REFORMING VARIABLE VAGUENESS

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ABSTRACT

Like much of constitutional law, the Supreme Court's void-for-vagueness doctrine employs a system of tiered scrutiny. This decades-old framework imposes differential demands of clarity, depending on the type of enactment under review. But the distinctive workings of variable vagueness remain largely obscure to courts and scholars alike. This Article seeks to illuminate this integral facet of constitutional litigation. My comprehensive study of tiered vagueness reveals an enterprise awash with fluidity. By articulating such a raw and complex decisional structure—and failing to police its development in the ensuing years—the Court has unsettled a doctrine whose entire purpose is to maximize legal clarity. This Article lays bare the resulting methodological rot and charts a path toward doctrinal reconstruction.

The present variability framework has revealed itself to be little more than a taxonomic misadventure, relying as it does on crude and equivocal proxy tests. Nor has the Court provided any guidance on how the canonical variability factors interact. In addition, the framework's non-exhaustive quality has enabled courts to spin off novel low-scrutiny contexts—ones that other decisions have deemed flatly insusceptible to vagueness challenges. And the current system invites courts to issue sweeping constitutional pronouncements for the sole purpose of choosing a case-specific level of scrutiny. I propose a drastically simplified model that focuses directly on the severity of applicable penalties. Having selected a presumptive level of scrutiny on this basis, courts should then tailor the "ordinary intelligence" inquiry to account for any pertinent attributes shared by the regulated class—for example, children's diminished legal acumen.

TABLE OF CONTENTS

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INTRODUCTION

The Supreme Court's void-for-vagueness doctrine has two dominant objectives: ensuring fair notice of prohibited conduct and guarding against "arbitrary and discriminatory enforcement."[1] But this classic formulation elides an antecedent question: *which level* of vagueness scrutiny applies. In the Court's telling, "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment."[2] Phraseology that would pass muster in a more permissive context may well melt under the glare of stringent inspection. In this sense, vagueness doctrine—which employs a threshold categorization scheme—embodies the cross-cutting technique of tiered review.

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1 Kolender v. Lawson, 461 U.S. 352, 357 (1983); *see also* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1141–43 (2017). Recent decisions have also underscored the threat that vague laws pose to legislative policymaking primacy. *See* United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

2 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

But the distinctive workings of what I call "variable vagueness" bear little resemblance to the traditional forms of tiered scrutiny. Multi-layered vagueness is not a mechanism for safeguarding constitutional liberties regarded as "fundamental."[3] Nor does vagueness's threshold inquiry police the fit between the means and ends of challenged legislation.[4] Instead, vagueness variability seeks out contexts in which it is essential that laws be drafted with precision. It then subjects those enactments to a form of heightened scrutiny—one that, to be sure, hardly amounts to a "strong presumption[]"[5] of unconstitutionality. Given these structural differences, it is not surprising that leading scholars of tiered scrutiny have overlooked the variable quality of vagueness review.[6]

In 1982, the Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* articulated a framework for identifying the degree of "clarity that the Constitution demands of a law."[7] In distilling a core set of earlier-announced variability principles,[8] *Hoffman Estates* relied on a series of blunt categorizations to calibrate the rigor of vagueness review. In short, criminal statutes and laws that "threaten[] to inhibit" constitutional rights must be reviewed more stringently, while civil enactments, economic regulations, and laws containing a scienter requirement need not be drafted as precisely.[9] These pronouncements promised a much-needed dose of clarity for a doctrine whose entire purpose is to maximize legal clarity. By supplying top-

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3 *See* G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME III: 1930–2000, at 598 (2019) ("A cluster of noneconomic rights . . . came to be termed as 'fundamental' liberties in the Due Process Clause and, because of that designation, triggered a standard of strict scrutiny for state regulations restricting them.").

4 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007) (explicating this familiar feature of constitutional scrutiny).

5 Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J. L. & PUB. POL'Y 475, 486 (2016).

6 *See, e.g.*, RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 96–123 (2019); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 71–111 (2001); WHITE, *supra* note 3, at 600–91; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1 (2000); David Schraub, *Unsuspecting*, 96 B.U. L. REV. 361 (2016); Maxwell L. Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043 (2017); R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016).

7 *Hoffman Estates*, 455 U.S. at 499; *see also id.* at 498 (cautioning that vagueness principles "should not . . . be mechanically applied").

8 *See infra* note 30.

9 *See Hoffman Estates*, 455 U.S. at 498–99.

down methodological direction, the Court seemed committed to ensuring "a uniform resolution of important federal questions"[10]—one far outpacing the Justices' capacity for routine error-correction.

Unfortunately, *Hoffman Estates* accomplished nothing of the sort. Four decades on, the doctrine is awash with fluidity; it is difficult to overstate how impressionistic the "level of vagueness scrutiny" inquiry has become in practice. This Article will demonstrate how the Supreme Court's effort to discipline vagueness doctrine instead grossly subjectified it. By endorsing such a raw and complex decisional structure—and neglecting to police its development—the Court effectively surrendered the prospect of system-wide coherence in the field of vagueness variability.[11] Below, I lay bare this methodological rot and chart a path toward doctrinal reconstruction.

To begin, the Court misfired in its effort to premise tiered vagueness review on the supposedly dichotomous nature of contestable legal constructs. The category of "economic" regulations is hardly self-defining, and the Court itself has confirmed that statutes can be "quasi-criminal" as well as simply criminal or civil.[12] Nor did the Court provide tools for diagnosing "threat[s]" to constitutional rights—a concept with no doctrinal pedigree. *Hoffman Estates* was also silent on how to harmonize competing variability factors—for example, when economic regulations implicate constitutional rights or contain criminal penalties. And despite its canonical status, *Hoffman Estates* did not purport to be exhaustive. The Court's vagueness decisions are strewn with specialized considerations that went unmentioned in *Hoffman Estates*. Lower courts have seized on this apparent latitude, constructing novel low-scrutiny contexts out of principles that threaten to unsettle the entire edifice of vagueness variability.

But the problem is not simply that *Hoffman Estates* failed to yield stable or predictable results. Its rules often clash with their stated justifications, which can render compliance with the Court's commands a hollow formalism. For example, lower courts must apparently relax their review of "economic" regulations even when none of the avowed reasons for doing so obtain. Similarly, many civil regulations authorize sanctions that can prove far more

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10 Grove, *supra* note 5, at 476.

11 *Cf.* Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2046 (2008) (emphasizing "the need to craft rules that can and will be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of litigated cases") (emphasis omitted).

12 *Hoffman Estates*, 455 U.S. at 499. Notably, this occurred in a *separate* section of the Court's opinion.

crushing than the fines prescribed by certain criminal laws.[13] These incongruities highlight a curious framing choice underlying *Hoffman Estates*: Rather than implementing its vision through a regime of either rules or standards, the Court opted to employ both rules *and* standards, first reciting the rules' underlying values and then pursuing those values only through imperfect proxies.[14]

Compounding these troubles, *Hoffman Estates* failed to follow its own logic and acknowledge a spectrum of severity *within* the categories of criminal and civil penalties.[15] Probation and lifelong imprisonment bear only a distant kinship; likewise, a loss of parental rights—a decidedly "civil" sanction—can hardly be compared to a small monetary exaction.[16] Yet under *Hoffman Estates*, these outcomes register only as "criminal" and "civil" penalties, ones subject to the enigmatic adjustments of "more" and "less" stringent review. The Court also failed to explain why the presence of a scienter requirement should affect the degree of clarity required by due process (as opposed to the amount of clarity that an enactment actually exhibits).[17] At most, a mens rea element should be treated like any other adjacent statutory language with the capacity to limit a prohibition's reach.

Finally, the phenomenon of "constitutional" vagueness review enshrines a remarkably robust conception of the judicial role. By mandating exacting review for laws that "threaten[] to inhibit the exercise of constitutionally protected rights,"[18] *Hoffman Estates* contemplates that every vagueness claim will also yield a judicial determination concerning the reach of some other constitutional right.[19] Modern vagueness doctrine thus exhibits a tail-wagging-the-dog quality that can shape constitutional law in unexpected ways.[20] Indeed, courts have embraced and rebuffed rights claims that no party advanced—solely to select a level of scrutiny to govern the legal claim

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13 *See* Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 76, 85 (1948) (observing that the "severity of sanction . . . does not necessarily parallel a distinction between criminal and civil statutes").

14 These disjunctions resemble an arguable tension between the Second Amendment's "prefatory" and "operative" clauses. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 577–78 (2008) (distinguishing between these two components).

15 *See infra* Part II.B; *see also* Note, *supra* note 13, at 85 (remarking that "degrees of severity of sanction vary widely within each of the two categories").

16 *See* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) ("In parental rights termination proceedings, the private interest affected is commanding"—"far more precious than any property right.").

17 *See infra* Part II.C.

18 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

19 Unless, that is, the court concludes that a challenged law would not be unconstitutionally vague even if reviewed under the strictest standard.

20 *See infra* Part II.D.2.

actually presented. This stubborn order of operations also deprives litigants of the ability to ensure a "clean" vagueness ruling that will not risk contaminating adjoining areas of law.

Not long ago, Professor Mila Sohoni skillfully chronicled the emergence of vagueness variability, contending that the doctrine's relaxed notice features "sharply lowered the costs of enacting federal legislation"[21] and gave a "boost to the project of building the modern regulatory state."[22] Yet tiered vagueness review has become far more than a state-building project. It is a set of prescriptions that govern manifold legal challenges at the federal, state, and local levels. Throughout this Article, I evaluate not just the generative potential of vagueness variability, but its actual performance as a legal doctrine. Oddly, no one has yet examined whether *Hoffman Estates* has fulfilled its promise—whether it actually serves its underlying objectives and provides workable guidance to lower courts.[23]

This Article undertakes that task. Part I summarizes extant Supreme Court precedent on the concept of tiered vagueness review. Although *Hoffman Estates* remains the leading formulation of vagueness variability, its framework is silent on six types of enactments that the Court has singled out as deserving of either greater or lesser scrutiny. This further proliferation of specialized contexts—from the *Supreme Court itself*—has powerfully signaled to lower courts that *Hoffman Estates* need not be the last word on variability. Part I summarizes both the constraints imposed by existing doctrine and the opportunities preserved by its conspicuous silences.

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21 Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1174 (2013).

22 *Id.* at 1217.

23 For a sampling of articles that briefly discuss vagueness's multi-tiered nature, see Bradley E. Abruzzi, *Copyright and the Vagueness Doctrine*, 45 U. MICH. J.L. REFORM 351, 361–63 (2012); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 248–49 (2002); David W. Gartenstein & Joseph F. Warganz, Note, *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 505–09 (1990); Christopher Gunther, Note, *Can Punitive Damages Standards Be Void for Vagueness?*, 63 ST. JOHN'S L. REV. 52, 55–56, 59 (1988); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1137–39; Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 261 n.14 (2010); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 81 (2014); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 358–59 (2005); James F. Shekleton, *The Campus as Agora: The Constitution, Commerce, Gadfly Stonecutters, and Irreverent Youth*, 31 J.C. & U.L. 513, 539 (2005); Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 732–34, 737–41, 744–48 (2018); Jeffrey I. Tilden, Note, Big Mama Rag*: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1552–53, 1555–59 (1981); Frederick Bernays Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A. J. 357, 360 (1968).

Part II recounts the lived experience of *Hoffman Estates*, thoroughly surveying federal and state decisions implementing the idea of variable vagueness.[24] *Hoffman Estates* glossed over a host of definitional landmines that shatter the framework's surface administrability. Part II documents these deficiencies, revealing a rickety methodology whose actual implementation belies the test's self-styled definitiveness. This Part also exposes notable divergences between the stated goals of vagueness variability and the measures chosen to pursue them. Part II closes by cataloguing the practice of tiered vagueness *outside* the *Hoffman Estates* canon. That decision's unfinished quality has enabled courts to spin off new variability principles, leading to fresh low-scrutiny contexts that other courts have deemed flatly insusceptible to vagueness challenges. The blurry boundaries of vagueness variability have thus called into question the very domain of vagueness doctrine.

Part III profiles a crucial variability principle absent from the *Hoffman Estates* framework: what I call "tailored ordinary intelligence."[25] As the Court has acknowledged elsewhere, laws must be reviewed less stringently when they apply only to a subgroup of actors who can be fairly regarded as a specialized interpretive community.[26] For these types of enactments, due process requires less exactitude than for laws governing society as a whole. I argue that this principle—one that holds sophisticated parties to a heightened standard of responsibility—is a superior tool for achieving the objectives of *Hoffman Estates*'s "economic" category, because it advances those aims directly rather than through dubious surrogate factors. Part III then explains why the principle's converse should also hold true. In other words, when laws apply to persons who—as a class—cannot be held to a standard of "ordinary" adult intelligence, vagueness review should be at its most insistent. Accordingly, I argue, courts should apply a "reasonable child" standard to vagueness challenges brought by juveniles.

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24 Because the level-of-scrutiny framework operates independently from the characterization of a particular challenge as facial or as-applied, I do not distinguish between these types of decisions.

25 Vagueness doctrine requires that "person[s] of ordinary intelligence" be given a fair opportunity to know what is forbidden. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

26 *See infra* Part III.A; *see also* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 299 (2003) ("If a statute targeting a particular field uses terminology known within that field, granting that terminology its specialized meaning is consistent with ensuring that defendants receive fair notice of the law."); Joseph Bounds Morris, Note, *Invalidity of Criminal Statute for Vagueness*, 26 TEX. L. REV. 216, 218 (1947) ("The Supreme Court has recognized some special situations where men in a particular field or industry would be able to ascertain what conduct is prohibited . . . .").

Part IV concludes by rethinking tiered vagueness from the ground up. I advocate a simplified two-step approach for calibrating the stringency of review. At *step one*, courts should select a level of scrutiny that corresponds directly to the severity of authorized sanctions. This approach calls for openly considering "the consequences of imprecision,"[27] rather than refracting them through flawed proxy tests. Once a presumptive level of scrutiny has been selected, at *step two*, courts should determine whether to make an upward or downward adjustment based on pertinent traits shared by the regulated class. Under this revised framework, the underlying purposes of variability would no longer clash with their implementing rules; they would *become* the rules. Nor would vagueness holdings any longer entail tangled threshold determinations that too often eclipse the actual legal challenges at issue.

It is time for the Justices to end their prolonged disengagement with vagueness variability. The present framework has proven to be little more than a taxonomic misadventure, relying as it does on crude and ill-fitting categorizations. Nor should vagueness doctrine be forced to host proxy clashes over the bounds of the New Deal settlement.[28] By incorporating the teachings of experience, the Court can clarify the basic mission—and refine the implementing criteria—of this ubiquitous tool of constitutional litigation.

I. THE LAW OF VAGUENESS VARIABILITY

A. The Canon and Beyond

In declaring that vagueness principles "should not . . . be mechanically applied,"[29] the *Hoffman Estates* framework purported to break no new analytic ground. Instead, it simply identified four factors that its prior decisions[30] had

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27 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

28 *See* Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 321 (defining the New Deal settlement as entailing "a relaxation of structural constraints on Congress's control over the economy," as well as "an invigoration of constitutional protections for 'discrete and insular minorities' along with free speech").

29 *Hoffman Estates*, 455 U.S. at 498.

30 *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 391 (1979) (explaining that vagueness concerns are exacerbated when a statute "threatens to inhibit the exercise of constitutionally protected rights"); *id.* at 395 ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (stating that "greater leeway is allowed" when "statutes govern[] business activities"); NAACP v. Button, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression."); Winters v. New York,

deemed central to the level of "clarity that the Constitution demands of a law"[31]—factors that would continue governing the analysis moving forward.

The first of these guideposts was expressed as a straightforward rule: "[E]conomic regulation is subject to a less strict vagueness test."[32] Yet the Court also ventured to offer three supporting justifications for this rule: that (1) economic regulation's "subject matter is often more narrow"; (2) "businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action," often leading to "clarif[ication] . . . by [their] own inquiry";[33] and (3) economic enterprises may be able to "resort to an administrative process" for official clarification of unclear laws.[34]

Next, the Court explained that due process affords "greater tolerance of enactments with civil rather than criminal penalties."[35] Yet again, the Court supplemented a seemingly uncomplicated test with the rule's underlying rationale: that "the consequences of imprecision are qualitatively less severe" when only civil penalties are at stake.[36] For its third variability factor, the Court indicated that laws containing a scienter requirement are subject to relaxed vagueness review. Such a feature "may mitigate a law's vagueness," the Court noted, "especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[37]

Finally, the Court identified "perhaps the most important factor" affecting the proper level of vagueness scrutiny: "whether [a law] threatens to inhibit the exercise of constitutionally protected rights."[38] Two paradigmatic examples were given: "If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[39] Although *Hoffman Estates* itself did not justify this leading

333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement."); Connally v. Gen. Constr. Co., 269 U.S. 385, 395 (1926) ("[U]nder other conditions the term 'locality' might be definite enough, but not so in a statute . . . imposing criminal penalties.").

31 *Hoffman Estates*, 455 U.S. at 499.

32 *Id.* at 498.

33 *Id.*

34 *Id.*

35 *Id.* at 498–99.

36 *Id.* at 499.

37 *Id.*

38 *Id.*

39 *Id.*

variability factor, the Court had previously underscored the danger of "deterr[ing] . . . constitutionally protected conduct."[40]

Hoffman Estates was a momentous development in vagueness doctrine—the Court's first (and only) effort to synthesize its prior guidance on "the importance of fair notice and fair enforcement"[41] in various settings. To calibrate the proper level of vagueness scrutiny, it would seem, a court need only classify an enactment along four simple dimensions: Is the law economic in nature? Does it carry civil or criminal penalties? Does it contain a scienter requirement? And does it threaten to impair constitutional rights? But the Court only loosely limned the practical implications of these classifications, characterizing the resulting review as simply "less strict"[42] or "more stringent"[43] than some unspecified normative baseline.

And despite its air of authoritativeness, the *Hoffman Estates* framework was not nearly as exhaustive as it seemed. It contained no mention of six discrete categories that have become staples of the Court's variability jurisprudence. The first of these is that Congress may legislate "with greater breadth and with greater flexibility" in prescribing rules for military conduct.[44] As the Court observed in *Parker v. Levy*, "the military is, by necessity, a specialized society separate from civilian society"—one that has "developed laws and traditions of its own."[45] In this highly regimented universe, the government typically functions as "employer, landlord, provisioner, and lawgiver rolled into one."[46] The "overriding demands of discipline and duty"[47] faced by servicemembers thus warranted a corresponding reduction in their constitutional rights—including those safeguarded by vagueness doctrine.

Second, public employees may be disciplined or even fired under behavioral standards that would "almost certainly [be] too vague when applied to the public at large."[48] In *Arnett v. Kennedy*, the Court rejected a vagueness challenge to a federal statute authorizing the discharge of civil-service employees "for such cause as will promote the efficiency of the

40 Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 283 (1961).

41 *Hoffman Estates*, 455 U.S. at 498.

42 *Id.*; *see also id.* (certain enactments warrant "greater tolerance").

43 *Id.* at 499.

44 Parker v. Levy, 417 U.S. 733, 756 (1974).

45 *Id.* at 743.

46 *Id.* at 751.

47 *Id.* at 744 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)) (plurality opinion).

48 Waters v. Churchill, 511 U.S. 661, 673 (1994).

service."[49] This hazy prohibition was deemed sufficiently precise in light of the "impracticability of greater specificity,"[50] as well as the assumption that such a flexible standard was "necessary for the protection of the Government as an employer."[51]

Third, public-school administrators are afforded considerable leeway in crafting standards for student behavior. "[S]chool disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions," the Court explained in *Bethel School District No. 403 v. Fraser*, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process."[52] The perceived impracticality of drafting clearer restrictions—as well as the importance of the government's aims—thus underlay an additional low-scrutiny context.

Fourth, legislatures may regulate with less specificity when acting as a subsidizer or patron. In *National Endowment for the Arts v. Finley*, the Court upheld the terms of an "undeniably opaque" financial-grant program, one that would have "raise[d] substantial vagueness concerns" if it had instead appeared in a "criminal statute or regulatory scheme."[53] As justification, the Court alluded to the underlying reason for *Hoffman Estates*'s civil/criminal divide: "[W]hen the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."[54] The Court also cited familiar practical concerns, insisting that "[i]n the context of selective subsidies, it is not always feasible for Congress to legislate with clarity."[55]

Fifth, the Court's recent opinion in *Sessions v. Dimaya* confirmed that "the most exacting vagueness standard" applies to statutes governing the

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49 Arnett v. Kennedy, 416 U.S. 134, 158 (1974) (plurality opinion) (quoting 5 U.S.C. § 7501(a)); *see also id.* at 161 (countenancing such broad "'catchall' clauses" as ones "prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming'") (quoting Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968), *aff'd*, 425 F.2d 472 (D.C. Cir. 1969) (en banc)).

50 *Id.* at 161; *see also id.* (citing the "infinite variety of factual situations" that government employees' behavior could be expected to present).

51 *Id.* at 162.

52 478 U.S. 675, 686 (1986).

53 524 U.S. 569, 588 (1998).

54 *Id.* at 589.

55 *Id.*; *see also id.* at 622 n.17 (Souter, J., dissenting) (agreeing that "[t]he necessary imprecision of artistic-merit-based criteria justifies tolerating a degree of vagueness that might be intolerable" in other contexts). By contrast, Justice Scalia argued that vagueness doctrine simply "has no application to funding" or to "government grant programs." *Id.* at 599 (Scalia, J., concurring in the judgment).

deportability of aliens.[56] Although "[t]he removal of an alien is a civil matter," the Court focused directly on the "grave nature of deportation"[57]—a "particularly severe penalty" that may be more devastating than a term of imprisonment.[58] Sixth, and finally, a separate section of *Hoffman Estates* further muddled the civil/criminal distinction by recognizing the concept of "quasi-criminal" enactments—ones warranting "a relatively strict test."[59] Fitting within this category are civil provisions that carry a "prohibitory and stigmatizing effect."[60]

B. Does Tiered Vagueness Matter?

By instructing that the level of allowable imprecision "depends . . . on the nature of the enactment,"[61] *Hoffman Estates* made the level-of-scrutiny question a precondition for resolving every vagueness challenge. That case's layered framework plainly presupposes that upward or downward adjustments can carry practical bite.[62] Yet the Supreme Court's vagueness decisions do not always engage this antecedent question. Numerous cases

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56 Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (plurality opinion).

57 *Id.* (quoting Jordan v. De George, 341 U.S. 223, 231 (1951)).

58 *Id.* (quoting Jae Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).

59 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

60 *Id.*

61 *Id.* at 498.

