Sarbanes-Oxley Act — Destruction of Evidence — Yates v. United States

After a series of catastrophic corporate and accounting frauds in the early 2000s,[1] Congress passed the Sarbanes-Oxley Act of 2002.[2] The Act included a provision, codified as 18 U.S.C. § 1519, making it a crime, punishable by up to twenty years in prison, to "knowingly alter[], destroy[], . . . falsif[y], or make[] a false entry in any record, document, or tangible object" in order to obstruct a federal investigation.[3] In 2011, Florida fisherman John Yates was convicted under that provision for destroying not records, not documents, but seventy-two undersized red grouper. Last Term, in *Yates v. United States*,[4] the Supreme Court threw out Yates's conviction, holding that the phrase "tangible object," for purposes of § 1519, encompasses only objects "used to record or preserve information."[5] While the plurality opinion is couched in the language of statutory interpretation, a constitutional concern lurks under the surface: the level of notice mandated by the Due Process Clause. The Court reached the right result in narrowing the statute's application, but it should have clearly identified the due process problem and applied the canon of constitutional avoidance to accomplish the same ends.

In August 2007, Yates was leading a fishing expedition in the Gulf of Mexico when his vessel, the *Miss Katie*, was boarded by John Jones, a Florida official tasked with enforcing state and federal fishing laws.[6] Jones noticed that three red grouper on the boat appeared to be shorter than the twenty inches required by federal regulations.[7] Jones measured all of Yates's grouper, determining that seventy-two fish were undersized and separating those from the remainder of the haul.[8] Jones issued a citation for this civil violation and told Yates to leave the undersized fish in their separate crates.[9] Four days later, after the

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[1] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

[2] Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

[3] 18 U.S.C. § 1519 (2012). This section was intended to "clarify and close loopholes in the existing criminal laws" directed at the destruction of evidence. S. REP. NO. 107-146, at 14 (2002). The provision was motivated by revelations that employees at Enron and Arthur Andersen had been shredding documents in the midst of Enron's collapse. *See id.* at 2–4.

[4] 135 S. Ct. 1074 (2015).

[5] *Id.* at 1079 (plurality opinion).

[6] United States v. Yates, 733 F.3d 1059, 1061 (11th Cir. 2013).

[7] *Id.* At the time, federal regulations required harvested red grouper to be at least twenty inches long, *see* 50 C.F.R. § 622.37(d)(2)(ii) (2006); however, that regulation has since been amended to allow for the catching of red grouper eighteen inches or longer, *see* 50 C.F.R. § 622.37(d)(2)(iv) (2014). All of the fish set aside by Officer Jones were longer than the eighteen inches currently required by the regulation. *Yates*, 135 S. Ct. at 1079 (plurality opinion).

[8] *Yates*, 135 S. Ct. at 1079 (plurality opinion).

[9] *Id.*

Miss Katie had returned to shore, Jones reviewed the offending fish and noticed that many were now longer than those he had previously measured.[10] Suspecting foul play, Jones questioned a crewmember, who admitted that Yates had instructed the crew to cast the undersized grouper overboard and replace them with larger fish.[11]

In May 2010, almost three years after instructing his crew to toss the too-small grouper overboard, Yates was indicted for violating 18 U.S.C. § 1519.[12] The government took the position that the discarded fish were "tangible objects" within the meaning of the statute, and that Yates had intentionally destroyed evidence relevant to a federal investigation. During his trial, Yates moved for a judgment of acquittal, arguing that § 1519's reference to a "tangible object" must be read in light of the destruction of evidence in the Enron implosion that spurred Sarbanes-Oxley's passage.[13] It should thus be interpreted to reach only physical items used to store information — things like hard drives, not fish.[14] However, the trial judge applied binding Eleventh Circuit precedent, which read the provision broadly, and denied the motion.[15] Yates was convicted and sentenced to thirty days imprisonment, followed by supervised release for three years.[16]

The Eleventh Circuit affirmed Yates's conviction, attending to the scope of § 1519 in a single paragraph.[17] Writing for a unanimous panel, Judge Dubina held that the term "tangible object" "unambiguously applies to fish."[18] The court also determined that because the statute was clear, the rule of lenity did not apply.[19]

The Supreme Court reversed. Writing for a plurality of the Court, Justice Ginsburg[20] began her analysis with the ordinary meaning of the statutory term. On its face, "tangible object" would clearly encompass fish, as they are things that can be "seen, caught, and handled."[21] However, "[i]n law as in life, . . . the same words, placed in different

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10 *Id.* at 1080.

