited *United States v. Reese*, 92 U.S. 214, 221 (1875), in laying out the second prong of the vagueness test. *Kolender*, 461 U.S. at 358 n.7. This was incorrect, as *Reese* did not discuss the perils of arbitrary and discriminatory enforcement at all, and only discussed separation of powers concerns. See *Reese*, 92 U.S. at 221.

[147] *Kolender*, 461 U.S. at 360 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

[148] See Jeffries, supra note 35, at 217–18 ("What is wrong with the law [in *Kolender*], of course, is not that it invaded legislative power . . . but that it invited arbitrary enforcement.").

[149] Carissa Byrne Hessick, Vagueness Principles, 48 Ariz. St. L.J. 1137, 1143 (2016) [hereinafter Hessick, Vagueness Principles].

[150] Id. at 1143–44, 1143 n.32.

[151] See Snoddon, supra note 44, at 2313.

state and local governments must take.[152] States have broad leeway in structuring their governments and have not unanimously adopted the structure of the federal government.[153] Note that even before 1937, whenever the Court *did* invoke the separation of powers in vagueness cases about economic regulations, it did so mainly in cases involving federal law.[154] Perhaps the Due Process Clauses of the Federal Constitution serve as a backstop against abrogation of common law procedural protections and carry with them a separation of powers baseline.[155] Still, applying nondelegation principles in the context of state and local laws would have been, at least, counterintuitive.[156]

Nondelegation did not make a full return to vagueness cases until 2008. That is, in almost no cases between 1937 and 2008 did nondelegation play a more than nominal role in the Court striking down a law as void for vagueness.[157]

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[152] See, e.g., Shelby County v. Holder, 570 U.S. 529, 543 (2013) ("Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments . . . ."); Dreyer v. Illinois, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State.").

[153] See Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1050 & n.323 (2006) (citing *Dreyer*, 187 U.S. at 84) ("There is a significant limit to the separation of powers argument . . . it applies only to the federal government. It is a matter of state, not federal, constitutional law whether the same infirmities exist in a state system."); Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1188 (1999); Carissa Byrne Hessick, The Myth of Common Law Crimes, 105 Va. L. Rev. 965, 1007 (2019) [hereinafter Hessick, The Myth] ("[N]ot all states have adopted the same separation of powers arrangements that were laid out in the federal Constitution.").

[154] Amsterdam, supra note 39, at 67 n.3 ("As regards federal statutes, a separation-of-powers notion has sometimes been invoked . . . .").

[155] See generally Chapman & McConnell, supra note 41, at 1681 (stating that commentators have underemphasized that due process has always been bound up with separation of powers).

[156] See Sessions v. Dimaya, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting) (arguing that though "the Constitution prohibits Congress from delegating core legislative power to another branch," he "locate[d] that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause").

[157] A reasonable search revealed one exception in which the Court used nondelegation-infused vagueness to strike a federal law down: United States v. Evans, 333 U.S. 483, 486–87 (1948). Besides *Evans*, two cases are worth mentioning. United States v. Robel, 389 U.S. 258, 263 (1967), was a First Amendment vagueness case. But in concurrence, Justice Brennan raised a nondelegation argument, stating that the scope of permissible delegation is lower "when the regulation invokes criminal sanctions and potentially affects fundamental rights." Id. at 275 (Brennan, J., concurring in the judgment). And in United States v. Batchelder, 442 U.S. 114, 122–23, 125–26 (1979), the Court considered both a vagueness and nondelegation challenge to a federal sentencing law but disposed of both challenges with relative ease.

That changed after *Sorich v. United States*, in which Justice Scalia dissented from the Court's denial of certiorari.[158] *Sorich* involved the federal mail and wire fraud statute's "honest services" provision, which defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[159] Justice Scalia excoriated the statute for criminalizing broad swaths of activities and creating "a potent federal prosecutorial tool."[160] And then, in nondelegation terms, he said that the statute creates both "the prospect of federal prosecutors' (or federal courts') creating ethics codes and setting disclosure requirements" and "an invitation for federal courts to develop a common-law crime of unethical conduct."[161] He demanded that the Court rule on the statute's constitutionality.

The Court granted his demand in *Skilling v. United States*.[162] To avoid constitutional concerns and the void-for-vagueness doctrine, the Court in *Skilling* construed the honest services provision narrowly and cabined its seemingly unlimited scope.[163] But Justice Scalia would have gone further and held it void-for-vagueness as applied to *Skilling*. Bringing vagueness back full circle to the era in which it was nondelegation-adjacent, he cited to *Reese* and Chief Justice Waite's famous line: "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."[164]

Two years later, the Court decided *FCC v. Fox Television Stations, Inc.*, holding that the FCC's "indecency policy," a regulation promulgated under statutory authority, was impermissibly vague as applied to two broadcast networks.[165] Although the Court did not explicitly mention any separation of powers issues, they were likely lurking in the background—at issue was the application of an *agency's* regulation rather than a congressional statute.

[158] 555 U.S. 1204, 1207 (2009) (Scalia, J., dissenting from denial of certiorari).
[159] 18 U.S.C. § 1346.
[160] *Sorich*, 555 U.S. at 1205–06 (Scalia, J., dissenting from denial of certiorari).
[161] Id. at 1207.
[162] 561 U.S. 358, 402–04 (2010).
[163] Id. at 402–09.
[164] Id. at 424–25 (Scalia, J., concurring in part and concurring in the judgment) (quoting United States v. Reese, 92 U.S. 214, 221 (1875)); see also supra notes 71–75 and accompanying text (noting *Reese's* incorporation of both vagueness and nondelegation themes).
[165] 567 U.S. 239, 258 (2012).

And most recently, the Court decided *Johnson v. United States*,[166] *Sessions v. Dimaya*,[167] and *United States v. Davis*,[168] all of which involved extraordinarily broad residual clauses in the federal code. As noted *supra*,[169] the Court decided these cases on vagueness grounds, but laced its opinions with heavy doses of nondelegation.