62 This assumption has been extensively borne out by practice. *See, e.g.*, City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 451 (1983) ("This level of uncertainty is fatal where criminal liability is imposed."); LeRoy v. Ill. Racing Bd., 39 F.3d 711, 715 (7th Cir. 1994) ("As a norm addressed to the general public for the conduct of daily affairs, Rule 20.1 would be seriously deficient."); Wiemerslage *ex rel.* Wiemerslage v. Maine Twp. High Sch. Dist. 207, 29 F.3d 1149, 1152 (7th Cir. 1994) (past vagueness rulings in the criminal context "do not require us to declare the school's disciplinary rule void for vagueness"); United States v. Chatman, 538 F.2d 567, 569 (4th Cir. 1976) ("Were the statute in question here an ordinary criminal statute we might feel constrained to hold that it runs afoul of the well-established void-for-vagueness doctrine."); Langford v. City of St. Louis, 443 F. Supp. 3d 962, 988 (E.D. Mo. 2020) (distinguishing a prior decision that did not involve "First Amendment activity"); Foxborough Dev. Corp. v. City of Hahira, No. 7:09-CV-106, 2011 WL 338618, at *5 (M.D. Ga. Jan. 31, 2011) ("A municipal ordinance that involves speech and carries possible criminal penalties provides little guidance for a court considering the propriety of a local subdivision regulation."); Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 816 (E.D. Va. 1998) (distinguishing earlier decisions "because the statutes in those cases were concerned with economic regulations"); Malfitano v. County of Storey, 396 P.3d 815, 818 (Nev. 2017) (recognizing that the Constitution "tolerate[s] a degree of vagueness in this context not otherwise permissible in the criminal context"); Matter of Seraphim, 294 N.W.2d 485, 493 (Wis. 1980) ("[T]hat these provisions may not have the preciseness required of laws defining criminal conduct is of no consequence.").

both upholding[63] and invalidating[64] challenged provisions have said nothing about the appropriate level of scrutiny. These recurrent silences are puzzling and unfortunate. Failing to underscore—or at least acknowledge—the caliber of review in these situations masks the protean nature of vagueness precedents under the *Hoffman Estates* regime. Properly understood, the present system of variable vagueness precludes courts from citing earlier decisions for the proposition that certain phraseology either "is" or "is not" vague in some abstract sense—a classic "deference mistake."[65]

Perhaps these omissions have resulted from simple oversight, abetted by incomplete adversary presentation. Another possible explanation stems from the Court's shifting depictions of vagueness's domain. The Justices can hardly be expected to invoke the *Hoffman Estates* framework when characterizing vagueness as reserved for "crimes,"[66] "criminal laws,"[67] and "penal statute[s]."[68] Perhaps, too, courts have refrained from specifying a level of scrutiny after concluding that individual cases would have been resolved identically under any standard. But the articulation of this rationale—as virtually never occurs—would seem to be an indispensable ingredient of reasoned explanation.

In any event, the Court has done itself no credit by propounding a seemingly mandatory decisional framework whose operation it has illustrated only selectively. One could forgive lower courts for regarding vagueness variability not as an ongoing constraint, but as merely a cluster of doctrinal accessories—an option to be activated when solidifying results reached on other grounds. To my knowledge, not a single appellate court has reversed

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63 *See* Salman v. United States, 137 S. Ct. 420 (2016); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); United States v. Williams, 553 U.S. 285 (2008); Gonzales v. Carhart, 550 U.S. 124 (2007); Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994); Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); Chapman v. United States, 500 U.S. 453 (1991); Boos v. Barry, 485 U.S. 312 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984). Here, I include decisions that characterize scienter requirements as merely enhancing statutory clarity, rather than providing a reason to relax the level of scrutiny. *See infra* Part II.E.2.

64 *See* United States v. Davis, 139 S. Ct. 2319 (2019); Johnson v. United States, 135 S. Ct. 2551 (2015).

65 *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 645 (2015) (defining a "deference mistake" as an act of "rel[ying] on precedent without fully accounting for the legal and factual deference regime under which that precedent was decided, thereby stripping the holding from its legal context").

66 *Davis*, 139 S. Ct. at 2326.

67 Beckles v. United States, 137 S. Ct. 886, 892 (2017); *Johnson*, 135 S. Ct. at 2556.

68 Kolender v. Lawson, 461 U.S. 352, 357 (1983). *But see* Boutilier v. INS, 387 U.S. 118, 123 (1967) ("[T]his Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions.").

or remanded a vagueness decision for failing to identify the applicable level of scrutiny (or at least to explain why doing so would not be outcome-determinative).

Despite these omissions, the Court *has* repeatedly underscored the centrality of vagueness variability—look no further than its recent decision in *Dimaya*. And lower courts have dutifully implemented the tangled teachings of *Hoffman Estates* with far greater frequency. I profile this underexplored practice in Part II.

II. VARIABILITY IN THE TRENCHES

On its own, the *Hoffman Estates* framework is little more than a set of abstract propositions. Yet its strictures—such as they are—theoretically govern every vagueness claim brought in every federal and state court throughout the country. Given the immense practical stakes of comprehending the workings of tiered vagueness review, it is remarkable that the Court's decades-old intervention into this area has largely escaped critical examination.

This Part takes up that task. In documenting how lower courts have carried out the project of multi-layered vagueness scrutiny, my study detects several glaring imprecisions in the Court's rule statements, highlights the rifts between those rules and their underlying values, and uncovers *Hoffman Estates*'s unintended consequences. Part II dissects not only the four canonical variability actors, but also the emerging tendency to recognize novel low-scrutiny contexts—a departure that the Supreme Court has entirely refrained from policing. What emerges is a portrait of scrutiny without constraint. By acting consistently with the foundational principles (and rule-less interstices) of vagueness variability, it is possible to subject nearly any type of enactment to some form of either heightened *or* reduced scrutiny. This astonishing permissiveness forms the core of the case for doctrinal reform advanced in Part IV.

A. Economic Regulations

Hoffman Estates's first variability category consists of "economic regulation," which "is subject to a less strict vagueness test."[69] As a formal doctrinal matter, "economic" laws are reviewed especially leniently "simply

69 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

because they are economic" in nature.[70] But the *Hoffman Estates* Court supplemented this rule statement with three supporting justifications. These principles reveal a disconnect between the stated reasons for vagueness variability and the inclusion of "economic" regulations within that regime. The Court does not think that fair notice and non-arbitrary enforcement are somehow less "importan[t]"[71] in this context; to the contrary, each principle reflects the abiding importance of regulatory fairness. *Hoffman Estates* instead posits that businesses—as sophisticated economic actors—are, on balance, significantly more likely to avail themselves of the machinery of legal clarification. This probabilistic assumption is thought to justify a reduction in the level of scrutiny applicable to all forms of "economic" regulation.[72]

In practice, however, this first variability factor has largely defied its rule-like portrayal. Lower courts have instead gravitated toward the test's underlying principles—seemingly without notice from the Supreme Court itself.

1. Which Enactments Are "Economic"?

It should not be surprising that lower courts have resisted building variability doctrine around the nebulous concept of "economic" regulation—a term left wholly undefined by *Hoffman Estates*. Indeed, the question of which activities are "economic" in nature has bedeviled Commerce Clause jurisprudence for over two decades.[73] The term's meaning is even less evident in the vagueness context, given the endless varieties of state and local legislation.[74]

When adhering to the strict parameters of *Hoffman Estates*, lower courts have operationalized the idea of "economic" regulation using three primary approaches. Most narrowly, some courts have required that a law actually regulate the terms of "transactions" between businesses and consumers.[75]

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70 Sohoni, *supra* note 21, at 1189.

71 *Hoffman Estates*, 455 U.S. at 498.

72 *See* Shekleton, *supra* note 23, at 539 ("In the Court's view, business operators have incentives to understand regulations and to demand that government officials assist them to achieve compliance . . . .").

73 *See* David M. Driesen, *The Economic/Noneconomic Activity Distinction Under the Commerce Clause*, 67 CASE W. RES. L. REV. 337, 337 (2016) ("[T]he lower courts have struggled to figure out whether federal statutes challenged under the Commerce Clause regulate 'economic' activity or 'noneconomic' activity.").

74 *See* McCarl, *supra* note 23, at 81 (arguing that "[t]he term 'economic regulation' is itself vague in the linguistic sense").

75 Mass. Ass'n of Private Charter Schs. v. Healey, 159 F. Supp. 3d 173, 211 (D. Mass. 2016); Metal Mgmt. W., Inc. v. State, 251 P.3d 1164, 1171 (Colo. App. 2010).

Others have reserved this low-scrutiny category for laws "applied against businesses"[76]—including statutes regulating "businesses owners,"[77] "business behavior,"[78] "business activities,"[79] and the "conduct of businesses."[80] And still other decisions have characterized the "economic" category far more expansively, as encompassing prohibitions that are "administrative"[81] or "regulatory"[82] in nature. Needless to say, this trio of touchstones could yield vastly different results over the full range of potential fact patterns. And the concepts of "administrative" and "regulatory" enactments are even more elusive than the "economic" category they purportedly gloss.

The Court's stated reasons for reviewing "economic" enactments more leniently would seem to encompass only those situations in which businesses have a financial incentive to comply with the law. But not all courts have reserved this treatment for laws that are "purely"[83] or "strictly"[84] economic in nature. The label has also been bestowed on laws with an abundance of conceivably *non*commercial applications. For instance, relaxed vagueness review was accorded to a premises-liability statute applicable to "*all* landowners," whether or not they were engaged in commerce.[85] There is no obvious need to classify prophylactically in this way—to regard as facially

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76 Vedernikov v. Mercantile Adjustment Bureau, Civ. No. 18-17364, 2019 WL 1857119, at *4 (D.N.J. Apr. 25, 2019).

77 Wis. Vendors, Inc. v. Lake County, Illinois, 152 F. Supp. 2d 1087, 1095 (N.D. Ill. 2001).

78 IDK, Inc. v. County of Clark, 836 F.2d 1185, 1198 (9th Cir. 1988); Garner v. White, 726 F.2d 1274, 1278 (8th Cir. 1984).

79 Whatley v. Zatecky, 833 F.3d 762, 781 (7th Cir. 2016); DiCola v. FDA, 77 F.3d 504, 508 (D.C. Cir. 1996); United States v. Hooshmand, 931 F.2d 725, 732 (11th Cir. 1991); United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988); United States v. Batson, 706 F.2d 657, 680 (5th Cir. 1983).

80 Big Bear Super Mkt. No. 3 v. INS, 913 F.2d 754, 757 (9th Cir. 1990); *see also* Botosan v. Paul McNally Realty, 216 F.3d 827, 836 (9th Cir. 2000) ("commercial conduct"); ACA Connects – Am.'s Commc'ns Ass'n v. Frey, 471 F. Supp. 3d 318, 330 (D. Me. 2020) (applicable to "businesses accustomed to regulation").

81 Richmond Med. Ctr. for Women v. Gilmore, 11 F. Supp. 2d 795, 816 (E.D. Va. 1998); F. Ronci Co. v. Narragansett Bay Water Quality Mgmt. Dist. Comm'n, 561 A.2d 874, 877 (R.I. 1989).

82 United States v. $122,043.00, 792 F.2d 1470, 1477 (9th Cir. 1986); Galanis v. N.Y. City Envtl. Control Bd., 83-Civ-0701, 1986 WL 642, at *1 (S.D.N.Y. Jan. 2, 1986); Vista Healthcare, Inc. v. Tex. Mut. Ins. Co., 324 S.W.3d 264, 273 (Tex. App. 2010); *F. Ronci Co.*, 561 A.2d at 877; Tufto v. State, No. 81AP-859, 1982 WL 4124, at *2 (Ohio Ct. App. 1982).

83 Smith v. Goguen, 415 U.S. 566, 573 n.10 (1974); Pinnock v. IHOP Franchisee, 844 F. Supp. 574, 580 (S.D. Cal. 1993).

84 Blackwelder v. Safnauer, 689 F. Supp. 106, 126 (N.D.N.Y. 1988).

85 Giebink v. Fischer, 709 F. Supp. 1012, 1015, 1017 (D. Colo. 1989) (emphasis added).

"economic" any statute with one or more economic applications. Yet similar examples abound.[86]

Even setting aside this denominator problem, vagueness doctrine is riddled with perplexing and inconsistent applications of *Hoffman Estates*'s first prong. Perhaps most dubiously, a requirement that educators refrain from romantic relationships with their students was deemed "economic" in nature.[87] The same was true of a Bankruptcy Code provision authorizing courts to dismiss actions filed by certain consumer debtors[88]—actors who may possess none of the sophistication and legal acumen enjoyed by corporations. A federal anti-kickback statute was likewise deemed "economic" in nature,[89] even though a commercial-bribery statute was not.[90] And a regulation of medical prescriptions was found to involve "business activity,"[91] while a ban on the unlicensed practice of medicine was said to operate in a "non-economic context."[92]

As these examples show, even the most basic parameters of *Hoffman Estates*'s first category have been left to the unguided suppositions of lower courts. Nor has the Supreme Court clarified whether the concept of "economic" activity should carry the same meaning in the Commerce Clause and vagueness contexts.[93] Far from anchoring a stable variability regime, then, the category of "economic" regulation has been a site of definitional turmoil.

2. The Flawed Foundations of "Economic" Vagueness

More fundamentally, the Court miscalculated in assuming that a law's economic or noneconomic quality would serve as a reliable stand-in for values that justify relaxing the stringency of vagueness review. Each

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86 *See, e.g.*, Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd., 904 P.2d 373, 376, 384 (Alaska 1995) (deeming "economic" a restriction on land uses that could harm adjacent property values); Commonwealth v. John G. Grant & Sons Co., 526 N.E.2d 768, 770–71 (Mass. 1988) (deeming "economic" a prohibition on "filling or altering a fresh water wetland subject to flooding").

87 State Bd. for Educator Certification v. Lange, No. 03-12-00453-CV, 2016 WL 785538, at *2, 5 (Tex. App. Feb. 25, 2016).

88 *In re* Kelly, 841 F.2d 908, 911–12, 915 (9th Cir. 1988).

89 Hanlester Network v. Shalala, 51 F.3d 1390, 1398 (9th Cir. 1995).

90 United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988).

91 Abraham v. Beck, 456 S.W.3d 744, 753 (Ark. 2015).

92 Peckmann v. Thompson, 745 F. Supp. 1388, 1393 (C.D. Ill. 1990).

93 For a lucid overview of the phenomenon of inter-doctrinal "borrowing," see Jacob D. Charles, *Constructing a Constitutional Right: Borrowing and Second Amendment Design Choices*, 99 N.C. L. REV. 333 (2021).

assumption undergirding the "economic" vagueness rule—and its associated discontents—will be discussed in turn.

a. Subject-Matter Narrowness

First, the Court explained that economic regulation warrants less strict review "because its subject matter is often more narrow."[94] But there is no reason why this principle could not be applied directly, rather than advanced only by proxy. The present approach suffers from severe underinclusiveness—economic statutes, after all, are hardly the only ones capable of regulating on narrow topics. Tellingly, many courts have reasoned directly from the breadth of a statute's subject matter—whether or not the law was deemed to be "economic."[95] The Fifth Circuit has even reformulated *Hoffman Estates*'s first prong, insisting that more leeway is allowed for "statutes governing business activities *in narrow categories*."[96]

At bottom, though, it should not matter whether the subject matter being regulated is narrow or broad. Confined categories can still be regulated with an impermissibly vague touch. (Consider a hypothetical ban on behaving "moronically" in a specified public park on July 4.) The relevant question should instead be whether a *prohibition*—whatever the bounds of its subject matter—is sufficiently knowable to pass constitutional muster.

b. A Party's Own Inquiry

Second, *Hoffman Estates* observed that businesses "can be expected to consult relevant legislation in advance of action"—and may even be "ab[le] to clarify the meaning of the regulation by [their] own inquiry."[97] As with the previous principle, lower courts have invoked this rationale *directly* in selecting a level of vagueness scrutiny. Several courts have claimed (contrary to *Hoffman Estates*) that the Constitution tolerates more imprecision *when* regulated parties are in a position to seek clarification through their own

94 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

95 Ky. Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1413 (6th Cir. 1994); United States v. Doremus, 888 F.2d 630, 635 (9th Cir. 1989); Chalmers v. City of Los Angeles, 762 F.2d 753, 758 (9th Cir. 1985); State v. Anderson, 447 P.3d 176 (Wash. Ct. App. 2019); Eagle Env'tl. II, L.P. v. Pa. Dep't Envtl. Prot., 884 A.2d 867, 882 (Pa. 2005).

96 United States v. Batson, 706 F.2d 657, 680 (5th Cir. 1983) (emphasis added).

97 *Hoffman Estates*, 455 U.S. at 498.

inquiry.[98] And others have applied lesser scrutiny[99]—or even dismissed vagueness claims altogether[100]—after concluding that a challenger was fully able to consult the applicable law. The Court itself has encouraged such personalized inquiries by ratcheting down vagueness protections for challengers known to have participated in the lawmaking process.[101]

The Court's sociological musings about the legal acumen of businesses should be viewed alongside its earlier reflections in *Papachristou v. City of Jacksonville*: "The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them."[102] The Court should be commended for its strikingly realistic appraisals of the legal sophistication and worldly wisdom enjoyed by varied socioeconomic groups.[103] Rarely does constitutional law so directly privilege the interests of marginalized voices.[104] But presumptions about the ease of statutory consultation cannot do the work assigned by *Hoffman Estates*. If the relevant legal materials are intolerably unclear, then merely knowing that they exist—and examining them "in advance" of actual enforcement—cannot rectify the preexisting due-process problem.

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98 City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996); Blackwelder v. Safnauer, 689 F. Supp. 106, 127 (N.D.N.Y. 1988); Chem. Waste Mgmt., Inc. v. EPA, 673 F. Supp. 1043, 1058 (D. Kan. 1987); United States v. Sun & Sand Imps., Ltd., 564 F. Supp. 1402, 1405 (S.D.N.Y. 1983); Wesner v. Metro. Dev. Comm'n Marion Cty., 609 N.E.2d 1135, 1140 (Ind. Ct. App. 1993); Rogers v. Watson, 594 A.2d 409, 414 (Vt. 1991).

99 *See* Norton Outdoor Advert., Inc. v. Pierce Twp., No. 1:05cv401, 2007 WL 1577747, at *11 (S.D. Ohio May 30, 2007) (affording greater "tolerance"); Seniors Civ. Liberties Ass'n v. Kemp, 761 F. Supp. 1528, 1552 (M.D. Fla. 1991) (applying a "less strict test"); Ruiz v. Comm'r of Dep't of Transp., 679 F. Supp. 341, 351 n.8 (S.D.N.Y. 1988) (employing a "less strict test").

100 *See* Nat'l Oilseed Processors Ass'n v. OSHA, 769 F.3d 1173, 1183 (D.C. Cir. 2014); Roark & Hardee LP v. City of Austin, 522 F.3d 533, 552 (5th Cir. 2008); United States v. Phillips, 87 F. App'x 650, 652 (9th Cir. 2004); Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 367 (4th Cir. 2002); Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1277 (11th Cir. 1999); Brockert v. Skornicka, 711 F.2d 1376, 1381 (7th Cir. 1983); United States v. Riccio, 43 F. Supp. 3d 301, 307 (S.D.N.Y. 2014); Med. Soc'y of State of N.Y. v. Cuomo, 777 F. Supp. 1157, 1165 (S.D.N.Y. 1991); Kleiber v. City of Idaho Falls, 716 P.2d 1273, 1277 (Idaho 1986).

101 *See* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342–43 (1952) (noting that the trucking industry had "participated extensively" and been "much consult[ed]" in the drafting process); *see also Roark & Hardee LP*, 522 F.3d at 552 (underscoring that "the City's proffered guidelines were drafted after town meetings with the business owners themselves").

102 405 U.S. 156, 162–63 (1972).

103 *See* Koh, *supra* note 23, at 1138 ("[T]he social marginalization of the regulated group has also led the Court to invoke a stronger version of the vagueness doctrine.").

104 *See* Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1430 (2017) (arguing that the Court's recent constitutional decisions have "afford[ed] special protections . . . to politically power*ful* entities that are able to advance their interests full well in the democratic arena").

To be sure, I am sympathetic to the idea that unusually well-informed actors should be held to an elevated standard of responsibility.[105] But that is because legal language sometimes carries an idiomatic meaning for specialized audiences—not because those groups are engaged in "economic" pursuits.

c. Administrative Clarification

Finally, the Court justified applying a "less strict" standard to economic laws on the ground that businesses "may have the ability to . . . resort to an administrative process" to clarify uncertain legal obligations.[106] This foundation is so theoretically indefensible that lower courts have enlisted the principle to perform an entirely different role than the one *Hoffman Estates* envisioned.

As the Court acknowledged through its use of the word "may," not all "economic" regulations will be administered by governmental entities able and willing to dispense targeted legal guidance. In these situations, it makes no sense to impose a constitutional detriment whose rationale is contingent on the process having succeeded. The administrative-clarification principle is also grossly underinclusive, given that such opportunities exist in a variety of noneconomic settings.[107] There is simply no impediment to proceeding in an individualized (rather than a category-wide) fashion on this score.

For the most part, that is exactly what lower courts have done. Courts routinely dismiss vagueness claims after accounting for the availability of an authoritative clarification mechanism.[108] Critically, this technique is

105 *See infra* Part III.A.

106 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

107 *See* Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (removal protections for federal civil servants); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973) (restrictions on federal civil servants' political activities); Broadrick v. Oklahoma, 413 U.S. 601, 608 n.7 (1973) (restrictions on state employees' political activities); Schickel v. Dilger, 925 F.3d 858, 879 (6th Cir. 2019) (prohibition on state legislators' acceptance of gifts).

108 For examples of this phenomenon, *see* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 738 (D.C. Cir. 2016); CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 632 (3d Cir. 2013); Folk v. Sturgell, 375 F. App'x 308, 313 (4th Cir. 2010); Quigley v. Giblin, 569 F.3d 449, 458 (D.C. Cir. 2009); Aeronautical Repair Station Ass'n v. FAA, 494 F.3d 161, 174 (D.C. Cir. 2007); Hyatt v. Town of Lake Lure, 114 F. App'x 72, 76 (4th Cir. 2004); Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control, 317 F.3d 357, 367 (4th Cir. 2002); Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 509 (5th Cir. 2001); Trans Union Corp. v. FTC, 245 F.3d 809, 818 (D.C. Cir. 2001); United States v. Pearson, 211 F.3d 1275, at *1 (9th Cir. 2000); United States v. Lee, 183 F.3d 1029, 1032 (9th Cir. 1999); City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996); United States v. Boynton, 63 F.3d 337, 345 (4th Cir. 1995); United States v. Amirnazmi,

deployed not to scale down the level of scrutiny, but to resolve the ultimate merits question of whether a party has received fair notice. As this lengthy experience has shown, the availability of tailored guidance has precisely zero bearing on the "*importance* of fair notice"[109] (as opposed to whether such notice actually exists under the circumstances). This justification for reduced scrutiny should thus recede entirely from the Court's variability jurisprudence.

Of course, there may well be sound reasons to avoid authorizing executive actors to convert vague laws into personalized and specific legal obligations.[110] But if vagueness doctrine is to continue inviting such administrative clarification, the effect of that process should be commensurate with the fair-notice benefits actually conferred on individual regulated parties.

B. The Civil/Criminal Divide

According to *Hoffman Estates*, the Constitution also affords "greater tolerance" to "enactments with civil rather than criminal penalties."[111] This variability distinction is grounded in the differential harshness of such penalties: According to the Court, "the consequences of imprecision are qualitatively less severe" when no criminal sanctions are involved.[112] The civil/criminal divide thus rests on the assumption that *every* criminal penalty inflicts greater hardship than any civil penalty could.

Even though this assumption is empirically unsupportable,[113] many lower courts have maintained strict fealty to *Hoffman Estates*'s rule statement, declining to afford heightened scrutiny to civil enactments carrying severe

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Crim. No. 08-0429-01, 2009 WL 2603180, at *1 (E.D. Pa. Aug. 21, 2009); Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd., 904 P.2d 373, 376, 384 (Alaska 1995); Rogers v. Watson, 594 A.2d 409, 414 (Vt. 1991); Nova Univ. v. Educ. Inst. Licensure Comm'n, 483 A.2d 1172, 1188 (D.C. 1984); Town of Brookline v. Comm'r of Dep't of Envtl. Quality Eng'g, 439 N.E.2d 792, 799 (Mass. 1982).

109 *Hoffman Estates*, 455 U.S. at 498 (emphasis added).

110 *See* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1091–92 (2020) ("[I]f the primary rationale of the void-for-vagueness doctrine is to prevent undue delegation of lawmaking power from legislatures to executive officials, this methodology is passing strange.").

111 *Hoffman Estates*, 455 U.S. at 498–99.

112 *Id.* at 499.

