Armed Career Criminal Act — Residual Clause — Johnson v. United States

The Armed Career Criminal Act of 1984[1] (ACCA) imposes a mandatory minimum fifteen-year prison sentence on predicate felons who have three prior convictions for violent felonies or serious drug offenses upon their conviction for a firearm offense.[2] Burglary, arson, extortion, and crimes involving the use of explosives are all defined as violent felonies under ACCA, as are crimes that fall into the statute's residual clause: crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[3] Last Term, in *Johnson v. United States*,[4] the Supreme Court struck down ACCA's residual clause because it was unconstitutionally vague.[5] To do so, the Court had to eschew a classic canon of construction, overturn its precedent, and broaden the vagueness doctrine. *Johnson* thus sent an important cautionary message to Congress and the courts: when a poorly drafted statute imperils defendants' liberty and due process rights, the Court will not hesitate to strike it down, even if it must go to great lengths to do so.

Samuel James Johnson was a predicate felon upon whom ACCA's mandatory minimum was imposed after his 2012 firearm conviction.[6] Johnson had a lengthy criminal record and in 2010 came under investigation for his involvement with the National Socialist Movement, "a white-supremacist organization suspected of plotting acts of terrorism."[7] During the investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives" and that he owned a .22 caliber semiautomatic assault rifle and a .45 caliber semiautomatic handgun.[8] He also showed agents his AK-47 rifle and a "cache of ammunition containing approximately 1,100 rounds."[9] On the basis of these revelations and admissions, Johnson was arrested in the spring of 2012.[10]

In April 2012, Johnson was charged by a grand jury in a six-count indictment for being an armed career criminal in possession of a firearm and a felon in possession of ammunition.[11] Two months

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[1] 18 U.S.C. § 924(e) (2012).

[2] *See id.*

[3] *Id.* § 924(e)(2)(B)(ii).

[4] 135 S. Ct. 2551 (2015).

[5] *Id.* at 2557.

[6] United States v. Johnson, 526 F. App'x 708, 708–09 (8th Cir. 2013) (per curiam).

[7] *Johnson*, 135 S. Ct. at 2574 (Alito, J., dissenting). Johnson subsequently left this organization to form his own, the Aryan Liberation Movement. *Johnson*, 526 F. App'x at 709.

[8] *Johnson*, 526 F. App'x at 709.

[9] *Id.*

[10] *Id.*

[11] *Id.*

later,[12] he pled guilty to a single count of being a convicted felon in possession of an AK-47 rifle.[13] Johnson's presentence investigation report (PSR) found that three of his predicate crimes were violent felonies,[14] which qualified him for ACCA's mandatory minimum sentence. The first was a 1999 attempted simple robbery conviction; the second was a 2007 simple robbery conviction; and the third, also from 2007, was a conviction for possessing a short-barreled shotgun.[15] In September 2012,[16] concurring with the PSR's conclusion that these crimes constituted violent felonies, the United States District Court for the District of Minnesota deemed Johnson an armed career criminal and sentenced him to 180 months' imprisonment with five years of supervised release.[17]

The Eighth Circuit affirmed.[18] Johnson made two arguments on appeal: first, that his attempted robbery and shotgun possession predicate crimes were not violent felonies justifying an ACCA sentencing enhancement; and second, that ACCA was unconstitutionally vague.[19] The Eighth Circuit found that its precedent dispatched Johnson's first claim: in *United States v. Lillard*,[20] the court had found short-barreled shotgun possession to be a violent felony,[21] and in *United States v. Sawyer*,[22] it had found attempted robbery to be the same.[23] Furthermore, the court held, ACCA's residual clause was not void for vagueness; bound by precedent affirming ACCA's constitutionality, the court quickly dismissed Johnson's second challenge and affirmed the district court's ACCA-enhanced sentence.[24]

The Supreme Court reversed and remanded the case for further proceedings.[25] Writing for the Court, Justice Scalia declared that ACCA's residual clause violated the Due Process Clause of the Fifth Amendment because it was void for vagueness.[26] The Court's vagueness doctrine,

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[12] *Sam Johnson Gets 15 Years in Prison*, AUSTIN DAILY HERALD (Sept. 6, 2012, 11:15 AM), http://www.austindailyherald.com/2012/09/sam-johnson [http://perma.cc/2LRA-UYWZ].

