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CRIMINAL CONSTITUTIONAL AVOIDANCE

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CRIMINAL CONSTITUTIONAL AVOIDANCE

William W. Berry III*

Just two terms ago in United States v. Skilling, the Supreme Court used the avoidance canon in response to a void-for-vagueness challenge to the federal criminal fraud statute. As explained below, the Court severely restricted the statute’s meaning, limiting its proscription against “deprivation of honest services” to bribery and kickbacks.

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

Simply put, vague criminal statutes are not inherently ambiguous. Instead of offering a choice between two

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meanings, they are indefinite, uncertain, and unclear. And, it is not the potential meanings of the vague statute that create constitutional problems; there is only a constitutional problem if there is no ascertainable meaning.

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

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INTRODUCTION

A resolution to avoid an evil is seldom framed until the evil is so far advanced as to make avoidance impossible.

- Thomas Hardy

The canon of constitutional avoidance and the propriety of its use are again at the center of academic debate.

1 THOMAS HARDY, FAR FROM THE MADDOCK CROWD (1874).

following the United States Supreme Court’s decision at the end of last term to uphold the Patient Protection and Affordable Care Act in National Federation of Independent Business v. Sebelius. In affirming the individual mandate, Chief Justice Roberts’ controlling opinion decided to interpret the ambiguous language of the statute in order to


4 The four other justices in the majority, Ginsburg, Breyer, Sotomayor, and Kagan, joined with Roberts, but also voted to uphold the statute on commerce clause grounds. Id. at 2609.
save the constitutionality of the statute. The four dissenting justices, on the other hand, argued that Roberts’ interpretation contravened Congress’ intent by altering the meaning of the plain language of the statute.

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

The second point of contention when the Court uses the avoidance canon is whether there are constitutional norms protected by the use of the canon. Such resistance norms provide a penumbral value to under-enforced constitutional provisions. Thus, in order to escape the avoidance doctrine, Congress must be clear about its intent to approach constitutional lines. The criticism of using the avoidance canon to give value to such norms is that it enables the judiciary to create a penumbral constitution,

5 *Id.* at 2594. Specifically, Roberts determined that the applicable meaning of ambiguous “penalty” language was that it constituted a “tax,” such that passage of the statute fell under Congress’ taxing power. *Id.*

6 *Id.* at 2651.

7 *Id.* at 2577-80.

8 *Id.*

9 *Id.*

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

11 As explained below, resistance norms are constitutional values, often under-enforced, that increase in significance when the Court applies the avoidance doctrine, such that their precise scope becomes undetermined. *See* Young, *supra* note 2; discussion *infra* part II.

12 Young, *supra* note 2; Morrison, *supra* note 2.
exceeding its Article III power.\textsuperscript{13}

To be sure, this debate about the avoidance canon is not new.\textsuperscript{14} The academic literature concerning the justifications for and the shortcomings of the canon of constitutional avoidance is well developed.\textsuperscript{15}

But, the academic literature has not explored the application of the avoidance doctrine to criminal statutes as a class.\textsuperscript{16} This article takes a small step in that direction. It explores whether the canon of constitutional avoidance is appropriate in cases involving void-for-vagueness challenges to federal criminal statutes.

\textsuperscript{13} See Posner, supra note 2.

\textsuperscript{14} See Vermeule, supra note 2; see generally supra note 2.

\textsuperscript{15} See supra note 2; William N. Eskridge, Jr., All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806, 101 COLUM. L. REV. 990, 1079-80 (2001).

\textsuperscript{16} I am indebted to Sara Sun Beale for raising this issue at the close of her entertaining and insightful “term paper” on the Skilling case, which illuminates the core arguments and issues in the case through a hypothetical discussion between two members of a law faculty. See Sara Sun Beale, An Honest Services Debate, 8 OHIO ST. J. CRIM. L. 251 (2010). She closes her article as follows:

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

\textit{Id.} at 271-72.
Just two years ago in *United States v. Skilling*, the Supreme Court used the avoidance canon in response to a void-for-vagueness challenge to the federal criminal fraud statute. As explained below, the Court severely restricted its meaning, limiting its proscription against deprivation of honest services to bribery and kickbacks.

This article argues that, contrary to the Court’s decision in *Skilling*, the canon of constitutional avoidance is inappropriate in void-for-vagueness cases. This is because such cases do not present a statutory ambiguity that requires choosing between competing meanings or interpretations. Instead, void-for-vagueness challenges focus on the clarity of a statute and ask simply whether it is clear enough to satisfy the notice requirements of the Constitution. In other words, this article claims that the absence of statutory ambiguity—one interpretation that complies with the Constitution and one interpretation that indicates constitutional infirmities—in void-for-vagueness cases makes the use of the avoidance canon improper in such cases.

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

Part I of this article explores the justifications for the canon of constitutional avoidance. In Part II, this article describes the Court’s void-for-vagueness doctrine and its

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18 Id.
19 Statutes do not have to be completely clear to satisfy the requirements of the vagueness doctrine. They just must be clear enough to provide adequate notice to citizens of the conduct proscribed by the statute.
use of the avoidance canon to circumvent the vagueness question in *Skilling*. Part III argues that the use of the avoidance canon in *Skilling* was improper, and explains why it is not an appropriate vehicle to respond to void-for-vagueness constitutional challenges to federal criminal statutes. Part IV explores the negative theoretical and practical consequences of applying the avoidance canon to potentially vague statutes. Finally, Part V concludes the article by outlining a model for applying the avoidance canon to other constitutional questions involving criminal statutes.

