AD HOC CONSTRUCTIONS OF PENAL STATUTES

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The Supreme Court construed penal statutes in forty-three cases from the 2013 Term through the 2022 Term. In those cases, the Court tended to adopt narrow constructions, a preference consistent with several substantive canons of construction, such as the rule of lenity and the avoidance of constitutional vagueness concerns. Substantive canons were routinely included in party briefs, frequently raised during oral argument, and occasionally explicated in concurring opinions. Yet the Court did not rely on substantive canons in the vast majority of the narrow-construction cases. For example, the Court never firmly relied upon the rule of lenity—the substantive canon most often raised in briefs and at argument—to justify a narrow construction over the entire ten-Term period. Instead, the Court's rationale in these cases tended to be "ad hoc," in the sense that the Court based its narrow reading only on statute-specific ordinary-meaning analysis. That approach may be motivated by textualist suspicion of substantive canons or a desire to maximize interpretive discretion in future cases involving penal statutes. Whatever its cause, the Court's ad hoc approach has large-scale implications that perpetuate the enactment, enforcement, and interpretation of penal statutes in an expansive manner—undermining the rule of law by systematically increasing discretion for various actors who administer criminal law.

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INTRODUCTION

With textualism now the dominant methodology at the Supreme Court,[1] scholarship on statutory interpretation "has taken an empirical turn,"[2] testing some of textualism's basic assumptions[3] and examining the Court's use of various interpretive tools across large sets of decisions.[4] Yet this strand of scholarship tends to treat the Court's statutory interpretation decisions as a monolith, making no distinctions based on the subject matter of the statutes being interpreted.[5] Criminal law scholarship on the Court's interpretive methods, by contrast, is inherently subject-matter specific. But it tends toward theory, describing particular tools of interpretation and making normative arguments for why they should be used.[6]

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1 *See* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023) ("The Supreme Court is now dominated by devoted textualists . . . ."); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 ("The Roberts Court is often described as textualist . . . .").

2 Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning,"* 90 GEO. WASH. L. REV. 1053, 1054 (2022).

3 *See, e.g.*, Jonathan H. Choi, *Measuring Clarity in Legal Text*, 91 U. CHI. L. REV. 1, 10 (2024) (using "statistical methods to produce a quantitative, 'rational' method for determining clarity in legal text"); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020) (using a survey method "to test dictionaries and legal corpus linguistics"); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905–07, 919, 949–50, 954–60, 967–69 (2013) (using survey of 137 congressional staffers responsible for drafting legislation to question textualists' reliance on some canons and refusal to consider legislative history); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 784 (2014) ("[O]ur study calls into question the conclusion that text is always the best evidence of the [legislative bargain].").

4 *See, e.g.*, Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017) (examining the use of substantive canons by the Roberts Court); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 488–94 (2013) (concluding, based on an empirical and doctrinal examination, that "dictionaries add at most modest value to the interpretive enterprise" and "are being overused and often abused by the Court," *id.* at 493); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1716 (2010) (finding that the Court has relied less on legislative history over time).

5 *See* Krishnakumar, *supra* note 4, at 842; Law & Zaring, *supra* note 4, at 1683.

6 *See, e.g.*, Joel S. Johnson, *Vagueness Avoidance*, 110 VA. L. REV. 71, 78 (2024) (arguing for recognition of the avoidance of constitutional vagueness concerns as a distinct tool of statutory construction); F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2347 (2022) (arguing for restoration of the historical practice of construing criminal statutes narrowly); Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921–24 (2020) (arguing for a more robust, historical version of the rule of lenity as a tool for constraining criminal laws); Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 351

This Article aims to tie those two strands of scholarship together by taking a hard look at the Court's cases involving the construction of federal penal statutes in all merits cases from the 2013 Term through the 2022 Term. That category of cases warrants special attention, not least because it makes up a significant portion of the Court's merits docket. The ten Terms studied saw forty-three merits cases involving the construction of penal statutes—accounting for nearly 7% of all fully briefed and argued merits cases the Court decided during that period.[7] Penal statutes also deserve special focus because they implicate distinct concerns, including those related to the principle of legality, fair notice, and arbitrary enforcement.[8] The ways in which the Court construes these statutes can have serious downstream effects on how criminal law is administered.

To be sure, the Court is focused in these cases on statutory construction of *federal* penal statutes,[9] while the vast majority of criminal adjudication occurs within the state system.[10] But the Court plays an important role in setting the interpretive culture for the methodology

(2019) (advocating for increased use of clear-statement rules for constraining the reach of criminal laws); Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 656–65 (2019) (advocating for a due process constraint on overbroad criminal laws); *see also* Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 S. CAL. L. REV. 397, 434–42 (2022) (arguing for reconceptualizing lenity as an excuse defense).

7 Based on the final tallies in the SCOTUSblog Stat Pack for the first 9 of the 10 Terms studied, there were 565 fully briefed and argued merits cases decided from OT 2013 through OT 2021. *See Stat Pack Archive*, SCOTUSBLOG, https://www.scotusblog.com/reference/stat-pack/ [https://perma.cc/GNB6-3W3Z]. For the OT 2022 Term, there were fifty-seven full-opinion merits cases. *See The Supreme Court 2022 Term: The Statistics*, 137 HARV. L. REV. 490, 490 (2023). Thus, in total, there were 622 cases during the ten-term period. Approximately 6.9% (43/622) of them involved the construction of penal statutes.

8 *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190, 201 (1985) (observing that the "principle of legality," which "forbids the retroactive definition of criminal offenses," is "'[*t*]*he* first principle'" of criminal law and is justified by separation of powers, fair warning, and arbitrary enforcement concerns (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79 (1986))).

9 The Court's analysis of state laws is "constrained by a distinctive federalism principle—that it is the province of the highest state court to construe state law"—which requires it to adhere to "any preexisting state-court constructions of indefinite statutory language" or, in the absence of a preexisting state-court construction, to "attempt to 'extrapolate' the meaning the highest state court would likely give to the state law." Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. CHI. L. REV. 1565, 1571, 1613 (2023).

10 *See, e.g.*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/SYB6-D6UH] (showing that only about 10.9% of the 1.9 million people in prisons and jails in the United States are within the federal system).

that both federal[11] and state courts[12] use when construing penal statutes. The Court's behavior in cases involving federal penal statutes thus helps to promote or reduce the use of various tools of interpretation at both the federal and state levels.

In addition, although the category of penal statutes studied here primarily comprises criminal statutes, it also includes statues that render citizens eligible for deportation, a "'particularly severe penalty,' which may be of greater concern" to the deportee "than 'any potential jail sentence.'"[13] The findings presented in this Article thus shed some light on the Court's approach in the immigration context.

The descriptive aim is to determine how often the Court adopts narrow constructions of penal statutes (relative to the positions advanced by the parties[14]) and what principles it considers when doing

11 The traditional view has been the lower courts are not bound by the Supreme Court's interpretive methodology as a matter of stare decisis. *See, e.g.*, Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, 1197 (2014) ("When the Supreme Court rules on matters of statutory interpretation, it does not establish 'methodological precedents.'"); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 389 (2005) ("[S]tare decisis effect attaches to the ultimate holding . . . but not to general methodological pronouncements, no matter how apparently firm."); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002) ("[T]he Justices do not seem to treat methodology as part of the holding [of a case]."). But scholars have recently observed that lower courts often follow the Supreme Court's interpretive methods. *See, e.g.*, Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 106, 145–48 (2020) (exposing how lower courts follow the Supreme Court's lead on methods of statutory interpretation); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1344–46 (2018) (reporting that some lower-court judges surveyed believe that they may be bound by at least some of the Court's interpretive methods).

12 *See* Zachary B. Pohlman, *State-Federal Borrowing in Statutory Interpretation*, 31 GEO. MASON L. REV. 839, 841 (2024) (observing how state courts often borrow statutory interpretation methodology and tools of interpretation, including substantive canons, from federal law decisions of the Supreme Court); *see also* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 705 (2016) (observing that states "routinely follow[] federal law even when adherence is not compelled[,] . . . as if federal law exerts a kind of gravitational pull on states" that "expands beyond courts—to legislatures, rulemakers, and even the people themselves").

13 Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Lee v. United States, 137 S. Ct. 1958, 1968 (2017)); *see also id.* (applying the same "exacting" void-for-vagueness standard to removal statutes that is applicable to criminal statutes because of the "'grave nature of deportation'—a 'drastic measure,' often amounting to lifelong 'banishment or exile'" (quoting Jordan v. De George, 341 U.S. 223, 231 (1951))).

14 As later explained, the label "narrow" conveys that the Court adopted a construction approximating the one sought by the party (usually the defendant) seeking the narrower of the readings presented by the parties. The label "broad" conveys the opposite. Those terms are not used in this Article to suggest more abstract notions of what constitutes a broad or narrow construction of a statute outside the context of the litigation.

so. The Article presents a number of findings related to that goal. At the most basic level, it shows that the Court adopted narrow constructions of penal statutes nearly twice as often as it adopted broad constructions. And the Court's preference for narrow constructions strengthened over time: most of the broad constructions were adopted in the first four Terms studied, while narrow constructions dominated later Terms.[15] Notably, that recent increase in the narrow-construction rate coincided with a recent rise in criminal-defense representation by experienced Supreme Court counsel.[16]

The Court's preference for narrow readings is consistent with several substantive canons of construction, which encapsulate nonlinguistic considerations that point toward a particular result, such as the rule of lenity and the avoidance of constitutional concerns. Yet, in more than two-thirds of the narrow-construction cases, the Court did not rely on substantive canons.[17] That finding runs counter to the traditional view among statutory interpretation scholars that substantive canons "wield significant power" over case outcomes.[18] But it aligns with more recent criticisms of substantive canons voiced by some scholars and current Justices.[19]

In most of the narrow-construction cases, the Court based its narrow reading only on the ordinary meaning of the particular statute's text without appealing to substantive canons. These statute-specific

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15 *See infra* subsection II.B.2.

16 *See infra* subsections II.B.2–3.

17 *See infra* subsection II.B.4.

18 Krishnakumar, *supra* note 4, at 827 (describing the "conventional wisdom" concerning substantive canons); *see also id.* at 829, 829–32 (providing empirical evidence of the use of substantive canons in the Roberts Court that "call[s] into doubt the conventional account").

19 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (noting that "strong-form" substantive canons "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning" (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123 (2010))); West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (characterizing certain substantive canons as "get-out-of-text-free cards"); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521 (2023) (arguing that substantive canons are incompatible with textualism); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2135–36, 2149–50 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (raising suspicions about substantive canons to the extent their application depends on an "ambiguity trigger," *id.* at 2149, which requires a judge to determine that the statutory language is ambiguous, rather than clear, before applying the canon); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 28 (Amy Gutmann ed., new ed. 2018) (characterizing substantive canons as "dice-loading rules" that pose "a lot of trouble" for "the honest textualist").

rationales are "ad hoc,"[20] in the sense that they do not provide generic principles of construction that can be widely applied in future cases involving other penal statutes. That is not to say that the Court's interpretive analysis in these cases was simplistic; to the contrary, it often involved sophisticated and resource-intensive analysis of dictionaries, statutory context, descriptive canons of interpretation, and other tools for determining linguistic meaning.[21] Most of the time, however, the Court's heavy reliance on ordinary-meaning analysis came at the expense of reliance on substantive canons[22] or any other distinct policy of interpretation that would consistently lean toward narrow constructions of penal statutes.

Even so, substantive canons that promote narrow constructions appear to have often played some role in the Court's decisionmaking process. Substantive canons were routinely included in party and amicus briefs, frequently raised during oral argument (often by a Justice), and occasionally explicated in concurring opinions. Yet, for whatever reason, a majority of the Court repeatedly purported to rest narrow constructions of penal statutes on ad hoc rationales. The Court typically took a passive approach to substantive canons raised in briefs or at argument—treating them as a mere afterthought,[23] explicitly relegating them to dicta,[24] or ignoring them altogether.[25] For example, the Court *never* firmly relied upon the rule of lenity—the substantive canon most often raised in the briefs and at argument—to justify a narrow construction over the entire ten-Term period.

The frequency with which substantive canons were raised may suggest that they did some persuasive work. Savvy Supreme Court litigators may have understood that raising these canons was worthwhile, even if the Court would be unlikely to employ them. That practice lends some credence to the longstanding notion that statutory

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20 *Cf.* Jeffries, *supra* note 8, at 199–200 ("[T]he construction of penal statutes no longer seems guided by any distinct policy of interpretation; it is essentially ad hoc."). Although I have taken the term "ad hoc" from Jeffries to describe an approach to construing penal statutes, I am not using the term in exactly the same way.

21 *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1564–73 (2023); Bittner v. United States, 143 S. Ct. 713, 719–24 (2023); Wooden v. United States, 142 S. Ct. 1063, 1069–74 (2022); Van Buren v. United States, 141 S. Ct. 1648, 1654–60 (2021).

22 *See infra* subsection II.C.2.

23 *See, e.g.*, Burrage v. United States, 571 U.S. 204, 216 (2014) (noting lenity in passing after justifying a narrow construction with ordinary-meaning analysis); McDonnell v. United States, 579 U.S. 550, 574–76 (2016) (invoking vagueness avoidance to corroborate a conclusion already reached).

24 *See, e.g.*, *Van Buren*, 141 S. Ct. at 1661–62 (invoking lenity and vagueness avoidance but disclaiming reliance on them).

25 See the eleven cases in Table 2, *infra*, in which a substantive canon was raised in briefs or during oral argument but not invoked in a majority or plurality opinion.

interpretation arguments are more persuasive when built as "*cable*[*s*]" than as "*chains*."[26] A cable weaves together many threads, producing from multiple modalities a "cumulative strength."[27] A chain relies on only one modality, making it "no stronger than its weakest link."[28] As the Court has become increasingly committed to textualist methodology, its stated reasoning in statutory interpretation cases has become more chain-like—relying more heavily and exclusively on textualist tools that determinate semantic meaning.[29] The findings in this Article provide some reason to think that litigants have remained cable-like in their approach,[30] and that cable-like briefs may be good practice even when the Court is producing chain-like opinions.[31]

The Court's preference for ad hoc constructions may be motivated by textualist commitments that view substantive canons as inescapably judge made and policy driven.[32] The ad hoc approach may be thought to be more consistent with the rule of law values on which textualism is based.[33] It is also possible that the Court's preference for ad hoc constructions is a function of its composition: efforts to rely on substantive canons may ultimately be softened to retain the votes needed to hold together a majority, resulting in the pervasive passive approach to substantive canons in majority opinions.[34] Another possible explanation is that the Justices prefer an ad hoc approach—instead of widely applicable substantive canons—because it maximizes interpretive discretion in future cases involving penal statutes.[35]

Whatever the reason for it, the Court's ad hoc approach in narrow-construction cases has consequences. It usually satisfies the party that argued for the narrow reading. Often, it means *lenity in fact*: a

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26 William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 351, 350–52 (1990) (emphasis added).

27 *Id.* at 351.

28 *Id.*

29 *See* Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59, 63 (2024); Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 433 (2019) (observing that reliance on text alone has "displace[d]" use of other sources).

30 *Cf.* Bruhl, *supra* note 29, at 88 (showing that, even in the age of textualism, Supreme Court litigators continue to include legislative history arguments in their briefs).

31 *See infra* Section III.C.

32 *See infra* Section III.A.

33 *See, e.g.*, Scalia, *supra* note 19, at 23–25 (justifying textualism with rule of law values); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 555 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (noting that Justice Scalia's advocacy for canons "is dominated" by a concern for "[c]ontinuity[,] . . . a rule of law value"); *see also supra* note 19 and accompanying text.

34 *See infra* Section III.C.

35 *See infra* Section III.D.

conviction is vacated because the narrowly construed statute does not cover the facts in the record. And because the narrow construction limits future applications of the statute, interest groups that file amicus briefs are also likely satisfied to the extent they are focused on the particular statute's domain.[36] Commentary and news coverage of the decisions thus often describe these ad hoc outcomes as victories for defendants.[37]

That is undoubtedly true on one level. The class of defendants affected by a statute shrinks when the Court adopts a narrow reading. But on a larger scale, the gap between the Court's preference for narrow constructions and its distaste for substantive canons that would consistently yield those results has large-scale ramifications. Taken together, these consequences seem to perpetuate the enactment, enforcement, and interpretation of penal statutes in an excessively broad and indeterminate manner—in a way that systematically increases discretion for various actors who administer criminal law.[38] Somewhat ironically, then, the ad hoc approach the Court advances in the name of a rule-based textualism may ultimately work to undermine the rule of law.

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36 In *Van Buren*, for example, the Court narrowly construed a provision of the Computer Fraud and Abuse Act. *See* Van Buren v. United States, 141 S. Ct. 1648, 1662 (2021). Several computer research interest groups had filed amicus briefs advocating for a narrow construction that would remove their activities from the statute's scope. *See* Brief of Amici Curiae Computer Security Researchers et al. in Support of Petitioner at 5, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Brief of *Amici Curiae* Kyratso Karahalios et al. in Support of Petitioner at 21, *Van Buren*, 141 S. Ct. 1648 (No. 19-783); Brief of Amicus Curiae The Markup in Support of Petitioner at 4, *Van Buren*, 141 S. Ct. 1648 (No. 19-783). Following the decision, individuals in the field called it "a win for cybersecurity researchers." Andrea Vittorio, *Justices Side with Police Officer in Anti-Hacking Law Test*, BLOOMBERG LAW (June 3, 2021, 3:51 PM EDT), https://news.bloomberglaw.com/privacy-and-data-security/justices-side-with-police-officer-in-test-of-anti-hacking-law [https://perma.cc/R2KD-MNTL] (attributing the remark to Tarah Wheeler, a cyber fellow at Harvard University).

37 *See, e.g.*, Katherine Fung, *Supreme Court Unanimously Sides with Criminal Defendants*, NEWSWEEK (June 18, 2023, 4:50 PM EDT), https://www.newsweek.com/supreme-court-unanimously-sides-criminal-defendants-1807274 [https://perma.cc/MAN9-H5Q4] (describing the Court's narrow-construction decision as "good news [for] criminal defendants"); James Romoser, *The Other Supreme Court Ruling with Big Repercussions for U.S. Health Care*, SCOTUSBLOG (Oct. 24, 2022, 7:00 PM), https://www.scotusblog.com/2022/10/the-other-supreme-court-ruling-with-big-repercussions-for-u-s-health-care/ [https://perma.cc/6ZF5-D6JY] (noting that defendants could "take advantage" of the Court's narrow-construction decision); Jordan S. Rubin, *Divided High Court Sides with Defense on Repeat-Offender Law*, BLOOMBERG LAW (June 10, 2021, 3:55 PM EDT), https://news.bloomberglaw.com/us-law-week/split-court-sides-with-defense-in-gun-offender-penalty-case [https://perma.cc/NCW4-W9X8] (describing outcome of narrow-construction decision as a "benefit [to] defendants" (quoting Professor Leah Litman)).

38 *See infra* Part IV.

As an initial matter, the Court's ad hoc approach does little to deter legislatures from drafting open-ended penal statutes. When a narrow construction depends only on ordinary-meaning analysis, no message is sent to the legislature that open-ended statutory language poses widespread problems.[39] Statutes with such language create the conditions for courts to adopt broad constructions. And the Court's reluctance to endorse generic principles of narrow construction for penal statutes has the effect of granting significant interpretive discretion to lower courts. To the extent lower courts follow the Supreme Court's methodology,[40] the ad hoc approach grants them permission to adopt sweeping constructions, and it may in fact indirectly encourage that outcome.[41]

Examples of broad lower court constructions of penal statutes pervade the Federal Reporter,[42] with the result that the Supreme Court's correction of them "has become nearly an annual event."[43] In *Yates v. United States*, for example, the lower courts made quick work of the statutory interpretation question that ultimately produced several opinions from a fractured Supreme Court. In a single-page order, the district court applied the term "tangible object" in a provision of the Sarbanes-Oxley Act to the undersized fish that the defendant had caught and discarded, declining to limit that "broad" catch-all term to objects similar to the more specific terms "record" and "document" that preceded it in a statutory list.[44] The Eleventh Circuit affirmed, devoting only one paragraph to its conclusion that the plain and

39 *See infra* Section IV.A.

40 This Article assumes that lower courts often follow the Court's interpretive methods, either because they view them as binding or simply because they operate within a paradigm of statutory interpretation set by the Court's lead. *See supra* notes 11–12 and accompanying text.

41 *See infra* Section IV.B.

42 *See, e.g.*, United States v. Dawson, 64 F.4th 1227, 1235–37, 1239 (11th Cir. 2023) (adopting a broad construction based on plain language as informed by dictionaries and rejecting lenity); United States v. Fischer, 64 F.4th 329, 336, 336–37 (D.C. Cir. 2023), *vacated*, 144 S. Ct. 2176 (2024) (adopting broad construction based on "unambiguous . . . 'ordinary or natural meaning'" and dictionaries (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994))); United States v. Taylor, 44 F.4th 779, 788 (8th Cir. 2022) (adopting broad construction based on natural meaning and dictionaries); United States v. Lumbard, 706 F.3d 716, 723, 722–23 (6th Cir. 2013) (adopting broad construction based on the statute's "ordinary and natural meaning" as informed by dictionaries (quoting *In re* Carter, 553 F.3d 979, 986 (6th Cir. 2009))); United States v. Desposito, 704 F.3d 221, 226, 226–27 (2d Cir. 2013) (adopting a broad construction based on "ordinary meaning" and dictionaries).

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

44 United States v. Yates, No. 10-cr-66, 2011 WL 3444093, at *1 (M.D. Fla. Aug. 8, 2011), *aff'd*, 733 F.3d 1059 (11th Cir. 2013), *rev'd*, 574 U.S. 528 (2015); *see* 18 U.S.C. § 1519 (2018) (criminally prohibiting the "destroy[ing]" of "any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation).

ordinary meaning of the catch-all term "unambiguously applies to fish."[45] The Supreme Court reversed, adopting a narrower reading of "tangible object" that excluded fish.[46] In doing so—in stark contrast to the lower courts—a four-Justice plurality produced eighteen pages of statutory analysis that employed multiple descriptive canons of interpretation, considered the statute's structure and title, and looked to legislative history;[47] an opinion concurring in the judgment provided several additional pages of analysis that employed descriptive canons and considered the statute's title;[48] and a dissenting opinion produced eighteen more pages of sophisticated textual analysis that favored the opposite result.[49]

The Court's ad hoc approach also affects lawyers. It invites prosecutors to exercise their charging and plea-bargaining discretion to pursue broad theories of prosecution that sweep in conduct on the outer peripheries of a statute's text, increasing the risk of arbitrary and unfair enforcement of penal statutes that often carry significant penalties.[50] At the same time, the ad hoc approach burdens defense counsel by making *cheaper* narrow-construction arguments based on substantive canons less likely to succeed, often leaving costlier sophisticated ordinary-meaning arguments as the only viable option. That may not pose a problem for experienced Supreme Court defense counsel backed by elite law firms and other resource-rich institutions. But the added cost of building from scratch a sophisticated statute-specific ordinary-meaning argument is a heavy burden on defense lawyers in the lower courts, most of whom are public defenders or other appointed counsel with more limited resources.[51]

The Court's ad hoc approach may also increase police discretion under the Fourth Amendment, at least on the margins, by easing officers' ability to justify questionable searches or seizures with their own expansive constructions of predicate offenses; no firm principle of narrow construction impedes a showing that such readings are reasonable under the Court's interpretive regime. The ad hoc approach may thus play some role in facilitating "[l]aw by cop"[52] through on-the-street

45 *Yates*, 733 F.3d at 1064. Having found that the term was "unambiguous," the Eleventh Circuit concluded that the rule of lenity was inapplicable. *Id.*

46 *Yates*, 574 U.S. at 536.

47 *See id.* at 537–49 (plurality opinion) (Ginsburg, J.).

48 *See id.* at 549–52 (Alito, J., concurring in judgment).

49 *See id.* at 552–70 (Kagan, J., dissenting).

50 *See infra* Section IV.C.

51 *See infra* Section IV.D.

52 Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2074 (2015).

invention and enforcement of aggressively broad constructions of open-ended statutes.[53]

Consistent and explicit reliance on at least some of the substantive canons consistently raised by parties would be normatively preferable. If the Court were to take that approach, the substantive canons would work to inhibit unduly broad constructions of all penal statutes and to reduce the discretion of key actors who administer criminal law.

Importantly, this Article's normative preference for substantive canons derives not from the canons qua canons, but from their use as effective means of providing generic principles for narrowly construing penal statutes. The same result could be achieved through some other means. In recent Terms, for example, the Court has sometimes referred to a "tradition[]" of "exercis[ing] restraint" when construing penal statutes, without tying that tradition to a specific substantive canon.[54] Clear explication of that tradition as a doctrine to be followed by lower courts would serve the same function as a substantive canon.

The Article proceeds in four Parts. Part I provides a bit of background on textualism and substantive canons as relevant to penal statutes. Part II describes methods and presents findings concerning the Court's construction of penal statutes over the ten Terms studied. Part III offers some potential explanations for the Court's clear preference for ad hoc narrow constructions over those based on widely applicable substantive canons. And Part IV explores the downstream consequences of the Court's ad hoc approach for various actors who administer criminal law. The Article concludes by gesturing toward some prescriptions, encouraging courts to rely more often on substantive canons and advising lawyers to continue raising them, regardless whether they make their way into judicial opinions.

