

# Semantic Vagueness and Extrajudicial Constitutional Decisionmaking

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# SEMANTIC VAGUENESS AND EXTRAJUDICIAL CONSTITUTIONAL DECISIONMAKING

Anthony O'Rourke\*

This Article integrates two scholarly conversations to shed light on the divergent ways in which courts and legislatures implement constitutional texts. First, there is a vast literature examining the different ways in which courts and extrajudicial institutions, including legislatures, implement the Constitution's textually vague expressions. Second, in recent years legal philosophers have begun to use philosophy of language to elucidate the relationship between vague legal texts and the content of laws. There is little scholarship, however, that uses philosophy of language to analyze the divergent ways in which legislatures and courts implement vague constitutional provisions. This Article argues that many legislative and judicial enactments can—and should—be re-characterized as efforts to “precisify” vague constitutional language. This re-characterization, I argue, has at least two benefits. First, it provides a resource for defending the legitimacy of “legislative constitutionalism” in cases where there is a divergence between how courts and legislatures implement a constitutional text. Second, it will enable scholars to move beyond longstanding and sometimes unproductive taxonomic debates concerning the types of activity that count as constitutional interpretation.

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## INTRODUCTION

The Constitution is replete with vague textual provisions that courts and legislatures, respectively, implement in divergent ways. Legislation to prevent “unreasonable

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searches and seizures,”<sup>1</sup> for example, often departs significantly from Fourth Amendment doctrine.<sup>2</sup> Statutes that enforce “equal protection of the laws” likewise bear little resemblance to the judicial doctrines governing that right.<sup>3</sup> There is a rich literature examining the roles of courts and legislatures in implementing the Constitution’s textually vague expressions.<sup>4</sup> Two features of this literature, however, becloud many scholarly analyses of extrajudicial constitutionalism.

First, scholars often discount the degree to which extrajudicial decisionmaking is linked to the Constitution’s text. As scholars have recognized, legislatures and courts often diverge significantly in how they implement vague constitutional provisions. For example, the Family and Medical Leave Act (FMLA) implements the Fourteenth Amendment’s Equal Protection Clause, but looks nothing like previous judicial understandings of what that clause requires.<sup>5</sup> These divergences lead many scholars of extrajudicial constitutionalism to treat the application of the Constitution’s text as the province of judges, and to assume that legislative enactments are unanchored from the text. Many scholars assume that legislatures shape the Constitution’s meaning only indirectly. Through statutes, legislatures can articulate norms and values that, in turn, shape our collective sense of what the Constitution means.<sup>6</sup> Little attention has been given, however, to the ways in which Congress more directly seeks to implement the Constitution’s text.

Second, the extrajudicial constitutionalism literature is littered with terminological debris. Specifically, volumes of scholarship have been devoted to whether certain types of judicial and legislative decisions should be characterized as “interpretations”—as opposed to “understandings” or “constructions”—of the Constitution.<sup>7</sup> At the core

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<sup>1</sup> U.S. CONST. amend. IV, § 1.

<sup>2</sup> Cf. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 850–55 (2004) (describing how the Supreme Court’s Fourth Amendment jurisprudence has been shaped by statutory protections in federal wiretapping laws).

<sup>3</sup> U.S. CONST. amend. XIV; see *infra* notes 19–28 and accompanying text.

<sup>4</sup> Significant descriptive accounts of legislative constitutional implementation include JACK M. BALKIN, *LIVING ORIGINALISM* 25 (2011); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 14 fig. 2 (2010); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 8–10 (1993); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 169–70 (2001); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003). A related literature examines the ways in which administrative agencies influence our understanding of the Constitution. See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897–98 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 522 (2015). For the sake of scope, this Article postpones analysis of administrative constitutional decisionmaking.

<sup>5</sup> See *infra* notes 21–24 and accompanying text.

<sup>6</sup> See generally ESKRIDGE, JR. & FEREJOHN, *supra* note 4.

<sup>7</sup> See *infra* Part IV.

of this debate is a genuine disagreement over the appropriate methods of elaborating the Constitution's meaning. However, the debate comes at a cost: the lack of a coherent vocabulary for scholars of extrajudicial constitutionalism who are venturing to explore questions other than the legitimacy of the various interpretive methodologies that are on offer.