I. THE CANON OF CONSTITUTIONAL AVOIDANCE

A. The Development of the Modern Avoidance Canon

The canon of constitutional avoidance predates the establishment of judicial review.\(^{20}\) A substantive canon,\(^{21}\) its traditional form stated that when deciding, “Between


\(^{21}\) A “substantive” or “normative” canon is one that aims to accomplish a stated judicial purpose, here avoiding constitutional decision-making, as opposed to seeking to ascertain and follow the intent of Congress. See, e.g., Young, supra note 2, at 1593–99 (2000); Rodriguez, supra note 2 at 749 (1992) (stating that “normative canons may or may not coincide with legislators' values or intentions”); Ross, supra note 2, at 563 (1992) (claiming that normative canons are judicial creations which are driven by policy objectives rather than congressional intent).
two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act.”

Under classical avoidance, the court must “reach the issue whether the doubtful version of the statute is constitutional [and conclude that it is not] before adopting the construction that saves the statute from constitutional invalidity.”

Over time, however, the Court broadened this classical version of the canon of constitutional avoidance. Because the application of the classical avoidance canon required the Court to make a constitutional determination in deciding whether to apply the canon, the Supreme Court modified the canon in United States ex rel. Attorney General v. Delaware & Hudson Company. The Court in that case explained that the classical canon in essence required the Court to issue advisory opinions. To apply the avoidance canon, the Court first had to decide that one interpretation was unconstitutional. But, because such a determination did not control the outcome of the case—the saving construction did—the decision as to the

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24 See Morrison, supra note 2, at 1259; Vermeule supra note 2, at 1947.

25 See Morrison, supra note 2, at 1259; Vermeule supra note 2, at 1958-59.

26 213 U.S. 366 (1909); see John Copeland Nagle, Delaware & Hudson Revisited, 72 Notre Dame L. Rev. 1495, 1496 (1997) (identifying Delaware & Hudson as “[t]he true culprit” responsible for the rise of modern avoidance).
unconstitutional interpretation became an advisory opinion.\textsuperscript{27}

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

\[\text{[U]}\text{nless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.}\textsuperscript{28}

This modern avoidance canon thus requires the Court to choose alternative plausible statutory interpretations not just where one interpretation is unconstitutional, but also where one interpretation gives rise to serious constitutional doubts. As the \textit{Delaware \& Hudson} Court explained, “[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”\textsuperscript{29}

Justice Brandeis’ famous concurrence in \textit{Ashwander v. Tennessee Valley Authority} further highlighted the move in the years that followed to cement the modern avoidance canon in the name of judicial deference to the legislature.\textsuperscript{30} The canon increased legislative deference by minimizing the cases in which the Court even reached the question of a statute’s constitutionality, much less struck it down.\textsuperscript{31}

\textsuperscript{27} \textit{213 U.S. at 407-09.}
\textsuperscript{28} \textit{Id.} at 408.
\textsuperscript{31} \textit{Ashwander v. TVA}, 297 U.S. 288, 348 (1936) (Brandeis, J.,
Brandeis explained,

The Court has frequently called attention to the “great gravity and delicacy” of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.\textsuperscript{32}

Thus, the “cardinal principle,” of the modern avoidance canon, “which ‘has for so long been applied by [the] Court that it is beyond debate,’” requires merely that the Court make “a determination of serious constitutional doubt, and not a determination of unconstitutionality.”\textsuperscript{33}

\textbf{B. The Justifications for the Avoidance Canon}

The justifications for the use of the canon fall generally into two categories: judicial restraint and normative justifications.\textsuperscript{34} The judicial restraint theory relies on the idea that the Court should avoid interpretations of statutes that raise constitutional doubts in order to respect, to the greatest degree possible, legislative decision-making.\textsuperscript{35} As explained below, the judicial restraint justification has become less plausible with the application of the modern

\textsuperscript{32} Id. Brandeis famously outlined seven categories of interpretive principles for the Court to use in interpreting statutes including modern avoidance. Id.


\textsuperscript{34} See, \textit{e.g.}, Morrison, \textit{supra} note 2; \textit{ESKRIDGE, supra} note 2.

\textsuperscript{35} See, \textit{e.g.}, Morrison, \textit{supra} note 2; \textit{ESKRIDGE, supra} note 2; Vermeule, \textit{supra} note 2.
canon. In many cases, the modern canon results in the Court engaging in statutory rewriting that looks very little like restraint.\textsuperscript{36}

The second primary justification scholars have offered is one of constitutional enforcement of resistance norms.\textsuperscript{37} The avoidance canon thus should “give voice to certain normative values,” namely “those embodied in the underlying constitutional provisions that create the constitutional ‘doubt.’”\textsuperscript{38} Under this justification, the overarching norm of the avoidance canon is a restriction on the ability of Congress to legislate to the outer limits of its constitutional authority without being explicit about its decision to do so.\textsuperscript{39}

1. Judicial Restraint

Under its initial conception of classical avoidance, the Court emphasized that “[t]his [avoidance] canon is followed out of respect for Congress, which we assume legislates in light of constitutional limitations.”\textsuperscript{40} The modern canon likewise rests on the notion that the Court should “minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections.”\textsuperscript{41}

\textsuperscript{36} Schauer, \textit{supra} note 2 (criticizing the avoidance canon as disguised judicial activism); As explained below, the traditional canon sought only to prevent constitutional interpretations, as opposed to avoiding all constitutional doubts, making judicial restraint at least a more plausible justification.