I. TEXTUALISM, SUBSTANTIVE CANONS, AND PENAL STATUTES

Modern textualism arose in response to purposivism, a competing methodology aimed at implementing the "spirit" of a legislative enactment.[55] Beginning in the 1980s, textualists—led by Justice Scalia and

53 *See infra* Section IV.E.

54 *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1572 (2023) (explaining that "[t]his Court has 'traditionally exercised restraint in assessing the reach of a federal criminal statute'" both "'out of deference to the prerogatives of Congress and . . . concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed'" (quoting Marinello v. United States, 138 S. Ct. 1101, 1109, 1106 (2018) (second alteration in original))).

55 Tara Leigh Grove, *The Supreme Court 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 272 (2020). Under a strong form of purposivism, textualists complained, a court could "alter even the clearest statutory text" to avoid results inconsistent with congressional intent or the perceived "policy of the legislation as a whole." John F. Manning,

Judge Easterbrook—promised an approach that "would be more faithful to the words actually used by the legislature" and that would "also better constrain the federal judiciary."[56] Textualism begins with the premise that because "Congress makes law only by formally enacting texts,"[57] courts are obligated to act as faithful agents, applying "valid statutes as they find them, rather than seeking to improve upon them in the course of giving them effect."[58] Textualist judges thus aim to show "fidelity to the text as it is written."[59]

Textualism is often justified on the basis of rule-of-law values.[60] A foundational premise of the rule of law is that those in authority should not be left to act upon "their own preferences, their own ideology, or their own individual sense of right and wrong."[61] It thus aims to prevent unfair surprise by "assur[ing] that the processes of government, rather than the predilections of the individual decision maker, govern."[62] By merely determining the ordinary meaning of a particular statute's text, the argument goes, a textualist court curbs its own potential to act according to its own predilections in an unfair or arbitrary manner.[63]

Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 11 (2001) (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940)).

56 Grove, *supra* note 55, at 271, 273.

57 Eidelson & Stephenson, *supra* note 19, at 523, 522–23 (describing the foundational premises of modern textualism); *see also* Scalia, *supra* note 19, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated."); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2208–11 (2017) (making a similar point).

58 Eidelson & Stephenson, *supra* note 19, at 523; *see* Scalia, *supra* note 19, at 20 ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which . . . .").

59 Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856 (2020).

60 *See supra* note 33 and accompanying text. In the context of penal statutes, the rule of law limits abuses of official discretion and ensures fair notice of what the law requires so that people can plan their lives accordingly. *See* PACKER, *supra* note 8, at 86, 84–86 (observing that the rule of law prevents "unfair surprise"); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181–82 (2d ed. 2008) (explaining how an ideal criminal law regime allows individuals "to predict and plan the future course of [their] lives within the coercive framework of the law" and "to foresee the times of the law's interference"); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213–14 (1979) ("[T]he law must be capable of being obeyed. . . . [I]t must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it." (emphasis omitted)).

61 Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008).

62 RONALD A. CASS, THE RULE OF LAW IN AMERICA 17 (2001).

63 *See, e.g.*, Scalia, *supra* note 19, at 25 (arguing that the formalism of textualism "is what makes a government a government of laws and not of men").

To determine the content of statutory text,[64] most modern textualists ask what a reasonable reader would understand its ordinary meaning to be.[65] In doing so, textualists rely on various tools, including dictionaries and canons of construction. Scholars divide canons into two basic categories: descriptive canons (sometimes called "linguistic" or "semantic" canons) and substantive canons (sometimes called "normative" canons).[66] Descriptive canons capture "generalizations about how particular linguistic constructions are used and understood by competent speakers of English."[67] Substantive canons capture "nonlinguistic considerations that weigh in favor of particular legal results."[68]

Substantive canons are often thought to "wield significant power" over case outcomes.[69] Yet they stand in some "tension" with textualism[70] and have thus been viewed with increasing suspicion in recent years.[71] As Justice Barrett explained in an article she wrote before becoming a judge, substantive canons "pose[] a significant problem of authority" when a court applies one of them "to strain statutory text," because the court is "us[ing] something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent."[72] Substantive canons are thus "at apparent odds with the central premise from which textualism proceeds."[73] Substantive canons are legitimate for the faithful-agent textualist, according to Justice Barrett, only when they are used merely "as tie breakers

64 *See* Eidelson & Stephenson, *supra* note 19, at 524 ("Sophisticated textualists appreciate that a text is just an assemblage of signs, and that talk of fidelity to 'the text itself' can thus only be a figure of speech; the real object of fidelity is some *content* that a text is used or understood to convey.").

65 *See id.*; Grove, *supra* note 2, at 1056–57 (highlighting dispute among commentators about whether "ordinary meaning" is an empirical concept or a legal concept).

66 Eidelson & Stephenson, *supra* note 19, at 516–17; Krishnakumar, *supra* note 4, at 833.

67 Eidelson & Stephenson, *supra* note 19, at 516; *see also* Krishnakumar, *supra* note 4, at 833 (observing that descriptive canons "focus on the text of the statute and encompass rules of syntax and grammar, 'whole act' rules about how different provisions of the same statute should be read in connection with each other . . . , and Latin maxims such as *expressio unius est exclusio alterius* and *noscitur a sociis*").

68 Eidelson & Stephenson, *supra* note 19, at 517; *see also* Krishnakumar, *supra* note 4, at 833 (observing that substantive canons "sometimes operate as tiebreakers, or thumbs on the scale").

69 Krishnakumar, *supra* note 4, at 827 (describing the "conventional wisdom" concerning substantive canons). *But see id.* at 829, 829–32 (providing empirical evidence of the use of substantive canons in the Roberts Court that "call[s] into doubt the conventional account").

70 Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

71 *See supra* note 19 and accompanying text.

72 Barrett, *supra* note 19, at 110, 121–24.

73 *Id.* at 110.

between equally plausible interpretations of a statute" arising from ambiguity in statutory language.[74]

Keeping the tension between modern textualism and substantive canons in mind, this Article examines the frequency with which substantive canons are invoked and relied upon in Supreme Court cases involving penal statutes. For purposes of the Article, the term "penal statute" refers to any statute that defines the conduct that subjects one to a civil or criminal penalty or that increases such a penalty. That category includes not only ordinary crime-definition statutes,[75] but also statutes that impose an increased term of imprisonment[76] or that render a noncitizen eligible for deportation.[77] The Article does not examine the Court's cases concerning only the scope of compensation or restitution that may arise as a result of a criminal conviction,[78] the

74 *Id.* at 123. In the tiebreaker scenario, Congress has effectively "delegated resolution of statutory ambiguity to the courts," and "it is no violation of the obligation of faithful agency for a court to exercise the discretion that Congress has given it." *Id.* Justice Barrett has further explained that the faithful-agent theory is more amenable to substantive canons that are "[c]onstitutionally inspired" because they "promot[e]" a "set of norms that have been sanctioned by a super-majority as higher law." *Id.* at 168.

75 *See, e.g.*, 18 U.S.C. § 1519 (2018) (criminally prohibiting the "destroy[ing]" of "any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation).

76 *See, e.g.*, 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2018) (imposing twenty-year mandatory minimum sentence on those who unlawfully distribute a Schedule I or II drug, when "death or serious bodily injury results from the use of such substance," *id.* § 841(b)(1)(A), (B), (C)).

Under the Sixth Amendment, statutes that impose an increased term of imprisonment are functionally part of the crime that must be proven to a jury beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" under the Sixth Amendment).

77 *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (2018) (rendering deportable any noncitizen convicted of an "aggravated felony" after entering the United States); *id.* § 1101(a)(43) (2018) (defining "aggravated felony").

As the Court has recently acknowledged, deportation is a "'particularly severe penalty,' which may be of greater concern" to the deportee "than 'any potential jail sentence.'" Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Lee v. United States, 137 S. Ct. 1958, 1968 (2017)); *cf. id.* (applying the same "exacting" void-for-vagueness standard to removal statutes that is applicable to criminal statutes because of the "'grave nature of deportation'—a 'drastic measure,' often amounting to lifelong 'banishment or exile'" (quoting Jordan v. De George, 341 U.S. 223, 231 (1951))).

78 *See, e.g.*, Lagos v. United States, 138 S. Ct. 1684, 1687, 1687–90 (2018) (construing provision of Mandatory Victims Restitution Act that requires certain convicted defendants to "reimburse the victim for . . . expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" (emphasis omitted) (quoting 18 U.S.C. § 3663(b)(4) (2012))). Unlike statutes that increase a term of imprisonment, compensation and restitution statutes need not be proven to the jury beyond a reasonable doubt under Sixth Amendment doctrine. *But see* Hester v. United

jurisdictional element of a statute,[79] or the degree of a court's discretion in reducing a sentence previously imposed.[80] Nor does the Article examine cases involving statutes concerning collateral review of convictions already imposed[81] or statutes that would traditionally trigger administrative law doctrines of deference to agency interpretations.[82]

A number of substantive canons could be relevant to the construction of penal statutes. But five particular canons repeatedly appear in Supreme Court litigation concerning the scope of penal statutes.[83] Those five canons, each of which consistently leans toward narrow readings of penal statutes, are as follows:

1. Lenity. Historically, the rule of lenity was a robust substantive canon for narrowly construing ambiguous penal statutes in the defendant's favor.[84] But under the modern formulation of the rule, only grievously ambiguous penal statutes are subject to it.[85] A statute contains a "grievous ambiguity" only if ambiguity remains after all other interpretive tools have been exhausted.[86] Notably, however, recent

States, 139 S. Ct. 509, 510–11 (2019) (Gorsuch, J., dissenting from denial of certiorari) (urging the Court to address whether *Apprendi* extends to restitution).

79 *See, e.g.*, Taylor v. United States, 579 U.S. 301, 305–10 (2016) (construing the commerce element of Hobbs Act robbery).

80 *See, e.g.*, Concepcion v. United States, 142 S. Ct. 2389, 2398–2401 (2022) (construing a provision of the First Step Act allowing district courts to exercise discretion to reduce a sentence previously imposed). Statutes that permit courts to exercise discretion to modify already-imposed sentences by reducing the penalty exceed the reach of the *Apprendi* doctrine and are outside the class of statutes to which the rule of lenity traditionally applies. *See* Bifulco v. United States, 447 U.S. 381, 387 (1980) (explaining that lenity applies to "interpretations of the substantive ambit of criminal prohibitions, [and] to the penalties they impose"). Anyone seeking relief under such a statute has already been found guilty beyond a reasonable doubt (or admitted culpability), was already subjected to punishment, and is seeking to benefit from Congress's post-sentencing largesse; their criminal liability or sentence cannot be increased by application of the statute.

81 *See, e.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1863 (2023) (holding that an incarcerated individual who has already filed one postconviction petition cannot file another to assert a previously unavailable claim of statutory innocence). Statutes that permit collateral review of convictions already imposed cannot increase an offender's already-imposed penalty. *See supra* note 80.

82 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (addressing whether the EPA had authority to impose caps, subject to penalty, on greenhouse gas emissions at a level that would force power plants to transition away from the use of coal to generate electricity).

83 *See infra* Section II.C.

84 *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 894 (2004) (noting that the robust historic rule of lenity required "identify[ing] all the plausible readings of the statute" and "select[ing] the narrowest interpretation within that set of plausible options").

85 Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016) (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998)).

86 *Muscarello*, 524 U.S. at 139, 138–39 (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

concurring opinions suggest that at least three current Justices favor reviving a more robust version of lenity.[87]

2. Constitutional avoidance. There are two main types of constitutional avoidance canons—the "unconstitutionality" canon and the "doubts" canon.[88] Under the unconstitutionality canon, if one construction would render a statute unconstitutional, a court should adopt any plausible construction that would save it.[89] Under the doubts canon, if one construction would raise serious constitutional questions, a court should adopt any plausible construction that would avoid those questions.[90] Both canons are triggered by ambiguity: a court will not consider avoidance unless it first determines that the statutory language can be fairly understood to have two or more discrete semantic meanings, one of which is unconstitutional or raises serious constitutional questions.[91] The canons "function[] as a means of choosing between" available alternatives.[92]

3. Vagueness avoidance. Vagueness avoidance refers to a particular species of constitutional avoidance that has special salience in the

87 Recently, Justice Gorsuch has advocated for a more muscular conception of the rule of lenity. *See* Bittner v. United States, 143 S. Ct. 713, 724–25 (2023) (opinion of Gorsuch, J.) (arguing for a conception of lenity more robust than the Court's modern formulation); Wooden v. United States, 142 S. Ct. 1063, 1083–86 (2022) (Gorsuch, J., concurring in judgment) (making a similar argument). Justice Sotomayor joined his concurring opinion in *Wooden*, 142 S. Ct. at 1079, and Justice Jackson joined him in *Bittner*, 143 S. Ct. at 717.

88 *See* John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997).

89 *Id.* at 1496 (quoting United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909)); *see* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (reasoning that the Judiciary Act of 1789 "must[] receive a construction, consistent with the constitution" and interpreting it to avoid violating Article III jurisdictional constraints).

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

91 *See, e.g.*, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) (explaining that "[t]he canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction'" (alteration in original) (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018))); *see also* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 933 (2016) (noting that "avoidance" is "thought to be legitimate only if the relevant source of law is ambiguous").

92 Clark v. Martinez, 543 U.S. 371, 385 (2005) (emphasis omitted) (first citing Almendarez-Torres v. United States, 523 U.S. 224, 237–38 (1998); and then citing *Del. & Hudson Co.*, 213 U.S. at 408).

context of penal statutes. A court engages in vagueness avoidance when it narrowly construes a statute to avoid constitutional concerns under the void-for-vagueness doctrine.[93] Vagueness avoidance is analytically distinct from ordinary constitutional avoidance insofar as it is triggered by *vagueness* in statutory language, rather than *ambiguity*.[94] Notably, however, the Court has not formally recognized vagueness avoidance as a distinct canon, even though it has frequently used it.[95] As a result, discussions of vagueness avoidance in briefs, at oral argument, and in the Court's opinions are not as precise as they otherwise might be;[96] they often highlight absurd applications that would result from broad constructions in addition to traditional vagueness concerns.[97] This study treats all such discussions of vagueness, breadth, and related concepts as variations of vagueness avoidance.

4. Federalism presumption. The federalism presumption is another constitutionally inspired canon. It counsels against construing ambiguity in a statute in a manner that would encroach upon traditional

93 *See* Skilling v. United States, 561 U.S. 358, 405 (2010) ("It has long been our practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." (citing Hooper v. California, 155 U.S. 648, 657 (1895))); *see, e.g.*, United States v. Williams, 553 U.S. 285, 306–07 (2008); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525–26 (1994); Chapman v. United States, 500 U.S. 453, 467–68 (1991); Parker v. Levy, 417 U.S. 733, 754–57 (1974); Scales v. United States, 367 U.S. 203, 223 (1961); United States v. Harriss, 347 U.S. 612, 620–24 (1954).

Vague language in a penal statute presents constitutional concerns under the void-for-vagueness doctrine because it does not sufficiently define the standard of conduct. *See* Johnson v. United States, 576 U.S. 591, 595 (2015). That undermines due process and the separation of powers by effectively delegating the legislative task of crime definition, thereby inviting arbitrary enforcement and failing to provide adequate notice. *See* United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

94 *See* Johnson, *supra* note 6, at 74. For a discussion of the distinction between ambiguity and vagueness, see *infra* text accompanying notes 227–33.

95 *See supra* note 93.

96 *See, e.g.*, Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (relying on "interpretive 'restraint'" akin to vagueness avoidance (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995))); Transcript of Oral Argument at 38–39, 42–43, 52, 62, 67–72, 80, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10); *Dubin*, 143 S. Ct. at 1572 (referring to vagueness concerns generally); Brief of the Nat'l Ass'n of Crim. Def. Laws. as *Amicus Curiae* in Support of Petitioner at 13–18, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783) (referring to vagueness concerns in connection with ordinary constitutional avoidance).

97 *See, e.g.*, *Van Buren*, 141 S. Ct. at 1661–62 (invoking "constitutional avoidance" when discussing how the "fallout" of a broad construction would render "millions of otherwise law-abiding citizens . . . criminals" and enable arbitrary enforcement); Brief for Petitioner at 32–42, *Dubin*, 143 S. Ct. 1557 (No. 22-10) (highlighting vagueness concerns in connection with ordinary constitutional avoidance and highlighting the broad sweep of the government's reading); *see also* Brennan-Marquez, *supra* note 6, at 656–65 (advocating for due process constraint on overbroad criminal laws).

areas of state law.[98] The federalism presumption is often articulated as a clear-statement rule, meaning that the statute is presumed not to intrude upon a traditional area of state law absent a clear statement from Congress to the contrary.[99]

5. Scienter presumption. Under the presumption in favor of scienter, a court will presume that the legislature intended to require a defendant to possess a culpable mental state with respect to each element of a statutory offense that "criminalize[s] otherwise innocent conduct" absent statutory evidence to the contrary.[100] The presumption applies even when Congress does not specify a mental state in the statutory text.[101] Although the Court has not explicitly formulated the presumption as a clear-statement rule, the presumption sometimes seems to function in that manner.[102]

II. THE SUPREME COURT'S CONSTRUCTION OF PENAL STATUTES

A. Methods

The findings and conclusions presented in this Part are based on a content analysis[103] of all merits decisions from the 2013 through 2022

98 *See, e.g.*, McNally v. United States, 483 U.S. 350, 360 (1987) (declining to construe open-ended language in federal fraud statutes in a broad manner that would enable federal prosecutors to "set[] standards of disclosure and good government for local and state officials").

99 *See* Cleveland v. United States, 531 U.S. 12, 24 (2000) (rejecting reading that would amount to "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (noting that "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the usual constitutional balance of federal and state powers (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985))); BFP v. Resol. Tr. Corp., 511 U.S. 531, 544 (1994) ("[W]hen the Federal Government . . . radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." (alterations in original) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540 (1947))); *see also* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401–02 (2010).

100 United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994); *see, e.g.*, Flores-Figueroa v. United States, 556 U.S. 646, 652–53 (2009).

101 *E.g.*, Staples v. United States, 511 U.S. 600, 605–06 (1994).

102 *See, e.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (noting that the scienter presumption "applies with equal or greater force" when a statute "includes a general scienter provision" and finding "no convincing reason" in the statute's text "to depart from" the presumption); *see also* Ruan v. United States, 142 S. Ct. 2370, 2377 (2022) (employing a similar analysis).

103 *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64 (2008) (defining "content analysis" as a method by which a "scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning").

Supreme Court Terms that resolved a question concerning the construction of a penal statute.

Those parameters yielded forty-three cases.[104] Of the penal statutes construed in those cases, sixteen (37.2%) concerned firearms;[105] twelve (27.9%) concerned white-collar crimes, such as fraud and bribery;[106] five (11.6%) concerned immigration;[107] and three (7.0%) concerned drugs.[108] The remaining seven (16.3%) concerned various other topics.[109]

That breakdown by type of penal statute substantially deviates from a federal database on the number of nationwide federal

104 United States v. Hansen, 143 S. Ct. 1932 (2023); Pugin v. Garland, 143 S. Ct. 1833 (2023); Percoco v. United States, 143 S. Ct. 1130 (2023); Lora v. United States, 143 S. Ct. 1713 (2023); Dubin v. United States, 143 S. Ct. 1557 (2023); Ciminelli v. United States, 143 S. Ct. 1121 (2023); Bittner v. United States, 143 S. Ct. 713 (2023); Wooden v. United States, 142 S. Ct. 1063 (2022); United States v. Taylor, 142 S. Ct. 2015 (2022); *Ruan*, 142 S. Ct. 2370; Van Buren v. United States, 141 S. Ct. 1648 (2021); Borden v. United States, 141 S. Ct. 1817 (2021); Shular v. United States, 140 S. Ct. 779 (2020); Kelly v. United States, 140 S. Ct. 1565 (2020); United States v. Stitt, 139 S. Ct. 399 (2018); Stokeling v. United States, 139 S. Ct. 544 (2019); *Rehaif*, 139 S. Ct. 2191; Quarles v. United States, 139 S. Ct. 1872 (2019); Marinello v. United States, 138 S. Ct. 1101 (2018); Shaw v. United States, 137 S. Ct. 462 (2016); Salman v. United States, 137 S. Ct. 420 (2016); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017); Dean v. United States, 137 S. Ct. 1170 (2017); Voisine v. United States, 579 U.S. 686 (2016); Ocasio v. United States, 578 U.S. 282 (2016); Nichols v. United States, 578 U.S. 104 (2016); McDonnell v. United States, 579 U.S. 550 (2016); Mathis v. United States, 579 U.S. 500 (2016); Luna Torres v. Lynch, 578 U.S. 452 (2016); Lockhart v. United States, 577 U.S. 347 (2016); Yates v. United States, 574 U.S. 528 (2015); Whitfield v. United States, 574 U.S. 265 (2015); Mellouli v. Lynch, 575 U.S. 798 (2015); McFadden v. United States, 576 U.S. 186 (2015); Henderson v. United States, 575 U.S. 622 (2015); Elonis v. United States, 575 U.S. 723 (2015); United States v. Castleman, 572 U.S. 157 (2014); United States v. Apel, 571 U.S. 359 (2014); Rosemond v. United States, 572 U.S. 65 (2014); Loughrin v. United States, 573 U.S. 351 (2014); Burrage v. United States, 571 U.S. 204 (2014); Bond v. United States, 572 U.S. 844 (2014); Abramski v. United States, 573 U.S. 169 (2014).

105 *Lora*, 143 S. Ct. at 1715–16; *Wooden*, 142 S. Ct. at 1067–68; *Taylor*, 142 S. Ct. at 2019; *Borden*, 141 S. Ct. at 1821; *Shular*, 140 S. Ct. at 782; *Stitt*, 139 S. Ct. at 404; *Stokeling*, 139 S. Ct. at 549; *Rehaif*, 139 S. Ct. at 2194; *Quarles*, 139 S. Ct. at 1875; *Dean*, 137 S. Ct. at 1174; *Voisine*, 579 U.S. at 688; *Mathis*, 579 U.S. at 503; *Henderson*, 575 U.S. at 624; *Castleman*, 572 U.S. at 159; *Rosemond*, 572 U.S. at 67; *Abramski*, 573 U.S. at 171–72.

106 *Percoco*, 143 S. Ct. at 1133; *Dubin*, 143 S. Ct. at 1563; *Ciminelli*, 143 S. Ct. at 1124; *Bittner*, 143 S. Ct. at 717; *Kelly*, 140 S. Ct. at 1568; *Marinello*, 138 S. Ct. at 1104; *Shaw*, 137 S. Ct. at 465; *Salman*, 137 S. Ct. at 423; *Ocasio*, 578 U.S. at 284; *McDonnell*, 579 U.S. at 555; *Yates*, 574 U.S. at 531; *Loughrin*, 573 U.S. at 353.

107 *Hansen*, 143 S. Ct. at 1937; *Pugin*, 143 S. Ct. at 1838; *Esquivel-Quintana*, 137 S. Ct. at 1567; *Luna Torres*, 578 U.S. at 454; *Mellouli*, 575 U.S. at 801.

108 *Ruan*, 142 S. Ct. at 2374–75; *McFadden*, 576 U.S. at 188; *Burrage*, 571 U.S. at 206.

109 *Van Buren*, 141 S. Ct. at 1652 (cybercrime); *Nichols*, 578 U.S. at 105 (sex-offender status); *Lockhart*, 577 U.S. at 349 (child pornography); *Whitfield*, 574 U.S. at 266 (bank robbery); *Elonis*, 575 U.S. at 726 (threats); *Apel*, 571 U.S. at 361 (unauthorized entry into military base); *Bond*, 572 U.S. at 848 (chemical weapons).

offenders by type of crime, which reflects that between 2015 and 2022, the two largest categories of federal offenders were immigration offenders and drug offenders.[110] Immigration offenders constituted 32.7% of all federal offenders, and drug offenders constituted 29.8% of the total.[111] By contrast, firearms offenders constituted only 11.1%, and categories associated with white-collar crime made up 10.9%.[112]

The weights of those four categories are more or less flipped in the forty-three cases reviewed. The overrepresentation of firearms-related statutes owes to the large number of cases involving provisions in the Armed Career Criminal Act[113] or Gun Control Act[114] that impose mandatory minimums, which have been a steady source of circuit splits prompting the Court's intervention.[115] White-collar penal statutes may be overrepresented because those statutes regulate socially beneficial domains, for which it is especially difficult for Congress to draw clear lines dividing permissible behavior from impermissible behavior.[116] The overrepresentation of the categories may also suggest the Court's special interest in the subject matter.

The review of each of the forty-three cases included an examination of all of the opinions, party briefs, amicus briefs, and oral argument transcripts. All told, the review covered 83 opinions,[117] 141 party briefs, 236 amicus briefs, and approximately 3,300 pages of oral

110 *See Interactive Data Analyzer*, U.S. SENT'G COMM'N, https://ida.ussc.gov/analytics/saw.dll?Dashboard [https://perma.cc/2YQS-93RP] (filtered for fiscal years 2015 through 2022).

111 *Id.* (combining the "Drug Possession" and "Drug Trafficking" categories).

112 *Id.* (combining the "Bribery/Corruption," "Fraud/Theft/Embezzlement," and "Tax" categories).