11 *Id.*

12 *Id.* Yates was also charged with violating 18 U.S.C. § 2232(a), which makes it a crime to destroy property to prevent a federal seizure. *Id.* Yates was convicted of that count and did not contest that conviction in his appeal before the Supreme Court. *Id.* at 1079.

13 *Id.* at 1080.

14 *See id.*

15 *See* United States v. Yates, No. 2:10-cr-66-FtM-29SPC, 2011 WL 3444093, at *1–2 (M.D. Fla. Aug. 8, 2011) ("Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action." (quoting United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008))).

16 *Yates*, 135 S. Ct. at 1080–81 (plurality opinion).

17 United States v. Yates, 733 F.3d 1059, 1061, 1064 (11th Cir. 2013).

18 *Id.* at 1064. Judge Dubina was joined by Judge Jordan and Judge Baldock, the latter from the Tenth Circuit and sitting by designation.

19 *Id.*

20 Justice Ginsburg was joined by Chief Justice Roberts and Justices Breyer and Sotomayor.

21 *Yates*, 135 S. Ct. at 1079 (plurality opinion).

contexts, sometimes mean different things."[22] For Justice Ginsburg, the context in *Yates* started with § 1519's title — "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy" — and the title of the section of Sarbanes-Oxley that created § 1519 — "Criminal penalties for altering documents."[23] She took these headings to indicate that Congress did not intend for "tangible object" to "sweep within its reach physical objects of every kind," and she demanded a clearer statement from Congress if it did intend for the statute to function as "an all-encompassing ban on the spoliation of evidence."[24]

Justice Ginsburg then argued that § 1519's placement in a portion of the U.S. Code narrowly aimed at obstructive acts in financial contexts hinted at its limited scope.[25] Other provisions of Sarbanes-Oxley, but not § 1519, were placed alongside statutes that criminalized obstructive acts generally.[26] And in fact, one of those other provisions, § 1512(c)(1), "significantly overlap[ped]"[27] with § 1519.[28] In Justice Ginsburg's view, § 1519 could not be read as broadly as the government proposed, or else it would have the same scope as § 1512(c)(1), thus robbing the latter provision of any independent meaning.[29]

The plurality opinion next applied three canons of construction to § 1519. First, based on *noscitur a sociis*, under which words draw meaning from their neighbors, the term "tangible object" is limited by its surrounding phrases, including what the Court characterized as references to "objects used to record or preserve information"[30] — like "any record [or] document" — and the provision's ban on "falsif[ying] or mak[ing] a false entry."[31] Second, the canon of *ejusdem generis*, under which a general term is read to encompass only items similar to the more specific words that precede it, supports a narrow reading of "tangible object."[32] Third, using the canon against surplusage, Justice

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[22] *Id.* at 1082. Before examining what for her was the relevant context in *Yates*, Justice Ginsburg brushed aside the government's argument that § 1519's reference to "tangible object" should be read in light of Federal Rule of Criminal Procedure 16, under which "tangible objects" are "interpreted to include any physical evidence." *Id.* at 1082–83. Justice Ginsburg determined that § 1519, as a penal provision, should carry a narrower meaning. *Id.* at 1083.

[23] *Id.*

[24] *Id.* Justice Ginsburg also consulted the relatively specific heading of 18 U.S.C. § 1520, which was passed alongside § 1519 — "Destruction of corporate audit records" — to support her point. *Id.*

[25] *Id.* at 1083–84. For example, § 1517 concerns financial institutions and § 1518 focuses on healthcare offenses.

[26] *Id.* at 1084.

[27] *Id.* at 1085 (quoting Brief for the United States at 49, *Yates*, 135 S. Ct. 1074 (No. 13-7451)).

[28] *Id.* at 1084–85.

[29] *Id.* at 1085.

[30] *Id.*

[31] 18 U.S.C. § 1519 (2012).