\textsuperscript{37} Young, \textit{supra} note 2, at 1575-76 (2000); Morrison, \textit{supra} note 2.

\textsuperscript{38} Young, \textit{supra} note 2, at 1585, 1541. \textit{See also} Frickey, \textit{supra} note 2.

\textsuperscript{39} \textit{See} Morrison, \textit{supra} note 2; Eskridge, \textit{supra} note 2.


\textsuperscript{41} Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).
Professor Trevor Morrison’s excellent article on the use of the avoidance canon in the Executive branch succinctly summarizes this judicial restraint justification for the avoidance canon.\textsuperscript{42} He explains:

The combination of classical avoidance, \textit{Delaware \& Hudson}, and \textit{Ashwander} yields the following:

(1) In keeping with their oath to uphold the Constitution, members of Congress are presumed to have intended to legislate within constitutional limits. As faithful agents of the legislature, the federal courts are obliged to honor that legislative intent.

(2) The values of legislative supremacy and judicial restraint, including the interest in mitigating countermajoritarian concerns, direct the courts to avoid, when possible, passing on the constitutionality of federal statutes.

(3) Although the countermajoritarian difficulty is at its most acute when a court actually invalidates a statute as unconstitutional, the avoidance canon cannot be limited only to those circumstances without requiring the courts to offer advisory opinions on constitutional issues.\textsuperscript{43}

\textsuperscript{42} Morrison, \textit{supra} note 2.
\textsuperscript{43} \textit{Id.} at 1206-07. Professor Frickey has similarly explained,

Descriptively, the classic justifications for the canon are that it promotes judicial restraint by allowing judges to avoid the “delicate process of constitutional adjudication” and its concomitant countermajoritarian difficulties; it coincides with the probable congressional intent preferring the ongoing validity of some version of the statute to invalidity as the result of judicial review; and it encourages a healthy, cooperative attitude between the Court and Congress by “remanding” issues for careful congressional deliberation consistent with the members’ oath of office to uphold the Constitution, thereby illuminating the issue not only for Congress but also the Court if the issue ever returns
As Morrison notes, however, scholars have criticized this justification for the modern canon extensively.\textsuperscript{44} Professor Frederick Schauer argues, for instance, that when the Court uses the avoidance canon, it may abandon the best interpretation of the statute at issue in favor of any alternative that is “fairly possible,” opening the door both for poor interpretation and political activism on the Court.\textsuperscript{45}

Further, it is easy to see how rewriting a statute (or at least altering its meaning) in the name of avoiding the constitution does not appear to be an exercise of restraint. Deriving a meaning for a statute that does not flow directly from its text in the name of saving it seems much more like activism than restraint.

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

2. Resistance Norms

A second justification for the avoidance canon is its ability to give voice to under-enforced constitutional norms. Professor Ernest Young provides a robust account to it.

\textsuperscript{44} See generally Morrison, \textit{supra} note 2.
\textsuperscript{45} See Schauer, \textit{supra} note 2.
of this justification, describing it as a rule “that is designed not to reflect what Congress might have wanted under particular conditions, but rather to give voice to certain normative values.” These values are the ones that give rise to the constitutional doubt.

Young’s account explains that, in some cases, the avoidance canon can provide a penumbral expression of an under-enforced constitutional norm. In other words, the canon protects the norm by avoiding an interpretation of a statute that approaches the norm unless Congress has clearly stated to the contrary.

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

The resistance norm account of the canon provides a more defensible justification than the judicial restraint

\[46\] Young, supra note 2 at 1585. See also Morrison, supra note 2 (highlighting the same concept).

\[47\] Eskridge, supra note 2, at 286; see also Morrison, supra note 2 (highlighting the same idea).

\[48\] Eskridge, supra note 2. A possible analogy here would be to a new dating relationship in which neither member of the couple has defined the extent of the relationship (or its boundaries with reference to dating others). The relationship might have a greater perceived reality (penumbral presence) as long as the couple does not have a “define-the-relationship” (DTR) conversation. In other words, the Supreme Court, in this context, will avoid pressing the issue unless Congress insists on defining the relationship, that is, the scope of the constitutional provision.
account. First, the criticism of the canon that it undermines Congress’ statutory intent carries less weight if the goal of the canon is to protect constitutional norms from Congressional infringement.49 Second, Judge Posner’s argument that the avoidance canon promotes the development of a penumbral constitution “becomes just a statement of the canon’s point, not an indictment of it.”50

C. The Ambiguity Assumption of the Avoidance Canon

As William Eskridge has explained, the avoidance canon is a substantive canon. This means that it serves to protect the substance—the underlying values—of the Constitution. The Supreme Court has described the canon as follows:

Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.51

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

The decision of whether to invoke the canon arises where there is a latent statutory ambiguity. Without an open question of statutory interpretation, the avoidance canon is not relevant to the Court’s decision-making.

49 Morrison, supra note 2.
50 Id. See Posner, supra note 2.
Invocation of the canon thus presumes (1) an open question of what a statute means based on ambiguous language that suggests two or more possible meanings and (2) one of the possible meanings raises doubts as to the constitutionality of the statute.