113 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 2185, 2185 (codified as amended at 18 U.S.C. § 924(e)).

114 Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1224 (codified as amended at 18 U.S.C. § 924(c)) (imposing increased penalties for gun use in a crime).

115 *See, e.g.*, Lora v. United States, 143 S. Ct. 1713, 1715–16 (2023); Wooden v. United States, 142 S. Ct. 1063, 1068 (2022); United States v. Taylor, 142 S. Ct. 2015, 2019–20, (2022); Borden v. United States, 141 S. Ct. 1817, 1823 (2021); Shular v. United States, 140 S. Ct. 779, 784 (2020); United States v. Stitt, 139 S. Ct. 399, 404–05 (2018); Quarles v. United States, 139 S. Ct. 1872, 1875–76 (2019); Mathis v. United States, 579 U.S. 500, 508 (2016); Rosemond v. United States, 572 U.S. 65, 69–70 (2014); *see also* Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 641–42 (2021) ("[T]he Roberts Court has had a special fondness for federal firearms crimes.").

116 *See* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385, 402 (1987) (observing that "[e]fforts to extirpate 'organized crime,' the assault on 'white-collar crime,' and the uses of criminal sanctions to achieve objectives of economic regulation, impose new and largely unprecedented burdens on the language of the criminal law," and that "[i]n many instances the criminal behavior sought to be deterred cannot be clearly and crisply stated").

117 The 83 total opinions comprise 43 majority or plurality opinions, 29 concurring opinions (including those concurring only in part), and 21 dissenting opinions.

argument transcripts. The primary goal was to determine how often the Court adopted a narrow construction of a penal statute relative to the competing positions advanced by the parties, and what principles of construction it considered when doing so.

Labeling a construction as "narrow" conveys that the Court adopted a construction approximating the one sought by the party (usually the defendant) seeking the narrower of the readings presented by the parties. Labeling a construction as "broad" conveys the opposite. Those terms are not used to suggest more abstract notions of what constitutes a broad or narrow construction of a statute outside the context of the litigation.

In determining the principles of construction considered, the focus was the extent to which the Court justified narrow constructions on the basis of substantive canons, rather than on mere ordinary-meaning analysis that relies on dictionaries, descriptive canons, and the like. Other factors relevant to the Court's decisionmaking were also considered.

Each case was examined along the following dimensions: (1) whether the Court adopted a broad or narrow construction; (2) the majority or plurality's stated rationale for a narrow construction; (3) whether the majority or plurality affirmatively invoked a substantive canon and, if so, whether it actually relied upon it; (4) whether concurring opinions discussed substantive canons; (5) whether party briefs employed substantive canons to support narrow constructions; (6) whether amicus briefs employed substantive canons to support narrow constructions; (7) whether a party or Justice invoked a substantive canon during oral argument in support of a narrow construction; (8) whether defense counsel was a specialist associated with an elite institution (e.g., large law firm or top law school); and (9) the type of penal statute at issue.

In recording the Court's invocations of substantive canons in majority or plurality opinions, only *affirmative* invocations were counted, excluding instances where the Court merely acknowledged that a litigant had raised a substantive canon only to reject the argument as unpersuasive.[118] A further distinction was made between instances when the Court definitively relied upon a substantive canon as part of its holding and those when it merely invoked a substantive canon—either as an afterthought or as corroboration for a conclusion already

118 *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (noting but quickly rejecting petitioner's lenity argument); Lockhart v. United States, 577 U.S. 347, 361 (2016) (noting but quickly rejecting petitioner's lenity argument); McFadden v. United States, 576 U.S. 186, 196–97 (2015) (noting but quickly rejecting petitioner's vagueness avoidance argument).

reached based on ordinary-meaning analysis.[119] Although the parties, amici, and Justices raised a number of substantive canons in the forty-three cases reviewed, they raised the five substantive canons identified in the preceding Part most often. Accordingly, canon-specific findings were made as to each of those canons.

* * *

Before presenting the findings, some caveats are warranted. The findings and conclusions presented are based on analysis of every case in which the Supreme Court construed a penal statute from the 2013 Term through the 2022 Term. The study is comprehensive insofar as it covers the entire set of cases meeting that description.

Because this study is comprehensive, there was no need to develop a larger sample that is representative of the entire set. The study evaluates the entire set of cases involving the construction of penal statutes over the ten-Term period. But the set itself is fairly small, as it comprises only forty-three cases. The date range could have been expanded to capture more cases. But doing so would have risked introducing outdated information into the study. The focus here is on how the current Court construes penal statutes. For every case within the set of cases studied, at least five of the current Justices were part of the decisionmaking process.

The analysis of the forty-three cases does not necessarily reflect past decisionmaking or predict future decisionmaking. But because the set of cases is complete, the analysis provides strong insights about the Court's approach to statutory construction over the ten Terms studied. The study might also provide some insights about what occurred before that time period and what might occur after it, though those insights are less strong than those about the period sampled.

More generally, it is difficult to draw firm conclusions based on the Court's behavior in merits cases across Terms. A selection effect stems from the Court's discretionary docket. It is inevitable that in different Terms the Court reviews different kinds of cases concerning statutes with different degrees of indeterminacy, and that the mix of cases in turn depends on decisions by parties, lower courts, and others. The findings presented here should thus be understood with that limitation in mind.

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119 *See, e.g.*, Burrage v. United States, 571 U.S. 204, 216 (2014) (noting lenity in passing after justifying narrow construction with ordinary-meaning analysis); McDonnell v. United States, 579 U.S. 550, 574–76 (2016) (invoking vagueness avoidance and federalism presumption only as corroboration for a conclusion already reached); Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021) (invoking lenity and vagueness avoidance but disclaiming reliance on them).

B. General Findings

In the forty-three cases reviewed, the Court adopted a narrow construction nearly twice as often as it adopted a broad construction. The Court narrowly construed the penal statute at issue on twenty-seven occasions,[120] and it broadly construed it on sixteen occasions.[121] In all but one of the narrow-construction cases, the defendant had sought that result.[122]

1. Subject Matter for Narrow and Broad Constructions

As Figure 1 shows, the Court's preference for narrow constructions held true across subject matters, and the preference was strongest in cases involving drug or white-collar statutes. Of the sixteen cases involving firearm statutes, the Court adopted a narrow construction in nine (56.3%).[123] Of the twelve cases involving white-collar crimes, the Court adopted narrow constructions in eight (66.7%).[124] Of the five cases involving immigration statutes, the Court adopted a narrow

120 *See* United States v. Hansen, 143 S. Ct. 1932, 1937 (2023); Percoco v. United States, 143 S. Ct. 1130, 1137 (2023); *Lora*, 143 S. Ct. at 1715; Dubin v. United States, 143 S. Ct. 1557, 1563 (2023); Ciminelli v. United States, 143 S. Ct. 1121, 1124 (2023); Bittner v. United States, 143 S. Ct. 713, 724 (2023); *Wooden*, 142 S. Ct. at 1074; *Taylor*, 142 S. Ct. at 2023; Ruan v. United States, 142 S. Ct. 2370, 2379 (2022); *Van Buren*, 141 S. Ct. at 1661; *Borden*, 141 S. Ct. at 1826; Kelly v. United States, 140 S. Ct. 1565, 1571 (2020); Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019); Marinello v. United States, 138 S. Ct. 1101, 1106 (2018); *Esquivel-Quintana*, 137 S. Ct. at 1572–73; Dean v. United States, 137 S. Ct. 1170, 1177 (2017); Nichols v. United States, 578 U.S. 104, 110 (2016); *McDonnell*, 579 U.S. at 567; *Mathis*, 579 U.S. at 509; Yates v. United States, 574 U.S. 528, 547–49 (2015); Mellouli v. Lynch, 575 U.S. 798, 812 (2015); *McFadden*, 576 U.S. at 197; Henderson v. United States, 575 U.S. 622, 631 (2015); Elonis v. United States, 575 U.S. 723, 740 (2015); *Rosemond*, 572 U.S. at 77; *Burrage*, 571 U.S. at 216; Bond v. United States, 572 U.S. 844, 866 (2014).

121 *See* Pugin v. Garland, 143 S. Ct. 1833, 1838 (2023); Shular v. United States, 140 S. Ct. 779, 782 (2020); United States v. Stitt, 139 S. Ct. 399, 405 (2018); Stokeling v. United States, 139 S. Ct. 544, 553 (2019); Quarles v. United States, 139 S. Ct. 1872, 1879 (2019); Shaw v. United States, 137 S. Ct. 462, 467 (2016); Salman v. United States, 137 S. Ct. 420, 427 (2016); Voisine v. United States, 579 U.S. 686, 692 (2016); Ocasio v. United States, 578 U.S. 282, 292 (2016); Luna Torres v. Lynch, 578 U.S. 452, 473 (2016); *Lockhart*, 577 U.S. at 361; Whitfield v. United States, 574 U.S. 265, 269 (2015); United States v. Castleman, 572 U.S. 157, 168 (2014); United States v. Apel, 571 U.S. 359, 372 (2014); Loughrin v. United States, 573 U.S. 351, 353 (2014); Abramski v. United States, 573 U.S. 169, 191 (2014).

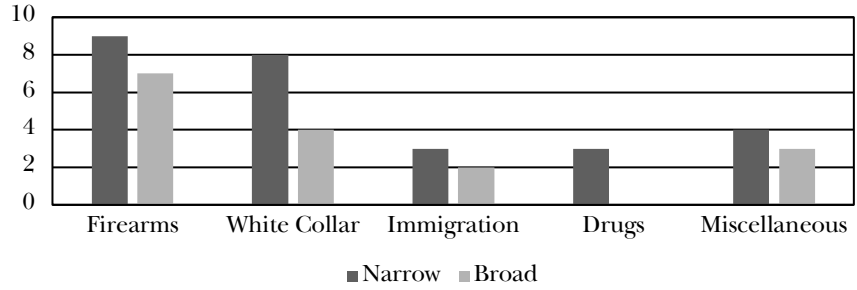
122 The only exception was *Hansen*, where the typical party positions were flipped. The defendant argued for a broad construction in service of a First Amendment overbreadth argument, placing the government in the unusual position of arguing for a narrow construction. *See* Brief for Respondent at 14–18, *Hansen*, 143 S. Ct. 1932 (No. 22-179). The Court adopted the narrow construction. *See Hansen*, 143 S. Ct. at 1937.

123 *Compare* cases cited *supra* note 105 *with* cases cited *supra* note 120.

124 *Compare* cases cited *supra* note 106 *with* cases cited *supra* note 120.

construction in three (60%).[125] And of the three cases involving drug statutes, the Court adopted narrow constructions of all three (100%).[126] The Court also adopted narrow constructions in four of the remaining seven cases involving miscellaneous statutes (57.1%).[127]

Figure 1: Subject Matter for Narrow/Broad Constructions



2. Narrow Versus Broad Constructions over Time

As Figure 2 shows, however, the ratio of outcomes was not evenly distributed across the ten Terms. Indeed, eleven of the sixteen broad constructions occurred during the first four Terms (OT 2013–OT 2016).[128] And only one broad construction occurred in the twelve cases from the three most recent Terms (OT 2020–OT 2022).[129] In fact, in the first seven Terms, narrow and broad constructions were nearly evenly split—sixteen narrow constructions to fifteen broad constructions.

125 *Compare* cases cited *supra* note 107 *with* cases cited *supra* note 120.

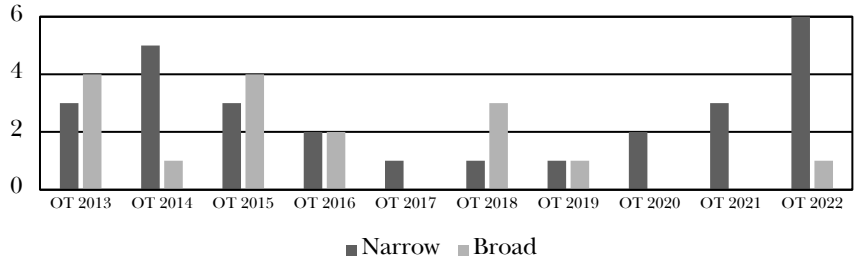
126 *Compare* cases cited *supra* note 108 *with* cases cited *supra* note 120.

127 *Compare* cases cited *supra* note 109 *with* cases cited *supra* note 120.

128 *See, e.g.*, Shaw v. United States, 137 S. Ct. 462, 467 (2016); Salman v. United States, 137 S. Ct. 420, 427 (2016); Voisine v. United States, 579 U.S. 686, 692 (2016); Ocasio v. United States, 578 U.S. 282, 292 (2016); Luna Torres v. Lynch, 578 U.S. 452, 473 (2016); Lockhart v. United States, 577 U.S. 347, 361 (2016); Whitfield v. United States, 574 U.S. 265, 269 (2015); United States v. Castleman, 572 U.S. 157, 168 (2014); United States v. Apel, 571 U.S. 359, 372 (2014); Loughrin v. United States, 573 U.S. 351, 353 (2014); Abramski v. United States, 573 U.S. 169, 191 (2014).

129 *See* Pugin v. Garland, 143 S. Ct. 1833, 1838 (2023).

Figure 2: Narrow/Broad Constructions over Time



The Court's changing personnel may be relevant to the recent tilt toward narrow constructions. The October 2017 Term was Justice Gorsuch's first full Term on the Court (replacing Justice Scalia).[130] Justice Kavanaugh joined the Court at the beginning of the October 2018 Term (replacing Justice Kennedy).[131] Justice Barrett joined the Court at the beginning of the October 2020 Term (replacing Justice Ginsburg).[132] And Justice Jackson joined the Court before the October 2022 Term (replacing Justice Breyer).[133]

3. Type of Defense Counsel

The type of counsel representing the defendants in these cases may also be relevant.

Scholars have previously observed that criminal defendants are frequently represented by lawyers without relevant Supreme Court experience, with one empirical study from 2016 finding that two-thirds of lawyers representing criminal defendants lacked any prior argument experience before the Court.[134] Although the forty-three cases reviewed here involved statutes that are penal (and not only criminal), thirty-eight of those cases involved criminal statutes.[135] The cases

130 *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/H5U3-M6K9].

131 *See id.*

132 *See id.*

133 *See id.*

134 *See* Andrew Manual Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 2008 (2016); *see also* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1493, 1493–97 (2020) (describing how "[c]riminal defendants . . . are on average represented by less experienced—and . . . sometimes less able—counsel in front of the Court when compared to the prosecution").

135 The five cases not involving criminal statutes are *Pugin v. Garland*, 143 S. Ct. 1833, 1838 (2023), *Bittner v. United States*, 143 S. Ct. 713, 715 (2023), *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567 (2017), *Luna Torres v. Lynch*, 578 U.S. 452, 454 (2016), and *Mellouli v. Lynch*, 575 U.S. 798, 801 (2015).

reviewed thus provide new data relevant to prior scholarship on who represents criminal defendants before the Court.

As a rough but imperfect proxy for detecting relevant Supreme Court expertise, defense counsel who presented oral argument in the forty-three cases reviewed can be divided into two categories: (1) specialist counsel, who are associated with an elite law firm, law school, or nonprofit organization with a practice specializing in Supreme Court litigation, and (2) nonspecialist counsel, who are associated with a federal public defender's office, small regional firm, or solo practice without a specialization in Supreme Court litigation. Specialist counsel typically have relevant experience either because they have previously argued before the Court or because they are part of a practice group with such experience.

Specialist counsel appeared on behalf of defendants in thirty-one of the forty-three (72.1%) cases reviewed.[136] Nonspecialist counsel

136 Docket (Mar. 27, 2023), United States v. Hansen, 143 S. Ct. 1932 (2023) (No. 22-179) (Esha Bhandari of the American Civil Liberties Union Foundation arguing for respondent); Docket (Apr. 17, 2023), *Pugin*, 143 S. Ct. 1833 (No. 22-23) (Martha Hutton of O'Melveny & Meyers LLP arguing for respondent Pugin and Mark C. Fleming of WilmerHale arguing for respondent Cordero-Garcia); Docket (Nov. 28, 2022), Percoco v. United States, 143 S. Ct. 1130 (2023) (No. 21-1158) (Jacob M. Roth of Jones Day arguing for petitioner); Docket (Mar. 28, 2023), Lora v. United States, 143 S. Ct. 1713 (2023) (No. 22-49) (Lawrence D. Rosenburg of Jones Day arguing for petitioner); Docket (Feb. 27, 2023), Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10) (Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic arguing for petitioner); Docket (Nov. 28, 2022), Ciminelli v. United States, 143 S. Ct. 1121 (2023) (No. 21-1170) (Michael R. Dreeben of O'Melveny & Myers LLP arguing for petitioner); Docket (Nov. 2, 2022), *Bittner*, 143 S. Ct. 713 (No. 21-1195) (Daniel L. Geyser of Haynes & Boone, LLP arguing for petitioner); Docket (Oct. 4, 2021), Wooden v. United States, 142 S. Ct. 1063 (2022) (No. 20-5279) (Allon Kedem of Arnold & Porter Kaye Scholer LLP arguing for petitioner); Docket (Dec. 7, 2021), United States v. Taylor, 142 S. Ct. 2015 (2022) (No. 20-1459) (Michael R. Dreeben of O'Melveny & Myers LLP arguing for respondent); Docket (Mar. 1, 2022), Ruan v. United States, 142 S. Ct. 2370 (2022) (Nos. 20-1410, 21-5261) (Lawrence S. Robbins of Kramer Levin Robbins Russell arguing for petitioner Ruan and Beau B. Brindley, a solo practitioner, arguing for petitioner Kahn); Docket (Nov. 30, 2020), Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783) (Jeffrey L. Fisher of Stanford Law School Supreme Court Litigation Clinic arguing for petitioner); Docket (Nov. 3, 2020), Borden v. United States, 141 S. Ct. 1817 (2021) (No. 19-5410) (Kannon K. Shanmugam of Paul, Weiss, Rifkind, Wharton & Garrison LLP arguing for petitioner); Docket (Jan. 14, 2020), Kelly v. United States, 140 S. Ct. 1565 (2020) (No. 18-1059) (Jacob M. Roth of Jones Day arguing for petitioner); Docket (Oct. 9, 2018), United States v. Stitt, 139 S. Ct. 399 (2018) (Nos. 17-765, 17-666) (Jeffrey L. Fisher of Stanford Law School Supreme Court Clinic arguing for respondents); Docket (Apr. 24, 2019), Quarles v. United States, 139 S. Ct. 1872 (2019) (No. 17-778) (Jeremy C. Marwell of Vinson & Elkins LLP arguing for petitioner); Docket (Dec. 6, 2017), Marinello v. United States, 138 S. Ct. 1101 (2018) (No. 16-1144) (Matthew S. Hellman of Jenner & Block LLP arguing for petitioner); Docket (Oct. 5, 2016), Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628) (Alexandra A.E. Shapiro of Shapiro Arato LLP arguing for petitioner); Docket (Feb. 27, 2017), *Esquivel-Quintana*, 137 S. Ct. 1562 (No.

appeared for defendants in the remaining twelve cases (27.9%),[137] though sometimes with assistance from a specialist institution.[138]

16-54) (Jeffrey L. Fisher of Stanford Law School Supreme Court Litigation Clinic arguing for petitioner); Docket (Oct. 6, 2015), Ocasio v. United States, 578 U.S. 282 (2016) (No. 14-361) (Ethan P. Davis of King & Spalding LLP arguing for petitioner); Docket (Apr. 27, 2016), McDonnell v. United States, 579 U.S. 550 (2016) (No. 15-474) (Noel J. Francisco of Jones Day arguing for petitioner); Docket (Apr. 26, 2016), Mathis v. United States, 579 U.S. 500 (2016) (No. 15-6092) (Mark C. Fleming of Wilmer Cutler Pickering Hale & Dorr, LLP arguing for petitioner); Docket (Jan. 14, 2015), *Mellouli*, 575 U.S. 798 (No. 13-1034) (Jon Laramore of Faegre Baker Daniels arguing for petitioner); Docket (Apr. 21, 2015), McFadden v. United States, 576 U.S. 186 (2015) (No. 14-378) (Kevin K. Russell of Goldstein & Russell, P.C. arguing for petitioner); Docket (Feb. 24, 2015), Henderson v. United States, 575 U.S. 622 (2015) (No. 13-1487) (Daniel R. Ortiz of the University of Virginia School of Law Supreme Court Litigation Clinic arguing for petitioner); Docket (Dec. 1, 2014), Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983) (John P. Elwood of Vinson & Elkins LLP arguing for petitioner); Docket (Jan. 15, 2014), United States v. Castleman, 572 U.S. 157 (2014) (No. 12-1371) (Charles A. Rothfeld of Mayer Brown LLP arguing for respondent); Docket (Dec. 4, 2013), United States v. Apel, 571 U.S. 359 (2014) (No. 12-1038) (Erwin Chemerinsky of University of California Irvine School of Law arguing for respondent); Docket (Nov. 12, 2013), Rosemond v. United States, 572 U.S. 65 (2014) (No. 12-895) (John P. Elwood of Vinson & Elkins LLP arguing for petitioner); Docket (Apr. 1, 2014), Loughrin v. United States, 573 U.S. 351 (2014) (No. 13-316) (Kevin K. Russell of Goldstein & Russell, P.C. arguing for petitioner); Docket (Nov. 5, 2013), Bond v. United States, 572 U.S. 844 (2014) (No. 12-158) (Paul D. Clement of Bancroft PLLC arguing for petitioner); Docket (Jan. 22, 2014), Abramski v. United States, 573 U.S. 169 (2014) (No. 12-1493) (Richard D. Dietz of Kilpatrick Townsend & Stockton, LLP arguing for petitioner).

137 Docket (Jan. 21, 2020), Shular v. United States, 140 S. Ct. 779 (2020) (No. 18-6662) (Richard M. Summa of the Federal Public Defender's office arguing for petitioner); Docket (Oct. 9, 2018), Stokeling v. United States, 139 S. Ct. 544 (2019) (No. 17-5554) (Brenda G. Bryn of the Federal Public Defender's office arguing for petitioner); Docket (Apr. 23, 2019), Rehaif v. United States, 139 S. Ct. 2191 (2019) (No. 17-9560) (Rosemary T. Cakmis of the Federal Public Defender's office arguing for petitioner); Docket (Oct. 4, 2016), Shaw v. United States, 137 S. Ct. 462 (2016) (No. 15-5991) (Koren L. Bell of the Federal Public Defender's office arguing for petitioner); Docket (Feb. 28, 2017), Dean v. United States, 137 S. Ct. 1170 (2017) (No. 15-9260) (Alan G. Stoler, solo practitioner, arguing for petitioner); Docket (Feb. 29, 2016), Voisine v. United States, 579 U.S. 686 (2016) (No. 14-10154) (Virginia G. Villa, solo practitioner, arguing for petitioner); Docket (Mar. 1, 2016), Nichols v. United States, 578 U.S. 104 (2016) (No. 15-5238) (Daniel T. Hansmeier of the Federal Public Defender's office arguing for petitioner); Docket (Nov. 3, 2015), *Luna Torres*, 578 U.S. 452 (No. 14-1096) (Matthew L. Guadagno, solo practitioner, arguing for petitioner); Docket (Nov. 3, 2015), Lockhart v. United States, 577 U.S. 347 (2016) (No. 14-8358) (Edward S. Zas of Federal Defenders of New York, Inc. arguing for petitioner); Docket (Nov. 5, 2014), Yates v. United States, 574 U.S. 528 (2015) (No. 13-7451) (John L. Badalamenti of the Federal Public Defender's office arguing for petitioner); Docket (Dec. 2, 2014), Whitfield v. United States, 574 U.S. 265 (2015) (No. 13-9026) (Joshua B. Carpenter of Federal Defenders of Western N.C., Inc. arguing for petitioner); Docket (Nov. 12, 2013), Burrage v. United States, 571 U.S. 204 (2014) (No. 12-7515) (Angela L. Campbell of Dickey & Campbell Law Firm, PLC arguing for petitioner).

138 In *Dean* and *Voisine*, the nonspecialist counsel presenting argument had assistance from specialist co-counsel. *See Dean*, 137 S. Ct. at 1174 (listing as co-counsel lawyers from Sidley Austin LLP and the Northwestern Supreme Court Practicum); Brief for Petitioners

Criminal-specific findings are similar. Excluding the five non-criminal cases from the set of forty-three cases, there were twenty-seven cases (71.1%) with specialist counsel[139] and eleven (28.9%) with non-specialist counsel.[140] Notably, twelve of the thirty-eight criminal cases involved statutes associated with white-collar crime,[141] and all but two of those cases (83.3%) had specialist counsel.[142] In the remaining twenty-six non-white-collar cases, specialist counsel was still featured almost twice as often as nonspecialist counsel—seventeen cases (65.4%) with specialist counsel and nine (34.6%) with nonspecialist counsel.[143] The breakdown of criminal cases suggests that, over the ten Terms studied, criminal defendants were represented before the Court by more experienced attorneys more often than they had been previously.[144]

In many of the cases with nonspecialist counsel, experienced Supreme Court litigators at specialist firms or institutions likely offered to provide *pro bono* representation but were refused for some reason.[145] Two likely exceptions, however, are the cases involving defendants accused or convicted under sex-offender statutes—*Lockhart* and *Nichols*—a category of defendants with which specialist institutions may be unwilling to associate.[146] Those cases were the only two in the entire set in which *no* amicus brief was filed, a strong indication that the institutions that typically file amicus briefs—and the *pro bono* departments of law firms who usually draft the briefs for them—are not willing to support sex-offender defendants.[147]

On the whole, the Court adopted narrow constructions much more often in cases with specialist counsel than it did in cases with nonspecialist counsel, a finding consistent with prior scholarship

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at 37, *Voisine*, 579 U.S. 686 (No. 14-10154) (listing as co-counsel lawyers from Sidley Austin LLP and the Northwestern University Supreme Court Practicum).