113 *See infra* notes 123–126 & 134; *see also* Koh, *supra* note 23, at 1138 (describing the premise as "unstable"); Robert B. Krueger, Note, *Requirement of Definiteness in Statutory Standards*, 53 MICH. L. REV. 264, 273 (1954) (arguing that "notice to the persons affected may be equally as important" in the civil context); Sohoni, *supra* note 21, at 1224 (observing that "[c]ivil regulations often impose consequences that are as severe in some respects as criminal sanctions").

penalties.[114] Conversely, some courts have applied the most stringent standard to criminal laws imposing fairly mild penalties.[115] And courts have also selected a level of scrutiny based entirely on a government's presumed reasons for imposing certain sanctions, viewing as dispositive the presence[116] or absence[117] of an intent to punish (rather than the severity of a deprivation). Most strikingly, the Ninth Circuit applied relaxed scrutiny to a law authorizing the postponement of prisoners' release dates, deeming the extension of incarceration periods "administrative" in nature.[118]

Yet the civil/criminal divide is not as unyielding as these courts have assumed. On the very same page of its opinion, the *Hoffman Estates* Court unsettled the rigid dichotomy it had just posited. The Court regarded the ordinance under review as "quasi-criminal" in nature—thereby warranting "a relatively strict test"—because it carried a "prohibitory and stigmatizing effect."[119] This belated addendum can be understood as a concession that a

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114 *See* Fogie v. THORN Americas, Inc., 95 F.3d 645, 650 (8th Cir. 1996) (declining to apply a stricter standard, since "[t]he punitive aspects of the usury statute impose only civil penalties"); Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 914 (3d Cir. 1990) ("[F]or purposes of testing the penal severity of a given statute, *Hoffman Estates* focused on the distinction between criminal and civil sanctions . . . ."); Cotton States Mut. Ins. Co. v. Anderson, 749 F.2d 663, 669 n.9 (11th Cir. 1984) ("The mere fact that a large sum of money is at stake does not necessarily make this a penal statute."); CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878, 900 n.18 (S.D. Ind. 2015) ("The possibility of steep fines, by itself, does not render a statute 'quasi-criminal.'"); Pharm. Care Mgmt. Ass'n v. Gerhart, No. 4:14-cv-000345, 2015 WL 10767327, at *7 (S.D. Iowa Sept. 8, 2015) ("The Court declines to hold that any civil statute with the potential penalty of license revocation constitutes a quasi-criminal statute."); Pinnock v. IHOP Franchisee, 844 F. Supp. 574, 580 n.9 (S.D. Cal. 1993) (finding "no authority" for the proposition that civil enactments carrying severe fines should be reviewed more rigorously).

115 *See* Vandergriff v. City of Chattanooga, 44 F. Supp. 2d 927, 935–36 (E.D. Tenn. 1998) (applying "the strict test for criminal statutes"). As a result, it is not entirely true that "[c]ourts will look beneath a law's 'civil' or 'criminal' veneer" when selecting a level of scrutiny. Abruzzi, *supra* note 23, at 363.

116 *See* Guardian Title Co. v. Bell, 805 P.2d 33, 36–37 (Kan. 1991) (deeming certain monetary exactions "penal in nature," given the manner of their assessment); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (classifying punitive damages as "quasi-criminal," since they "are imposed for purposes of retribution and deterrence"). As one court remarked, exemplary damages are "penal in nature," even if they "do not approach the severity of criminal penalties." Galjour v. Gen. Am. Tank Car Corp., 764 F. Supp. 1093, 1098 (E.D. La. 1991).

117 *See* Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir. 1997) (finding that the act of transferring prisoners to solitary confinement was "not a disciplinary measure, but an administrative strategy"); United States v. Watkins, 18-CR-131, 2018 WL 4922135, at *4 (W.D.N.Y. Oct. 9, 2018) ("[P]retrial detention is not penal at all, but regulatory."); Raitano v. Tex. Dep't of Pub. Safety, 860 S.W.2d 549, 551 (Tex. App. 1993) ("A driver's license is not suspended for the purpose of visiting additional punishment upon an offender but in order to protect the public against incompetent and careless drivers") (quotation marks omitted).

118 Hess v. Bd. of Parole & Post-Prison Supervision, 514 F.3d 909, 914 (9th Cir. 2008).

119 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

strictly bimodal regime would have failed to approximate the actual severity of a range of statutory penalties. But the Court made no effort to integrate the category of "quasi-criminal" enactments into the framework it had articulated to channel the decisionmaking of lower courts.

Indeed, not since *Hoffman Estates* has the Court expounded on the notion of "prohibitory and stigmatizing" consequences. This prolonged silence is significant, given the immense breadth and subjectivity of these terms. (Most prohibitions, after all, would seem to be "prohibitory," and one could argue that "[t]here is stigma attached to every civil penalty."[120]) Its development left unguided, the "quasi-criminal" concept has effectively functioned as a residual tool for enhancing the scrutiny applied to any civil enactment carrying severe consequences of some sort.[121] If anything, the Court has encouraged this freewheeling practice by confirming that the prospect of "reputational injury"—even to a corporation—warrants increased vagueness scrutiny.[122]

With comparable frequency, courts proceed without regard for the civil/criminal nomenclature standardized by *Hoffman Estates*. These decisions engage in a type of unmediated consequentialism, according primacy to "the seriousness of what is at stake under the statutory scheme."[123] This practice has had three main effects. First, certain unquestionably "civil" provisions—such as ones authorizing expulsion from educational

120 Sweetman v. State Elections Enf't Comm'n, 732 A.2d 144, 162 n.21 (Conn. 1999).

121 For examples of this phenomenon, see Manning v. Caldwell, 930 F.3d 264, 273 (4th Cir. 2019); Powell v. Ryan, 855 F.3d 899, 905 (8th Cir. 2017) (Shepherd, J., concurring); Women's Med. Ctr. of Nw. Houston, 248 F.3d 411, 422 (5th Cir. 2001); United States v. Clinical Leasing Serv., Inc., 925 F.2d 120, 122 & n.2 (5th Cir. 1991); Lamar Tex. Ltd. P'ship v. City of Port Isabel, Civ. No. B-08-115, 2009 WL 10694738, at *5 (S.D. Tex. Nov. 10, 2009); Doe v. Biang, 494 F. Supp. 2d 880, 894–95 (N.D. Ill. 2006); Ford Motor Co. v. Tex. Dep't of Transp., 106 F. Supp. 2d 905, 911 (W.D. Tex. 2000); AutoMaxx, Inc. v. Morales, 906 F. Supp. 394, 400 (S.D. Tex. 1995); Nat'l Paint & Coatings Ass'n v. City of Chicago, 803 F. Supp. 135, 148 (N.D. Ill. 1992); ABN 51st St. Partners v. City of New York, 724 F. Supp. 1142, 1147 (S.D.N.Y. 1989); Rasche v. Bd. of Trs. of Univ. of Ill., 353 F. Supp. 973, 976 (N.D. Ill. 1972); Delgado v. Souders, 46 P.3d 729, 747 (Or. 2002).

122 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 255 (2012). In doing so, the Court did *not* use the term "quasi-criminal."

123 Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196, 1203 (E.D. Pa. 1971).

institutions[124] or the termination of parental rights[125]—have been scrutinized with the rigor usually reserved for laws deemed "criminal" or "quasi-criminal."[126] Second, in boundary-straddling cases of first impression, courts have similarly calibrated the level of scrutiny by focusing squarely on the consequences of violations.[127] And third, courts have acknowledged a spectrum of severity *within* both conceptual categories. Especially severe civil or criminal penalties have thus been accorded especially stringent scrutiny,[128] and vice versa.[129]

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124 *See* Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601, 605 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) ("[T]he penalties for violation are sufficiently grievous to mandate careful scrutiny for vagueness."); Marin v. Univ. of Puerto Rico, 377 F. Supp. 613, 627 (D.P.R. 1973) (insisting that "a year's suspension from college could well have a far more devastating and long-term effect" than "a conviction under an anti-noise ordinance"); Sullivan v. Houston Indep. Sch. Dist., 307 F. Supp. 1328, 1344 (S.D. Tex. 1969) ("If the punishment could be this severe, there is no question but that a . . . student might well suffer more injury than one convicted of a criminal offense."); Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968) (observing that "expulsion from an institution of higher learning" may be "a more severe sanction than a monetary fine or a relatively brief confinement").

125 *See* Turner v. Jackson, 417 S.E.2d 881, 889 (Va. Ct. App. 1992) (acknowledging the "grave penalty" that parties may suffer from "the termination of parental rights"); Alsager v. Dist. Ct. of Polk Cty., 406 F. Supp. 10, 17 & n.4 (D. Iowa 1975) (concluding that "the permanent destruction of the family unit . . . is a much more drastic consequence" than certain criminal penalties).

126 *See In re* Bithoney, 486 F.2d 319, 323 (1st Cir. 1973) (subjecting attorney disciplinary proceedings to "very severe" scrutiny "in view of the gravity" of the penalties involved); Hill v. Coggins, 423 F. Supp. 3d 209, 218–19 (W.D.N.C. 2019) (concluding that "a 'relatively strict test' for vagueness must be applied" given "the drastic nature of the relief sought").

127 *See* Hess v. Bd. of Parole & Post-Prison Supervision, 514 F.3d 909, 914 (9th Cir. 2008) (considering "[t]he consequences of imprecision" in identifying "the level of specificity required" for parole-release statutes); United States v. Watkins, 18-CR-131, 2018 WL 4922135, at *3 (W.D.N.Y. Oct. 9, 2018) (stating, in a challenge to a pretrial-detention statute, that "the degree of permissible vagueness depends on the severity of the consequences of imprecision") (quotation marks omitted).

128 *See* Wollschlaeger v. Governor, 848 F.3d 1293, 1323 (11th Cir. 2017) (en banc) (Marcus, J.) (referring to the "devastating consequences [that] attach to . . . [such] serious civil sanctions"); Whatley v. Zatecky, 833 F.3d 762, 782 (7th Cir. 2016) (alluding to the "especially dire consequence" of a sentencing enhancement); PETA, Inc. v. Stein, 466 F. Supp. 3d 547, 582 (M.D.N.C. 2020) (accounting for "the substantial exemplary damages associated with a violation"); United States v. Tana, 618 F. Supp. 1393, 1397 (S.D.N.Y. 1985) (citing "[t]he relatively severe criminal penalty to which the plaintiff may be subjected"); Landman v. Royster, 333 F. Supp. 621, 655 (E.D. Va. 1971) ("[T]he greater the individual loss, the higher the requirements of due process."); State v. Afanador, 631 A.2d 946, 950 (N.J. 1993) ("We appreciate full well the severe nature of the penalty . . . and have given the gravity of that sanction due consideration . . . .").

129 *See* Powell v. Ryan, 855 F.3d 899, 903 (8th Cir. 2017) ("[T]he only sanction for violating rules of the Fair is ejection from the Fair"—"a modest consequence."); United States v. Hunter, 663 F.3d 1136, 1142 (10th Cir. 2011) ("[W]e must also keep in mind that this is a misdemeanor traffic regulation statute . . . ."); T.A. v. McSwain Union Elementary Sch., No. 1:08-cv-01986, 2010 WL 2803658, at *10 (E.D. Cal. July 16, 2010) (alluding to "the minimal penalties imposed for violations of the School's dress code"); Mike Naughton Ford, Inc. v. Ford Motor Co., 862 F. Supp. 264, 271

The Supreme Court itself has reasoned directly from the harshness of statutory penalties on two occasions. In *National Endowment for the Arts v. Finley*, the Court concluded that a relaxed vagueness standard applies to governmental subsidies, given that "the consequences of imprecision are not constitutionally severe."[130] And *Sessions v. Dimaya* held that laws authorizing the deportation of aliens must meet "the most exacting vagueness standard."[131] Despite deportation's nominally civil character, the Court viewed that sanction as "a particularly severe penalty" that "may be of greater concern to a convicted alien than 'any potential jail sentence.'"[132] *Dimaya* dispels any remaining illusion that a law's civil or criminal nature must dictate the rigor with which it is reviewed. In fact, under a straightforward reading of *Dimaya*, courts are now explicitly authorized to accord heightened scrutiny to statutes imposing unusually "grave" or "drastic" penalties[133]—whether or not they can be shoehorned into the enigmatic "quasi-criminal" category.

An admirably thoughtful concurrence by Justice Gorsuch reinforces *Dimaya*'s core methodological lesson. In his view, "if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes?"[134] Justice Gorsuch saw no justification for leniently reviewing governmental efforts to "subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home."[135]

Especially after *Dimaya*, courts have all the tools they need to align actual practice with the underlying purposes of penalty-sensitivity in vagueness doctrine. But because the Court has never consciously revamped the familiar tenets of *Hoffman Estates*, many lower courts have persisted in citing them as the final word on vagueness variability.[136] Accordingly, only an explicit reorientation can achieve the type of system-wide methodological uniformity to which an apex court's legal pronouncements should aspire.

(D. Colo. 1994) (citing the "relatively minor" criminal penalties at issue); Weil v. McClough, 618 F. Supp. 1294, 1297 (S.D.N.Y. 1985) ("The relatively light civil penalty to which the plaintiff was subjected further justifies the application of only moderate scrutiny . . . .").

130 524 U.S. at 589.

131 Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (plurality opinion).

132 *Id.* (quoting Jae Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).

133 *Id.* (quotation marks omitted).

134 *Id.* at 1229 (Gorsuch, J., concurring in part and concurring in the judgment).

135 *Id.* at 1231.

136 *See supra* notes 114–115.

C. Scienter

Hoffman Estates's third variability factor is whether a law contains a scienter requirement—for example, that the forbidden act be performed intentionally, knowingly, or willfully. According to the Court, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[137] A host of Supreme Court decisions—to say nothing of lower-court opinions—have touted the clarifying capacity of individual scienter requirements.[138] If anything, the Court has only affirmed that proposition more forcefully since *Hoffman Estates*.[139]

As a variability factor, however, the scienter category is clumsily cast. The existence of a mens rea element cannot inform the normative inquiry into how much clarity due process *should* require (as opposed to the degree of clarity that an enactment actually exhibits). And it has become increasingly evident that mens rea requirements cannot perform the herculean task of elucidating otherwise-unintelligible commands.

1. The Variability Mismatch

Hoffman Estates famously asserted that the twin prongs of vagueness doctrine "should not . . . be mechanically applied."[140] As the Court explained, the "importance of fair notice and fair enforcement" will not be the same for all types of laws.[141] *Hoffman Estates*'s variability framework is thus meant to ascertain "[t]he degree of vagueness that the Constitution tolerates" in certain situations.[142] But the Court's observations about scienter requirements—that they "may mitigate a law's vagueness"[143] or "narrow the scope of [a] prohibition"[144]—address an entirely different question. The

137 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

138 *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 21 (2010) (claiming that "the knowledge requirement of the statute further reduces any potential for vagueness"); Gonzales v. Carhart, 550 U.S. 124, 149 (2007) (observing that "[t]he Court has made clear that scienter requirements alleviate vagueness concerns"); Hill v. Colorado, 530 U.S. 703, 732 (2000) (insisting that scienter requirements "ameliorate[]" vagueness concerns); Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 526 (1994) (asserting that "the scienter requirement we have inferred . . . assists in avoiding any vagueness problem").

139 *See Carhart*, 550 U.S. at 149 ("The Court has made clear that scienter requirements alleviate vagueness concerns.").

140 *Hoffman Estates*, 455 U.S. at 498.

141 *Id.*

142 *Id.*

143 *Id.* at 499.

144 *Carhart*, 550 U.S. at 150.

presence or absence of a mens rea term may have some bearing on how clear a law actually is, but it has nothing to do with how clear a law *must be* in order to survive vagueness review.

An analogy will help illustrate the point. It would likely be unconstitutional to criminalize the making of "loud, boisterous, and unusual noise" as a generally applicable conduct rule. But that murky prohibition would be significantly clarified by a requirement that the noise "impede[] or disrupt[] the performance of official duties by Government employees" within a designated facility.[145] Such limiting language does not reduce the situational importance of fair notice and non-arbitrary enforcement; it simply increases the likelihood of satisfying whichever standard of clarity the Constitution demands. Likewise, whatever a scienter requirement's capacity to mitigate vagueness, that consideration has no place within a framework meant to ascertain *how much* vagueness the Constitution tolerates. A scienter requirement is thus no different than any other type of statutory language with the capacity to qualify a seemingly indefinite command. The Court, tellingly, has never sought to justify the scienter category's inclusion on any other terms.

2. The Clarity Mismatch

Once the degree of tolerable vagueness has been determined, the twin aims of vagueness doctrine come into play. The first of these animating purposes is to ensure that people have "fair notice of what the law demands of them."[146] Scienter requirements serve a valuable purpose in predicating criminal punishment on regulated parties' awareness of certain salient facts, or of the consequences of their actions.[147] Yet despite the Court's insistence that "scienter requirements alleviate vagueness concerns,"[148] it is far from obvious that a mens rea term could demystify an indecipherable prohibition. Take, for example, a hypothetical restriction on "antisocial behavior." It is unclear how the statute could be violated knowingly, given that one cannot know the meaning of so shapeless a command. Nor can a required showing of purpose illuminate *what it is* that must be done deliberately.

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145 38 C.F.R. § 1.218(a)(5); United States v. Agront, 773 F.3d 192, 198 (9th Cir. 2014); *see also* Boos v. Barry, 485 U.S. 312, 332 (1988) ("[T]he 'prohibited quantum of disturbance' is whether normal embassy activities have been or are about to be disrupted."); United States v. Bronstein, 849 F.3d 1101, 1109 (D.C. Cir. 2017) ("[T]he [terms] 'harangue' and 'oration'. . . refer to public speeches that tend to disrupt the Court's operations, and no others.").

146 United States v. Davis, 139 S. Ct. 2319, 2325 (2019).

147 *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70–72 (1994).

148 *Carhart*, 550 U.S. at 149.

Indeed, the Supreme Court itself has denied that a scienter requirement can clarify the meaning of an incomprehensible law. In one of its foundational vagueness decisions, the Court invalidated a state law that prohibited "treat[ing] contemptuously the flag of the United States."[149] It made no difference that the state's highest court had interpreted the law to apply only to intentional contempt: "this holding still does not clarify what conduct constitutes contempt, whether intentional or inadvertent."[150] The Court has cast doubt on *Hoffman Estates*'s scienter principle on at least three other occasions, as well.[151]

Many lower courts have similarly voted with their feet, refusing to march in lockstep with the Supreme Court's most recent guidance on this issue. In their view, a scienter requirement cannot "make definite that which is undefined."[152] These decisions are a powerful testament to the illogicality of

149 Smith v. Goguen, 415 U.S. 566, 568–69, 582 (1974).

150 *Id.* at 580.

151 *See* Baggett v. Bullitt, 377 U.S. 360, 369 (1964) ("But what is it that the Washington professor must 'know'?"); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286 (1961) (querying, of certain conduct that must be committed "knowingly," "What do these phrases mean?"); Screws v. United States, 325 U.S. 91, 105 (1945) (plurality opinion) ("Of course, willful conduct cannot make definite that which is undefined.").

152 State v. Mark Marks, P.A., 654 So.2d 1184, 1189 (Fla. Dist. Ct. App. 1995); *see also* Agnew v. Dist. of Columbia, 920 F.3d 49, 60 (D.C. Cir. 2019) (finding that the "vagueness of a conduct prohibition cannot be cured by . . . intentionality"); Gallardo v. Lynch, 818 F.3d 808, 821 (9th Cir. 2016) (inquiring, "specific intent to do what?"); Reprod. Health Servs. v. Nixon, 428 F.3d 1139, 1144 (8th Cir. 2005) (asking "*what* the medical professional must 'know'") (emphasis added); Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1159 ("The mitigating effect of the scienter requirement is diluted . . . by the futility of attempting to determine what it means to intend to do something [fundamentally] vague . . . ."); United States v. Loy, 237 F.3d 251, 265 (3d Cir. 2001) (insisting that "legislatures [cannot] simply repair otherwise vague statutes by inserting the word 'knowingly'"); Forbes v. Napolitano, 236 F.3d 1009, 1013 (9th Cir. 2000) ("That distinction is not clarified by the statute's scienter requirement."); Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 535 (6th Cir. 1998) (finding that a "scienter provision [c]ould not help to cure the problems inherent in this provision"); United States v. Corrow, 119 F.3d 796, 804 n.11 (10th Cir. 1997) ("We do not say that a scienter requirement will rescue an otherwise vague statute . . . ."); United States v. Heller, 866 F.2d 1336, 1342 (11th Cir. 1989) (concluding that, because the underlying prohibition was "vague," "the defendant's subjective intent to engage in the prohibited conduct was irrelevant"); Nova Records, Inc. v. Sendak, 706 F.2d 782, 789 (7th Cir. 1983) ("A scienter requirement cannot eliminate vagueness, therefore, if it is satisfied by an 'intent' to do something that is in itself ambiguous."); Kramer v. Price, 712 F.2d 174, 178 (5th Cir. 1983) ("Specifying an intent element does not save § 42.07 from vagueness because the conduct which must be motivated by intent . . . remain[s] vague."); Frese v. MacDonald, 425 F. Supp. 3d 64, 80 (D.N.H. 2019) (finding that, notwithstanding a statute's "'knowing' scienter requirement, the statute may still not adequately delineate what . . . must be known . . . ."); McCormack v. Hiedeman, 900 F. Supp. 2d 1128, 1148 (D. Idaho 2013) ("The inclusion of 'knowing' does not save the provision from vagueness."); R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 311 (D.R.I. 1999) (explaining that a scienter

Hoffman Estates's scienter precept[153]—and to the feebleness of Supreme Court decisions that propagate fundamentally incoherent frameworks.

In addition, as Professor Michael Mannheimer has observed, the inclusion of a scienter requirement cannot alleviate the doctrine's concern with arbitrary and discriminatory enforcement. Due to early-stage evidentiary limitations, arrests and charging decisions are routinely "based only on the objectively observable conduct of the defendant."[154] Enforcement officials are thus no more constrained in this respect when the prohibitions they invoke require proof of a specified mental state.

Lastly, if the mere presence of a scienter requirement could eliminate vagueness concerns, then the doctrine would do almost no work in the criminal context—where its bite is said to be especially pronounced. After all, the Court has repeatedly endorsed a statutory-construction principle whereby criminal laws must generally be read to contain a mens rea requirement, whether express or implied.[155] So *Hoffman Estates*'s scienter principle is not just a poor fit for vagueness doctrine; it would threaten to destabilize the very core of vagueness variability.

D. Constitutional Rights

Fourth, and "most important[ly]," *Hoffman Estates* specified that laws receive stricter vagueness scrutiny if they "threaten[] to inhibit the exercise of constitutionally protected rights."[156] This variability factor was catalyzed by a pathbreaking student note written by Professor Anthony Amsterdam in 1960.[157] Up to that point, the Supreme Court had never mandated heightened vagueness review for laws affecting constitutional rights.[158] In

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requirement that "modifies a vague term" cannot save an otherwise-unconstitutional law); United States v. Spy Factory, Inc., 951 F. Supp. 450, 477 (S.D.N.Y. 1997) ("[T]he 'knowing or having reason to know' language means little if the term 'surreptitious' is unclear . . . .").

153 *See* Sohoni, *supra* note 21, at 1194 ("The presence of a mens rea requirement in a criminal statute cannot make otherwise unclear statutory language clear as to what it prohibits."); Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L.Q. 195, 228–29 (1955) ("If a statute is so vague as to have no meaning, it is a contradiction in terms to say that guilty knowledge or evil purpose cures the vagueness.").

154 Mannheimer, *supra* note 110, at 1095.

155 Elonis v. United States, 135 S. Ct. 2001, 2009 (2015).

156 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

157 *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (hereinafter "Amsterdam").

158 The closest it had come was in *Smith v. California*, 361 U.S. 147 (1959), when the Court characterized an earlier decision as "intimat[ing] that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech," *id.* at 151.