II. VAGUENESS AND CONSTITUTIONAL AVOIDANCE

A. The Constitutional Prohibition against Vagueness

The precise origins of the constitutional prohibition against vagueness are not clear, as initially the concept was primarily a principle of construction focusing on notice. As Justice Holmes explained in Nash v. United States, “the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty...” Over time, this limiting construction became a part of the due process requirements of the Fifth and Fourteenth Amendments. As the Court indicated, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates

52 Note, Void for Vagueness: An Escape from Statutory Interpretation, 23 IND. L.J. 272, 275 (1947-1948) (“Neither The Federalist nor the records of debates of the Constitutional Convention and the ratifying conventions indicate that the concept was considered a serious issue, if an issue at all.”); Cristina D. Lockwood, Defining Indefiniteness: Suggested Revisions to the Void-for-Vagueness Doctrine, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 255 (2010).

53 229 U.S. 373, 377 (1914). Holmes qualified this with respect to the Sherman Act, noting that “[t]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree...” Id. See Lockwood, supra note 52.
the first essential of due process of law.” And the Court applied this doctrine to criminal statutes: “[n]o one may be required at the peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”

At the heart of the constitutional prohibition against vagueness is the concept of fair notice. As the Court has explained, “[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition.”

Nonetheless, the Court has never required perfect clarity to survive a vagueness challenge. Rather, the prohibition only requires a statute “to provide a person of ordinary intelligence fair notice of what is prohibited,” as the Court has “eschewed the idea of perfect clarity or mathematical certainty.”

To satisfy due process, then, “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” This standard allows for facial and as-applied challenges, depending on the statute at issue. The Skilling case provides an example of the latter.

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57 United States v. Williams, 128 S. Ct. 1830, 1845 (2008) (emphasis added); Lockwood, supra note 52, at 271.


59 See, e.g., Lawson, supra note 52.

B. United States v. Skilling

In June 2010, the United States Supreme Court decided United States v. Skilling, one of a triumvirate of cases concerning the scope of the federal criminal “honest services” statute. This statute defines the “scheme or artifice to defraud” language of the federal mail and wire fraud statute as depriving another of “the intangible right of honest services.” In Skilling, former Enron executive Jeffrey Skilling challenged his federal criminal conviction under the honest services statute because, among other things, the statute was unconstitutionally vague as applied to his conduct.

The Court, however, avoided the constitutional issue altogether, holding that “the intangible right of honest services” included only bribery and kickbacks. Clearly not a textual reading of the statutory language, the Court instead relied on its review of the cases decided under the prior honest services statute that the Court had struck down twenty years earlier in United States v. McNally. The

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61 130 S.Ct. 2896 (2010).
65 Id.
66 Skilling also challenged the voir dire procedure, the process of selecting jurors, but the Court held that that claim was without merit. 130 S.Ct. at 2905.
67 130 S.Ct. at 2905. Skilling’s alleged deprivation of honest services consisted of his misleading Enron shareholders concerning information about the company and its financial health. Id.
69 483 U.S. 350 (1987) (holding that the mail fraud statute was “limited in scope to the protection of property rights” and “[i]f Congress desired to go further... it must speak more clearly.”).
Court reasoned that Congress’ adoption of the honest services statute at issue, 18 U.S.C. §1346, sought to include the types of crimes, namely bribery and kickbacks, that had been brought under the prior statute.\textsuperscript{70} This approach required a strained reading of the prior cases to conclude that honest services only applied to bribery and kickbacks.\textsuperscript{71}

The \textit{Skilling} Court based its decision to avoid the constitutional issue on the long-held canon of constitutional avoidance.\textsuperscript{72} As described above, this substantive canon mandates that, in cases where two plausible interpretations of a statute exist and one interpretation will raise serious doubts as to the constitutionality of the statute, the Court should choose the

\textsuperscript{70} 130 S.Ct. at 2906.


\textsuperscript{72} See, e.g., United States v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) (“[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”). See discussion supra part I-A.
alternative interpretation.\textsuperscript{73}

The Court explained that “[i]n urging invalidation of §1346, Skilling swims against our case law’s current, which requires us, if we can, to construe, not condemn, Congress’ enactments” (emphasis added).\textsuperscript{74} Citing \textit{Civil Service Comm’n v. Letter Carriers},\textsuperscript{75} the Court emphasized the strong presumption against striking down federal statutes on vagueness grounds.

Interestingly, in \textit{Civil Service}, the Court considered whether the phrase “political activity” was unconstitutionally vague. The construction of the statute by the Civil Service Court, in upholding the statute, was citing to the federal regulations promulgated by the Election Commission that defined the permissible and impermissible “political activities.”\textsuperscript{76}

Unlike in \textit{Skilling} where the Court used common law precedents as the basis for interpreting the statute, the Civil Service Court applied a federal regulation to explain the meaning of a vague statute. In other words, the Court did not avoid the vagueness issue in \textit{Civil Service}. Instead, it decided it.