[13] *Johnson*, 526 F. App'x at 709 & n.2.

[14] *Id.* at 709.

[15] *Id.*

[16] *Sam Johnson Gets 15 Years in Prison*, *supra* note 12.

[17] *Johnson*, 526 F. App'x at 709 n.1, 710.

[18] *Id.* at 712. A panel of Judges Wollman, Murphy, and Smith decided the case. *Id.* at 708.

[19] *Id.* at 709–10.

[20] 685 F.3d 773 (8th Cir. 2012).

[21] *Id.* at 777.

[22] 588 F.3d 548 (8th Cir. 2009).

[23] *Id.* at 556. The robbery statute at issue in *Sawyer* was an Arkansas statute, but the court found it "quite similar" to the Minnesota statute that Johnson had been convicted of violating. *Johnson*, 526 F. App'x at 711.

[24] *Johnson*, 526 F. App'x at 711–12.

[25] *Johnson*, 135 S. Ct. at 2563.

[26] *See id.* at 2556–67. Justice Scalia was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Though the case was decided on the basis of vagueness,

he began, had long stood to protect defendants from any "criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[27] The doctrine's protections extend to criminal sentencing statutes.[28]

Two features of ACCA's residual clause, he continued, combined to make it the kind of standardless sentencing statute that the vagueness doctrine prohibits.[29] Both derived from the "categorical approach" to ACCA-enhanced sentencing required under *Taylor v. United States*.[30] Courts using the categorical approach may only "assess[] whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'"[31] It forces courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury."[32] Thus, the first problem, Justice Scalia explained, was that the residual clause "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements."[33] Without guidance regarding proper "ordinary case" determination, individual judges were left to speculate on what conduct most typically gives rise to a particular conviction.[34]

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this had not been the question originally presented to the Court. The original briefs of both parties, as well as several amici, did not address the question of the clause's unconstitutional vagueness, but focused their discussion entirely on the issue of whether the defendant's predicate crime — possession of a sawed-off shotgun — was a violent felony that merited an ACCA sentencing enhancement. *See* Brief for Petitioner at i, *Johnson*, 135 S. Ct. 2551 (No. 13-7120); Brief for the United States at I, *Johnson*, 135 S. Ct. 2551 (No. 13-7120); Brief Amicus Curiae for Gun Owners of America, Inc. et al. in Support of Petitioner at 2–3, *Johnson*, 135 S. Ct. 2551 (No. 13-7120); Brief for Law Professors as Amici Curiae in Support of Respondent at i, *Johnson*, 135 S. Ct. 2551 (No. 13-7120); Brief of Amici Curiae The Brady Center to Prevent Gun Violence et al. at i, *Johnson*, 135 S. Ct. 2551 (No. 13-7120). In November 2014, the Court heard oral arguments to decide this question. Transcript of Oral Argument at 1, *Johnson*, 135 S. Ct. 2551 (No. 13-7120), 2014 WL 7661636. The Court then requested, however, that the parties return to argue a different question: whether ACCA's residual clause was unconstitutionally vague. *Johnson*, 135 S. Ct. 939, 939 (2015) (mem.). This reargument took place on April 20, 2015. Transcript of Oral Argument at 1, *Johnson*, 135 S. Ct. 2551 (No. 13-7120), 2015 WL 1816697.

[27] *Johnson*, 135 S. Ct. at 2556 (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

[28] *Id.* at 2556–57 (citing United States v. Batchelder, 442 U.S. 114, 123 (1979)).

[29] *Id.* at 2557.

[30] 495 U.S. 575 (1990).