139 *See* cases cited *supra* note 136 (excluding *Pugin*, *Bittner*, *Esquivel-Quintana*, and *Mellouli*).

140 *See* cases cited *supra* note 137 (excluding *Luna Torres*).

141 *See* cases cited *supra* note 106.

142 *Compare* cases cited *supra* note 136, *with* cases cited *supra* note 106.

143 *Compare* cases cited *supra* notes 105, 107–09, *with* cases cited *supra* notes 136–37.

144 The penal statutes reviewed here do not constitute all of the Court's criminal cases over the ten-Term period. Other categories of criminal cases may more likely feature nonspecialist counsel. At a minimum, though, the new data presented here suggests that updated research on representation of criminal defendants before the Court is needed.

145 Epps & Ortman, *supra* note 134, at 1496 (noting that "many inexperienced lawyers representing criminal defendants seem unwilling to cede ground to more experienced counsel" and offering several "possible explanations").

146 This assertion is based on my own experiences as a Supreme Court and appellate litigator.

147 The National Association of Criminal Defense Lawyers filed an amicus brief in nearly all other cases studied. *See infra* Appendix.

suggesting that the level of an advocate's Supreme Court experience and expertise affects outcomes.[148] In specialist-counsel cases, the Court adopted a narrow construction 70.0% of the time (twenty-one of thirty cases).[149] In nonspecialist-counsel cases, it did so only 41.7% of time (five of twelve cases).[150]

In addition, as Figure 3 shows, the frequency of nonspecialist representation changed over time. Indeed, nine of the twelve cases with nonspecialist counsel occurred during the first four Terms (OT 2013–OT 2016). And nonspecialist counsel did not appear in any of the twelve cases from the three most recent Terms (OT 2020–OT 2022).[151] Over the first seven Terms, the division between types of counsel was much closer—nineteen cases with specialist counsel and twelve cases with nonspecialist counsel. The recent decrease in nonspecialist counsel closely aligns with the recent decrease in broad constructions of penal statutes.[152]

148 *See, e.g.*, Angela J. Campbell, *Newbs Lose, Experts Win: Video Games in the Supreme Court*, 95 NEB. L. REV. 965, 970 (2017) (observing that "Supreme Court specialists are more likely to obtain outcomes desired by their clients"); Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. 429, 451–52 (2016) (finding that the Justices are more likely to incorporate language from the briefs of top Supreme Court specialists); Adam Feldman, *Counting on Quality: The Effects of Merits Brief Quality on Supreme Court Decisions*, 94 DENV. L. REV. 43, 65 (2016) ("Increased attorney experience positively affects the amount of language opinions shared with merits briefs."); Joan Biskupic, Janet Roberts & John Shiffman, *At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM GMT), https://www.reuters.com/investigates/special-report/scotus/ [https://perma.cc/T3YC-8DSW] (finding that, from 2004 through 2012, "66 of the 17,000 lawyers who petitioned the Supreme Court succeeded at getting their clients' appeals heard" at a rate "six times" higher than "all others filed by private lawyers").

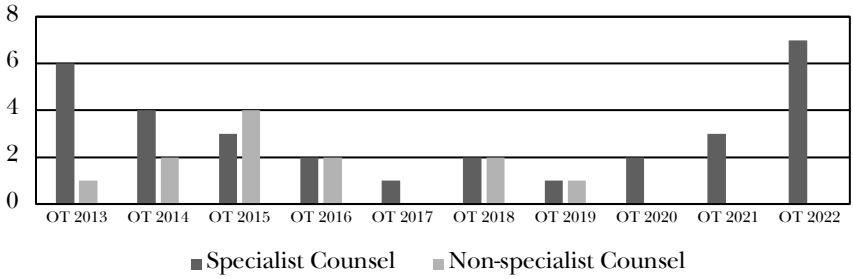
149 *Compare* cases cited *supra* note 136, *with* cases cited *supra* note 120. Thirty was used as the denominator here, because in one of the thirty-one cases with specialist defense counsel—*Hansen*—the defendant pursued a *broad* construction of the statute at issue. *See supra* note 122.

150 *Compare* cases cited *supra* note 137, *with* cases cited *supra* note 120.

151 *See supra* note 137 (listing no cases from OT 2020 through OT 2022).

152 *See supra* Figure 2.

Figure 3: Type of Counsel over Time



4. Substantive Canons in Narrow-Construction Cases

The remainder of the findings presented focus on the twenty-seven cases in which the Court adopted a narrow construction, with the aim of assessing the influence of substantive canons in those decisions.

Table 1 lists each of the twenty-seven narrow-construction cases. It shows that substantive canons were almost always invoked in briefs and often discussed at oral argument. In twenty-five of the twenty-seven cases, a party's brief raised at least one substantive canon as a basis for narrowly construing the penal statute. In twenty-two cases, at least one amicus brief did the same. And in twenty cases, at least one substantive canon was raised during oral argument.

Yet the Court's majority or plurality opinions in these twenty-seven cases tell a different story. The Court affirmatively invoked substantive canons in only fifteen of the twenty-seven majority or plurality opinions.[153] Specialist counsel represented the defendant in twelve of those cases; nonspecialist counsel represented the defendant in the other three.[154] The Court definitively relied upon a substantive canon as part

153 United States v. Hansen, 143 S. Ct. 1932, 1945–46 (2023); Percoco v. United States, 143 S. Ct. 1130, 1136–37 (2023); Dubin v. United States, 143 S. Ct. 1557, 1572 (2023); Ciminelli v. United States, 143 S. Ct. 1121, 1128 (2023); Ruan v. United States, 142 S. Ct. 2370, 2376–78 (2022); Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021); Kelly v. United States, 140 S. Ct. 1565, 1574 (2020); Rehaif v. United States, 139 S. Ct. 2191, 2195–97 (2019); Marinello v. United States, 138 S. Ct. 1101, 1108 (2018); McDonnell v. United States, 579 U.S. 550, 575–77 (2016); Mathis v. United States, 579 U.S. 500, 511–12 (2016); Elonis v. United States, 575 U.S. 723, 734–37 (2015); Yates v. United States, 574 U.S. 528, 547–48 (2015) (Ginsburg, J., plurality opinion); Bond v. United States, 572 U.S. 844, 855, 857–58, 863 (2014); Burrage v. United States, 571 U.S. 204, 216 (2014).

154 *Compare* cases cited *supra* note 153, *with* cases cited *supra* notes 136–37. Notably, one of the twelve cases with specialist counsel was *Hansen*, in which defense counsel argued for broad construction. *See supra* notes 122, 136. In that case, the Office of the Solicitor General—also specialist counsel—represented the government and argued for a narrow

of its holding in only eight of the twenty-seven cases.[155] Specialist counsel represented the defendant in seven of those cases; nonspecialist counsel did so in only one.[156]

In the nineteen narrow-construction cases in which the Court did not definitely rely on a substantive canon, the Court's narrow construction of the penal statutes can be described as "ad hoc." That is, the Court justified the narrow construction on the basis of the "ordinary meaning" of the particular statute's text—as informed by dictionaries, statutory context, and relevant descriptive canons[157]—thereby ignoring or significantly discounting the role of the substantive canons in its decisionmaking.[158]

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construction. *See* Docket (Mar. 27, 2023), *Hansen*, 143 S. Ct. 1932 (No. 22-179) (Deputy Solicitor General Brian H. Fletcher arguing for petitioner).

155 For case-by-case analysis distinguishing between instances in which the Court merely invoked a substantive canon and those in which it definitively relied upon it, see *infra* subsection II.C.2.

156 *Compare* subsection II.C.2, *with* cases cited *supra* notes 136–37.

157 The Court's reliance on descriptive canons in some of these cases does not make the approach any less ad hoc in the relevant sense. Because descriptive canons merely capture "generalizations about how particular linguistic constructions are used and understood by competent speakers of English," Eidelson & Stephenson, *supra* note 19, at 516, their application to a particular penal statute is still rooted in the particular statute's text; the aim is to determine the ordinary meaning of the arrangement of words. Substantive canons, by contrast, bring in some policy of interpretation external to the text that applies to a particular class of statutes. *See id.* at 517 (observing that substantive canons capture "nonlinguistic considerations that weigh in favor of particular legal results").

158 *See, e.g.*, *Burrage*, 571 U.S. at 210, 210–16 (narrow construction based on "ordinary meaning"); McFadden v. United States, 576 U.S. 186, 191–92 (2015) (narrow construction based on "natural reading," "ordinary meaning," and dictionaries); *Yates*, 574 U.S. at 537, 536–48 (Ginsburg, J., plurality opinion) (narrow construction based on "ordinary meaning" in context, dictionaries, and descriptive canons); *McDonnell*, 579 U.S. at 567–75 (narrow construction based on dictionaries, descriptive canon, and precedent); Nichols v. United States, 578 U.S. 104, 110, 109–10 (2016) (narrow construction based on "plain text"); Dean v. United States, 137 S. Ct. 1170, 1176 (2017) (rejecting broad construction "[a]t odds with the text"); Borden v. United States, 141 S. Ct. 1817, 1825–27 (2021) (narrow construction based on dictionaries and common usage) (Kagan, J., plurality opinion); *Van Buren*, 141 S. Ct. at 1655, 1654–62 (narrow construction based on "ordinary usage," dictionaries, and statutory context and structure); Wooden v. United States, 142 S. Ct. 1063, 1069, 1069–74 (2022) (narrow construction based on "ordinary meaning" and usage, dictionaries, and statutory history).

Table 1: Substantive Canons in Narrow-Construction Cases[159]

Case	Party Briefs	Amicus Briefs	Oral Argument	Invocation in Maj./Plur.	Reliance in Maj./Plur.
Bond v. United States	X	X	X	X	X
Burrage v. United States	X	X	X	X	-
Rosemond v. United States	X	-	-	-	-
Elonis v. United States	X	X	-	X	X
Henderson v. United States	X	X	X	-	-
McFadden v. United States	X	-	X	-	-
Mellouli v. Lynch	-	-	-	-	-
Yates v. United States	X	X	X	X	-
Mathis v. United States	X	X	-	X	X
McDonnell v. United States	X	X	X	X	-
Nichols v. United States	X	-	-	-	-
Dean v. United States	X	X	X	-	-
Esquivel-Quintana v. Sessions	-	X	X	-	-
Marinello v. United States	X	X	X	X	X
Rehaif v. United States	X	X	X	X	X
Kelly v. United States	X	X	X	X	X
Borden v. United States	X	X	X	-	-
Van Buren v. United States	X	X	X	X	-
Ruan v. United States	X	X	X	X	X
United States v. Taylor	X	X	X	-	-
Wooden v. United States	X	X	X	-	-
Bittner v. United States	X	X	X	-	-
Ciminelli v. United States	X	X	-	X	-
Dubin v. United States	X	X	X	X	-
Lora v. United States	X	-	X	-	-
Percoco v. United States	X	X	-	X	X
United States v. Hansen	X	X	X	X	-
TOTAL:	**25**	**22**	**20**	**15**	**8**

C. Canon-Specific Findings

This section looks closely at the use of specific canons in the narrow-construction cases, revealing significant variation. Although the Court used an ad hoc approach in more than two-thirds of the narrow-construction cases, it definitively relied upon a substantive canon in the remaining cases.[160] When it did so, that canon was usually vagueness avoidance (three times), the federalism presumption (three times), or the scienter presumption (three times).[161] By contrast, the Court *never* definitively relied upon the rule of lenity, and only once upon ordinary constitutional avoidance.[162]

Yet lenity was the canon most often raised in briefs or during oral argument—appearing in those materials in 77.8% (twenty-one of

159 For citations to relevant case materials for each of the cases listed, see *infra* Appendix.

160 *See supra* subsection II.B.4.

161 *See infra* Figure 4.

162 *See infra* Figure 4.

twenty-seven) of the narrow-construction cases.[163] Vagueness avoidance was raised in those materials 55.6% of the time (fifteen cases); ordinary constitutional avoidance was raised 48.1% of the time (thirteen cases); the federalism presumption was raised 33.3% of the time (nine cases); and the scienter presumption was raised 18.5% of the time (five cases).[164]

1. Specific Canons in Narrow-Construction Cases

Table 2 shows how often each of the five most commonly occurring substantive canons were invoked in the twenty-seven narrow-construction cases. It groups the invocation of the canons into two categories: (1) inputs, which are represented on the left side of each column by the variables "P" (party brief), "A" (amicus brief), and "O" (oral argument); and (2) outputs, which are represented on the right side of each column by the variable "M" (majority/plurality opinion) and "C" (concurring opinion).

The final row of Table 2 displays the total number of cases with input invocations on the left and with majority or plurality invocations on the right. Invocations appearing in concurring opinions are not included in the output total. The parenthetical shows the percentage of cases with input invocations accompanied by a majority or plurality opinion invocation—i.e., "hit rate."

163 *See infra* Table 2.
164 *See infra* Table 2.

Table 2: Specific Substantive Canons in Narrow-Construction Cases[165]

Case	Lenity		Vagueness Avoidance		Constitutional Avoidance		Federalism Presumption		Scienter Presumption	
Bond	- - -	- -	- - -	- -	P A O	M -	P A O	M -	- - -	- -
Burrage	P A -	M C	- A -	M -	- - -	- -	- - -	- -	P - O	- -
Rosemond	P - -	- -	- - -	- -	- - -	- -	- - -	- -	- - -	- -
Elonis	- - -	- -	- - -	- -	P - -	- -	- A -	- -	P - -	M -
Henderson	- - -	- -	- - -	- -	P A O	- -	- - -	- -	- - -	- -
McFadden	- - -	- -	P - O	- -	- - -	- -	- - -	- -	- - -	- -
Mellouli	- - -	- -	- - -	- -	- - -	- -	- - -	- -	- - -	- -
Yates	P A -	M -	P A O	- -	- - -	- -	- - -	- -	- - -	- -
Mathis	- - -	- -	- - -	- -	P A -	M C	- - -	- -	- - -	- -
McDonnell	- A -	- -	P A O	M -	P A -	M -	P A -	M -	- - -	- -
Nichols	P - -	- -	- - -	- -	- - -	- -	- - -	- -	- - -	- -
Dean	P A O	- -	- - -	- -	- - -	- -	- - -	- -	- - -	- -
Esquivel-Quintana	- A O	- -	- A -	- -	- - -	- -	- - -	- -	- - -	- -
Marinello	- A O	- -	- A O	M -	- - -	- -	- - -	- -	- - -	- -
Rehaif	P A -	- -	- - -	- -	P - -	- -	- - -	- -	P A O	M -
Kelly	P A -	- -	P A O	- -	- - -	- -	P A O	M -	- - -	- -
Borden	P A O	- -	- A O	- -	- - -	- -	- - -	- -	- - -	- -
Van Buren	P A O	M -	P A O	M -	P A O	- -	- A O	- -	- - -	- -
Ruan	- A -	- -	P A -	M -	- A -	- -	P - O	- -	P A O	M -
Taylor	P A -	- -	P A O	- -	- A -	- -	- - -	- -	- - -	- -
Wooden	P A O	- C	- - -	- -	- - -	- -	- - -	- -	- - -	- C
Bittner	P A O	- C	- - -	- -	- A -	- -	- - -	- -	- - -	- -
Ciminelli	P - -	- -	P A -	- -	- - -	- -	P A -	M -	- - -	- -
Dubin	P A O	- -	P A O	M -	- - -	- -	P - O	- -	- - -	- -
Lora	P - O	- -	- - -	- -	P - O	- -	- - -	- -	- - -	- -
Percoco	P - -	- -	P A -	M -	P A -	- -	P A -	- -	- - -	- -
Hansen	- A -	- -	- A -	- -	P A O	M -	- - -	- -	P - -	M -
TOTALS: (hit rate)	**21 / 3 (14.3%)**		**15 / 7 (46.7%)**		**13 / 4 (30.8%)**		**9 / 4 (44.4%)**		**5 / 4 (80%)**	

As Table 2 shows, the rule of lenity was included in case inputs in twenty-one of the twenty-seven cases, but it was affirmatively invoked in a majority or plurality opinion on only three of those occasions. That results in a hit rate of 14.3%. Lenity was also invoked in three concurring opinions.

Vagueness avoidance was included in case inputs for fifteen of the twenty-seven cases, and it was affirmatively invoked in a majority or plurality opinion on seven of those occasions. That results in a hit rate of 46.7%. No concurring opinion invoked vagueness avoidance.

Constitutional avoidance was included in case inputs for thirteen of the twenty-seven cases, but affirmatively invoked in a majority or plurality opinion on only four of those occasions. That results in a hit rate of 30.8%. Constitutional avoidance was also invoked in one concurring opinion.

165 For citations to the relevant case materials for each listed case, see *infra* Appendix.

The federalism presumption was included in case inputs for nine of the twenty-seven cases, and affirmatively invoked in a majority or plurality opinion on four of those occasions. That results in a hit rate of 44.4%. No concurring opinion invoked the federalism presumption.

The scienter presumption was included in case inputs for five of the twenty-seven cases, and affirmatively invoked in a majority or plurality opinion on only four of those occasions. That results in a hit rate of 80%, the highest of any of the five canons. The scienter presumption was also invoked in one concurring opinion (though not as a basis for deciding the particular case).[166]

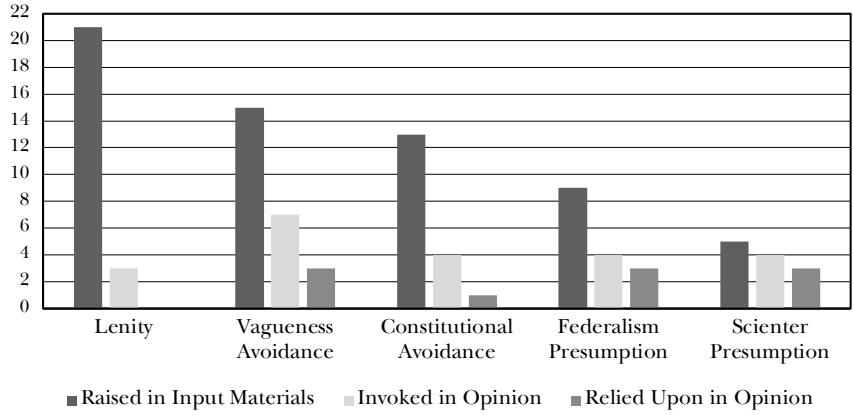
2. Depth of Reliance on Substantive Canons

As in Table 2, Figure 4 shows the total of number of cases in which a specific canon was raised in input materials relative to the number of those occasions when the Court affirmatively invoked the canon in the majority or plurality opinion. Figure 4 also adds a third metric—instances when the Court did not merely *invoke* the substantive canon, but also definitively *relied upon* it as a basis for adopting the narrow construction.

The data for that metric is based on case-by-case analysis of each case in which the Court invoked a substantive canon; a summary of that analysis follows Figure 4. As the figure shows, the Court definitively relied on the three most commonly raised canons—lenity, vagueness avoidance, and constitutional avoidances—far less often than it invoked those canons in majority or plurality opinions. The federalism presumption and the scienter presumption, by contrast, were definitively relied upon in most instances of invocation.

166 Justice Kavanaugh mentioned the scienter presumption in his concurrence in *Wooden* only as a way of arguing against a more robust rule of lenity; he did not suggest that it had any application in that particular case. *See* Wooden v. United States, 142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring).

Figure 4: Depth of Reliance on Substantive Canons



As Figure 4 reflects, the rule of lenity was raised in input materials in twenty-one of the twenty-seven cases in which the Court adopted a narrow construction of a penal statute. The Court affirmatively invoked lenity in the majority or plurality opinions of only three of the narrow-construction cases—*Burrage*, *Yates*, and *Van Buren*. But the Court did not definitively rely upon lenity in *any* of those cases; rather, its invocation of lenity amounted to mere afterthought or, at best, corroboration of a conclusion already reached.[167] Lenity thus had a 0%

167 In *Burrage*, Justice Scalia's majority opinion mentioned lenity only in passing. After seven pages of ordinary-meaning analysis to justify a narrow construction, he concluded by saying, "Especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." Burrage v. United States, 571 U.S. 204, 216, 209–16 (2014) (citing Moskal v. United States, 498 U.S. 103, 107–08 (1990)).

In *Yates*, Justice Ginsburg wrote a four-justice plurality opinion in which she invoked lenity, but only in a single paragraph, couched in the conditional tense, at the end of an eighteen-page opinion focused on the statute's text, descriptive canons, the statute's structure and title, and legislative history to resolve the ambiguity in the statute. Yates v. United States, 574 U.S. 528, 531–48 (2015) (Ginsburg, J., plurality opinion). Justice Alito provided the fifth vote in favor of the narrow construction, but his concurring opinion relied solely on "traditional" text-based "tools of statutory construction." *Id.* at 549 (Alito, J., concurring in judgment); *cf.* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

In *Van Buren*, the Court narrowly construed a penal statute. Writing for a six-justice majority, Justice Barrett mentioned lenity at the end of her analysis, but expressly disclaimed that it was in play because "the text, context, and structure" of the statute were sufficient. Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021).

rate of conversion (the rate at which case inputs raising a canon yielded definitive reliance in a majority or plurality opinion).[168]

Some variation of vagueness avoidance was raised in input materials in fifteen of the twenty-seven cases in which the Court adopted a narrow construction of a penal statute. The Court invoked vagueness avoidance in the majority or plurality opinion of seven of the cases—*Burrage*, *McDonnell*, *Marinello*, *Van Buren*, *Ruan*, *Dubin*, and *Percoco*. The Court definitively relied upon it in three of those seven cases.[169] The Court's invocation of vagueness avoidance in the remaining cases amounted to mere afterthought.[170] Vagueness avoidance thus had a 20% rate of conversion.

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168 A study of an earlier but slightly overlapping period—2005 through 2017—found that the Court applied lenity more frequently, but that study included instances in which lenity was used merely as "window dressing"—that is, merely "as a supplementary tool of persuasion" that "accompanie[d] other rationales on which the decision purportedly turns." Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 183 & n.24, 182–83 (2018) (quoting Gluck & Posner, *supra* note 11, at 1302, 1330); *see id.* at 185 (finding that, during the period studied, the Court "applied the lenity rule to narrow construction in about one-third of [the cases]").

169 In *Marinello*, the Court expressly "exercise[d]" what it called "interpretive 'restraint'" when narrowly construing a tax statute. Marinello v. United States, 138 S. Ct. 1101, 1108 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 600 (1995)). Writing for the majority, Justice Breyer rooted that narrow construction in a "concern that 'a fair warning should be given to the world in language that the common world will understand,'" one justification for the void-for-vagueness doctrine. *Id.* at 1106 (quoting *Aguilar*, 515 U.S. at 600); *see also* cases cited *supra* note 93.

In *Ruan*, the Court adopted a narrow construction, primarily on the basis of the scienter presumption. *See infra* note 175 and accompanying text. But Justice Breyer's opinion for the Court also observed that the "vague" regulatory language defining the terms of the statute also "support[ed]" narrowing the statute's scope with a strong scienter requirement. Ruan v. United States, 142 S. Ct. 2370, 2380 (2022).

In *Percoco*, the Court adopted a narrow construction, relying on the "teaching" of *Skilling v. United States*, an earlier case in which the Court employed vagueness avoidance to adopt a narrow construction of the same statute. *See* Percoco v. United States, 143 S. Ct. 1130, 1137, 1135–38 (2023) (noting that the narrow construction avoided a reading that gave the statute "an uncertain breadth that raises 'the due process concerns underlying the vagueness doctrine'" (quoting Skilling v. United States, 561 U.S. 358, 408 (2010))); *see also Skilling*, 561 U.S. at 405, 408–09.

170 In *Burrage*, Justice Scalia's majority opinion cited *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–90 (1921), a well-known void-for-vagueness decision, for the proposition that criminal laws must be "express[ed] . . . in terms ordinary persons can comprehend." *Burrage*, 571 U.S. at 218. But he did so only to rebut the government's policy-based argument for a broader reading, ultimately characterizing the discussion as "beside the point" and insisting that the Court was simply "apply[ing] the statute as it is written." *Id.*

In *Van Buren*, Justice Barrett's majority opinion explicitly disclaimed reliance on vagueness avoidance. *Van Buren*, 141 S. Ct. at 1661–62.

In *McDonnell*, writing for a unanimous Court, Chief Justice Roberts adopted a narrow construction based on dictionaries, descriptive canons, and precedent. McDonnell v. United States, 579 U.S. 550, 566–69, 671–72 (2016). Only after arriving at that conclusion

Ordinary constitutional avoidance was raised in input materials for thirteen of the twenty-seven cases in which the Court adopted a narrow construction of a penal statute. The Court invoked constitutional avoidance in the majority or plurality opinion of only four of the cases—*Bond*, *Mathis*, *McDonnell*, and *Hansen*. But the Court definitively relied upon constitutional avoidance in only one of those four cases.[171] Its invocation of constitutional avoidance in the remaining cases amounted to mere afterthought.[172] Constitutional avoidance thus had a 7.7% rate of conversion.