[32] *Yates*, 135 S. Ct. at 1086–87 (plurality opinion).

Ginsburg determined that if Congress had intended "tangible object" to have the broad meaning advanced by the government, its two neighboring terms, "record" and "document," would be rendered redundant.[33] Justice Ginsburg thus forcefully rejected the "aggressive interpretation" advanced by the government.[34]

Finally, in case the tools of statutory interpretation applied by the plurality left any doubt as to the meaning of the provision, Justice Ginsburg invoked the rule of lenity, which requires that ambiguity in criminal statutes be interpreted in the defendant's favor.[35] The rule of lenity was especially appropriate here given § 1519's draconian maximum sentence.[36] Justice Ginsburg thus adopted the narrow reading of "tangible object," interpreting it to reach only objects similar to those at the heart of the Enron debacle that spurred the statute's passage — those used to "record or preserve information."[37]

Justice Alito concurred in the judgment. While he agreed with the plurality's constrained reading of "tangible object," he believed the question could have been decided on narrower grounds. Justice Alito focused on three components of the statute: its nouns, its verbs, and its title.[38] Agreeing with the plurality opinion, he wrote that the nouns "record" and "document," through the aid of *noscitur a sociis* and *ejusdem generis*, help to diminish the scope of "tangible object."[39] Next, Justice Alito explained that the verbs "falsifies" and "makes a false entry in" also apply more neatly to nouns associated with "filekeeping."[40] Finally, the presence of "records" in the title of the provision also "points toward filekeeping, not fish."[41] While "perhaps none of these features by itself would tip the case in favor of Yates, the three combined" did.[42]

Justice Kagan dissented, joined by Justices Scalia, Kennedy, and Thomas. Justice Kagan argued that Congress intended for § 1519 to have a broad reach. Indeed, "conventional tools of statutory construction all lead to a more conventional result: A 'tangible object' is an ob-

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[33] *Id.* at 1087.

[34] *Id.* The government had also argued that the overall phrase "record, document, or tangible object" had been adapted from a Model Penal Code (MPC) obstruction provision and was intended to stand for the broad universe of evidence that could be tampered with. *Id.* However, unlike the misdemeanor MPC provision, § 1519 was a felony punishable by up to twenty years in prison. *Id.* As a result, the meaning of the analogous term in the MPC did not illuminate Congress's intent in drafting § 1519.

[35] *Id.* at 1088.

[36] *See id.*

[37] *See id.* at 1088–89.

[38] *Id.* at 1089 (Alito, J., concurring in the judgment).

[39] *Id.*

[40] *Id.* at 1089–90.

[41] *Id.* at 1090.

[42] *Id.* at 1089.

ject that's tangible."[43] Citing Dr. Seuss's *One Fish Two Fish Red Fish Blue Fish*, Justice Kagan wrote that, as "a discrete thing that possesses physical form," a fish falls within the ordinary meaning of the phrase "tangible object."[44] This plain meaning of "tangible object," encompassing all physical evidence, was supported both by its appearance in other statutes[45] and by its context in § 1519.[46] And Sarbanes-Oxley's legislative history "puts extra icing on a cake already frosted,"[47] clearly indicating Congress's intent that § 1519 bar all destruction of evidence, reaching far beyond the financial frauds that spurred its passage.[48]

Having made her case for a broad reading of § 1519, Justice Kagan went on to attack the plurality and concurring opinions point by point. She started by critiquing the plurality's reliance on the provision's title and its location within the U.S. Code.[49] She then argued that the opinion misused the canon of surplusage; she saw no irreconcilable conflict between sections 1519 and 1512(c)(1).[50] Justice Kagan also saw no room for the canons of *noscitur a sociis*, *ejusdem generis*, or the rule of lenity; these tools were useful when a statute was ambiguous, but for her § 1519 was crystal clear.[51] Ultimately, she wrote, "[s]ection 1519 *is* very broad. It is also very clear. Every traditional tool of statutory interpretation points in the same direction . . . ."[52]

In the final section of her dissent, Justice Kagan presented the "real issue" motivating the plurality's treatment of § 1519: "overcriminalization and excessive punishment in the U.S. Code."[53] While Congress can rely on most sentencing judges to blunt the edges of many criminal

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[43] *Id.* at 1091 (Kagan, J., dissenting).