[31] *Johnson*, 135 S. Ct. at 2557 (quoting Begay v. United States, 553 U.S. 137, 141 (2008)).

[32] *Id.* (quoting James v. United States, 550 U.S. 192, 208 (2007)). The majority noted that it declined the dissent's invitation to overturn *Taylor* and reject its categorical approach for several reasons: (1) the Government did not ask the Court to do so, (2) Congress intentionally wrote ACCA to require consideration of prior convictions, not prior conduct, and (3) "requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction" would be "utter[ly] impracticab[le]." *Id.* at 2562.

[33] *Id.* at 2557.

[34] *Id.* at 2557–58.

This problem was compounded by a second: not only did sentencing judges have to guess what constituted a typical crime, but they also had to guess how much risk that ordinary case had to pose in order to be a violent felony.[35] The statute directed a sentencing judge to determine whether a given crime's "typical" case presented a risk of serious injury comparable to that posed by four crimes — burglary, arson, extortion, and crimes involving the use of explosives — that were "far from clear in respect to the degree of risk each poses."[36] In so "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates."[37] This fact, Justice Scalia continued, was confirmed by the inability of the Supreme Court and circuit courts to agree "about the nature of the inquiry one [was] supposed to conduct and the kinds of factors one [was] supposed to consider."[38] The vagueness evinced by this disagreement was not disproven by any judicial agreement on a core subset of qualifying crimes, Justice Scalia concluded, rejecting the arguments of the Government and dissent.[39]

Finally, Justice Scalia addressed stare decisis.[40] Acknowledging that the Court had previously rejected vagueness challenges to ACCA's residual clause, Justice Scalia noted that it had done so only in passing, "without full briefing or argument."[41] Even if these rejections amounted to holdings, stare decisis would still not bar the Court from revisiting its earlier ACCA decisions, as its experience had revealed

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[35] *Id.* at 2558.

[36] *Id.* (quoting *Begay*, 553 U.S. at 143).

[37] *Id.*

[38] *Id.* at 2560.

[39] *Id.* at 2561. Justice Scalia asserted that a vague statute is not saved "merely because there is some conduct that clearly falls within the provision's grasp," even though statements in some of the Court's "opinions could be read to suggest otherwise." *Id.* at 2560–61; *see also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (stating that a court should uphold a vagueness challenge "only if the enactment is impermissibly vague in all of its applications"). Citing several vagueness cases, Justice Scalia noted that prior statutes were void for vagueness even where a certain core of conduct seemed clearly to fall within their over-vague scope. *Johnson*, 135 S. Ct. at 2561. Nor was ACCA saved by the presence of similar "terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'" in other statutes; ACCA's vagueness was a unique problem created by the required application of a subjective, qualitative standard to an undefined, "idealized ordinary case of the crime." *Id.*

[40] *Johnson*, 135 S. Ct. at 2562.

[41] *Id.* at 2562–63. The Court's four decisions interpreting ACCA's residual clause were *James v. United States*, 550 U.S. 192, 203 (2007) (concluding that "the risk posed by attempted burglary is comparable" to that posed by burglary); *Begay*, 553 U.S. at 139 (concluding that drunk driving does not fall within the residual clause); *Chambers v. United States*, 555 U.S. 122, 123 (2009) (concluding that failure to report to prison does not fall within the residual clause); and *Sykes v. United States*, 131 S. Ct. 2267, 2270 (2011) (concluding that vehicular flight from a police officer falls within the residual clause).

them to be unworkable.[42] Particularly with regard to vagueness challenges, Justice Scalia said, only experience could reveal a statute to be unconstitutionally impossible to apply evenhandedly.[43]

Justice Thomas concurred in the judgment.[44] Declining to find ACCA void for vagueness, he utilized "conventional principles of interpretation and [the Court's] precedents" to find that a conviction for the possession of a short-barreled shotgun was not a violent felony under ACCA's residual clause.[45] Possession of a short-barreled shotgun presented "simply too remote . . . a risk of physical injury to fall within the residual clause."[46] The case, Justice Thomas contended, should have ended there: the residual clause allowed "any fool [to] know that a particular category of conduct would be within the reach of the statute," and was thus "not unconstitutional on its face."[47] For Justice Thomas, the majority's decision to take the case further than necessary raised concerns about the vagueness doctrine and its troubling similarities with substantive due process.[48]