Amsterdam's telling, however, the Court had implicitly done just that, deploying vagueness review as "an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[159] Amsterdam's descriptive observation—or at least some variant of it—was almost immediately doctrinalized as a rule of decision[160] that has remained a fixture of vagueness analysis ever since. Under *Hoffman Estates*, laws that "threaten[] to inhibit the exercise" of constitutional rights are viewed with the utmost disfavor.[161]

That formulation, however, has spawned tremendous confusion over the very nature of "constitutional" vagueness review. As my research shows, there is no settled understanding of what it means to *threaten* to inhibit constitutional rights. And although all constitutional rights were ostensibly drawn within the phrase's protective ambit, the Court's variability repertoire leaves room to argue that only First Amendment freedoms are so privileged—and that the relevant rights can be rank-ordered along a spectrum of fundamentality. This Section documents key imprecisions in the Court's conception of "constitutional" vagueness. It then argues that conditioning vagueness scrutiny on ancillary constitutional determinations has engendered perverse consequences that warrant a belated doctrinal reckoning.

1. What is "Constitutional" Vagueness?

a. The Concept of "Threatened" Impairments

Under *Hoffman Estates*, a law will receive exacting vagueness scrutiny as long as it "threatens" to impair constitutional rights.[162] Measures that are actually adjudged to violate individual rights plainly meet this threshold, as do laws that regulate within the scope of constitutional coverage—even if the government can proffer a satisfactory reason for such regulations.

Hoffman Estates fails to clarify, however, whether a stricter test is also required for Constitution-*adjacent* enactments. In other words, it is an open question whether the Court has ratified Professor Amsterdam's precise description of vagueness doctrine as providing "an insulating buffer zone of

159 Amsterdam, *supra* note 157, at 75.

160 *See* NAACP v. Button, 371 U.S. 415, 432–33 & n.14 (1963) (citing Amsterdam, *supra* note 157, at 75–76, 80–81, 96–104).

161 *Hoffman Estates*, 455 U.S. at 499.

162 *Id.*

added protection *at the peripheries* of several of the Bill of Rights freedoms."[163] If so, then monitoring "threat[s]" to constitutional rights entails identifying an assortment of penumbral zones that radiate beyond the edges of constitutional protection. This reading of *Hoffman Estates* presupposes a universe of lesser, permissible endangerments of constitutional values that do not formally implicate recognized rights, but nonetheless trigger exacting vagueness review. *Hoffman Estates* failed to expound on this prophylactic concept, as did prior decisions that arguably drew such a distinction.[164]

Unsurprisingly, then, lower courts have operationalized the notion of "threatened" constitutional violations in widely divergent ways. Some of these rule statements appear to conflate threatened and actual violations, reserving heightened review for the latter—only laws that "abridge,"[165] "inhibit,"[166] "interfere with,"[167] "impinge,"[168] "trench on,"[169] "infringe,"[170] or "throttle"[171] constitutional rights. It is exceedingly unlikely that *Hoffman Estates* intended to reserve exacting scrutiny for enactments already adjudged to violate the Constitution—an approach that would render "constitutional" vagueness review duplicative of ordinary constitutional adjudication.

Still other courts evidently view *Hoffman Estates* as requiring a threshold determination of constitutional coverage, but no ultimate adjudication of constitutionality. This genre seeks out laws that merely "implicate,"[172]

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163 Amsterdam, *supra* note 157, at 75 (emphasis added).

164 *See* Colautti v. Franklin, 439 U.S. 379, 391 (1979) (referring to laws that "threaten[] to inhibit the exercise of constitutionally protected rights"); Buckley v. Valeo, 424 U.S. 1, 41 (1976) (per curiam) (identifying "an area permeated by First Amendment interests"); Smith v. California, 361 U.S. 147, 151 (1959) (referring to laws "having a potentially inhibiting effect on speech").

165 Platt v. Bd. of Comm'rs on Grievances & Discipline, 894 F.3d 235, 246 (6th Cir. 2018) ("abridging").

166 DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1271 (11th Cir. 2007); Craft v. Nat'l Park Serv., 34 F.3d 918, 922 (9th Cir. 1994); Murphy v. Matheson, 742 F.2d 564, 570 (10th Cir. 1984).

167 Schickel v. Dilger, 925 F.3d 858, 878 (6th Cir. 2019); United States v. Walton, 36 F.3d 32, 35 (7th Cir. 1994); Planned Parenthood of Cent. & N. Ariz. v. Arizona, 718 F.2d 938, 948 (9th Cir. 1983) ("interferes with").

168 Betancourt v. Bloomberg, 448 F.3d 547, 553 (2d Cir. 2006).

169 Smylis v. City of New York, 983 F. Supp. 478, 483 (S.D.N.Y. 1997).

170 United States v. Di Pietro, 615 F.3d 1369, 1371 n.2 (11th Cir. 2010) ("infringes"); Garner v. White, 726 F.2d 1274, 1278 (8th Cir. 1984) ("infringing"); Shawgo v. Spradlin, 701 F.2d 470, 477–78 (5th Cir. 1983).

171 LaRouche v. Sheehan, 591 F. Supp. 917, 926 (D. Md. 1984).

172 United States v. Class, 930 F.3d 460, 468 (D.C. Cir. 2019) ("implicates"); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015) ("implicating"); FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 255 (3d Cir. 2015); United States v. Jaensch, 665 F.3d 83, 89 n.4 (4th Cir. 2011) ("implicates"); Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) ("implicates"); Woodis v. Westark Cmty. Coll., 160 F.3d 435, 438 (8th Cir. 1998) ("implicating"); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1337 (6th Cir. 1978) ("implications").

"reach,"[173] "touch upon,"[174] "affect,"[175] "impact,"[176] "arise under,"[177] "regulate,"[178] "govern,"[179] "abut upon,"[180] "encumber,"[181] "burden,"[182] "restrain,"[183] or "limit"[184] constitutional protections in some manner. Other formulations of *Hoffman Estates*'s fourth prong—in requiring that constitutional rights suffuse a vagueness claim in some unspecified way—may also fit into this category.[185]

Under each of these first two approaches, resolving a vagueness claim necessarily involves a substantive analysis of the reach of some other constitutional right. Whether the right is deemed to be implicated—or actually infringed—will thus determine whether its exercise is "threaten[ed]," in the scrutiny-setting parlance of *Hoffman Estates*. This task is fairly routine when the challenged enactment is also alleged to violate some

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173 Etzler v. City of Cincinnati, No. 1:07-cv-1035, 2013 WL 1196649, at *3 (S.D. Ohio Mar. 25, 2013).

174 Wis. Vendors, Inc. v. Lake County, 152 F. Supp. 2d 1087, 1095 (N.D. Ill. 2001) ("touches upon"); United States v. Sutherland, No. 1:00CR00052, 2001 WL 497319, at *2 (W.D. Va. May 10, 2001) ("touching upon").

175 Penny Saver Publ'ns v. Vill. of Hazel Crest, 905 F.2d 150, 155 (7th Cir. 1990) ("affecting"); Int'l Soc. for Krishna Consciousness v. Eaves, 601 F.2d 809, 830 (5th Cir. 1979) ("consider the effect on"); Carrigan v. Comm'n on Ethics of State of Nev., 313 P.3d 880, 884 (Nev. 2013) ("affecting").

176 Doe v. Biang, 494 F. Supp. 2d 880, 895 (N.D. Ill. 2006) ("impacts").

177 Huett v. State, 672 S.W.2d 533, 537 (Tex. App. 1984) ("arising under").

178 Imaginary Images, Inc. v. Evans, 612 F.3d 736, 749 (4th Cir. 2010) (citation omitted); Bryant v. Gates, 532 F.3d 888, 893 (D.C. Cir. 2008) ("regulates"); Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) ("regulates").

179 Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843, 855 (2d Cir. 1984) ("governing").

180 City of Madison v. Baumann, 455 N.W.2d 647, 650 n.3 (Wis. Ct. App. 1990), *rev'd on other grounds*, 470 N.W.2d 296 (Wis. 1991) ("abuts upon").

181 Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, at *3 (E.D. Pa. May 11, 1992) ("encumbered").

182 Cracco v. Vance, 376 F. Supp. 3d 304, 312–13 (S.D.N.Y. 2019); Metal Mgmt. West, Inc. v. State, 251 P.3d 1164, 1171–72 (Colo. App. 2010).

183 O'Toole v. O'Connor, No. 2:15-cv-1446, 2016 WL 4394135, at *16 (S.D. Ohio Aug. 18, 2016) ("restrains").

184 Hayes v. N.Y. Att'y Grievance Comm., 672 F.3d 158, 168 (2d Cir. 2012); DiCola v. FDA, 77 F.3d 504, 508 (D.C. Cir. 1996) ("limits"); Psychas v. Dist. Dep't of Transp., Civ. No. 18-0081, 2019 WL 4644503, at *14 (D.D.C. Sept. 24, 2019) ("limits").

185 *See, e.g.*, Butler v. O'Brien, 663 F.3d 514, 520 (1st Cir. 2011) (laws that "involve[]" constitutional rights); Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1157 (10th Cir. 2006) (laws "in the [constitutional] context"); Gammoh v. City of La Habra, 395 F.3d 1114, 1119 (9th Cir. 2005) (constitutional rights "at stake"); Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 513 (9th Cir. 1988) (constitutional rights "at issue"); Doe v. Staples, 706 F.2d 985, 988 (6th Cir. 1983) (laws that "concern" constitutional rights); Exxon Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir. 1981) (laws "in the area of [constitutional] rights"); Cable Ala. Corp. v. City of Huntsville, 768 F. Supp. 1484, 1506 (N.D. Ala. 1991) (constitutional concerns "present"); Siegel v. LifeCenter Organ Donor Network, 969 N.E.2d 1271, 1280–81 (Ohio Ct. App. 2011) (laws "directed towards" constitutional rights).

other right; in these situations, courts can simply adopt their distinct constitutional analyses wholesale.[186] But when no separate constitutional claim is raised, these approaches necessitate a separate constitutional inquiry *solely to calibrate the intensity of vagueness review*.

By contrast, other courts have interpreted the notion of a "threat[]" to constitutional rights more expansively, assuming that laws can imperil constitutional values without formally burdening recognized rights. Such courts have focused on laws that "chill,"[187] "may have an improper chilling effect on,"[188] "create uncertainty regarding,"[189] "potentially interfere with,"[190] "may [or might] infringe,"[191] "could undermine,"[192] "potentially inhibit,"[193] "possibly infringe,"[194] "are capable of reaching,"[195] "may fade into,"[196] or operate "in the shadow of" constitutional protections.[197]

The Supreme Court has never acknowledged this basic ambiguity lurking within its *Hoffman Estates* rule statement. Indeed, that pivotal language—whether a law "threatens to inhibit the exercise of constitutionally protected rights"[198]—has never again appeared in a Supreme Court opinion. The Court has, instead, described constitutional-rights variability in shifting terms that track the very disagreement exhibited by lower courts. Singled out for heightened review have been laws that "potentially implicate[]," [199] that "involve[]," [200] and that "interfere[] with" [201] constitutional rights. And because the Court has never overtly revised its *Hoffman Estates* framework,

186 *See, e.g.*, Murphy v. Matheson, 742 F.2d 564, 570 (10th Cir. 1984) (free-speech holding); Shawgo v. Spradlin, 701 F.2d 470, 478 (5th Cir. 1983) (free-speech and right-to-privacy holdings); Seniors Civil Liberties Ass'n v. Kemp, 761 F. Supp. 1528, 1552 (M.D. Fla. 1991) (freedom-of-association holding).

187 Hanlester Network v. Shalala, 51 F.3d 1390, 1398 (9th Cir. 1995) ("chills").

188 Lowden v. County of Clare, 709 F. Supp. 2d 540, 551 (E.D. Mich. 2010).

189 Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 135 (3d Cir. 2000).

190 Gresham v. Peterson, 225 F.3d 899, 908 (7th Cir. 2000) ("potentially interferes with"); Fleming v. U.S. Dep't of Agric., 713 F.2d 179, 184 (6th Cir. 1983) ("potential interference with").

191 Whatley v. Zatecky, 833 F.3d 762, 777 (7th Cir. 2016); Rubin v. Garvin, 544 F.3d 461, 467 (2d Cir. 2008).

192 State v. Cameron, 100 N.J. 586, 595 (1985).

193 Boddie v. Am. Broad. Cos., 881 F.2d 267, 271 (6th Cir. 1989).

194 Dodger's Bar & Grill, Inc. v. Johnson Cty. Bd. of Cty. Comm'rs, 32 F.3d 1436, 1443 n.6 (10th Cir. 1994).

195 VIP of Berlin, LLC v. Town of Berlin, 593 F.3d 179, 186 (2d Cir. 2010).

196 United States v. Dozier, 672 F.2d 531, 539 (5th Cir. 1982).

197 United States v. Morrison, 844 F.2d 1057, 1073 (4th Cir. 1988).

198 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

199 Holder v. Humanitarian Law Project, 561 U.S. 1, 21 (2010).

200 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 253 (2012).

201 *Humanitarian Law Project*, 561 U.S. at 19.

that case's cryptic phraseology continues to be cited and applied by lower courts. The Court has thus erected—likely unwittingly—a significant obstacle to the uniform implementation of "the most important"[202] element of tiered vagueness review.

b. The Domain Question

The Court's failure to clarify the essential contours of "constitutional" vagueness review has exacerbated preexisting confusion about the very domain of vagueness doctrine. Laws that should arguably receive *no* vagueness scrutiny have ironically been accorded the *most stringent* vagueness scrutiny, given their effect on constitutional rights.

The Court has never definitively resolved which types of enactments are susceptible to vagueness review. It has sometimes suggested that a law must directly "regulate the public"[203]—by formally "forbid[ding] or requir[ing]" certain conduct[204]—before vagueness doctrine can apply. Lower courts routinely invoke this understanding to dismiss vagueness claims as falling outside the doctrine's domain.[205] Yet the Court has also described the office of vagueness less restrictively. Under this view, an actor need only be exposed to "some risk or detriment"[206] or be "burden[ed]"[207] in some way to call upon vagueness principles. Accordingly, a host of lower courts have applied the doctrine to laws that did not purport to render any type of

202 *Hoffman Estates*, 455 U.S. at 499.

203 Beckles v. United States, 137 S. Ct. 886, 895 (2017).

204 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 253 (2012); *see also* A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925) (explaining that vagueness doctrine presupposes "the exaction of obedience to a rule or standard"); *cf.* Boutilier v. INS, 387 U.S. 118, 123 (1967) ("The section imposes neither regulation of nor sanction for conduct."); City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 291 (1982) (holding that vagueness principles do not apply to internal investigative directives).

205 *See, e.g.*, United States v. Christie, 825 F.3d 1048, 1064–65 (9th Cir. 2016) ("RFRA cannot be unconstitutionally vague because it . . . does not define the elements of an offense, fix any mandatory penalty, or threaten people with punishment if they violate its terms."); *In re* Griffin, 823 F.3d 1350, 1354 (11th Cir. 2016) (refusing to apply vagueness doctrine to provisions that "do not establish the illegality of any conduct"); United States v. Sylla, 790 F.3d 772, 774 (7th Cir. 2015) (same, for a law that "does not attempt to prohibit or prescribe any conduct"); Kinnell v. Graves, 265 F.3d 1125, 1128 (10th Cir. 2001) (same, for a law that "does not prohibit any conduct").

206 Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 740 (1970).

207 Giaccio v. Pennsylvania, 382 U.S. 399, 403 (1966).

conduct unlawful, but that straddled the conceptual divide between imposing adverse consequences and withholding favorable treatment.[208]

Literal adherence to *Hoffman Estates* threatens to warp the preconditions for vagueness review—whatever the doctrine's exact reach. Courts have accorded heightened vagueness scrutiny to laws that threatened to chill expression, despite the absence of any formal prohibition.[209] According to the Ninth Circuit, for example, laws that implicate First Amendment rights warrant enhanced vagueness review "even if there is no sanction or penalty imposed on the speaker."[210] Yet surely vagueness claims should be dismissed at the threshold if the reasons for such review are entirely absent. The unsettled nature of "constitutional" vagueness has thus deepened existing uncertainties about the proper scope of vagueness doctrine.

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208 Courts have subjected each of the following to vagueness doctrine: a rule governing access to state fairgrounds, *see* Powell v. Ryan, 855 F.3d 899, 903 (8th Cir. 2017); a law limiting the subjects of ballot initiatives, *see* Pest Comm. v. Miller, 626 F.3d 1097, 1111–12 (9th Cir. 2010); an evidentiary presumption, *see* Thibodeau v. Portuondo, 486 F.3d 61, 66 (2d Cir. 2007); a regulation governing access to public-library facilities, *see* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1267 (3d Cir. 1992); a rule authorizing students' disqualification from a school election, *see* Henerey *ex rel.* Henerey v. City of St. Charles, Sch. Dist., 200 F.3d 1128, 1134–35 (8th Cir. 1999); a statute of limitations, *see* Horn v. Burns & Roe, 536 F.2d 251, 254–56 (8th Cir. 1976); a zoning ordinance, *see* Islamic Soc'y of Basking Ridge v. Twp. of Bernards, 226 F. Supp. 3d 320, 352–53 (D.N.J. 2016); trademark-licensing guidelines, *see* Gerlich v. Leath, 152 F. Supp. 3d 1152, 1179–80 (S.D. Iowa 2016); a statute governing the consolidation of public-school districts, *see* Bd. of Educ. of Shelby Cty. v. Memphis City Bd. of Educ., No. 11-2101, 2011 WL 3444059, at *36 (W.D. Tenn. 2011); a law regulating concealed-carry permitting, *see* Iverson v. City of St. Paul, 240 F. Supp. 2d 1035, 1038 (D. Minn. 2003); a law regulating the "construction, alteration, [and] demolition of structures," *see* Boczar v. Kingen, No. IP 99-0141-C-T/G, 2000 WL 1137713, at *15 (S.D. Ind. Mar. 9, 2000); a law specifying which city employees may receive a legal defense, *see* Smylis v. City of New York, 983 F. Supp. 478, 482–83 (S.D.N.Y. 1997); a law regulating the appointment of business auditors, *see* Sanitation & Recycling Indus. v. City of New York, 928 F. Supp. 407, 420–21 (S.D.N.Y. 1996); a law governing candidates' ballot access, *see* Kay v. Mills, 490 F. Supp. 844, 852 (E.D. Ky. 1980); a law creating professional-licensing criteria, *see* Malfitano v. County of Storey, 396 P.3d 815, 818 (Nev. 2017); a law granting tax exemptions, *see In re* Lietz Constr. Co., 47 P.3d 1275, 1288 (Kan. 2002); and internal interpretive guidelines, *see* Jackson v. W., 419 S.E.2d 385, 392 (Va. Ct. App. 1992).

209 Enhanced scrutiny has been accorded to each of the following: a provision creating an exemption from import duties, *see* Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512–13 (9th Cir. 1988); a law defining tax-exempt status, *see* Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980); a regulation governing access to public-library facilities, *see* Armstrong v. Dist. of Columbia Pub. Library, 154 F. Supp. 2d 67, 77 (D.D.C. 2001); a law providing that candidates who failed to support a constitutional amendment would have their views indicated on the ballot, *see* Gralike v. Cook, 996 F. Supp. 901, 913 (W.D. Mo. 1998); and statutory criteria for recognizing new political parties, *see* Citizens to Establish a Reform Party v. Priest, 970 F. Supp. 690, 699 (E.D. Ark. 1996).

210 Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1056 (9th Cir. 2003).

c. Which Rights Qualify?

The Supreme Court has not only left unclear *how* constitutional protections shape vagueness review; it has invited confusion about *which* constitutional rights can trigger heightened review in the first place. In the decades before *Hoffman Estates*, the Court had—with one exception[211]—reserved this distinction for First Amendment rights.[212] Such treatment was justified on the ground that free expression "need[s] breathing space to survive."[213] Increased vagueness scrutiny for enactments affecting expression thus serves much the same purpose as First Amendment overbreadth doctrine, which permits the invalidation of laws that "may deter or 'chill' constitutionally protected speech."[214]

Hoffman Estates seemingly broke from this trend. In drawing no distinctions between types of "constitutionally protected rights,"[215] the Court appeared to mandate enhanced vagueness scrutiny for laws affecting *any* such right. This approach arguably amounts to a kind of general constitutional overbreadth—a sweeping, trans-substantive expansion of that principle—operating under the auspices of vagueness doctrine. Yet the Court did not explain why non–First Amendment rights also deserve such solicitude. Perhaps tellingly, *Hoffman Estates* illustrated its "constitutionally protected rights" rule with two examples considerably better rooted in precedent: laws that "interfere[] with the right of free speech or of association."[216]

Lower courts—unsurprisingly—have splintered in characterizing the types of constitutional rights specially insulated by vagueness doctrine. Numerous decisions have drawn no such distinctions, employing generic phrasing that affirms the scrutiny-boosting capacity of *all* constitutional

211 *See* Colautti v. Franklin, 439 U.S. 379, 391 (1979) (declaring, in an abortion-related case, that vagueness concerns are "especially" pronounced when laws "threaten[] to inhibit the exercise of constitutionally protected rights").

212 *See, e.g.*, Hynes v. Mayor & Council of Borough of Oradell, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech."); Buckley v. Valeo, 424 U.S. 1, 40–41 (1976) (per curiam) (undertaking "[c]lose examination" of a criminal statute "in an area permeated by First Amendment interests"); Parker v. Levy, 417 U.S. 733, 756 (1974) ("[M]ore precision in drafting may be required . . . in the case of regulation of expression.").

213 NAACP v. Button, 371 U.S. 415, 433 (1963); *see also* Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (explaining that speech-inhibiting laws "lead citizens to steer far wider of the unlawful zone" than if the laws had been drafted more precisely) (internal quotation marks omitted).

214 Virginia v. Hicks, 539 U.S. 113, 119 (2003).

215 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

216 *Id.*

guarantees.[217] Others have understood *Hoffman Estates*'s fourth prong as limited to expressive freedoms,[218] to both speech *and* association,[219] or to the (presumably) broader category of "First Amendment" rights.[220] And several courts have indicated that only "fundamental" rights warrant heightened vagueness review—without clarifying which rights meet that description.[221]

Though the Supreme Court has never disavowed *Hoffman Estates*'s "constitutionally protected rights" formulation, two recent decisions portend at least a modest retreat. In 2010, the Court characterized *Hoffman Estates*'s relevant lesson as follows: "We have said that when a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'"[222] In their original context, however, these two examples had clearly been offered as subsets of the broader category of "constitutionally protected rights." So it is difficult to regard the Court's slanted recounting as anything but intentional. And in 2012, the Court stressed that vagueness principles operate most forcefully "[w]hen speech is involved."[223] Separate opinions from multiple Justices have further reinforced variable vagueness's

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217 *See, e.g.*, United States v. Class, 930 F.3d 460, 468 (D.C. Cir. 2019); Whatley v. Zatecky, 833 F.3d 762, 777 (7th Cir. 2016); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015); United States v. Di Pietro, 615 F.3d 1369, 1371 (11th Cir. 2010); Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 551 (6th Cir. 2007); Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 135 (3d Cir. 2000); Woodis v. Westark Cmty. College, 160 F.3d 435, 438 (8th Cir. 1998)); *In re* Kelly, 841 F.2d 908, 915 (9th Cir. 1988); Shawgo v. Spradlin, 701 F.2d 470, 477–78 (5th Cir. 1983).

218 *See, e.g.*, Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming, 971 F.3d 1021, 1030 (9th Cir. 2020); Platt v. Bd. of Comm'rs, 894 F.3d 235, 246 (6th Cir. 2018); DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1271 (11th Cir. 2007); United States v. Walton, 36 F.3d 32, 35 (7th Cir. 1994); LaRouche v. Sheehan, 591 F. Supp. 917, 920 (D. Md. 1984); People v. Graves, 368 P.3d 317, 324 (Colo. 2016).