This Article uses recent work in philosophy of language to address these two deficiencies in the extrajudicial constitutionalism literature. Drawing upon scholarship on semantic vagueness, I argue that many constitutional decisions—both legislative and judicial—can be understood as efforts to “precisify” vague constitutional texts. This account of constitutional decisionmaking has at least two analytical benefits. First, it shows that if courts and legislatures are both authorized to implement a constitutionally vague text, their strategies for doing so will necessarily diverge. A philosophically informed account of semantic vagueness thus calls into question the assumption that legislatures do not play a direct role in implementing vague constitutional provisions.

Third, this framework allows one to sidestep the seemingly intractable definitional debate over which types of decisionmaking qualify as constitutional “interpretation.” Simply put, both “interpretation” and “construction” of the Constitution—in the many ways those terms are defined—can be treated as ways of precisifying the document's text. By adopting this vocabulary, one can better analyze the subtle ways in which a text's structure and linguistic meaning can shape constitutional decisionmaking. This terminological simplification will not resolve the question of whether it is normatively legitimate for legislatures to shape the Constitution's meaning. However, it may allow for a clearer analysis of how they go about doing so.

Methodologically, this Article brings two growing literatures into conversation. In legal philosophy, scholars have developed increasingly sophisticated accounts of the ways in which semantic vagueness shapes the development of substantive law.<sup>8</sup> Much of this scholarship, however, focuses on the ways in which vagueness influences judicial decisionmaking, and ignores how legislatures and other lawmaking institutions grapple with semantically vague constitutional texts. In constitutional theory, meanwhile, there is wide recognition that much of constitutional law is made outside the courts.<sup>9</sup> Many have observed that the vague language of the United States Constitution serves to legitimize this—constitutionalism<sup>10</sup>—but their analysis of

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<sup>8</sup> The contributions of these scholars are cited throughout the Article. Pioneering works include TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* (2000) and Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509 (1994). Many other significant contributions can be found in *PHILOSOPHICAL FOUNDATIONS OF VAGUENESS IN THE LAW* (Andrei Marmor & Scott Soames eds., 2011) [hereinafter *PHILOSOPHICAL FOUNDATIONS*].

<sup>9</sup> See sources cited *supra* note 4.

<sup>10</sup> See, e.g., BALKIN, *supra* note 4, at 25 (arguing that the Constitution's use of “the vague and abstract language of principles” suggests that its goal is to “channel politics, by articulating a collection of key values and commitments that set the terms of political discourse”); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 26 (1999) (arguing that extrajudicial constitutional “construction” is “expanded by the

vagueness tends to stop there. By merging these conversations, this Article lays out new research paths for using legal philosophy to shed light on the realities of constitutional practice.

This Article is organized into four Parts. Part I briefly defends the premise that some legislation can be analyzed as an effort to implement the Constitution's text. Part II defines semantic vagueness and shows that constitutional decisionmaking involves the precisification of vague expressions. Applying this insight, Part III shows that divergences between legislative and constitutional decisionmaking result inevitably from the application of semantically vague constitutional provisions. Thus, the ubiquity of semantically vague textual provisions in the Constitution suggests that the document is designed to promote institutional competition over the implementation of its guarantees. Part IV highlights this Article's significant implications for longstanding debates over the nature of constitutional interpretation.

#### I. LEGISLATIVE DECISIONMAKING AND CONSTITUTIONAL TEXT

This Article proceeds from the premise that courts and legislatures both serve the function of implementing semantically vague constitutional texts. This premise may not seem obvious to readers who have a passing familiarity with the extrajudicial constitutionalism literature. Scholars have identified a number of statutes that contribute to our understanding of the Constitution's meaning.<sup>11</sup> Less attention has been paid, however, to the relationship between these statutes and the Constitution's actual text. Scholars often treat legislative enactments as part of the "small-c" constitution, which is comprised of "the web of documents, practices, institutions, norms, and traditions that structure American government."<sup>12</sup> According to Richard Primus's summary of "small-c" constitutional theory, the rules that are developed in this fashion are "not grounded in the text of the big-C Constitution."<sup>13</sup>

This characterization of legislative constitutional decisionmaking is accurate to the extent that the Constitution's text does not *require* Congress to enact statutes that contribute to our constitutional structure. This is not to say, however, that the "big-C Constitution's" text plays no role in shaping legislation that contributes to the "small-c" constitution. As Curtis Bradley and Neil Siegel have recently argued, there are many

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limited possibility of decisive interpretation" of the Constitution's text); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 106 (2010) (linking extrajudicial "construction" to linguistic vagueness).