Absent from these cases were discussions of constitutional buffer zones and principles of equality. Gone were concerns about racialized enforcement and street-cleaning statutes. In 1985, Dean Jeffries noted that nondelegation may have been part of the rationale underlying the early vagueness cases, but that this rationale was later abandoned.[170] Jeffries might have spoken too soon.[171]

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Peering back reveals the hollowness of Justice Gorsuch's claim about the relationship between vagueness and nondelegation. While pre-1937 vagueness had a strong tint of nondelegation, the vagueness that took its place was something different altogether. Targeted to protect fundamental constitutional rights and ensure equal protection, the "new vagueness" arose in contexts in which nondelegation had no role to play. Nondelegation, meanwhile, was absent. Only recently, in cases like *Skilling*, *Dimaya*, and *Davis*, did the Court again pick up on the nondelegation thread—on the "old vagueness," so to speak—and treat vagueness and separation of powers as corollaries of each other.

[166] 576 U.S. 591, 593 (2015).

[167] 138 S. Ct. 1204, 1211–12 (2018).

[168] 139 S. Ct. 2319, 2323–24 (2019).

[169] See supra notes 45–68 and accompanying text; *Johnson*, 576 U.S. at 596–97.

[170] Jeffries, supra note 35, at 203 n.40 ("Indeed, such a notion surfaced some years ago as the constitutional doctrine of non-delegation and may have been part of the rationale underlying the early vagueness cases. Today, however, no such assumption is generally entertained." (citations omitted)).

[171] Indeed, Jeffries himself notes that one of the underlying rationales of the legality principle and vagueness doctrine is the separation of powers. Id. at 201. Still, Jeffries refers to separation of powers in terms of "[j]udicial deference to legislative primacy" in making criminal law—that is, in terms of the comparative competencies of courts and legislatures. Id. at 203 n.40. In contrast, he rejects the principle of constitutionally mandated legislative *exclusivity* in making criminal law, which he links to the nondelegation doctrine. Id. He states that the effect of separation of powers rhetoric in vagueness cases is "to beg the question rather than to answer it." Id. at 205. The Court's decisions in *Skilling*, *Dimaya*, *Davis*, and *Gundy* contradict Jeffries's argument, and suggest instead that legislative exclusivity and nondelegation do inform vagueness.

III. TWO VAGUENESS DOCTRINES

When criminal law faculty teach first-year law students about vagueness doctrine, they often rely on *Papachristou v. City of Jacksonville*. They focus on how vagrancy laws created problems of fair notice and discriminatory enforcement. In response, students may ask, when else do courts refuse to enforce laws because they are void for vagueness? One potential response is *Skilling v. United States*. But one only needs to cursorily compare *Papachristou* and *Skilling* to see that what is happening in one case is starkly different from what is happening in the other. The racialized-policing-and-free-speech vagueness from *Papachristou* and the white-collar vagueness from *Skilling* are an uneasy fit. And the Court writes differently about vagueness when it arises in different contexts.

Wholly absent from *Skilling* and *Sessions v. Dimaya* are considerations of free speech and discrimination. Take *Skilling* for example. Was Jeffrey Skilling—a wealthy white male and notoriously egregious fraudster[172]—really at risk of arbitrary and discriminatory enforcement by prosecutors? Think too of the defendant in *Dimaya*, a Filipino non-citizen that had been convicted for burglary twice.[173] Setting aside the inequalities built into the federal immigration code, was twice-convicted Dimaya really at risk of *arbitrary* deportation?

This failure of fit goes both ways—which separation of powers was the Court upholding in *City of Chicago v. Morales*?[174] Why would the Federal Constitution have anything to say about whether the Chicago City Council improperly delegated its legislative authority to a different branch of government?

Drawing a straight line through the Court's inconsistent vagueness cases is difficult because two distinct concepts have been camouflaged under the common label of "vagueness." These two concepts are different both in their substance and in the ends that they address. There are two vagueness doctrines.[175] We can roughly categorize the two as the

[172] See generally Bethany McLean & Peter Elkind, The Smartest Guys in the Room (2003) (explaining Skilling's role in the Enron scandal).

[173] *Sessions v. Dimaya,* 138 S. Ct. 1204, 1211 (2018).

[174] 527 U.S. 41, 64 (1999).

[175] For a similar doctrinal split, see Josh Bowers, Two Rights to Counsel, 70 Wash. & Lee L. Rev. 1133, 1138–39 (2013) (describing the rift between effective assistance of counsel at trial as opposed to during plea bargaining); see also Snoddon, supra note 44, at 2302–03, 2306 (arguing that the Court has used two different vagueness doctrines—an as-applied test

following: (1) Rights-Based Vagueness: vagueness and fundamental rights, and (2) Structure-Based Vagueness: vagueness and nondelegation.[176]

Due process concerns are present in both categories. But from there, the analysis diverges. As the Court has been practicing it, vagueness is a doctrine that extends beyond the Due Process Clauses, reaching out to other parts of the Constitution to build itself up. In each of these two lines of vagueness cases, the Court hangs its hat on different constitutional hooks: fundamental rights and equal protection for Rights-Based Vagueness, and the separation of powers for Structure-Based Vagueness. This Part provides a brief sketch of Rights-Based Vagueness, followed by a descriptive account of Structure-Based Vagueness.

A. Rights-Based Vagueness: Vagueness and Fundamental Rights

Classic vagueness cases like *Papachristou* and *Lanzetta v. New Jersey* characterize Rights-Based Vagueness. This version of vagueness addresses due process concerns along with encroachments on other fundamental constitutional protections like free speech and equal protection, providing "breathing room" for individual liberty and constitutional rights.[177] Because it has been applied primarily to status crimes and vagrancy laws, and thus to state and local laws, federal nondelegation concerns are absent in this line of cases.[178] As noted in

consisting only of fair notice, and a facial test encompassing both fair notice and arbitrary enforcement).