219 *See, e.g.*, Schickel v. Dilger, 925 F.3d 858, 878 (6th Cir. 2019); Butler v. O'Brien, 663 F.3d 514, 520 (1st Cir. 2011); Commonwealth v. John G. Grant & Sons Co., 526 N.E.2d 768, 771 (Mass. 1988).

220 *See, e.g.*, Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011); VIP of Berlin, LLC v. Town of Berlin, 593 F.3d 179, 186 (2d Cir. 2010); Doctor John's, Inc. v. City of Roy, 465 F.3d 1150, 1157 (10th Cir. 2006); Klein v. San Diego County, 463 F.3d 1029, 1039 (9th Cir. 2006); Throckmorton v. Nat'l Transp. Safety Bd., 963 F.2d 441, 445 (D.C. Cir. 1992); Penny Saver Publ'ns v. Vill. of Hazel Crest, 905 F.2d 150, 155 (7th Cir. 1990); Doe v. Staples, 706 F.2d 985, 988 (6th Cir. 1983); Hall v. Bd. of Sch. Comm'rs, 681 F.2d 965, 971 (5th Cir. 1982).

221 *See, e.g.*, United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984); CFPB v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878, 901 (S.D. Ind. 2015); Bass Plating Co. v. Town of Windsor, 639 F. Supp. 873, 880 (D. Conn. 1986); Holloway v. Ark. State Bd. of Architects, 101 S.W.3d 805, 811 (Ark. 2003); Jim O. Inc. v. City of Cedar Rapids, 587 N.W.2d 476, 478 (Iowa 1998); D.P. v. State, 597 So.2d 952, 955 (Fla. Dist. Ct. App. 1992); *see also* Coal. of N.J. Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666, 676 (D.N.J. 1999) (inquiring into whether a law "touches upon *significant* constitutionally protected conduct") (emphasis added).

222 Holder v. Humanitarian Law Project, 561 U.S. 1, 19 (2010) (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

223 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 253 (2012).

First Amendment–centrism.[224] As a result, lower courts are governed by incompatible rule statements that the Court has never sought to reconcile. The predictable result has been a dwindling of common ground on the very nature of "constitutional" vagueness review.

d. Lesser Heightened Scrutiny?

However one defines the sphere of relevant constitutional rights or what it takes to "threaten[]" their exercise, the rule appears to rest on a simple dichotomy. Under the straightforward language of *Hoffman Estates*, such rights either are or are not threatened, thereby triggering—or not—"more stringent" vagueness review.[225] In practice, however, courts have generally recognized a spectrum of importance *within* the category of heightened vagueness scrutiny.[226] After all, why should laws threatening inferior constitutional values be reviewed with maximum rigor?

Several courts, for example, have found that First Amendment rights trigger the *most* stringent level of exacting vagueness scrutiny. These courts do not limit the category of "constitutional rights" to First Amendment freedoms alone; instead, they accord the latter a preferred position within the firmament of constitutional protection.[227] According to the D.C. Circuit, when the Supreme Court uses the phrase "'constitutionally protected conduct,' it is clear that it is referring primarily to the First Amendment expressive freedoms, which have long received special protection in vagueness cases."[228] Laws burdening First Amendment rights have also been deemed "especially"[229] and "particularly"[230] deserving of heightened vagueness review.

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224 *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("This Court has already expressly held that a 'stringent vagueness test' should apply to . . . [laws] abridging basic First Amendment freedoms.") (quoting *Hoffman Estates*, 455 U.S. at 499); Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 807 (2011) (Alito, J., concurring in the judgment) (indicating that "a law that regulates expression" is subject to heightened vagueness review).

225 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

226 *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 19 (1997) (observing that courts often "attribut[e] . . . different valences to arguably chilled rights," thereby implying that some "[constitutional] rights are more important than others").

227 *Id.* ("[M]ost courts will deem a chilling effect on free speech worse than the same chill on some other right . . . .").

228 Sweet Home v. Babbitt, 1 F.3d 1, 4 (D.C. Cir. 1993).

229 J2 Global Commc'ns, Inc. v. Protus IP Solutions, No. CV-06-00566, 2008 WL 11335051, at *12 (C.D. Cal. Jan. 14, 2008).

230 Advance Pharm., Inc. v. United States, 391 F.3d 377, 396 (2d Cir. 2004).

Still other courts have taken a more fine-grained approach, rank-ordering First Amendment rights along a scale of significance. Accordingly, some types of speech regulations have received a *lesser* form of heightened vagueness review—what one might call a "somewhat greater degree of specificity."[231] This dubious honor has been accorded to laws mandating commercial disclosures,[232] as well as restrictions on commercial speech,[233] erotic expression,[234] student[235] and teacher[236] speech, associational privacy,[237] and candidates' ballot access.[238] Though constitutional in nature, these rights are thought to be "not as 'fundamental' as traditional, content-based free speech rights."[239]

This intuitively sensible approach finds little support in *Hoffman Estates* itself, which speaks of "constitutionally protected rights" as a monolithic grouping.[240] Indeed, several courts have rejected the idea that some constitutional rights are more precious than others—at least for purposes of fine-tuning the level of vagueness scrutiny.[241] And the more fluid approach would seemingly require courts to gauge the worth of *any* constitutional right sufficiently implicated by a vagueness claim. It is easy to envision judges doctrinally devaluing rights that they regard as morally or socially costly—perhaps, for example, reproductive rights or Second Amendment freedoms.

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231 Dodger's Bar & Grill, Inc. v. Johnson Cty. Bd. of Cty. Comm'rs, 32 F.3d 1436, 1443 n.6 (10th Cir. 1994).

232 *See* Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 24 (D.C. Cir. 2009).

233 *See* Native Am. Arts, Inc. v. Bundy-Howard, Inc., 168 F. Supp. 2d 905, 910 (N.D. Ill. 2001); Berger v. R.I. Bd. of Governors, 832 F. Supp. 515, 519 (D.R.I. 1993); Ass'n of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747, 759–60 (N.D. Cal. 1992); Capoccia v. Comm. on Prof'l Standards, No. 89-CV-866, 1990 WL 211189, at *4–*5 (N.D.N.Y. Dec. 20, 1990).

234 *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 61 (1976); Dodger's, 32 F.3d at 1443 n.6.

235 *See* T.A. v. McSwain Union Elementary Sch., No. 1:08-cv-01986, 2010 WL 2803620, at *5 (E.D. Cal. July 16, 2010).

236 *See* Cal. Teachers Ass'n v. Davis, 64 F. Supp. 2d 945, 956 (C.D. Cal. 1999); Bd. of Educ. of Jefferson Cty. Sch. Dist. R-1 v. Wilder, 960 P.2d 695, 701 (Colo. 1998) (en banc).

237 *See* Puzick v. City of Colorado Springs, 680 P.2d 1283, 1287 (Colo. App. 1983).

238 *See* LaRouche v. Sheehan, 591 F. Supp. 917, 922, 926 (D. Md. 1984).

239 *Id.*

240 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

241 *See* Cal. Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) ("[I]f a teacher's instructional speech enjoys First Amendment protection under the *Hazelwood* standard, then a more stringent vagueness test governs our review."); O'Toole v. O'Connor, No. 2:15-cv-1446, 2016 WL 4394135, at *16 (S.D. Ohio Aug. 18, 2016) (declining to reduce the level of scrutiny under *Hoffman Estates*'s fourth prong, even though the challenged law restricted the speech of judicial candidates); Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns, 329 F. Supp. 2d 789, 805 (M.D. La. 2004) (same, for "constitutionally protected commercial speech"); Wis. Vendors, Inc. v. Lake County, 152 F. Supp. 2d 1087, 1095 (N.D. Ill. 2001) (same, for "sexually explicit but non-obscene" expression).

And such sentiments, once uttered, can hardly be expected to remain confined to the vagueness context. Indeed, savvy jurists may well welcome the opportunity to rank-order constitutional protections under the guise of facilitating proper vagueness review.

Finally, "lesser" heightened scrutiny has also been accorded to laws that implicate constitutional rights "tangentially,"[242] "incidental[ly],"[243] or "to a limited degree."[244] This mode of analysis assumes that constitutional deprivations operate along a spectrum—ranging from direct, wholesale violations to incidental (and often trivial) burdens—with the *most* stringent review reserved for paradigmatic infringements.[245] But this approach arguably conflicts with the text of *Hoffman Estates*, which mandates exacting review for *all* laws that "threaten[]" constitutional rights.

* * *

Vagueness doctrine is designed to enhance legal clarity—an objective the Supreme Court deems especially urgent when constitutional rights are involved. But the Court's effort to regularize "constitutional" vagueness review has instead witnessed a multi-pronged fracturing among lower courts on the inquiry's essential elements. There is no common understanding of what a "threatened" deprivation entails, which constitutional rights the doctrine is designed to protect, whether heightened vagueness scrutiny is itself a tiered concept, and whether an effect on constitutional rights can expand the domain of vagueness doctrine. In time, these vices could be rectified by a more disciplined articulation of vagueness variability. But three other defects of "constitutional" vagueness are here to stay—with or without greater doctrinal precision.

2. The Vices of "Constitutional" Vagueness

a. Aren't Constitutional Interests Always Present?

The Supreme Court's decision to ground vagueness doctrine in the Fifth and Fourteenth Amendments' Due Process Clauses has complicated the

242 Nova Univ. v. Educ. Inst. Licensure Comm'n, 483 A.2d 1172, 1188 (D.C. 1984).

243 FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 318 (D.N.J. 2003).

244 Doe v. Biang, 494 F. Supp. 2d 880, 895 (N.D. Ill. 2006); *see also id.* at 894 ("Section 120(b) reaches only a narrow slice of constitutionally protected conduct.").

245 As Professor Michael Dorf has observed, "Supreme Court precedent sharply distinguishes between direct and incidental burdens" in other areas of constitutional law. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177 (1996); *see also* Joseph Blocher, *Bans*, 129 YALE L.J. 308, 321 (2019) (observing that "the particular methodology that a court chooses to employ often depends largely on how it characterizes the burden on the right").

notion of "constitutional" vagueness review. As the Court has explained, due-process principles come into play whenever the government seeks to impair a liberty or property interest recognized by the Constitution.[246] It stands to reason that the domain of vagueness doctrine should be roughly commensurate with the reach of due-process guarantees—the avowed basis for entertaining vagueness claims in the first place. The Court itself has strongly suggested that such a showing is required for vagueness doctrine to be animated.[247] If that is so, however, then *every* law challengeable on vagueness grounds will threaten some harm to a constitutional value that due process is designed to protect, leaving little work to be performed by a tiered-review mechanism that singles out laws threatening to diminish constitutional rights.

Lower-court understandings of vagueness's domain make this problem manifest. The Eleventh Circuit, for example, rejects all vagueness claims brought in a pre-enforcement posture unless the challenged law stifles "constitutionally protected" conduct.[248] The Fourth Circuit has adopted a related approach, permitting vagueness claims seeking injunctive relief only when the prohibited conduct is "arguably affected with a constitutional interest,"[249] or when the plaintiff's "right to free expression" has been chilled.[250] Given the court's recognition that "notice of prohibited conduct" is a type of "constitutional due process interest,"[251] however, it would seem that *all* vagueness challenges implicate such an interest. The Fourth and Eleventh Circuits have thus refused to entertain forward-looking vagueness claims *unless* the challenged law would warrant stringent scrutiny under *Hoffman Estates*.

Consider also the Supreme Court's decision in *City of Chicago v. Morales*,[252] which invalidated an anti-loitering ordinance as unconstitutionally vague. The plurality opinion opened its analysis by holding that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause."[253] Citing only the existence of a due-process "liberty

246 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

247 *See* Boutilier v. INS, 387 U.S. 118, 123 (1967) (explaining that an "exaction must strip a participant of his rights to come within the principle of the cases").

248 Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340, 1350 (11th Cir. 2011); *see also id.* (refusing to entertain a vagueness challenge to a law regulating "normal business activity").

249 Kenny v. Wilson, 885 F.3d 280, 288 (4th Cir. 2018) (quoting Babbitt v. Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

250 *Id.* (quoting Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013)).

251 *Id.* (quoting Knife Rights, Inc. v. Vance, 802 F.3d 377, 384 n.4 (2d Cir. 2015)).

252 City of Chicago v. Morales, 527 U.S. 41 (1999).

253 *Id.* at 53 (plurality opinion).

interest,"[254] those Justices went on to declare that the ordinance "infringe[d] on constitutionally protected rights"—and thus warranted heightened review under *Hoffman Estates*.[255] This conceptual conflation triggered accusations from two dissenting Justices that the plurality had proclaimed a constitutional right to loiter as a matter of substantive due process.[256] In any event, a practice of applying heightened scrutiny whenever a liberty interest is present[257] would mark a radical shift from *Hoffman Estates*'s multi-tiered framework, rendering its fourth prong largely superfluous.

Conversely, some courts have refused to entertain vagueness claims after concluding that no liberty or property interest was implicated. These holdings are often indistinguishable from an assertion that there is no constitutional right to engage in the prohibited activity. For instance, federal courts have found no constitutionally protected liberty interest in carrying a concealed weapon,[258] participating in interscholastic athletics,[259] selling alcoholic beverages,[260] or engaging in recreational dancing.[261] Had these courts concluded otherwise, heightened scrutiny would almost certainly have been triggered by the very showing that warranted vagueness review in the first place.

b. Reducing Litigation Options

Vagueness doctrine is trans-substantive in character. It can benefit the destitute and downtrodden[262] as well as the wealthy and powerful.[263] Because virtually any law carrying adverse consequences is eligible to be challenged on vagueness grounds, vagueness principles are not beholden to any particular subject matter. And because vagueness doctrine is centered around structural rule-of-law values that command near-universal assent—

254 *Id.* at 53 n.19.

255 *Id.* at 55.

256 *Id.* at 83–84 (Scalia, J., dissenting); *id.* at 102–06 (Thomas, J., dissenting).

257 *See* Karem v. Trump, 960 F.3d 656, 665 (D.C. Cir. 2020) (applying a "particularly" exacting vagueness test in light of the court's antecedent holding that bona fide Washington correspondents possess a liberty interest in obtaining a White House press pass).

258 Iverson v. City of St. Paul, 240 F. Supp. 2d 1035, 1038 (D. Minn. 2003); Conway v. King, 718 F. Supp. 1059, 1061 (D.N.H. 1989).

259 Maroney v. Univ. Interscholastic League, 764 F.2d 403, 406 (5th Cir. 1985).

260 Maxwell's Pic-Pac, Inc. v. Dehner, 739 F.3d 936, 942 (6th Cir. 2014).

261 Willis v. Town of Marshall, 293 F. Supp. 2d 608, 620 (W.D.N.C. 2003).

262 *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (invalidating a criminal vagrancy ordinance that "ma[de] easy the roundup of so-called undesirables").

263 *See* FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 258 (2012) (invalidating an agency's enforcement policy at the behest of a large corporation).

at least in the abstract—vagueness challenges need not arouse the acute moral difficulties at the core of many constitutional doctrines. Litigants, sensing opportunities for juristic interest-convergence, can thereby hope to "avoid[] a direct engagement"[264] with fraught constitutional questions that often outshine the humdrum modalities of vagueness review.

Under the *Hoffman Estates* framework, however, savvy advocates are precluded from bringing constitutional claims that sound only in vagueness. To adjudicate a vagueness claim, a court must—either explicitly or implicitly—assess the challenged law's impact on some other constitutional right.[265] The structure of vagueness variability thus deprives litigants of the opportunity to frame certain constitutional claims at their preferred level of specificity. Perhaps, for instance, one might wish to challenge an abortion restriction or a commercial-speech regulation only on vagueness grounds to avoid any risk of entrenching undesirable precedent. *Hoffman Estates* makes that sort of strategic calculation all but impossible. In requiring courts to confront substantive constitutional doctrines that advocates have deliberately refrained from invoking, the existing tiered-review framework may exert a chilling effect on constitutional discourse—the very type of impoverishment that *Hoffman Estates* was designed to counteract.

c. Multiplying Constitutional Pronouncements

In contemplating that every vagueness claim will create law on the reach of other constitutional protections—the antithesis of constitutional avoidance—*Hoffman Estates* embodies an aggrandized conception of the judicial role. And the resulting analytical detours are often executed with a cursoriness hardly befitting their accompanying proclamations.

The Supreme Court's decision in *Kolender v. Lawson*[266] illustrates the problem well. *Kolender* involved a criminal statute requiring that persons provide a "credible and reliable" form of identification when directed to do so by a police officer.[267] With no supporting analysis, the Court simply asserted that the statute "implicates consideration of the constitutional right

264 Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 163 (2011).

265 Again, unless a court concludes that the prohibition would pass muster even if reviewed under the more stringent standard.

266 Kolender v. Lawson, 461 U.S. 352 (1983).

267 *Id.* at 356–57.

to freedom of movement."[268] It is unclear why concern for unrestricted movement should not also encompass the movement-curtailing consequences of arrest and confinement more generally, or at least prohibitions on failing to obey *any* type of police command. Clearly, the "constitutional right" that *Kolender* purported to identify could—if taken seriously—have far-reaching consequences. Vagueness decisions have discerned still other effects on constitutional values that rarely give rise to successful freestanding rights claims. These include the "right to family integrity,"[269] the rights to free assembly[270] and free press,[271] the right to direct the upbringing of one's children,[272] and the "'right to acquire, use, enjoy, and dispose' of property."[273]

Even when an asserted constitutional right seems far-fetched, it is doubtful that vagueness doctrine should be an available mechanism for forestalling rights recognition. But that is precisely what has occurred. Vagueness decisions have announced that there is no constitutional right to "build on land,"[274] "hear the private speech of others,"[275] "provid[e] teeth-whitening services,"[276] engage in commerce on public sidewalks,[277] furnish electronic devices to incarcerated persons,[278] permit smoking in one's establishment,[279] own a dog[280] or an exotic cat,[281] dwell on public property,[282]

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268 *Id.* at 358; *see also* Streetwatch v. Nat'l R.R. Passenger Corp., 875 F. Supp. 1055, 1059 (S.D.N.Y. 1995) ("This vagueness is especially troublesome because enforcement of these Rules of Conduct implicates Plaintiffs' fundamental freedom of movement."); *In re* A.B., No. H036810, 2011 WL 5080639, at *2 (Cal. Ct. App. Oct. 26, 2011) ("[T]he challenged probation condition may implicate a protected constitutional interest in the right to travel or loiter.").

269 Alsager v. Dist. Ct. of Polk Cty., 406 F. Supp. 10, 19 (D. Iowa 1975).

270 *See* United Food & Commercial Workers v. Bennett, 934 F. Supp. 2d 1167, 1205 (D. Ariz. 2013); State v. Cameron, 498 A.2d 1217, 1221 (N.J. 1985).

271 *See* Karem v. Trump, 960 F.3d 656, 665 (D.C. Cir. 2020); Boddie v. Am. Broad. Cos., 881 F.2d 267, 271 (6th Cir. 1989).

272 *See* Jeffery v. O'Donnell, 702 F. Supp. 516, 519, 522 (M.D. Pa. 1988); Williams v. Reiner, 2 Cal. Rptr. 2d 472, 484 (Cal. Ct. App. 1991), *rev'd on other grounds*, 853 P.2d 507 (Cal. 1993).

273 ABN 51st St. Partners v. City of New York, 724 F. Supp. 1142, 1147 (S.D.N.Y 1989) (quoting Evans v. City of Chicago, 689 F.2d 1286, 1297 (7th Cir. 1982)).

274 Crotty v. City of Chicago Heights, No. 86-C-3412, 1990 WL 84516, at *2 (N.D. Ill. June 7, 1990).

275 United States v. Spy Factory, Inc., 951 F. Supp. 450, 465 (S.D.N.Y. 1997).

276 Colindres v. Battle, No. 1:15-CV-2843-SCJ, 2016 WL 4258930, at *11 (N.D. Ga. June 6, 2016).

277 Kleiber v. City of Idaho Falls, 716 P.2d 1273, 1277 (Idaho 1986).

278 Fulgham v. State, 47 So.3d 698, 703 (Miss. 2010).

279 Roark & Hardee LP v. City of Austin, 522 F.3d 533, 552 (5th Cir. 2008); Flamingo Paradise Gaming, LLC v. Chanos, 217 P.3d 546, 553 n.6 (Nev. 2009).

280 Colorado Dog Fanciers, Inc. v. City & Cty. of Denver, 820 P.2d 644, 651 (Colo. 1991) (en banc).

281 State v. DeFrancesco, 668 A.2d 348, 358 n.21 (Conn. 1995).

282 Tobe v. City of Santa Anna, 892 P.2d 1145, 1169 (Cal. 1995).

or "drive trucks of any particular weight."[283] Vagueness doctrine has thus become saturated with dismissive constitutional pronouncements delivered only in passing.

Such drive-by declarations have appeared in highly charged contexts, as well. Few would contend, for example, that the jurisprudence of abortion restrictions should be influenced by incidental utterances made simply to select a level of vagueness scrutiny. Yet in *Colautti v. Franklin*—a case presenting only a vagueness claim—the Supreme Court stated that a law criminalizing the performance of certain kinds of abortions exerted a "chilling effect on the exercise of constitutional rights."[284] The more generalized right to privacy, too, has featured prominently at the threshold of courts' vagueness analyses.[285]

The *Hoffman Estates* regime has also yielded notable statements on the constitutional right to keep and bear arms.[286] Even before the Supreme Court's opinion in *District of Columbia v. Heller*,[287] at least three vagueness decisions found that restrictions on non-militia-related weapons use implicated *state* constitutional rights.[288] Other pre-*Heller* decisions, in the course of adjudicating vagueness claims, found no impact on federally

283 Ruiz v. Comm'r of Dep't of Transp., 679 F. Supp. 341, 350 n.6 (S.D.N.Y. 1988).

284 Colautti v. Franklin, 439 U.S. 379, 394 (1979); *see also* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 135 (3d Cir. 2000) (observing that laws affecting "a woman's right to abortion" must exhibit "a higher degree of clarity"); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 205 (6th Cir. 1997) ("The uncertainty induced by this statute therefore threatens to inhibit the exercise of constitutionally protected rights.").

285 *See* Whisenhunt v. Spradlin, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from denial of certiorari) ("[P]etitioners' lawful, off-duty sexual conduct clearly implicates the 'fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy'" (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)); Doe v. Biang, 494 F. Supp. 2d 880, 895 (N.D. Ill. 2006) (finding that the challenged law, "albeit to a limited degree, impacts an offender's right to privacy"); State v. Cameron, 498 A.2d 1217, 1221 (N.J. 1985) ("The threat or actuality of enforcement could undermine the right[] to . . . privacy."); Puzick v. City of Colorado Springs, 680 P.2d 1283, 1287 (Colo. App. 1983) (concluding that the plaintiff's conduct was not "constitutionally protected as within the zone of privacy").

286 *See* Daniel Rice, *Variable Vagueness and the Shadow Second Amendment*, SECOND THOUGHTS (Duke Center for Firearms Law) (July 8, 2020), https://firearmslaw.duke.edu/2020/07/variable-vagueness-and-the-shadow-second-amendment/ [https://perma.cc/B6CD-STEC] (arguing that "firearms scholars should closely monitor signs of symbiosis between Second Amendment doctrine and vagueness variability").

