DEFINING INDEFINITENESS: SUGGESTED REVISIONS TO THE VOID FOR VAGUENESS DOCTRINE

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Abstract

The void for vagueness doctrine is itself indefinite. The current void for
vagueness analysis provides that the law is void for vagueness if it fails to
provide fair notice of the prohibited conduct or is so standardless that it
allows for discriminatory enforcement. Uncertainty within the doctrine ex-
ists because the United States Supreme Court has not articulated a definitive
position as to when facial review is appropriate in the void for vagueness
analysis. Further, the Court's decision that a law can be void for vagueness
based solely on a finding that there is a potential for discriminatory enforce-
ment creates uncertainty because it is not clear what standard the Court
applies to determine that such a potential exists. Arguably, law enforcement
discretion always exists with the corresponding potential for discriminatory
enforcement. Thus, the judiciary, under a lax facial review standard, could
invalidate any law, indicating an absence of any standard. This expanded
potential for judicial activism and the uncertainty within the doctrine
might be acceptable if the judiciary's actions in declaring the law void for
vagueness actually eliminated or limited discriminatory enforcement of the
law. However, it is not clear that the result the judiciary seeks in invalidating
a law as unconstitutionally vague, namely that the legislature create a
more specific law, eliminates or limits discriminatory enforcement. Thus, a
false perception exists that the judiciary remedies discriminatory enforcement
through the void for vagueness doctrine when in fact it does not do so.

This Paper proposes two changes that would result in a clear standard.
First, it suggests that the second prong of the void for vagueness analysis be
eliminated, such that the only requirement for determining that a law is unconstitutionally vague would be whether the language of the law provided fair notice of the prohibited conduct. Second, it suggests that a strict facial review standard be adopted such that a law must be determined to be unconstitutionally vague in all of its applications before it can be invalidated in its entirety. The institution of these two suggested changes would require a determination that the law is standardless, thereby providing no notice of the prohibited conduct, before the law could be invalidated on its face in its entirety, as has been the Court’s traditional practice. Instituting these suggested changes would help create a more definitive and predictable void for vagueness doctrine. In turn, this clearer void for vagueness doctrine would help legislatures seeking to accomplish certain aims create constitutional laws, while at the same time limiting the judiciary’s ability to invalidate laws in their entirety that have constitutional applications. Because it is suggested that the second prong of the void for vagueness analysis regarding discriminatory enforcement be eliminated, the Paper concludes with a brief discussion of other methods that may be more capable to create solutions to the problem of discriminatory enforcement of laws.

**Introduction**

Despite significant changes to the void for vagueness doctrine since 1948, the United States Supreme Court’s opinion of the doctrine at that time is still true today: “‘[I]ndefiniteness’ is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept.”

This Paper suggests two changes to the doctrine to clarify and define this indefinite doctrine.

The void for vagueness doctrine currently provides that a law is void for vagueness if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” The Court previously has provided that of the two prongs, the second prong regarding discriminatory enforcement is more meaningful to the void for vague-

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2. United States v. Williams, 128 S. Ct. 1830, 1845 (2008). The Court upheld a federal law limiting the distribution of child pornography. The Court determined that a law that prohibits a person from knowingly distributing child pornography that included the phrases, “‘in a manner that reflects the belief’ and ‘in a manner that is intended to cause another to believe’” that the material is child pornography, did not give law enforcement “virtually unfettered discretion,” because it did not require subjective judgment but instead was a factual determination that could be made by a court or jury. *Id.* at 1846.
ness analysis.\textsuperscript{3} In its most recent decision involving the doctrine, the Court, in setting forth the analysis, changed the second prong without explanation. Previously, the second prong had stated that the law would be void for vagueness “[i]f it authorizes or even encourages arbitrary and discriminatory enforcement.”\textsuperscript{4} As stated above, the second prong now provides that a law would be void for vagueness, if it “is so standardless that it authorizes or encourages seriously discriminatory enforcement.”\textsuperscript{5}

It is this author’s opinion that the Supreme Court’s latest change, which limits the scope of the second prong, does not go far enough. Instead, the second prong should be eliminated, and the determination of whether the law is unconstitutionally vague should be made only if, under the first prong, it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”\textsuperscript{6} The second suggested change is to limit the use of facial review within the void for vagueness analysis.

In support of these changes, this Paper proposes that invalidating a law as unconstitutionally vague under the void for vagueness doctrine because it encourages discriminatory enforcement, however laudable the intent, does not help resolve the problem of discriminatory enforcement.

\textsuperscript{3} Smith v. Goguen, 415 U.S. 566, 574 (1974). The Court held that a Massachusetts flag misuse statute that provided, “‘[w]hoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States . . . shall be punished . . . [.]'” id. at 568-69, was void for vagueness as applied to the defendant “because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.” Id. at 578.

\textsuperscript{4} Hill v. Colorado, 530 U.S. 703, 732 (2000). The Court upheld a Colorado statute that “makes it unlawful within the regulated areas for any person to ‘knowingly approach’ within eight feet of another person without that person’s consent, ‘for the purpose of passing a leaflet or handbill to, display a sign to, or engaging in oral protest, education, or counseling with such other person . . . .’” Id. at 707 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)). The Court then determined that the likelihood that “anyone would not understand any of those common words seems quite remote.” Id. at 732.

\textsuperscript{5} Williams, 128 S. Ct. at 1845 (emphasis added). The Court in Williams cited Hill, but the Court in Hill used a different standard, as explained in the text above.

\textsuperscript{6} Id. The Court in Williams also used different language than the Court in Hill as to the first prong, but the language the Court in Williams used is consistent with language that has been used in the past, see infra notes 45-62 and accompanying text, and does not change the level of notice required. Thus, in Hill, the Court used the terms, “reasonable opportunity to understand,” whereas the Court in Williams used “fair notice.” On the other hand, the difference in the language used in Williams as to the second prong is not consistent with the language used in Hill or any other previous case, see infra notes 68-76 and accompanying text, and does create a more rigorous standard with the added words, “so standardless” and “seriously.” For a discussion on this topic, see infra note 68-76 and accompanying text.
of laws. Law enforcement discretion serves important and necessary purposes. Yet, assume there was a law that as written allowed for the argument that it was so vague that it granted law enforcement too much discretion. Further assume that a court invalidated the law as unconstitutionally vague and that its goal in doing so was met: the drafting body subsequently drafted a more specific law. This sought-after result does not necessarily, and arguably does not at all, lead to a reduction of law enforcement discretion, which would thereby limit the risk of discriminatory enforcement. Put simply, more specific laws do not equate with less law enforcement discretion and thus less potential for discriminatory enforcement. The ineffectiveness of the remedy sought through the second prong of the void for vagueness analysis allows for its elimination as part of redefining and clarifying the scope of the doctrine.

Even assuming, despite the arguments set forth within this Paper to the contrary, there was validity in the position that a specific law results in more guidance to law enforcement and therefore must decrease discriminatory enforcement to some extent, there is a further reason justi-

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7 See infra notes 263-65, 268, 288, 302, 307-08 and accompanying text. For example in the context of public order laws, Professor Livingston stated the following:

[(I)]f the animating concern behind vagueness review in the context of public order laws is the desire to avoid abusive and even racially discriminatory enforcement, the invalidation of laws requiring more than ministerial judgment in their application is a gravely limited and even counterproductive means of addressing that concern. There is no necessary congruence between requiring rule-like provisions in individual statutory formulations enforced by police on the street and constraints on abusive police enforcement in the broader legal regime. In fact, the aggressive invalidation of laws embodying indefinite standards (such as statutes and ordinances prohibiting various forms of "unreasonable" behavior in public places) could put pressure on localities to adopt "rule-like" formulations that substantially broaden police authority, as in the now common example of juvenile curfews. Moreover, police officers enforcing specific rules against conduct like public drinking, jaywalking, and unlicensed street vending have substantial opportunity to abuse their authority by enforcing these rules in discriminatory ways. The problem of police discretion in maintaining order is not resolved or even substantially ameliorated by requiring that public order laws be spelled out with "rule-like" precision.


8 See infra notes 261, 264 and accompanying text.

fying eliminating this second prong in the void for vagueness analysis. Given the Court’s failure to articulate a consistent position as to when facial review is proper in the void for vagueness analysis, as well as the Court’s determination that the second prong (the nondiscriminatory enforcement requirement)\(^\text{10}\) is more meaningful to the void for vagueness analysis, the Court has expanded the potential reach of the doctrine. The result is that more enacted laws could be invalidated in their entirety. Thus, the suggestion to eliminate the second prong of the current void for vagueness test can be premised on the fact that the remedy sought through its use is ineffective, and that its elimination would limit the judiciary’s ability to use the doctrine to invalidate enacted laws in their entirety. Redefining the doctrine and making its parameters clearer helps legislatures seeking to accomplish certain objectives create constitutional laws, and limits the possibility of the doctrine being used as a vehicle for members of the judiciary to overreach into the legislative arena by invalidating laws with broad strokes of judicial power.

This Paper will first discuss the historical basis of the void for vagueness doctrine and set forth the development of both prongs: the fair notice requirement\(^\text{11}\) and the nondiscriminatory enforcement requirement. This history, however, will not attempt to discuss all the cases that fall within this doctrine,\(^\text{12}\) nor will it categorize the cases by subject, because it is this author’s opinion that such a categorization is

\(^{10}\) Going forward, this Paper will refer to the Court’s requirement, as set forth in United States v. Williams, that the statute not be “so standardless that it authorizes or encourages seriously discriminatory enforcement,” as the nondiscriminatory enforcement requirement. Williams, 128 S. Ct. at 1845

\(^{11}\) The “fair notice” requirement refers to the Court’s requirement, as set forth in Williams, that the statute is void for vagueness if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.” Id. at 1845.

\(^{12}\) Such an exhaustive review, even of only the United States Supreme Court cases, is not needed to set forth an accurate picture of the fair notice and nondiscriminatory enforcement requirements because many cases use the same language in providing these requirements. There is not an abundance of literature solely on the void for vagueness doctrine, as much literature analyzes the doctrine as applied to a specific statute or other doctrines. See, e.g., Tracey Maclin, What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine, 3 U. Pa. J. Const. L. 398 (2001). But even the articles that do cover the topic generally do not claim to provide an exhaustive review of all the United States Supreme Court cases. One such example is Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960), which given the numerous references to it, stands as the venerable article on the subject. For a more recent summary and thorough discourse on the doctrine, see Andrew E. Goldsmith, The Void-For-Vagueness Doctrine in the Supreme Court, Revisited, 30 Am. J. Crim. L. 279 (2003).
not illuminating. Instead, there is no reliable indicator, whether it be categorization of the existing cases or otherwise, that helps predict how the Court will rule on any given vagueness challenge to a law. The historical analysis, in addition to being useful to understanding the doctrine, supports the premise that the required certainty that shields a law from a court determination that it is unconstitutionally vague is uncertain itself.

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13 Other authors share this view. Over fifty years ago, when there were notably fewer cases, this view was stated more eloquently:

Yet who would venture to divine what courts will or will not find uncertain. To understand and rationalize the applications of the doctrine would require a philosopher’s stone, for which one may search in vain in the reported decisions. The more time spent in trying to understand the doctrine, the less sure one becomes about its content.

Rex A. Collings, Jr., Unconstitutional Uncertainty—An Appraisal, 40 CORNELL L. Q. 195, 196 (1954-55). Collings went on to differentiate between cases that that concerned constitutional rights and those that did not. Id. at 196-97.

14 One could categorize the types of laws that the Court has set forth as falling at opposite ends of the spectrum of required certainty of notice of conduct prohibited. At one end, requiring the least amount of certainty, are those laws concerning economic regulation. At the other end, requiring the most amount of certainty, are those laws concerning constitutional rights.

Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (citations omitted). However, because the individual justices have trouble agreeing on what behavior encompasses a constitutional right, it is difficult to predict the level of certainty that will be required of, and thus, predict the outcome of, a vagueness challenge to laws regulating behavior that may be constitutional. For example, in Justice Scalia’s dissent in Morales, he argued that there is no constitutional right of freedom to loiter and that the plurality’s creation of such a constitutional right “utterly impoverished our constitutional discourse.” Morales, 527 U.S. at 84 (Scalia, J., dissenting). Additionally, this categorization does not take into account that the Court has determined that some laws are unconstitutionally vague even when the litigant has notice because they encourage arbitrary and discriminatory enforcement. See infra notes 160-62 and accompanying text. Lastly, but causing the most uncertainty, is the inability to predict whether the Court will review any type of law facially or “as applied.” The type of review affects the outcome of the analysis under the doctrine. Thus, knowing that certain broad categories of cases require more certainty does not aid in predicting whether the Court will uphold a vagueness challenge to that type of law in a particular case.

15 In 1948, Justice Frankfurter stated that the void for vagueness doctrine was “itself an indefinite concept.” Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting). This view had not changed by 1985 when Professor Jeffries stated, “[t]he difficulty is that there is no yardstick of impermissible indeterminacy.” John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 196 (1985).
Having laid this historical foundation, the Paper will next review the Court's ambivalence as to whether the void for vagueness challenge should require a facial review of the law, or whether the challenge to the law must be reviewed "as applied." It will explore the history of the Court's decisions in this area.\(^\text{16}\)

This Paper then concludes, based on this historical analysis of the void for vagueness doctrine, that the Court traditionally has applied the void for vagueness analysis to invalidate in their entirety those laws that it determines are standardless, meaning that the Court determined that the law provided no notice of the conduct being regulated. Those laws that clearly set forth a core of behavior that could be constitutionally regulated have not been invalidated. Having reached this conclusion, the Paper suggests two changes to redefine and clarify the void for vagueness doctrine in accordance with its traditional application. Thus, in the next section, the Paper recommends limiting facial review in the void for vagueness doctrine to limit its scope in keeping with the Court's application of the doctrine. In all cases in which a law has been challenged as void for vagueness, the litigant should first be required to establish that the law is unconstitutionally vague "as applied" to the litigant.\(^\text{17}\) Only if this requirement is met could the litigant argue that the entire law is unconstitutionally vague. The Paper further suggests that such an argument should require the litigant to prove that the law is unconstitutionally vague in all of its other applications. This section discusses reasons in support of this suggested change that include the point that it separates facial review in the void for vagueness context from facial review in the overbreadth context, and that it prevents unwarranted judicial activism.

Second, this Paper suggests eliminating the nondiscriminatory enforcement requirement, leaving the fair notice requirement. The next section initially establishes the validity of the fair notice requirement as a method to determine whether a law is unconstitutionally vague under the Due Process Clause. It refers back to the history of the fair notice requirement and concludes that notice within the void for vagueness analysis is fair notice to ordinary people, as opposed to lawyer's notice, and then why it is not, has not been, and need not be actual notice. It then discusses reasons in support of the suggested change, which include that it prevents the possibility of judicial expansion of the void for

\(^{16}\) Again, this section contains an illustrative as opposed to an exhaustive review.

\(^{17}\) If successful, the litigant could not be prosecuted under the challenged law.
I. HISTORY OF THE VOID FOR VAGUENESS DOCTRINE

A. Constitutional Basis

The void for vagueness doctrine was not present in colonial practice.¹⁸ "Neither The Federalist nor the records of debates of the Constitutional Convention and the ratifying conventions indicate that the concept was considered a serious issue, if an issue at all."¹⁹ When references in early cases to vagueness appeared,²⁰ the courts did not mention a constitutional basis for their decisions.²¹ Instead, the concept was "primarily a principle of construction and had not yet received the sanc-

¹⁸ Note, Void for Vagueness: An Escape from Statutory Interpretation, 23 IND. L.J. 272, 274 (1947-1948) [hereinafter An Escape from Statutory Interpretation]. "[In the seventeenth and eighteenth centuries . . . t]he Privy Council appears never to have resorted to the 'vagueness' reasoning, although it invalidated Colonial legislation for other reasons." Id. at 275.

¹⁹ Id.

²⁰ See id. at 274, which provides a thorough and interesting history of the void for vagueness doctrine. Two early cases cited therein are United States v. Sharp and Drake v. Drake. In Sharp, Circuit Judge Washington said, "I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all . . . ." United States v. Sharp, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264). In Drake, the court stated in dictum, "[w]hether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it, be itself intelligible." Drake v. Drake, 15 N.C. (1 Dev.) 110, 115-16 (1833).

²¹ There is debate over whether these early cases were based on the doctrine of strict construction or whether they were the precursors to the void for vagueness doctrine. See An Escape from Statutory Interpretation, supra note 18, at 275 n.18; Robert B. Krueger, Comment, Legislation: Requirement of Definiteness in Statutory Standards, 53 MICH. L. REV. 264, 265 n.1 (1954-1955).

Most writers feel that the requirement of definiteness has become solely a matter of constitutional law. While they acknowledge that statutes have been held void for indefiniteness regardless of constitutionality, they regard this either as a historical accident resulting from incorrect application of the common law rule that criminal statues should be strictly construed or as an anomalous phase in the evolution of the constitutional definiteness doctrine.

Id.
tity of being associated with the constitutional requirement of due process." This principal of construction focused on notice. Thus, in 1891, in *United States v. Brewer,*23 the Court provided, "[l]aws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid,"24 without reference to constitutional support. In 1914, Mr. Justice Holmes in *Nash v. United States*25 limited the scope of the above principle with the often-quoted statement, "[t]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree,"26 without specifically providing a constitutional basis for the decision to uphold the portion of the Sherman Act that was challenged as vague.27

In the 1921 case of *United States v. L. Cohen Grocery Co.,*28 the Court relied generally on the Fifth and Sixth Amendments,29 holding that an economic regulation preventing the charging of an "unjust or

22 An Escape from Statutory Interpretation, supra note 18, at 278. Some have postulated that Roman maxims such as *nulla poena sine lege* and *nullum crimen sine lege* might be a basis. "The former expresses the view that criminal conduct is not to be met with a sanction not specified anterior to the conduct; the latter, the view that no activity is punishable unless the sovereign has so declared." James C. Quarles, Some Statutory Construction Problems and Approaches in Criminal Law, 3 VAND. L. REV. 531, 532 (1949-50). Another is *ibi jus uncertain, ibi jus nullum,* which provides, "where the law is uncertain, there is no law." Krueger, supra note 21, at 266. 23 United States v. Brewer, 139 U.S. 278 (1891). The issue before the Court was whether a Tennessee statute prevented, among other things, the removal of the ballot box from the place where the election was held before the votes were counted. The court held that the statute did not "distinctly and specifically" provide that requirement. *Id.* at 287. 24 *Id.* at 288. 25 *Nash v. United States,* 229 U.S. 373 (1914). 26 *Id.* at 376-77. In *Nash,* the defendants argued that part of the Sherman Act was "so vague as to be inoperative on its criminal side" and that there needed to be "some definiteness [or] certainty." *Id.* 27 *Id.* at 378. Justice Holmes stated "[w]e are of [the] opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act." *Id.* He did not further elaborate on this constitutional aspect, but instead determined that the decision of *Waters-Pierce Oil Co. v. State of Texas,* 212 U.S. 86 (1909), was controlling. *Nash,* 229 U.S. at 378. In *Waters-Pierce Oil Co. v. State of Tex.,* 212 U.S. 86, 109 (1909), was not "so vague, indefinite and uncertain as to deprive them of their constitutionality." *Id.* at 108. The Court upheld the conviction because the defendants had had a jury trial and the judgment had been reviewed in the appellate court. *Id.* at 111 ("We are not prepared to say that there was a deprivation of due process of law."). 28 United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921). 29 It has been argued, however, that a statute that fails to give notice should not be deemed a violation of the Sixth Amendment for violating the right of the accused
unreasonable rate or charge” for necessities was “void for repugnancy to
the Constitution.”30 Interestingly, by 1926, the Court expressed its firm
belief that a statute’s vagueness offends the Constitution:

That the terms of a penal statute creating a new offense must be suffi-
ciently explicit to inform those who are subject to it what conduct on
their part will render them liable to its penalties, is a well-recognized
requirement, consonant alike with ordinary notions of fair play and
the settled rules of law. And a statute which either forbids or requires
the doing of an act in terms so vague that men of common intelli-
gence must necessarily guess at its meaning and differ as to its applica-
tion, violates the first essential of due process of law.31

In 1927, in Cline v. Frink Dairy Co.,32 this constitutional requirement
was applied to a state anti-trust statute. The Court referenced L. Cohen

“to be informed of the nature and cause of the accusation.” The rationale of these
decisions seems to be that accusation under a vague statute is no accusation at all. It is
submitted that this is an incorrect application of the Sixth Amendment. That provi-
sion is commonly thought to prevent detention without charge, not to establish any
scale of definiteness for Congress.

Krueger, supra note 21, at 269 n.19 (citing Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926); L.
Cohen Grocery, 255 U.S. 81). Reliance on the Sixth Amendment did not gain acceptance within
the void for vagueness doctrine. See supra note 35 and accompanying text.