Nonetheless, the Court used that case as its basis for construing the honest-services statute such that it was no longer vague.\textsuperscript{77} There is confusion here in that the Court

\textsuperscript{73} A companion doctrine is the severability doctrine, which addresses when the Court should permit the statute to survive by striking down only the unconstitutional part of the statute. \textit{See}, e.g., United States v. Booker, 543 U.S. 220 (2005) (holding that the Sentencing Act violated the Sixth Amendment, but could be preserved by severing the “mandatory” nature of the Sentencing Guidelines). For an interesting discussion of the relationship between the avoidance canon and the doctrine of severability, \textit{see} Vermeule, \textit{supra} note 2.

\textsuperscript{74} 130 S.Ct. at 2928.

\textsuperscript{75} 413 U. S. 548, 571 (1973).

\textsuperscript{76} \textit{Id.} at 579, fn. 21.

\textsuperscript{77} 130 S.Ct. at 2928.
did not have to “construe” the statute by limiting its meaning; it simply had to decide whether the statute was too vague to decide whether Skilling’s conduct fell within its meaning.

The consequence of applying this canon in *Skilling* was that the Court essentially rewrote the statute. The language “deprivation of the intangible right to honest services,” which had previously covered a wide variety of conduct, now applies only to bribery and kickbacks.\(^{78}\) This legislative-type decision-making in the name of avoiding potential doubts about the constitutionality of the statute raises questions about the propriety of the canon of constitutional avoidance itself. Indeed, many commentators have criticized the use of the canon of constitutional avoidance, and even those who support its use suggest that the Court apply it narrowly.\(^{79}\)

Despite the criticism of the canon, if restricting the statute to cover only bribery and kickbacks was one of several possible meanings of “honest services,” then the use of the avoidance canon by the Court would have been consistent with its prior usage. Instead, there was no ambiguity about the meaning of the phrase “honest services”; there were not competing meanings of the phrase. Indeed, the issue in the case was not what “honest services” meant or included. The issue was whether the term “honest services” was too vague to have any intelligible meaning at all. And the Court “avoided” this constitutional question by rewriting the statute and

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\(^{78}\) Indeed, federal prosecutors have long enjoyed the simplicity and flexibility of this language in prosecuting fraud cases, and have likewise considered this statutory language to be a valuable prosecutorial weapon. See, e.g., Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980) (referring to the mail fraud statute as the “true love” of white collar prosecutors).

\(^{79}\) See *supra* note 2.
changing its meaning.  

III. “CRIMINAL” CONSTITUTIONAL AVOIDANCE

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

A. Vagueness, Not Ambiguity

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

In Skilling, though, the question before the Court was whether the federal fraud statute (prohibiting deprivation of honest services) was, as applied, void-for-vagueness. There were not two competing meanings of “honest services” to choose between in applying the statute. Rather, the question concerned whether the statutory language provided adequate notice concerning the criminal nature of federal prosecutors have pursued a countless number of cases under the “honest services” doctrine that had nothing to do with bribery or kickbacks. Indeed, the government also prosecuted many crimes that did not involve bribery or kickbacks under the prior statutory regime as well. See supra note 71.
Skilling’s conduct. Skilling argued that the “deprivation of honest services” prohibition did not clearly give notice of what conduct violated the statute, and thus was, as applied, void-for-vagueness under the requirements of the due process clause. Skilling did not claim that any particular substantive application or interpretation of the statutory language resulted in the statute being unconstitutional.

Instead, it was the inability to determine what the meaning of the statute was that created the constitutional problem. Its scope was indefinite, according to Skilling, such that it was difficult to ascertain a clear limit on what conduct fell under the statute and what conduct did not.

The proper choice before the Court, then, was whether Skilling was correct on the merits of his constitutional claim that the statute was impermissibly vague. In other words, there was no ambiguity in the statute, and thus no opportunity to consider whether the avoidance canon should apply.

Put another way, the interpretation of the scope of the statute was the constitutional question. To question whether the Constitution applied to Skilling’s argument was disingenuous.

The analytical move the Court made, then, was to ignore the question before it and rewrite the statute to remove the constitutional question. That is certainly a very different enterprise than choosing between two possible interpretations of a statute.

As explained in more detail below, this interpretation resulted both in the Court abdicating its role as a court and improperly acting as a legislature.

B. The Court Abdicating its Role as a Court

In choosing to employ the canon of constitutional avoidance in the context of void-for-vagueness cases like
Skilling, the Court abdicates its role as a court. As a court, its primary role is to resolve cases or controversies.\(^{81}\)

As indicated above, Skilling’s primary claim was that the vagueness of the statutory language violated his due process right to notice. Given the alleged vagueness of the statutory language, the Court’s proper role was to determine the constitutional acceptability of its application to Skilling’s conduct.

Dating back to *Marbury v. Madison*, the interpretation of the Constitution and its application to federal statutes has been at the heart of the Court’s judicial review.\(^{82}\) Judicial review, however, provides the Court a number of different legitimate options to resolve cases.\(^{83}\)

In doing so, the Court must balance a number of competing interests when assessing whether a statute is unconstitutionally vague. For instance, the defendant’s interest in receiving notice is much greater when the criminal statute proscribes conduct that is *malum prohibitum*\(^{84}\) as opposed to conduct that is *malum in se*.\(^{85}\)

The Court can also limit the impact of a challenge to the statute by resolving the challenge “as applied” instead of in a facial manner. As a result, the statute can be vague as to certain conduct, but not others.\(^{86}\) The Court certainly could have adopted such an approach in *Skilling*.