287 Dist. of Columbia v. Heller, 554 U.S. 570 (2008).

288 *See* Klein v. Leis, 767 N.E.2d 286, 295 (Ohio Ct. App. 2002); Robertson v. City & Cty. of Denver, 978 P.2d 156, 159 (Colo. App. 1999); People v. McFadden, 188 N.W.2d 141, 144 (Mich. Ct. App. 1971).

protected Second Amendment rights.[289] And both stand-alone[290] and concurrent[291] vagueness claims brought after *Heller* have yielded significant statements on the coverage of key Second Amendment concepts. It is highly questionable whether this fraught realm of constitutional law should be informed by subsidiary—and often perfunctory—observations concerning the Second Amendment's reach. The same is true of courts' vagueness-driven forays into other areas, including the First Amendment rights of free expression[292] and free exercise.[293]

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289 *See* United States v. Roach, 201 F. App'x 969, 974 (5th Cir. 2006) (concluding that "drug users and addicts have no fundamental right to bear arms"); United States v. Graham, 305 F.3d 1094, 1105 (10th Cir. 2002) (reasoning that a statute banning the sale of explosives "d[id] not implicate" the Second Amendment); Peoples Rights Org. v. City of Columbus, 152 F.3d 522, 538 (6th Cir. 1998) ("[T]he Federal Constitution does not provide a right to possess an assault weapon."); Coal. of N.J. Sportsmen, Inc. v. Whitman, 44 F. Supp. 2d 666, 676 (D.N.J. 1999) (stating that several firearm-related restrictions, including bans on "assault firearms" and "large capacity ammunition magazines," "d[id] not implicate constitutionally protected conduct"); Richmond Boro Gun Club, Inc. v. City of New York, 896 F. Supp. 276, 279, 289 (E.D.N.Y. 1995) (asserting that an ordinance banning the possession or transfer of certain "assault weapons" and "ammunition feeding devices" "implicate[d] no constitutionally protected conduct"); State v. Thomas, 683 N.W.2d 497, 525–26 (Wis. Ct. App. 2004) (finding "no basis for a felon to assume that . . . he or she is within his or her lawful right to bear [a] firearm"); State v. Vitale, No. CR8-930111888S, 1994 WL 282254, at *6 (Conn. Super. Ct. 1994) (concluding that a general reckless-endangerment prohibition "d[id] not threaten to inhibit the exercise of . . . the right to bear arms").

290 *See* Parker v. State, 164 Cal. Rptr. 3d. 345, 365–66 (Cal. Ct. App. 2013) (finding that statutes regulating the sale, delivery, and transfer of handgun ammunition "implicate[d] . . . individual rights under the Second Amendment," given that "the utility of a gun for self-defense purposes is greatly reduced without ammunition"), *rev. granted and op. superseded*, 317 P.3d 1184 (Cal. 2014), *dismissed as moot*, 384 P.3d 1242 (Cal. 2016).

291 *See* United States v. Cook, 970 F.3d 866, 873 (7th Cir. 2020) (a law prohibiting firearm ownership by "unlawful user[s]" of controlled substances "implicate[d] [the] Second Amendment right to possess a gun"); United States v. Class, 930 F.3d 460, 468 (D.C. Cir. 2019) (a law prohibiting firearm possession on the grounds of the U.S. Capitol "implicate[d] the right to bear arms"); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 265 (2d Cir. 2015) (laws prohibiting the possession of certain semiautomatic weapons and large-capacity magazines "implicat[ed] the exercise of constitutional rights"); United States v. Moss, No. 18-CR-316, 2019 WL 3215960, at *2 (D. Conn. July 17, 2019) (a law prohibiting firearm possession by persons addicted to controlled substances "did not implicate" the Second Amendment); Kuck v. Danaher, 822 F. Supp. 2d 109, 133 (D. Conn. 2011) (a permitting scheme governing the carrying of firearms outside the home "implicate[d] a constitutional right").

292 *See, e.g.*, FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 254 (2012); United States v. Jaensch, 665 F.3d 83, 89 n.4 (4th Cir. 2011); *Gresham*, 225 F.3d at 908; CFTC v. Oystacher, 203 F. Supp. 3d 934, 941 (N.D. Ill. 2016); United States v. Lahey, 967 F. Supp. 2d 731, 741 (S.D.N.Y. 2013); McCoy v. City of Columbia, 929 F. Supp. 2d 541, 552 (D.S.C. 2013); *Wis. Vendors, Inc.*, 152 F. Supp. 2d at 1095; United States v. Pourhassan, 148 F. Supp. 2d 1185, 1191 (D. Utah 2001); State v. Indrisano, 640 A.2d 986, 996 (Conn. 1994); *Cameron*, 498 A.2d at 1221; Pizza v. Wolf Creek Ski Dev. Corp., 711 P.2d 671, 675 (Colo. 1985) (en banc).

293 *See* Islamic Soc'y of Basking Ridge v. Twp. of Bernards, 226 F. Supp. 3d 320, 354 (D.N.J 2016); Care & Protection of Charles, 504 N.E.2d 592, 597 (Mass. 1987); *Cameron*, 498 A.2d at 1221.

E. Scrutiny Outside the Canon

As demonstrated above, *Hoffman Estates*'s four-part framework has proven devilishly complex to administer. But that limited ensemble of factors is only part of the official story. The Court itself has advanced additional variability principles—ones that lower courts have drawn upon to fashion novel low-scrutiny contexts. And those courts, perhaps emboldened by *Hoffman Estates*'s non-exhaustive quality, have articulated and applied variability principles with *no* apparent grounding in Supreme Court precedent.

This Section profiles the development of vagueness scrutiny outside *Hoffman Estates*'s four canonical categories. The doctrine has witnessed sweeping assertions that certain kinds of laws must be afforded near-total deference—seemingly without regard to the severity of accompanying penalties. The bottom-up fragmentation of tiered vagueness review further illustrates just how fluid and impressionistic the level-of-scrutiny inquiry has become in the absence of Supreme Court supervision. Strangely, this process often proceeds without regard for the basic purposes of vagueness doctrine, yielding disagreement about whether certain types of laws warrant *low* scrutiny or *no* scrutiny.

1. Governmental Interest

In a dissenting opinion published in 1948, Justice Felix Frankfurter—with his typical scholarly flair—penned the first defense of tiered vagueness review ever to appear in the U.S Reports. He reasoned that "whether notice is or is not 'fair' depends upon the subject matter to which it relates."[294] Chief among his chosen considerations was the following: "How important is the policy of the legislation"?[295] For Frankfurter, this was a matter of comparative institutional capability. When a policy "closely relate[s] to the basic function of government,"[296] he believed, the degree of allowable precision should be entrusted to "the competence of legislatures."[297]

In one sense, Frankfurter's vision failed to win the day. The perceived importance of the government's interest figured nowhere in *Hoffman Estates*'s list of variability factors. In context, that was an especially notable omission:

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294 Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

295 *Id.* at 525.

296 *Id.* at 535.

297 *Id.* at 526; *see also* Note, *Indefinite Criteria of Definiteness in Statutes*, 45 HARV. L. REV. 160, 163 (1931) (arguing that robust vagueness review "shows a regrettable disregard for the essential problems of the legislature").

The power to define and punish criminal activity is surely a core governmental concern, yet legislatures must draft such laws with *heightened* precision.[298] And the Court has twice rejected the idea that vital state interests can compensate for statutory vagueness.[299] But other Supreme Court decisions have underscored the importance of policies challenged on vagueness grounds.[300] The Court has cautioned that invalidating opaquely worded public-subsidy criteria would bring an end to countless "valuable Government programs."[301] According to the Court, moreover, inexact civil-service retention standards are "necessary for the protection of the Government as an employer."[302] And the Court has characterized the military's development of a distinct body of law as "essential to perform[ing] its mission effectively."[303] Lower courts have thus accorded "substantial judicial deference"[304] to vaguely worded military regulations, opting to trust "the professional judgment of military authorities" on those matters.[305]

At the intersection of the latter two connections—public employment and the maintenance of unified force-wielding teams—lies the law-enforcement context. Lower courts have permitted police officers to be fired or otherwise disciplined under open-ended regulations that would never suffice in the criminal context. Such decisions have cited local governments' "substantial interest in creating and maintaining an efficient police organization"[306]—a benefit that redounds to "the good of all members of society."[307] Courts have also invoked the "peculiar needs" of penal

298 *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982).

299 *See* Kolender v. Lawson, 461 U.S. 352, 361 (1982) ("As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity."); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 689 (1968) ("Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children.").

300 *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) (noting that "the nature of the governmental interest" is "considered in the vagueness inquiry").

301 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998).

302 Arnett v. Kennedy, 416 U.S. 134, 162 (1974); *see also* Hernandez v. Bailey, 716 F. App'x 298, 305 (5th Cir. 2018) (cautioning that the application of ordinary vagueness principles in this context could "undermin[e] the intragovernmental relationships that facilitate the exercise of state governmental power").

303 Parker v. Levy, 417 U.S. 733, 744 (1974); *see also* Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 504 (1994) (characterizing *Levy* as concluding that such broad prohibitions were "necessary for the achievement of military objectives").

304 Gen. Media Commc'ns, 131 F.3d 273, 286 (2d Cir. 1997).

305 Stein v. Mabus, No. 3:12-CV-00816-H, 2013 WL 12092058, at *9 (S.D. Cal. Feb. 14, 2013).

306 Puzick v. City of Colorado Springs, 680 P.2d 1283, 1286 (Colo. App. 1983).

307 Vorbeck v. Schnicker, 660 F.2d 1260, 1263 (8th Cir. 1981).

institutions in upholding ill-defined prison regulations,[308] "even . . . where the First Amendment freedoms of inmates are implicated."[309] Such deference is considered "necessary to ensure safety and order in a dangerous environment."[310] The Supreme Court has likewise deemed flexible disciplinary rules essential to "maintaining security and order" in public schools.[311] Predictably, lower courts have afforded school officials "broad discretion in enforcement of school codes."[312]

Moving beyond these institutional contexts, the Court long ago embraced a loosely worded forest-fire-prevention statute as necessary to avert "one of the great economic misfortunes of the country."[313] The D.C. Circuit has afforded Congress greater latitude to regulate in the realm of foreign affairs, given the "special exigencies of foreign policy."[314] One court has characterized the "preservation of dignity and decorum" at national cemeteries as "a paramount concern"—one justifying even the *criminalization* of behavior that "def[ies] objective description."[315] Finally—and most expansively of all—courts have leniently reviewed enactments designed to "promote the public welfare"[316] and protect "public health and safety."[317]

As these examples show, the practice of ratcheting down the level of vagueness scrutiny in response to an important governmental interest has crowded out judicial concern for the severity of resulting deprivations. No sensible tiered-vagueness regime could long survive this trumping effect. What enactment, after all, does not aim to enhance "public welfare"? And what good is a constitutional protection whose strictures all but vanish whenever a regulation serves weighty governmental interests? It is

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308 United States v. Chatman, 538 F.2d 567, 569 (4th Cir. 1976).

309 Chatin v. New York, No. 96-Civ-420, 1998 WL 196195, at *8 (S.D.N.Y. 1998).

310 Hughes v. Werlinger, No. 11-C-219, 2014 WL 1670095, at *7 (W.D. Wis. Apr. 28, 2014); *see also* Meyers v. Aldredge, 492 F.2d 296, 311 (3d Cir. 1974) (contending that "vagueness principles must be applied in light of the legitimate needs of prison administration").

311 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (quotation marks omitted).

312 Wiemerslage *ex rel.* Wiemerslage v. Me. Twp. High Sch. Dist. 207, 824 F. Supp. 136, 141 (N.D. Ill. 1993).

313 United States v. Alford, 274 U.S. 264, 267 (1927).

314 Palestine Info. Office v. Shultz, 853 F.2d 932, 944 (D.C. Cir. 1988).

315 Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1325 (Fed. Cir. 2002).

316 Heyert v. Taddese, 70 A.3d 680, 702 (N.J. Super. Ct. App. Div. 2013).

317 United States v. Alcan Aluminum Corp., 755 F. Supp. 531, 540 (N.D.N.Y. 1991); *see also* United States v. Hunter, 663 F.3d 1136, 1142 (10th Cir. 2011) (permissively reviewing a law "enacted for the safety of the driving public"); United States v. Chalk, 441 F.2d 1277, 1280 (4th Cir. 1971) (holding that civil executives enjoy "broad discretion" to issue binding directives to "maintain order and protect lives and property").

remarkable that the Court has permitted these antithetical approaches to take hold, thereby undercutting the force of its own pronouncements.

2. Inability to Draft More Precisely

In his prescient tour through vagueness variability, Justice Frankfurter tendered another observation: Language that seems "meaningless" for one purpose "may be as definite as another subject-matter of legislation permits."[318] Elevating this axiom into a normative touchstone, Frankfurter thus inquired, "[h]ow easy is it to be explicitly particular?"[319] In his view, enactments that are as clear as circumstances allow ought to be reviewed with the utmost toleration.

Once again, because Frankfurter's insight was not memorialized by *Hoffman Estates*, it failed to win esteem as an acknowledged doctrinal principle. But the approach has burrowed into the infrastructure of tiered vagueness review nonetheless. The Supreme Court has repeatedly referenced the "impracticality of greater specificity" in deciding whether textual imprecision crosses a constitutional line.[320] It has even applied this principle to statutory standards for imposing the death penalty—the harshest sanction known to American law.[321] Lower courts have followed suit in countless settings, "uph[olding] 'catch-all' clauses where it is impractical to formulate an exhaustive list of actionable conduct."[322]

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318 Winters v. New York, 333 U.S. 507, 525 (1948) (Frankfurter, J., dissenting).

319 *Id.*

320 Arnett v. Kennedy, 416 U.S. 134, 161 (1974) (plurality opinion); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 589 (1998) ("In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity."); Kolender v. Lawson, 461 U.S. 352, 361 (1983) ("[T]his is not a case where further precision in the statutory language is either impossible or impractical."); Smith v. Goguen, 415 U.S. 566, 581–82 (1974) ("[N]othing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."); Robinson, *supra* note 23, at 381 ("[T]he standard of vagueness must . . . be adjusted to take account of the extent to which precision is possible."); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 661 (1981) ("[C]ourts are generally more tolerant of vagueness where value references are inevitable than where the legislature *could* define facts more precisely.").

321 *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994) (noting that "our vagueness review is quite deferential" when considering such aggravating factors, which are "not susceptible of mathematical precision").

322 Donovan v. City of Haverhill, 311 F.3d 74, 78 (1st Cir. 2002). Decisions citing the inevitability of generality have upheld challenged regulations in the following contexts: traffic safety, *see* United States v. Hunter, 663 F.3d 1136, 1142 (10th Cir. 2011); excessive noise, *see* DA Mortg., Inc. v. City of Miami Beach, 486 F.3d 1254, 1271 (11th Cir. 2007); accommodations for the disabled, *see* Botosan v. Paul McNally Realty, 216 F.3d 827, 837 (9th Cir. 2000); the discipline of public-school teachers, *see* Marchi v. Bd. of Cooperative Educ. Servs. of Albany, 173 F.3d 469, 480 (2d Cir. 1999);

As with the "governmental interest" principle discussed above, the "impracticality of specificity" approach is difficult to square with the broader *Hoffman Estates* rubric. As long as the Court continues to subject certain enactments to exacting scrutiny, it is rank question-begging to relax the stringency of review for any type of regulation deemed "inherently discretionary"[323] or difficult to formulate with precision. If a legislature or agency cannot achieve the exactitude necessary for a law imposing some drastic consequence, then the regulation should simply be constitutionally forbidden. For example, it may be extremely difficult to particularize which types of conduct present "a serious potential risk of physical injury to another."[324] (That is presumably why Congress chose to employ such residual verbiage in drafting the Armed Career Criminal Act.) But the Court did not hesitate to invalidate statutory language employing that impenetrable phrase.[325] It is difficult to see why vagueness doctrine should insist on minimum standards of clarity and fair enforcement only when it would not be challenging to provide them.

On a more practical level, courts will rarely be equipped to determine whether circumstances would "prevent[] a legislature from [drafting] with substantial specificity"[326] in a given area. One cannot assess the "practicability of using more exact[] terms"[327] without canvassing the subject matter at issue and hypothesizing a spectrum of alternative drafting choices. This type of institutional role-play would seem to require a level of technical proficiency that generalist judges cannot responsibly profess. It should come

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the practice of medicine, *see* Varandani v. Bowen, 824 F.2d 307, 312 (4th Cir. 1987); the killing of migratory birds, *see* United States v. Manning, 787 F.2d 431, 438 (8th Cir. 1986); protective equipment on jobsites, *see* McLean Trucking Co. v. OSHA, 503 F.2d 8, 10 (4th Cir. 1974); health standards for aviators, *see* Greve v. Civil Aeronautics Bd., 378 F.2d 651, 656 (9th Cir. 1967); toxic substances, *see* Galjour v. Gen. Am. Tank Car Corp., 764 F. Supp. 1093, 1098 (E.D. La. 1991); the removal of judicial officers, *see* Sarisohn v. Appellate Division, 265 F. Supp. 455, 458 (E.D.N.Y. 1967); land use, *see* Covel v. Town of Vienna, 78 Va. Cir. 190, 217 (Va. Cir. Ct. 2009); the impeachment of local officials, *see* Fitzgerald v. City of Md. Heights, 796 S.W.2d 52, 56 (Mo. Ct. App. 1990); air pollution, *see* Town of Brookline v. Comm'r of Dep't of Envt'l Quality Eng'g, 439 N.E.2d 792, 798–99 (Mass. 1982); and child custody, *see* Custody of a Minor, 393 N.E.2d 379, 384 (Mass. 1979).

323 Henry v. Jefferson Cty. Planning Comm'n, 215 F.3d 1318, at *5 (4th Cir. 2000); *see also* Barclays Bank Int'l Ltd. v. Franchise Tax Bd., 10 Cal. App. 4th 1742, 1767 (Cal. Ct. App. 1992) ("[I]n this inherently imprecise context . . . .").

324 Johnson v. United States, 135 S. Ct. 2551, 2555–56 (2015).

325 *Id.* at 2563.

326 Smith v. Goguen, 415 U.S. 566, 581–82 (1974).

327 Doe v. Biang, 494 F. Supp. 2d 880, 894 (N.D. Ill. 2006).

as no surprise that courts have reached questionable—and even contradictory—results when reasoning in this fashion.[328]

3. Miscellaneous Justifications

As explained above, *Hoffman Estates* did not claim to be all-encompassing. It simply formalized a series of doctrinal precepts that the Supreme Court's earlier decisions "ha[d] recognized."[329] At no point, moreover, has the Court forbidden lower courts from developing new rationales for applying differential vagueness scrutiny. One can hardly fault these actors for filling doctrinal space that the Court has never closed off to experimentation. Although courts have not fully capitalized on this freedom, a shift toward greater methodological self-rule could strain the beleaguered *Hoffman Estates* regime past the breaking point.

Three real-life doctrinal coinages help illustrate this concern. First, the Seventh Circuit has announced that vagueness review "must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme."[330] In other words, "[t]he greater the burden on the regulated class, the more acute the need for clarity and precision."[331] The "burdens" referenced here are not penalties for noncompliance, but the practical obstacles that parties must overcome to conform to the law—including the cost of hiring "lawyers to advise [them] about compliance."[332] If accepted, this principle would ironically increase the burden on reviewing courts by requiring particularized fact-finding into the resources and legal acumen of specific regulated entities. It would also entail the selection of a contestable normative baseline—namely, which types of practical burdens *should* be tolerated in a host of contexts. There can be little doubt that burden-based variability would profoundly transform the character of vagueness doctrine.

Second, the Fifth Circuit "permit[s] slightly more imprecision" when laws are applied "by a relatively small number of enforcement officials to a

328 For example, one federal court posited that because "[p]rison life is highly routine," it "ought not to be difficult to establish in advance reasonably clear rules as to expected behavior." Landman v. Royster, 333 F. Supp. 621, 655 (E.D. Va. 1971). But another court has insisted that "[m]ore specificity in the prison context would be impossible." Booker v. Maly, No. 9:12-CV-246, 2014 WL 1289579, at *12 (N.D.N.Y. Mar. 31, 2014).

329 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

330 Wis. Right to Life, Inc. v. Barland, 751 F.3d 804, 837 (7th Cir. 2014).

331 *Id.*; *see also* Metal Mgmt. West, Inc. v. State, 251 P.3d 1164, 1172 (Colo. App. 2010) (deeming "compliance with the statute . . . not [a] huge burden[]").

332 *Wis. Right to Life*, 751 F.3d at 837.

relatively small number of people."[333] In these situations, "certain patterns of enforcement and tacit understandings" can develop—a type of dialectic refinement wholly absent when laws are "enforced against the public at large in multifarious contexts."[334] The premise of this approach is not that judicial decisions will eventually narrow a law's reach through one or more limiting constructions. It is that local executive actors will come to exercise their immense enforcement discretion in highly predictable ways, such that textual opacity will cease to pose any meaningful constitutional problem. This philosophy is hard to reconcile with the vagueness doctrine's insistence that written laws establish "minimal guidelines to govern law enforcement," rather than enabling executive officials to customize the content of enacted law.[335] The Fifth Circuit's approach would also create intractable line-drawing problems, such as how small and homogeneous an enforcement community must be for the requisite "patterns" and "tacit understandings" to develop.

Finally, some courts have applied a highly deferential vagueness test when there is no tradition of invalidating certain types of regulations on vagueness grounds. In upholding a loosely worded enactment, the Fourth Circuit noted that "[h]ospitals have historically had wide discretion to make decisions regarding their medical staff."[336] And the Second Circuit has applied a "less exacting . . . test of vagueness" in light of "the historical acceptance of an extremely broad standard for legislatures' decisions about the fitness of their members."[337] Such an approach threatens to freeze vagueness variability in its tracks, interposing a formidable threshold barrier in cases of first impression. And a historically grounded presumption of constitutionality is in tension with the Court's decision in *Smith v. Goguen*, which deplored the "unfettered latitude" afforded under a type of law whose adoption had been "universal."[338]

Whatever the flaws of these approaches, any hazards of methodological freelancing must be laid at the Supreme Court's doorstep. The Court's narrow and infrequent interventions in variability doctrine have—for better or worse—granted lower courts a vast license to innovate.

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333 ISKCON v. Eaves, 601 F.2d 809, 831 (5th Cir. 1979).

334 *Id.*

335 Kolender v. Lawson, 461 U.S. 352, 358 (1983).

336 Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 218 (4th Cir. 2002).

337 Monserrate v. N.Y. State Senate, 599 F.3d 148, 158 (2d Cir. 2010).

338 Smith v. Goguen, 415 U.S. 566, 578, 582 n.31 (1974).

4. Domain Battles

This laissez faire approach to vagueness variability is exacerbated by an even more glaring doctrinal blind spot: the Court's persistent failure to clarify which types of enactments are susceptible to vagueness challenges. As outlined above, it is unclear whether a law must directly regulate behavior—or prescribe a corresponding penalty—in order to be challengeable on vagueness grounds.[339] This conceptual void has created a rift among lower courts as to whether certain kinds of laws are subject to *limited* scrutiny, or simply *no* scrutiny at all. This is true of license-eligibility provisions,[340] internal decisionmaking guidelines,[341] statutes governing parole[342] and pretrial detention,[343] and laws creating government subsidies.[344] The confusion has even extended to statutes that unquestionably do regulate behavior.[345] Notwithstanding the reform agenda outlined below in Part IV, it may be unrealistic to expect the Court to rationalize its tiered-vagueness jurisprudence until it first answers the more fundamental question of what vagueness doctrine is for.

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339 *See supra* notes 203–208.

340 *Compare* Maxwell's Pic-Pac, Inc. v. Dehner, 739 F.3d 936, 942 (6th Cir. 2014) (deeming vagueness doctrine inapplicable, given the absence of any affected liberty or property interest), *with* Malfitano v. County of Storey, 396 P.3d 815, 818 (Nev. 2017) (tolerating "a degree of vagueness in this context not otherwise permissible," given that "there is no criminal or civil penalty for failing to comply").

341 *Compare* All Aire Conditioning, Inc. v. City of New York, 979 F. Supp. 1010, 1017 (S.D.N.Y. 1997) ("[P]laintiffs may not predicate a vagueness claim on the [internal prosecutorial] standards."), *with* Jackson v. W., 419 S.E.2d 385, 403 (Va. Ct. App. 1992) (finding that "the greatest level of tolerance should be afforded" to a set of "interpretive guidelines lacking the force and effect of law").