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did he note that the government's "expansive" reading "would raise significant constitutional concerns," including those related to vagueness. *Id.* at 574, 574–77 (observing that the "standardless sweep" of that reading would render the "outer boundaries" of federal bribery "shapeless," and that the "more constrained" construction the Court adopted "avoid[ed] this 'vagueness shoal,'" *id.* at 576–77 (first quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983); and then quoting *Skilling*, 561 U.S. at 368)).

In *Dubin*, writing for the majority, Justice Sotomayor adopted a "targeted reading" confined to the statute's "core," based on the statute's text and title, statutory context, and a descriptive canon. Dubin v. United States, 143 S. Ct. 1557, 1569, 1564–72 (2023). Only after justifying the narrow construction on those bases did she flag vagueness-like concerns presented by "the staggering breadth of the Government's reading," noting that the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute" and has "prudently avoided reading incongruous breadth into opaque language in criminal statutes" out of "'concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed.'" *Id.* at 1572 (alteration in original) (quoting *Marinello*, 138 S. Ct. at 1109, 1106). She explicitly diminished the significance of those concerns to the Court's holding, beginning the discussion with the prefatory statement, "[i]f more were needed" (beyond ordinary-meaning analysis), and making clear immediately thereafter that the Court was not holding that avoidance of those concerns was a "dispositive" basis for the narrow construction. *Id.* at 1572–73.

171 In *Mathis*, the Court definitively relied upon constitutional avoidance to justify a narrow construction, explaining that a contrary conclusion "would raise serious Sixth Amendment concerns." Mathis v. United States, 579 U.S. 500, 511 (2016).

172 In *McDonnell*, the Court's invocation of avoidance of a constitutional issue—political activity protected by the First Amendment—amounted to mere afterthought rather than definitive reliance. *See McDonnell*, 579 U.S. at 574–75 (noting, after arriving at the narrow construction, that the government's "expansive" reading "would raise significant constitutional concerns," including concerns that "citizens . . . might shrink from participating in democratic discourse").

In *Bond*, writing for the majority, Chief Justice Roberts narrowly construed a penal statute without relying on constitutional avoidance. *See* Bond v. United States, 572 U.S. 844, 848 (2014). He began by noting that the parties had argued over the constitutional issue, but the opinion proceeded to analyze the statute without expressing a view on the weighty constitutional issue it had flagged. *Id.* at 855.

In *Hansen*, the typical party positions were flipped. The defendant argued for a broad construction in order to challenge that construction on a First Amendment overbreadth ground. *See* United States v. Hansen, 143 S. Ct. 1932, 1948 (2023). The government was thus in the unusual position of arguing that the penal statute should be narrowly construed. *See, e.g.*, *id.* at 1941. In a majority opinion by Justice Barrett, the Court sided with the government, narrowly construing the terms "encourage" and "induce" based on sophisticated

The federalism presumption was raised in input materials for nine of the twenty-seven cases in which the Court narrowly construed a penal statute. The Court invoked the federalism presumption in the majority or plurality opinion of four of the cases—*Bond*, *McDonnell*, *Kelly*, and *Ciminelli*. The Court definitively relied upon the federalism presumption in three of those four cases.[173] It mentioned it as a mere afterthought in the remaining case.[174] The federalism presumption thus had a 33.3% rate of conversion.

The scienter presumption was raised in input materials for five of the twenty-seven cases in which the Court narrowly construed a penal statute. The Court invoked the scienter presumption in four of the cases—*Elonis*, *Rehaif*, *Ruan*, and *Hansen*. The Court definitively relied upon the scienter presumption in three of those four instances.[175] It

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textual analysis. *Id.* at 1940–44. Only after reaching that conclusion did the majority invoke constitutional avoidance—noting in the conditional tense that, "even if the [g]overnment's reading were not the best one," constitutional avoidance "would still counsel [the Court] to adopt it." *Id.* at 1946.

173 In both *Kelly* and *Ciminelli*, the Court definitively relied upon the federalism presumption to adopt narrow constructions of the federal fraud statutes. Kelly v. United States, 140 S. Ct. 1565, 1571–74 (2020); Ciminelli v. United States, 143 S. Ct. 1121, 1126, 1128 (2023). Writing for a unanimous Court in *Kelly*, Justice Kagan based that reading on the Court's earlier decisions and observed that "[i]f U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making [a regulatory choice], the result would be . . . 'a sweeping expansion of federal criminal jurisdiction,'" with the result that "the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking." *Kelly*, 140 S. Ct. at 1574 (quoting Cleveland v. United States, 531 U.S. 12, 24 (2000)). In *Ciminelli*, in an opinion by Justice Thomas, the Court rejected a broad theory of federal fraud, in part because it would have "ma[de] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction" of the federalism presumption. *Ciminelli*, 143 S. Ct. at 1128.

In *Bond*, the Court relied upon a clear-statement formulation of the federalism presumption to justify a narrow construction, explaining that a broad construction would have encompassed simple common law assault in that "it would 'dramatically intrude[] upon traditional state criminal jurisdiction.'" *Bond*, 572 U.S. at 857 (alteration in original) (quoting United States v. Bass, 404 U.S. 336, 350 (1971)); *see also id.* at 860 ("insist[ing] on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States").

174 In *McDonnell*, the Court used the federalism presumption merely as corroboration for a narrow construction already adopted on the basis of dictionaries, a descriptive canon of interpretation, and prior precedent. *McDonnell*, 579 U.S. at 567–77. The Court simply noted at the end of its analysis that a broad construction would "raise[] significant federalism concerns" and that "where a more limited interpretation . . . is supported by both text and precedent," it "decline[d] to 'construe the statute in a manner that . . . involve[d] the Federal Government in setting standards' of 'good government for local and state officials.'" *Id.* at 576–77 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

175 In *Elonis*, the Court definitively relied upon the scienter presumption when adopting a narrow construction, noting that courts "generally 'interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does

mentioned it as a mere afterthought in the remaining case.[176] The scienter presumption thus had a 60% rate of conversion.

D. Takeaways

As this Part has shown, in the forty-three instances in which the Court faced an issue of statutory construction of a penal statute over the ten Terms studied, the Court adopted a narrow construction nearly twice as often as it did a broad construction. And most of the broad constructions were adopted during the first four Terms of the period studied. Only one was adopted in the three most recent Terms, suggesting a trend toward narrowly construing penal statutes.

That rise in the narrow-construction rate may be related to a simultaneous increase in the rate of specialist defense counsel representing defendants.[177] Over the ten-Term period, specialist counsel represented defendants in thirty-one of the forty-three cases, while nonspecialist counsel represented them in twelve cases. But nine of those twelve cases with nonspecialist counsel occurred during the first four Terms. Nonspecialist counsel did not appear in any of the twelve cases from the three most recent Terms, and all but one of those cases

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not contain them,'" and that the scienter presumption "should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." Elonis v. United States, 575 U.S. 723, 734, 737 (2015) (alteration in original) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 72 (1994)).

In *Rehaif*, writing for a seven-Justice majority, Justice Breyer narrowly construed a penal statute, relying on the "longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct,'" which "applies with equal or greater force when Congress includes a general scienter provision in the statute itself." Rehaif v. United States, 139 S. Ct. 2191, 2195 (2019) (quoting *X-Citement Video*, 513 U.S. at 72).

In *Ruan*, in another majority opinion by Justice Breyer, the Court again applied the scienter presumption to adopt a narrow construction. Ruan v. United States, 142 S. Ct. 2370, 2377 (2022) ("[W]e normally 'start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state.'" (quoting *Rehaif*, 139 S. Ct. at 2195)). The Court again reiterated that "the presumption applies with equal or greater force" when a statute "*includes* a general scienter provision," and that application of the presumption helps to "separate wrongful from innocent acts." *Id.* (quoting *Rehaif*, 139 S. Ct. at 2195, 2197).

176 In *Hansen*, the Court mentioned the scienter presumption merely as an afterthought. After it adopted a narrow construction of the encourage-or-induce statute, *see supra* note 172 and accompanying text, the Court rejected the defendant's contention the statute should be broadly construed because it lacked "the necessary *mens rea*" to support the narrow construction, *Hansen*, 143 S. Ct. at 1944, 1944–45.

177 While the narrow-construction rate has some correlation with the increase in specialist counsel, no causal claim can be made because the dataset is too small to control for confounding variables.

in which the defendant sought a narrow construction[178] ended in that result. Overall, the Court adopted narrow constructions much more often in cases with specialist defense counsel (70.0% of the time) than it did in cases with nonspecialist counsel (41.7% of the time).

The Court's overall preference for narrow constructions is consistent with the five substantive canons studied, each of which points toward narrower readings of federal penal statutes. Yet, in more than two-thirds of the cases, the Court adopted a narrow construction without definitively relying on substantive canons of construction. When it did definitively rely on a substantive canon, that canon was usually vagueness avoidance, the federalism presumption, or the scienter presumption. By contrast, the Court *never* definitively relied upon the rule of lenity, and only once definitively relied upon ordinary constitutional avoidance.

For most narrow-construction cases, the relied-upon rationale was ad hoc. The Court based the narrow construction only on the ordinary meaning of the statute's text, as informed by dictionaries, statutory context, and descriptive canons.

Despite those purported ad hoc rationales, substantive canons appear to have often played a role in the decision-making process in these cases. In almost all of the narrow-construction cases, at least one—and usually multiple—substantive canons were invoked in party or amicus briefs. And in nearly three-fourths of the cases, at least one substantive canon was raised during oral argument,[179] often by a Justice.[180] The frequency with which substantive canons were raised may suggest that they did some persuasive work. Justices who signed on to majority opinions that expressed only ordinary-meaning analysis to justify narrow constructions may have been persuaded to reach that result because it aligned with the values reflected in the discussions of substantive canons included in the briefs or raised during oral arguments.[181]

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178 As noted, specialist defense counsel in *Hansen* sought a broad construction. *See supra* note 122 and accompanying text.

179 *See supra* Table 1.

180 *See, e.g.*, Transcript of Oral Argument at 36–37, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10) (Justice Alito raising lenity); *id.* at 39, 42–43 (Justice Sotomayor raising lenity and vagueness concerns); *id.* at 48, 52, 67–72 (Justice Gorsuch raising federalism and vagueness concerns); *id.* at 59, 62 (Justice Jackson raising lenity, federalism concerns, and vagueness concerns); Transcript of Oral Argument at 59–60, *Ruan*, 142 S. Ct. 2370 (Nos. 20-1410, 21-5261) (Justice Kavanaugh raising vagueness concerns); Transcript of Oral Argument at 23, Van Buren v. United States, 141 S. Ct. 1648 (2021) (No. 19-783) (Justice Gorsuch raising constitutional avoidance); *id.* at 40 (Justice Thomas raising lenity); *id.* at 48 (Justice Sotomayor raising vagueness concerns).

181 *Cf.* Bruhl, *supra* note 29, at 70 (noting that legislative history arguments in Supreme Court briefs "likely play[] a bigger role in decisions than the opinions reveal" because "[a] judge who finds textual clarity and then eschews recourse to legislative history may find the

Savvy Supreme Court litigators may have understood, even if only on a gut level, that something is to be gained by including in their briefs discussions of substantive canons that are unlikely to be employed in the majority opinion.

The practice of including substantive canons in briefs despite their low conversion rate is consistent with Eskridge and Frickey's influential claim that statutory interpretation arguments are more persuasive when they are built as *cables* than as *chains*.[182] Since the time in which Eskridge and Frickey were writing, the Court has become increasingly committed to textualist methodology. As a result, its stated reasoning in statutory interpretation cases has become more chain-like—for example, by relying more heavily and exclusively on textualist tools.[183] But there is reason to think that litigants have remained cable-like in their approach. For example, as Aaron-Andrew Bruhl has shown, even in the age of textualism, Supreme Court litigators continue to include legislative history arguments in their briefs.[184] This Article's findings suggest a similar phenomenon with respect to substantive canons in the context of penal statutes.

The three canons most commonly raised in briefs and during oral argument were the rule of lenity, vagueness avoidance, and ordinary constitutional avoidance. But none of those canons had a rate of conversion exceeding 20%. Despite the fact that the Court never definitively relied upon the rule of lenity, it was the substantive canon most frequently raised in briefs or during oral argument—making such an appearance in 77.8% of the narrow-construction cases. Vagueness avoidance was raised in 55.6% of the narrow-construction cases, with a conversion rate of 20%. Ordinary constitutional avoidance was raised in 48.1% of the cases, with a 7.7% conversion rate.

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text clear because of the context or comfort provided by evidence of text-conforming legislative intent").

182 Eskridge & Frickey, *supra* note 26, at 350–52. A cable weaves together many threads, producing from multiple modalities a "cumulative strength." *Id.* at 351. A chain relies on only one modality, making it "no stronger than its weakest link." *Id.* Eskridge and Frickey took this metaphor from Charles Sanders Peirce, who suggested that philosophy ought

> to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.

5 CHARLES SANDERS PEIRCE, *Some Consequences of Four Incapacities*, *in* COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 265 (Charles Hartshorne & Paul Weiss eds., 1934). Eskridge and Frickey used the metaphor primarily as a way to describe how the Court was engaging in statutory interpretation. But the article also made references to attorneys' practices. Eskridge & Frickey, *supra* note 26, at 321.

183 *See* Bruhl, *supra* note 29, at 63; Snyder, *supra* note 29, at 433 (observing that reliance on the text alone has "displace[d]" use of other sources).

184 *See* Bruhl, *supra* note 29, at 88.

The remaining two canons were raised far less often but had much higher conversion rates. The federalism presumption was raised in only 33.3% of the cases, with a conversion rate of 33.3%. The scienter presumption was raised in only 18.5% of the cases, but it had a 60% conversion rate.

III. SOME EXPLANATIONS FOR AD HOC CONSTRUCTIONS

As the last Part showed, the Court usually adopted narrow constructions of penal statutes during the ten-year period studied. And it usually justified those narrow constructions on an ad hoc basis—relying on statute-specific ordinary-meaning analysis at the exclusion of more widely applicable substantive canons, despite frequent invocation of those canons in briefs and oral argument. When the Court did definitively rely on a substantive canon, that canon was almost always vagueness avoidance, the federalism presumption, or the scienter presumption. This Part considers some potential explanations for these findings.

A. Tension with Textualism

The "tension" between textualism and substantive canons may help to explain the Court's preference for ad hoc constructions of penal statutes.[185] As textualism has risen in prominence in recent years,[186] substantive canons have been viewed with increasing suspicion[187] insofar as they are "at apparent odds with the central premise from which textualism proceeds."[188] That perceived dissonance may explain why the Court most often adopted ad hoc ordinary-meaning rationales to justify narrow constructions rather than employing substantive canons. Some of the Justices may view substantive canons as less legitimate than other tools of interpretation and may therefore be willing to rely upon them only if absolutely necessary.

Discussion surrounding the emergence of the administrative law major questions doctrine is illustrative.[189] Under that doctrine—which

185 Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

186 *See* Eskridge et al., *supra* note 1, at 1614.

187 *See supra* text accompanying note 19.

188 Barrett, *supra* note 19, at 110.

189 Earlier decisions showed hints of something like the major questions doctrine as a carve out to the *Chevron* framework. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477–78 (2021); *id.* at 484–85 (characterizing the major questions doctrine as a "linear descendent" of *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980)); *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (explaining that "extraordinary cases" may warrant "hesitat[ion] before concluding that Congress has intended . . . an implicit delegation" deserving of

the Court explicated in a series of recent cases—clear statutory authorization is required before the Court will conclude that Congress has delegated policymaking authority concerning "major" questions to an administrative agency.[190] Most commentators initially understood that newly articulated doctrine to be a substantive canon taking the form of a clear-statement rule.[191] But modern textualism's distaste for substantive canons quickly birthed efforts to justify the major questions doctrine as a descriptive canon.[192] Most prominently, in *Biden v. Nebraska*,[193] Justice Barrett argued in a concurring opinion that the major questions doctrine could be understood as a "tool for discerning—not departing from—the text's most natural interpretation" by "situat[ing]" the "text in [a] context" of "common sense" that avoids "literalism."[194] The "expectation of clarity" required by the doctrine, she continued, follows from "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[195] That reflects "our constitutional structure," Justice Barrett explained, "which is itself part of the [relevant] legal context" for determining ordinary meaning.[196]

Regardless of the merits of that conception of the doctrine, the effort to justify the major questions doctrine as a descriptive canon is itself reflective of a deeper suspicion among certain textualists of substantive canons, including those traditionally used in service of narrow

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deference). Recently, however, the Court "unhitched the major questions exception from *Chevron*." Mila Sohoni, *The Supreme Court 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022).

190 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

191 *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1035 (2023); Sohoni, *supra* note 189, at 309; *see also* Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1166 (2024) (noting that "the vast majority of commentators" understood the newly articulated major questions doctrine as a clear-statement rule).

192 *See, e.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916, 949–64 (2024) (citing Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527 (2018)) (relying on philosophical literature to argue that the major questions doctrine rests on norms of linguistic usage concerning how uncertainty is dealt with in "high-stakes" contexts, arguing that "interpreters tend to expect clarity[] when . . . lawmakers or parties authorize others to make important decisions on their behalf," *id.* at 916–17).

193 Biden v. Nebraska, 143 S. Ct. 2355 (2023).

194 *Id.* at 2376, 2378–79 (Barrett, J., concurring); *see also id.* at 2376 (noting that a substantive-canon conception of the major questions doctrine might be "inconsistent with textualism").

195 *Id.* at 2380 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

196 *Id.*; *see also id.* at 2380–81 (elaborating that "in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on 'important subjects'" instead of "pawning them off to another branch" (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825))).

constructions of penal statutes. It may also point toward a viable path for reconceptualizing and reinvigorating penal statute canons such as lenity.[197]

B. Differences in How Substantive Canons Operate

Yet general textualist suspicion of substantive canons does not fully explain the canon-specific findings in Part I, which show that the Court is more likely to rely on some canons than others when narrowly construing penal statutes. One way to make sense of those canon-specific findings is to focus on differences in how the substantive canons operate in application. In particular, distinguishing between substantive canons triggered by ambiguity—lenity and constitutional avoidance—and the remaining canons does much to explain which canons the Court more often definitively relied upon.

1. Canons with an Ambiguity Trigger

As already noted, faithful-agent textualists, such as Justice Barrett, view substantive canons as legitimate when they are used merely to "break[] a tie between equally plausible interpretations of a statute" arising from ambiguity in statutory language.[198] An implication of that view is that substantive canons triggered by ambiguity should typically be used sparingly. For the faithful-agent textualist, reliance on one of these substantive canons is permitted *only after* other interpretive tools have been applied. That modest conception comports with the modern formulations of constitutional avoidance and the rule of lenity.[199]

Although lenity has a significant historical pedigree as a robust substantive canon for narrowly construing penal statutes,[200] courts and legislatures have deliberately weakened it over the last century and a

197 *See generally* Joel S. Johnson, *Major-Questions Lenity* (Nov. 11, 2024) (unpublished manuscript), https://ssrn.com/abstract=5016739 [https://perma.cc/E5GB-C6HN] (arguing that the emergence of a new major questions doctrine presents an opportunity to restore a more robust historic conception of lenity either as a substantive or a descriptive canon).

198 *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

199 *See, e.g.*, Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1833 (2022) (explaining that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction" (alteration in original) (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018))); Muscarello v. United States, 524 U.S. 125, 139 (1998) (limiting application of lenity to instances in which "grievous ambiguity" remains following the use of all other interpretative tools (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994))).

200 *See* Price, *supra* note 84, at 894 (explaining that, under a more robust historical formulation of the rule of lenity, courts were "to identify all the plausible readings of the statute" and then "select the narrowest interpretation within that set of plausible options").

half,[201] viewing the more robust historical version of lenity as a form of judicial activism inconsistent with the modern methodological commitment to implementing the legislative will.[202] Ever since Justice Frankfurter joined the Supreme Court in 1939, a majority of the Court has held a diminished view of lenity, with the result that federal courts may invoke it only after trying to resolve ambiguity by looking to a statute's "text, structure, purpose, and legislative history."[203] The modern Court has gone further, suggesting that application of lenity is limited to instances in which "grievous ambiguity" remains following the use of all other interpretative tools.[204] Because lenity is now "[r]ank[ed] . . . 'last' among interpretive conventions," as Dan Kahan has noted, it has become essentially "irrelevan[t]" to the Court's analysis.[205]

The lenity-specific analysis in Part II seems to confirm as much. The Court did not definitively rely upon lenity in any of the narrow-construction cases, even though it was raised in briefs or during oral argument in virtually all of them.[206] The frequency with which lenity is raised may suggest that parties and amici believe that it has some salience with at least some members of the Court, even if it is unlikely to

201 Starting in the mid-nineteenth century, attitudes at both the state and federal levels began to shift away from the more robust historic version of lenity. *See* Johnson, *supra* note 9, at 1580–83. Many state legislatures passed statutes expressly abrogating the rule of lenity, *see* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 752–53, 753 nn.26–27, 754 nn.28–29 (1935), because it had become "viewed as an impediment to efforts to implement criminal policy through legislation," Johnson, *supra* note 9, at 1580. At the federal level, as statutes became more complex—and as the regulatory state began taking shape—around the turn of the twentieth century, "courts became more comfortable looking to a broader range of materials, including legislative history, to determine legislative intent." *Id.* at 1582.

202 By the New Deal period, commentators were characterizing the rule of lenity as judicial "casuistry" that undermined legislative intent. *See, e.g.*, JOHN BARKER WAITE, CRIMINAL LAW IN ACTION 16, 320 (1934); *see also* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1203 (2013).

203 Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 717 (2017); *see* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943); *see also* United States v. Davis, 139 S. Ct. 2319, 2333 (2019); United States v. Castleman, 572 U.S. 157, 172–73 (2014); *Muscarello*, 524 U.S. at 138–39; Moskal v. United States, 498 U.S. 103, 108 (1990); United States v. Brown, 333 U.S 18, 25–26 (1948) (making clear that lenity would not trump "common sense" or "evident statutory purpose," *id.* at 25); United States v. Gaskin, 320 U.S. 527, 529–30 (1944) (noting that lenity had no weight when its application would cause "distortion or nullification of the evident meaning and purpose of the legislation," *id.* at 530).

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

205 Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386; *see* Hessick & Hessick, *supra* note 6, at 2339 (characterizing modern lenity as a "hollow shell of its historic ancestors" that "rarely affects the interpretation of criminal statutes"); *see also* Price, *supra* note 84, at 885 (suggesting that lenity "has lately fallen out of favor").

206 *See supra* Table 2.

be featured in a majority opinion.[207] That belief appears to be founded. In the two most recent Terms studied, in two separate concurring opinions—one in *Wooden* and one in *Bittner*—Justice Gorsuch advocated for a more muscular conception of the rule of lenity.[208] Justice Sotomayor joined his concurring opinion in *Wooden*, and Justice Jackson joined him in *Bittner*.[209] Presumably, then, at least three current Justices favor a more robust conception of lenity.

Justice Kavanaugh, by contrast, wrote a concurring opinion in *Wooden* in which he argued against a more robust form of lenity.[210] He is suspicious of substantive canons to the extent their application depends on an "ambiguity trigger," which requires a judge to determine that the statutory language is ambiguous, rather than clear, before applying the canon.[211] That poses a "major problem," according to Justice Kavanaugh, because "ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis."[212] The looser the trigger is permitted to be, the greater the manipulability problem.[213] In addition to arguing against a robust conception of lenity on this basis, Justice Kavanaugh has singled out constitutional avoidance as a substantive canon that should be "jettison[ed]" because its ambiguity trigger is "so uncertain."[214]

Justice Kavanaugh is not alone in criticizing constitutional avoidance. As Anita Krishnakumar has observed, several commentators heavily criticized the Court for often aggressively using constitutional avoidance in a variety of contexts.[215] Scholars accused the Court of

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207 In a narrow-construction case decided after the period studied, Justice Gorsuch asserted in a concurring opinion that "lenity is what's at work behind" many of the Court's narrow constructions of penal statutes. Snyder v. United States, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J., concurring).

208 *See* Bittner v. United States, 143 S. Ct. 713, 724–25 (2023) (opinion of Gorsuch, J.) (arguing for a conception of lenity more robust than the Court's modern formulation); Wooden v. United States, 142 S. Ct. 1063, 1083–86 (2022) (Gorsuch, J., concurring in judgment) (making a similar argument).

209 *See Wooden*, 142 S. Ct. at 1079; *Bittner*, 143 S. Ct. at 717.

210 *See Wooden*, 142 S. Ct. at 1075–76 (Kavanaugh, J., concurring).

211 *See* Kavanaugh, *supra* note 19, at 2149, 2135–36; *see also* Choi, *supra* note 3, at 10 (using statistical methods to evaluate Justice Kavanaugh's concerns about evaluating clarity in text).

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

213 *Id.* at 1076.

214 Kavanaugh, *supra* note 19, at 2146.

215 *See* Krishnakumar, *supra* note 4, at 867–71 (showing the Court's significant reliance on constitutional avoidance between 2006 and 2012); *id.* at 836–38 (describing the critical response to the significant reliance on constitutional avoidance); *see also* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1276, 1276–78 (2016) (describing how the early Roberts Court often avoided "thorny" constitutional questions).