Justice Alito dissented.[49] The majority, he said, in its haste to be rid of the residual clause, had carelessly discarded both stare decisis and the canons of construction.[50] Beginning with the former, Justice Alito noted that four majorities of the Court had found ACCA's residual clause capable of interpretation, and that he saw no reason to overrule this clear precedent.[51]

Justice Alito next turned to the vagueness doctrine.[52] The threshold for vagueness, he stated, was higher than the majority claimed.[53] Statutes are presumptively valid and must be upheld where they articulate an "ascertainable standard."[54] ACCA's residual clause, with its "unquestionably . . . ascertainable standard," could not thus be vague.[55] Its language mirrored that of many similar state and federal standards, which all would be struck down in an interpretive "nuclear

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[42] *Johnson*, 135 S. Ct. at 2562.

[43] *Id.*

[44] *Id.* at 2563 (Thomas, J., concurring in the judgment). Justice Kennedy also wrote a brief opinion concurring in the judgment. *Id.* (Kennedy, J., concurring in the judgment).

[45] *Id.* at 2563 (Thomas, J., concurring in the judgment).

[46] *Id.* at 2565.

[47] *Id.* at 2573 (quoting City of Chicago v. Morales, 527 U.S. 41, 112 (1999) (Thomas, J., dissenting)).

[48] *Id.* at 2563–64. Justice Thomas proceeded to explore the possibility that both might lack a foundation in the Due Process Clause with an account of the vagueness doctrine's history. *See id.* at 2566–72.

[49] *Id.* at 2573 (Alito, J., dissenting).

[50] *Id.*

[51] *Id.* at 2575–76.

[52] *Id.*

[53] *See id.* at 2576–77.

[54] *Id.* at 2576 (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921)).

[55] *Id.* at 2577.

explosion" if ACCA were to be invalidated.[56] Justice Alito disagreed that these other standards could be distinguished because ACCA's categorical approach required courts to identify a crime's most typical case.[57] He argued that, instead, the Court-created categorical approach should be discarded to save the statute from unconstitutionality, as the canon of constitutional avoidance required.[58]

Justice Alito also rejected both the *Taylor* Court's justifications for the categorical approach and the Court's dismissal of the rule of *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[59] which deemed unconstitutional only a law "impermissibly vague in *all* of its applications."[60] Finally, having declined to invalidate ACCA's residual clause, Justice Alito closed his dissent by determining that Johnson's conviction for possession of a short-barreled shotgun was a qualifying violent felony, whether the Court considered it under the categorical approach or otherwise.[61]

Justice Scalia cabined *Johnson*'s holding to the language and structure of ACCA's residual clause, noting that its vagueness was the unique result of a sort of speculation-layering.[62] He apparently shared Justice Alito's fear that an overbroad opinion would incite a "nuclear explosion," invalidating "scores of federal and state laws,"[63] and "[t]ransforming vagueness doctrine."[64] In reality, the impact of *Johnson* is likely to be broader than the majority admits and narrower than the dissent fears. The doctrinal disputes that occupied the Justices in *Johnson* are significant in themselves; Justice Alito's advocacy for the canon of constitutional avoidance and Justice Thomas's critique of substantive due process implicate broader debates regarding theories of constitutional and statutory interpretation.

As important, however, is the signaling function that *Johnson* serves. With *Johnson*, a six-Justice majority evinced a new willingness

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[56] *Id.*

[57] *Id.*

[58] *Id.* at 2578–80.

[59] 455 U.S. 489 (1982).

[60] *Johnson*, 135 U.S. at 2580 (Alito, J., dissenting) (quoting *Hoffman Estates*, 455 U.S. at 495 (emphasis added)).