[44] *Id.*

[45] *Id.* ("Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term 'tangible object' or its first cousin 'tangible thing,'" *id.*, and "all courts have adhered to the statutory language's ordinary (*i.e.*, expansive) meaning," *id.* at 1092.).

[46] *Id.* at 1091–93. Justice Kagan relied on § 1519's reference to "any" "tangible object" as a proxy for the drafters' intent for the provision to have a broad scope. *Id.* at 1092. Moreover, she wrote, "'tangible object' appears as part of a three-noun phrase (including also 'records' and 'documents') common to evidence-tampering laws and always understood to embrace things of all kinds." *Id.*

[47] *Id.* at 1093.

[48] *Id.* at 1093–94 ("'When a person destroys evidence,' the drafters explained, 'overly technical legal distinctions should neither hinder nor prevent prosecution.' Ah well: Congress, meet today's Court, which here invents just such a distinction with just such an effect." *Id.* at 1094 (citation omitted) (quoting S. REP. NO. 107-146, at 7 (2002)).).

[49] *Id.* at 1094–95.

[50] *Id.* at 1095–97.

[51] *Id.* at 1097–99. Justice Kagan called this alleged misuse of the canons "one more of the plurality's never-before-propounded, not-readily-explained interpretive theories." *Id.* at 1098.

[52] *Id.* Justice Kagan also stridently critiqued Justice Alito's concurrence. *See id.* at 1099–100 ("[T]he sum total of three mistaken arguments is . . . three mistaken arguments." *Id.* at 1100 (omission in original).).

[53] *Id.* at 1100.

laws,[54] "§ 1519 is a bad law — too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion."[55] In this way, the provision "is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."[56] However, Justice Kagan wrote, it is beyond the role of a judge to rewrite a clear statute. Judges may voice their disapproval of laws "in lectures, in law review articles, and even in dicta. But [they] are not entitled to replace the statute Congress enacted with an alternative of [their] own design."[57]

In *Yates*, the Court narrowed the scope of a broad obstruction statute. Given the financial mischief that prompted § 1519's passage and the context in which the phrase "tangible object" is situated, the Court was right to reject a reading of the statute that encompassed every "physical item within the jurisdictional reach of the United States."[58] But it could have gotten to this result in a better way. The Court relied on the toolkit of statutory interpretation; it should have focused instead on the constitutional concerns raised by a broad reading of the statute. The Due Process Clause requires the government to provide notice that one's conduct might be illegal, and the Court employs several doctrines to help police this requirement.[59] The plurality only hinted at this notice rationale in an opinion focused almost entirely on statutory interpretation.[60] The Court should have explicitly named the constitutional dimensions of the issue it faced and then applied the canon of constitutional avoidance to reach the same result. Doing so would have served as a valuable signal of how § 1519, and other similarly broad criminal laws, should be understood by other judges, prosecutors, legislators, and the public at large.

The government's interpretation of § 1519, as well as the statute's plain text, presented a potentially serious constitutional issue: if the provision prohibited the spoliation of all things that could hypotheti-

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[54] *Id.* at 1100–01. For example, the district court judge in Yates's case sentenced him to thirty days in prison, far less than the statutory maximum of twenty years. *Id.* at 1080–81 (plurality opinion).

[55] *Id.* at 1101 (Kagan, J., dissenting).

[56] *Id.*

[57] *Id.*

[58] Brief for Eighteen Criminal Law Professors as Amici Curiae in Support of Petitioner at 2, *Yates*, 135 S. Ct. 1074 (No. 13-7451).

[59] Two examples are the void-for-vagueness doctrine, *see* Skilling v. United States, 130 S. Ct. 2896, 2931 (2010), and the rule of lenity, *see* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[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.").