"overreach[]," both by using constitutional avoidance to "rewrit[e] plain statutory text" and "by engaging in extensive discussions of the constitutional infirmities at issue," with the effect of "essentially providing advisory opinions that laid the groundwork for later constitutional challenges."[216] Following that criticism, starting in 2013, the Court went from "a period of aggressively and openly using the avoidance canon . . . to a period of relative nonreliance on [it]."[217] That more general trend toward "ratcheting down"[218] reliance on constitutional avoidance may help explain the Court's recent reluctance to rely upon constitutional avoidance when narrowly construing penal statutes.

2. Canons with a Vagueness Trigger or Presumption

The Court has been more willing to justify narrow constructions of penal statutes on the basis of substantive canons *not triggered by ambiguity*—namely, the scienter presumption, the federalism presumption, and vagueness avoidance. The ways in which these canons operate in application may explain why.

Because the scienter and federalism canons are formulated as *presumptions*,[219] they create default rules and set high bars for legislative efforts to override them. In effect, applying a presumption loads the dice in favor of the policy preference captured by the canon and then places the burden of rebutting it on the proponent of the broad construction.[220] The scienter and federalism presumptions thus operate

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216 Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 531–32 (2019); *see, e.g.*, Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 222–23 (suggesting that the Court was using the canon "strategically" to "give[] the public appearance of . . . moving moderately and slowly" while laying the groundwork for constitutional change in a conservative direction); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2d 173, 185, 174 (2014) (warning that "avoidance ha[d] become an important tool of judicial empowerment" rather than "a cornerstone principle of judicial restraint"); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2116 (2015) (commenting that the Court had relied on constitutional avoidance to adopt "statutory interpretations that would be unthinkable" otherwise).

217 Krishnakumar, *supra* note 216, at 563; *compare id.* at 588–89 (summarizing the Court's significant reliance on constitutional avoidance between 2006 and 2012), *with id.* at 590–91 (summarizing the Court's diminished use of constitutional avoidance between 2013 and 2017).

218 *Id.* at 568.

219 *See supra* text accompanying notes 98–99 (discussing the federalism presumption), 100–02 (discussing the scienter presumption).

220 To the extent the federalism and scienter presumptions are applied as clear-statement rules, the tilt in favor of the policy preference is even stronger. *See* Hessick & Kennedy, *supra* note 6, at 356 ("Clear statement rules protect the value or interest at issue by requiring a particular outcome unless the statute contains explicit and unambiguous language to the contrary.").

as "tool[s] of first resort," employed "at the beginning of the interpretive process—the stage at which [courts] are deciding the 'plain meaning' of statutory language."[221] That stands in stark contrast both to the modern formulation of the rule of lenity, which is a "tool of last resort"[222] employed only if "grievous ambiguity" remains following the use of all other interpretative tools,[223] and to constitutional avoidance, which is also triggered by ambiguity that remains following ordinary-meaning analysis.[224]

The fact that the federalism and scienter presumptions apply at the beginning of statutory analysis may explain why their conversion rate was so high in the set of narrow-construction cases reviewed.[225] Unsurprisingly, in an era in which the Court is suspicious of ambiguity-triggered canons, the federalism and scienter presumptions were definitively relied upon *six times* more often than constitutional avoidance or lenity—despite the fact that they were raised in briefs or during oral argument far less often.[226]

The relative success of vagueness avoidance follows a somewhat similar pattern. Recall that, although vagueness avoidance is a type of constitutional avoidance, it is analytically distinct from ordinary constitutional avoidance insofar as it is triggered by *vagueness* in statutory language, rather than *ambiguity*.[227] Significantly, vagueness cannot usually be resolved by the traditional tools of interpretation that tend to resolve ambiguity.

Ambiguity refers to linguistic indeterminacy that arises when a term can be used in more than one sense such that it is open to a "discrete number of possible meanings."[228] Ambiguity can typically be resolved through *interpretation*, the process of recovering the "semantic content of the legal text"[229] by looking to materials such as "statutory context, rules of grammar, dictionaries, and usage norms embodied in descriptive canons of statutory interpretation."[230] A term exhibits vagueness, by contrast, when "there are difficult, borderline cases to which the indeterminate term may or may not apply, with the result

221 *Id.* at 380.

222 *Id.* at 379.

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

224 *See supra* note 91.

225 *See supra* text accompanying notes 173–76.

226 *See supra* Figure 4.

227 *See supra* notes 91–94 and accompanying text.

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

229 Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010).

230 Johnson, *supra* note 6, at 88.

that it is open to practically 'innumerable' . . . applications."[231] Vagueness cannot usually be resolved through mere interpretation, but only through *construction*, the process of "giv[ing] a text legal effect" by "translating the linguistic meaning into legal doctrine."[232]

The upshot is that, following ordinary-meaning analysis of an indeterminate statue, vagueness in statutory language persists far more often than does ambiguity. There is thus greater utility for a vagueness-triggered substantive canon than there is an ambiguity-triggered canon. Unsurprisingly, in the narrow-construction cases reviewed, the Court definitively relied upon some version of vagueness avoidance *three times* more often than it definitively relied upon ordinary constitutional avoidance and lenity combined.[233]

C. Retaining a Majority Through Passivity

Another potential explanation for the overall dominance of ad hoc rationales is that they are often needed to hold together a majority. The validity and strength of substantive canons are contentious topics,[234] about which the Justices inevitably have nuanced views that do not always align. It is at least plausible that definitive reliance on substantive canons in early draft majority opinions is often later softened to retain votes[235] or moved to a concurring opinion. Institutionalist values that favor less fractious decisionmaking, judicial modesty, and stated rationales that appear more lawlike (rather than policy driven) may further push the Court toward softened majority opinions[236] that take a *passive* approach to substantive canons—treating them as a mere

231 *Id.* at 82 (quoting SOLAN, *supra* note 228, at 39).

232 Solum, *supra* note 229, at 96; *see* Johnson, *supra* note 6, at 89 ("Vagueness . . . [is] typically irreducible at the interpretation stage" because "[e]vidence of linguistic meaning does not ordinarily dictate how a court should define the [term's] scope.").

233 *See supra* Figure 4.

234 *See supra* note 19.

235 *Cf.* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 741 (2008) (suggesting that judges on a mixed panel may choose to trade votes for reasoning); Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 95 ("[T]he writing judge responds to the threat of dissent and consciously moderates the opinion from a more extreme form in order to achieve unanimity."); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2172 (1998) (suggesting that judges on a mixed panel may moderate their votes to avoid dissent).

236 For example, intense public scrutiny may "make[] the Justices sensitive to charges of activism and could encourage them to adopt at least a pose of restraint" by justifying statutory interpretation decisions on the "purportedly neutral guidance offered by dictionaries." Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 20 (2018) (citing Brudney & Baum, *supra* note 4, at 499–500).

afterthought,[237] explicitly relegating them to dicta,[238] or ignoring them altogether.[239]

Take lenity, for example. We know from Justice Gorsuch's recent concurring opinions in *Wooden* and *Bittner* that he—and apparently Justice Sotomayor and Justice Jackson as well—supports a more robust version of the rule of lenity that would more often be used as a basis for narrowly construing penal statutes.[240] We also know from Justice Kavanagh's concurring opinion in *Wooden* that he does not support beefing up lenity.[241] In between those two extremes are some number of Justices who do not have firm views, or at least do not wish to take a strong stance until it is necessary to do so.

Suppose one of the pro-lenity Justices is assigned the task of drafting a majority opinion justifying a narrow construction. If the drafter circulates an initial draft in which a robust conception of lenity plays a prominent role, some Justices are likely to push back and may threaten to withhold support. The drafter is then faced with a choice—either soften their position or retain it in some capacity at the risk of losing a majority, at least on that point. Drafters may often choose the first option, leaving no trace in the final opinion that definitive reliance on lenity was ever considered. But at least some of the time, they will choose the second option.

That seems to be exactly what happened in *Bittner*. In that case, the Court narrowly construed the maximum statutory penalty for a nonwillful violation of a tax reporting requirement concerning foreign accounts.[242] Justice Gorsuch wrote for a five-justice majority in the bulk of his opinion. But only Justice Jackson joined the section of his opinion in which he relied upon a robust conception of lenity.[243] The other three Justices in the majority—Chief Justice Roberts, Justice Alito, and Justice Kavanaugh—were unwilling to do the same. As a result, the majority rationale was based solely on an ordinary-meaning analysis.[244]

While cases like *Bittner* provide some evidence of this phenomenon, it seems plausible that something similar is occurring behind the

237 *See, e.g.*, Burrage v. United States, 571 U.S. 204, 216 (2014) (noting lenity in passing after justifying a narrow construction on the basis of ordinary-meaning analysis); McDonnell v. United States, 579 U.S. 550, 574–75 (2016) (invoking vagueness avoidance and the federalism presumption but only as corroboration for a conclusion already reached).

238 *See, e.g.*, Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021) (invoking lenity and vagueness avoidance but explicitly disclaiming reliance on them).

239 See the eleven cases listed in Table 2, *supra*, in which a substantive canon was raised in input materials but not invoked in a majority or plurality opinion.

240 *See supra* text accompanying notes 208–09.

241 *See supra* text accompanying notes 210–14.

242 Bittner v. United States, 143 S. Ct. 713, 723–25 (2023).

243 *Id.* at 717.

244 *Id.* at 719–24.

scenes in other cases involving the more contentious substantive canons—namely, lenity, vagueness avoidance, and constitutional avoidance. If so, then litigants' frequent invocation of these canons may be justified because the canons might be persuasive to particular Justices, even if the Court's majority opinions are likely to opt for ad hoc rationales.[245] Cable-like briefs may be good practice even when the Court is producing chain-like opinions.

D. Interpretive Discretion

Another possible explanation is that a majority of Justices prefer ad hoc constructions because they seek to maximize interpretive discretion in future cases involving penal statutes.[246]

Suppose the Court explicitly held that a robust version of the rule of lenity applies to the construction of all penal statutes, perhaps by formulating the canon as a presumption or a clear-statement rule.[247] Such a rule would have the analytical strength of the federalism or scienter presumptions because it would kick in at the beginning of the analysis. Yet it would be relevant to a much wider set of statutes—not merely those raising scienter or federalism issues, but *all penal statutes*. Adherence to the clear-statement lenity rule would thus yield narrow constructions in a much larger number of cases. But it would also have the effect of decreasing judicial discretion in choosing between broad or narrow constructions on the basis of statute-specific textual arguments.

That might be unattractive to many Justices on multiple levels. For one thing, it would limit the Court's own ability to justify broad constructions in scenarios where that is the desired outcome. A number of the narrow-construction cases reviewed involved sympathetic defendants relative to the nature of the charging statute.[248] But in many

245 *See* Snyder v. United States, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J., concurring) (suggesting that "lenity is what's at work behind" many of the Court's narrow constructions of penal statutes).

246 *See* Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 124 (2016) (arguing that "the Court's general approach to statutory interpretation deploys textualist rhetoric to mask pragmatic decisions").

247 *See* Hopwood, *supra* note 203, at 695, 698–701 (arguing for reconceptualizing lenity as a clear-statement rule); Maisie A. Wilson, Note, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663, 1668 (2021) (arguing for codification of lenity as a clear-statement rule).

248 *See, e.g.*, Dubin v. United States, 143 S. Ct. 1557, 1563 (2023) (prosecution under federal aggravated identity theft statute of healthcare worker who overbilled); Yates v. United States, 574 U.S. 528, 531–32 (2015) (Ginsburg, J., plurality opinion) (prosecution of commercial fisherman for throwing regulated fish overboard under provision of Sarbanes-Oxley Act that criminally prohibited "knowingly alter[ing], destroy[ing],

of the cases in which the Court adopted a broad construction, the penal statute at issue targeted an exceedingly unsympathetic class of defendants or raised countervailing values that seemed to pull otherwise defendant-friendly Justices in the opposite direction. In *Lockhart*, for example, a six-Justice majority—which included Justice Sotomayor and Justice Ginsburg—broadly construed a statute concerning sexual abuse of minors, expressly rejecting application of the rule of lenity.[249]

And in both *Castleman* and *Voisine*, the Court broadly construed statutes that forbid firearm possession by anyone convicted of a "misdemeanor crime of domestic violence."[250] In *Castleman*, Justice Sotomayor's majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan.[251] In *Voisine*, Justice Kagan's majority opinion was joined by the same group, except that Justice Alito replaced Justice Sotomayor; Justice Thomas wrote a dissenting opinion joined in part by Justice Sotomayor.[252] In the portion of the dissent in which Justice Thomas was writing only for himself, he argued that constitutional avoidance compelled a narrower construction in light of Second Amendment concerns.[253]

Abramski is another example of when a broad construction may have been influenced by political considerations related to gun regulation. Justice Kagan's majority opinion broadly construing a criminal

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mutiliat[ing], conceal[ing], cover[ing] up, falsify[ing], or mak[ing] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence [an] investigation," *id.* at 531 (quoting 18 U.S.C. § 1519 (2012))); Bond v. United States, 572 U.S. 844, 847–48 (2014) (prosecution under the Chemical Weapons Convention Implementation Act of a woman who had spread household toxic chemicals on various objects so that her husband's paramour would come into contact with them).

249 18 U.S.C. § 2252(b)(2) (2012) (imposing ten-year mandatory minimum on defendants with "a prior conviction under [federal law] or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"); Lockhart v. United States, 577 U.S. 347, 361 (2016) (adopting broad construction and noting that "the arguable availability of multiple, divergent principles of statutory construction cannot automatically trigger the rule of lenity"); *cf. id.* at 377 (Kagan, J., dissenting) (arguing that lenity should "[a]t the very least . . . tip the scales in [the defendant's] favor").

250 18 U.S.C. § 922(g)(9) (2012) (forbidding possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence"); *id.* § 921(a)(33)(A) (defining "misdemeanor crime of domestic violence"); Voisine v. United States, 579 U.S. 686, 688 (2016) (adopting broad construction encompassing prior misdemeanor assault conviction for reckless conduct); United States v. Castleman, 572 U.S. 157, 159 (2014) (adopting broad construction to encompass prior misdemeanor assault conviction for "'intentionally or knowingly caus[ing] bodily injury to' the mother of [the defendant's] child").

251 *Castleman*, 572 U.S. at 158. Justice Scalia and Justice Alito (joined by Justice Thomas) each filed concurring opinions. *Id.* at 173 (Scalia, J., concurring in part and concurring in judgment); *id.* at 183 (Alito, J., concurring in judgment).

252 *Voisine*, 579 U.S. at 687–88; *id.* at 699 (Thomas, J., dissenting).

253 *Id.* at 713–16 (Thomas, J., dissenting).

provision of the Gun Control Act was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor;[254] Justice Scalia's dissenting opinion—joined by Chief Justice Roberts and Justices Thomas and Alito—criticized the majority for "mak[ing] it a federal crime for one lawful gun owner to buy a gun for another lawful gun owner."[255]

In each of these cases, a clear-statement rule of lenity would have made the broad-construction outcome much more difficult to achieve. The Court would have been starting from the premise that the statute did not apply to the case before it. And that presumption could have been rebutted only by a clear statement on the face of the statute, limiting the Court's ability to justify a broad construction on the basis of interpretive tools such as statutory context, structure, and descriptive canons. That is costly from the perspective of interpretive discretion. A Court that wishes to maximize its options in future cases would be less willing to explicate sweeping principles of statutory construction applicable to all penal statutes.

In addition, the Court may desire an interpretive regime that gives lower courts significant discretion.[256] A majority of Justices may be satisfied with a world in which lower courts often use that discretion to construe penal statutes to sweep broadly, so long as the Court has the ability to intervene on occasion when it perceives a broad construction as going too far. In that way, the Court's ad hoc approach effectively sets a default approach that enables broad lower court discretion, which it can override as necessary; notably, however, the Court elects to intervene in certain types of cases—chiefly, firearms and white-collar cases—at a significantly higher rate than in other types of cases.[257] Employing widely applicable substantive canons would effectively set the default the other way, a result the Court may not desire.

IV. AD HOC CONSTRUCTIONS AND THE RULE OF LAW

As Part II showed, a majority of the Court often purports to rest narrow constructions of penal statutes on statute-specific ordinary-

254 18 U.S.C. § 922(a)(6) (2012) (imposing criminal penalties on any person who, in connection with a firearm's acquisition, makes false statements about "any fact material to the lawfulness of the sale"); Abramski v. United States, 573 U.S. 169, 171–72 (2014) (adopting broad construction encompassing straw purchasers).

255 *Abramski*, 573 U.S. at 207, 193 (Scalia, J., dissenting).

256 *See infra* Section IV.B (describing how the ad hoc approach grants lower courts greater interpretive discretion).

257 *See supra* text accompanying notes 105–06 (observing that of the penal statutes construed in the forty-three cases studied, sixteen (37.2%) involved firearms and twelve (27.9%) involved white-collar crimes, despite the fact that firearms offenders account for only 11.1% of all federal offenders and white-collar offenders account for 10.9% of all federal offenders, see *supra* notes 112 and accompanying text).

meaning rationales at the exclusion of more widely applicable substantive canons. Those outcomes are usually viewed as victories for defendants.[258] That is undoubtedly true on a basic level. The class of defendants affected by a particular statute is better off when the Court adopts a narrower reading instead of a broad reading. But on a larger scale, the Court's consistent ad hoc approach works to undermine the rule of law by systematically increasing discretion for various actors who administer criminal law.

In one sense, the Court's ad hoc approach would seem to promote the rule of law insofar as it is rooted in a textualist methodology, which is itself often justified on the basis of rule-of-law values.[259] By merely determining the semantic meaning of a particular statute, the thinking goes, the Court curbs its own potential to act according to its own predilections in an unfair or arbitrary manner.[260] Strict adherence to ordinary-meaning analysis is thought to be more lawlike than reliance on policy-based substantive canons.

Yet the Court's repeated reluctance to rely on substantive canons or other generic principles of construction has subtler downstream effects that seem to push against rule-of-law values. These effects relate to various actors who administer criminal law—legislatures, lower courts, prosecutors, defense counsel, and police. Some of the downstream effects may be fairly marginal in isolation. But taken together, they may work to perpetuate the enactment, enforcement, and interpretation of penal statutes in a broad and indeterminate manner, potentially outweighing any rule-of-law benefits to be had from strictly adhering to ordinary-meaning textualism.[261] This Part explores these downstream effects of the ad hoc approach.

A. Legislatures

As an initial matter, the Supreme Court's ad hoc approach does little to deter legislatures from writing open-ended penal statutes.

Scholars have long bemoaned the dysfunction associated with criminal legislation,[262] tying the well-documented proliferation of

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258 *See supra* text accompanying notes 36–37.

259 *See supra* text accompanying notes 60–63.

260 *See, e.g.*, Scalia, *supra* note 19, at 25 (arguing that the formalism of textualism "is what makes a government a government of laws and not of men").

261 *See* Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1815 (2021) ("[S]tatutory method sets into motion a procedural cascade that affects criminal justice at every level. . . . Rule-oriented textualism at the top unleashes a punitiveness at the bottom that is no less harsh for being technocratic.").

262 *See, e.g.*, MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1–22 (2015); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 244–81 (2011); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE

criminal statutes over many decades[263] to a cyclical series of "wars on crime,"[264] media's distortion of politics,[265] and legislatures' acute sensitivity to public outrage about crime.[266] In response to the moral panic of the moment, legislatures are often quick to enact new criminal legislation to soothe the public's anxieties.[267] That rushed legislation is often sloppily drafted, resulting in excessively broad and indeterminate laws[268] that are very rarely repealed.[269] No real political pressure pushes legislatures to be more precise when drafting criminal legislation. Because interest groups in favor of narrowly drafted statutes

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CRIMINAL LAW, at v (2007); Hessick & Kennedy, *supra* note 6, at 359–63; Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–44 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 569–78 (2001). *But cf.* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 525–34 (2020) (observing that "[p]ublic attitudes towards crime and punishment are in flux," *id.* at 525).

263 Congress enacts proposed criminal legislation at a higher rate than other types of proposed legislation, *see* BRIAN W. WALSH & TIFFANY M. JOSYLN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 13 (2010) (observing that Congress enacted criminal laws at a rate forty-five percent higher than all other types of legislation), resulting in many new federal crimes each year. *See also* John Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (June 16, 2008), https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes [https://perma.cc/PU42-3W64] (observing that Congress enacted an average of 56.5 crimes per year between 2000 and 2007). A recent study suggests a significant increase in federal criminal legislation over the last several decades. *See* GIANCARLO CANAPARO, PATRICK A. MCLAUGHLIN, JONATHAN NELSON & LIYA PALAGASHVILI, HERITAGE FOUND., COUNT THE CODE: QUANTIFYING FEDERALIZATION OF CRIMINAL STATUTES 12 (2022) (finding that from 1994 to 2019, the number of U.S. Code sections creating a federal crime increased by 36 percent).

264 V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 925 (2004).

265 Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 44–51 (1997); *see also* HUSAK, *supra* note 262, at 16 ("Tabloids and the popular media thrive on accounts of how offenders 'get away' with crime by escaping through loopholes and technicalities.").

266 Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 868–78 (2000).

267 *See* Hessick & Kennedy, *supra* note 6, at 360; *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 966 (2009) ("Legislators gain political credit for responding to the crime du jour with a new crime or an increased penalty, even if the new crime is redundant.").

268 Hessick & Kennedy, *supra* note 6, at 360 (observing that criminal legislation in response to a moral panic is often "poorly drafted and ill-considered," resulting in "imprecise or overly broad laws"); *see also* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 987–92 (2019) (collecting examples).

269 Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 115 (2022) (noting that the "prospect of a legislature repealing" criminal legislation that no longer matches societal norms "is slim"); *see also* Hessick & Kennedy, *supra* note 6, at 360.

wield little political power,[270] "defendants' interests nearly always go unrepresented in legislative hallways,"[271] leaving the unintended consequences of overly broad and indeterminate statutory language unattended.[272]

Yet there is plenty of political upside to erring on the side of broad and open-ended language in penal statutes.[273] By enacting such language, a legislature evades political accountability for making tough judgment calls about where exactly the line should be drawn.[274] It effectively delegates the line-drawing task to courts.[275] When a court's narrow construction yields a politically unpopular outcome, legislators can place the blame on the judiciary, deriding the decision as inconsistent with the open-ended language on the face of the statute. And if the outcome is politically popular, legislators can praise the judiciary for correctly giving effect to the law.

At a minimum, the Supreme Court's ad hoc approach gives a pass to this phenomenon. It may even make it worse, to the extent the Court's interpretive approach affects legislative behavior.[276] When a narrow construction depends only on ordinary-meaning analysis of the

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270 *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980 (2006) (explaining that, apart from white-collar crime, "the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–31 (2006) (comparing the powerful lobbies for expansive and punitive criminal laws with the weak groups on the other side).

271 STUNTZ, *supra* note 262, at 173.

272 *Id.*

273 *See, e.g.*, Hessick, *supra* note 268, at 993 (noting that "[c]arefully crafted laws require significant time and effort," which "are often in short supply when legislatures are in session"); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1493 (2008) (arguing that expansive laws can be beneficial because they allow the state to punish those who adapt their behavior to legal regimes).

274 The use of open-ended language may also be seen as an attractive way to allow for application of penal laws to a wider range of foreseen and unforeseen conduct, *see* Kahan, *supra* note 205, at 353 (explaining that "open-textured statutes require smaller investments of time and less political consensus to enact than do extremely precise statutes"), or as a way to deal with the significant practical constraints on the legislative process, *cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 261 (1994) (noting in the context of applying the presumption against retroactivity that "[i]t is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts").

275 *See* Kahan, *supra* note 205, at 347 (arguing that the "underenforcement of lenity . . . reflects the existence of another largely unacknowledged, but nonetheless well established, rule of federal criminal law: that Congress may *delegate* criminal lawmaking power to courts").

276 *See* Gluck & Bressman, *Statutory Interpretation Part I*, *supra* note 3, at 906–07 (finding that certain "interpretive rules that courts employ . . . affect how [Congressional staffers] draft" statutes while others do not).

statute at issue, no message is sent to the legislature suggesting that indeterminate statutory language poses widespread problems. Nor is any real incentive created for more precise drafting going forward.[277] And the Court's reluctance to endorse the generic principles of strict construction encapsulated by substantive canons may indirectly invite more drafting of open-ended penal statutes[278] that run counter to rule-of-law values.[279]

Consider, by contrast, a regime of robust lenity or some other generic policy of strict construction. As Kahan has argued, such a regime would work to "disciplin[e] Congress" by ensuring no "rule of criminal liability" becomes "operative" absent "Congress's self-conscious and express imprimatur."[280] It would, in other words, "*forc[e]* Congress to take the lead in the field of criminal law and to forgo judicial assistance in defining criminal obligations."[281] The Court's ad hoc approach puts no similar pressure on Congress.