342 *Compare* Tuitt v. Fair, 822 F.2d 166, 180 (1st Cir. 1987) (characterizing parole as a "gratuitous benefit," and deeming vagueness doctrine inapplicable for that reason), *with* Hess v. Bd. of Parole & Post-Prison Supervision, 514 F.3d 909, 914 (9th Cir. 2008) (specifying a reduced "level of specificity . . . for a parole release statute to avoid impermissible vagueness").

343 *Compare* United States *ex rel.* Fitzgerald, 747 F.2d 1120, 1129 (7th Cir. 1984) (deeming vagueness doctrine inapplicable to a statute "not framed in terms of delineating sanctions for prohibited conduct"), *with* United States v. Watkins, 18-CR-131, 2018 WL 4922135, at *4 (W.D.N.Y. Oct. 9, 2018) (holding that the statute "provides due process," given the "consequences of imprecision"). On appeal, the Second Circuit in *Watkins* held that the challenged provision of the federal Bail Reform Act was "not amenable to a [vagueness] challenge." United States v. Watkins, 940 F.3d 152, 161 (2d Cir. 2019).

344 *Compare* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 599 (1998) (Scalia, J., concurring in the judgment) (concluding that vagueness doctrine "has no application to funding"), *with* Great Am. Houseboat Co. v. United States, 780 F.2d 741, 746–47 (9th Cir. 1986) ("[T]olerance is greatest in cases where the consequences of noncompliance are mere reduction of government subsidy.").

345 *Compare* Toppins v. Day, 73 F. App'x 84, at *2 (5th Cir. 2003) (denying "that prison regulations can be found void for vagueness"), *with* Meyers v. Aldredge, 492 F.2d 296, 310 (3d Cir. 1974) ("Due process undoubtedly requires certain minimal standards of specificity in prison regulations . . . .").

III. TAILORED "ORDINARY INTELLIGENCE"

A stylized approach toward vagueness review subdivides the analysis into two sequential steps: (1) selecting an appropriate level of scrutiny and (2) determining whether, under that standard, a law fails to provide fair notice or prevent arbitrary and discriminatory enforcement. The fair-notice inquiry relies on a norm of objective reasonableness: whether a "person of ordinary intelligence" could fairly know what is prohibited.[346] This formulation was meant to obviate case-by-case inquiries into the actual capabilities and intelligence of individual litigants. But the doctrine also recognizes that each law must provide "fair notice *to those to whom [it] is directed*."[347]

This precept undergirds a crucial variability principle missing from *Hoffman Estates*: that the same statutory language may provide fair notice to certain categories of persons, but not to others. Some regulations, for example, apply only to a limited group of sophisticated actors who can be justly regarded as a distinct interpretive community. When lawgivers speak in an idiomatic tongue, due process will tolerate less precision than if the same prohibitory language had been directed to the general public. Conversely, when laws apply to persons who—as a class—unmistakably lack "ordinary" adult intelligence, vagueness review should be at its most exacting.

This Part exposes the permeability of the boundary between *Hoffman Estates* variability and the constitutional demand of fair notice. In Part III.A, I demonstrate that tailored "ordinary intelligence" has quietly functioned as a bedrock premise of modern variability doctrine. In a multitude of settings, courts have held professionals and other experts to a higher standard of knowledge than could be required of society as a whole. And in Part III.B, I identify a burgeoning norm of holding children to a reduced standard of intelligence—exactly as the Supreme Court's recent rulings on the constitutional rights of juveniles would seem to dictate. These overwhelming patterns should be explicitly accounted for in a revised variability framework.

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346 United States v. Williams, 553 U.S. 285, 304 (2008).

347 Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048 (1991) (quotation marks omitted) (emphasis added) (alteration in original).

A. Vagueness for Experts

In 1961, the Supreme Court disposed of a vagueness claim by finding that "business people of ordinary intelligence," applying "ordinary commercial knowledge," were sufficiently apprised of what the challenged statute prohibited.[348] The *Hoffman Estates* Court—in a separate section of its opinion—similarly inquired into what "[a] business person of ordinary intelligence" would understand.[349] And in 2007, the Court measured fair notice against the knowledge that "doctors of ordinary intelligence" possessed.[350] With these decisions, the Court expressly recognized that legal language can bear an idiomatic meaning to professional and other technical audiences. The U.S. Reports are replete with implementations of this idea, even when the Court does not specifically gesture toward the protean nature of "ordinary intelligence."[351]

Lower courts have exercised this implied tailoring authority in a multitude of additional settings. Rather than simply ask what "ordinary people"[352] would know, they have measured constitutional fair notice against the capacities of ordinary lawyers,[353] manufacturers,[354] pilots,[355]

348 McGowan v. Maryland, 366 U.S. 420, 428 (1961).

349 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 (1982).

350 Gonzales v. Carhart, 550 U.S. 124, 149 (2007).

351 *See In re* Snyder, 472 U.S. 634, 644–45 (1985) (evaluating the phrase "'conduct unbecoming a member of the bar' . . . in light of the traditional duties imposed on an attorney"); *Hoffman Estates*, 455 U.S. at 501 n.18 ("[T]hat technical term has sufficiently clear meaning in the drug paraphernalia industry."); United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 36 (1963) (reviewing a vagueness challenge "[i]n view of the business practices against which [the challenged law] was unmistakably directed"); Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 242–43 (1932) (inquiring whether a prohibition was "sufficiently definite to enable those familiar with the operation of oil wells" to comprehend it); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (observing that some laws "hav[e] a technical or other special meaning, well enough known to enable those within their reach to correctly apply them"); Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 240–41 (1925) (citing the absence of an "accepted . . . commercial standard which could be regarded as impliedly taken up and adopted by the statute"); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) ("[T]he term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it . . . ."); Omaechevarria v. Idaho, 246 U.S. 343, 348 (1918) ("Men familiar with range conditions . . . will have little difficulty in determining what is prohibited by it.").

352 Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

353 Hayes v. N.Y. Att'y Grievance Comm., 672 F.3d 158, 169 (2d Cir. 2012); Wilson v. State Bar of Ga., 132 F.3d 1422, 1430 (11th Cir. 1998); Jump v. Goldenhersh, 619 F.2d 11, 15 (8th Cir. 1980).

354 Alliance for Nat. Health v. Sebelius, 775 F. Supp. 2d 114, 133 (D.D.C. 2011).

355 State v. Ring, 259 P. 780, 782 (Ore. 1927).

developers,[356] employers,[357] distributors,[358] exporters,[359] teachers,[360] dentists,[361] mine operators,[362] securities professionals,[363] taxi drivers,[364] military servicemembers,[365] radio broadcasters,[366] dairy operators,[367] and law-enforcement officers.[368] The principle of customized ordinary intelligence has been most aptly summarized as follows: When "a select group of persons ha[s] specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard [of specificity] is lowered."[369] Innumerable decisions endorse the technique of class-based fair notice,[370] and I am aware of no authorities that question its propriety. But for whatever reason, the concept has not been conventionally understood as bearing on the level-of-scrutiny inquiry, even though it calls for relaxing the stringency of review.

Fair-notice tailoring should not be undertaken reflexively. For example, it would be disingenuous to argue that "widow[s] of reasonable

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356 CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 632 (3d Cir. 2013).

357 Jake's Fireworks Inc. v. Acosta, 893 F.3d 1248, 1258 (10th Cir. 2018); Rimmer v. Colt Indus. Operating Corp., 656 F.2d 323, 330 (8th Cir. 1981); Diebold, Inc. v. Marshall, 585 F.2d 1327, 1336 (6th Cir. 1978); CompassCare v. Cuomo, 465 F. Supp. 3d 122, 166 (N.D.N.Y. 2020).

358 Ass'n of Nat'l Advertisers v. Lungren, 44 F.3d 726, 738 (9th Cir. 1994).

359 United States v. Lee, 183 F.3d 1029, 1033 (9th Cir. 1999).

360 Williams v. Vidmar, 367 F. Supp. 2d 1265, 1275 (N.D. Cal. 2005); Barringer v. Caldwell Cty. Bd. of Educ., 473 S.E.2d 435, 441 (N.C. Ct. App. 1996).

361 Kerr v. State Bd. of Dentistry, No. 1539 C.D.2007, 2008 WL 9398716, at *9 (Pa. Commw. Ct. 2008).

362 United States v. Mostad, 760 F. App'x 512, 514 (9th Cir. 2019); Am. Coal Co. v. Fed. Coal Co. v. Fed. Mine Safety & Health Review Comm'n, 796 F.3d 18, 28 (D.C. Cir. 2015); Rock of Ages Corp. v. Sec'y of Labor, 170 F.3d 148, 156 (2d Cir. 1999); Walker Stone Co. v. Sec'y of Labor, 156 F.3d 1076, 1084 (10th Cir. 1998).

363 Heath v. SEC, 586 F.3d 122, 141 (2d Cir. 2009).

364 Padberg v. McGrath-McKechnie, 203 F. Supp. 2d 261, 287 (E.D.N.Y. 2002).

365 Yeoman v. West, 140 F.3d 1443, 1448 (Fed. Cir. 1998).

366 Info. Providers' Coal. for Defense of the First Amendment v. FCC, 928 F.2d 866, 875 (9th Cir. 1991).

367 Ass'n of Irritated Residents v. Fred Schakel Dairy, No. 1:05-CV-00707, 2008 WL 850136, at *16 (E.D. Cal. Mar. 28, 2008).

368 United States v. Spicer, 656 F. App'x 154, 159 (6th Cir. 2016); United States v. John-Baptiste, 747 F.3d 186, 200 (3d Cir. 2014); Lewis v. Smith, Civ. No. 18-4776, 2019 WL 3536343, at *10 (E.D. La. Aug. 2, 2019).

369 Precious Metals Assocs. v. CFTC, 620 F.2d 900, 907 (1st Cir. 1980).

370 *See, e.g.*, United States v. Gibson, 409 F.3d 325, 334 (6th Cir. 2005) ("Whether the regulation in question here is understandable to the average person is not the issue."); United States v. Swarovski, 592 F.2d 131, 133 (2d Cir. 1979) ("We are dealing here with a regulation of limited scope aimed at a small and relatively sophisticated group of persons."); Scarbeck v. United States, 317 F.2d 546, 556 (D.C. Cir. 1962) (noting that statutes sometimes "deal[] with a limited class of persons, so situated as to have specialized knowledge concerning the acts prohibited").

intelligence"[371] or "transient sex offender[s] of ordinary intelligence"[372] could not comprehend a challenged law, for those groups possess no distinctive attributes that vagueness doctrine should strive to accommodate. But genuine class-based fair notice is a pervasive feature of modern vagueness variability, despite its absence from the *Hoffman Estates* canon. It would behoove the Court to supplement its theoretical embrace of "ordinary intelligence"[373] with a frank acknowledgment that vagueness doctrine has long accounted for a rich diversity of ordinary intelligences.

B. Vagueness for Children

Vagueness's "ordinary intelligence" standard readily accommodates yet another form of class-wide tailoring. In recent decades, the Supreme Court has adopted a general presumption that doctrinal tests must account for children's distinctive traits, perspectives, and life experiences. This approach maintains continuity with a key American legal tradition: that "children cannot be viewed simply as miniature adults."[374] Accordingly, the Court has acted to ensure that doctrines "designed for adults [are] not uncritically applied to children."[375] In the Court's phrasing, "it is the odd legal rule that does *not* have some form of exception for children."[376]

The Court has even gone so far as to require an affirmative "justification for taking a different course" in any given setting.[377] Notably, this is true "even where a 'reasonable person' standard otherwise applies."[378] The deck is thus heavily stacked against the unqualified application of adult-centric vagueness principles to children. Indeed, it is hard to imagine what could justify treating children comparably to adults when adjudicating vagueness challenges. Courts have not hesitated to highlight children's relative ignorance of the legal system and their difficulty in learning what the law

371 United States v. Seay, 718 F.2d 1279, 1290 (4th Cir. 1983) (Butzner, J., dissenting).

372 United States v. Bruffy, No. 1:10cr77, 2010 WL 2640165, at *3 (E.D. Va. 2010).

373 United States v. Williams, 553 U.S. 285, 304 (2008).

374 J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011); *see also* May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect."); Prince v. Massachusetts, 321 U.S. 158, 169 (1944) (explaining that "[w]hat may be wholly permissible for adults . . . may not be so for children").

375 Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 794 (2011).

376 Miller v. Alabama, 567 U.S. 460, 481 (2012).

377 *J.D.B.*, 564 U.S. at 274.

378 *Id.*; *see also id.* (refusing to apply an undifferentiated "reasonable person" standard to self-incrimination doctrine, given "the reality that children are not adults").

forbids.[379] And a key focus of vagueness doctrine is to ensure that "*regulated parties* . . . know what is required of *them*."[380] It is no help to juveniles if reasonably intelligent adults can steer clear of legal proscriptions. It would simply be "nonsensical" to proceed in this way "as though [children] were not children."[381]

In keeping with these principles, lower courts routinely acknowledge—both when sustaining[382] and rejecting[383] vagueness claims—that legal enactments applicable to children must be fairly comprehensible to children. Three federal circuit courts (the Fourth,[384] Seventh,[385] and Tenth[386]) have

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379 *See* Ohio v. Clark, 135 S. Ct. 2173, 2182 (2015) ("[R]esearch on children's understanding of the legal system finds that young children have little understanding of prosecution."); Miller v. Alabama, 567 U.S. 460, 477–78 (2012) (referring to children's "inability to deal with police officers or prosecutors" and their "incapacity to assist [their] own attorneys"); Graham v. Florida, 560 U.S. 48, 78 (2010) ("Juveniles . . . have limited understandings of the criminal justice system and the roles of the institutional actors within it."); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) ("[A child] cannot be compared with an adult . . . knowledgeable of the consequences of his admissions."); Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion) (describing children as "easy victim[s] of the law"); State v. Joanna V., 94 P.3d 783, 787 (N.M. 2004) (explaining that "children . . . cannot [be] expect[ed] to appreciate the subtle shades and nuances of our law").

380 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 253 (2012) (emphases added).

381 *Miller*, 567 U.S. at 474.

382 *See, e.g.*, Naprstek v. City of Norwich, 545 F.2d 815, 818 (2d Cir. 1976) ("[M]inors subject to the ordinance are not given fair notice . . . ."); Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975) (stating that regulations must "convey notice to students . . . of what is prohibited") (internal citations omitted); T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767, 789 (N.D. Ind. 2011) ("[V]agueness will void a policy that fails to give a student adequate warning that his conduct is unlawful . . . .") (quotation marks omitted); James P. v. Lemahieu, 84 F. Supp. 2d 1113, 1121 (D. Hi. 2000) (holding that a statute "d[id] not provide 'fair notice' to students"); Ashton v. Brown, 660 A.2d 447, 458 (Md. 1995) ("[W]e do not understand how a seventeen year old . . . could tell whether he or she was [violating a juvenile curfew ordinance].").

383 *See, e.g.*, Doe *ex rel.* Doe v. Hopkinton Public Schs., Civ. No. 19-11384-WGY, 2020 WL 5638019, at *16 (D. Mass. Sept. 22, 2020) ("[A] school-age child of common intelligence understands that . . . ."); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 267 (3d Cir. 2002) (deeming a school policy "specific enough to give fair notice to the students"); Turner v. Sw. City Sch. Dist., 82 F. Supp. 2d 757, 766 (S.D. Ohio 1999) ("Students . . . are on notice of what conduct is prohibited."); Dempsey v. Alston, 966 A.2d 1, 12 (N.J. Super. Ct. App. Div. 2009) (finding a law to be "not so vague as to leave . . . students without knowledge of its requirements"); *In re* Jackson, 497 P.2d 259, 261 (Wash. Ct. App. 1972) (holding that the challenged statutory language "gives fundamentally fair notice to the child").

384 *See* Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (tailoring the notice requirement to "a reasonably intelligent high school student"); Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973) (same, for "a reasonably intelligent student").

385 *See* Sherman *ex rel.* Sherman v. Koch, 623 F.3d 501, 520 (7th Cir. 2010) (inquiring into what "[a] student of ordinary intelligence" would understand).

386 *See* Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 51 (10th Cir. 2013) (applying a "reasonable high school student of ordinary intelligence" standard); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1368 (10th Cir. 2000) (applying a "reasonable student of ordinary intelligence" standard).

gone a step further, expressly tailoring the fair-notice requirement to the capabilities of a "reasonable" or "ordinary" *student*. Many other federal and state decisions have employed such language,[387] and jurists have similarly measured fair notice against what "children of ordinary understanding,"[388] "child[ren] . . . of common intelligence,"[389] "juveniles of common intelligence,"[390] and "reasonable juvenile[s]"[391] would know. As one state court has observed, when a rule applies to schoolchildren, "the test to be applied is that it must be capable of comprehension by a student who is possessed of average intelligence."[392] This bounty of decisional law reflects a simple truth: Vagueness doctrine's "'ordinary people' standard takes on an air of unreality" when applied to non-adults.[393]

To be sure, this principle is not universally accepted. The Supreme Court has never squarely articulated a juvenile-specific fair-notice standard. Its decades-old *Fraser* decision, which tolerates a great deal of imprecision in school disciplinary rules, contains no hint of such a norm.[394] And at least one court has refused to apply a stricter vagueness test to an ordinance subjecting juveniles to criminal penalties, reasoning that "children do not possess the same rights as adults."[395] But it is striking that so many courts have

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387 Courts have used the following formulations: "a [student] of ordinary intelligence," Young America's Found. v. Kaler, 370 F. Supp. 3d 967, 993 (D. Minn. 2019) (alteration in original) (quotation marks omitted); "ordinary middle school students," S.N.B. v. Pearland Indep. Sch. Dist., 120 F. Supp. 3d 620, 627 (S.D. Tex. 2014); "a reasonable student of ordinary intelligence," Hardwick *ex rel.* Hardwick v. Heyward, 674 F. Supp. 2d 725, 744–45 (D.S.C. 2009); "a reasonable student," Nguon v. Wolf, 517 F. Supp. 2d 1177, 1198 (C.D. Cal. 2007); "a reasonable student of ordinary intelligence," A.M. v. Cash, No. 3:07-CV-272-N, 2007 WL 9723149, at *5 (N.D. Tex. July 10, 2007); "a reasonable student," Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1111 (S.D. Cal. 2004); "a reasonably intelligent thirteen year-old," Wagner *ex rel.* Wagner-Garay v. Ft. Wayne Cmty. Schs., 255 F. Supp. 2d 915, 925 (N.D. Ind. 2003); "the reasonable Westfield High School student," Westfield High Sch. L.I.F.E. Club v. City of Westfield, 249 F. Supp. 2d 98, 127 (D. Mass. 2003); "an average student," Wiemerslage *ex rel.* Wiemerslage v. Me. Twp. High Sch. Dist. 207, 824 F. Supp. 136, 141 (N.D. Ill. 1993); "ordinary students," Claiborne v. Beebe Sch. Dist., 687 F. Supp. 1358, 1360 (E.D. Ark. 1988); "reasonable students," Baker v. Downey City Bd. of Educ., 307 F. Supp. 517, 523 (C.D. Cal. 1969); "a student with common intelligence," Parkins v. Boule, No. 94000987, 2 Mass. L. Rptr. 331, at *21 (Mass. Super. Ct. 1994); "a student of ordinary intelligence," Hwang *ex rel.* Hwang v. Amity Reg'l Bd. of Educ., No. CV 94-0362420, 1994 WL 468279, at *1 (Conn. Super. Ct. 1994).

388 *See* Dist. of Columbia v. B.J.R., 332 A.2d 58, 60 (D.C. 1975); Blondheim v. State, 529 P.2d 1096, 1100 (Wash. 1975) (en banc).

389 S.H.B. v. State, 355 So.2d 1176, 1179 (Fla. 1977) (England, J., dissenting).

390 *In re* Doe, 513 P.2d 1385, 1390 (Haw. 1973) (Richardson, C.J., dissenting).

391 City of Milwaukee v. K.F., 426 N.W.2d 329, 343 (Wis. 1988) (Heffernan, C.J., dissenting).

392 Dumez v. La. High Sch. Athletic Ass'n, 334 So.2d 494, 502 (La. Ct. App. 1976).

393 United States v. J.D.T., 762 F.3d 984, 1014 (9th Cir. 2014) (Berzon, J., concurring).

394 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986).

395 Schleifer *ex rel.* Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998).

independently gravitated toward a standard—fair notice *to children*—that the Supreme Court has never directly mandated. And *Fraser*'s hands-off approach toward disciplinary due process is in serious tension with the fact that children are not "person[s] of ordinary intelligence."[396] It would be highly anomalous to inflict severe disciplinary sanctions based on school policies that juveniles could not hope to understand.

At a minimum, Supreme Court precedent poses no obstacle to applying a "reasonable child" standard outside the narrow context of "school disciplinary rules."[397] This is true even of criminal and civil enactments that regulate behavior in the school context. To take just one example, children should not be precluded from challenging broadly worded "school disturbance" prohibitions even though the Court has—in a challenge brought by *adult* litigants—upheld an ordinance criminalizing the act of "disturb[ing]" a school session.[398] The Court would do well to enshrine the emerging proposition that vagueness doctrine cannot hold children to an adult standard of responsibility. And more broadly, advocates should leverage the technique of tiered review to rethink which types of prohibitions are susceptible to credible vagueness challenges. It will be the rarest of precedents that entirely insulates a linguistic formulation from vagueness attack by *all* persons in *all* settings, regardless of the practical implications of liability.

IV. REFORMING VARIABLE VAGUENESS

As experience has shown, the *Hoffman Estates* framework suffers from deep theoretical and practical impurities. It relies on an assortment of misguided proxies; its basic terms have proven perplexing to administer; it has engendered perverse consequences; it does not even account for several common variability considerations; and, as I will show in Part IV.A, it leaves lower courts rudderless when the framework's factors point in different directions. Even if variability principles are "incapable of precise, mechanistic application,"[399] that is no reason to condone a regime of illusory constraints that make a mockery of vagueness's core objectives.

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396 United States v. Williams, 553 U.S. 285, 304 (2008).

397 *Fraser*, 478 U.S. at 686.

398 Grayned v. City of Rockford, 408 U.S. 104, 110–14 (1972). For a gripping examination of states' criminal "school disturbance" laws, *see* Amanda Ripley, *How America Outlawed Adolescence*, THE ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149/ [https://perma.cc/LTN9-6XTB].

399 Cruz v. Town of Cicero, No. 99-C-3286, 1999 WL 560989, at *15 (N.D. Ill. July 28, 1999).

This Part proposes a better way. I argue for a drastically simplified variability test centered around just two factors: penalty-sensitivity and specialized fair notice. Instead of advancing these values through faulty surrogate rules, however, courts should pursue those aims openly and directly—exactly as many decisions already have. The approach advanced below would not eliminate the residuum of discretion that underlies this intrinsically circumstantial enterprise. But my two-step proposal would greatly reduce the inquiry's freewheeling character and facilitate a transparent exercise of judgment in service of *what really matters*.[400]

A. The Perils of Mixing and Matching

The Supreme Court's *Hoffman Estates* framework rests on four discrete dichotomies: whether a law is economic in nature, carries civil or criminal penalties, contains a scienter requirement, or threatens to impair constitutional rights.[401] But of course, any given law may exhibit a grab bag of these qualities—as well as a variety of extracanonical factors. The Court's inattention to how these components might interact must be counted among *Hoffman Estates*'s chief failings. That shortcoming has, predictably, led to sharp divergences among lower courts about how to reconcile clashing variability criteria. Put simply, the problem of mixing and matching poses a serious threat to the coherence and administrability of tiered vagueness review. Minimizing this conceptual dissonance—and forthrightly addressing how the constituent principles of vagueness variability interact—should be an overarching aim of doctrinal reform.