[61] *Id.* at 2582–84. The "probabilistic" residual clause, he posited, encompassed crimes that raised a "serious potential risk of injury to another." *Id.* at 2582 (quoting James v. United States, 550 U.S. 192, 208 (2007)). Possession of a sawed-off shotgun, a weapon "uniquely attractive to violent criminals," *id.* at 2583, and "not typically possessed . . . for lawful purposes," was such a crime, *id.* at 2582–83 (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)).

[62] *See id.* at 2557–60 (majority opinion).

[63] *Id.* at 2577 (Alito, J., dissenting).

[64] *Id.* at 2581.

to engage with questions of statutory clarity in the criminal context.[65] Broadening the vagueness doctrine and declining to apply a traditional canon of statutory interpretation, the *Johnson* majority demonstrated the lengths to which it would go to strike down a criminal statute that offered no clear congressional command. Despite Justice Scalia's best efforts then, *Johnson* is likely to have an impact beyond ACCA's bounds: It urges congressional caution and precision, particularly where, as was the case with ACCA, a statute is shaped by political compromise. *Johnson* also encourages the judiciary to be more permissive in adjudicating vagueness claims.

ACCA was born in the 1980s, an era in which Congress famously heightened criminal penalties. The proposed bill was originally termed the Career Criminal Life Sentence Act of 1981, and would have made both robbery and burglary federal crimes, punishable by life imprisonment, when either was committed by a felon with two prior convictions for robbery or burglary.[66] The House and Senate passed a revised version of this bill, which reduced the sentence imposed to a mandatory minimum of fifteen years.[67] That bill was vetoed by President Reagan, however, because its extension of federal jurisdiction to the state crimes of robbery and burglary raised federalism concerns.[68] In subsequent hearings held as the bill was being revised, law enforcement agencies from the Department of Justice to the National District Attorneys Association echoed these concerns.[69] Ultimately, the federalism problem was addressed with a substantial amendment: the bill was modified to impose its mandatory sentencing enhancement when offenders with three prior convictions for robbery or burglary violated a federal firearm statute.[70] As such, the bill was enacted into law as the Armed Career Criminal Act (ACCA).[71]

Thus, ACCA's limits grew out of its political context: the bill was tied to firearm crime and limited to defendants with predicate robbery and burglary convictions to minimize federal encroachment on state law enforcement.[72] Originally, ACCA had been inspired by a growing concern that a small number of criminals were responsible for the ma-

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[65] Prior to *Johnson*, the Court had not found a criminal statute void for vagueness in fifteen years. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 55–56 (2015).

[66] *See* S. 1688, 97th Cong. § 2 (1981); *see also* James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546–48 (2009) (detailing ACCA's legislative history).

[67] *See* Derrick D. Crago, Note, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179, 1192 (1991).

[68] *Id.*

[69] *See* Levine, *supra* note 66, at 546 (citing H.R. REP. NO. 98-1073, at 4 (1984)).

[70] *Id.* (citing 130 CONG. REC. 28,095 (1984) (statement of Rep. Hughes)).

[71] *Id.*

[72] *See id.* at 547; *see also* David C. Holman, 43 CONN. L. REV. 209, 229 n.108 (2010).

jority of street crimes.[73] The bill's sponsors and advocates hoped that targeting these criminals, en masse, with sentencing enhancements would incapacitate and deter them, ultimately decreasing street crime rates.[74] The incapacitation rationale was simple: the more offenders there were in prison, the fewer there would be on the streets to reoffend. But Congress needed to empower law enforcement to deter repeat offenders "without permitting a radical expansion of Federal jurisdiction over common law crimes and without creating a need for a local veto over the exercise of Federal jurisdiction."[75] ACCA's application was therefore limited to permit its passage.

Soon though, ACCA's scope was broadened. In 1986, ACCA was revised to include the residual clause, with its enumerated crimes and "otherwise" language.[76] "This allowed for incapacitating a wider variety of career criminals than just robbers and burglars,"[77] in keeping with the original intentions of ACCA's sponsors.