B. Lower Courts

Penal statutes drafted with open-ended language create opportunities for courts to adopt broad constructions if they so choose. And the Supreme Court's ad hoc approach enables lower courts to do exactly that by effectively granting them significant interpretive

277 The strongest medicine for the legislative incentive to draft open-ended penal statutes would be to void such statutes as unconstitutionally vague, rather than construing them at all. *See, e.g.*, Percoco v. United States, 143 S. Ct. 1130, 1139–42 (2023) (Gorsuch, J., concurring in judgment) (advocating for application of void-for-vagueness doctrine rather than narrowing open-ended statutory language to its core); Skilling v. United States, 561 U.S. 358, 415–27 (2010) (Scalia, J., concurring in part and concurring in judgment) (making a similar argument). But insofar as the task of statutory *construction*—as opposed to mere interpretation—is a legitimate judicial activity, narrow readings that avoid a vagueness conclusion may be the more modest path when a practically identifiable core can be identified. *See* Johnson, *supra* note 6, at 95–102.

278 For a recent example, see Rodchenkov Anti-Doping Act of 2019, Pub. L. No. 116-206, § 3, 134 Stat. 998, 999 (codified as amended at 21 U.S.C. § 2402 (2022)) (making it unlawful for non-athletes "to knowingly carry into effect, attempt to carry into effect, or conspire with any other person to carry into effect a scheme in commerce to influence by use of a prohibited substance or prohibited method any major international sports competition").

279 *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (explaining, in the vagueness context, that criminal laws should be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

280 Kahan, *supra* note 205, at 351.

281 *Id.*; *see also id.* at 354 ("'Strict construction' would essentially defeat the implied-delegation strategy for reducing the costs of congressional lawmaking. Under a rule of strict construction, the only statutory applications that courts would enforce would be those clearly and expressly approved of by Congress.").

discretion[282]—giving lower federal courts and state courts[283] license to adopt sweeping constructions of penal statutes.[284]

As a practical matter, the ad hoc approach may in fact indirectly encourage lower courts to adopt broad constructions, because "statutory interpretation is different at the top and bottom of the legal system."[285] While the Supreme Court resolves statutory interpretation questions in a "resource-rich environment,"[286] conditions in the lower courts are more meager. Significantly higher caseloads translate into each case getting less time and attention.[287] In the federal courts of appeals, for example, four out of five cases are resolved without oral

282 This Article assumes that lower courts often follow the Court's interpretive methods. *See supra* notes 11–12 and accompanying text.

283 *See* Pohlman, *supra* note 12, at 841 (observing that state courts often borrow statutory interpretation methodology from federal law decisions of the Supreme Court).

284 At a minimum, the interpretive discretion granted to lower courts is likely to yield a "patchwork" of decisions, with some courts adopting broad constructions and others adopting narrow constructions. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1600 (2021) (arguing that, when the Supreme Court delegates questions of constitutional law to the lower courts, lower-court decisions "seem likely to push the law in *opposing* directions" and yield "a patchwork of disparate decisions"); *see also* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1730–31 (2021) (arguing that the "rhetoric" of textualism "obscures the discretionary choices an interpreter must make when resolving a hard case" and that "motivated or unmindful judge[s] can pick and choose texts and (con)texts" to reach desired results); Kahan, *supra* note 205, at 351 ("Giving courts the discretion to select broad as well as narrow readings of ambiguous statutes creates a risk that they will exceed congressionally desired limits on criminal liability by disguising judicial definitions of crimes as mere 'interpretations.'").

285 Kleinfeld, *supra* note 261, at 1816.

286 Bruhl, *supra* note 236, at 13. The Court has about 70 merits cases each Term. *See* U.S. CTS., SUPREME COURT OF THE UNITED STATES—CASES ON DOCKET, DISPOSED OF, AND REMAINING ON DOCKET AT CONCLUSION OF OCTOBER TERMS, 2017 THROUGH 2021 (2022), https://www.uscourts.gov/statistics-reports/judicial-business-2022-tables [https://perma.cc/6DEV-A6UN]. And "[e]ach of those cases receives the attention of nine experienced judges, each of whom is assisted by resourceful librarians and several highly capable clerks." Bruhl, *supra* note 236, at 12. In addition, the "briefing and arguments" are "increasingly presented by Supreme Court experts," and nearly "every case attracts amicus briefs that present additional arguments, information, and perspectives." *Id.*

287 Bruhl, *supra* note 236, at 13.

argument[288] and with lower-quality briefing.[289] Resources for resolving issues of statutory interpretation are even thinner in the district courts, where case-management duties demand substantial time.[290]

Even if a lower court has sufficient resources for a particular case, moreover, it usually must spread those resources across a number of discrete issues. The Supreme Court, by contrast, has the luxury of focusing all of its energy—and the energy of the litigants—on the single statutory interpretation question presented.

Fewer resources in the lower courts "lead[s] to simpler and quicker interpretive approaches."[291] In other words, lower courts are more likely to rely on *cheaper* interpretive tools to resolve questions of statutory interpretation. Both substantive canons and simple forms of ordinary-meaning analysis (e.g., mere reliance on dictionaries) are cheap relative to more complex arguments, such as those based on statutory context or analogies to other statutory schemes.[292] Unlike those costlier types of arguments, substantive canons[293] and dictionary definitions can easily be included in briefs and grasped by lower courts. More complex arguments require significantly more research and analysis by lawyers, law clerks, and judges. All else equal, resource-strapped lower courts are likely to employ substantive canons or simple forms of ordinary-meaning analysis.[294]

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288 *See* U.S. CTS., U.S. COURTS OF APPEALS—CASES TERMINATED ON THE MERITS AFTER ORAL ARGUMENTS OR SUBMISSION ON BRIEFS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, https://www.uscourts.gov/statistics/table/b-10/judicial-business/2022/09/30 [https://perma.cc/U282-YXUK] (showing that seventy-nine percent of cases before the courts of appeals are decided without argument); *see also* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 83–94 (2013) (describing measures courts of appeals have taken in response to docket pressures).

289 *See* Bruhl, *supra* note 236, at 13 (observing that "[t]he parties often fail to make the right arguments and present the best information" and that "[a]micus briefs, which might fill the gaps in the parties' presentations, are uncommon"); Interview by Bryan A. Garner with Justice Stephen G. Breyer, 13 SCRIBES J. LEGAL WRITING 145, 160 (2010) (assessing briefing in the Supreme Court as "pretty uniformly good" and stating that "[y]ou'll get very good briefs in the circuits on a lesser number of occasions").

290 *See* Bruhl, *supra* note 236, at 14.

291 *Id.* at 14; *see also id.* at 26 (finding that "lower courts use fewer interpretive tools overall, and they especially avoid the most complex tools[,] . . . even in cases that eventually reach the Supreme Court").

292 *See* Eskridge & Nourse, *supra* note 284, at 1727 (noting that the use of some more sophisticated forms of textualist analysis can be "costly").

293 To be sure, some substantive canons are costlier than others. For example, constitutional avoidance arguments likely require more resources than simple invocation of the rule of lenity. But relative to sophisticated ordinary-meaning arguments made on an ad hoc basis, ready-made substantive canons are likely cheaper.

294 *See* Kleinfeld, *supra* note 261, at 1816 (describing "an ecosystem of mechanically applied textual rules" in lower courts for reasons of bureaucratic administration).

As between substantive canons and simple ordinary-meaning analysis, lower courts are more likely to prefer simple forms of ordinary-meaning analysis because of the Supreme Court's consistent ad hoc approach. Lower courts have shown a propensity for adhering to whatever interpretive regime emerges from the Court.[295] Over the last several decades, for example, the federal courts of appeals have followed the Court's lead in increasing their reliance on certain textualist tools, including dictionaries and descriptive canons,[296] and decreasing their reliance on legislative history.[297] In the context of penal statutes, the Court's consistent preference for ad hoc constructions thus likely leads to a lower court preference for reliance on ordinary-meaning analysis over substantive canons. And because lower courts tend to rely on cheaper tools, their ordinary-meaning analysis is likely to be relatively simple most of the time.

Paired with the open-ended language in many statutes, simple ordinary-meaning analysis likely yields more broad and literalistic constructions in the lower courts. Superficial interpretive analysis that looks to dictionaries and little else is likely to result in a construction of statutory language that gives it a broad scope.[298] As Joshua Kleinfeld has put it, "the version of rule-oriented textualism that prevails in the ordinary criminal courthouses . . . is not the subtle stuff of visionary jurists like Easterbrook and Scalia."[299] Rather, "[i]t's a kind of 'them's

295 *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994) ("An interpretive regime tells lower court judges . . . how strings of words in statutes will be read, what presumptions will be entertained as to statutes's [sic] scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities."); *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) ("Justice Scalia's textualist statutory interpretation methodology has taken startlingly strong hold in some states, although in a form of which the Justice himself might not approve.").

296 *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 190–98 (2009); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React when the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 496–506 (2015); James J. Brudney & Lawrence Baum, *Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals*, 125 YALE L.J.F. 104, 105 (2015); John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 497–502 (2014).

297 CROSS, *supra* note 296, at 183–87; Nicholas R. Parrillo, *Leviathan and Interpretative Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 389 (2013).

298 In fact, even reliance on dictionaries is infrequent in the courts of appeals relative to the Supreme Court. *See* James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681, 704–05 (2017).

299 Kleinfeld, *supra* note 261, at 1818.

the rules' approach one might get from the TSA at the airport or test administrators at a standardized exam."[300]

Examples from lower courts are easy to find.[301] For proof that a number of these broad constructions are shown to be incorrect, one need look no further than the lower court decisions in the cases in which the Supreme Court ultimately adopted a narrow construction of a penal statute.[302] As one court of appeals judge recently put it, the Supreme Court's correction of broad lower-court readings "has become nearly an annual event."[303]

Consider *Yates*. In that case, the lower courts breezed past the statutory interpretation question that ultimately produced several opinions from a fractured Supreme Court. In a single-page order, the district court applied the term "tangible object" in a provision of the Sarbanes-Oxley Act to the undersized fish that the defendant had caught and discarded, declining to limit that "broad" catch-all term to objects similar to the more specific terms "record" and "document" that preceded it in a statutory list.[304] In just one paragraph, the Eleventh Circuit affirmed by relying upon a dictionary to conclude that the "plain" and "ordinary" meaning of the catch-all term "unambiguously applies to fish."[305] The Supreme Court reversed, adopting a narrower reading of "tangible object" that excluded fish. In doing so—in stark contrast to the lower courts—a four-Justice plurality produced eighteen pages of statutory analysis that employed multiple descriptive canons, considered the statute's structure and title, and looked to legislative history;[306] an opinion concurring in the judgment provided several additional pages of analysis that employed descriptive canons and considered the statute's title; [307] and a dissenting opinion produced

300 *Id.*

301 *See supra* note 42.

302 *See, e.g.*, United States v. Van Buren, 940 F.3d 1192, 1208 (11th Cir. 2019) (relying on circuit precedent to adopt a broad construction based only on the plain language of the statute), *rev'd*, 141 S. Ct. 1648 (2021); United States v. Rehaif, 888 F.3d 1138, 1144 (11th Cir. 2018) (adopting broad construction based on circuit precedent that provided very little analysis of statutory language), *rev'd*, 139 S. Ct. 2191 (2019); United States v. Bond, 681 F.3d 149, 154–55 (3d Cir. 2012) (relying on dictionaries in concluding that the "clarity of the statute" compelled a broad construction), *rev'd*, 572 U.S. 844 (2014).

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

304 United States v. Yates, No. 10-cr-66, 2011 WL 3444093, at *1 (M.D. Fla. Aug. 8, 2011), *aff'd*, 733 F.3d 1059 (11th Cir. 2013), *rev'd*, 574 U.S. 528 (2015).

305 *Yates*, 733 F.3d at 1064. Having found that the term was "unambiguous," the Eleventh Circuit concluded that the rule of lenity did not apply. *Id.*

306 *See Yates*, 574 U.S. at 531–49 (Ginsburg, J., plurality opinion).

307 *See id.* at 549–52 (Alito, J., concurring in judgment).

eighteen more pages of sophisticated textual analysis that favored the opposite result.[308]

Similarly, in *Dubin*, the Fifth Circuit insisted upon a sweeping reading of the federal aggravated identity theft statute on the basis of simple ordinary-meaning analysis. Both the panel opinion and the en banc majority opinion justified the broad construction with dictionary definitions.[309] Because the Fifth Circuit perceived those definitions as supplying the "plain meaning" of the statute, it characterized the statutory analysis as "relatively straightforward."[310] The Supreme Court ultimately adopted a narrow construction of the statute, relying on more sophisticated ordinary-meaning analysis that looked beyond dictionaries to the statute's text and title, statutory context, and a descriptive canon.[311]

The Court's ad hoc approach thus seems to encourage lower courts to rely on simple ordinary-meaning analysis, which may more often lead to broad, literalistic constructions than does the more sophisticated ordinary-meaning analysis the Court is able to do. Allegiance to "[t]extualism at the top" of the judiciary may "mean[] literalism at the bottom."[312]

C. Prosecutors

Another implication of the ad hoc approach is that it invites broad theories of prosecution. That enables punishment for conduct on a statute's peripheries—often with severe penalties—thereby risking arbitrary enforcement incompatible with the rule of law.

When it comes to penal statutes, legislatures and prosecutors work in tandem. As Bill Stuntz famously put it, "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes."[313] By enacting many broad and indeterminate penal statutes, legislatures create what amounts to a principal-agent relationship with prosecutors.[314] The open-ended statutes give prosecutors significant

308 *See id.* at 552–70 (Kagan, J., dissenting).

309 United States v. Dubin, 982 F.3d 318, 325–26 (5th Cir. 2020) (first citing OXFORD DICTIONARY OF ENGLISH (3d ed. 2010); and then citing BLACK'S LAW DICTIONARY (10th ed. 2014)), *aff'd*, 27 F.4th 1021 (5th Cir. 2022) (en banc), *vacated*, 143 S. Ct. 1557 (2023); *Dubin*, 27 F.4th at 1022 (en banc) (per curiam) (affirming "for the reasons set forth in the panel's majority opinion").

310 *Dubin*, 982 F.3d at 325.

311 *Dubin*, 143 S. Ct. at 1564–72.

312 Kleinfeld, *supra* note 261, at 1818.

313 Stuntz, *supra* note 262, at 510. The "potential for alliance" between prosecutors and legislatures is strong; each group sees political gains from expansive criminal law. *Id.*

314 *Id.* at 549.

discretion, and the legislature can rely on prosecutors to use that discretion to refrain from enforcement of those laws when it would lead to political backlash.[315] When prosecutors do not refrain, legislatures can simply blame them for being too aggressive.[316]

Prosecutors often use their charging discretion[317] to push the boundaries of open-ended penal statutes.[318] In doing so, they are engaged not just in the executive task of enforcing the criminal law, but they are in effect also engaged in the legislative task of crime definition,[319] at least interstitially. And because plea bargaining is the dominant way criminal cases are resolved, prosecutors in effect perform an adjudicative function in most cases as well.[320] That consolidation of

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315 *Id.* at 548; *see also* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090 (1993) (observing that "[e]xecutive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations").

316 As Professors Hessick and Kennedy have explained, "Cooperation with prosecutors also insulates legislatures against voter backlash. One might expect that the prosecution of individuals for innocuous behavior under broadly written laws would provoke a response by voters, but legislators can easily frame such a prosecution as a failure of prosecutorial discretion." Hessick & Kennedy, *supra* note 6, at 363 (citing Stuntz, *supra* note 262, at 548). Legislatures "can claim that this sort of prosecution is not what they intended when they passed the imprecise or overbroad statute, and instead simply reflects poor judgment on the part of the prosecutor filing the charge." *Id.*

317 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to . . . bring before a grand jury, generally rests entirely in his discretion."); *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

318 *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1495 (2010) ("[P]rosecutors in the U.S. have every incentive to extend criminal liability . . . .").

The Justice Department tends to advocate for expansive readings. *See, e.g.*, Brief for the United States at 10–37, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10); Brief for the United States at 19–43, Ruan v. United States, 142 S. Ct. 2370 (2022) (Nos. 20-1410 and 21-5261); Brief for the United States at 14–38, Rehaif v. United States, 139 S. Ct. 2191 (2019) (No. 17-9560); Brief for the United States at 13–46, Marinello v. United States, 138 S. Ct. 1101 (2018) (No. 16-1144); Brief for the United States in Opposition at 20–26, McDonnell v. United States, 579 U.S. 550 (2016) (No. 15-474); Brief for the United States in Opposition at 14–31, Yates v. United States, 574 U.S. 528 (2015) (No. 13-7451); Brief for the United States in Opposition at 17–24, Elonis v. United States, 575 U.S. 723 (2015) (No. 13-983); Brief for the United States in Opposition at 15–20, Burrage v. United States, 571 U.S. 204 (2014) (No. 12-7515).

319 *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature . . . which is to define a crime, and ordain its punishment.").

320 *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–77 (2009) ("At the federal level, just as in the

functions—enforcement, legislation, and adjudication—gives prosecutors immense power and discretion, increasing the odds that a particular prosecutor's biases will control outcomes. Studies show that "even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions," with a disparate impact on men and persons of color.[321]

In particular cases, prosecutors are permitted to threaten defendants with more serious charges as a way of convincing a defendant to plead guilty to a lesser charge that the prosecutor deems appropriate.[322] For prosecutors seeking more serious charges to use as leverage in the plea-bargaining process, there is a strong incentive to push the boundaries of open-ended statutes.[323] If these more venturesome theories of prosecution yield guilty pleas to less serious charges, then they have served their function. And because courts do not provide a meaningful pretrial opportunity for criminal defendants to challenge the scope of a criminal statute—for example, in a motion-to-dismiss proceeding akin to that of civil litigation[324]—the expansive reading of the statute later dropped in the course of plea bargaining ends up evading judicial review.

Sometimes, of course, aggressive theories of prosecution advance to trial and are tested in court. But for reasons already explained, lower courts often accept the expansive readings urged by prosecutors—even when the Supreme Court later rejects them.[325] That bifurcation in outcomes allows the government to push the expansive

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states, most criminal cases are resolved without ever going to trial. Plea bargaining . . . is the norm. This means that a prosecutor's decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases."); *id.* at 878 ("In most cases, . . . the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range.").

321 *Id.* at 884 (noting research that found "consistent and meaningful gender effects on imprisonment and length" and found "in one district that 'Hispanics have more than twice the imprisonment odds of whites . . . and receive sentences that are nearly six months longer as well,'" *id.* at 884 n.64 (omission in original) (quoting Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 272 (2005))); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 888–89 (1995) (noting empirical studies finding that the race of the defendant and victim affect charging decisions); *see also* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 269 (2007) (noting that the danger of selective prosecution and racial disparity is greatest at the federal level).

322 *See Bordenkircher*, 434 U.S. at 358.

323 *See* Barkow, *supra* note 320, at 879.

324 *See* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D. 347, 348–49 (2015) (observing that judges very rarely dismiss indictments and arguing for a more robust approach that matches the motion-to-dismiss proceeding in civil litigation).

325 *See supra* Section IV.B.

readings in the lower courts, often for many years, until the Supreme Court intervenes. For example, a decade before the Supreme Court adopted a narrow reading of the Computer Fraud and Abuse Act in *Van Buren*,[326] prosecutors in multiple jurisdictions had argued for a reading so broad that it encompassed any Internet user who violated a website's terms of service.[327]

The Court's ad hoc approach does little to deter prosecutions under other statutes based on theories of maximum statutory breadth. Consistent and explicit use of substantive canons to reject expansive theories of prosecution would be more likely to encourage charging policies that acknowledge hard limits on the scope of federal criminal laws and prohibit prosecutions beyond those limits.

D. Defense Counsel

The Supreme Court's ad hoc approach also burdens defense counsel. It makes cheaper narrow-construction arguments that are based on ready-made substantive canons less likely to succeed, leaving more burdensome sophisticated ordinary-meaning arguments as the only viable option in many instances.

When a statute contains open-ended language, it is not too difficult to make a prima facie case for a broad construction. A prosecutor need not do much beyond superficial interpretive analysis that relies on a few dictionary definitions of the open-ended statutory terms.[328] The onus is then on the defendant to look for ways to argue (often counterintuitively) that a narrower construction should be adopted instead. That can be done by relying on a substantive canon or by building a sophisticated ordinary-meaning analysis that shows the superficial reading to be overly simplistic.

Defense lawyers arguing before the Supreme Court—typically specialists from elite institutions[329]—tend to have the resources to build sophisticated ordinary-meaning arguments. They also tend to know

326 The text of the statute covers anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." 18 U.S.C. § 1030(a)(2)(C) (2018). The Court narrowly construed the phrase "exceeds authorized access" to encompass only "access[ing] a computer with authorization but then obtain[ing] information located in particular areas of the computer—such as files, folders, or databases—that are off limits." Van Buren v. United States, 141 S. Ct. 1648, 1662 (2021).

327 *See, e.g.*, Indictment ¶¶ 35–37, United States v. Swartz, 945 F. Supp. 2d 216 (D. Mass. May 13, 2013) (Crim. No. 11-10260); United States v. Lowson, Crim. No. 10-144, 2010 WL 9552416, at *7 (D.N.J. Oct. 12, 2010); United States v. Drew, 259 F.R.D. 449, 467 (C.D. Cal. 2009).

328 *See supra* text accompanying notes 309–10.

329 *See supra* note 136 and accompanying sources.

which types of textualist arguments will be most effective with the Justices and can more easily analogize to the Court's recent statutory interpretation cases in other contexts. Experienced Supreme Court defense lawyers thus routinely devote the bulk of their briefs to sophisticated ordinary-meaning arguments, tacking on substantive canons only as fail-safe arguments at the end of their briefs.[330]

But criminal defendants in most courthouses "cannot access textualism at its best."[331] Defense lawyers in the lower courts usually have limited resources. Most are public defenders or other appointed counsel.[332] Many of them are excellent advocates. But the "combination of . . . fixed salar[ies] and . . . heavy caseload[s] makes it" practically "impossible[] for [them] to perform all of the . . . work . . . [needed] to provide zealous advocacy" on every aspect of every case.[333] And the task of building from scratch a sophisticated ordinary-meaning argument specific to a particular statute is costlier than invoking a prepackaged substantive canon.[334] Yet because lower courts are likely to follow the Court's ad hoc interpretive regime,[335] substantive canons are less likely to be effective. To the extent that is known, defense counsel must weigh the benefits of spending a significant chunk of their finite resources on a sophisticated statutory interpretation argument—

330 *See, e.g.*, Reply to Brief in Opposition at 8–12, Percoco v. United States, 143 S. Ct. 1130 (2023) (No. 21-1158) (authored by Yaakov Roth) (making constitutional avoidance, federalism, and vagueness avoidance arguments at end of brief); Brief for Petitioner at 36–44, Dubin v. United States, 143 S. Ct. 1557 (2023) (No. 22-10) (authored by Jeffrey Fisher) (making federalism, vagueness avoidance, and lenity arguments at end of brief); Brief for Petitioner at 36–37, 41–49, Ciminelli v. United States, 143 S. Ct. 1121 (2023) (No. 21-1170) (authored by Michael Dreeben) (making lenity, vagueness avoidance, and federalism arguments at end of brief); Brief for the Petitioner at 33–34, Bittner v. United States, 143 S. Ct. 713 (2023) (No. 21-1195) (authored by Daniel Geyser) (making lenity argument at end of brief); Brief for the Petitioner at 45–46, Wooden v. United States, 142 S. Ct. 1063 (2022) (No. 20-5279) (authored by Allon Kedem) (making lenity argument at end of brief); Brief for the Petitioner at 42–44, Borden v. United States, 141 S. Ct. 1817 (2021) (No. 19-5410) (authored by team of attorneys including Kannon Shanmugam) (making lenity argument at end of brief).

331 Kleinfeld, *supra* note 261, at 1818.

332 From 2015 through 2018, about three-fourths of all criminal defendants in federal courts were represented by public defenders or appointed counsel. *See* KELLY ROBERTS FREEMAN, BRYCE PETERSON & RICHARD HARTLEY, COUNSEL TYPE IN FEDERAL CRIMINAL COURT CASES, 2015–18, at 13 tbl.3 (2022) (observing that 33.34% of federal defendants were represented by public defenders and 43.27% were represented by counsel appointed under the Criminal Justice Act).

333 Joel S. Johnson, Note, *Benefits of Error in Criminal Justice*, 102 VA. L. REV. 237, 277 (2016); *see also* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 825–27 (2016).

334 *See* Kleinfeld, *supra* note 261, at 1818 ("One of the things that money buys in law is statutory nuance.").

335 *See supra* text accompanying notes 11–12.

complete with whole-code inferences, common law background, and perhaps even corpus linguistics—against the costs of not devoting those same resources to some other aspect of representation. In many instances, defense counsel will not pursue a sophisticated ordinary-meaning argument, concluding that time is better spent on other arguments or in plea negotiations. Even when defense counsel elects to pursue a costly interpretive argument, that hardly guarantees that it will be effective.

If the Supreme Court consistently and explicitly relied on substantive canons or some other generic principle to justify narrow constructions of penal statutes, the costs of successfully arguing for narrow constructions in the lower courts would decrease.

E. Police

The Court's ad hoc approach may also affect the investigation stage, albeit in a somewhat attenuated way. Police discretion under the Fourth Amendment is vast, separate and apart from the Court's ad hoc approach. But that approach to construing penal statutes may increase police discretion even more at the margins.

Unlike courts, police do not interpret and apply law in an authoritative manner. Rather, they are supposed to enforce the law as written, within the bounds of the Fourth Amendment's requirement for individualized suspicion that someone is guilty of a previously defined crime.