[176] See Snoddon, supra note 44, at 2334 (proposing a "Structure and Rights Approach" to vagueness). Although this Note's division of the Court's vagueness cases is superficially similar to Snoddon's "Structure and Rights Approach," there are crucial differences. For one, Snoddon views the "arbitrary enforcement" aspect of the standard vagueness test as encompassing both "due process and separation of powers." Id. at 2325. In doing so, Snoddon proposes a universal vagueness test that integrates the separation of powers into its ambit. In contrast, this Note views Structure-Based Vagueness and Rights-Based Vagueness as existing wholly independent of each other and having different domains. For another, the rights included as part of Snoddon's approach include only fair notice, id. at 2340–41, whereas Rights-Based Vagueness as this Note understands it has protected, at different times, free speech, abortion, and equal protection rights. See supra notes 132–37 and accompanying text. Last, and most important, Snoddon neither traverses the history of the vagueness doctrine through the 1900s nor connects vagueness to the seemingly ascendant nondelegation doctrine, which is the central contribution of this Note, see infra Part IV.

[177] See Amsterdam, supra note 39, at 85 ("[T]he vagueness doctrine is chiefly an instrument of buffer-zone protection.").

[178] To the extent that the Court has implicitly applied separation of powers principles to vague local and state laws, it has been incorrect to do so. See, e.g., Cline v. Frink Dairy Co.,

Section II.B, the rights-protecting function of this version of vagueness traces back to the *Lochner*-era Court's protection of economic rights. The critique that Rights-Based Vagueness is just a way for courts to protect substantive due process rights is, to a certain extent, warranted.[179]

One final point on Rights-Based Vagueness deserves attention. Over the past three decades, cases involving this type of vagueness have disappeared from the Court's docket. *Morales* appears to have been the last one. This is despite the fact that "state legislatures and city councils have sought, mostly successfully, to recreate the authority loitering and vagrancy laws once gave the police."[180] Only time will tell whether this line of vagueness cases has any purchase in the future.

B. Structure-Based Vagueness: Vagueness and Nondelegation

Structure-Based Vagueness has its origins in early vagueness cases and has seen a recent resurrection in cases like *Skilling* and *Dimaya*. This vagueness is infused with nondelegation inferred from the Federal Constitution's Vesting Clauses. That is why Structure-Based Vagueness applies only to vague *federal* penal statutes—criminal statutes and statutes that carry with them severe but non-criminal consequences, like federal immigration statutes.[181] Such vague statutes have two constitutional infirmities. Not only do they violate the Due Process Clause's command of fair notice, but they also delegate the authority to make law to prosecutors and courts in violation of the Constitution's nondelegation principle. Issues of fundamental rights and racial discrimination are absent.[182] More concerning is constitutional

274 U.S. 445, 457–58 (1927) (referencing the need to constrain law enforcement as its primary concern); see also Snoddon, supra note 44, at 2304 & n.15 (2019) (using *Cline* as an example of the Court incorrectly conflating a separation of powers issue with a due process issue).

[179] See Johnson v. United States, 576 U.S. 591, 618 (2015) (Thomas, J., concurring in the judgment) ("[T]he Court's application of its vagueness doctrine has largely mirrored its application of substantive due process.").

[180] William J. Stuntz, Commentary, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842, 855 (2001) (footnote omitted) (citing City of Chicago v. Morales, 527 U.S. 41 (1999)).

[181] See Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

[182] See Jeffries, supra note 35, at 197 ("A review of modern vagueness decisions by the Supreme Court supports the hypothesis that the Court sees [the danger of racial discrimination] chiefly at the local level and is (probably correctly) relatively unconcerned about the potential for racially discriminatory enforcement of federal law. Indeed, it may well be that federal statutes benefit from a more general (and sometimes misplaced) assumption of federal prosecutorial restraint."). Thus, Structure-Based Vagueness is not just a strengthened version

structure.[183] To the extent that scholars and the Court have pointed out the similarities between vagueness and nondelegation,[184] these similarities are limited to the subset of vagueness cases that comprise Structure-Based Vagueness. And to the extent that Justice Gorsuch sees the overlap, Structure-Based Vagueness is what he sees.

Notably, Structure-Based Vagueness does not apply to vague state and local laws, because federal nondelegation concerns do not apply to criminal laws enacted by state and local governments. And as with vagueness generally, Structure-Based Vagueness has less teeth in the civil context because due process concerns are much weaker than they are in the criminal context.[185] Thus, in the context of federal laws that delegate *non-criminal* rulemaking authority to agencies, Structure-Based Vagueness does not have much of a role to play. State and local street-cleaning criminal statutes may raise serious due process concerns, and delegation of, say, environmental lawmaking authority may raise important questions about separation of powers. But in those contexts, due process and separation of powers exert no *combined* force as they do at their intersection. Structure-Based Vagueness is both potent and narrow.

* * *

Categorizing vagueness cases into Rights-Based Vagueness and Structure-Based Vagueness brings much-needed clarity to a doctrine that has been anything but consistent. The Court's recent turn from Rights-Based Vagueness to Structure-Based Vagueness also reiterates what scholars have long maintained about vagueness doctrine: that it is a "makeweight," "an available instrument in the service of other more

of Rights-Based Vagueness, but something different altogether. Cf. Snoddon, supra note 44, at 2333 (proposing a new framework for the vagueness doctrine that is rooted in both due process and separation of powers).

[183] Of course, on some level, structural considerations are only important *because* the separation of powers protects individual liberty. See The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

[184] See supra notes 39–68 and accompanying text.