<sup>11</sup> See ESKRIDGE, JR. & FEREJOHN, *supra* note 4, at 8–9 ("Although the Constitution as a formal matter trumps statutes inconsistent with its terms, as a practical matter Constitutional law's evolution is generally—and ought to be—influenced by the norms entrenched in other ways, such as by the development of a state statutory consensus, or through the creation of a federal superstatute."); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230–46 (2001) (analyzing the "Constitution-bending" effects of the Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973).

<sup>12</sup> Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1080 (2013).

<sup>13</sup> *Id.* at 1082.

instances in which nonjudicial officials perceive themselves as being constrained by the plain meaning of the Constitution's text.<sup>14</sup> These officials' perceptions of the Constitution's textual clarity, Professors Bradley and Siegel argue, often are the product of the interpreters' normative commitments and other extratextual considerations.<sup>15</sup> Nevertheless, the officials perceive their contributions to the "small-c" constitution as being justified by and grounded in the Constitution's text.<sup>16</sup>

For the purposes of this Article, there are two central points that one can distill from this argument. First, there are instances in which one can regard Congress as intending to use statutes to implement the Constitution's text.<sup>17</sup> Second, in some of these instances, the constitutional text at issue might have a greater degree of semantic vagueness than Congress recognizes.<sup>18</sup>

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<sup>14</sup> Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1217–18 (2015).

<sup>15</sup> *Id.* at 1216–17 (arguing that the "perceived clarity" of the Constitution's text can be affected by considerations that include "reasoning about the purpose of a constitutional provision, structural inferences, understandings of the national ethos, consequentialist considerations, customary practice, and precedent").

<sup>16</sup> *Cf.* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2389 (2015) ("[T]he fact—if it is true—that interpreters throughout history have tried to find ways to characterize text as ambiguous does not show that unambiguous text is empty or symbolic; if anything, it shows that it is thought binding." (footnote omitted)).

<sup>17</sup> Here and elsewhere in this Article, I ascribe intentions and motivations to courts and legislatures when discussing their constitutional decisionmaking strategies. For extended defenses of this approach to legislative intentions specifically (and collective intentions more generally), see RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 218–43 (2012); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614–17 (2014); Scott J. Shapiro, *Massively Shared Agency*, in *RATIONAL AND SOCIAL AGENCY: THE PHILOSOPHY OF MICHAEL BRATMAN* 257, 259–61 (Manuel Vargas & Gideon Yaffe eds., 2014). For a discussion of recent cognitive science literature that supports the ascription of intentions to institutions, see Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2077–79 (2016). I recognize, of course, that there are other contexts in which it may be misleading to treat institutions as having collective intentions. *See generally*, e.g., Kenneth A. Schepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

<sup>18</sup> I use the terms "legislative constitutional decisionmaking" and "legislative constitutionalism" to refer to the process by which legislatures implement norms embodied in the Constitution, especially norms linked to specific constitutional provisions. *Cf.* Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLAL. REV. 894, 897 n.6 (2016) (noting that "[t]he term 'constitutionalism' . . . has no settled meaning" and using the term to refer to the "broad set of practices that are involved as officials and ordinary individuals invoke, make claims upon, contest, and implement the norms embodied in the U.S. Constitution"). This Article proceeds from the premise that legislative constitutional decisionmaking, thus defined, can influence the trajectory of constitutional law in ways that are compatible with a traditional understanding of judicial supremacy. *See, e.g.*, ESKRIDGE, JR. & FERREJOHN, *supra* note 4, at 14 (arguing that "normative commitments are announced and