But the introduction of this broad clause also incited a tidal wave of litigation that brought ACCA before the Court in four cases in as many years, as the judiciary struggled to fill in the gap created by Congress.[78] In all of these cases, members of the Court attempted to make sense of the residual clause by looking to or imagining Congress's purpose in passing ACCA. In *Begay v. United States*,[79] for example, Justice Breyer's majority opinion speculated about the purpose behind Congress's inclusion of the enumerated crimes: the crimes were listed to clarify that "the statute cover[ed] only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'"[80] The enumerated crimes limit ACCA's reach to crimes similar both in kind and in degree of risk posed to the examples themselves.[81] This approach made sense given what the Court identified as the underlying purpose of the Act: ACCA was enacted in an at-

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[73] *See* H.R. REP. NO. 98-1073, at 1–3 (describing the recidivism research that led to ACCA's passage).

[74] *See id.*

[75] *Id.* at 5.

[76] H.R. REP. NO. 99-849, at 6 (1986). ACCA was also revised in 1988, when the Anti-Drug Abuse Act instituted a requirement that ACCA's three predicate felonies have been "committed on occasions different from one another." H.R. REP. NO. 100-5210, at 110 (1988); *see also* Levine, *supra* note 66, at 548.

[77] Levine, *supra* note 66, at 547.

[78] *See* Sykes v. United States, 131 S. Ct. 2267, 2295 (2011) (Scalia, J., dissenting). Justice Alito in fact referenced this flood in his dissent, stating that the majority's willingness to "brush[] aside *stare decisis*" and "[i]nvert[] the canon that a statute should be construed if possible to avoid unconstitutionality" derived from its anxiety "to rid [the Court's] docket of bothersome residual clause cases." *Johnson*, 135 S. Ct. at 2573–74 (Alito, J., dissenting).

[79] 553 U.S. 137 (2008).

[80] *Id.* at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2012)).

[81] *Id.* at 143.

tempt to reduce the "special danger" that arises when a violent felon possesses a gun.[82] Even the Court's best efforts to discern a congressional purpose from the structure of ACCA's residual clause required stretching the statute's language and ended in disagreement.[83]

Johnson was then simply the latest in a series of cases in which the Court wrestled with the residual clause. *Johnson* was not facially a case about the judicial role; it was rather a case concerning statutory interpretation, stare decisis, and the vagueness doctrine. But underlying the debate of these technical issues was a more fundamental question: when a flawed statute is sending offenders to prison for a mandatory minimum of fifteen years, what are judges to do? In *Johnson*, the Justices offered their answers. Justice Alito's dissent and Justice Thomas's concurrence highlighted the conservative options available: when faced with the task of interpreting the residual clause, they suggested that a judge utilize the traditional tools of statutory interpretation, within the boundaries of stare decisis.[84] The majority opinion, however, offered an alternative: Justice Scalia declined to apply a canon of construction, and instead affirmed a judicially created interpretive rule.[85] He similarly declined to adhere to precedent because the Court's lived "experience" had shown it to be misguided.[86] Finally, he significantly revived and broadened the vagueness doctrine, indicating that where a statute was *mostly* vague, but perhaps clearly covered a

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[82] *Id.* at 146. Justice Scalia concurred in the judgment, critiquing the majority for failing to articulate a principle according to which all future cases could be decided. There was nothing to indicate, he complained, that Congress intended the enumerated crimes to indicate anything other than a requisite degree of risk. *Id.* at 149–53. Justice Alito dissented, joined by Justices Souter and Thomas. Noting that the residual clause "call[ed] out for legislative clarification," and "sympathetic to the . . . Court's attempt to craft a narrowing construction of [the] provision," Justice Alito nonetheless found that it deviated too far from the statutory text to be a tenable test. *Id.* at 155 (Alito, J., dissenting). Justice Alito's concurrence one year later in *Chambers* echoed this concern: In *Chambers*, the majority found that a failure-to-report offense was not a predicate crime of violence that could justify a career offender enhancement. Chambers v. United States, 555 U.S. 122, 123 (2009). Finding himself bound by *Begay*'s problematic precedent, Justice Alito concurred in the judgment but wrote separately "to emphasize that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship" had led it. *Id.* at 132 (Alito, J., concurring in the judgment). Justice Alito closed his concurrence with a plea that Congress provide a list of predicate offenses that would qualify as crimes of violence; only such a list could "right ACCA's ship." *Id.* at 134.