[185] See Sohoni, Notice, supra note 81, at 1193 (describing the Court's high tolerance for vagueness in civil economic statutes); Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982) (first citing Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting); and then citing Winters v. New York, 333 U.S. 507, 515 (1948)) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

determinative judicially felt needs and pressures."[186] Just as the *Lochner* Court used vagueness to protect economic liberty, and as the *Papachristou* Court used it to protect personal autonomy and prevent racial discrimination,[187] the *Dimaya-Davis-Gundy* Court has used vagueness as a makeweight to satisfy its own judicial values and reinforce the separation of powers. These categories and the values they incorporate may explain why particular Justices have been enthusiastic about the vagueness doctrine in some contexts, but skeptical in others. Justice Scalia, for example, was an ardent advocate for the separation of powers and an equally strong critic of personal autonomy rights.[188] Rights- and Structure-Based Vagueness may explain his dissent in *Morales*, a loitering case, but his vociferous arguments in favor of invalidating as void for vagueness the honest services statute in *Skilling*. As the Roberts Court continues to put a premium on structural propriety and the separation of powers, Structure-Based Vagueness becomes all the more relevant.

IV. UNPACKING STRUCTURE-BASED VAGUENESS

Structure-Based Vagueness has the potential to serve as a potent tool for defense attorneys and courts to strike at the heart of substantive federal criminal law.[189] But the first step in wielding it effectively is understanding its underlying rationales. Three are important. First, the basic criminal law principle of legality. Second, an aversion toward hyperlexis—the basic intuition that there exists "too much law." And third, skepticism about the federal institutional designs that allow for overcriminalization and draconian punishment. When these rationales are squarely implicated, Structure-Based Vagueness applies with full force.

Structure-Based Vagueness also provides a limiting principle to cabin a more expansive nondelegation doctrine. The Court has signaled that it

[186] Amsterdam, supra note 39, at 75; see also Goluboff, supra note 1, at 1387 (making a similar point about the shifting applications of vagueness doctrine).

[187] See J. Harvie Wilkinson III & G. Edward White, Constitutional Protection for Personal Lifestyles, 62 Cornell L. Rev. 563, 608–10 (1977).

[188] Compare Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221–22 (1995) (emphasizing the historical significance and importance of the separation of powers), with Lawrence v. Texas, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (arguing in dissent that a Texas statute prohibiting certain intimate sexual conduct should be upheld).

[189] See generally William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Issues 1, 6 (1996) (arguing that vagueness doctrine is one area where courts are willing to strike down criminal laws on substantive constitutional grounds).

plans to resurrect the nondelegation doctrine in the near future.[190] This has been controversial. Critics assail the nondelegation doctrine as a veil for the Court to involve itself in salient political issues in service of conservative politicians.[191] An expansive nondelegation doctrine that pulls the chair out from under regulatory agencies like the EPA or FDA would be, to say the least, politically risky.[192] Justice Kagan has hinted that an expansive nondelegation doctrine would hasten the end of government itself.[193] But proponents of the doctrine argue that a robust nondelegation doctrine is necessary because "the modern administrative state openly flouts almost every important structural precept of the American constitutional order."[194] This raises a fundamental question: What form should the nondelegation doctrine take?

Cabining nondelegation to the work it does within Structure-Based Vagueness[195] might provide a happy medium. The rationales in favor of

[190] See supra notes 31–34 and accompanying text; Ian Millhiser, Brett Kavanaugh's Latest Opinion Should Terrify Democrats, Vox (Nov. 26, 2019, 8:00 AM), https://www.vox.com/2019/11/26/20981758/brett-kavanaughs-terrify-democrats-supreme-court-gundy-paul [https://perma.cc/6367-PW3Q].

[191] See Nicholas Bagley, A Warning from Michigan, The Atlantic (Oct. 7, 2020), https://www.theatlantic.com/ideas-/archive/2020/10/america-will-be-michigan-soon/616635/ [https://perma.cc/W8FZ-GTQ3].

[192] See, e.g., Matt Ford, The Plot to Level the Administrative State, New Republic (Jan. 14, 2020), https://newrepublic.com/article/156207/plot-level-administrative-state [https://perma.cc/VYM4-Z9PP].

[193] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional . . . ."); see also Nicholas Bagley, Opinion, 'Most of Government is Unconstitutional,' N.Y. Times (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html [https://perma.cc/9U44-2ZXV] (restating Justice Kagan's opinion in *Gundy* that an expansive nondelegation doctrine will render most of the modern American government unconstitutional).

[194] Lawson, supra note 37, at 1233; see Philip Rucker & Robert Costa, Bannon Vows a Daily Fight for 'Deconstruction of the Administrative State,' Wash. Post (Feb. 23, 2017), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/N86J-9RHR?type=image].

[195] Or cabining it to criminal law more broadly. Professors Hessick and Hessick argue that the nondelegation doctrine should be cabined to apply only to explicit delegations of criminal rulemaking authority. See Hessick & Hessick, supra note 44, at 285, 306–21. This Note expands their proposal to include implicit delegations as well, like the ones in *Sessions v. Dimaya* and *United States v. Davis*. Professor Lawson provides a helpful example to distinguish between explicit delegations on the one hand, and the implicit delegations at issue in Structure-Based Vagueness on the other. To illustrate an implicit delegation, he first poses a hypothetical statute that forbids "all transactions in interstate commerce that fail to promote goodness and niceness." Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327,

delegating lawmaking authority in the regulatory sphere—expertise and efficiency—do not apply in the criminal law sphere, providing extra reason to prohibit criminal law delegations.[196] Cabining nondelegation to criminal law and centering it around principles of legality would keep the Court out of the political thicket and keep criticisms of judicial activism at bay. Perhaps it is no coincidence that *Gundy v. United States*, the latest nondelegation case, was about criminal law.[197]

This Part first discusses the rationales that animate Structure-Based Vagueness. It then identifies federal statutes that implicate those underlying rationales.

A. Structure-Based Vagueness's Underpinnings

1. Legality

Legality, the principle of "advance legislative specification of criminal misconduct,"[198] is "[t]he first principle" of criminal law.[199] It forbids retroactive crime creation and requires ex ante proscription of what is criminal and what is not.[200] Vagueness and nondelegation intersect because the principle of legality provides a strong intellectual foundation for *both*.