[60] Professor Richard Re has noted the "suppressed but discernible constitutional problem" sounding in due process and "notice values" in *Yates*. *See* Richard M. Re, *Stuntz's Presence in* Yates, PRAWFSBLAWG (Mar. 2, 2015, 5:25 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/stuntzs-presence-in-yates.html [http://perma.cc/7G5B-CKTL].

cally be used in a federal investigation, it risked violating the Due Process Clause. In *Lambert v. California*,[61] the Court held that due process requires notice.[62] In that decision, the Court determined that it was unconstitutional to prosecute an individual for a crime they did not know they had committed.[63] In contrast to *Lambert*'s explicit constitutional holding, the *Yates* plurality obliquely invoked notice, using it as a mode of statutory interpretation: the *Yates* holding was informed by how the law's extreme breadth and severe penalty could help elucidate congressional intent.[64]

The Court should have foregrounded the question of notice and articulated the constitutional implications of a § 1519 that reached red grouper.[65] This notice concern[66] is particularly acute here because those who violate the statute may face a two-decade sentence. As Justice Ginsburg wrote, "Yates would have had scant reason to anticipate a *felony* prosecution,"[67] having simply received a ticket for a civil in-

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[61] 355 U.S. 225 (1957).

[62] *Id.* at 228; *see also* Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." (quoting United States v. Harriss, 347 U.S. 612, 617 (1954))).

[63] *Lambert*, 355 U.S. at 229–30. While *Lambert* is somewhat an outlier in the Court's criminal law jurisprudence, *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 589–90 (2001), its rationale animates several doctrines and subsequent cases. As Professor William Stuntz has argued, if the rule of *Lambert* were applied aggressively, "stale crimes would cease to exist and overbroad crimes would, over time, acquire narrower definitions." *Id.* at 597; *see also id.* at 588 ("Perhaps courts could create the judicial equivalent of new criminal codes, and insulate them from legislative override by pegging them to due process.").

[64] *See, e.g.*, *Yates*, 135 S. Ct. at 1087 (plurality opinion) ("[W]e are persuaded that an aggressive interpretation of 'tangible object' must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping.").

[65] The use of notice in *Yates* is distinct from how it has been relied upon in the past. The Court has held that "due process does not require actual notice." Jones v. Flowers, 547 U.S. 220, 225 (2006). And because Yates was likely aware that tossing the fish overboard was legally dubious, *see* John Yates, *A Fish Story*, POLITICO MAG. (Apr. 24, 2014), http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html [http://perma.cc/MWC6-QYF2], Yates might be hard-pressed to argue that he had no notice that his conduct was unlawful. But the Court's analysis stressed that Yates almost certainly did not have sufficient notice of the potential *seriousness* of his conduct — that is, that he could be prosecuted under a felony provision as harsh as § 1519.

[66] Notice is not the only constitutional norm at issue in *Yates*. A concern rooted in proportionality can also be seen in the plurality's focus on the disconnect between Yates's potentially severe sentence and his relatively innocuous conduct. Proportionality review helps to ensure "government is restrained and avoids oppressive and arbitrary action." Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3108 (2015).

[67] *Yates*, 135 S. Ct. at 1087 (plurality opinion) (emphasis added). It is not surprising that the Court hinted at a constitutional notice concern rather than saying that charging Yates with such a serious crime was, for example, disproportionate to the underlying conduct. To whatever extent criminal law has been constitutionalized over the last half-century, those legal efforts have largely focused on procedure rather than substance. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 209–12 (2011) ("The Constitution is not written with substan-

fraction.[68] The plurality's discussion and application of the rule of lenity further betray its concern with notice.[69] Justice Ginsburg cited case law characterizing this canon as a tool that "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal."[70] This language echoes one scholar's description of the "core concept of notice" as asking "whether the ordinary and ordinarily law-abiding individual would have received some signal that his or her conduct risked violation of the penal law."[71] The plurality opinion should have explicitly acknowledged that the notice issue figured into the Justices' approach and analysis.

Having articulated its constitutional notice concerns, the Court should then have applied the canon of constitutional avoidance and refused to adopt an expansive reading of "tangible object."[72] Despite countervailing reasons not to invoke the avoidance canon,[73] doing so would have aligned with the Court's past practice. First, in *Skilling v. United States*,[74] the Court used constitutional avoidance to narrow a

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tive criminal law in mind." *Id.* at 212.). Hinting at the procedural concern of notice is thus a more natural fit with the development and current jurisprudence of criminal law.