[83] The fact that the Court found itself hard-pressed to discern the limits of ACCA's residual clause is unsurprising in light of the fact that — as far as can be discerned from ACCA's legislative history — Congress's purpose in linking the Act to firearm possession had little to do with setting such limits, and rather was more about preserving federalism values.

[84] *Johnson*, 135 S. Ct. at 2573–74 (Alito, J., dissenting); *id.* at 2563 (Thomas, J., concurring in the judgment).

[85] *See id.* at 2556–57 (majority opinion).

[86] *Id.* at 2560 ("It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.").

core of conduct, it could still be violative of a defendant's due process rights and therefore void.[87]

These were dramatic steps, and Justice Scalia took care to cabin the *Johnson* opinion's application to the particular provision before the Court. The opinion he authored was narrow and technical: Justice Scalia carefully deconstructed the residual clause to identify the layered ambiguity that made it both unique and unconstitutionally vague.[88] He sidestepped stare decisis by characterizing purportedly problematic precedent as dicta.[89] This narrowness suggests that Justice Alito's feared "nuclear explosion" is unlikely to come to pass.

Yet *Johnson*'s impact may well be broader than the majority admits.[90] Sentencing statutes are the province of Congress, and the Court has shown that it is willing to enforce even the most draconian, within the bounds of the Eighth Amendment, provided that Congress clearly requests that it do so.[91] Yet Justice Scalia's opinion demonstrates the great lengths to which the Court is prepared to go when a poorly drafted statute imperils defendants' liberty and due process rights. The *Johnson* majority's willingness to find the residual provision unconstitutionally vague — despite the availability of the constitutional avoidance canon and the presence of precedent, and in light of Justice Scalia's earlier express messages to Congress[92] — will put pressure on Congress to be more precise in the future. This pressure will be heightened if *Johnson* also encourages judges to hear, and litigants to raise, constitutional challenges to vague criminal statutes.

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[87] *See id.* at 2561.

[88] *See id.* at 2556–60.

[89] Conceding that "statements in some of [the Court's] opinions could be read to suggest" that a statute cannot be vague where "there is some conduct that clearly falls within the provision's grasp," he emphasized that the Court's "*holdings* squarely contradict[ed that] theory." *Id.* at 2560–61.

[90] Already, *Johnson* has had a significant impact on federal sentencing policy. Shortly after the case was decided, the United States Sentencing Commission announced that it would begin the process of amending a portion of the Sentencing Guidelines that contained language mirroring that of the residual clause. Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence (Aug. 7, 2015), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150807_Press_Release.pdf [http://perma.cc/VGJ6-N3XJ]. Appellate courts have already splintered in deciding the question of *Johnson*'s retroactivity, *see* Brian Toth, *On* Johnson *Retroactivity, the Eleventh Circuit Splits with the Seventh Circuit*, SDFLA BLOG (Aug. 12, 2015), http://sdfla.blogspot.com/2015/08/on-johnson-retroactivity-eleventh.html [http://perma.cc/RM7K-XHJE], which may suggest that the Court has not yet heard its last residual clause case.

[91] *See, e.g.*, Ewing v. California, 538 U.S. 11, 30–31 (2003) (upholding California's three-strikes law); Harmelin v. Michigan, 501 U.S. 957, 961, 996 (1991) (upholding a mandatory life sentence for a first offense of possessing crack cocaine).

[92] *See, e.g.*, Sykes v. United States, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) ("Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.").