30 L. Cohen Grocery, 255 U.S. at 91. The Court defined the issue as:
[T]he certainty or uncertainty of the text in question, that is, whether the words
“That it is hereby made unlawful for any person willfully . . . to make any unjust or
unreasonable rate or charge in handling or dealing in or with any necessaries,” consti-
tuted a fixing by Congress of an ascertainable standard of guilt and are adequate to
inform persons accused of violation thereof of the nature and cause of the accusation
against them.

Id. at 89. The Court then stated in its holding,
[t]hat they are not, we are of opinion, so clearly results from their mere statement as to
render elaboration on the subject wholly unnecessary . . . . It leaves open, therefore,
the widest conceivable inquiry, the scope of which no one can foresee and the result of
which no one can foreshadow or adequately guard against.

Id. 31 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). The Court refused to enforce a
state statute that mandated an employer to determine the “current rate” of wages, stating,
[to] construe the phrase “current rate of wages” as meaning either the lowest rate or
the highest rate, or any intermediate rate or, if it were possible to determine the
various factors to be considered, an average of all rates, would be as likely to defeat the
purpose of the legislature as to promote it.

Id. at 394.

32 Cline v. Frink Dairy Co., 274 U.S. 445 (1927). The Court interpreted a Colorado stat-
tute that had an exception that provided, among other things, “that no agreement or association
shall be deemed to be unlawful or within the provisions of this act, the object and purposes of
Grocery Co., in which the Court relied upon the Fifth and Sixth Amendments to determine that a federal law was unconstitutionally vague. It then provided,

[w]e are now considering a case of state legislation and threatened prosecutions in a state court where only the Fourteenth Amendment applies; but that amendment requires that there should be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required.

It is now the Due Process Clause of the Fifth Amendment and its applications to the states through the Fourteenth Amendment that is the basis for the void for vagueness doctrine. The Court's authority to rely on these constitutional provisions to invalidate legislative enactments, of course, comes from Marbury v. Madison. Although many early vagueness cases involved challenges to economic regulations, from its infancy, the void for vagueness doctrine

which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed . . . .” Id. at 456. It determined that the statute was vague, reasoning that,

[s]uch an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise.

Id. at 457-58.

Id. at 458.

Id. The Court held,

[b]ut it will not do to hold average man to the peril of an indictment for the unwise exercise of his economic or business knowledge, involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result.

Id. at 465.

An often-quoted passage is “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” Connally, 269 U.S. at 391; Lanza v. New Jersey, 302 U.S. 445, 453 (1939); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

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has also been applied to criminal laws. Perhaps the most often cited is the 1939 case of Lanzetta v. New Jersey, in which the Court set forth this doctrine by stating: "No one may be required at the peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

At all times, the doctrine was also applied in cases where the law challenged as void for vagueness implicated constitutional rights. In 1948, the Court in Winters v. New York stated, "[a] failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute’s inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused’s rights under procedural due process . . . ."

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Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27.

39 Lanzetta, 306 U.S. 451. The Court framed the issue as whether a New Jersey enactment was "repugnant to the due process clause of the Fourteenth Amendment." Id. at 452 (emphasis added). The enactment stated:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster . . . .

Id.

40 Id. at 453. The Court then held that "[t]he challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the Due Process Clause of the Fourteenth Amendment." Id. at 458 (emphasis added).


A person who . . . [p]rints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . . [i]s guilty of a misdemeanor . . . .

Id. at 508. The Court held that "the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner." Id. at 519. The Court stated, "[i]t leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." Id. (quoting L. Cohen Grocery, 255 U.S. at 89).

42 Id. at 509-10.
Although it is not easy to pinpoint the genesis of the void for vagueness doctrine, at some point near the decision in Nash, a law’s vagueness was seen as violating the right of due process. This determination allowed the United States Supreme Court to invalidate vague federal or state enactments in a variety of disciplines as unconstitutional. What is clear, however, is that from the beginning, the requirement of notice was foremost in the minds of the Court in implementing this doctrine.

B. Fair Notice

In a void for vagueness challenge, regardless of the type of statute challenged, the Court’s concern has been whether the law at issue provides notice of what it allows or prohibits. In one of the earliest Supreme Court void for vagueness cases, decided in 1875, the Court in United States v. Reese discussed notice to the violator of the statute when it stated,

[p]enal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence [sic], and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

Here the Court references the “common mind” and “[e]very man.” In another early case, the Court in Connally v. General Construction Co., in 1926 stated, “[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first

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43 Nash v. United States, 229 U.S. 373 (1914).
44 See supra notes 28-42 and accompanying text.
45 United States v. Reese, 92 U.S. 214 (1875). The Court used this language when referring to a federal statute that provided that citizens “otherwise qualified, . . . shall be entitled and allowed to vote . . . without distinction of race, color, or previous condition of servitude.” Id. at 216. The Court found in favor of the defendants, holding that the statute regulated state behavior beyond Congress’s power to do so granted under the Fifteenth Amendment. Id. at 221-22. The Court ultimately used the separation of powers doctrine to resolve the matter.
46 Id. at 220. See also James v. Bowman, in which the Court, in refusing to narrow a statute that was alleged to hinder the right of suffrage guaranteed by the Fifteenth Amendment, stated, “it is all-important that a criminal statute should define clearly the offence which it purports to punish.” James v. Bowman, 190 U.S. 127, 142 (1903).
essential of due process of law." 48 Similarly, the Court references "men of common intelligence." This reference to common or ordinary men with common or ordinary intelligence is a thread throughout the void for vagueness cases. 49

Another repeated reference within the void for vagueness cases is to fair notice or fair warning. In 1945, the Court in Screws v. United States 50 stated, "[t]he constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition." 51


49 In Grayned v. City of Rockford, the Court stated, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). In Kolender v. Lawson, the Court stated, "[a]s generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . ." Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Goguen, 415. U.S. 566; Grayned, 408 U.S. 104; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally, 269 U.S. 385). In Morales, the Court stated that a statute may be invalidated for vagueness if it fails "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." City of Chicago v. Morales, 527 U.S. 41, 56 (1999). And in Hill, the Court stated that a statute is impermissibly vague, "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." Hill v. Colorado, 530 U.S. 703, 732 (2000).

50 Screws v. United States, 325 U.S. 91, 93 (1945). Against an attack of unconstitutional vagueness, the Court upheld a federal statute that provided,

[wh]oever under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined . . . .

Id. The Court determined that the requirement was not vague "when a statute prohibits only 'willful' acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids." Id. at 104.

In 1954, the Court in *United States v. Harriss*,52 combined the concepts of ordinary intelligence and fair notice in its notice requirement when it stated, “the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”53 Echoing this statement, the Court in 1999 in *City of Chicago v. Morales*54 stated, “the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. ‘No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes.’”55 Using a combination similar to that provided in *Harriss*, the Court, in its most recent void for vagueness case, stated that a vague statute is one that fails “to provide a person of ordinary intelligence fair notice of what is prohibited . . . .”56

The Court, in defining notice, has also sought to limit it. As provided above, Justice Oliver Wendell Holmes Jr. sought to limit the certainty required with the often-quoted statement that, “the law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”57 Along the same lines, in *Boyce Motor Lines v. United States*,58 the Court provided, [b]ut few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable de-

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52 *Harriss*, 347 U.S. 612, 617 (1954). The Court upheld the Federal Regulation of Lobbying “which requires designated reports to Congress from every person ‘receiving any contributions or expending any money’ for the purposes of influencing the passage or defeat of any legislation by Congress,” by narrowly interpreting the statute in accordance with the statute’s legislative history. Id. at 614, 619-23 (quoting 2 U.S.C. § 261 (1995)).

53 Id. at 617; see also *Papachristou*, 405 U.S. at 162.

54 *Morales*, 527 U.S. 41. For a discussion of this case, see *infra* notes 143-44 and accompanying text.


57 Nash v. United States, 229 U.S. 373, 377 (1914). For a discussion of this case, see *supra* notes 25-27 and accompanying text.

58 *Boyce Motor Lines*, Inc. v. United States, 342 U.S. 337 (1952). The Court upheld a federal statute providing that “[d]rivers of motor vehicles transporting any explosive, inflammable liquid, in-flammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares . . . .” Id. at 338-39 (internal quotations omitted). The Court relied upon the history of the drafting of the statute and statute’s requirement of “culpable intent.” Id. at 340-43.
gree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. 59

The Court in *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 60 combined this limiting scope with the ordinary man concept when it stated,

there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any costs, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. 61

In its latest case, the Court in *United States v. Williams* stated, ""perfect clarity and precise guidelines have never been required even of regulations that restrict expressive activity."" 62

Thus, when defining what constitutes notice in the void for vagueness doctrine, the Court has consistently over a period of at least a hundred years referred to common or ordinary men with common or ordinary intelligence, and has also historically and consistently referred to fair notice or fair warning. In further defining fair notice to ordinary men of common intelligence, the Court has eschewed the idea of perfect clarity or mathematical certainty. Instead, the Court has set the standard at reasonable certainty, advising that individuals bear some respon-

59 *Id.* at 340. In a similar vein, the Court in *Grayned* stated, ""[c]ondemned to the use of words, we can never expect mathematical certainty from our language."" *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

60 U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548 (1973). The Court upheld a federal statute that provided ""that an employee in an executive agency must not take ‘an active part in political management or in political campaigns . . . .'"" *Id.* at 568 (quoting 5 U.S.C. § 7324 (1970)). The Court relied, in part, on the existence of a federal regulation that provided specific activities that the statute regulated, thus preventing a claim that the statute was unconstitutionally vague. *Id.* at 575-79.

61 *Id.* at 579-80.

62 United States v. Williams, 128 S. Ct. 1830, 1845 (2008). For a discussion of this case, see *supra* note 2 and accompanying text. Thus, although the Court has stated in the past that where constitutional liberties are involved, the Court can require more exacting language, see *supra* note 135 and accompanying text, the Court has recently in *Williams* recognized that ""perfect clarity and precise guidelines,"" even in cases concerning the First Amendment, are not required. *Id.*
sibility to estimate whether behavior perilously close to prohibited conduct is itself prohibited.

C. Nondiscriminatory Enforcement

Prior to 1972, the fair notice requirement was the standard the Court relied upon most often in determining whether a statute was unconstitutionally vague. The Court mentioned other factors in its analysis, but not as consistently as it mentioned fair notice. However, in 1972, in Papachristou v. City of Jacksonville, the Court expressed concern regarding arbitrary and discriminatory enforcement of a vague law. The Court determined that the vagrancy law, which prohibited "persons wandering or strolling around from place to place without any lawful purpose or object," upon which the defendants were arrested, was void for vagueness because "[i]t furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' Within this decision, the Court stated, "[t]his ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions."

63 Professor Hill stated that the Supreme Court has looked to four concerns: "[N]otice; avoidance of a potential for discriminatory and arbitrary enforcement; enablement of judges to instruct and otherwise control juries; and avoidance of a chilling effect on constitutionally protected conduct." Alfred Hill, Vagueness and Police Discretion: The Supreme Court in a Bog, 51 RUTGERS L. REV. 1289, 1304 (1999). See also Goldsmith, supra note 12, in which Goldsmith sets forth five concerns: notice, separation of powers, prevention of arbitrary enforcement, creation of standard for appeal, and creation of record for appeal. Id. at 283-94.


65 This concern arose from the facts of the case. For example, four of the defendants were arrested for riding in a car, supposedly because they had stopped near a used-car lot that had been broken into several times, even though there had been no problems on the night of the arrest. None of the four defendants had been previously arrested. Id. at 158-59. The defendants were charged "with prowling by auto." Id. at 159 (internal quotations omitted). "The arresting officers denied that the racial mixture in the car played any part in the decision to make the arrest." Id.

66 Id. at 159.

67 Id. at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

68 Id. at 162 (quoting Harris, 347 U.S. at 617; Thornhill, 310 U.S. 88; Herndon v. Lowry, 301 U.S. 242 (1937)). Note that the Court cited generally to Thornhill, 310 U.S. 88, and Herndon, 301 U.S. 242, for this new standard regarding statutes that encouraged "arbitrary and erratic arrests and convictions." However, the Thornhill case did not address void for vagueness, and the Court's citation here was without reference to a specific page. Later in the decision, the
In subsequent decisions, the Court confirmed its adoption of this second basis for determining whether a law is unconstitutionally vague. In 1972, the Court in Grayned v. City of Rockford,\textsuperscript{69} stated, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”\textsuperscript{70} Thus, the Court changed the language from “arbitrary and erratic arrests”\textsuperscript{71} to “arbitrary and discriminatory enforcement.”\textsuperscript{72} Then in 1974, in Smith v. Goguen,\textsuperscript{73} the Court clearly affirmed its adoption of this standard when it determined that it was more meaningful to the void for vagueness analysis than the fair notice requirement, stating,

[we] recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not the actual notice, but the other principal element of

\textsuperscript{69} Grayned v. City of Rockford, 408 U.S. 104 (1972). The Court upheld a city anti-noise ordinance that provides,

no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof ....

\textsuperscript{70} Id. at 107-08. The Court reasoned,

[w]e do not have here a vague, general “breach of the peace” ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this “particular context,” the ordinance gives “fair notice to those to whom [it] is directed.”

\textsuperscript{71} Papachristou, 405 U.S. at 162.

\textsuperscript{72} Grayned, 408 U.S. at 108.

\textsuperscript{73} Smith v. Goguen, 415 U.S. 566 (1974). For a discussion of this case, see supra note 3 and accompanying text.
the doctrine—the requirement that a legislature establish minimal
guidelines to govern law enforcement.\footnote{Id. at 574. The Court provided no further citation. Interestingly, by this point in the case when the Court made this comment, it had already determined that the language of the statute did not provide fair notice. Id. at 572-73.}

Thus, the Court in \textit{Goguen} decided that a requirement borne only two years earlier should be the focus of the analysis, thereby changing approximately 133 years of doctrine.\footnote{However, perhaps taking note of this fracture with the long history of the doctrine, the Court subsequently in \textit{Kolender}, referenced \textit{Reese}, 92 U.S. 214 (1875), in a footnote, stating, "[o]ur concern for minimal guidelines finds its roots as far back as our decision in \textit{Reese} ... ." \textit{Kolender v. Lawson}, 461 U.S. 352, 358 n.7 (1983). The Court then quoted \textit{Reese} as providing, \begin{quote}
[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.
\end{quote}
\textit{Reese} has been described as a "shaky pedigree" because "[n]owhere does \textit{Reese} mention law enforcement, an executive function then only in its infancy as far as professional police departments were concerned." Strosnider, \textit{supra} note 9, at 116.}

This departure has been confirmed by later cases, and the language used, until recently, has stayed relatively constant, requiring that the law "not encourage arbitrary and discriminatory enforcement."\footnote{\textit{Kolender}, 461 U.S. at 357 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.") (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); \textit{Goguen}, 415 U.S. 566; \textit{Grayned}, 408 U.S. 104; \textit{Papachristou}, 405 U.S. 156; Connally v. Gen. Constr. Co., 269 U.S. 385 (1926)).}

Later cases changed the language somewhat, adding that the law cannot "authorize or even" encourage arbitrary and discriminatory enforcement.\footnote{City of Chicago v. Morales, 527 U.S. 41, 56 (1999). The Court in \textit{Hill} in 2000 followed this standard as provided in \textit{Morales}. Hill v. Colorado, 530 U.S. 703, 731 (2000).}

In discussing the second prong of the void for vagueness analysis, the Court stressed the importance of including guidelines for enforcement of the law, first by referring to "explicit standards\footnote{\textit{Grayned}, 408 U.S. at 108 (stating that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."). For a discussion of this case, see \textit{supra} notes 69-70 and accompanying text.} and later, by stating, "[w]here the legislature fails to provide such \textit{minimal guidelines}, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'\footnote{\textit{Kolender}, 461 U.S. at 358 (emphasis added). For a discussion of this case, see \textit{supra} note 130 and accompanying text. This standard was first provided in \textit{Goguen}, 415 U.S. at 574.}"
The Court has expressed concern specifically regarding police discretion and has stated that a law should not “entrust lawmaking ‘to the moment-to-moment judgment of the policeman on his beat.’”

However, as noted earlier, the Court’s most recent opinion on the void for vagueness doctrine indicates a limiting of this second prong, where it changed the standard such that a law is unconstitutionally vague if it “is so standardless that it authorizes or encourages seriously discriminatory enforcement.” It is this Paper’s premise that this change, which limits the scope of the second prong, does not go far enough and that instead, the Court should eliminate the second prong of the void for vagueness analysis. To understand why, it is necessary to first discuss the Court’s position, or lack thereof, on facial review within the void for vagueness doctrine.

II. FACIAL REVIEW IN THE VOID FOR VAGUENESS DOCTRINE

This section reviews the Court’s ambivalence regarding whether the void for vagueness challenge should require a facial review of the statute, or whether the challenge to the statute must be reviewed “as applied.”

A. History of Facial Review under the Fair Notice Requirement

It appears that, initially, the Court was of the opinion that in all void for vagueness cases, facial review of the law at issue was proper. If the Court determined that a law was vague, it could invalidate the law in its entirety as unconstitutional without reference to whether the law provided notice of the prohibited conduct to the litigant. In 1939, in an early void for vagueness case, the Court stated in Lanzetta:

[i]f on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . . It is the statute, not the accusation

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80 Kolender, 461 U.S. at 360 (quoting Goguen, 415 U.S. at 575).
under it, that prescribes the rule to govern conduct and warns against transgression.\textsuperscript{84}

The Court invalidated the statute as unconstitutionally vague on its face because the terms employed were "so vague, indefinite, and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."\textsuperscript{85} Nowhere within the opinion did the Court consider whether the statute provided notice to the specific defendants charged. Instead, it appears that the Court reasoned that because it had determined that the statute was standardless, providing no notice of the conduct that was prohibited, the statute could be invalidated based on a facial review only. In other words, because no standard was provided as to what conduct was regulated, it is impossible that the litigant or anyone else could have had notice under the statute.

However, the Court did not limit facial review only to those laws that it deemed standardless, but also reviewed laws on their face that it determined gave notice of a standard. In another early case, the Court in 1947, in United States v. Petrillo,\textsuperscript{86} reviewed a section of a federal regulatory law on its face, determining that it was not vague.\textsuperscript{87} The Court did not cite to Lanzetta or any other vagueness case to support its ability to review the statutory section on its face, and consistent with a facial review, the Court did not refer to the litigant when upholding the statutory section as not vague.\textsuperscript{88} Additionally, in 1954, in Harriss,\textsuperscript{89} the Court reviewed a statute involving First Amendment rights on its face and upheld the statute. Interestingly, the Court's sole citation in sup-

\textsuperscript{84} Id. at 453.
\textsuperscript{85} Id. at 458. It has been stated that the mafioso charged with violating the statute could not plausibly plead lack of notice. Hill, supra note 63, at 1292.
\textsuperscript{86} United States v. Petrillo, 332 U.S. 1 (1947).
\textsuperscript{87} Id. at 6. The law stated, "it shall be unlawful . . . to coerce . . . a licensee . . . to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services . . . ." Id. at 3. The Court upheld the law, reasoning that, "[i]t would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was willfully attempting to compel another to hire unneeded employees." Id. at 7.
\textsuperscript{88} Id. at 8. Instead, the Court stated, "[t]he language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Id. The Court did not refer to whether it conveyed definite warning to the litigants in the case.
\textsuperscript{89} United States v. Harriss, 347 U.S. 612 (1954). For a discussion of this case, see supra notes 52-53 and accompanying text.
Port of its ability to review the statute on its face was to *Petrillo*, as opposed to a case involving First Amendment rights.\(^9\) Thus, the Court’s position at this time seemed to be that in cases where any type of statute was challenged as void for vagueness, facial review was appropriate.

Subsequently in 1960, the Court in *United States v. Raines*\(^9\) directly addressed facial review, although not in a void for vagueness setting. The Court began by recognizing that exercising the fundamental power of constitutional review is “the gravest and most delicate duty that this Court is called on to perform”\(^9\) and that a federal court has no jurisdiction to determine the constitutionality of a state or federal statute unless there are litigants in an actual controversy.\(^9\) In so declaring, the Court stated that a litigant for whom the statute is constitutional cannot claim that the statute is unconstitutional because it might be unconstitutional as applied to other individuals or situations.\(^9\) Thus, the Court set forth the principle that a litigant must be able to survive an “as-applied” challenge, meaning that the statute must be unconstitutional as to that litigant, before the Court can determine that the statute is unconstitutional \textit{in toto}.