Dean Jeffries points out that vagueness doctrine serves as an "operational arm" of the principle of legality.[201] Vagueness—and its requirement of fair notice—supports legality by requiring sufficient specificity and clarity in criminal statutes. Broad, undefined terms given meaning in the shroud of "cases and controversies" necessarily deprive citizens of notice about what is and is not illegal. Laws that fail to provide

340 (2002). This statute "leaves so much undetermined that it would constitute an act of legislation" for the judiciary or executive to attribute any meaning to it. Id. An explicit delegation, in contrast, would add to the "goodness and niceness" statute "an explicit provision declaring that the President or some administrative body (or perhaps even the courts) 'shall promulgate rules to define the conduct proscribed by this statute.'" Id. at 343.

[196] See Hessick & Hessick, supra note 44, at 321–29.

[197] 139 S. Ct. at 2121.

[198] Jeffries, supra note 35, at 190.

[199] Packer, supra note 102, at 79–80, 89; see also H.L.A. Hart, Philosophy of Law, Problems of, *in* 6 The Encyclopedia of Philosophy 264, 273–74 (Paul Edwards ed., 1967) (arguing that the values of "generality, clarity, publicity, and prospective operation" are the fundamental requirements of a valid law).

[200] See Lon L. Fuller, The Morality of Law 39 (rev. ed. 1969).

[201] Jeffries, supra note 35, at 196.

a person of ordinary intelligence fair notice "remit[] the actual task of defining criminal misconduct to *retroactive* judicial decisionmaking."[202]

Nondelegation serves as an operational arm of legality too. Congress delegates lawmaking authority to prosecutors when it enacts expansive, indeterminate, and overlapping criminal statutes that prosecutors give meaning to.[203] These broad transfers of legislative power severely undercut criminal law's prospectiveness. Prosecutors have no reason to prospectively share information about the meaning they plan on giving criminal statutes or their enforcement decisionmaking.[204] Nor do prosecutors have external constraints on their enforcement decisions. Instead, they have the power of initiative and leeway to bring charges under broad and surprising readings of criminal statutes, for which courts often provide rubber stamps.[205] And because of sentencing schemes and plea bargaining structures that favor prosecutors, courts often do not even have the chance to pass on the prosecutors' stretched interpretations.[206] Additionally, when prosecutors *do* publicize their enforcement criteria, they insist that they are not bound by those criteria; they can bring charges when they see fit regardless of the publicized criteria.[207] Allowing prosecutors to define laws through case-by-case adjudication is the

[202] Id. (emphasis added).

[203] Federal criminal statutes are in a class of their own. In fact, "[m]ost federal crimes . . . derive from exceedingly open-textured statutes." Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 471 (1996) [hereinafter Kahan, Is *Chevron* Relevant to Federal Criminal Law?]. These open-textured, indecipherable crimes are then given meaning by prosecutors. Although prosecutors do not receive explicit deference for their interpretation of criminal statutes, they enjoy the "power of initiative" to bring charges and argue in favor of "exceedingly broad statutory readings," thus giving shape and meaning to the open-textured laws. Id. at 480–81. For a discussion of delegated federal criminal lawmaking at work, see Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 367–81; see also Hessick, The Myth, supra note 153, at 968 ("[T]he true scope and meaning of criminal laws have been left to prosecutors . . . ."); Chapman & McConnell, supra note 41, at 1785 ("[A]t a certain point, broad delegations of standardless power to the executive [through interpretive discretion] strain the understanding that the executive can regulate conduct only pursuant to law.").

[204] See Hessick & Hessick, supra note 44, at 336.

[205] Id.; see also Kahan, Is *Chevron* Relevant to Federal Criminal Law?, supra note 203, at 485 (highlighting the "vital" role that prosecutors play "in determining the content of incompletely specified statutes").

[206] Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757, 762 (1999) (footnote omitted) (citing Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 844 (2d ed. 1992)) ("With very limited ability to discover the precise contours of the government's case, federal criminal defendants generally cannot seek the equivalent of summary judgment.").

[207] See Hessick & Hessick, supra note 44, at 336.

epitome of retroactivity.[208] Moreover, in contrast to other areas in which Congress delegates lawmaking authority to regulatory agencies, Congress does not have the ability to "use . . . tools [like the Administrative Procedure Act]" to manage and monitor delegated *criminal* enforcement activity.[209] Nondelegation, by preventing Congress from transferring its legislative powers, takes retroactive lawmaking power out of the hands of prosecutors and courts.

The rejection of federal common law crimes is a good example of how nondelegation is connected to legality. In *United States v. Hudson & Goodwin*, the Court held that federal courts cannot exercise criminal jurisdiction in common law cases.[210] This decision was "based in part on a *separation-of-powers objection* to judicial crime creation."[211] This early rejection of federal common law crimes in 1812 indicates that the judicial authority to create crimes is "incompatible with our system of divided government."[212] Beyond the separation of powers concerns, the rejection of common law crimes is *also* closely associated with legality.[213] This shows how nondelegation and legality are linked. By preventing courts from making up criminal law as they go and protecting citizens from the particular perils of retroactive crime creation, nondelegation upholds and bolsters the "first principle" of criminal law.

2. Hyperlexis and Liberty

Another factor driving Structure-Based Vagueness is an intuitive but deep concern that "America suffers from 'hyperlexis,' or the existence of 'too much law.'"[214] As one commentator puts it:

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[208] See generally SEC v. Chenery Corp., 332 U.S. 194, 209–18 (1947) (Jackson, J., dissenting) (criticizing retroactive lawmaking through case-by-case adjudication).

[209] Richman, supra note 206, at 767 (emphasis added).

[210] 11 U.S. (7 Cranch) 32, 34 (1812).

[211] Jeffries, supra note 35, at 192 n.9 (emphasis added).

[212] Hessick, The Myth, supra note 153, at 1013.

[213] See Peter Westen, Two Rules of Legality in Criminal Law, 26 L. & Phil. 229, 286–87 (2007) (citing A.T.H. Smith, Judicial Law Making in the Criminal Law, 100 L.Q. Rev. 46, 54–56 (1984)) ("The practice of creating 'common law offenses' that do not purport to be interpretations of statutes has not only lapsed, but has come to be regarded as a violation of legality.").