This problem is most pronounced when layering criminal penalties on top of economic regulations. In fact, there is a clear circuit split on how stringently courts must review such laws. Some courts have rounded up—applying an exacting standard to *all* criminal statutes[402]—while most have rounded down, emphasizing the more permissive context of business

400 *See* SHAMAN, *supra* note 6, at 105 (arguing that rigid tiers of scrutiny "hamper[] legal analysis by deflecting the focus of inquiry toward abstractions that are divorced from the specific merits of a case").

401 *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982).

402 *See* Murphy v. Matheson, 742 F.2d 564, 570 (10th Cir. 1984); Elizondo v. Harris County, Civ. No. H-14-393, 2014 WL 12769280, at *4 (S.D. Tex. Sept. 9, 2014); United States v. Agriprocessors, Inc., No. 08-CR-1324-LRR, 2009 WL 2255728, at *14 (N.D. Iowa July 27, 2009); United States v. Sun & Sand Imports, Ltd., 564 F. Supp. 1402, 1405 (S.D.N.Y. 1983).

behavior.[403] The Court has cultivated further uncertainty by announcing that "quasi-criminal" civil sanctions,[404] as well as ones that "could have an adverse impact on [a party's] reputation,"[405] warrant heightened vagueness scrutiny. These ill-defined concepts give courts wide-ranging discretion to override a conventional application of *Hoffman Estates* in virtually every civil or "business" case.

Consider another conundrum: Which standard applies when a criminal statute contains a scienter requirement (as virtually all do[406])? According to *Hoffman Estates*, criminal statutes warrant stringent vagueness review.[407] Yet the presence of a scienter requirement is said to "mitigate a law's vagueness."[408] Courts have splintered on this question, as well, applying both relaxed[409] and fully heightened[410] review to criminal laws containing a scienter requirement. *Hoffman Estates* did itself no credit by positing variability factors that would cancel each other out in a vast number of cases. This sort of tunnel vision has also caused lower courts to uphold criminal statutes on the ground that they could not have been drafted more precisely.[411]

Hoffman Estates failed to clarify the proper interaction between yet another pair of clashing categories: economic regulations and laws threatening to inhibit constitutional rights. Some decisions have applied exacting scrutiny

403 *See* United States v. Hsu, 364 F.3d 192, 196 (4th Cir. 2004); United States v. Doremus, 888 F.2d 630, 635 (9th Cir. 1989); Horvath v. City of Chicago, 510 F.2d 594, 596 n.8 (7th Cir. 1975); United States v. Manfredi, 488 F.2d 588, 602 (2d Cir. 1973); United States v. $122,043.00, 792 F.2d 1470, 1477 (9th Cir. 1986); Minter v. Wells Fargo Bank, N.A., 274 F.R.D. 525, 544 (D. Md. 2011); Parrish v. Lamm, 758 P.2d 1356, 1367 (Colo. 1988) (en banc); State *ex rel.* Guste v. K-Mart Corp., 462 So.2d 616, 621 (La. 1985).

404 *Hoffman Estates*, 455 U.S. at 499.

405 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 256 (2012).

406 *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) ("[T]he 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'").

407 *Hoffman Estates*, 455 U.S. at 498–99.

408 *Id.* at 499.

409 *See* United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984); Mike Naughton Ford, Inc. v. Ford Motor Co., 862 F. Supp. 264, 271 (D. Colo. 1994); Parrish v. Lamm, 758 P.2d 1356, 1367 (Colo. 1988) (en banc).

410 *See* Condon v. Wolfe, 310 F. App'x 807, 821 (6th Cir. 2009); Forbes v. Napolitano, 236 F.3d 1009, 1011 (9th Cir. 2000); Murphy v. Matheson, 742 F.2d 564, 570 (10th Cir. 1984); Planned Parenthood of Idaho, Inc. v. Wasden, 376 F. Supp. 2d 1012, 1020 (D. Idaho 2005); State v. Alangcas, 345 P.3d 181, 197 (Haw. 2015).

411 *See* Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1325 (Fed. Cir. 2002); United States v. Manning, 787 F.2d 431, 438 (8th Cir. 1986); United States v. Rosenberg, 515 F.2d 190, 198 (9th Cir. 1975).

to laws restricting commercial speech[412] and ones impairing constitutional property rights,[413] notwithstanding the presence of a paradigmatic low-scrutiny consideration. Others, however, have declined to afford commercial-speech regulations the full benefit of "constitutional" vagueness review.[414]

Hoffman Estates is also silent on whether civil laws implicating constitutional rights should be reviewed as stringently as their criminal counterparts. One court has held that *all* such laws must receive the same demanding scrutiny, "[r]egardless of whether a statute is civil or criminal in nature."[415] Other decisions, however, have applied only "mixed"[416] or "loosen[ed]"[417] scrutiny to civil enactments implicating constitutional rights. Relatedly, several courts—presupposing the possibility of hybrid inputs—have applied merely an intermediate level of scrutiny (such as a "moderately stringent" test[418]) to criminal laws not perceived to threaten constitutional rights. These decisions are difficult to reconcile with the Supreme Court's insistence that "the most exacting vagueness standard" applies to criminal statutes, whatever their effect on constitutional rights.[419]

Finally, it is unclear why certain low-scrutiny contexts—such as military regulations, school policies, and public-employment rules—deserve to override other features that typically trigger demanding vagueness review. For example, the challenger in *Parker v. Levy* (an Army dermatologist) was "sentenced to dismissal from [military] service, forfeiture of all pay and allowances, and confinement for three years at hard labor" for speaking out

412 *See* NAACP v. Button, 371 U.S. 415, 423, 433 (1963) (requiring "narrow specificity" of a law regulating the "solicitation of legal business"); Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns, 329 F. Supp. 2d 789, 805 (M.D. La. 2004) ("[B]ecause the TCPA regulates constitutionally protected commercial speech, it must satisfy a more rigid vagueness test . . . .").

413 *See* Yoder v. City of Bowling Green, No. 3:17 CV 2321, 2019 WL 415254, at *4 n.4 (N.D. Ohio Feb. 1, 2019) (clarifying that a more exacting standard applies when "property rights" are at stake); City of Norwood v. Horney, 853 N.E.2d 1115, 1143 (Ohio 2006) (holding that eminent-domain laws warrant "the heightened standard of review employed for a statute . . . implicat[ing] a First Amendment or other fundamental constitutional right").

414 *See supra* note 233.

415 CFPB v. ITT Educ. Servs., 219 F. Supp. 3d 878, 900 (S.D. Ind. 2015).

416 Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 293 (S.D.N.Y. 1992).

417 O'Toole v. O'Connor, No. 2:15-cv-1446, 2016 WL 4394135, at *16 (S.D. Ohio 2016).

418 Copeland v. Vance, 893 F.3d 101, 114 (2d Cir. 2018) (quoting Betancourt v. Bloomberg, 448 F.3d 547, 553 (2d Cir. 2006)); Condon v. Wolfe, 310 F. App'x 807, 821 (6th Cir. 2009) (quoting *Bloomberg*, 448 F.3d at 553); *see also* United States v. Posters 'N' Things Ltd., 969 F.2d 652, 659 (8th Cir. 1992) (applying "neither the most stringent nor the most tolerant of tests").

419 Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (plurality opinion). Still, under the *Hoffman Estates* framework, it stands to reason that constitutionally fraught criminal statutes ought to be reviewed *doubly* stringently.

against the Vietnam War.[420] Notwithstanding these devastating consequences and the flagrant suppression of political expression, the Court permitted Congress to legislate "with greater breadth and with greater flexibility" in the military setting—full stop.[421] *Levy* exemplifies the Court's penchant for virtually immunizing certain institutional settings from vagueness challenges, regardless of the resulting hardships.

Heeding this lesson, lower courts have held that public entities enjoy "broad discretion"[422] to fire civil servants for "conduct unbecoming" of their positions,[423] as well as "broad authority" to expel unruly students.[424] It is apparently irrelevant that these actions can be deeply stigmatizing, threatening serious harm to the personal and professional reputations of supposed transgressors. We should not be surprised when courts likewise level down—without explanation—in new contexts implicating both high- and low-scrutiny considerations.[425]

The tensions explored in this Section are exacerbated by persistent disagreement over how to apply each *Hoffman Estates* factor, as well as the unrelenting expansion of specialized scrutiny contexts. If vagueness variability is to accomplish its underlying goals—and exert any real constraining force—its operative principles must be drastically simplified and realigned with the basic purposes of tiered review.

B. A Path Forward

1. Bidding Farewell to Hoffman Estates

The *Hoffman Estates* formulation has persisted for nearly forty years without material modification or refinement. It is no minor accomplishment for a doctrinal framework to have achieved such staying power—and to have evaded any serious effort at revision. But as I hope to have demonstrated, *Hoffman Estates*'s shortcomings are far too profound to permit continued

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420 Parker v. Levy, 417 U.S. 733, 736, 738–39 (1974); *see also* Stan Thomas Todd, Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 870 (1974) (noting that "[i]n the military . . . context[] especially, the potential severity of the sanctions is tremendous").

421 *Levy*, 417 U.S. at 756.

422 Hernandez v. Bailey, 716 F. App'x 298, 305 (5th Cir. 2018).

423 *See, e.g.*, Flanagan v. Munger, 890 F.2d 1557, 1569 (10th Cir. 1989) (police officer); Wishart v. McDonald, 500 F.2d 1110, 1116 (1st Cir. 1974) (schoolteacher).

424 Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002).

425 *See* United States v. Soltero, 510 F.3d 858, 866 (9th Cir. 2007) (commenting that district courts enjoy "broad" latitude to set conditions of supervised release, "even when [they] affect fundamental rights").

inertia. A reformulated variability test is urgently needed—one that should begin by wiping clean the existing quartet of canonical variability factors.

First, the Court should cease categorizing challenged enactments as "economic" or "noneconomic" in nature. The meaning of that term is subject to deep theoretical contestation, and a law's classification as "economic" (or not) is a poor proxy for the rule's stated justifications.[426] Those underlying purposes, moreover, bear little connection to the question *Hoffman Estates* claimed to be answering: how much imprecision the Constitution tolerates in various legal settings. Vagueness doctrine already contains superior tools for holding sophisticated actors to a stricter fair-notice standard. *Hoffman Estates*'s first variability factor should thus be discarded as a failed experiment.

Second, any lingering suggestion of a strict civil/criminal divide should suffer the same fate. To be sure, that distinction enjoys deep constitutional roots and reflects a sensible rule of thumb in most vagueness cases.[427] But it is patently untrue that "the consequences of imprecision" entailed by civil penalties are, across the board, "qualitatively less severe" than their criminal counterparts.[428] And the current phrasing fails to account for another obvious truth: that extraordinarily severe civil and criminal laws should not be scrutinized comparably to garden-variety prohibitions. Yet lower courts regularly employ a rigidly binary classification scheme, citing the apparent constraints of *Hoffman Estates*. The Court's recognition of a sphere of "quasi-criminal" enactments evinces its justified discomfort with relying on crude proxies for consequentialism, even if it has not fully embraced direct and unmediated consequentialism.

Third, the presence or absence of a scienter requirement has no bearing on "[t]he degree of vagueness that the Constitution tolerates"[429] in adjacent prohibitory language. This *Hoffman Estates* factor—which the Court has never attempted to justify in variability terms—has always been a conceptual misfit. A refined variability framework should jettison the present focus on

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426 Justice Marshall once leveled a similar critique in the equal-protection context: "[I]n focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake . . . ." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 478 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

427 *See, e.g.*, Addington v. Texas, 441 U.S. 418, 423–24 (1979) (explaining that, in the criminal context, "the interests of the defendant are of such magnitude" that "our society imposes almost the entire risk of error upon itself"); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (asserting that "the power of the State weighs most heavily" in criminal cases).

428 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

429 *Id.* at 498.

scienter, thereby teeing up a more salient question: whether (and if so, when) a mens rea element can aid in satisfying whatever standard of clarity applies in a given context.

Finally, vagueness doctrine should cease inquiring into whether a challenged law "threatens to inhibit"—or would otherwise affect—the exercise of constitutional rights.[430] This recommendation will surely be controversial. *Hoffman Estates* characterized this variability factor as "perhaps the most important,"[431] and Professor Amsterdam's seminal student note had identified vagueness doctrine's *raison d'être* as creating "an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."[432] Modern scholarship has similarly underscored the capacity of vagueness doctrine to realize the First Amendment value of expressive equality.[433]

But it has never been adequately explained why vagueness review must entail a *formal determination* about the reach of one or more constitutional rights. The Court has observed that "[w]hen speech is involved, rigorous adherence to [vagueness] requirements is necessary to ensure that ambiguity does not chill protected speech."[434] But First Amendment law already contains a mechanism for ensuring that regulations will not "deter or 'chill' constitutionally protected speech": the concept of overbreadth.[435] It is unclear why vagueness review should function as an inordinately strict shadow First Amendment doctrine, leading to the invalidation of laws that would survive ordinary analysis. Nor has the Court explained why vagueness doctrine—uniquely—should be used to combat chilling effects on *all* constitutional rights, thereby grafting overbreadth principles onto doctrines that have never benefited from such prophylactic safeguards.[436] In any event, nearly all constitutional-rights doctrines involve some sort of tailoring analysis that asks whether governments have regulated disproportionately

430 *Id.* at 499.

431 *Id.*

432 Amsterdam, *supra* note 157, at 75.

433 *See* Sun, *supra* note 264, at 157–70 (examining the Court's use of vagueness doctrine to advance racial justice during the Civil Rights Movement).

434 FCC v. Fox Tel. Stations, Inc., 567 U.S. 239, 253–54 (2012).

435 Virginia v. Hicks, 539 U.S. 113, 119 (2003); *see also* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1585 (2020) (Thomas, J., concurring) (contending that "vagueness doctrine's application in the First Amendment context" is functionally indistinguishable from overbreadth doctrine).

436 *See* United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); New York v. Ferber, 458 U.S. 747, 768 (1982) (noting that overbreadth doctrine "is predicated on the sensitive nature of protected expression").

broadly in relation to their avowed goals.[437] The breadth and unintelligibility of rights-affecting enactments can be fully accounted for at this stage.[438] Put differently, courts could just as easily underscore the strength of rights claims by invoking credible vagueness concerns, rather than the other way around.

Even if it is still true that vagueness doctrine is "chiefly an instrument of buffer-zone protection,"[439] that would not justify elevating constitutional concerns to the surface of vagueness doctrine. Vagueness review has also been prominently deployed to "curb . . . law's use for racialized social control."[440] Yet the Supreme Court has never prescribed heightened vagueness review for enactments that raise a suspicion of racial animus. In fact, one of the doctrine's core virtues is that it "does *not* compel judges to ascribe ill will or bad faith" to governmental actors;[441] the doctrine's structure simply creates the conditions for the fulfillment of other constitutional values.[442] That salutary feature will persist whether or not judges must make second-order constitutional determinations in order to resolve vagueness claims.

Until now, moreover, the immense costs of "constitutional" vagueness review have gone overlooked. Predicating heightened scrutiny on the presence of constitutional implications encourages cursory pronouncements that threaten to distort the broader fabric of constitutional decisionmaking. For courts inclined to make constitutional law only after careful reflection, moreover, this type of bundled adjudication expends precious resources in service of the ancillary task of scrutiny-setting. This feature of vagueness variability also frustrates litigant autonomy by depriving plaintiffs of the ability to secure a stand-alone vagueness ruling unencumbered by explicit or implicit rights holdings. And if a liberty or property interest must be implicated for vagueness doctrine to apply in the first place, formally accounting for effects on constitutional values blurs the distinction between

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437 Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2084–85 (2019).

438 *See* Collings, *supra* note 153, at 220 ("The result can be more simply reached by stating that the statute . . . violates the principles of the First Amendment . . . ."); Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 284 (1948) ("Its invalidity could be urged from the standpoint of vagueness. However, could it not be as strongly argued that the statute was invalid because it conflicted with the First Amendment by restricting legitimate activity?").

439 Amsterdam, *supra* note 157, at 85.

440 Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 243 (2017).

441 Sun, *supra* note 264, at 185 (emphasis added).

442 *See* Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2060 (2015) (contending that "[v]agueness cases are often controlled by factors extraneous to vagueness doctrine").

enactments warranting *stringent* vagueness review and those warranting *any* vagueness review.

2. A Successor Framework—and Its Benefits

Before articulating my proposed test, a preliminary clarification is in order. My framework would regard the level-of-scrutiny inquiry as a mandatory phase in the order of operations. Much modern vagueness adjudication simply elides this step altogether, as if a controlling framework had never been announced.[443] Such haphazard decisionmaking should be decisively curbed. To be sure, respecting the authoritative character of variability doctrine would not require the selection of a level of scrutiny in every case; courts could bypass that threshold question if the rigor of review would make no practical difference. But my model would require that such an assumption be made explicit, as is routinely done in other contexts.[444]

In place of the timeworn *Hoffman Estates* test, I propose a simplified two-step framework for selecting a level of vagueness scrutiny. Under this approach, the underlying purposes of variability would no longer clash with their implementing rules; they would *become* the rules.

At *step one*, courts should identify the penalty authorized by a challenged law (or the penalty actually imposed)—as well as any other collateral consequences[445]—and select a level of scrutiny corresponding directly with the severity of these inputs. In this way, courts would examine the true "consequences of imprecision"[446] rather than imperfect substitutes for that criterion. This approach would liberate judges to intensify their scrutiny of laws that are nominally civil in character, but that are experienced as harshly as criminal deprivations. Devising a sanction-centric variability framework would also forestall a misconception prevalent among lower courts: that criminal laws cannot receive exacting scrutiny unless constitutional concerns are also present.[447] And a penalty-based approach would encourage courts to focus on which types of burdens trigger vagueness review in the first

443 *See supra* Part I.B.

444 *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring) (explaining that, in an earlier case, the Court "did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard"); Dist. of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (holding that the challenged law would fail under "any of the standards of scrutiny that we have applied").

445 *See* Lawrence v. Texas, 539 U.S. 558, 576 (2003) (recognizing that "the Texas criminal conviction carries with it the other collateral consequences always following a conviction").

446 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

447 *See supra* note 418 and accompanying text.

place—a question that the Supreme Court has *still* never answered satisfactorily.

To be sure, the type of unalloyed consequentialism I am proposing would require courts to develop a new vocabulary of vagueness variability. Rather than employing the ill-defined language of relativity—reviewing laws "less strict[ly]"[448] or "more stringent[ly]"[449] than some unspecified median enactment—courts would begin characterizing the level of vagueness scrutiny in absolute terms. At least some growing pains are to be expected under this regime. But in assessing the severity of a deprivation, courts could draw upon the familiar framework of procedural due process, under which the amount of process required depends on the "nature of the private interest . . . affected."[450] And any remaining transition costs would be a small price to pay for a concomitant increase in theoretical coherence.

Once a level of scrutiny has been selected at step one, at *step two*, courts should determine whether to make an upward or downward adjustment based on the nature of the regulated class. If a prohibition governs the conduct of juveniles—or has been applied to a juvenile—then an especially demanding form of scrutiny should apply. But if the challenged law employs idiomatic language intelligible to a distinct subgroup, then courts should tolerate more linguistic imprecision than would be permitted for laws regulating society as a whole.[451] In this way, the intuition behind *Hoffman Estates*'s "economic" category—that sophisticated actors should be treated less forgivingly than non-experts—would be advanced directly, rather than through misguided stand-in principles. And to avoid unguided judicial forays into technical domains, if the government wishes to receive the benefit of this form of review, it should bear the burden of demonstrating that a specialized body of relevant knowledge exists within the regulated community.

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448 *Hoffman Estates*, 455 U.S. at 498.

449 *Id.* at 499.

450 Turner v. Rogers, 564 U.S. 431, 444 (2011) (quotation marks omitted) (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); *see also* Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("In government-initiated proceedings to determine juvenile delinquency, civil commitment, deportation, and denaturalization, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof.") (citations omitted); Leading Case, Void-for-Vagueness Doctrine—*Sessions v. Dimaya*, 132 HARV. L. REV. 367, 374 (2018) ("Court[s] should lean on this precedent when weighing various civil injuries for purposes of vagueness analysis.").

451 *See* Goldsmith, *supra* note 26, at 299 ("If a statute targeting a particular field uses terminology known within that field, granting that terminology its specialized meaning is consistent with ensuring that defendants receive fair notice of the law.").

These two considerations—the actual severity of penalties, followed by any tailored-fair-notice adjustments—should be the sole components of a modified variability framework. The Court should explicitly foreclose reliance on all other considerations at this threshold stage. Two of those factors in particular—the importance of a governmental interest and the impossibility of drafting more precisely—tend to operate as trumps, engulfing any consideration of statutory penalties. But if (for example) a vaguely worded criminal statute cannot be written any more clearly, then governmental goals must simply be pursued through other means. Legislatures ought not be able to evade their constitutional due-process obligations by regulating on especially important matters or characterizing certain subjects as "inherently discretionary."[452] Nixing these criteria would greatly streamline tiered vagueness review by minimizing the frequency with which variability factors offset one another. Yet my proposal would still account for the distinctiveness of institutional structures like the military and the civil service, in which familiar "customs and usages" can impart recognizable meaning to otherwise-obscure enactments.[453]

Finally, the stare decisis costs of transitioning to my two-step framework would be surprisingly minimal. The "consequences of imprecision"[454] have always been a chief concern of vagueness variability—so much so that the Court has twice reasoned directly from the severity of sanctions, including most recently in 2018.[455] And the Court has already measured fair notice against the capacities of "business person[s] of ordinary intelligence"[456] and "doctors 'of ordinary intelligence.'"[457] Lower courts have exercised this tacit tailoring authority countless times over the decades,[458] thereby fulfilling the ultimate objective of *Hoffman Estates*'s "economic regulation" test. The Court would remain free to account for a scienter requirement's effect on statutory clarity once a level of scrutiny had been properly chosen. And although discontinuing "constitutional" vagueness review would be a significant change, the simplification gains would vastly outweigh any pangs of doctrinal disruption. In fact, the disruption surely runs in both directions, insofar as

452 Henry v. Jefferson Cty. Planning Comm'n, 215 F.3d 1318, at *5 (4th Cir. 2000).

453 Parker v. Levy, 417 U.S. 733, 746–47 (1974).

454 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

455 *See supra* notes 130–133 and accompanying text.

456 *Hoffman Estates*, 455 U.S. at 501; *see also* McGowan v. Maryland, 366 U.S. 420, 428 (1961) (using the phrase "business people of ordinary intelligence").

457 Gonzales v. Carhart, 550 U.S. 124, 149 (2007) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

458 *See supra* notes 353–370.

vagueness review has been a wellspring of drive-by determinations with uncertain effects on substantive constitutional law.

CONCLUSION

After nearly four decades of disarray, there may be no corner of constitutional doctrine whose essential mechanisms of tiered review are so wholly up for grabs. Perhaps that is because vagueness variability—for all its rhetoric of "more stringent"[459] and "less strict"[460] review—hardly exemplifies the much-studied mechanics of tiered scrutiny. Vagueness variability is sui generis, channeling courts' appraisals of how much clarity the Constitution demands in particular regulatory contexts. Because the peculiar workings of tiered vagueness have never been methodically analyzed, scholars have neglected to interrogate *Hoffman Estates*'s feeble foundations.

This Article has articulated a corrective vision for vagueness variability: a near-exclusive focus on the severity of applicable penalties. By privileging the "consequences of imprecision"[461]—the consequences themselves, rather than crude proxies for those deprivations—the Court can squarely align the aspirations of multi-tiered vagueness with the doctrinal tools chosen to implement that concept. To be sure, pursuing variability's core values directly will sacrifice any benefits associated with strict rule-adherence. But *Hoffman Estates*'s mechanized approach hardly merits a legacy of stability and constraint. The Court should promptly expel this methodological decay—and carefully monitor other fundamental frameworks for symptoms of unworkability.

459 *Hoffman Estates*, 455 U.S. at 499.

460 *Id.* at 498.

461 *Id.* at 499.