This is the rule that was followed in 1963 in *United States v. National Dairy Products Corp.*,\(^9\) a void for vagueness case in which the

\(^9\) The Court in *Harris* reviewed the majority of statutory provisions on their face and cited to *Petrillo* for its ability to do so, even though the challenged law in *Harris* involved First Amendment rights, whereas the challenged law in *Petrillo* did not. *Harris*, 347 U.S. at 617 (stating that “[w]e judge the statute on its face.”) (citing *Petrillo*, 332 U.S. at 6, 12). The majority in *Harris* could have cited to *Winters*, 333 U.S. 507 (1948), wherein the Court determined that a facial review was proper when the challenged statute implicates the First Amendment, but it cited solely to *Petrillo*. The dissent in *Harris* cited to *Lanzetta* and *Winters*. *Harris*, 347 U.S. at 628-29 (Douglas, J., dissenting) (citing *Lanzetta*, 306 U.S. at 453; *Winters*, 333 U.S. at 515).

\(^9\) United States v. Raines, 362 U.S. 17 (1960). This case concerned a complaint alleging violation of the Civil Rights Act against registrars of Terrell County, Georgia that had through “various devices, in the administration of their offices, discriminated on racial grounds against Negroes who desired to register to vote in elections conducted in the State.” \textit{Id.} at 19.

\(^9\) \textit{Id.} at 20 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803)).

\(^9\) \textit{Id.} at 21.

\(^9\) \textit{Id.} The Court reasoned that “application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.” \textit{Id.} at 22.

litigants put the facial review issue squarely before the Court.96 The Court stated, "[i]t is true that a statute attacked as vague must initially be examined 'on its face[ ]' . . . ."97 But then the Court stated, "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged."98 The Court, then proceeded to review the statute for vagueness and determined that the statute was constitutional as applied to the defendants because the statute had provided them warning as to the prohibited conduct.99 Thus, the defendants could not sustain a constitutional challenge to the statute and the case was remanded for trial.100

*National Dairy* exemplifies a change in how the Court examined statutes challenged as vague because, as opposed to an automatic facial review, the Court instead made a determination that the statute was constitu-

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96 Id. at 31-32.

National Dairy and Wise argue that § 3 is to be tested solely "on its face" rather than as applied to the conduct charged in the indictment . . . . The Government, on the other hand, places greater emphasis on the latter, contending that whether or not there is doubt as to the validity of the statute in all of its possible applications, § 3 is plainly constitutional in its application to the conduct alleged in the indictment.

Id. at 31-32.

97 Id. at 32. The Court stated, "a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented." Id. at 32 (quoting United States v. Raines, 362 U.S. 17, 22 (1960)). It is this author’s opinion that the Court, in referencing an initial inquiry on its face, is referring to a court’s duty to apply any limiting construction that the federal or state courts have set forth. "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982) (emphasis added); Kolender v. Lawson, 461 U.S. 352, 355 (1983); *Natl Dairy*, 372 U.S. at 31.

98 *Natl Dairy*, 372 U.S at 33 (citing Robinson v. United States, 324 U.S. 282 (1945)). The sole issue in *Robinson* was "the court’s statutory authority to impose the death sentence" which hinged on interpretation of the language “provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnapped person has been liberated unharmed." *Robinson*, 324 U.S. at 283 (quoting Federal Kidnapping Act, 18 U.S.C.S. § 1201 (2010)). The Court held that although Congress “did not unmistakably mark some boundary between a pin prick and a permanently mutilated body,” “we cannot doubt that a kidnapper who violently struck the head of his victim with an iron bar . . . comes within the group Congress had in mind.” Id. at 286.

99 *Natl Dairy*, 372 U.S. at 36-37. “We therefore consider the vagueness attack solely in relation to whether the statute sufficiently warned National Dairy and Wise that [their conduct was prohibited].” Id. at 33. “And we believe that National Dairy and Wise could reasonably understand from the statutory language that the conduct described in the indictment was proscribed by the Act.” Id. at 34.

100 Id. at 37.
tional as applied to the litigants in the case and thus it could not be invalidated in its entirety.101

The rules change in void for vagueness cases where the challenged statute involves First Amendment freedoms.102 “[W]here a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”103 In early First Amendment cases, it appears that the Court did not always rely upon the First Amendment concerns to justify facial review, but instead followed the practice of conducting a facial review of all vague statutes.104 However, in National Dairy, in setting forth the rule that the statute’s vagueness must be viewed in light of the defendants’ conduct, the Court mentioned that the rule does not apply in First Amendment cases. The Court stated, “[in this connection we also note that the approach to ‘vagueness’ governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute ‘on its face’ because such vagueness may in itself deter constitutionally protected and socially desirable conduct.’”105

101 Professor Hill has argued that it was not National Dairy that changed the facial review practice but instead that the change first occurred in Parker v. Levy, 417 U.S. 733 (1974), which misconstrued National Dairy and was then solidified by United States v. Mazurie, 419 U.S. 544 (1975). Hill, supra note 63, at 1296-98. Regardless, by the time of Mazurie, the Court stated, “it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.” Mazurie, 419 U.S. at 550.

102 National Dairy, 372 U.S. at 36 (“[T]he approach to ‘vagueness’ governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute ‘on its face’ because such vagueness may in itself deter constitutionally protected and socially desirable conduct.” (emphasis added)).


104 United States v. Harriss, 347 U.S. 612, 615 (1954). In Harriss, the majority determined that the statute involved First Amendment concerns, but cited to Petrillo as support for a facial review, even though the statute in Petrillo did not involve First Amendment concerns. Harriss, 347 U.S. at 617. Therefore, the Court in Harriss most likely relied on Petrillo, as opposed to a case concerning First Amendment rights, because at the time of Harriss, facial review of statutes was common practice in all vagueness cases.

105 National Dairy, 372 U.S. at 36. The quote continues, [n]o such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. We are thus permitted to consider the warning provided by § 3 not only in terms of the statute ‘on its face’ but also in the light of the conduct to which it is
Thus, initially, in a case in which a law was challenged as void for vagueness, it appears that the Court engaged in an "automatic" facial review, meaning there was not an initial determination that the law was unconstitutionally vague as to the litigants in the case. Subsequently, with Raines and National Dairy, it appears that only when First Amendment rights were implicated would the Court engage in an automatic facial review.

Coates v. City of Cincinnati is an interesting case in this regard because it was decided in 1971, not too long after National Dairy and Raines, and the majority viewed the case as involving First Amendment rights, but the dissent did not. The majority reviewed the ordinance on its face without analysis or citation. Justice Black, in his separate opinion, discussed the facial review issue, arguing that under Lanzetta and L. Cohen Grocery Co., "[t]his Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face." He also stated that "laws which broadly forbid conduct or activities which are protected by the Federal Constitution . . . are void on their face," presumably referring to the application of facial review in the void for vagueness doctrine when a

applied. The reliance of National Dairy and Wise on First Amendment cases is therefore misplaced.

Id. (emphasis added).

106 Coates v. City of Cincinnati, 402 U.S. 611 (1971). The Court invalidated a Cincinnati ordinance that "makes it a criminal offense for 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." Id. at 611-12.

107 Id. at 612. The majority provided that "throughout this litigation it has been the appellants' position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution." Id.

108 Id. at 616 (citing Lanzetta v. New Jersey, 306 U.S. 451 (1939); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921)). Justice Black stated that where the statute has no standard as to the conduct governed, it is unconstitutional on its face. However, a review of the cases demonstrates that the Court did not limit facial review to those cases in which it determined that the law was standardless, i.e., where it was "so vague that men of common intelligence must necessarily guess at its meaning . . . []" Lanzetta, 306 U.S. at 453. Even in cases in which the Court upheld the law at issue, it stated that it was reviewing the law on its face. For example, in Petrillo, the Court conducted a facial review and upheld a statute that did not involve First Amendment rights. United States v. Petrillo, 332 U.S. 1, 6 (1947). Later in Harriss, the challenged statute did involve First Amendment rights, and the Court reviewed the statute on its face but did not cite to a case involving First Amendment rights as a basis for doing so; the Court cited Petrillo instead. Harriss, 347 U.S. at 617. It thus appears that prior to Raines and National Dairy, the Court automatically conducted a facial review of any type of law challenged as unconstitutionally vague and that lack of standards was not the determining factor.
law implicates First Amendment rights. Justice Black went on to provide that it was no easy task to determine when “a law can be held void on its face and when such summary action is inappropriate.” He stated that he would have remanded the case to supplement the record to determine whether the conduct for which defendants were punished was protected by the Federal Constitution before making that determination.

However, Justice White in his dissent viewed the issue differently because he determined that the challenged law did not implicate the First Amendment. Initially, he stated, “[o]ur cases . . . recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment.” In those types of cases, he concluded facial review is proper and the litigant need not prove that the law is unconstitutional as applied to him. Conversely, however, where a law does not implicate First Amendment rights, Justice White asserted that the litigant must prove that the law is unconstitutional as applied to the litigant before the Court can review the law on its face.

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109 Coates, 402 U.S. at 617 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)). Justice Black’s proposition here that laws that implicate any rights “protected by the Federal Constitution” are subject to facial review, id., is broader than previous precedent and broader than the Thornhill case cited, which limits facial review to challenged laws implicating First Amendment rights.

110 Id. at 617. Justice Black stated, “[l]aws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances.” Id.

111 Id.

112 “[T]he Cincinnati ordinance does not purport to bar or regulate speech as such.” Id. at 620 (White, J., dissenting). “I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute.” Id.

113 Id. at 619 (citing United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); Kunz v. New York, 340 U.S. 290 (1951)).

114 Coates, 402 U.S. at 619-20.

Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute.

Id. (citing Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965)). “The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unannarrowed form would tend to suppress constitutionally protected rights.” Id. at 620 (citing United States v. Nat’l Dairy Prods. Corp., 372 U.S. 29, 36 (1963)).

115 “In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.” Id. at 619 (quoting Nat’l Dairy,
Thus, Justice White's dissent in *Coates* provided what appeared to be a clear distinction and rule regarding the Court's proper use of facial challenges in void for vagueness cases. If the law involved a First Amendment right, the law could be challenged on its face and the litigant would not need to show that the law was unconstitutional as applied to him. He would be allowed to invoke the rights of hypothetical litigants because "the otherwise continued existence of the statute . . . would tend to suppress constitutionally protected rights."\(^{116}\) However, if the law did not involve First Amendment rights, then in accordance with *Raines* and *National Dairy*, a litigant must survive an "as-applied" challenge first before the litigant could successfully argue that the law is void for vagueness on its face in its entirety.\(^{117}\)

Subsequently, the Court followed Justice White's rule derived from *Raines* and *National Dairy*, rejecting automatic facial review, and determining first whether a law was unconstitutional as applied to the litigant when the law did not implicate First Amendment rights. In the 1974 case of *Parker v. Levy*,\(^{118}\) the defendant was an Army captain and was charged with violation of several sections of the Uniform Code of Military Justice.\(^{119}\) He argued that the provisions under which he was charged were unconstitutionally vague.\(^{120}\) The Court determined that even considering the narrowing interpretations that had been given to the Code sections, "[i]t would be idle to pretend that there are not areas within the general confines of the articles’ language which have been left

\[\text{372 U.S. at 33} \] (internal quotations omitted). The Court stated that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* (quoting United States v. Raines, 362 U.S. 17, 21 (1960)) (internal quotations omitted).

\(^{116}\) *Id.* at 620.

\(^{117}\) *Id.* at 619.


\(^{119}\) *Id.* at 756-57. The Court determined that "[b]ecause of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs." *Id.*

\(^{120}\) *Id.* at 737-38. The Court references examples of the broad language within the Uniform Code of Military Justice, stating that it punishes anyone who "willfully disobeys a lawful command of his superior commissioned officer" or who engages in "conduct unbecoming an officer and a gentleman" while also prohibiting "all disorders and neglects to the prejudice of good order and discipline in the armed forces." *Id.* (quoting the Uniform Code of Military Justice, 10 U.S.C. §§ 890, 933, 934).
vague despite these narrowing constructions.” However, the Court also determined that there was a substantial range of conduct to which articles under the Code clearly applied without any vagueness or imprecision, and that the defendant’s conduct fell squarely therein. The Court then provided that it is not the case

that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

In the 1975 case of United States v. Mazurie, the Court stated succinctly, “[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.”

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121 Id. at 754.

122 Id. The Court stated, “[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.” Id. at 757 (quoting United States v. Nat’l Dairy Prods. Corp., 372 U.S. 29, 33 (1963)).

123 Id. at 756. The Court further stated,

The result of the Court of Appeals’ conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court.

Id.

124 United States v. Mazurie, 419 U.S. 544, 550 (1975). The Court upheld a federal law prohibiting “the introduction of alcoholic beverages into ‘Indian country,’” where “‘Indian country’ was defined . . . to include non-Indian-held lands ‘within the limits of any Indian reservation.’” Id. at 547. The Court concluded that “the statute was sufficient to advise the Mazuries that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community.” Id. at 553.

125 Id. at 550 (citing United States v. Nat’l Dairy Prods. Corp., 372 U.S. 29 (1963)). The Court, however, did not follow this rule in the case of Colautti v. Franklin, 439 U.S. 379 (1979), which involved a facial challenge to the Pennsylvania Abortion Control Act. The Court reviewed the law on its face, without a discussion of the review standard, determining that several portions of the law were impermissibly vague. Colautti v. Franklin, 439 U.S. 379, 390-401. The latest decision regarding an abortion law has determined that an “as-applied” review is necessary and refused to invalidate the law on its face. Gonzales v. Carhart, 550 U.S. 124, 132 (2007). For a discussion critical of this decision regarding an as-applied review, see id. at 187-91 (Ginsburg, J., dissenting).
Further, in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., the Court clarified that a statute could not be invalidated in its entirety on its face unless it was unconstitutionally vague in all of its applications. The Court made this statement in reliance on the rule from Mazurie and National Dairy, requiring that where First Amendment rights were not involved, the litigant must prove that the statute is unconstitutional as applied to him. The Court then theorized that

[t]he rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

Again, it appears that in cases not involving First Amendment rights, the Court had provided and was following a clear rule. A statute cannot be invalidated in its entirety unless it is unconstitutionally vague in all of its applications. Thus, a litigant must establish that the statute is unconstitutionally vague as applied to her. If it is not, then it is not unconstitutionally vague in all of its applications and cannot be invalidated in its entirety.

126 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). The Court upheld a local ordinance that required a business "to obtain a license if it sells 'any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . . .'" Id. at 499. Flipside had challenged the language "designed or marketed for use," and the Court concluded, "[u]nder either the 'designed for use' or 'marketed for use' standard . . . that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing." Id. at 500.
127 Id. at 495. The Court stated, '[t]he court should then examine the facial vagueness challenge and [assuming the enactment implicates no constitutionally protected conduct,] should uphold the challenge only if the enactment is impermissibly vague in all of its applications . . . . A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.'

128 Id. at 495 n.7 (citing Mazurie, 419 U.S. at 550; United States v. Powell, 423 U.S. 87, 92-93 (1975); Nat'l Dairy, 372 U.S. at 32-33).
129 Id. (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)). The Court then stated, "[s]uch a provision simply has no core." Id. (citing Smith v. Goguen, 415 U.S. 566, 578 (1974)).
However, the Court did not follow this rule in its 1983 decision in *Kolender v. Lawson*, where it reviewed the statute on its face, determining it was unconstitutionally vague without any reference to the statute’s constitutionality as applied to the defendant in the case, harkening back to the rule of “automatic” facial review. The majority did not affirmatively provide a specific rationale to support its facial review. Instead, the majority in a footnote attacked the reasons Justice White set forth in his dissent as to why facial review was improper. The resulting reasoning appears to be that, because the majority determined that the law implicated a constitutional right to freedom of movement and First Amendment liberties, although the Court did not explain which First Amendment liberties were implicated, under the overbreadth doctrine a facial review is allowed in the void for vagueness analysis.

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130 *Kolender v. Lawson*, 461 U.S. 352 (1983). The Court invalidated a California criminal statute that “requires persons who loiter or wander on the streets to provide a ‘credible and reliable’ identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio* . . . .” *Id.* at 353. The Court reasoned that the law “contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ‘credible and reliable’ identification. As such, the statute vests virtually complete discretion in the hands of the police . . . .” *Id.* at 358.

131 *Id.* at 358 n.8.

132 *Id.* at 374 (White, J., dissenting) (“Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened are never mentioned.”)

133 *Id.* at 355. In a footnote, the majority listed several reasons why Justice White’s description of the majority holding was inaccurate. First, the majority stated that a facial challenge is allowed “if a law reaches ‘a substantial amount of constitutionally protected conduct.’” *Id.* at 358 n.8. The Court cited *Hoffman Estates* for this proposition even though the Court in the same footnote recognized that the ordinance in *Hoffman Estates* “simply regulates business behavior” and that the Court there was only “reaffirm[ing] the validity of facial challenges in situations where free speech or free association are affected . . . .” *Id.* Thus, the Court’s proposition is much broader than the rule set forth in *Hoffman Estates* because the *Kolender* majority did not limit its position on facial review only to laws implicating First Amendment rights as the Court in *Hoffman Estates* did.

Second, the *Kolender* majority stated that the Court had “invalidate[d] a criminal statute on its face even when it could conceivably have had some valid applications.” *Id.* Interestingly, Justice Scalia later attacked this proposition in his dissent in *Morales*. He stated that the Court in *United States v. Salerno*, 481 U.S. 739 (1987), “repudiated” *Kolender’s* statement that a facial challenge could succeed “even when [the statute] could conceivably have had some valid application.” *Kolender* seems to have confused the standard for First Amendment overbreadth challenges with the standard governing facial challenges on all other grounds.” *City of Chicago v. Morales*, 527 U.S. 41, 79 n.2 (1999) (Scalia, J., dissenting). This point seems quite correct given the *Kolender* majority’s third point that, in essence, because facial review is allowed in the overbreadth doctrine, it is allowed in the void for vagueness doctrine, presumably only if the law at issue implicates First Amendment rights. But this latter point is unclear because *Kolender* is not a First Amendment case and, as stated above, the *Kolender* majority argued facial review was
Justice White, in his dissent, addressed the facial review issue by applying the rule from *Hoffman Estates* and taking his position in *Coates* one step further. He stated that even in First Amendment cases, the litigants should prove that the statute is unconstitutional as applied to them before they can constitutionally challenge the statute in its entirety.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. . . . If the actor is given sufficient notice that his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases “suggest that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” . . . The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is “impermissibly vague in all of its applications.” . . . These general rules are equally applicable to cases where First Amendment or other “fundamental” interests are involved.135

In summary, Justice White’s rules for facial review as set forth in his dissent in *Kolender*, only affirmed the current “as-applied” rule at that time for cases not involving First Amendment rights—that if the litigant

proper where the law “reaches ‘a substantial amount of constitutionally protected conduct.’” *Kolender*, 461 U.S. at 358 n.8. The majority stated, “[b]ut we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.” *Id.*

Lastly, the *Kolender* majority stated that Justice White in his dissent cited no authority that prevented facial review when the law is determined to be void for vagueness “in the arbitrary enforcement context.” *Id.* This statement is true as there was not at that time any cases that had found a law to be unconstitutionally vague based solely on the second prong, the nondiscriminatory enforcement requirement.


135 *Kolender*, 461 U.S. at 369-70 (White, J., dissenting) (citing United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Powell, 423 U.S. 87, 92-93 (1975)) (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)). Justice White stated that where the statute implicates First Amendment or other “fundamental” interests more precision may be required but that “[i]t does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own.” *Id.* at 369-70.
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could not support an “as-applied” challenge, then the statute could not
be invalidated in its entirety as unconstitutionally vague, because the
statute would not be unconstitutional in application to the litigant. If
the litigant could support an “as-applied” challenge in those same
types of cases, this rule then requires that the litigant prove that the
statute is impermissibly vague in all of its other applications before the
entire statute could be invalidated as unconstitutional.

However, Justice White then took the position that there is no
difference between cases in which the statute implicates First Amend-
ment or other “fundamental interests.” Instead, he argued that even
when the statute challenged for vagueness implicates First Amendment
or other “fundamental interests,” a facial review should not occur unless
the litigant proves that the statute is unconstitutional as applied to her.
If the litigant is able to satisfy this requirement, Justice White also indi-
cated that the statute should not be invalidated in its entirety unless the
litigant further proves that the statute is vague in all of its other applica-
tions. Thus, at this time, there was tension between the justices who
followed an earlier rule allowing for “automatic” facial review in void for
vagueness cases or who advocated a facial review based on the over-
breadth doctrine and a link to a constitutionally protected right, with
Justice White and his quest to limit facial review in the void for vague-
ness doctrine. Justice White’s position on facial review in the void for
vagueness analysis was consistent with the Court’s position regarding
facial review in other doctrinal areas exemplified by Raines and the

136 *Hoffman Estates*, 455 U.S. at 495 ("A plaintiff who engages in some conduct that is clearly
proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

137 Justice White set forth the following reasoning:

If any fool would know that a particular category of conduct would be within the
reach of the statute, if there is an unmistakable core that a reasonable person would
know is forbidden by the law, the enactment is not unconstitutional on its face and
should not be vulnerable to a facial attack . . . .

*Kolender*, 461 U.S. at 370-71 (White, J., dissenting).