[214] Mila Sohoni, The Idea of "Too Much Law," 80 Fordham L. Rev. 1585, 1587 (2012) [hereinafter Sohoni, Too Much Law] (quoting Bayless Manning, Hyperlexis: Our National Disease, 71 Nw. U. L. Rev. 767, 767 (1977)).

> Law has always been one of the garrulous professions, and modern communications gadgetry makes it all too easy to record, reproduce, and distribute legal words. As in the wake of a great ship mewing seagulls follow, so legal commentators pursue the society's law-making machines, squabbling over the newly emitted material. Our law libraries are swamped, our citizenry is confounded by the legal blizzard, and our imperilled forest reserves are further depleted.[215]

Critics of hyperlexis contend that "legislatures have become 'offense factories' that churn out new statutes each week," and that the federal criminal code is rife with statutes that overlap, reiterate each other, and cover relatively blameless everyday conduct.[216] Both citizens[217] and institutional actors like Congress, the executive branch, and courts[218] share concerns of hyperlexis. They are drawn to this criticism because of a common philosophical and ideological belief that the existence of "too much law" encroaches on liberty and undercuts the ideal of living in a free society.[219] There is a concern that "[t]housands of pages of statutes and millions of pages of regulation are smothering America's economy and killing its spirit."[220]

Vagueness and nondelegation provide a tool to address hyperlexis.[221] Fears of hyperlexis are not new—they date back to the Founding and beyond. James Madison defends the counter-majoritarian structure of the Senate because it provides an "additional impediment . . . against improper acts of legislation."[222] He identifies the late eighteenth-century version of hyperlexis—the "excess of law-making[,] the disease[] to which our governments are most liable."[223] Although the Court has traditionally deferred to the political branches in policing the explosive

[215] See Manning, supra note 214, at 767.

[216] Douglas Husak, Overcriminalization: The Limits of the Criminal Law 34, 34–44 (2008) (describing an explosion in federal criminal legislation through the use of three innovations—"overlapping offenses, crimes of risk prevention, and ancillary offenses").

[217] See, e.g., Too Many Laws, Too Many Prisoners, Economist, July 24, 2010, at 23, 24–25. https://www.economist.com/briefing/2010-/07/22/too-many-laws-too-many-prisoners [https://perma.cc/4DKF-4VAV].

[218] See Sohoni, Too Much Law, supra note 214, at 1591–97.

[219] Id. at 1626–28.

[220] Id. at 1586.

[221] See Sohoni, Notice, supra note 81, at 1223 ("Vagueness, retroactivity, and lenity offer a tempting array of tools for curbing the modern-day *bêtes noirs* of federal 'overregulation' or 'overcriminalization.'").

[222] The Federalist No. 62, at 377–78 (James Madison) (Clinton Rossiter ed., 1961).

[223] Id. at 378.

growth of the federal code, Professor Sohoni points out that *Citizens United v. FEC* might be a turning point.[224] In that case, Sohoni explains, the Court appeared to conclude that that the campaign finance laws at issue were "void for verbosity."[225] In the Court's words, "[p]rolix laws chill speech for the same reason that vague laws chill speech."[226]

Justice Gorsuch identified vagueness and nondelegation as methods of countering hyperlexis in *Gundy* and *Sessions v. Dimaya*. He indicated that a central reason for hyperlexis is the relative ease of creating federal law, which is brought about by vague laws and delegations of legislative power. In *Gundy*, he said that "the framers went to great lengths to make lawmaking difficult," and that these "detailed and arduous processes for new legislation" were "bulwarks of liberty."[227] Ditto in *Dimaya*. Enacting laws "is supposed to be a hard business, the product of an open and public debate," and delegating lawmaking to unelected prosecutors and judges short-circuits the legislative process, making it easier and easier to add to the federal *corpus juris*.[228] Structure-Based Vagueness can be seen as driven by a motivation to curb the explosion of federal criminal laws and disable a sprawling federal criminal bureaucracy.

Structure-Based Vagueness's rebirth in the midst of an expanding and hyperlexical federal code also parallels a similar dynamic from the 1930s. To some extent, there appears to be a link between the modern Court's skepticism of the burgeoning federal code and the *Lochner*-era Court's distrust of big government in light of rapid and expansive economic legislation.[229] This parallel may render the modern Court (applying Structure-Based Vagueness) susceptible to accusations of *Lochner*-ian judicial activism. But tying Structure-Based Vagueness to legality[230] and cabining it to the expanding federal *criminal* code provides a crucial limiting component.[231]

[224] Sohoni, Too Much Law, supra note 214, at 1599–1600.

[225] Id. at 1600.

[226] Citizens United v. FEC, 558 U.S. 310, 324 (2010).

[227] Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

[228] Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring) (citing Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962)).

[229] See 2 Bruce Ackerman, We the People: Transformations 279–312 (1998).

[230] See supra Subsection IV.A.1.

[231] See, e.g., Chapman & McConnell, supra note 41, at 1788 ("[I]n carrying out the responsibility to interpret statutes passed by Congress arguably vesting the executive with broad discretionary power, courts should bear in mind the distinction between regulatory schemes affecting the life, liberty, and property of Americans, on the one hand, and programs

While this "argument from liberty"[232] may ring in libertarian and conservative critiques of expansive government, the politics of hyperlexis cannot be categorized so easily. For example, the votes in *United States v. Davis*, *Dimaya*, and *Gundy* reflected cross-ideological agreement.[233] And in *Skilling*, all nine Justices agreed that read broadly, the honest services provision would have been void for vagueness.[234] Structure-Based Vagueness, in just the right circumstances, appeals to jurists across the spectrum because it provides "a more fundamental and genuine strain of resistance to the statutory and regulatory complexity that characterizes federal law today."[235] Hyperlexis "is not so much a reliable stalking horse for conservative ideology, but rather [is] a more widely shared concern that courts have made too sharp a retreat from policing constitutional constraints on various kinds of legislative and executive action affecting individuals and businesses."[236] Despite its libertarian bent, Structure-Based Vagueness is broadly appealing.