Or, in situations where the need for notice falls below the need for criminal enforcement in a particular area, the Court can apply the void-for-vagueness standard narrowly, limiting its scope.

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\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) *Malum prohibitum* conduct is conduct that is illegal because the state decides it is so.

\(^{85}\) *Malum in se* conduct is conduct that is illegal because it is an evil unto itself.

\(^{86}\) See Lockwood, *supra* note 52.
But using the avoidance canon to skirt the constitutional claim *when there is no other claim related to the statute* is to abdicate its role as a Court. Skilling was not asking the Court to determine the meaning of the statute; he wanted the Court to assess whether the statute itself, as constituted, satisfied one of the basic requirements of criminal statutes: absence of vagueness.

To make this clear, it is helpful to contrast the void-for-vagueness claim with the rule of lenity. The rule of lenity requires the Court to construe ambiguous criminal statutes in favor of the defendant. Thus, where a federal criminal statute’s language leaves it susceptible to several competing meanings, the Court that follows the rule of lenity will choose the one most favorable to the defendant. The ambiguity is construed against the drafter—the government.

By contrast, there is no substantive interpretation of the statutory text in the context of vagueness. The Court is not determining whether specific conduct *falls under* the criminal statute; it is assessing whether the level of specificity in the statute’s language is sufficient.

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

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88 See *Lockwood*, supra note 52.
C. The Court Acting as a Legislature

In addition to failing to fulfill its role as a court, the Supreme Court’s decision in *Skilling* also resulted in it adopting another branch’s role, acting as a legislature. As explained below, this is probably the most troubling part of the Court’s decision.

Certainly, the Supreme Court, and all courts for that matter, engage in rule-making on a number of different levels. Courts have a long history of deciding common law cases and extrapolating new rules from prior cases.

When interpreting statutes, the courts likewise enjoy wide latitude to determine the meaning of legislative language. This freedom of interpretation has led the courts, in many cases, to go far beyond the plain language of a text to ascertain its meaning, often considering such other indicia as legislative intent, legislative purpose, underlying policy considerations, and other comparable provisions or laws.\(^{89}\)

The result of this dynamic statutory interpretation is often the court significantly adding to or subtracting from the plain meaning of the statutory text. The Supreme Court itself has often engaged in such interpretive exercises such that the final product appears to constitute a re-writing of the statute, at least in the sense that its meaning is different from its plain language.

Such an interpretation, though, is an acceptable exercise of judicial review. This is because there are limits on the Court’s exercise of this discretion. The Court’s policy choices cannot exist apart from the case or controversy. Indeed, the statutory language and the question before the Court cabin its discretion to engage in *ad hoc* re-writing of federal statutes.

In the *Skilling* case specifically and in the void-for-

\(^{89}\) Eskridge, *supra* note 2.
vagueness context more generally, however, the Court is not engaging in the exercise of statutory interpretation when it uses the avoidance canon. Rather, it is engaged in the legislative activity of re-writing a statute.

As described above, the decision to use the avoidance canon in *Skilling* resulted in the Court making a normative judgment about the content of the statute rather than assessing its vagueness as written. The normative judgment concerned which kinds of conduct ought to be criminal.

In saving bribery and kickbacks, the Court did not assess whether the many other types of prosecutions previously brought under the statute were part of the statute. Instead, it concluded that it could clearly define bribery and kickbacks, and as a result, those acts survived.

In doing so, though, the Court legalized much of the previously criminal conduct under the statute. For instance, many kinds of fraud involving intangible self-dealing where one uses gifts and services to curry favor from organizations or politicians while failing to disclose one’s interests are no longer criminal.90

Even more troubling, though, was that the Court did not carefully consider as a matter of policy whether such acts ought to be criminal. Perhaps to mask the legislative role it was playing or simply lacking the inclination to explore its policy choices, the Court nonetheless rewrote a federal criminal statute largely without policy explanation.

Its purported justification, Congress’ pre-*McNally* intent, falls short on two accounts. First, it is clear that Congress intended the statute to be more than a limit on bribery and kickbacks because the prior cases said so,91 and

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91 See supra note 71.
it did not amend the legislation during the next 25 years. Second, there was no ambiguity about what Congress intended to regulate—honest services. If Congress had only intended to restrict bribery and kickbacks under the statute, it could easily have said so. Further, the question before the Court was not what the scope of “honest services” was; rather, it was whether one could identify the scope at all. The paradigm shift by the Court reflected its activist posture of acting as a legislature, not a court.

Finally, there is nothing to indicate *Skilling* was a special case. Indeed, two other identical cases, *Weyhrauch* and *Black*, were on the docket. Rather, the distinction between ambiguity and vagueness extends to all void-for-vagueness challenges. As explained above, using the avoidance canon in vagueness cases resulted in the Court abdicating its role and acting like a legislature.

IV. CONSEQUENCES OF MISUSING THE AVOIDANCE DOCTRINE

A. Theoretical Consequences

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

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92 *Id.*
93 *See supra* note 62.
1. Misusing the Avoidance Canon Undermines its Goals

When the Court applies the avoidance canon to vague statutes, it undermines the purposes of the canon itself. First, to the extent that the Court attempts to exercise judicial restraint, it does not achieve that purpose here. As discussed above, applying the avoidance doctrine to vagueness statutes will often result in the Court rewriting the statute in the name of saving it.