138 It has been asserted that there is no set standard that would apply across doctrines dictat-
ing when a challenge should trigger a facial review and when it should be an as-applied chal-
lenge. Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third Party Standing*, 113
Harv. L. Rev. 1321, 1321 (2000). It is Professor Fallon’s opinion that facial review is an
outgrowth of as-applied review and that there must first be an as-applied determination of
whether the statute is unconstitutional as to the litigant. *Id.* at 1324.
subsequent void for vagueness cases that adopted the reasoning in *Raines.*\(^{139}\)

However, later courts have not followed the rule Justice White provided in his dissent in *Kolender*. Justice White retired from the bench in 1993. His efforts to standardize facial review in the void for vagueness doctrine with other doctrinal areas and to limit facial review in void for vagueness analysis was somewhat assumed by Justice Scalia, as is evident by Justice Scalia’s dissent in *Morales*\(^ {140}\) in which he discussed facial review in a void for vagueness challenge. The plurality in *Morales* created its own unique facial review standard.\(^ {141}\) Justice Scalia’s dissent is a critical analysis of the plurality’s standard and follows the rule provided by Justice White in his dissent in *Kolender*.\(^ {142}\) Given the lengthy analysis of this issue in *Morales*, a discussion of that case is warranted.

In *Morales*, a plurality of the Court declared a Chicago ordinance that sought to regulate gang loitering unconstitutionally vague because it allowed for arbitrary and discriminatory enforcement, and because it did not provide fair notice.\(^ {143}\) The ordinance provided that

[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to

\(^{139}\) *Salerno* is one such subsequent case. United States v. Salerno, 481 U.S. 739 (1987). *Salerno* was a criminal case where the litigants challenged the Bail Reform Act of 1984 as unconstitutionally vague. The Court stated,

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [it] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an “overbreadth” doctrine outside the limited context of the First Amendment.

*Id.* at 745. This case has been criticized and scholars have argued that it has not been followed. See, e.g., Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). However, in *Morales*, Justice Scalia in his dissent relied on *Salerno* for the position that the statute must be unconstitutional in all of its applications. City of Chicago v. Morales, 527 U.S. 41, 78-79 (1999) (Scalia, J., dissenting). Justice Scalia provided an impressive list of citations that support the *Salerno* rule, *id.* at 79, but then subsequently recognized that there are, in his words, “irrational” exceptions to the rule “when the statutes at issue concern hot-button social issues on which ‘informed opinion’ was zealously united.” *Id.* at 81 (citing to a gay rights case and an abortion case).

\(^{140}\) *Id.* at 74.

\(^{141}\) See *infra* notes 145-50 and accompanying text.

\(^{142}\) See *infra* notes 135, 137 and accompanying text.

\(^{143}\) *Morales*, 527 U.S. at 64.
In reaching its decision that facial review was proper, the plurality stated that “freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” Additionally, the plurality pointed out that the lower court had relied upon the overbreadth doctrine as its basis for a facial review. It then stated, “[t]here is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. For it is clear that the vagueness of this enactment makes a facial challenge appropriate.” The plurality provided no citation for this second sentence. The plurality then continued, “[t]his is not an ordinance that ‘simply regulates business behavior and contains a scienter requirement.’ It is a criminal law that contains no mens rea requirement and infringes on constitutionally protected rights. When vagueness permeates the text of such a law, it is subject to facial attack.

The plurality’s reasoning supporting facial review is unique. As pointed out by Justice Scalia’s dissent,

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144 Id. at 47.
145 Id. at 53.
146 Id. at 52.
147 Id. at 55.
148 Id. (citation omitted).
149 The plurality did not argue that the law involved First Amendment freedoms and thus, its facial review is not supported by cases that allow facial review of laws implicating First Amendment rights. By suggesting that facial review is warranted because a law implicates constitutional rights outside of the First Amendment, its opinion is broader than most previous precedent. See supra notes 102-03, 105, 133, 139 and accompanying text. It could be that the plurality was, in part, relying upon the previous, but subsequently changed, “automatic” facial review practices. But it did not, as other opinions had done, rely solely on the proposition that a facial review is allowed to invalidate a law that is standardless. One possible reason is that the plurality knew that the statute was not standardless because some defendants did have notice of the prohibited conduct. Morales, 527 U.S. at 82 (Scalia, J., dissenting). “But the ultimate demonstration of the inappropriateness of the Court’s holding of facial invalidity is the fact that it is doubtful whether some of these respondents could even sustain an as-applied challenge on the basis of the majority’s own criteria.” Id. Therefore, it may be that the plurality knew it needed additional reasons to support a facial review. However, in this attempt, the plurality’s references to scienter and to the fact that a criminal statute was at issue are also confusing. The Court has, in the past, discussed a scienter requirement as a defense to a vagueness challenge but not as a justification for a facial review. See, e.g., Screws v. United States, 325 U.S. 91, 101-03 (1945). Lastly, the Court has stated that a stricter standard can be imposed in deciding whether the language of a criminal statute is vague as opposed to an economic regulation, but again, not in a facial review.
[t]he proposition is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without mens rea requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial invalidation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates.\textsuperscript{150}

Relatedly, this Court ignored precedent that the Court had previously established regarding the necessity that the statute be unconstitutional in all of its applications outside of the First Amendment context.\textsuperscript{151} Justice Scalia, in his dissent, questioned whether facial review was ever appropriate\textsuperscript{152} but stated,

we have at least imposed upon the litigant the eminently reasonable requirement that he establish that the statute was unconstitutional in all its applications . . . because unless it is unconstitutional in all its applications we do not even know, without conducting an as-applied analysis, whether it is void with regard to the very litigant before us . . . .\textsuperscript{153}

Justice Scalia pointed out that the plurality's facial review was particularly egregious because several of the defendants in the case would not have been able to sustain an "as-applied" challenge, meaning that the law was constitutional as applied to them.\textsuperscript{154}

Thus, the plurality in \textit{Morales} somewhat aligned itself with previous cases that adopted the "automatic" facial review standard of earlier

\textsuperscript{150} \textit{Morales}, 527 U.S. at 83 (Scalia, J., dissenting).

\textsuperscript{151} Justice Scalia made this point by stating, "[t]he majority today invalidates this perfectly reasonable measure by ignoring our rules governing facial challenges . . . ." \textit{Id.} at 74 (Scalia, J., dissenting). Justice Scalia relied on \textit{Salerno} for this proposition and quoted the following language from that case: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." \textit{Id.} at 78-79 (emphasis added).

\textsuperscript{152} \textit{Id.} at 74 ("[W]hen a facial challenge is successful, the law in question is declared to be unenforceable in all its applications, and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration.").

\textsuperscript{153} \textit{Id.} at 78.

\textsuperscript{154} \textit{Id.} at 82 ("But the ultimate demonstration of the inappropriateness of the Court's holding of facial invalidity is the fact that it is doubtful whether some of these respondents could even sustain an as-applied challenge on the basis of the majority's own criteria.").
void for vagueness cases. It ignored a line of more recent decisions requiring that a law, if it does not involve First Amendment rights, must be found unconstitutional in all of its application before it can be declared unconstitutionally vague in its entirety on its face. Interestingly, in Kolender, in which the Court also sidestepped this precedent, the challenged law was a public order law, as was the ordinance at issue in Morales. However, in neither case did the Court affirmatively base its decision to allow a facial review on this fact. In Kolender, the majority provided its reasoning on the facial review issue in a footnote. It seemed to be based on a determination that the law implicated First Amendment liberties and therefore, in accordance with the overbreadth doctrine, a facial review was allowed in the void for vagueness analysis.\textsuperscript{155} Quite differently, in Morales, the Court stated its decision was not based on the overbreadth doctrine.\textsuperscript{156} Instead, the Court issued a novel justification for its ability to review the ordinance on its face. This justification would appear to be applicable to very few cases and has not served as guidance as to when a facial challenge is appropriate.

The latest void for vagueness case did not provide a discussion of the issue and did not follow the rule of the plurality in Morales. Instead, it followed the National Dairy line of cases. In Williams the Court stated,

\begin{quote}
[although ordinally, “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,” we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.]\textsuperscript{157}
\end{quote}

The Court in Williams advocated a position consistent with the National Dairy line of cases because it agreed with the rule that a law must be unconstitutionally vague as applied to the litigant in cases that do not concern First Amendment rights.\textsuperscript{158} In addition, when a law does im-

\begin{footnotes}
\item[156] Morales, 527 U.S. at 55.
\item[158] Williams, 128 S. Ct. at 1845.
\end{footnotes}
plicate First Amendment rights, the Court determined that the litigant would not need to survive an “as-applied” challenge.\(^{159}\)

Thus, one could state, in only a loose sense, that there are two groups of cases. There is the National Dairy line of cases requiring that, except where the challenged law involves First Amendment rights, the litigant must prove that the law is unconstitutionally vague in all of its applications. Such a test requires that the litigant survive an “as-applied” challenge before he can proceed with an argument that the law is void for vagueness on its face in its entirety. Then there is another group of cases, where the Court, albeit for various reasons, reviews a law on its face even though the law does not implicate First Amendment rights. All that can be stated with certainty is that the Court does not have a consistent position on facial review in void for vagueness cases, creating uncertainty within the doctrine.

B. History of Facial Review under the Nondiscriminatory Enforcement Requirement

The Court in Kolender determined that the law was unconstitutionally vague solely on the basis that “it encourage[d] arbitrary enforcement,”\(^{160}\) and as mentioned above, the majority did not affirmatively provide a specific rationale to support its facial review. Instead, the Court noted that there was “[n]o authority cited by the dissent [that] support[ed] its argument about facial challenges in the arbitrary enforcement context.”\(^{161}\) This statement is true because Kolender was the first case to reach a decision that a law was unconstitutionally vague on the sole basis that it encouraged arbitrary enforcement. However, later in Morales, Justice Breyer in his concurrence justified his review of the ordinance at issue on its face because he had reached his decision regarding the statute’s vagueness only on arbitrary and discriminatory enforcement grounds.\(^{162}\)

\(^{159}\) Id.

\(^{160}\) Kolender, 461 U.S. at 361.

\(^{161}\) Id. at 358 n.8.

\(^{162}\) City of Chicago v. Morales, 527 U.S. 41, 71 (1999) (Breyer, J., concurring). In Morales, a majority of Justices determined that the ordinance in Morales was void for vagueness under the second prong, the nondiscriminatory enforcement requirement. Id. at 64, 69. However, of that majority, Justice Breyer’s concurrence was the only opinion that discussed facial review where the void for vagueness determination is based solely on the second prong.
The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.\textsuperscript{163}

Justice Breyer then cited to \textit{Lanzetta} for the proposition that “[i]f on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it.”\textsuperscript{164}

Justice Breyer likened the ordinance in \textit{Morales} to the one in \textit{Coates}, stating that like the ordinance in \textit{Coates}, “this [\textit{Morales}] ordinance . . . cannot be constitutionally applied to anyone.”\textsuperscript{165} Justice Breyer’s reliance on \textit{Coates} as support for a facial review is confusing. As mentioned above, the majority in \textit{Coates} set forth no reasoning supporting its ability to review the statute therein on its face, most likely relying on the “automatic” facial review rule being practiced at that time but which, at the time of the decision in \textit{Morales}, had changed.\textsuperscript{166} Justice Breyer, however, appears to recognize this change, arguing that facial review is proper because “the ordinance is invalid in all its applications[,]”\textsuperscript{167} using language from the rule that replaced the “automatic” facial review rule.\textsuperscript{168} It is therefore not clear from his concurrence whether, in citing to \textit{Coates}, he was advocating an “automatic” facial review rule, or if he was following the \textit{National Dairy} line of cases. He did not cite to any of these cases but referenced the rule they stand for—that the law be unconstitutional in all of its applications before it can be invalidated on its face in its entirety.\textsuperscript{169}

In his concurrence, Justice Breyer determined that under the second prong, the statute was vague because it could always be discrimina-

\textsuperscript{163} Id. at 71.

\textsuperscript{164} Id. (citing \textit{Lanzetta} v. New Jersey, 306 U.S. 451, 452 (1939)).

\textsuperscript{165} Id. at 73.

\textsuperscript{166} See supra notes 83-101 and accompanying text.

\textsuperscript{167} \textit{Morales}, 527 U.S. at 71 (Breyer, J., concurring).

\textsuperscript{168} This seems especially true because Justice Breyer stated “the right that the defendants assert, the right to be free from the officer’s exercise of unchecked discretion, is more clearly their own.” Id. at 72. Taken as true that it is an individual right to be free from “officer’s exercise of unchecked discretion” would support an “as-applied” analysis, determining whether the individual had actually been subject to an “officer’s exercise of unchecked discretion.” Id.

\textsuperscript{169} Id. at 71-73.
torily enforced and was therefore invalid in all of its applications.\footnote{Id. at 71.} But it is the absence of an analysis as to whether the law was actually enforced discriminatorily against the individual defendants that indicates that the Breyer concurrence falls in line with the “automatic” facial review rule. Without this “as-applied” determination, there is no proof that the law was unconstitutional in all of its applications, warranting invalidating it on its face in its entirety.\footnote{It cannot be that Justice Breyer was arguing that because he had determined that potentially the ordinance could always be discriminatorily enforced that it was therefore discriminatorily enforced as to the defendants in the case. This reasoning parallels the reasoning used in the notice context, in which the argument is that because the law does not provide any standard of what conduct is prohibited, it cannot provide notice of a standard to the litigant. See, e.g., infra note 173. However, this reasoning is not transferable to the arbitrary enforcement context. In the notice context, if a determination is made that there is no standard provided, then it logically follows that the litigant cannot have notice of a standard. However, in the arbitrary enforcement context, if a determination is made that a law can potentially always be arbitrarily enforced, it does not follow that it was, in fact, arbitrarily enforced against the particular litigant. Thus, presuming that Justice Breyer was not using flawed logic, this presumption leads to the conclusion that he did not make a determination as to whether the law was discriminatorily enforced against the actual litigants, and that he was therefore advocating an “automatic” facial review rule in the arbitrary enforcement context.} Justice Breyer’s opinion only serves to further muddy the void for vagueness analysis because it is not clear which rule he was advocating in the situation in which the void for vagueness analysis is based solely on the second prong.\footnote{Interestingly, the plurality in Morales indicated, in dicta, that in all cases where the decision is based on the nondiscriminatory enforcement prong, a facial review is appropriate. The plurality stated, “imprecise laws can be attacked on their face under two different doctrines,” providing that under the second of such doctrines, “an enactment . . . may be impossibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” Morales, 527 U.S. at 52.} Further, there are no later opinions that specifically discuss a facial review in which the analysis is based solely on the nondiscriminatory enforcement requirement, which would help interpret a position by the Court. Thus, an analysis of facial review in the discriminatory enforcement context is similar to the fair notice context, where there is no clear direction on this issue from the Court.

III. THE COURT’S USE OF THE VOID FOR VAGUENESS DOCTRINE

In reviewing early void for vagueness cases, in which the Court’s practice was an “automatic” facial review and there was only the fair notice requirement, the Court generally followed the principle that the law needed to be standardless to be invalidated on its face in its en-
Thus, the Court in *Lanzetta*, invalidated the law by stating that it was “so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.” This also appeared to be the standard in First Amendment cases in which, for example, in *Winters*, the Court stated, “[i]t leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.” However, in 1972, in *Papachristou*, the Court added the second prong to the void for vagueness analysis. In 1974, in *Goguen*, the Court stated that this second prong was more meaningful to the void for vagueness analysis than the first prong. In this same year, the Court also solidified its rejection of the “automatic” facial review practice outside of the First Amendment context in *Parker* by stating “[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.”

If an “as-applied” analysis is required, then it becomes more difficult to invalidate a law in its entirety because that decision becomes litigation-dependent. If the law is not unconstitutional as to the liti-gant, the law cannot be invalidated in its entirety under this stricter standard. The Court has circumvented the stricter “as-applied” standard either by ignoring it and reverting back to a form of automatic

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173 “This Court has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendment because they contained no standard whatever by which criminality could be ascertained, and the doctrine of these cases has subsequently acquired the shorthand description of ‘void for vagueness.’” *Parker v. Levy*, 417 U.S. 733, 755 (1974) (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Winters v. New York*, 333 U.S. 507 (1948)). The Court in *Parker* then stated, “[i]n these cases, the criminal provision is vague ‘not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’” *Id.* (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).


175 *Winters*, 333 U.S. at 519.


178 *Parker*, 417 U.S. at 756. The Court further stated, [t]he result of the Court of Appeals’ conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court.

*Id.*
facial review,\textsuperscript{179} or by arguing that if the decision was based solely on the second prong, a facial review was proper.\textsuperscript{180} It appears that these deviations, when the Court avoided the “as-applied” standard after 1974 outside of the First Amendment context, are the exception as opposed to the rule.\textsuperscript{181} These exceptions create uncertainty within the doctrine. Moreover, to the extent that “exceptions” is a mischaracterization, and instead cases such as the Kolender and Morales decisions are but the start of a new direction for the doctrine, then the uncertainty would be magnified because each case provided a different rationale to support its facial review.\textsuperscript{182}

Further, the Court’s determination that the second prong is more meaningful could also change facial review where the challenged law involves First Amendment rights. In the past, the Court required a law to be standardless, meaning that it did not provide notice to the litigant or anyone else of the proscribed conduct, to be found unconstitutionally vague.\textsuperscript{183} However, where First Amendment rights are implicated and the litigant has notice, a law could still be invalidated in its entirety under the nondiscriminatory enforcement requirement because it has the potential to be arbitrarily enforced. Under such a standard, irrespective of whether First Amendment rights are implicated, it is not clear when there is enough vagueness to invalidate the law. A law can provide notice and there can be no evidence that the law was arbitrarily enforced, but the law could be invalidated in its entirety under the ambiguous standard of potential for arbitrary enforcement.

IV. Suggested Changes That Will Promote the Court’s Consistent Use of the Void for Vagueness Doctrine

This Paper suggests a strict facial review standard to limit facial review in the void for vagueness analysis. Under such a standard, a court could only invalidate a law in its entirety as unconstitutionally

\begin{footnotes}
\footnotetext[180]{Morales, 527 U.S. at 71-73 (Breyer, J., concurring).}
\footnotetext[181]{See supra notes 179 and accompanying text.}
\footnotetext[182]{See supra notes 130-33, 145-49, 155-56 and accompanying text. In Colautti, the Court did not provide a rationale, but the latest abortion rights case, Gonzales v. Carhart, required an “as-applied” analysis. See Gonzales v. Carhart, 550 U.S. 124, 149 (2007).}
\footnotetext[183]{See, e.g., United States v. Williams, 128 S. Ct. 1830, 1845 (2008), wherein the Court stated that the standard governing the analysis was whether the wording of the law was “so vague and standardless as to what may not be said that the public is left with no objective measure to what behavior can be informed.” Id. (internal quotations omitted).}
\end{footnotes}
vague if the law is unconstitutionally vague in all of its applications, regardless of whether the law implicates First Amendment concerns. In tandem with this suggestion, it is further suggested that the second prong of the void for vagueness analysis be eliminated, such that the only inquiry in determining whether a law is unconstitutionally vague is whether the language of the law provides fair notice to people of ordinary intelligence of what conduct is being regulated. Where fair notice is the only inquiry, following the above strict facial review standard forces a law to be standardless before it can be invalidated in its entirety. It would require a court to determine that a law provides no notice of what conduct is being regulated, before the law could be invalidated on its face in its entirety. If a court determines, instead, that a law gives notice of some behavior that can be constitutionally regulated, the law is not subject to being invalidated in its entirety because the law is not unconstitutionally vague in all of its applications. Therefore, a strict facial review rule, along with a fair notice requirement only, would result in a more consistent application of the void for vagueness doctrine in line with how the United States Supreme Court has generally applied the doctrine.

This analysis must focus only on the fair notice requirement because inclusion of the second prong—the nondiscriminatory enforcement requirement—potentially expands the reach of the doctrine. The second prong allows enacted laws that are not standardless, but instead have a core of clearly prohibited behavior that can constitutionally be proscribed, to be potentially invalidated in their entirety. The Court has determined that the second prong is more meaningful than the first prong to the void for vagueness analysis, and that a statute may be determined to be unconstitutionally vague based solely on this second prong. Further, where the Court has reached a decision that a law is void for vagueness based solely on the second prong, it has conducted a facial review of the law, without requiring that the litigants survive an "as-applied" challenge. Thus, currently a court need only to deter-

185 See, e.g., Morales, 527 U.S. 41.
187 Morales, 527 U.S. at 72. According to Justice Scalia’s dissent, some litigants would not have survived the "as-applied" challenge, nor was the statute void in all of its applications. Id. at 82 (Scalia, J., dissenting). “But the ultimate demonstration of the inappropriateness of the Court's holding of facial invalidity is the fact that it is doubtful whether some of these respon-
mine that the law at issue is unconstitutionally vague based solely on the second prong, which would then allow it to invalidate the law on its face in its entirety if there is a potential for discriminatory enforcement. Arguably, there always is. Any law can be found to allow for discretionary, and therefore potentially discriminatory, enforcement because law enforcement always has discretion in enforcing a law. Thus, under the current void for vagueness test, a law can be specific, and also regulate behavior that the state or federal government is constitutionally allowed to regulate, but, because there is a chance that it might be discriminatorily enforced, even though there is no proof that such discriminatory enforcement has occurred, the law can be invalidated on its face in its entirety. Such leniency grants the judiciary extensive legislative power and creates uncertainty as to the scope of the void for vagueness doctrine.