3. Combatting Institutional Pathologies

A third rationale underpinning the combination of vagueness and nondelegation, related to the first two, is that their combined force provides a tool to address the perverse federal institutional incentives that allow for the creation of expansive criminal punishment—what Professor Bill Stuntz refers to as the "pathological politics of criminal law."[237]The federal criminal code's history is one of growth and more growth, and the growth is both "deep"—in the sense that the same conduct is criminalized multiple times over—and "broad"—in that vast swaths of conduct are criminalized.[238] What allows for this expansion is a set of institutional arrangements between prosecutors and legislators—"tacit cooperation"

that merely expend money or involve exercises of power not affecting individual rights, on the other.").

[232] Sohoni, Too Much Law, supra note 214, at 1627.

[233] United States v. Davis, 139 S. Ct. 2319 (2019); *Dimaya*, 138 S. Ct. 1204; Gundy v. United States, 139 S. Ct. 2116 (2019).

[234] Skilling v. United States, 561 U.S. 358, 408 (2010); id. at 415 (Scalia, J., concurring in part and concurring in the judgment).

[235] Sohoni, Notice, supra note 81, at 1223; see also Yates v. United States, 574 U.S. 528, 568–70 (2015) (Kagan, J., dissenting) ("That brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code.").

[236] Sohoni, Notice, supra note 81, at 1223.

[237] See William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 510–11 (2001).

[238] Id. at 512–13, 517.

between institutional actors who know that "[l]egislators are better off when prosecutors are better off."[239]

Congress knows that federal prosecutors benefit from vague and overlapping criminal provisions. Politically insulated federal prosecutors demand broad criminal laws that allow them to engage in "especially interesting or fun" prosecutions that help in "attaining valuable litigation experience and advancing professional reputation."[240] Indeed, "federal criminal legislation often begins with the Justice Department and responds to pressure from that department and from U.S. Attorneys' offices."[241] And prosecutors know that legislators benefit from the political symbolism that their tough-on-crime laws display. Repeatedly drafting the expansive criminal statutes that prosecutors demand lets legislators posture and give their political base the signal that they are taking tough and swift action to address socially deviant behavior. Prosecutors and legislators bolster each other through these institutional arrangements and push courts and other limiting institutions out of the picture altogether.[242]

The result is a ratchet, a federal juggernaut that marches on in the direction of more and more punishment. In an oft-quoted part of Federalist No. 47, James Madison warns against this kind of political bedfellowship: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[243] In a recent case, Justice Kagan referred to the problems of overcriminalization and harsh punishment as "an emblem of a deeper pathology in the federal criminal code."[244] Plausibly, the pathology that Justice Kagan was referring to was exactly this one—the institutional distortion through which "the legislative (and judicial) power have increasingly passed into the hands of law enforcers."[245]

Perhaps these institutional and political pathologies have no comprehensive remedy. But Structure-Based Vagueness provides some

[239] Id. at 510.
[240] Id. at 543.
[241] Id. at 544.
[242] Id. at 528 ("[P]rosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery.").
[243] The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).
[244] Yates v. United States, 574 U.S. 528, 570 (2015) (Kagan, J., dissenting).
[245] Stuntz, supra note 237, at 578.

muscle for courts to combat them.[246] Requiring that federal criminal statutes are specific enough to provide fair notice prevents prosecutors from defining statutes through retroactive adjudication. But more important, the separation of powers aspect of Structure-Based Vagueness disrupts the institutional arrangements between Congress and federal prosecutors. By forcing lawmaking to occur within the legislature, Structure-Based Vagueness limits the ability of prosecutors to demand broad and indeterminate laws that they can use as they see fit and limits the ability of Congress to fulfill those demands.

When diagnosing the problem of pathological politics and the intermingling of the legislative and executive branches, Stuntz observes that "judges cannot separate these natural allies."[247] But perhaps they can. Although political realities might motivate Congress and federal prosecutors to pursue a destructive allegiance, courts applying Structure-Based Vagueness could significantly obstruct this pursuit.

B. Structure-Based Vagueness's Applications

Two examples illustrate Structure-Based Vagueness's potential force. First, take the Computer Fraud and Abuse Act ("CFAA"), which prohibits "access[ing] a computer without authorization or exceeding authorized access" in various circumstances.[248] Congress left the vague terms "access" and "authorization" undefined, and courts and commentators have struggled to give consistent meaning to them.[249] These ambiguous terms raise significant fair notice concerns, leaving people in the dark on what conduct is covered by the statute and what is not.[250] In addition to creating those due process concerns, the CFAA also delegates significant

[246] See generally Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513 (1991) (arguing that the separation of powers enhances individual liberty by protecting individual rights).

[247] Stuntz, supra note 237, at 510.

[248] See 18 U.S.C. § 1030. The Computer Fraud and Abuse Act was originally enacted as a 1986 Amendment to 18 U.S.C. § 1030. See Pub. L. No. 99-474, 100 Stat. 1213 (1986).

[249] See Orin S. Kerr, Vagueness Challenges to the Computer Fraud and Abuse Act, 94 Minn. L. Rev. 1561, 1562 (2010) (noting that CFAA's terms are "remarkably unclear" and that courts and commentators have disagreed regarding "how much conduct counts"); Josh Goldfoot & Aditya Bamzai, A Trespass Framework for the Crime of Hacking, 84 Geo. Wash. L. Rev. 1477, 1478–79 (2016) (acknowledging problems associated with defining the limits of "without authorization").

[250] See Kim Zetter, The Most Controversial Hacking Cases of the Past Decade, Wired (Oct. 26, 2015, 7:00 AM), https://www.wired.com/2015/10/cfaa-computer-fraud-abuse-act-most-controversial-computer-hacking-cases/ [https://perma.cc/9G9G-RUF3].

lawmaking authority to prosecutors who repeatedly stretch the terms of the statute in their charging decisions, and to technology companies that make liability under the statute turn on provisions in their terms-of-use contracts.[251] Because the statute thus raises both due process and separation of powers concerns, Structure-Based Vagueness strikes at its heart.