In *Skilling*, for instance, the Court avoided the vagueness question by limiting the meaning of “honest services” to bribery and kickbacks, and excluding all other forms of honest services. It is clear that the Court’s use of the canon *changed the meaning* of the statute, legalizing formerly illegal behavior.

The apparent value of avoiding the constitutional question of vagueness also is not present here as an indicia of judicial restraint. The Court has not, through this exercise of avoidance, deferred to Congress by finding an interpretation to avoid striking down a federal criminal statute. Circumscribing the meaning of a potentially vague provision, by definition, does not preserve its meaning. Rather, by narrowing the meaning of a vague statute in the name of avoidance, the Court is striking down at least part of the statute. In essence, the application of the avoidance canon to vague statutes actually decides the constitutional issue the Court seeks to avoid by discarding some possible meanings of the statute when it limits (and often rewrites) its scope.

Again, *Skilling* demonstrates why this is true. The decision to limit honest services fraud to bribery and kickbacks was, at its heart, a determination that other potential types of honest services were too vague to remain part of the statute. The Court’s exercise of avoidance, then, had the effect of deciding the constitutional issue by drawing a line between what was constitutionally clear
enough (bribery and kickbacks) and what was unconstitutionally vague (all other interpretations of “honest services”).

Second, the use of the avoidance canon with potentially vague statutes does not achieve its goal of giving penumbral value to under-enforced constitutional norms. To the contrary, applying the avoidance canon in this context undermines the resistance norm purpose entirely.

The value of notice—knowing the scope of a criminal statute—does not receive increased value by avoiding the question of where to draw the line as to vagueness. Instead, by failing to define the constitutional line as to the level of specificity required in a criminal statute, the Court minimizes the underlying value, the notice of the scope of the criminal prohibition.

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

*Skilling* shows how this works in practice. By avoiding the constitutional question and simply rewriting the statute, the Court has not provided any guidance to Congress on how specific it must be when it attempts to rewrite the honest services fraud statute to include other types of conduct besides bribery and kickbacks.

In doing so, the value of notice (the required level of specificity) loses force because Congress does not know how far it extends. Ironically, then, the consequence of the avoidance canon as to the constitutional value at issue is that the value here (notice) is not any more of an impediment to Congress than before. This is because notice is a value that increases with definition, not ambiguity.
2. Vagueness Better Achieves the Goals of Avoidance

Perhaps even more disturbing is the vagueness doctrine itself achieves the goals of the avoidance canon: judicial restraint and penumbral protection of under-enforced constitutional norms. In other words, the Court can better achieve the goals of the avoidance canon by choosing not to apply it to potentially vague criminal statutes.

First, answering the vagueness question achieves a greater degree of judicial restraint than applying the avoidance canon. If the Court upholds the statute as providing the required degree of constitutional specificity, then the statute remains intact. Clearly, this outcome demonstrates more restraint than rewriting the statute.

Although counterintuitive, striking down the statute as vague also exercises more judicial restraint than rewriting it. Making the statute unconstitutional delineates the scope of specificity required, but allows Congress to determine how close it wants to go to the constitutional line. In Skilling, for example, the Congress, and not the Court, would then decide what specific conduct constitutes “honest services.”

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

Second, the Court can better preserve the penumbral value of potentially vague statutes by deciding the vagueness question, not avoiding it. As discussed above, according the value of notice more significance means
giving it greater definition, not less.

If the Court upholds the statute, the Court provides Congress an example of a statute that satisfies the specificity requirement, defining what constitutes acceptable notice. On the other hand, if the Court strikes down the statute, it sets a floor as to the constitutional value of notice. The value of notice, then, gains more constitutional force because it has greater definition—the minimum level of specificity becomes a prerequisite for all statutes.

Addressing the vagueness question, then, achieves the penumbral goal of the avoidance canon. It gives greater scope and significance to the constitutional value at issue—fair notice.

B. Practical Consequences

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

1. Not Covered by Statute

As indicated above, the Court in Skilling limited the definition of “deprivation of honest services” to bribery and kickbacks. In the name of protecting the statute, the Court sacrificed much of its content.

If “deprivation of honest services” only includes bribery

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94 See supra note 78.
and kickbacks, a wide variety of previously criminal conduct will remain unreachable by prosecutors.\textsuperscript{95} The most obvious of these are breaches of fiduciary duties or undisclosed self-dealing where the conduct does not directly involve money or property.\textsuperscript{96}

In practice, this occurs when individuals use gifts or services to gain favor. Specifically, such fraud happens when this method of persuasion accompanies a failure to disclose financial interests in certain entities. This is particularly true where the funneling of business to those entities happens by virtue of particular position or status.\textsuperscript{97}

Of course, a number of issues remain in terms of delineating the scope of such criminal liability, \textit{i.e.}, when such behavior rises to the level of fraud. The relationship forming the basis of the fiduciary duty, the level of intent required to show honest-services fraud, and whether actual economic harm is necessary to establish a claim are all crucial issues that must be part of any new honest-services fraud statute.\textsuperscript{98}

Regardless of where one comes down at the margins, it is clear that one consequence of \textit{Skilling} is to inhibit prosecution of behavior formerly deemed fraudulent.