A. Suggested Change: Strict Facial Review Standard

This Paper suggests the adoption of a strict facial review standard in the void for vagueness analysis. Under such a standard, a court may only invalidate a law in its entirety as unconstitutionally vague if the law is unconstitutionally vague in all of its applications, regardless of whether the law implicates First Amendment concerns. Thus, a litigant would have to establish that the challenged law is unconstitutionally vague “as applied” to the litigant. If the litigant were to meet this requirement, the litigant would be granted relief from prosecution and could challenge the law as unconstitutionally vague on its face in its entirety. In this latter situation, the litigant would need to prove that the law is unconstitutionally vague in all of its other applications before the law could be invalidated on its face in its entirety.

i. Reasons Supporting a Strict Facial Review Standard

There are two reasons supporting this suggested rule. First, the strict facial review standard prevents confusion between facial review in the overbreadth doctrine and facial review in the void for vagueness doctrine. Second, the standard limits unwarranted judicial activism by
dents could even sustain an as-applied challenge on the basis of the majority’s own criteria.” Id. Justice Breyer in his concurrence argued that “every application of the ordinance represent[ed] an exercise of unlimited discretion,” and thus, “the ordinance is invalid in all of its applications.” Id. at 72 (Breyer, J., concurring). However, nowhere in his opinion was there an analysis that the law was discriminatorily enforced against the litigants.

188 See, e.g., Morales, 527 U.S. 41.
preventing the judiciary from invalidating laws with constitutional applications.

The Court has, at times, relied upon the overbreadth doctrine to support facial review in the void for vagueness doctrine. "[O]verbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court." In Kolender, the majority stated, "we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines," in response to Justice White's argument in his dissent that facial review of the law in the case was improper. Justice White argued that the overbreadth doctrine was improperly used as a basis to justify facial review, stating, "to imply . . . that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth . . . ." However, the link between the void for vagueness doctrine and the overbreadth doctrine persists. For example, in the Court's most recent void for vagueness decision, the Court stated,

[a]lthough ordinarily, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

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189 Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 508 (1982) (White, J., concurring) (citations omitted); Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'").

190 Kolender, 461 U.S. at 358 n. 8.

191 Id. at 370 (White, J., dissenting). Justice White believed that there was a "range of conduct that is clearly within the reach of the statute." He argued against the majority decision to invalidate the statute in its entirety on its face based on arbitrary law enforcement, stating, "[i]t is no basis for fashioning a further brand of 'overbreadth' and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the state's power to sanction." Id. at 371.

Thus, the Court has relied upon the overbreadth doctrine to support facial review in the void for vagueness doctrine.

Initially, however, this fact does not mandate adopting the overbreadth doctrine wholesale for challenges to any type of law in the void for vagueness doctrine. The Court has stated that overbreadth is limited to First Amendment rights. It is logical then that facial review in the void for vagueness context cannot be based on the overbreadth doctrine if the law challenged as unconstitutionally vague does not implicate First Amendment rights.

Additionally, it is not clear that the reasoning behind allowing a facial review in the overbreadth context applies in the void for vagueness context when First Amendment rights are implicated. Facial review is allowed in the overbreadth context because it is assumed that an overly broad law causes individuals to steer clear of prohibited behavior, and in doing so, individuals also end up avoiding constitutionally protected behavior. The individual’s right to engage in some constitutionally protected behavior is then chilled due to fear of prosecution under an overly broad law. The individual’s avoidance of prosecution results in a greater chance that the overly broad law will not be challenged as unconstitutional. Thus, when the law is challenged, it is not required that it be unconstitutional as to the litigant. Applying this assumption to the vagueness context, the individual’s behavior would be chilled in the same manner. As a result of a law’s vagueness, individuals will steer far clear of what they believe is the prohibited behavior, and also end up avoiding constitutionally protected behavior.

If the assumption is correct that vague laws chill behavior because individuals will steer farther from the restriction than is necessary, it arguably implies that bright line rules will prevent such chilling of be-

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194 Thus, the overbreadth doctrine should not be a justification for allowing a facial review in the void for vagueness doctrine of a law that concern constitutional rights outside of the First Amendment.
195 Dorf, supra note 139, at 261-62.
196 Id.
havior. Professor Hadfield argues to the contrary and asserts that bright line rules can also chill behavior. She states that a bright line rule can cause “excessive compliance.” Because it may be too costly for some individuals to avoid the bright line rule, they will ignore it. “The effect of the rule is likely to be one of two extremes: either excessive compliance or nil.” She then asserts that under a vague law, individual responses are more likely “to fall between the extremes induced by the bright line rule and thus likely to more closely approach some optimal outcome.” Thus, the justifications for allowing a facial review in the overbreadth context arguably do not neatly transfer to the void for vagueness context. Regardless, these are two separate doctrines.

Thus, in summary, as to the first reason supporting the suggested strict facial review standard, there are several justifications for divorcing

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198 Id.
199 Id.

A bright line rule causes all individuals either to steer into the same safe harbor, even if that harbor is quite costly for some, or to ignore the rule entirely if the harbor is simply too costly. The effect of the rule is likely to be one of two extremes: either excessive compliance or nil. A vague standard, on the other hand, does not attach sharp changes in the probability liability to small changes in a particular behavior selected as the turning point for liability; rather, as behavior improves, there is a gradual reduction in the probability of liability that elicits different responses from different individuals. These responses are likely to fall between the extremes induced by the bright line rule and thus likely to more closely approach some optimal outcome.

Id.

200 Id. ("A vague standard, on the other hand, does not attach sharp changes in the probability liability to small changes in a particular behavior selected as the turning point for liability; rather, as behavior improves, there is a gradual reduction in the probability of liability that elicits different responses from different individuals.")

201 The Court in Parker indicated its concern with the blending of the doctrines.

The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court.

the void for vagueness doctrine from the overbreadth doctrine on the facial review issue. First, the overbreadth doctrine does not support a facial review in the void for vagueness context where the law does not implicate First Amendment rights, because the overbreadth doctrine itself does not apply if the law does not implicate First Amendment rights. Second, the overbreadth doctrine should not serve as a justification for a facial review in situations where the law does implicate First Amendment rights, because these are two separate doctrines. As Justice White has argued, there is no need to conflate these two doctrines. Furthermore, the reasoning supporting facial review in the overbreadth doctrine does not necessarily support or justify the Court's use of facial review in the void for vagueness doctrine.

The second reason for the suggested strict facial review standard is that it limits when the judiciary can declare a law unconstitutional on its face in its entirety, preventing unwarranted judicial activism. "If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face . . . " This reason is the basis for the argument that the law must be unconstitutionally vague in all of its applications before it can be invalidated on its face in its entirety.

If the Court is reviewing a federal law, then the Court's decision that the law is void for vagueness on its face in its entirety effectively prevents any further application of that law or section of the law. Where the law or section of the law had constitutional applications, the Court's decision to invalidate the law in its entirety represents the Court making a legislative decision. If the Court is reviewing a state law, its determination that the state law is void for vagueness on its face in its entirety even though it has constitutional applications is also an example of the Court making a legislative decision. In addition, such a decision has federalism implications. To the extent that the unconstitutional

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202 Kolender v. Lawson, 461 U.S. 352, 370-71 (1983) (White, J., dissenting). Justice White stated that where the statute implicates First Amendment or other "fundamental" interests, more precision may be required, but that "[i]t does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." Id. at 370.

203 Id.


The danger is apparent. Inherent in the use of these doctrines [overbreadth and vagueness] and this standard is a judicial-legislative confrontation. The more frequent
portion is severable, the assumption would be that the Court was only
invalidating the unconstitutional section or sections, which minimizes
these concerns. Further, it is true that the Court has only rarely invali-
dated federal laws.\textsuperscript{205} Moreover, it can be argued that the Court or
other lower courts are only invalidating the law until such time as the
legislature can redraft it with more specificity. The judiciary is forcing
the legislature to perform its duties to draft specific laws, as opposed to
forcing the judiciary to determine the scope of the vague law.

The problem with such a broadly-defined void for vagueness doc-
trine is twofold. First, the indeterminate scope of the void for vagueness
doctrine creates an inability to form criteria to determine the circum-
stances under which the void for vagueness doctrine will result in the
court invalidating the law, hampering legislatures seeking to accomplish
certain objectives through constitutional legislation. Second, this inde-
terminacy in the scope of the void for vagueness doctrine allows the
judicial branch to use the doctrine to invalidate legislation that is not
vague but is otherwise objectionable to that judge or group of jus-
tices.\textsuperscript{206} Justice White, in his dissent in \textit{Kolender}, argued against a broad
void for vagueness doctrine to prevent the Court from using “the doc-
trine [to serve] as an open-ended authority to oversee the states’ legisla-
tive choices . . . .”\textsuperscript{207} Moreover, under the strict facial review standard,
the requirement that the legislature draft laws that are not unconstitu-
tionally vague remains in place. The judiciary could require redrafting
where a law is standardless, which is the traditional benchmark defining
the judiciary’s entry into the legislative sphere by the Court.

\begin{footnotesize}
our intervention, which of late has been unrestrained, the more we usurp the preroga-
tive of democratic government. Instead of applying constitutional limitations, we do
become a “council of revision.” If the court adheres to its present course, no state
statute or city ordinance will be acceptable unless it parrots the wording of our
opinions.

\textit{Id.}\textsuperscript{205}
Goldsmith, \textit{supra} note 12, at 290.
Almost by his very last word on this Court, as by his first, Mr. Justice Holmes admon-
ished against employing “due process of law” to strike down enactments which,
though supported on grounds that may not commend themselves to judges, can
hardly be deemed offensive to reason itself. It is not merely in the domain of econom-
ics that the legislative judgment should not be subtly supplanted by the judicial
judgment.

\textit{Id.} (Frankfurter, J., dissenting).
\textit{Id.} at 374.
\end{footnotesize}
The nondiscriminatory enforcement standard set forth in 2008 in *Williams* will not limit judicial activism. The standard provides that a law is unconstitutionally vague if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." For example, the existence of this standard would not have changed the result in *Morales*. There, the plurality's void for vagueness analysis under the second prong, stated that the law "provides absolute discretion to police officers to decide what activities constitute loitering." Given this determination, the plurality would have reached the same result under the standard articulated in *Williams*. Justice Breyer would also have determined that the ordinance met the standard, as is evidenced by his statement that

"[the ordinance] is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all of its applications." 

Justice Breyer then stated, "[t]his ordinance . . . cannot be constitutionally applied to anyone." Thus, it is reasonable to conclude that even if the standard, as articulated by the Court in *Williams*, had been used in *Morales*, the result would have been the same and the Court would have invalidated the entire ordinance, which had constitutional applications. Thus, the Court has invalidated state laws in their entirety as unconstitutionally vague; when it does so and there is a core of legality, the federal court is improperly substituting its decision for that of the state legislature.

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210 *ld.* at 71 (Breyer, J., concurring).
211 *ld.* at 73.
212 *ld.* at 82 (Scalia, J., dissenting).
213 *ld.* at 371.

But if there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the lawbreaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient
It has been argued that the right to be governed by a valid rule of law justifies a court’s invalidation of an entire law despite constitutional applications. Severability plays an important role in this argument. If a court declares that the unconstitutional portion of a law is severed or that it must be presumed that a law is severable, there can be no complaint because all further judgments will be made based only on the remaining constitutional and valid rule of law. However, if a law is not severable, then some individuals arguably may be governed by an invalid rule of law because as to some individuals the law will be valid. The argument is that a court is then justified in invalidating the law in its entirety. The issue becomes which government branch should determine whether this type of law should stay with its constitutionality to be determined on a case-by-case basis or should be invalidated in its entirety despite having constitutional applications.

In the void for vagueness context, this Paper’s position is that the legislature should determine whether the law remains. If a court has determined that a law is unconstitutionally vague as to the litigant but that the law has constitutional applications, it ought to be the legislature that balances the valid rule of law concerns and makes decisions as to the ultimate fate of the enacted law. Such a decision can be made without a court pointing the way by invalidating the law in its entirety. A court’s decision that the law is unconstitutionally vague as to the litigant

\[\text{Id.}^{214}\] For an argument that such invalidation of the entire statute is necessary, see Dorf, \textit{supra} note 139, at 278, in which the author argues that for certain types of laws, the constitutional infirmities cannot be resolved by severing the unconstitutional portions.

\[\text{Id.}^{215}\] Dorf, \textit{supra} note 139, at 278.

\[\text{Id.}^{216}\] For an argument that such invalidation of the entire statute is necessary, see Dorf, \textit{supra} note 139, at 278, in which the author argues that for certain types of laws, the constitutional infirmities cannot be resolved by severing the unconstitutional portions.

\[\text{Id.}^{217}\] A justification for the federal government’s infringement on state sovereignty is the protection of individual rights. The federal government, through the United States Supreme Court, acts to protect individuals from the coercive power of the state in the area of constitutionally guaranteed rights. Goldsmith, \textit{supra} note 12, at 290. In the situation in which the Supreme Court has the power to invalidate a state law in its entirety without an “as-applied” analysis doing so may not protect any known individual rights in need of protection. It is only hypothetical applications of the law that are the concern. The Court has often expressed its distaste
provides notice of the court's opinion that the law should be redrafted if
the legislature intended to proscribe the litigant's conduct. The court
will have sent the message to the legislature without invalidating a law
with constitutional applications.\textsuperscript{218}

The suggested strict facial review standard prevents a court from
invalidating a law on its face in its entirety when it has constitutional
applications. However, it allows vague laws to remain on the books,
imposing a cost to individuals to determine what behavior is governed
by the vague law. If a law is clear as to the behavior that is regulated, or
in other words, if the wording of a law provides notice to a person of
ordinary intelligence of what behavior is governed, then that cost is low.
But where a law is vague, the core of clearly regulated behavior is small,
and it would be difficult to say that the law is only vague at the margins,
then the cost to individuals is high. In this situation, the individual
must hire a lawyer or risk the costly consequences of an arrest. Thus,
the benefit of limiting judicial activism in the void for vagueness context
must be weighed against the cost to individuals of vague laws.

While only a certain level of vagueness can be tolerated, certainly
some level of vagueness can be tolerated because of the benefits of vague
laws. Specifically, Professor Hadfield notes, "[a] small degree of experi-
mentation by individuals acting on the margin of the permissible may
be deemed valuable because of uncertainty among lawmakers and regu-

\textsuperscript{218} The dissent in \textit{Winters} made this point when it stated,

\begin{quote}
[h]ow to escape, on the one hand, having a law rendered futile because no standard is
afforded by which conduct is to be judged, and, on the other, a law so particularized
as to defeat itself through the opportunities it affords for evasion, involves an exercise
of judgment which is at the heart of the legislative process. It calls for the accommo-
dation of delicate factors. But this accommodation is for the legislature to make and
for us to respect, when it concerns a subject so clearly within the scope of the police
power as the control of crime.
\end{quote}

lators about what constitutes optimal behavior.” Thus, this experimenta-
tion will sharpen the focus of the behavior that should be regulated. Additionally, Professor Luna mentions that “[o]ne goal of intentional vague-
ness is to ensure that anti-social conduct does not avoid punishment through de
t lawyering of linguistic loop-holes.”

But the concern is whether setting the bar at invalidation of only vague
laws that are standardless is too low, and the resulting cost to individuals
is too high.

Importantly, the suggested changes still require a court to initially
determine whether a law provided fair warning to the individual. This
requirement prevents prosecution of an individual who had no notice in
that particular situation, even though the law might still have other con-
stitutional applications and not be subject to invalidation in total. But
being subject to arrest presents a substantial cost to individuals, and this
point brings into sharp focus a core concern regarding the suggested
changes advocated. This Paper concludes that the proposed changes
limiting the scope of the void for vagueness doctrine to prevent unwar-
ranted judicial activism and to create a more definitive doctrine impose
an acceptable cost to individuals forced to determine the scope of vague
laws that are not standardless.

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219 Hadfield, supra note 197, at 549. The author takes this analysis even further by providing
that

[t]he diversity of activities encouraged by vagueness, in turn, contributes to decision-
makers’ refinement of the law. Vagueness introduces variability into the types of
cases heard by courts or regulatory agencies. This variability gives these institutions
more information about the nature of the activity regulated, thus improving their
ability to develop law.

Id.

220 Debra Livingston, Gang Loitering, the Court, and Some Realism About Police Patrol, 1999
SUP. CT. REV. 141, 195 (1999) [hereinafter Livingston, Gang Loitering]. Professor Livingston,
in her proposal for the Court’s reviewing discretion under the void for vagueness doctrine,
suggests that it is important that police departments be allowed to experiment with methods to
eliminate discretion.

By tolerating some measure of disagreement among state and lower federal courts
regarding the reasonableness of [different methods of promoting police accountability]
... the Supreme Court might further encourage this experimentation. The Court
might also maximize its own ability over time to make at least some judgments about
the relative efficacy of these various methods of ensuring that the exercise of police
discretion is reasonably constrained.

Id.

221 Erik Luna, Transparent Policing, 85 IOWA L. REV. 1107, 1138-39 (2000). The Court has
stated that “[i]f a law is framed with narrow particularity, too easy opportunities are afforded to
nullify the purposes of the legislation.” Winters, 333 U.S. at 525 (Frankfurter, J., dissenting).
There is yet another concern with the strict facial review standard. It has been stated that a strict facial review standard, which requires that a law be unconstitutionally vague in all of its applications in order to be invalidated, mandates that a court uphold all laws because the standard is too high and no law is unconstitutionally vague in all of its applications. However, the United States Supreme Court has held that a law is unconstitutionally vague in all of its applications in those cases in which the Court determined that the law at issue provided no standard at all. Goguen is an example of a case in which the Court determined that the statute, which involved First Amendment rights, was unconstitutional as applied to Goguen, and invalidated the statute because it was found to be unconstitutional in all of its applications. The Court has not shied away from invalidating enacted laws, and it seems unlikely that the suggested changes will result in all enacted laws being upheld. Additionally, any standard should encourage a finding of

222 Robert Batey, Vagueness and the Construction of Criminal Statutes—Balancing Acts, 5 Va. J. Soc. Pol'y & L. 1, 16 (1997) ("Further, a heightened impact may push the court into facial review of the statute's vagueness, which almost always presages the voiding of the statute."). Professor Hill has provided that, "[i]t is doubtful that there are many statutes, if indeed any, that are so clear that they will never receive invalid applications, or so vague that they will never receive valid applications—assuming the inadequacy of notice is the sole basis of constitutional vagueness." Hill, supra note 63, at 1295. It should be noted that the requirement is that the statute is unconstitutional in all of its applications and not that the statute is valid in all of its applications, as the first part of the quote suggests. Morales, 527 U.S. at 81 (Scalia, J., dissenting).

223 See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) ("Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.").


225 Id. at 578. The majority cited Coates for the proposition that "[t]his criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."") Id. at 578 (quoting Coates, 402 U.S. at 614). The Court went on to provide, "[s]uch a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. . . . Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language." Id. at 578. Thus, although the Court did not state specifically that it was invalidating the statute on its face or that it was unconstitutional in all of its applications, it is a fair assumption from this quoted language. It must be noted, however, that Justice White concurred in this opinion, finding that the statute did have a core of behavior that was constitutional and determining that the statute was not vague as applied to Goguen. However, Justice White did not join the majority because he determined that the statute was violative of the First Amendment. Id. at 590 (White, J., concurring).
the constitutionality of the law, as opposed to facilitating its invalidation. Any error should be on the side of the Court upholding the law.\textsuperscript{227}

Thus, the suggested strict facial review standard allows vague laws that are not standardless to remain in place, imposing a cost on individuals to determine the scope of a vague law. The Paper asserts that this is an acceptable cost when weighed against the benefit of the standard preventing unwarranted judicial activism and the benefit of a clearer void for vagueness doctrine.

The next section then argues that the second prong, the nondiscriminatory enforcement prong, of the void for vagueness analysis should be eliminated. Its inclusion in the void for vagueness analysis enables a court to avoid the stricter facial review standard advocated above, contrary to the perceived benefits of the standard. Further, its inclusion perpetrates the false belief that the judiciary is competent to limit discriminatory enforcement through the void for vagueness doctrine, when in fact it does not do so. This belief creates an unacceptable cost to individuals by allowing continued discriminatory enforcement of laws.