Second, Structure-Based Vagueness has a significant role to play in the immigration context. Vague immigration statutes—and specifically deportation statutes—carry severe due process concerns because of "the grave nature of deportation," a "'drastic measure,' often amounting to lifelong 'banishment or exile.'"[252] Moreover, "as federal immigration law increasingly hinge[s] deportation orders on prior convictions, removal proceedings [become] ever more intimately related to the criminal process."[253] Note also that immigration law is administered across various agencies within the Department of Homeland Security and Department of Justice. Ambiguous immigration laws bolster these agencies and delegate lawmaking authority to them, creating acute nondelegation concerns. Within the Department of Justice, immigration judges within the Executive Office for Immigration Review and, on appeal, the Board of Immigration Appeals ("BIA"), interpret immigration statutes in the context of removal proceedings. When federal courts review BIA decisions, they defer to the BIA's interpretations as long as they are reasonable.[254] The executive branch is thus largely responsible for the enforcement *and* interpretation of federal immigration law, compounding the separation of powers issue.

A prime example of an immigration statute susceptible to a Structure-Based Vagueness challenge is the "crime of moral turpitude" ("CIMT") provision in the federal immigration code. That provision renders any non-citizen "convicted of a crime involving moral turpitude"

[251] Id. (citing examples); Note, The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation, 127 Harv. L. Rev. 751, 752–56 (2013) (exploring the vagueness of CFAA's core terms and arguing for a clarified scope).

[252] Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jordan v. De George, 341 U.S. 223, 231 (1951)).

[253] Id. (internal quotation marks omitted) (citing Chaidez v. United States, 568 U.S. 342, 352 (2013)).

[254] Mary Holper, Deportation for a Sin: Why Moral Turpitude is Void for Vagueness, 90 Neb. L. Rev. 647, 653 (2012); Kristin E. Hickman & Aaron L. Nielson, Narrowing *Chevron*'s Domain, 70 Duke L.J. 931, 981, 988–89 (2021).

deportable.[255] Further, "crime of moral turpitude" is left undefined. In *Jordan v. De George*, the Court rejected a challenge to the moral turpitude provision over a heated dissent from Justice Jackson, who argued that "[i]rrationality is inherent in the task of translating the religious and ethical connotations of the phrase into legal decisions."[256] More recently, Judge Posner criticized the provision as being "stale, antiquated, and, worse, meaningless."[257] The criticism is fully warranted. Describing perhaps the quintessential definition of a lack of fair notice, a congressperson involved in an immigration debate in 1916 noted that "[n]o one can really say what is meant by saying a crime involving moral turpitude."[258] Non-citizens cannot really say either. Leaving the meaning of "moral turpitude" to the whim of immigration judges and DHS lawyers necessarily delegates Congress's lawmaking authority in violation of the nondelegation doctrine. The executive branch has repeatedly been able to interpret and update the meaning of "moral turpitude," usurping Congress's lawmaking role in the process.[259] Notably, in his *De George* dissent, Justice Jackson spoke in Structure-Based Vagueness terms, critiquing the provision's lack of fair notice while also "question[ing] the power of administrative officers . . . to decree deportation until Congress has given an intelligible definition of deportable conduct."[260]

For both the CFAA and CIMT statutes, savvy advocates have already begun making Structure-Based Vagueness arguments implicitly.[261] They could do so explicitly. They could argue in their briefs, motions, and oral arguments that such statutes are unconstitutional both because they are

[255] 8 U.S.C. § 1227(a)(2)(A).

[256] 341 U.S. 223, 232, 239 (1951) (Jackson, J., dissenting).

[257] Arias v. Lynch, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring).

[258] Sara Salem, Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law, 70 Fla. L. Rev. 225, 226 (2018) (quoting Restriction of Immigration: Hearing on H.R. 10384 Before the Comm. on Immigr. & Naturalization, 64th Cong. 8 (1916) (statement of Rep. Adolph J. Sabath)).

[259] Matter of Diaz-Lizarraga, 26 I&N Dec. 847, 852 (B.I.A. 2016) (updating "existing jurisprudence" on whether a theft offense constitutes a CIMT).

[260] *De George*, 341 U.S. at 234, 245 (Jackson, J., dissenting).

[261] See, e.g., Petition for Writ of Certiorari at 30–31, Olivas-Motta v. Barr, 140 S. Ct. 1105 (2020) (No. 19-282) (cert. denied) ("The 'crime involving moral turpitude' statute impermissibly delegates a Legislative function to the Executive and Judicial branches."); Brief for the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Petitioner at 8, Van Buren v. United States, No. 19-783 (U.S. June 3, 2021) (arguing that allowing third parties to dictate the meaning of the CFAA "not only fails to provide sufficient notice of criminal conduct, but also impermissibly delegates the distinctly legislative task of defining criminal conduct to third parties such as private employers and website owners").

too indefinite to provide due process and because they impermissibly delegate legislative power to the executive and judicial branches.

CONCLUSION

Although Justice Gorsuch is partially correct, he overlooks the doctrinal development of vagueness and its two different conceptions. Separating vagueness into these two conceptions—Rights-Based Vagueness and Structure-Based Vagueness—helps clarify the doctrinal relationship between vagueness and nondelegation. As recent cases show, the Roberts Court prefers Structure-Based Vagueness and its emphasis on the proper constitutional roles of the executive, legislative, and judicial branches. This development has occurred as Rights-Based Vagueness cases have largely disappeared. The rise of Structure-Based Vagueness has important implications. This tool provides courts with a viable route to tame the unchecked expansion of federal criminal law. Although Structure-Based Vagueness remains a largely conservative-libertarian legal project, it has important implications for progressive criminal justice reform and immigrant rights reform. Advocates ought to shape their advocacy accordingly.