Ultimately, legislatures control the scope of police investigative authority. Because each criminal offense on the books "gives [police] another legally valid reason to [search and seize],"[336] their investigative authority under the Fourth Amendment "expands and contracts along with the list of crimes on the books."[337] The more criminal statutes there are, the more power police have to search and seize. Even when particular criminal statutes are rarely prosecuted, police can rely on them as a pretext[338] to justify arrests[339] accompanied by searches[340] aimed at discovering evidence of more serious crimes.

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336 William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 854 (2001).

337 Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 360 (2021); *see also* Stuntz, *supra* note 336, at 854 (observing that legislatures "define the list of crimes" that "answers the Fourth Amendment's most important question: probable cause to believe what?").

338 *See* Whren v. United States, 517 U.S. 806, 813–15 (1996).

339 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

340 *See* Chimel v. California, 395 U.S. 752, 753–54 (1969).

Under the Supreme Court's decision in *Heien v. North Carolina*,[341] when relying on a statute as a predicate offense for a search or seizure, officers need not even rely on a correct interpretation of the statute so long as the interpretation is objectively reasonable.[342] In *Heien*, an officer pulled over a vehicle with one broken taillight, pursuant to a statute that was ambiguous as to whether it required one or two working taillights.[343] The vehicle owner was ultimately charged with trafficking cocaine, which was found during a consent search of the vehicle.[344] The Supreme Court held that even assuming the initial stop was premised on the officer's mistaken interpretation of the statute as requiring two working taillights, that interpretation was a reasonable mistake of law consistent with the Fourth Amendment.[345] Justice Kagan clarified in a concurring opinion that an officer's reading of an indeterminate statute is reasonable so long as "a reasonable judge could [have] agree[d] with the officer's" reading in light of the relevant legal sources.[346]

Heien gives police significantly more leeway to pursue searches and seizures premised on statutes with open-ended language. That is true with or without the Court's ad hoc approach to construing penal statutes. But that approach plausibly increases police discretion on the margins by making it easier for police to justify questionable searches or seizures with expansive constructions of predicate offenses. No firmly established generic policy of narrow construction—transmitted to officers by prosecutors or through training materials concerning enforcement priorities—stands in the way of showing that their expansive

341 Heien v. North Carolina, 574 U.S. 54 (2014).

342 *See id.* at 57; *see also* Wayne A. Logan, *The Harms of* Heien*: Pulling Back the Curtain on the Court's Search and Seizure Doctrine*, 77 VAND. L. REV. 1, 4 (2024) (noting that "[a]fter *Heien*, [police] have strong strategic reason to proceed" with a search or seizure "when they [are] unsure of the scope of a law . . . in the hope that a court will later condone their mistake and allow the evidence [discovered] to be used," and explaining that "*Heien* significantly undermined the rule of law" by "effectively allowing statutory ambiguity to be weaponized against citizens and encouraging rational ignorance among police").

343 *Heien*, 574 U.S. at 59.

344 *Id.* at 58.

345 *Id.* at 61–68.

346 *Id.* at 70 (Kagan, J., concurring); *see also* Johnson, *supra* note 337, at 349 (observing that the reasonable-mistake-of-law test is a "purely legal or analytical" inquiry).

Justice Kagan predicted that reasonable mistakes of law would be "exceedingly rare." *Heien*, 574 U.S. at 70 (Kagan, J., concurring). But a recent study of the eight-year period immediately following *Heien* found that "[o]f the over 270 [state and lower federal court] cases relying on *Heien* to resolve mistake of law challenges, a considerable majority (sixty-seven percent) deemed police mistakes of law reasonable." Logan, *supra* note 342, at 3.

reading, even if ultimately mistaken, was reasonable under the Court's interpretive regime.[347]

Suppose, by contrast, that the officer in *Heien* had been patrolling in a world with a strong norm that courts would apply a robust form of lenity to all penal statutes, narrowly construing all indeterminacies. So long as that norm were transmitted to officers by prosecutors or through training materials, it would have given the officer pause before enforcing the ambiguous statute in an expansive manner. And even if the officer had gone forward with the traffic stop based on a broad and mistaken reading, that reading would not have been reasonable under the Fourth Amendment because no "reasonable judge could [have] agree[d] with the officer's" reading in light of the relevant legal sources,[348] which would include the strong norm of robust lenity.

The Court's ad hoc approach thus represents a missed opportunity for a generic policy of narrow construction that would provide at least some check on the immense enforcement discretion afforded to police. That vast discretion presents serious fair-notice and arbitrary-enforcement concerns, because it effectively permits "[l]aw by cop" through on-the-street invention and enforcement of new crimes based on venturesome constructions of open-ended statutes.[349] To the extent the ad hoc approach increases police discretion in that manner, it likely exacerbates well-documented biases against people of color and those in poor communities that are already present in policing practices.[350] These biases exist apart from the ad hoc approach. But that approach may worsen them.

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347 As with legislatures, the strongest remedy for the police incentive to seek out extreme constructions of open-ended statutes in the investigatory stage would be to void the statutes themselves as unconstitutionally vague. *See supra* note 277; *see also* Johnson, *supra* note 337, at 381–84 (describing how the *Heien* framework can be used to support vagueness challenges to penal statutes used as predicate offenses for searches and seizures).

348 *See supra* note 346.

349 Low & Johnson, *supra* note 52, at 2074, 2077–79.

350 *See, e.g.*, Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813 (2007) (finding that New York City's stop-and-frisk initiative had a disproportionate effect on people of African American and Hispanic descent); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 L. & SOC'Y REV. 129, 143 (2000) ("In middle-class areas, policing tends to be reactive (responses to residents' calls), whereas poor neighborhoods experience greater proactive policing (officers initiate contacts and engage in more obtrusive stops of people on the streets)." (first citing W. Eugene Groves, *Police in the Ghetto*, *in* SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 103 (1968); and then citing PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE (1967))).

Police discretion to enforce low-level order-maintenance crimes is often exercised "disparately along lines of race, class, [and] ethnicity," *see* Josh Bowers, *Probable Cause,*

CONCLUSION

This Article has shown that the Supreme Court tends to adopt narrow constructions of penal statutes. But when doing so, it tends to rely on ad hoc rationales to the exclusion of substantive canons or other generic principles of construction for penal statutes. That approach works to undermine the rule of law by perpetuating the enactment, enforcement, and interpretation of penal statutes in an excessively broad and indeterminate manner, in a way that systematically increases discretion for various actors who administer criminal law. A few brief prescriptions for courts and practitioners are therefore warranted.

For the Supreme Court, the prescription is straightforward. When narrowly construing penal statutes, the Court should recognize the downstream consequences for the rule of law that result from its repeated reliance on ad hoc rationales. It should weigh those consequences against whatever benefits it perceives. Consistent reliance on substantive canons—or some other generic principle of construction that consistently leans toward narrow readings—would promote the rule of law at many stages of the criminal legal process by increasing predictability and decreasing discretion that invites arbitrary and unfair enforcement.

Lower courts need not wait for the Supreme Court. The Court's current ad hoc regime permits them not only to adopt broad constructions, but also to adopt narrow constructions based on substantive canons or other widely applicable principles. They should more often use their discretion to do just that. In particular, lower courts should

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Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity," 66 STAN. L. REV. 987, 1037, 1037–38 (2014), sometimes with deadly consequences. While Black Americans make up approximately 14% of the population, for example, they account for approximately 27% of all those shot and killed by police. *Fatal Force*, WASH. POST (Oct. 10, 2024), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_1 [https://perma.cc/PE37-TRF4]. One analysis of recent police-civilian encounters showed that officers directed a gun at Black individuals at eight times the rate of white individuals and threatened force against Black individuals at four times the rate of white individuals. *See* ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018: STATISTICAL TABLES 7 tbl.5 (2023); *see also* Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/UZ9X-GFWD] (collecting evidence on racial disparities in police shootings and use-of-force incidents). These racial disparities are likely even higher when accounting for "selection bias" in the initial decisions to stop individuals. *See* Dean Knox, Will Lowe & Jonathan Mummolo, *Administrative Records Mask Racially Biased Policing*, 114 AM. POL. SCI. REV. 619, 620 (2020).

consider pursuing a more robust conception of the rule of lenity,[351] more frequently and explicitly relying on vagueness avoidance,[352] and looking for opportunities to apply the federalism and scienter presumptions.

Regardless of what courts do, lawyers should continue to raise substantive canons as a basis for narrowly construing statutes. Even if a court does not ultimately rely upon a canon raised, inclusion of the policy goals it captures may nonetheless have persuasive value. At the Supreme Court in particular, lawyers should consider placing more emphasis on substantive canons, rather than relegating them to a fail-safe function at the end of briefs. Doing so may be tricky for Supreme Court defense counsel who must zealously advocate on behalf of their particular clients, and may rightly perceive the current Court as strongly preferring sophisticated, ordinary-meaning analysis to substantive canons. Lawyers drafting amicus briefs thus play a critical role in highlighting the significance of substantive canons and urging the Court to rely on them more heavily. But because amici are not typically allotted time for oral argument before the Court, it falls to defense counsel to draw attention to applicable substantive canons during argument.[353]

As it now stands, the Court's ad hoc rationales for its narrow constructions of penal statutes provide no clear policy of construction for lower courts. Perhaps that is intentional. Perhaps not. Either way, greater attention should be paid to this state of affairs and its potentially substantial costs.

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351 *See, e.g.*, Bittner v. United States, 143 S. Ct. 713, 724–25 (2023) (opinion of Gorsuch, J.) (arguing for a conception of lenity more robust than the Court's modern formulation); Wooden v. United States, 142 S. Ct. 1063, 1083–86 (2022) (Gorsuch, J., concurring in the judgment) (making a similar argument); *see also* Johnson, *supra* note 197, at 1–10 (arguing for the restoration of a more robust historic rule of lenity under the rubric of the major questions doctrine).

352 *See, e.g.*, Johnson, *supra* note 6, at 78 (arguing for recognition of vagueness avoidance as a distinct tool of statutory construction).

353 This dynamic—the disincentive for Supreme Court defense counsel to seek long-term victories as opposed to short-term victories for their clients—may favor the creation of an Office of the Defender General, which would advocate for the interests of criminal defendants as a class in Supreme Court cases in a way akin to the Office of the Solicitor General when it serves an amicus curiae function. *See* Epps & Ortman, *supra* note 134, at 1471–72.

APPENDIX: SUBSTANTIVE CANONS IN NARROW-CONSTRUCTION CASE MATERIALS

Materials Invoking Substantive Canons

Bond v. United States (No. 12-158)	572 U.S. 844, 855, 857–58, 863 (2014) (constitutional avoidance; federalism); Brief for Petitioner at 20–23, 42–46 (same); Brief *Amicus Curiae* of the Jud. Educ. Project in Support of Petitioner at 26–32 (same); Transcript of Oral Argument at 12, 52 (same).
Burrage v. United States (No. 12-7515)	571 U.S. 204, 216, 218 (2014) (lenity; vagueness avoidance); *id.* at 219 (Ginsburg, J., concurring in judgment) (lenity); Petitioner's Opening Brief at 22, 32 (lenity; scienter); Brief of Fams. Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner at 3–4 (lenity; arbitrary enforcement concerns akin to vagueness avoidance); Amicus Curiae Brief of Nat'l Ass'n of Crim. Def. Laws. in Support of Petitioner and Urging Reversal at 9 (lenity); Transcript of Oral Argument at 7 (scienter).
Rosemond v. United States (No. 12-895)	572 U.S. 65 (2014); Brief for the Petitioner at 49 (lenity).
Elonis v. United States (No. 13-983)	575 U.S. 723, 734–37 (2015) (scienter); Brief for the Petitioner at 26, 31–32 (constitutional avoidance; scienter); Amicus Curiae Brief of the Ctr. for Individual Rts. in Support of Petitioner at 3–11 (federalism).
Henderson v. United States (No. 13-1487)	575 U.S. 622 (2015); Brief for the Petitioner at 29 (constitutional avoidance); Brief *Amicus Curiae* of Gun Owners of Am., Inc. et al. in Support of Petitioner at 17 (same); Brief for the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae in Support of Petitioner at 4–5, 17–18 (same); Transcript of Oral Argument at 10, 16 (same).
McFadden v. United States (No. 14-378)	576 U.S. 186 (2015); Brief for the Petitioner at 43–57 (vagueness avoidance); Transcript of Oral Argument at 28 (same).
Mellouli v. Lynch	575 U.S. 798 (2015).
Yates v. United States (No. 13-7451)	574 U.S. 528, 547–48 (2015) (Ginsburg, J., plurality opinion) (lenity); Brief of Petitioner at 25–28 (lenity; vagueness avoidance); Brief for Eighteen Crim. L. Professors as *Amici Curiae* in Support of Petitioner at 18–21, 33–35 (same); Brief of Cause of Action et al. as *Amici Curiae* Supporting Petitioner at 21–27 (vagueness avoidance); Brief of Wash. Legal Found. as *Amicus Curiae* in Support of Petitioner at 8–11 (same); Transcript of Oral Argument at 17, 34 (same); Brief for *Amicus Curiae* Cato Inst. in Support of Petitioner at 16 (lenity); Brief Amicus Curiae of Pac. Legal Found. et al. in Support of Petitioner at 12–13 (same).
Mathis v. United States (No. 15-6092)	579 U.S. 500, 511–12 (2016) (constitutional avoidance); *id.* at 522 (Thomas, J., concurring) (same); Brief for Petitioner at 25–26 (same); Brief of the Nat'l Ass'n of Fed. Defs. & the Nat'l Ass'n of Crim. Def. Laws. as *Amici Curiae* in Support of Petitioner at 23 (same); Brief of the Am. Immigr. Laws. Ass'n et al. as Amici Curiae in Support of Petitioner at 21–22 (same).

McDonnell v. United States (No. 15-474)	579 U.S. 550, 575–77 (2016) (vagueness avoidance; constitutional avoidance; federalism); Brief for the Petitioner at 21–26 (vagueness avoidance; constitutional avoidance; federalism); Amicus Brief of Former Va. Att'ys Gen. in Support of Petitioner at 7–13 (lenity; vagueness avoidance; constitutional avoidance; federalism); Brief of Amicus Curiae Republican Governors Pub. Pol'y Comm. in Support of Petitioner at 5–26 (lenity; vagueness avoidance; federalism); Brief of Amicus Curiae Nat'l Ass'n of Crim. Def. Laws. in Support of Petitioner and Urging Reversal at 4–14 (same); Brief of *Amici Curiae* L. Professors in Support of Petitioner at 10–14 (vagueness avoidance; constitutional avoidance); Brief of Amicus Curiae James Madison Ctr. for Free Speech Supporting Petitioner at 3, 17–20 (constitutional avoidance); Brief *Amicus Curiae* of U.S. Just. Found. et al. in Support of Petitioner at 18–29 (federalism); Transcript of Oral Argument at 22, 49, 58 (vagueness avoidance).
Nichols v. United States (No. 15-5238)	578 U.S. 104 (2016); Brief for Petitioner at 59–62 (lenity).
Dean v. United States (No. 15-9260)	137 S. Ct. 1170 (2017); Brief of Petitioner at 32–33 (lenity); Brief of the Nat'l Ass'n of Crim. Def. Laws. & Fams. Against Mandatory Minimums as Amici Curiae in Support of Petitioner at 26–30 (same); Transcript of Oral Argument at 46 (same).
Esquivel-Quintana v. Sessions (No. 16-54)	137 S. Ct. 1562, 1572 (2017); Brief *Amici Curiae* of the Nat'l Immigrant Just. Ctr. & the Am. Immigr. Laws. Ass'n in Support of Petitioner at 7–9 (lenity); Brief of the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae in Support of Petitioner at 9–15 (same); Brief for Immigrant Def. Project et al. as Amici Curiae in Support of Petitioner at 18–23 (vagueness avoidance); Transcript of Oral Argument at 6, 10–12, 37 (lenity).
Marinello v. United States (No. 16-1144)	138 S. Ct. 1101, 1108 (2018) ("interpretive restraint" akin to vagueness avoidance); Brief of Petitioner at 56–58 (lenity); Brief of Am. Coll. of Tax Couns. as *Amicus Curiae* in Support of Petitioner at 4–21 (vagueness avoidance); Brief for *Amici Curiae* Cause of Action Inst. & Nat'l Ass'n of Crim. Def. Laws. in Support of Petitioner at 8–29 (same); Brief for the Chamber of Com. of the U.S. & Nat'l Fed'n of Indep. Bus. as *Amici Curiae* Supporting Petitioners at 18–23 (same); Brief for N.Y. Council of Def. Laws. as Amicus Curiae in Support of Petitioner at 4–25 (same); Transcript of Oral Argument at 19, 34 (lenity; vagueness avoidance).
Rehaif v. United States (No. 17-9560)	139 S. Ct. 2191, 2195–97 (2019) (scienter); Brief of Petitioner at 25–29, 32–33 (lenity; constitutional avoidance; scienter); Brief of Nat'l Ass'n of Crim. Def. Laws. as *Amicus Curiae* in Support of Petitioner at 9–19 (lenity; scienter); Brief Amicus Curiae of the Nat'l Immigrant Just. Ctr. in Support of Petitioner at 8–9 (scienter); Transcript of Oral Argument at 10, 27 (same).
Kelly v. United States (No. 18-1059)	140 S. Ct. 1565, 1574 (2020) (federalism); Brief for Petitioner at 34–35 (lenity; vagueness avoidance; federalism); Brief for Respondent William E. Baroni, Jr. in Support of Petitioner at 34–42 (same); Brief of Michael Binday as *Amicus Curiae* in Support of Petitioner at 23–29 (same); Transcript of Oral Argument at 4, 20 (vagueness avoidance; federalism).

Borden v. United States (No. 19-5410)	141 S. Ct. 1817 (2021); Brief for the Petitioner at 42–44 (lenity); Brief of L. Professors Leah Litman *et al.* as *Amici Curiae* in Support of Petitioner at 15–29 (vagueness avoidance); Brief for Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae in Support of Petitioner at 17–28 (lenity); Brief of FAMM as *Amicus Curiae* in Support of Petitioner at 5 (same); Brief for *Amicus Curiae* Ams. for Prosperity Found. in Support of Petitioner at 27–29 (same); Transcript of Oral Argument at 5, 66 (lenity; vagueness avoidance).
Van Buren v. United States (No. 19-783)	141 S. Ct. 1648, 1661–62 (2021) (lenity; vagueness avoidance); Brief for Petitioner at 36–41 (lenity; vagueness avoidance; constitutional avoidance); Brief for *Amicus Curiae* U.S. Tech. Pol'y Comm. of the ACM in Support of Neither Party at 4 (lenity); Brief of Amicus Curiae The Markup in Support of Petitioner at 27–28 (constitutional avoidance); Brief for the Reps. Comm. for Freedom of the Press et al. as Amici Curiae Supporting Petitioner at 4–18 (vagueness avoidance; constitutional avoidance); Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Petitioner at 8–9 (vagueness avoidance); Brief of the Nat'l Ass'n of Crim. Def. Laws. as *Amicus Curiae* in Support of Petitioner at 4–10, 13–18 (lenity; vagueness avoidance); Brief for *Amicus Curiae* Ams. for Prosperity Found. in Support of Petitioner at 17–32 (same); Brief for *Amicus Curiae* Comm. for Just. in Support of Petitioner at 10–13 (constitutional avoidance; vagueness avoidance; federalism); Transcript of Oral Argument at 13, 23, 40, 48, 67 (lenity; constitutional avoidance; vagueness avoidance; federalism).
Ruan v. United States (Nos. 20-1410, 21-5261)	142 S. Ct. 2370, 2376–80 (2022) (vagueness avoidance; scienter); Brief for the Petitioner at 15, 46 (No. 20-1410) (federalism; scienter); Brief of Petitioner at 14–25, 42–52 (No. 21-5261) (vagueness avoidance; scienter); Brief for Amicus Curiae Due Process Inst. in Support of Petitioner at 6–27 (No. 20-1410) (same); Brief of the Chamber of Com. of the U.S. as *Amicus Curiae* in Support of Neither Party at 4–11 (same); Brief of *Amici Curiae* Professors of Health L. & Pol'y in Support of Petitioner at 11–13, 21–22 (No. 20-1410) (lenity; scienter); Brief Amicus Curiae of Pac. Legal Found. in Support of Petitioner at 8–18 (No. 20-1410) (lenity; constitutional avoidance; scienter); Brief for *Amicus Curiae* Nat'l Pain Advoc. Ctr. in Support of Petitioners at 18–22 (scienter); Brief of Amicus Curiae the Nat'l Ass'n of Crim. Def. Laws. in Support of Petitioners at 8–10 (same); Brief of the Cato Inst. as *Amicus Curiae* Supporting Petitioner at 23–25 (No. 20-1410) (vagueness avoidance); Transcript of Oral Argument at 5, 58–60 (vagueness avoidance; federalism; scienter).
United States v. Taylor (No. 20-1459)	142 S. Ct. 2015, 2029 (2022); Brief for Respondent at 29–33, 47–50 (lenity; vagueness avoidance); Brief of *Amici Curiae* on Behalf of the Nat'l Ass'n of Crim. Def. Laws. & FAMM in Support of Respondent at 4 (vagueness avoidance); Brief for *Amicus Curiae* First Amend. Clinic in Support of Respondent at 2–12 (constitutional avoidance); Transcript of Oral Argument at 48, 66–71 (vagueness avoidance).

Wooden v. United States (No. 20-5279)	142 S. Ct. 1063, 1075–76 (2022) (Kavanaugh, J., concurring) (scienter); *id.* at 1079–87 (Gorsuch, J., concurring in judgment) (lenity); Brief for the Petitioner at 45–46 (same); Brief of the Nat'l Ass'n of Fed. Defs. as *Amicus Curiae* in Support of Petitioner at 20–21 (same); Brief of FAMM as *Amicus Curiae* in Support of Petitioner at 6–15 (same); Brief for Professors of Crim. L. as Amici Curiae Supporting Petitioner at 25–26 (same); Transcript of Oral Argument at 34–35, 62–65 (same).
Bittner v. United States (No. 21-1195)	143 S. Ct. 713, 724–25 (2023) (opinion of Gorsuch, J.) (lenity); Brief for the Petitioner at 33–34 (same); Brief of Ctr. for Taxpayer Rts. as *Amicus Curiae* in Support of Petitioner at 28–31 (same); Brief for the Chamber of Com. of the U.S. as Amicus Curiae Supporting Petitioner at 4–20 (same); Brief of the Am. Coll. of Tr. & Est. Couns. as *Amicus Curiae* in Support of Neither Party at 20–21 (constitutional avoidance); Transcript of Oral Argument at 40 (lenity).
Ciminelli v. United States (No. 21-1170)	143 S. Ct. 1121, 1128 (2023) (federalism); Brief for Petitioner at 41–49 (lenity; vagueness avoidance; federalism); Brief for *Amici Curiae* L. Professors in Support of Petitioner at 10–12 (vagueness avoidance); Brief of the Nat'l Ass'n of Crim. Def. Laws. as *Amicus Curiae* in Support of Petitioner at 4–8 (vagueness avoidance; federalism).
Dubin v. United States (No. 22-10)	143 S. Ct. 1557, 1572 (2023) (vagueness avoidance); Brief for Petitioner at 36–44 (lenity; vagueness avoidance; federalism); Brief for Professor Joel S. Johnson as Amicus Curiae Supporting Petitioner at 3–16 (vagueness avoidance); Brief of Nat'l Ass'n of Crim. Def. Laws. as *Amici Curiae* in Support of Petitioner at 22 (lenity); Transcript of Oral Argument at 37–39, 48, 52, 59 (lenity; vagueness avoidance; federalism).
Lora v. United States (No. 22-49)	143 S. Ct. 1713 (2023); Brief for Petitioner at 27–28, 30–31 (lenity; constitutional avoidance); Transcript of Oral Argument at 5, 45 (same).
Percoco v. United States (No. 21-1158)	143 S. Ct. 1130, 1136–37 (2023) (vagueness avoidance); Brief for Petitioner at 38–47 (vagueness avoidance; constitutional avoidance; federalism); Brief for Respondent Steven Aiello in Support of Petitioner at 32–37, 42–50 (lenity; vagueness avoidance; constitutional avoidance; federalism); Brief of Citizens United et al. as *Amici Curiae* in Support of Petitioner at 9–28 (vagueness avoidance; constitutional avoidance; federalism); Brief for the Chamber of Com. of the U.S. as *Amicus Curiae* in Support of Neither Party at 20–25 (vagueness avoidance; constitutional avoidance); Brief of *Amicus Curiae* N.Y. Council of Def. Laws. in Support of Petitioner at 4–11 (vagueness avoidance).
United States v. Hansen (No. 22-179)	143 S. Ct. 1932, 1945–46 (2023) (scienter; constitutional avoidance); Brief for the United States at 28, 35 (scienter; constitutional avoidance); Reply Brief for the United States at 6 n.1 (scienter); Brief for Pfizer Inc. as Amicus Curiae in Support of Neither Party at 5–8 (lenity; vagueness avoidance); Brief for Mont. and 24 Other States as *Amici Curiae* in Support of Petitioner at 6, 14 (constitutional avoidance); Brief *Amicus Curiae* of Immigr. L. Reform Inst. in Support of Petitioner at 8–9 (same); Transcript of Oral Argument at 4, 50–51 (same).