B. Suggested Change: Fair Notice Requirement Only

The Paper suggests that the second prong, the nondiscriminatory enforcement requirement, be eliminated from the void for vagueness analysis. Thus, the analysis would be limited to the fair notice requirement and whether the language of a given law provides people of ordinary intelligence with fair notice of the prohibited conduct. Under the suggested strict facial review standard proposed and explained, if a law does not provide notice to the litigant and the litigant further argues that the law should be invalidated on its face in its entirety, the litigant would need to establish that the law was unconstitutionally vague in all of its other applications. Under this suggested standard, only where a court determines that the law is standardless, meaning that it provides no notice of the conduct regulated to individual litigants, law enforcement, and/or adjudicators,\textsuperscript{228} would it be unconstitutional in all of its

\textsuperscript{227} United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963) ("Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.").

\textsuperscript{228} Such a determination applies to all people of ordinary intelligence and thus, by definition, a court must consider whether there was notice of the conduct regulated to law enforcement or adjudicators for purposes of enforcement. Traditionally, the view has been that if the statute
other applications and subject to invalidation in its entirety. Applying
the stricter facial review standard in conjunction with limiting the void
for vagueness analysis to the fair notice requirement would result in a
court only invalidating those laws that it deems standardless, thereby
creating a more definitive and predictable void for vagueness doctrine.

i. Fair Notice is Not Lawyer’s Notice or Actual Notice

At the outset, a requirement that the language of a law provide
ordinary people with fair notice of the conduct being regulated is a legit-
imate basis for determining whether the law is unconstitutionally vague
and violative of due process. Importantly, the Court has defined notice
in the void for vagueness doctrine and it is not lawyer’s notice, nor is it
actual notice.

Actual notice would be ideal. Individuals would have complete
information regarding the legal rules that govern their behavior. Based
on this complete information, everyone could choose to act with assur-
ance that their conduct is legal. However, the reality is that in the
United States, a person’s behavior is governed by the thousands of ex-
isting common law cases, along with an ever-increasing enactment of
statutory law and administrative regulations which are also subject to
interpretation by the judiciary. Thus, it is impossible for an individual
to have complete information regarding governing rules. Further,

provided “fair notice” to an individual it provides notice to the enforcing authority. City of
Chicago v. Morales, 527 U.S. 41, 95 (1999) (Scalia, J., dissenting). “If the statute had been
deemed adequate with regard to notice, it was apparently deemed adequate with regard to all the
other concerns or components of the vagueness doctrine.” Hill, supra note 63, at 1304. The
point Professor Hill was making is that the Court has always looked at factors other than notice
but at all times it has been the notice requirement that was the governing standard. “The Court
has repeatedly declared that what the Constitution requires is fair warning of what the law
forbids.” Id. at 1304 n.68.

229 Conversely, a person could choose to engage in conduct that the person knows is not legal
assuming some risk of punishment. Again, the punishment associated with that behavior would
ideally be proportional to how far the person strays from the sphere of assured legal conduct.
230 Even with the massive proliferation of governing rules, “ignorance of the law or a mistake
of law is no defense to criminal prosecution.” Cheek v. United States, 498 U.S. 192, 199
(1991). A justification for this maxim is that “to admit the excuse at all would be to encourage
ignorance where the law-maker has determined to make men know and obey, and justice to the
individual is rightly outweighed by the larger interest on the other side of the scales.” OLIVER
W. HOLMES, THE COMMON LAW 48 (1881). The Supreme Court has admitted that
[the present laws of the United States and of the forty-eight States are thick with
provisions that command that some things not be done and others be done, although
persons convicted under such provisions may have had no awareness of what the law
required or that what they did was wrong doing. The body of decisions sustaining
given the judge and jury system, it is not possible to predict with certainty what behavior will subject a person to punishment. The legal profession exists to synthesize this vast amount of legal information and predict whether particular conduct is within legal boundaries. Such opinions are only given if asked for and if the individual possesses the requisite time and money. Several authors believe that the notice that the Court is referring to in the void for vagueness analysis, and the best notice that can be obtained within the U.S. legal system, is what has been called “lawyer's notice.” However, the Court in its void for such legislation, including innumerable registration laws, is almost as voluminous as the legislation itself.

Lambert v. California, 355 U.S. 225, 230 (1957) (Frankfurter, J., dissenting). Such a system, however, provides job security for the legal profession. It is not expected that a layperson, even if quite capable, would synthesize the existing law and determine the governing rules associated with any particular conduct. It is anticipated that such a person would seek the advice of a lawyer and then use the information to engage in a risk analysis. This expectation can be viewed as a justification for the maxim. However, the reality is that people do not consult lawyers for advice regarding daily activities. Instead, if consultation occurs, it is in specialized situations such as the need for a will, divorce, or when the legal system is otherwise forced upon a person due to the government exercising its powers to enforce these governing rules.

Perhaps in recognition of this fact, this maxim is tempered. The rule of strict construction purports to limit this maxim with the suggestion that courts should construe statutes strictly against the government. Jeffries, supra note 15, at 210. Further, the required element of “willfulness” tempers this common law rule. See, e.g., Cheek, 498 U.S. at 199-200. Courts as a matter of statutory construction may also attribute to a statute the requirement of a certain mental element.” Lambert, 355 U.S. at 231. Specifically, in Lambert, the Court provided, “[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” Id. at 229-30.

A thorough discussion of these doctrines goes beyond the scope of this Paper. The point is that individuals do not have, and arguably do not anticipate, actual notice of the law governing their behavior. However, individuals still do not consult attorneys at every turn. Even when an attorney is consulted, the judge and jury system prevents absolute certainty as to the result of any application of governing rules. Note, Due Process Requirements of Definiteness in Statutes, 62 Harv. L. Rev. 77 (1948-1949) [hereinafter Due Process Requirements of Definiteness in Statutes]. There are ways that a court can, if it chooses, avoid strict enforcement of the maxim regarding ignorance of the law. Such discretion exists because the legal system in the United States as designed does not facilitate actual notice of the law or certainty as to its application.

Even in the clearest case of liability, one can imagine the many factors along the way, including law enforcement discretion, which could prevent punishment, especially if punishment does not include mental health treatment.

Due Process Requirements of Definiteness in Statutes, supra note 230, at 80 (“In general, it would seem fair to charge an individual with such knowledge of a statute's meaning and applicability as he could obtain through competent legal advice . . . ”); Krueger, supra note 21, at 268 n.17 (“Although it is doubtful in many instances that a statute is consulted for guidance, the
vagueness decisions, when discussing fair notice, continually and consistently uses the terms “common” or “ordinary men” with “common” or “ordinary intelligence.” Such terms are inconsistent with the concept of “lawyer’s notice.” The Court’s use of these terms indicates that it is concerned with notice to ordinary people.

Thus, any legitimate discussion of fair notice within the void for vagueness doctrine must focus on notice to ordinary people, as opposed to “lawyer’s notice.” However, the history of the fair notice requirement also demonstrates that the Court is not seeking, nor does it seem realistic to expect, actual notice to individuals. The Court has used, and continues to use, the terms “fair notice” or “fair warning.” The Court has referred to “actual notice,” but a close look at the context reveals that the Court was using “actual notice” to downplay the effectiveness of the fair notice requirement as a justification for its decision that the second prong, the nondiscriminatory enforcement requirement was more meaningful to the void for vagueness analysis. The Court stated in *Goguen* that, “[i]n such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature estab-

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233 *See supra* notes 46-49 and accompanying text.

234 The focus of this section is fair notice to individuals. Notice is less of a concern with corporate entities because they are more likely to obtain legal advice and better able to absorb the risk from a wrong decision.

[T]he vagueness of many commercial standards is not regarded as problematic. Courts may implicitly assume that regulated commercial entities can efficiently satisfy their need to be informed about a wide range of detailed legal rules by investing in a high fixed cost/low marginal cost system of obtaining the information necessary to bring greater precision to vaguely worded legislation . . . . Also, regulated commercial entities’ access to markets for liability insurance reduces the cost of bearing the risk of uncertain liability rules.

Hadfield, *supra* note 197, at 551. It would appear that courts require less notice to corporations. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.


235 *See infra* notes 236-39 and accompanying text.

236 *See supra* notes 51, 53, 55-56 and accompanying text.
lish minimal guidelines to govern law enforcement.” Inconsistent
with this statement, earlier in the opinion, the Court referred to the
“settled principles” of the void for vagueness doctrine, enunciating as
one principle that “[t]he doctrine incorporates notions of fair notice or
warning.” “Fair” notice or warning implies a standard that provides
less notice than actual notice. The discussion of the history of the fair
notice requirement demonstrates that the Court has never required the
law to provide actual notice or even precise guidelines, but has instead
set the standard at reasonable certainty within the language of the en-
acted law, and has advised that individuals bear some risk in having to
estimate whether their behavior that is “perilously close” to prohibited
conduct is itself prohibited. Previously, due process concerns were
satisfied by a level of notice that was less than actual but more than
lawyer’s notice.

If this summary of precedent is acceptable, then it is clear that due
process does not require actual notice. Yet arguments raised against the
fair notice standard of the void for vagueness doctrine are in essence
arguments for an actual notice standard. Professor Jeffries has com-
mented that the providing of fair notice is a rhetorical concept, arguing
that an ordinary citizen, given the vast amount of available law,
cannot synthesize that law and determine the governing rule or rules
and what conduct falls therein. Thus, the Court’s requirement of
reasonable clarity within the text of the law is not useful to an individual
and notice is therefore a rhetorical concept.

However, this concern is essentially an argument for an actual no-
tice requirement, which raises an initial question whether it is neces-

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238 Id. at 572. The Court in Kolender mentioned actual notice, citing this language in
239 See supra note 59 and accompanying text.
240 “The rhetoric of fair warning is plausible and comprehensive, but in many contexts it is
also shallow and unreal. Its explanatory value at the level of doctrinal rationalization is pur-
chased at the cost of unusual disparity with actual practice.” Jeffries, supra note 15, at 206.
241 Id. at 208.
242 “This process of research and interpretation is anything but easy. For the trained
professional, the task is time-consuming and tricky; for the average citizen, it is next
to impossible. Where there is a lawyer at hand, this kind of notice may be meaning-
ful. But in the ordinary case, the notice given must be recovered from sources so
various and inaccessible as to render the concept distinctly unrealistic.

Id.
242 Professor Jeffries concluded, “[i]n short, the fair warning requirement of the vagueness
doctrine is not structured to achieve actual notice of the content of the penal law.” Id. at 207.
sary to make actual notice the standard, given that individual choices based on actual notice will always have uncertain outcomes. That is, even if an individual had actual notice of the law, it is not possible within the common law system to predict with certainty what behavior will result in punishment due to the possibility of differing interpretations of the common law by judges and lawyers. In legal utopia, there would be actual notice with certainty of result. In reality, it seems self defeating, in light of this uncertainty of result caused by the common law system, to lament the inability to provide certainty in the form of actual notice.

The second question is whether the impossibility of actual notice, caused by an individual's inability to synthesize the case law construing a law, is actually detrimental to that individual's liberty. The judicial constructions that are the focus of this concern are often narrowing a law to ensure its constitutionality. In such cases, a court's limited construction of a given law has decreased the number of individuals that fall within its scope. Thus, when a law is narrowed to prevent its unconstitutionality, the individuals that fall outside of its scope, despite

243 Hadfield, supra note 197, at 546 ("Some level of practical uncertainty is unavoidable: even juries given precise instructions and judges subject to appellate review will sometimes make mistakes. Thus individuals can rarely be entirely sure about the legal consequences of the behavior in which they engage.").

244 The assumption here is that the law is not standardless because if it were, then the law should be rendered void in its entirety. Instead, it is assumed that the law sets forth some core of behavior that can constitutionally be prohibited. Further, Professor Stuntz has provided that "a blanket knowledge-of-the-law requirement would disable any criminal justice system." William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 589 (2001). Lastly, Professor Hadfield states that "[f]rom an economic perspective the judgment is that practical uncertainty is 'fair' (as in 'fair notice') because the cost of reducing uncertainty is prohibitive." Hadfield, supra note 197, at 546.

245 "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982) (emphasis added) (citations omitted); Kolender v. Lawson, 461 U.S. 352, 355 (1983). "This rule as to statutes charged with vagueness is but one aspect of the broader principle that this Court, if fairly possible, must construe congressional enactments so as to avoid a danger of unconstitutionality." United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (quoting United States v. Raines, 362 U.S. 17, 22 (1960)).

246 But see Harris, 347 U.S. at 635 (Jackson, J., dissenting) (expressing Justice Jackson's concern that such interpretations can run contrary to the ex post facto provision of the Constitution).
their individual lack of actual notice of the scope of the law, will not have had their liberty curtailed and would then not be likely to complain that the narrowing of the law would apply to them. When a law is narrowed and individuals still fall within its scope, this narrowing and the lack of notice of judicial construction is of no consequence to them, as their liberty will not have been affected in any way. Those individuals were at all times subject to the law. It does not seem unreasonable to assume that within the concept of fair notice, the individual is expected to understand that a court may narrow a law to preserve its constitutionality, and that this narrowing may occur through several judicial decisions.

On the flip side, there can be judicial decisions that broadly interpret the scope of a law and present notice issues.\textsuperscript{247} However, it seems reasonable for individuals to heed the warning provided by Justice Holmes that an individual remains responsible for behavior that is perilously close to known prohibited behavior.\textsuperscript{248} This is especially so given the realities of the United States legislative system. It is impossible for every statute to be drafted in non-vague terms.\textsuperscript{249} Furthermore, it might

\textsuperscript{247} If judicial interpretation broadens a law, its expanded scope would not apply to the litigant in that case. Bouie v. City of Columbia, 378 U.S. 347, 350 (1964). But where the Court interprets a law broadly, it creates notice problems. \textit{id.} at 352. In \textit{Bouie}, the Court determined that there was a lack of notice due to retroactive application of an interpretation of a trespass statute. \textit{id.}

\textsuperscript{248} Justice Thomas made this point in his dissent in \textit{Morales} when he stated, "[t]he term 'loiter' is no different from terms such as 'fraud,' 'bribery,' and 'perjury.' We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise." City of Chicago v. Morales, 527 U.S. 41, 113 (1999). In \textit{Lambert}, the Court upheld the defendant's claim that she had no notice of the need to register because she had previously committed a felony. Lambert v. California, 355 U.S. 225, 229-30 (1957). Thus, there will be times when a defendant could truthfully testify that she did not know about the particular statute under which she was charged. But the answer to this problem is not within the void for vagueness doctrine. See \textit{supra} note 230 for a brief discussion of doctrines that courts may use to limit prosecution where the litigant might be ignorant of the law.

be questioned whether such drafting would be more beneficial to society than allowing future behavior determine the proper scope of the law.\textsuperscript{250}

Actual notice would be optimum. However, given the impossibility thereof, it seems self-defeating to require the impossibility of actual notice, especially where the result of a choice based on actual notice will still be subject to uncertainty. Regardless, criticisms of the void for vagueness doctrine, and the fair notice requirement specifically, cannot be based on the wish for an actual notice system. Putting actual notice aside, fair notice of the regulated conduct from the language of a law is useful to an individual. It is useful despite the fact that the law might be narrowed to preserve its constitutionality because such narrowing does not adversely affect the individuals governed by the law. Moreover, even if the judicial construction broadens the law, it is reasonable for individuals to remain responsible for behavior that is perilously close to known prohibited conduct.\textsuperscript{251} Thus, given the realities of the legal system in the United States, fair notice of the proscribed conduct, such that an ordinary person reading the language of a law could understand it, satisfies due process concerns and is a legitimate basis for determining whether a law is unconstitutionally vague.\textsuperscript{252}

But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.

\textit{Id.\textsuperscript{250}} Hadfield, \textit{supra} note 197, at 549.

\[\text{[I]}\text{t suggests that the value to society of encouraging diversity in the behavior of individuals may also lie behind the vagueness of some legal rules. One of the consequences of vague rules about speech or commercial behavior, for example, is to permit a degree of diversity in the messages individuals communicate, the products they produce, or the means of production they employ—without completely ignoring the estimated risks of harm to society should some of the messages or products or means of production become widespread. A small degree of experimentation by individuals acting on the margin of the permissible may be deemed valuable because of uncertainty among lawmakers and regulators about what constitutes optimal behavior.}\]

\textit{Id.\textsuperscript{251}} Most certainly, the system cannot operate unless the burden is on individuals to determine the applicable law because, as stated by Professor Jeffries, such a rule that ignorance or mistake of the law is a defense allows for a decision that each person would be governed by their own version of what the law is. “Treating ignorance or mistake of law as a defense would mean that, for that individual, the law in fact is what he or she believed it to be, rather than what it is for everybody else.” Jeffries, \textit{supra} note 15, at 57.

\textit{Id.\textsuperscript{252}} An additional argument against this point is that there may be circumstances where the law provides notice but still may be discriminatorily applied. This may be true for an ordinance
ii. Reasons Supporting Fair Notice Requirement Only

a. Prevents Circumventing the Suggested Strict Facial Review Standard

Accepting the premise that the fair notice requirement is a legitimate basis for determining whether the law is unconstitutionally vague under the due process clause, there are then several reasons supporting the suggested rule to eliminate the second prong, the nondiscriminatory enforcement requirement. Initially, under current precedent, the inclusion of, and more specifically, the elevation in importance of the second prong expands the potential reach of the void for vagueness doctrine because it allows for an expanded or discretionary application of facial review. Where the void for vagueness decision is made solely based on the second prong there has been no determination as to whether the law was applied in a discriminatory manner as to the litigants bringing the suit. In *Kolender*, the majority invalidated the statute on its face as unconstitutionally vague on the grounds that the statute allowed for arbitrary and discriminatory enforcement and did not require that the litigant prove that the law had been discriminatorily applied as to him. The *Kolender* majority seemed to base its decision to review the law facially on the fact that there were First Amendment liberties at issue, thereby implicating the overbreadth doctrine and allowing a facial review in a void for vagueness challenge. Further, in *Morales*, the plurality stated that “imprecise laws can be attacked on their face under

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253 See supra notes 160-71 and accompanying text.

254 *Kolender v. Lawson*, 461 U.S. 352, 355 (1983). Instead, the Court criticized the White dissent as not having any authority that supported its position regarding the need to have a law be unconstitutional in all of its applications even where the decision to void the law as unconstitutionally vague is based on arbitrary and discriminatory enforcement. “No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context.” Id. at 358 n.8. But the White dissent could not rely upon any authority for this proposition because *Kolender* was the first case wherein the Court relied solely upon the nondiscriminatory enforcement requirement, to reach its decision within the void for vagueness analysis.

255 Id. at 358 n.8. See supra note 133 and accompanying text.
two different doctrines,” providing that under the second of such doctrines, “an enactment . . . may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.” Justice Breyer, in his concurrence in Morales, conducted a facial review to determine that the law was unconstitutionally vague based solely on the second prong. He did not state, as the plurality did, that facial review is always proper when conducting an analysis based on the second prong. Instead, his analysis on the facial review issue, although long, does not clearly set forth a basis for the facial review. But what is clear is that his opinion makes no mention of whether the law was actually discriminatorily enforced against the litigant. Thus, in those opinions in which the Court determined the law was unconstitutionally vague solely because it allowed for arbitrary and discriminatory enforcement, the Court invalidated the law in its entirety based on a facial review. Because these decisions were reached without a determination that the law was unconstitutionally vague as applied to the litigants, the laws were invalidated in their entirety without a determination that they were unconstitutional in all of their applications as would have been required by a strict facial review standard.

These decisions allow a court to expand the void for vagueness doctrine to invalidate laws in their entirety due to a lax facial review standard; regardless of the specificity of the language of the law, because

256 Morales, 527 U.S. at 52 (citing Kolender, 461 U.S. at 358).
257 Id. at 71-73 (Breyer, J., concurring); see supra note 171 and accompanying text.
258 Professor Cass Sunstein posits that the Court’s invalidation of a law is not judicial activism but is instead judicial minimalism because it allows the Court to postpone the substantive constitutional decision. Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 7-8 (1996). He states that it is “‘democracy-forcing’ in that it requires legislatures to speak with clarity.” Id. at 25. This view initially presupposes that the legislature did not speak with clarity as to every application of the law. Further, it presupposes that the appointed Court, as opposed to the elected legislature with its resources for investigation of these matters, is in the best position to determine whether the area of law is in need of change. But it is most troubling in the void for vagueness context because specific laws do not limit law enforcement discriminatory enforcement, making the whole exercise for naught. In this author’s opinion, judicial minimalism and decisional minimalism, however the term is coined, within the void for vagueness doctrine occurs when the Court limits facial review to those circumstances in which the law is unconstitutional in all of its applications, and then only in that limited circumstance does the right to be governed under a valid rule of law require that the law be declared invalid in its entirety.
discretion in applying the law is always present.\textsuperscript{259} The sheer volume of rules that can be enforced and the limited resources with which to do so allows for this discretion.\textsuperscript{260} Laws are not self-executing. Police officers and prosecutors must exercise discretion on a daily basis in deciding which laws will be enforced against which people.\textsuperscript{261} The number of laws that can be enforced allow police officers and prosecutors to threaten enforcement of a variety of laws.\textsuperscript{262} In the criminal law context, police use such threats to maintain peace without the necessity of arrest, or police may enforce “commonly violated, low-level regulations to pursue broader law enforcement goals . . . .”\textsuperscript{263} The police’s use of threatened enforcement can achieve important objectives by preventing the need for arrest and preventing serious crime.\textsuperscript{264} But the point is that the police have the discretion to make this determination.\textsuperscript{265} Furthermore, prosecutors have an enormous amount of discretion to decide whether the evidence supports charging a person with a crime and sub-

\textsuperscript{259} Stuntz, supra note 244, at 506; Jeffries, supra note 15, at 197 (“Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law.”).