68 The plurality continually stressed the harshness of the potential penalty, which Yates almost certainly had no idea he could face at the time of the incident. *See, e.g.*, *Yates*, 135 S. Ct. at 1081 (plurality opinion) ("For life, he will bear the stigma of having a federal felony conviction."); *id.* at 1087 (characterizing § 1519 as "not a misdemeanor, but a felony punishable by up to 20 years in prison"). In *Johnson v. United States*, 135 S. Ct. 2551 (2015), another case from this year's Supreme Court Term, the Court similarly expressed how the severity of punishment faced can inform whether a law comports with the Due Process Clause. *See id.* at 2560 ("Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process."). In this way, *Johnson* and *Yates* may represent an expansion of the Court's notice jurisprudence: while earlier cases focused on ensuring notice as to criminality, the most recent cases focus on notice as to penality.

69 *See Yates*, 135 S. Ct. at 1088 (plurality opinion) ("[The rule of lenity] is relevant here, where the Government urges a reading of § 1519 that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil.").

70 *Id.* (quoting Liparota v. United States, 471 U.S. 419, 427 (1985)).

71 John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 211 (1985).

72 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) (opinion of Roberts, C.J.) (invoking "a duty to construe a statute to save it, if fairly possible").

73 There are several reasons why the Court may have chosen not to invoke avoidance in *Yates*. First, as Professor Re has argued, § 1519 is not so vague as to be void, but rather is uncomfortably broad; using due process to explicitly narrow its application could appear to be a sharp doctrinal change. *See* Re, *supra* note 60. Second, the Court may simply not have seen the need to address the constitutional issue when a statutory resolution was available. *Cf.* Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 99 (1993) ("[W]e have adhered to a practice of deciding cases on statutory rather than constitutional grounds when both alternatives are available."). Finally, articulating the constitutional dimensions of notice may have been less crucial when the rule of lenity, a type of criminal law–specific clear statement requirement, serves a similar function.

74 130 S. Ct. 2896 (2010).

broad and vague statute rather than strike it in its entirety.[75] Second, in *Bond v. United States*,[76] decided in the Court's last Term, the Court reversed the defendant's conviction under an international chemical weapons accord because it threatened important federalism norms.[77] Such a prosecution required a clear statement of congressional intent. Similarly, in *Yates*, Justice Ginsburg's plurality opinion demanded a clear indication from Congress that it intended § 1519 to have a broad reach that threatened due process safeguards.[78] But the *Yates* Court did not name the constitutional norm that informed its analysis.

The Court would have better served the judiciary, political actors, and the public had it directly addressed the due process issue raised by a broad reading of § 1519. Doing so would notify other judges as to how they should approach similar statutes, alert prosecutors about how the Court expects them to exercise prosecutorial discretion,[79] and apprise legislators as to what the Court perceives as a problem with the current condition of criminal law.[80] Overtly identifying the constitutional problem at issue could also enhance judicial legitimacy.[81]

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[75] *See id.* at 2929 ("It has long been our practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.").

[76] 134 S. Ct. 2077 (2014).

[77] While the *Bond* Court also did not invoke avoidance, it did look to constitutional values. *See id.* at 2088–90 (describing the government's use of the statute as "dramatically intrud[ing] upon traditional state criminal jurisdiction," *id.* at 2088 (quoting United States v. Bass, 404 U.S. 336, 350 (1971)), and avoiding "reading statutes to have such reach in the absence of a clear indication that they do," *id.*). The Court may have been quicker to invoke constitutional values in *Bond* because federalism norms have no rule of lenity–esque escape hatches to help enforce constitutional imperatives. The Roberts and Rehnquist Courts have also generally been more amenable to the claims of states asserting their sovereignty than the claims of criminal defendants.

[78] The plurality made this connection to *Bond* explicit by citing the case while discussing Yates's inability to anticipate a prosecution under § 1519 and characterizing *Bond* as rejecting a "'boundless reading' of a statutory term given [the] 'deeply serious consequences' that reading would entail." *Yates*, 135 S. Ct. at 1087 (plurality opinion) (quoting *Bond*, 134 S. Ct. at 2090).