2. Not Covered by States

Many of the behaviors outlined above are clearly illegal

\textsuperscript{95} See \textit{Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision: Hearing Before the S. Comm. on the Judiciary}, 111th Cong. 4 (2010) (statement of Professor Samuel Buell, Duke University School of Law) (arguing that the securities, mail, and wire-fraud statutes do not reach “serious, novel forms of intangible harm” such as self-dealing).

\textsuperscript{96} \textit{Id.}; Elizabeth Sheyn, \textit{Honest Services after Skilling}, 2011 \textit{Wisc. L. Rev.} 48 (3011).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} \textit{Id.}
or, at the very least, have a history of criminality in the United States. This federal legalization of many types of fraud resulting from *Skilling* might not be a problem if state criminal law could adequately regulate such conduct.

Unfortunately, states lack two essential ingredients—appropriate state statutes and prosecutorial resources—needed to prosecute criminal behavior that now falls outside of the federal “honest services” statute. Partially because the “honest services” statute has been in place for twenty-five years and partially for other reasons, most states do not have sophisticated fraud statutes that punish “intangible services” fraud cases. Instead, the state statutes often criminalize tangible forms of fraud relating to property or cash, failing to account for the kinds of honest services fraud no longer covered by the federal statute.

The issue of prosecutorial resources is also a significant impediment to state law enforcement filling the void left by *Skilling*. District Attorney Offices tend to be understaffed and over-worked, given the high volume of criminal cases that occur on the state level, which has the lion’s share of crimes.

Perhaps even more important, is that white-collar crime cases tend to receive less priority than violent crimes. Societal demand for a response to a brutal rape or murder is typically stronger than for financial crimes, particularly on a local level.

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

Finally, the continued presence of corruption in state and local government make the absence of a federal presence in the prosecution of intangible services a further
impediment to their prosecution. It is preferable when investigating and prosecuting corruption cases that outside individuals perform the prosecutorial function. If the cases do not involve bribery and kickbacks, the state prosecutors may be in the politically uncomfortable position of prosecuting their fellow state government employees.

This is perhaps even more true in smaller communities and towns where prosecuting the company that employs most of the residents would be political suicide. The incentives for local prosecutors to pursue white-collar crimes, like honest services fraud, often become diminished in light of local political realities.

3. Congressional Barriers to Reform

One common response to the *Skilling* decision is that Congress can remedy the harm caused by the use of the avoidance canon by simply passing a revised version of the statute. While perhaps true as a theoretical matter, there are a number of obstacles to a simple Congressional remedy.

First, because the Court did not strike down the statute or otherwise provide any indication as to what language would satisfy the void-for-vagueness constitutional requirement, Congress does not have clear guidance on how to remedy the statute without creating the same constitutional problem again. Indeed, the Court attempted to fix a vagueness problem when it passed the current version of the statute in response to the Supreme Court’s 1987 decision in *United States v. McNally*.

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

Finally, and perhaps more disconcerting, the current atmosphere of gridlock, including the common use of the filibuster in the Senate, make the likelihood of the passing a new statute slim. Indeed, the Congress has held hearings about how to respond to Skilling, but has not been able to pass a new statute.99

V. A NEW MODEL FOR THE AVOIDANCE CANON

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

At the heart of the problem of applying the avoidance canon to void-for-vagueness constitutional challenges was that, as explained in Part IV above, doing so undermines its goals. The corollary principle is also true—answering the constitutional question better serves the goals of the canon.

To the extent, then, that one views the goals of the avoidance canon as important in deciding how the Court ought to address constitutional issues, such goals ought to drive the use of the canon. In other words, in deciding whether the avoidance canon is an appropriate tool to use in evaluating a federal criminal statute, the Court should ask whether using the canon would accomplish its aims.

99 Sheyn, supra note 96.
In practice, the Court should assess whether it could advance the interests of judicial restraint better by using the avoidance canon or avoiding it. With an ambiguous statute, as indicated above, this inquiry can cut both ways. Nonetheless, the Court must inquire as to what approach (using the canon or not) would best advance the underlying value.

Second and perhaps more important is the penumbral value of using the avoidance canon to give broader meaning to under-enforced constitutional norms. The avoidance canon accomplishes this, of course, by leaving the statute’s meaning ambiguous and not articulating the applicable constitutional limit on Congress.

This second inquiry, after examining the interest of judicial restraint, is whether the avoidance canon can increase the penumbral value of the constitutional norm. Part of this calculus would include the degree to which one could characterize that norm as under-enforced. The more under-enforced the norm, the stronger the case would be for applying the avoidance canon.

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

CONCLUSION

This article has taken the novel approach of examining the canon of constitutional avoidance through the lens of federal criminal statutes. Specifically, the article has considered one aspect of this intersection: the use of the
canon to address void-for-vagueness constitutional claims.

In light of the clear difference between vagueness and ambiguity, the article advanced the argument that courts should not use the canon to address questions of vagueness. Using the Skilling case as an example, the article demonstrated the harm created when a court confuses questions of vagueness with questions of ambiguity.

Further, the article demonstrated the adverse theoretical and political consequences of misusing the canon, the most ironic of these being that the best way to achieve the purposes of the canon with respect to vagueness challenges is to avoid the avoidance canon altogether.

The article concluded by suggesting tying the application of the canon to the purposes it purports to achieve. Doing so will prevent the Court from undermining the important goals of the canon through its misuse. In the final analysis, this article demonstrates the importance of limiting the use of canons to situations in which their purpose manifests itself.