\textsuperscript{260} Luna, supra note 221, at 1139. Luna calls it a “wild proliferation of penal codes” and states, “[t]his legislative obsession means more banned conduct and conduct banned in more ways, resulting in a substantial expansion of executive discretion.” Id. at 1138.

\textsuperscript{261} Id. at 1140-41 (“Police and prosecutors exercise virtually unlimited discretion to administer the relevant penal proscriptions.”); Morales, 527 U.S. at 109 (Thomas, J., dissenting) (“In order to perform their peacekeeping responsibilities satisfactorily, the police inevitably must exercise discretion.”); Stuntz, supra note 244, at 507.

\textsuperscript{262} Professor Stuntz’s position is that prosecutors are the criminal justice system’s real lawmakers because American criminal law “covers far more conduct than any jurisdiction could possibly punish.” Stuntz, supra note 244, at 508. “[O]nce legislators speak, once a crime is formally defined, police and prosecutors face the following choice—reinforce the message by enforcing the new law, negate the message by leaving the law unenforced, or revise the message by enforcing it only in certain kinds of cases or against certain kinds of defendants.” Id. at 521-22.

\textsuperscript{263} Livingston, Gang Loitering, supra note 220, at 175; Stuntz, supra note 244, at 539. [P]olice benefit from laws that criminalize street behavior that no one wishes to actually punish, solely as a means of empowering them to seize suspects. This is the force that drives much of the current movement to expand the range of so-called “quality of life” offenses, crimes that cover low-level street behavior that will only rarely be prosecuted, but that often serve as a convenient basis for an arrest and, perhaps, a search. Id.

\textsuperscript{264} Livingston, Police Discretion, supra note 7, at 589 (“Police scholars recognize that ‘it is especially desirable’ in the community policing context ‘that officers have the option, except when a serious offense is committed, to choose not to enforce the law if another alternative appears more effective.’”).

\textsuperscript{265} Livingston, Gang Loitering, supra note 220, at 176.
sequently negotiating a plea bargain. There is discretion at every stage of law enforcement.

Therefore, where there is no requirement that a court determine that a law was discriminatorily enforced as to the litigant, if a court is determined to review a law on its face to facilitate invalidating it in its entirety, it need only base its decision on the nondiscriminatory enforcement requirement. The Supreme Court has determined that the second prong is more meaningful to the void for vagueness analysis and that it can be the sole basis upon which a court determines whether a law is unconstitutionally vague. Thus, a court can decide that only the nondiscriminatory requirement applies and then decide that there is a possibility, as there arguably always is, that the law will be discretionarily and thus discriminatorily enforced. Such a decision allows a court to then invalidate the law in its entirety, even if the law clearly provides notice. The nondiscriminatory enforcement requirement potentially expands the void for vagueness doctrine by expanding a court’s ability to invalidate laws in their entirety by avoiding the strict facial review standard.

This point is especially true as to public order laws, and it has only been cases concerning public order laws in which discriminatory enforcement has been the main concern. A police officer may choose to enforce a public order law or she may choose instead to exercise a peacekeeping function by only using the threat of enforcement to keep order. A police officer will always have discretion to enforce or not enforce the law as to these minor crimes. Thus, all public order laws can be invalidated in their entirety because they can by definition be discriminatorily enforced given that it is always within an officer’s discretion to enforce the rule of law. All a court must find is potential discriminatory enforcement to find a law unconstitutionally vague.

266 Luna, supra note 221, at 1140-41. “Police and prosecutors exercise virtually unlimited discretion to administer the relevant penal proscriptions.” Id. at 1140.

267 Strosnider, supra note 9, at 118 (“Statutes challenged under the arbitrary enforcement prong thus now seem to enjoy a position as to standing formerly reserved for overbroad statutes, even when the statute—as in Morales—does not infringe First Amendment freedoms.” (citations omitted)); see supra notes 160-71 and accompanying text for a discussion of facial review when the void for vagueness analysis is based solely on the nondiscriminatory enforcement prong.

268 Public order laws bring the debate into sharp focus because they are victimless crimes that are fraught with the possibility of discriminatory enforcement. Whereas more serious crimes generally have victims and prosecutors involved to promote regular administration. Livingston, Police Discretion, supra note 7, at 610-11.

269 The latter option is preferred.

270 See supra notes 261, 266 and accompanying text.
Thus, because discretion always exists, with the corresponding potential for discriminatory enforcement, a court can reach a decision as to whether the public order law is unconstitutionally vague based solely on the nondiscriminatory enforcement requirement. Under current precedent, in such a situation, a court can review a law on its face with the ability to ultimately invalidate a law in its entirety.

As demonstrated using the analysis of the law at issue in *Morales*, following the nondiscriminatory enforcement requirement articulated by the Court in *Williams* would not have prevented the *Morales* plurality or Justice Breyer, who concurred, from invalidating the law in its entirety. The requirement still allows for circumventing the suggested strict facial review standard. The absence of a strict facial review standard creates uncertainty within the doctrine and allows for unwarranted judicial activism. Thus, because the nondiscriminatory enforcement requirement circumvents the strict facial review standard, it should be eliminated.

b. *The Analysis Outside of the Public Order Law Context is Repetitive*

The expanded judicial power to invalidate enacted laws in the public order context and arguably in other contexts, is the first reason to eliminate the second prong of the void for vagueness analysis. The second reason is that outside of the public order law context, there is no need for the second prong because cases employing the dual test often provide a repetitive analysis. This is true because "the vagueness that causes notice to be inadequate is the very same vagueness that causes 'too much discretion' to be lodged in the enforcing officer. Put another way: A law that gives the policeman clear guidance in all cases gives the public clear guidance in all cases as well."  

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271 See supra notes 209-12 and accompanying text. The nondiscriminatory enforcement requirement provides that a law will be vague if it "is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 128 S. Ct. 1830, 1845 (2008). A fair interpretation of this requirement is that it mandates that a law be "standardless," not that the discriminatory enforcement be "serious," because to most people it always is. Ideally, if a member of the judiciary determines that a law authorizes or encourages discriminatory enforcement, that member will believe that the discriminatory enforcement is serious. Thus, in *Morales* and in *Kolender*, where the Justices determined that the law at issue was standardless, the requirement would have been met, allowing the invalidation of the law in its entirety. City of Chicago v. *Morales*, 527 U.S. 41, 56 (1999); *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Thus, even if the current stricter requirement is followed, it does not resolve the issue.

272 *Morales*, 527 U.S. at 95 (Scalia, J., dissenting).
provides an example. In this case, physicians challenged the Partial-Birth Abortion Ban Act, a federal statute regulating abortion, on various grounds including that it was void for vagueness on its face. In discussing this challenge, the Court set forth the rule that a statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” The Court then concluded that the Act provided doctors “of ordinary intelligence a reasonable opportunity to know what is prohibited” because it set forth “relatively clear guidelines as to prohibited conduct” and provided ‘objective criteria’ to evaluate whether a doctor has performed a prohibited procedure.” The Court stated that because the Act provided that only doctors performing a delivery and extraction abortion procedure (“D & E”) that deliver a living fetus to an anatomical landmark would face criminal liability, the act was not void for vagueness. The Court further determined that because the Act has a scienter requirement, requiring that “the doctor deliberately . . . deliver[] the fetus to an anatomical landmark” the Act was not vague. The Court then, in discussing the nondiscriminatory enforcement requirement, concluded that the physicians had also failed to prove that the Act encouraged arbitrary or discriminatory enforcement. The Court stated, “[j]ust as the Act’s anatomical landmarks provide doctors with objective standards, they also ‘establish minimal guidelines to govern law enforcement.’” Further, the Court provided, “[t]he scienter requirements narrow the scope of the Act’s prohibition and limit prosecutorial discretion. It cannot be said that the Act, ‘vests virtually complete discretion in the hands of [law enforcement] . . . .’” The Court con-

275 Gonzales, 550 U.S. at 147.
276 Id. at 149.
277 Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)) (internal quotations omitted).
278 Id. (quoting Posters ‘N’ Things, Ltd. v. United States, 511 U.S. 513, 525-26 (1994)).
279 Id. at 149-50 (stating that this Act was different from statutory language that was determined to be vague because it prohibited delivery of a “substantial portion” of the fetus).
280 Id. at 149.
281 Id.
282 Id. at 150.
283 Id.
284 Id. at 149.
cluded that the act was not vague. The analysis under each prong was the same. The requirement that the doctor deliberately deliver the living fetus to an anatomical landmark provided notice to the doctors and to lawmakers, and therefore prevented arbitrary and discriminatory enforcement. The second prong was not needed.

This point can also be exemplified by reviewing the Court's decision in Posters 'N' Things, Ltd. v. United States, in which the Court did not even separate the analysis between the two prongs. In this case, the defendants were convicted of selling drug paraphernalia through the mail under the Mail Order Drug Paraphernalia Control Act and argued, among other things, that the statute was void for vagueness. The Court used the same general rule that the Court later used in Gonzales, quoted above. The Court then provided the following reasoning:

"[T]he list of items in § 857(d) constituting per se drug paraphernalia provides individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct." The Court then stated, "§ 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia. These factors minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute." The Court's reasoning for both prongs was the same. The list of items that constitute per se drug paraphernalia, and the objective criteria for assessing whether items constitute drug paraphernalia, provided notice to individuals of what items are or may be drug paraphernalia, and this exact information also provides notice to law enforcement so as to limit arbitrary and discriminatory enforcement. Thus, where the analysis for both prongs is the same, there is no need to have both. It is the nondiscriminatory enforcement requirement that should be eliminated because, as explained in the next section, it does not effectively limit discriminatory enforcement.

285 Id.
288 Posters 'N' Things, 511 U.S. at 525.
289 Id.
290 Id. at 526.
c. The Nondiscriminatory Enforcement Requirement Does Not Effectively Limit Discriminatory Use of Discretion

Even in the public order law or other contexts in which discriminatory enforcement may be more of a concern, this Paper suggests that the second prong be eliminated for a third reason. A court’s invalidation of a law is not an effective method to limit law enforcement discretion and thus limit potential law enforcement discriminatory enforcement. The whole exercise is for naught because the sought-after result, a more specific law, does not solve the problem of discriminatory enforcement.291

This section focuses on public order laws because it is discriminatory enforcement within this context that has been the concern to date. It explains why specific laws do not effectively limit discretionar, and thus discriminatory, enforcement.292 This section will then conclude by highlighting other legal and non-legal methods that are better equipped to prevent discriminatory enforcement of laws. Correcting the false perception that the judiciary is competent to resolve the discriminatory enforcement problem through the void for vagueness analysis may allow and encourage these better methods.293

When a court invalidates a law as unconstitutionally vague, the goal of that judicial decision is that the legislative body will enact a more specific law that will not be subject to an attack as being void for vague-

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291 Professor Debra Livingston has written two articles on this issue to which this section is heavily indebted. Anyone who is interested in or doubts the Paper’s premise that invalidating laws as unconstitutionally vague does not effectively limit police discretion should read Livingston, Police Discretion, supra note 7, and Livingston, Gang Loitering, supra note 220.

292 Initially, even if the second prong remained but the Court were to adopt the suggested recommendation limiting facial review, such that it would only invalidate those laws that had been discriminatorily enforced against the litigant and were unconstitutional in all of their applications, the Court’s invalidation of those laws is not an effective method for limiting police discretion because the drafting of more specific laws does not solve the problem of discriminatory enforcement. There are other methods better able to handle the problem of discriminatory enforcement. Therefore, retaining the second prong of the void for vagueness analysis and limiting facial review only, although a step in a positive direction, is not enough.

293 Public order laws bring the debate into sharp focus because they are victimless crimes that are fraught with the possibility of discriminatory enforcement, whereas more serious crimes generally have victims and involve prosecutors to promote regular administration. See Livingston, Police Discretion, supra note 7, at 611. Additionally, it is only in this context that the Court has issued opinions that determined that the law was unconstitutionally vague based solely on the nondiscriminatory enforcement requirement.

294 Livingston, Gang Loitering, supra note 220, at 201 ("Courts do no service to the project of police reform when they enunciate tests that create an illusion of constraint that does not in fact exist. Nor do they promote police accountability by denying police legitimate authority to address community problems.").
ness. When a court invalidates a public order law based solely on the fact that it has the potential for discriminatory enforcement, the goal is that the drafting body draft a more specific law that limits discretion and thereby limits the chance of discriminatory enforcement. However, laws can never be drafted to eliminate discretion, given the limits of language and foresight to script out every move by police officers or decision by prosecutors. Nor do specific laws guaranty less discretion. Professor Debra Livingston aptly demonstrates this point with regard to traffic stops, noting that traffic laws are “among the most precise regulations to be found in state and local legal codes,” but that “no one could deny that the opportunity for their arbitrary and discriminatory enforcement is huge.” Her point is that because almost everyone violates traffic laws at some time, a police officer can eventually pull over almost anyone. She states that actual arbitrary and discriminatory enforcement occurs with traffic stops and that this area of the law highlights “the limited ability of the Court materially to influence the opportunity for arbitrariness in police enforcement through the invalidation of vague laws.”

Further, Professor Stuntz points out that a court’s requirement of specific laws will not eliminate discretion because the “legislatures can achieve breadth and specificity at the same time.” The broad vagrancy laws of the 1960s and 1970s have been replaced with more specific laws and ordinances, but the problem is the breadth of crimes within the statutory code “which, taken together, criminalize everything and everyone the police and prosecutors might wish to punish.” Additionally, when a court invalidates a law, the newly-drafted law may give police more discretion, rather than reducing it. Professor Livingston stated,

[i]n fact, the aggressive invalidation of laws embodying indefinite standards (such as statutes and ordinances prohibiting various forms of “unreasonable” behavior in public places) could put pressure on locali-

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295 Luna, supra note 221, at 1141.
296 Livingston, Gang Loitering, supra note 220, at 173.
297 Id.
298 Id.
299 Id.
300 Stuntz, supra note 244, at 559.
301 Id. at 560 (“Vagueness doctrine rules out enacting all-encompassing crimes, but it permits the creation of many smaller, more tightly defined offenses. It thus pushes legislatures to expand criminal law by accumulation, by adding ever more distinct acts to the criminal code.”).
ties to adopt “rule-like” formulations that substantially broaden police authority as in the now common example of juvenile curfews. Moreover, police officers enforcing specific rules against conduct like public drinking, jaywalking, and unlicensed street vending have substantial opportunity to abuse their authority by enforcing these rules in discriminatory ways. The problem of police discretion in maintaining order is not resolved or even substantially ameliorated by requiring that public order laws be spelled out with “rule-like” precision.302

Thus, one result, due to concern over laws or ordinances being determined to be unconstitutionally vague, is that cities have enacted juvenile curfews, as opposed to other types of public order laws because these curfew laws are clearer. Professor Livingston commented on this, stating that, “[c]urfews may or may not be a better way of reducing crime and improving the quality of life in public spaces, but there is little to suggest that curfews are preferable from the standpoint of limiting the opportunity for arbitrary and discriminatory police enforcement.”303 Kim Strosnider discussed the new Chicago ordinance that replaced the ordinance that the Supreme Court struck down as unconstitutionally vague in Morales. In her opinion, the new law did not limit police discretion.304 Thus, even when the Supreme Court provides spe-

302 Livingston, Police Discretion, supra note 7, at 615. An argument is that with a specific law, law enforcement is more likely enforcing the law as to the people that the legislature intended be regulated. Therefore, there needs to be a distinction between discriminatory enforcement of a law and discriminatorily defining that law. Discretion in the latter category should not occur and is curtailed by specific laws.

This argument is less persuasive if there are so many laws that the number of people that fall within the regulated sphere is huge. Professor Stuntz has commented that the breadth of crimes within the statutory code, when “taken together, criminalize everything and everyone the police and prosecutors might wish to punish.” Stuntz, supra note 244, at 560. This argument also presupposes that specific laws eliminate discretion to define the offense. As pointed out in Abigail Caplovitz’s article, not all laws can be created to eliminate discretion to define the offense. Abigail Caplovitz, Drafting Limits: Statute Text and the Police Discretion to Define Order, 5 J. L & Soc. Challenges 93, 109 (2003). She pointed to a difference between a law regulating drinking in public versus a law regulating loitering with the intent to solicit prostitution. As to the first, there is limited discretion because either the person is drinking or not drinking, but the second law requires “officers to make a series of observations, evaluate them in light of a standard, and draw a conclusion.” Id. at 107. Her point is that the inability to draft laws with “the binary clarity” of the drinking in public law, requires “[a]ccepting that officers must be given judicial discretion despite the lack of institutional mechanisms to review it,” and she argues for other means in addition to clear laws to create uniformity and limit discretion. Id. at 109.

303 Livingston, Gang Loitering, supra note 220, at 171.

304 Strosnider, supra note 9, at 126.
cific drafting suggestions, as it did in *Morales*,\(^{305}\) drafting is difficult for the exact reason that discretion is a necessary function of law enforcement.\(^{306}\) It seems like a time-consuming, enormously expensive, and often, circular exercise.

Certainly, the discretion will not be eliminated.\(^{307}\) And it is folly to pretend that under the current criminal law system in the United States, it can be substantially curbed. The goal should instead be to encourage discretion that is exercised in a nondiscriminatory manner. Correcting the false perception that the judiciary is competent to handle this issue through the void for vagueness doctrine\(^{308}\) would allow the issue to be handled either through other established legal doctrines, or more aptly through other agencies which are more experienced, better equipped, and more capable of creating solutions that may result in a better exercise of discretion.\(^{309}\)

d. *More Effective Means of Limiting Police Discretion*

(i) *Legal Doctrines*

(a) *Equal Protection Doctrine*

The void for vagueness doctrine operates under the auspices of the Due Process Clause. There is no doubt that, under the Due Process Clause, a law is unconstitutional if it is discriminatorily enforced. However, it is unclear why the role for limiting discriminatory enforcement


\(^{306}\) Police spend much of their time in peacekeeping and order maintenance roles. It is within these roles that wide discretion is afforded. Livingston, *Police Discretion*, supra note 7, at 570. “[A]ll police scholars agree that police have always spent substantial time attempting to maintain or restore public order.” *Id.* at 579.

\(^{307}\) *Id.* at 650 (“But the police will inevitably exercise discretion in invoking laws that authorize order maintenance. And this will be true whether police are afforded relatively broad authority to enforce general standards or whether they enforce the most narrow and specific rules.”).

\(^{308}\) *Id.* at 593.

Limiting the discretion that police exercise on the street simply by demanding specificity in the laws that they enforce is so hopeless, in fact, that one is tempted to borrow Professor Mashaw’s observation about the futility of attempts to constrain the discretion exercised by administrative agencies through aggressive employment of the nondelegation doctrine: “Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.”

\(^{309}\) In *Morales*, “the majority’s inability to articulate a workable framework for its vagueness doctrine threatens to deprive communities of the ability to enact legitimate laws that might assist in the amelioration of pressing social problems—and in what amounts to an illusory effort to constrain police.” Livingston, *Gang Loitering*, supra note 220, at 164.
of laws has fallen within the void for vagueness doctrine when such an issue could be determined under the equal protection doctrine. Historically, courts applied the equal protection doctrine to determine whether a law was unconstitutional because it was being enforced in a discriminatory manner. Courts currently appear to be using the void for vagueness doctrine to avoid the equal protection doctrine by determining in advance of discriminatory enforcement that the law must be invalidated because it could potentially lead to arbitrary and discriminatory enforcement.\textsuperscript{310}

To date, in the cases before the United States Supreme Court in which the Court invalidated a law solely based on the second prong of the void for vagueness analysis, the Court made no determination that the law was actually discriminatorily applied to the litigants.\textsuperscript{311} The Court's fear was that the law could be discriminatorily enforced due to the level of discretion available to the enforcer of the statute.\textsuperscript{312} The law was determined to be unconstitutional before any action transpired which would traditionally render the statute unconstitutional.\textsuperscript{313} Thus, the Court's determination that the second prong can be the sole basis to establish whether a law is vague and its determination that the potential for discriminatory enforcement is all that needs to be shown to satisfy that requirement allows a law to be invalidated without any proof of actual discriminatory enforcement. Such a prophylactic application avoids the equal protection doctrine.