[79] At many points in oral argument, the Justices faulted the lack of prosecutorial discretion shown in this and other cases the Court has seen in recent years. *See* Transcript of Oral Argument at 28, 31, 52, *Yates*, 135 S. Ct. 1074 (No. 13-7451). If the Court had not only narrowed the application of § 1519, but also clearly voiced its notice concerns, it could have given pause to prosecutors hoping to bring charges under similarly expansive statutes.

[80] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020–21 (1989) ("[B]y narrowly construing statutes venturing close to the constitutional periphery, the Court can signal its concerns to Congress."). Professor David Shapiro has argued that "a great deal is lost in the process of debate if the reasons given by the judge to the public are inconsistent with those he would give in private, or to himself." David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 738 (1987).

[81] *See* Shapiro, *supra* note 80, at 737 (noting that once a lack of candor is identified it "only serves to increase the level of cynicism about the nature of judging and of judges"); *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 375 (1990) ("Typically, the failure of the Court to acknowledge the force of evolutive factors is simply a failure of candor, since it is apparent that the Court or at least some of the Justices have considered those factors seriously.").

The way in which notice figured into the plurality's analysis, questions at oral argument,[82] and Justice Kagan's explicit language[83] indicate that the Court was concerned with overbroad criminal laws and overenforcement more generally.[84] The Justices saw § 1519 as a statute that could be applied indiscriminately, reaching any piece of physical evidence, and with severe consequences. And while the Court's reliance on traditional tools of statutory interpretation to narrow the scope of an overbroad law may help to achieve its desired ends while mollifying the countermajoritarian anxiety,[85] being candid about the case's constitutional issue and the broader problem of overcriminalization could have had the added benefit of organizing public resistance to an ever-expanding federal code. Justice Kagan's closing paragraphs speak powerfully about deeply rooted problems in the American criminal justice system, and they would have been even more impactful if they had been delivered as a part of the opinion narrowing the law's application.[86] Many of the pathologies of the criminal justice system are grounded in the lack of broad-based, motivated, and organized resistance to the expansion of criminal law.[87] By articulating a constitutional concern and narrowing a statute in order to avoid running afoul of it, the Court's opinion could have served to motivate and give voice to arguments that have so far been diffuse and muted.[88]

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[82] *See, e.g.*, Transcript of Oral Argument, *supra* note 79, at 50 ("[Y]ou are really asking the Court to swallow something that is pretty hard to swallow. Do you deny that this statute, as you read it, is capable of being applied to really trivial matters, and yet each of those would carry a potential penalty of 20 years . . . [?]").

[83] *See Yates*, 135 S. Ct. at 1100–01 (Kagan, J., dissenting). Justice Kagan's dissent also alluded to Stuntz's work on the problems of American criminal law, calling § 1519 "an emblem of a deeper *pathology* in the federal criminal code," *id.* at 1101 (emphasis added), a reference to Stuntz's famous article *The Pathological Politics of Criminal Law*, *supra* note 63. *See* Re, *supra* note 60.

[84] Scholars have detailed the metastasis of American criminal law at length. *See, e.g.*, Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (describing the federal criminal code as a "haphazard grab-bag of statutes accumulated over 200 years"). Popular accounts have appeared too. *See, e.g.*, HARVEY A. SILVERGLATE, THREE FELONIES A DAY (2009); A Crime a Day (@CrimeADay), TWITTER, http://twitter.com/crimeaday (posting a choice federal crime from the U.S. Code each day).

[85] *See* Eskridge & Frickey, *supra* note 81, at 324 ("As unelected judges, applying statutes enacted by our elected legislators, they feel some pressure to tie their results rigorously to the expectations that legislators had when they enacted the statute. Any result not related to majoritarian expectations may seem illegitimate in a democracy.").

[86] *Cf.* Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 12 (2008) (discussing how dissenting justices "can spark a kind of deliberation that is not the same as partisan politics, but is rooted in the deeply democratic practices of constitutional governmental institutions").

[87] *See* Stuntz, *supra* note 63, at 552–53.

[88] *Cf.* Guinier, *supra* note 86, at 48 ("[D]emosprudence as a lawmaking or legal practice is animated by the intuition that citizen participation over time in the form of deliberation and iteration is vital to the legitimacy and justice function of lawmaking and to the sustainability of democracy itself.").