Further, the Court's adoption of the "automatic" facial review standard in those cases in which a law was determined to be unconstitutionally vague solely on the basis that the law encouraged potential discriminatory enforcement,\textsuperscript{314} likens to the facial review standard for

\textsuperscript{310} Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("Our concern here is based upon the 'potential for arbitrarily suppressing First Amendment liberties . . .'" (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965)).

\textsuperscript{311} See notes 160-61, 170-71 and accompanying text.

\textsuperscript{312} Kolender, 461 U.S. at 360 ("It is clear that the full discretion accorded to the police to determine whether the suspect has provided a credible and reliable identification necessarily entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat." (internal quotations omitted)).

\textsuperscript{313} City of Chicago v. Morales, 527 U.S. 41, 111 (1999) (Thomas, J., dissenting) ("Instances of arbitrary and discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds.").

\textsuperscript{314} See Kolender, 461 U.S. 352; see also Morales, 527 U.S. at 71-73 (Breyer, J., concurring).
equal protection cases.\textsuperscript{315} The lowering of the bar to access for facial review within the void for vagueness doctrine further exemplifies how the Court uses the void for vagueness doctrine to circumvent the need for the equal protection doctrine. Because there is already a doctrine in place to resolve the Court's concerns, the Court's circumvention of that doctrine seems to be unnecessary.\textsuperscript{316}

Many authors believe that the equal protection doctrine does not effectively address the problem of discriminatory enforcement because it is too difficult to prove a case,\textsuperscript{317} and thus the nondiscriminatory enforcement requirement is needed to satisfy a court's "constitutional responsibility [to limit] the opportunity for the arbitrary application of legal prohibitions."\textsuperscript{318} The standard within the equal protection doctrine has evolved and if a further change is required to satisfy the judiciary's responsibility to limit the opportunity for arbitrary enforcement, the change should be to the equal protection doctrine where the focus will be on the problem of discriminatory enforcement, as opposed to the vagueness of the law. A court's ability to use the nondiscriminatory enforcement requirement to avoid the tougher equal protection analysis, warrants, in itself, the removal of the requirement from the void for vagueness test. Because the false perception that the judiciary is competent to handle this serious issue of discriminatory enforcement within the void for vagueness doctrine hinders any needed change within the equal protection doctrine. To the extent that the invalidation of a law through the void for vagueness doctrine does not effectively limit the discretion afforded to law enforcement, then those individuals that are subject to discriminatory discretion are worse off because any necessary

\begin{itemize}
\item \textsuperscript{315} Strosnider, \textit{supra} note 9, at 125 ("[T]he relaxed standing rules for arbitrary enforcement cases are more akin to those for equal protection decisions than to other vagueness cases that do not also implicate overbreadth.").
\item \textsuperscript{316} For a contrary view, see \textit{id.} at 124-25 (providing that there is a need to allow the void for vagueness doctrine to operate in this context because the laws that would be challenged under the void for vagueness doctrine are "not as amenable to the checks and balances of the political system," as they are being enforced "primarily against a minority group or, especially, a small segment thereof").
\item \textsuperscript{317} Luna, \textit{supra} note 221, at 1139 ("The bar for selective enforcement and prosecution claims has been set at a nearly unreachable height for the vast majority of criminal defendants, an example of an abstract right with no practical remedy."); Strosnider, \textit{supra} note 9, at 123 ("While equal protection doctrine is theoretically applicable to criminal cases, the paucity of equal protection decisions in the criminal law belies the states' confidence in the doctrine's functional availability to stop racially discriminatory law enforcement practices.").
\item \textsuperscript{318} Livingston, \textit{Gang Loitering, supra} note 220, at 200.
\end{itemize}
changes, either to the equal protection doctrine, specifically, or surrounding the legal system, generally, will not be made.\textsuperscript{319}

(b) \textit{Changes to Other Existing Laws}

Professor Stuntz argues that a change in certain legal doctrines would limit prosecutorial discretion. Initially, he suggests that prosecutors should not have “the power to stack charges, to charge a large number of overlapping crimes for a single course of conduct” because “[e]ven if each of these offenses is narrowly defined to cover only serious misconduct, combining crimes enables prosecutors to get convictions in cases where there may be no misconduct at all.”\textsuperscript{320} He further suggests a reconfiguration of “double jeopardy law or the nonconstitutional law of joinder.”\textsuperscript{321} Alternatively, he proposes that a court should have the power “under the Eighth Amendment, the Due Process Clause, or both—to decline to impose any sentence that seemed unduly harsh.”\textsuperscript{322} If Professor Stuntz’s ideas are utilized, then prosecutorial discretion would be kept in check because the government would need to prove its case rather than force a guilty plea.\textsuperscript{323} Again, the false perception that the judiciary is competent to regulate law enforcement discretion through the void for vagueness doctrine hinds change in other areas of

\textsuperscript{319} Justice White’s dissent in \textit{Kolender} discussed this issue in general:

Of course, if the statute on its face violates the Fourth or Fifth Amendment . . . the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. \textit{Kolender}, 461 U.S. at 374 (White, J., dissenting).

\textsuperscript{320} Stuntz, supra note 244, at 594.

\textsuperscript{321} Id.

\textsuperscript{322} \textit{Id.} “[H]arsh sentencing statutes give prosecutors the ability to define their own sentencing rules.” \textit{Id.} at 595. Professor Stuntz recognizes that such a suggestion might not accomplish much in practice because “[e]ven when sentencing was everywhere discretionary, judges tended to defer to bargained-for sentencing recommendations. Judges rarely use their power to acquit in the teeth of adverse law and adverse facts.” \textit{Id.} at 596. Thus, Professor Stuntz states that a change in judicial culture is also needed. Professor Hadfield also points to other doctrines in place that serve as a check, such as the exclusionary rule. Hadfield, supra note 197, at 552.

\textsuperscript{323} Stuntz, supra note 244, at 597 (“With less charge-stacking, there might be more trials, where the boundaries of crimes might be the subject of litigation. Criminal law might again have something to do with who goes to prison, and for how long.”). Professor Stuntz also posits that instead of focusing on incident-specific litigation, as the void for vagueness doctrine does by definition, “a focus on identifying and correcting bad departments would be more productive than identifying and correcting bad officers.” \textit{Id.} at 538 n.134. He states that courts should instead use injunctions, mentioning 42 U.S.C. § 14141 (1994), which allows injunctions against police departments with a pattern of unconstitutional conduct. \textit{Id.}
law that may accomplish the regulation of discriminatory enforcement effectively.

(c) Fourth Amendment Jurisprudence

Lastly, it is difficult to reconcile current Fourth Amendment jurisprudence with the Court's current emphasis on limiting law enforcement discretion to limit the risk of potential discriminatory enforcement through the second prong in the void for vagueness analysis. Justice Thomas recognized this discrepancy in his dissent in Morales:

Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standard such as "probable cause" and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace.324

He further stated, "[i]n sum the Court's conclusion that the ordinance is impermissibly vague because it 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,' . . . cannot be reconciled with common sense, longstanding police practice, or this Court's Fourth Amendment jurisprudence."325

Fourth Amendment jurisprudence allows for considerable discretion among the police to determine probable cause and reasonable suspicion.

The Court has found both street detentions and frisks based on reasonable suspicion to be consistent with Fourth Amendment principles . . . . It has done so, moreover, irrespective of its recognition that the standard by which officers have to judge the propriety of their actions in detaining and frisking an individual cannot be stated in clear and readily understandable language.326

Justice Thomas's dissent in Morales quoted from Ornelas v. United States:327

325 Id. at 110.
326 Livingston, Gang Loitering, supra note 220, at 178.
Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . . Our cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists.\footnote{328} Thus, because law enforcement is entrusted to determine the parameters of vague words, such as "probable cause," they can also be entrusted to determine the parameters of similarly broad language in other criminal statutes. The Court's focus on the second prong in the void for vagueness analysis and applying it to limit law enforcement discretion due to the fear of discriminatory enforcement is at odds with Fourth Amendment jurisprudence, and the inclusion of this requirement in the void for vagueness analysis potentially strips law enforcement of needed discretion.\footnote{329} Elimination of the nondiscriminatory enforcement requirement brings the two doctrines back in sync.

(ii) Other Means of Regulating Law Enforcement Conduct

(a) Police Orders

There is a correlation between police orders and limited discretion. In cases in which the Court has invalidated a law based on arbitrary and discriminatory enforcement, it has lamented the lack of guidelines for the police or other enforcers of the statute.\footnote{330} Ironically, however, there was such an order limiting police discretion in \textit{Morales}, it was in effect ignored.\footnote{331}

In \textit{Morales}, the police department's General Order 92-4 was established specifically for the purpose of limiting police officer discretion. The order was summarized as follows by the \textit{Morales} plurality:

That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordi-

\footnote{328} \textit{Morales}, 527 U.S. at 110 (Thomas, J., dissenting) (citations and internal quotations omitted).

\footnote{329} \textit{But see} Maclin, supra note 12 (arguing that Fourth Amendment jurisprudence should be changed to meet the standard of tolerance to police discretion set forth in \textit{Morales}).

\footnote{330} Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

\footnote{331} \textit{Morales}, 527 U.S. at 63 (citations omitted).
nance is not enforced in an arbitrary or discriminatory way.” The limitations confine the authority to arrest gang members who violate the ordinance to sworn “members of the Gang Crime Section” and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. In addition, the order directs district commanders to “designate areas in which the presence of gang members has demonstrable effect on the activities of law abiding person in the surrounding community,” and provides that the ordinance “will be enforced only within the designated areas.”

The plurality did not give serious attention to whether this police order limited police discretion in enforcing the ordinance. It simply agreed with the Illinois Supreme Court’s refusal “to accept the general order issued by the police department as a sufficient limitation on the ‘vast amount of discretion’ granted to the police in its enforcement.” The plurality’s two sentences devoted to the reasons in support of this refusal noticeably lack any discussion of the details of the order. The plurality’s cursory dismissal of this order does little to encourage police departments to create such orders to help effectuate the proper use of discretion.

However, it has long been advocated that police departments should use department guidelines to place reasonable and effective constraints on police discretion. These guidelines can provide direction as to how police officers should handle specific types of situations that lend themselves to the exercise of discretion, as the Chicago police department did in Morales. The plurality in Morales chose to gloss over this

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332 Id. at 48.
333 Id. at 63.
334 As a justification, the plurality provided,

[that the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

Id. at 63-64. It is this comment that Justice Thomas in his dissent characterized as contrary to Fourth Amendment jurisprudence. See supra notes 325-26 and accompanying text.
335 Livingston, Gang Loitering, supra note 220, at 190 (“By not focusing on this aspect of the case, the court missed an opportunity to provide both legislators and police managers with the incentive to experiment with innovative administrative approaches to the reasonable restraint of police.”).
336 Livingston, Police Discretion, supra note 7, at 658-59. “By the 1970s, there was substantial consensus among legal scholars and law reformers that guidelines of one sort or another should be developed to structure discretionary decisionmaking on the street.” Id. at 659.
type of order; however, in other cases, the Court has considered and attached great importance to such orders.\textsuperscript{337} A court should not summarily dismiss such police orders in deciding whether to uphold a law, especially if the order was created collaboratively with the community. Doing so would encourage the creation of such orders in the first place. A court’s willingness to do so seems to be a much more effective and direct way for the judiciary to actually influence police exercise of discretion.

Needless to say, there are difficulties associated with implementing such regulations and using them in subsequent litigation against the police department.\textsuperscript{338} However, such orders are certainly a more direct and effective means of regulating police discretion than courts invalidating unconstitutionally vague laws. If the nondiscriminatory enforcement requirement is eliminated, these police orders should be a part of an analysis to determine whether the law provides notice of the prohibited conduct. Such an analysis, focused on notice only, may then encourage police departments to create police orders with input from the community and make them public rather than wholly internal.

(b) Transparent Policing and Monitoring

Another way to limit police discretion and the corresponding risk of discriminatory enforcement is to make the discretion that does occur more transparent.\textsuperscript{339} The determination that a law is unconstitutionally

\textsuperscript{337} See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 504 (1982) ("[S]uch administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope."); see also Morales, 527 U.S. at 92 n.10 (Scalia, J., dissenting) ("Administrative interpretations and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for in evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." (quoting Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989)) (internal quotations omitted)).

\textsuperscript{338} For a detailed discussion of the positive and negative implications of police orders for regulating police discretion, see Livingston, Police Discretion, supra note 7, at 658-63.

\textsuperscript{339} Livingston, Gang Loitering, supra note 220, at 197. Professor Livingston posits that [T]he healthy evolution of police organizations has long been stymied by the failure of police departments frankly to acknowledge the broad scope of police discretion and to explain the rationale for its exercise in different ways. Accountability is simply not possible when discretion is exercised furtively and with an air of illegitimacy. Id.; Luna, supra note 221, at 1142. Professor Luna also cites to works by other authors. See also Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 FORDHAM L. REV. 13, 54-67 (1998) (advocating racial impact studies); Tracey L. Meares, Rewards for Good Behavior; Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851 (1995) (advocating for financial incentives).
vague in no way increases the visibility of discretionary law enforcement; in fact, it has been argued that instead it actually “promote[s] arbitrary law enforcement by [concealing discretionary enforcement].”\textsuperscript{340} Erik Luna, in his article \textit{Transparent Policing}, gives several examples of how to increase the visibility of discretionary law enforcement to the community, which would arguably reduce discriminatory discretion.\textsuperscript{341} He suggests monitoring police through videotaping and mandatory record keeping.\textsuperscript{342} Professor Livingston suggests that internal monitoring, via audits that already occur, could be expanded to telephone or in-person surveys of citizen concerns regarding police enforcement.\textsuperscript{343} She also suggests external monitoring by citizen review boards,\textsuperscript{344} and monitoring through “legislative oversight committee[s] armed with the rich information about enforcement that a reasonably constrained police department could be required to provide.”\textsuperscript{345} Additionally, Professor Luna devotes significant attention to computer-aided crime mapping, which “involves the collection, analysis, and cartographic depiction of crime and police data.”\textsuperscript{346} Interestingly, he notes that in Oakland, California, the city posts these crime maps on the Internet for the public to monitor.\textsuperscript{347} Thus, there are monitoring methods within police depart-
ments that would make the police discretion that does occur more transparent to the public, allowing for more effective monitoring of this discretion by the legislatures, police departments, and the public. If such monitoring is in place and encouraged, it would more effectively limit law enforcement discretion with a corresponding limit in discriminatory enforcement. Thus, it supplants the need for the second prong of the void for vagueness analysis.\textsuperscript{348}

(c) Community Policing

There has been a movement within police departments called “community policing.” “Community policing programs emphasize close contact between police and the local communities they serve, decentralized decision-making, and crime prevention and proactive problem-solving rather than response and investigation.”\textsuperscript{349} The idea is that the police department’s accountability to the community through reporting any problems at community and city council meetings, or working with members of the community to solve various problems, helps limit police discretion. The community becomes involved with solving problems and providing standards for solving those problems that can be revised periodically.\textsuperscript{350} However, when courts invalidate “reasonable efforts of communities to authorize police to deal with a neighborhood’s disorder problem . . . [s]uch invalidation could prevent communities from experimenting with the more preventive, quality-of-life police pa-

\textsuperscript{348} It can be argued, however, that just the threat that a court might be able to invalidate the law due to its vagueness may limit discriminatory law enforcement discretion. Professor Livingston explains that the flip side is that the appearance of judicial competency may “sap[ ] energy from other efforts at police reform and . . . [deprive] police of lawful authority to deal with community problems they are expected to handle.” Livingston, Gang Loitering, supra note 220, at 180.

\textsuperscript{349} Adriaan Lanni, The Future of Community Justice, 40 Harv. C.R.-C.L. L. Rev. 359, 367 (2005). Professor Livingston urges community policing where “neighborhood residents are involved in identifying local public order problems and prioritizing among them ‘in a constructive dialogue with one another and with police officers who work in their immediate area.’” Livingston, Gang Loitering, supra note 220, at 198.

\textsuperscript{350} Livingston, Police Discretion, supra note 7, at 653-60.
trol advocated in the new policing theories.”\textsuperscript{351} Professor Livingston states that the unpredictability of the void for vagueness analysis could dissuade “communities from enacting proposed legislation since judicial broadening of constitutional tort remedies raises at least the prospect, however theoretical, that municipalities, police departments, and individual police officers could be held liable in damages for the enforcement of subsequently invalidated laws.”\textsuperscript{352}

The community policing focus is on public disorder and it is these “vagrancy” types of laws that have been the subject of cases in which the Court has invalidated a law as unconstitutionally vague solely on the basis that it encourages arbitrary and discriminatory enforcement.\textsuperscript{353} In \textit{Kolender} and \textit{Morales}, where the Court did so, it used a facial review standard, without requiring that the law at issue be unconstitutional in all of its applications, making it easier for the Court to invalidate the law.\textsuperscript{354} A lax facial review standard hamstrings efforts to implement community policing effectively. Community policing by its nature involves providing more authority to the police officers on the street, which therefore gives them more discretion. Thus, a court invalidating a law as unconstitutionally vague, which it is more apt to do with a lax facial review standard in the public order context, hinders community policing efforts. Community policing efforts thrive because it is the community, as opposed to the judiciary, that monitors and thereby limits discriminatory discretion. Community policing seems an infinitely better method to solve the need to limit police discretion than the judiciary invalidating laws as unconstitutionally vague.

In summary, law enforcement discretion is unavoidable. Recognizing this, the goal should be that law enforcement not employ that discretion in a discriminatory manner. The judiciary is not competent to effectuate this goal using the void for vagueness doctrine. By using the nondiscriminatory enforcement requirement to invalidate vague laws found to be so standardless that they authorize or encourage seriously discriminatory enforcement, a court requires that the drafting body draft more specific laws. However, more specific laws do not effectively

\begin{itemize}
  \item \textsuperscript{351} \textit{Id.} at 594. Professor Livingston then predicts that the absence of laws providing regulation of public order will perpetuate the current trend of an increased role for private police. This will lead to the subsequent problem that only a certain segment of the community and business population is able to pay for private police. \textit{Id.} at 632.
  \item \textsuperscript{352} \textit{Id.} at 631.
  \item \textsuperscript{353} See \textit{Kolender v. Lawson}, 461 U.S. 352, 361 (1983).
  \item \textsuperscript{354} See \textit{supra} notes 161-73 and accompanying text.
\end{itemize}
limit law enforcement’s discriminatory use of discretion, and may instead force the use of discretion underground. The goal should be transparent monitoring of law enforcement discretion, which can be achieved through various methods, agencies, or communities that are in a better position to monitor and limit police discretion. Such transparent monitoring cannot occur if the Court’s void for vagueness analysis continues to hinder these efforts. A broad void for vagueness doctrine hampers communities in attempts to enact constitutional laws that will accomplish specific community goals. Further, the persisting false perception that the judiciary is competent to monitor and limit law enforcement discretion may also prevent necessary changes in other areas of law. The Court’s ineffectiveness to achieve this proffered aim provides a third justification for eliminating the nondiscriminatory enforcement requirement from the void of vagueness analysis. Therefore, the nondiscriminatory enforcement requirement should be eliminated from the void for vagueness analysis because the analysis under it is often repetitive of the analysis under the fair notice requirement; its inclusion in the void for vagueness analysis allow courts to avoid the strict facial review standard creating an uncertain doctrine; and it does not achieve its goal of limiting discriminatory enforcement through nonvague laws.

CONCLUSION

This Paper advocates limiting facial review in the void for vagueness doctrine. It recommends that in all cases in which the law has been challenged as void for vagueness, the litigant must establish that the law is unconstitutional “as applied” to the litigant. Only when this requirement is met should the litigant be allowed to challenge the law on its face as unconstitutionally vague in its entirety. It is further suggested that such a challenge should require that the litigant prove that the law is unconstitutional in all of its other applications.

Additionally, this Paper suggests that the second prong, the nondiscriminatory enforcement requirement, be eliminated from the void for vagueness analysis. The analysis would be limited to the fair notice requirement and whether the language of the given law provided people with ordinary intelligence fair notice of the prohibited conduct. If under this analysis a law is found to be unconstitutionally vague as applied to the litigant—meaning that it did not provide fair notice to the

355 If successful, the litigant could not be prosecuted under the statute.
litigant, and the litigant argues that the law should be invalidated on its face in its entirety—, then under the strict facial review standard suggested above, the litigant would need to establish that the law was unconstitutional in all of its other applications. Only if it is determined that the law is standardless, meaning that it provides no notice of the conduct regulated, should the law be deemed unconstitutional in all of its applications and invalidated in its entirety. Thus, a stricter facial review standard, in conjunction with limiting the void for vagueness analysis to the fair notice requirement, would only result in invalidation of those laws that it deems are standardless, thereby creating a clearer and more predictable standard.