Granted, it is often unclear whether Congress intends for a statute to give effect to the Constitution's text, or is instead driven by broader normative aims.<sup>19</sup> Sometimes, however, Congress's textual commitments are explicit. This often is the case with legislation that Congress enacts within its authority under Section 5 of the Fourteenth Amendment.<sup>20</sup> The legislative history of the FMLA,<sup>21</sup> for example, describes the legislation as "based" on the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>22</sup> The Supreme Court upheld the FMLA as appropriate "prophylactic legislation" to enforce the Equal Protection Clause, rather than an impermissible "substantive redefinition of the Fourteenth Amendment right at issue."<sup>23</sup> As Robert Post and Reva Siegel have demonstrated, however, the FMLA can be easily reframed as a novel application of the Equal Protection Clause to provide the unusual remedy of paid family leave for instances of sex-based employment discrimination.<sup>24</sup>

An even clearer example of legislative attention to the Fourteenth Amendment's text involves the Patent and Plant Variety Clarification Act.<sup>25</sup> Congress justified this legislation by asserting that patents are a form of property that merits protection under the Due Process Clause of the Fourteenth Amendment.<sup>26</sup> The Supreme Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by enacting the statute.<sup>27</sup> Regardless of the Court's determination, however, Congress's justification for the legislation involved the intentional application of a vague constitutional provision—"nor shall any State deprive any person of life, liberty, or property, without due process of law"—to a novel context.<sup>28</sup>

Even when Congress does not invoke its Section 5 power, it sometimes expressly justifies legislation by reference to the Constitution's text. Consider, for

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entrenched . . . through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration").

<sup>19</sup> See Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1198–99 (2011) (questioning the practical relevance of legislative constitutionalism on the ground that "[a]rguments from morality, justice, democracy, or common sense are sometimes conflated with constitutional arguments").

<sup>20</sup> U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>21</sup> 29 U.S.C. §§ 2601–2654 (2012).

<sup>22</sup> H.R. REP. NO. 103-8(i), at 29 (1993); S. REP. NO. 103-3, at 16 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 18.

<sup>23</sup> Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)).

<sup>24</sup> See Post & Siegel, *supra* note 4, at 1971–80.

<sup>25</sup> 35 U.S.C. § 296 (1992) (amending the federal patent laws to abrogate state sovereign immunity), *invalidated* by Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

<sup>26</sup> S. REP. NO. 102-280, at 8 (1992), as reprinted in 1992 U.S.C.C.A.N. 3087, 3094.

<sup>27</sup> See *Fla. Prepaid*, 527 U.S. at 639–48.

<sup>28</sup> See U.S. CONST. amend. XIV, § 1; S. REP. NO. 102-280, at 8.

example, the Speedy Trial Act of 1974.<sup>29</sup> With that statute, Congress made clear that it was passing legislation to operationalize a vague constitutional provision. The Speedy Trial Act's title is something of a giveaway. Beyond the title, however, the House Judiciary Committee Report on the Speedy Trial Act of 1974 states that the bill was designed to "give effect to the Sixth Amendment right to a speedy trial" in a way that would "assist in reducing crime and the danger of recidivism[.]"<sup>30</sup> Thus, there is a high degree of transparency regarding Congress's intention to implement the Sixth Amendment's speedy trial right through legislation.

Similarly, the Supreme Court has demonstrated a relatively marked degree of textual fidelity in its speedy trial jurisprudence. Relative to other areas of criminal procedure, the text of the Sixth Amendment has played an obvious role in judicial efforts to implement the constitutional speedy trial right.<sup>31</sup> As explained below, the Supreme Court has expressly recognized the vagueness of the Speedy Trial Clause.<sup>32</sup> Moreover, when deciding speedy trial cases, the Court has employed textual arguments without appealing to other modalities of constitutional argumentation that are common in other criminal procedure contexts.<sup>33</sup>

This is not to suggest, however, that there is equivalence between the constitutional functions that courts and legislatures fulfill when they implement constitutional texts.<sup>34</sup> Courts implement the Constitution in the course of engaging in judicial review over legislative or executive actions.<sup>35</sup> Judicial implementation of the Constitution thus involves the politically delicate task of standing in judgment of a coordinate branch of government or of a state government. Congress, by contrast, implements the Constitution in the course of exercising its prerogative to make new laws to guide and constrain the executive branch. Constitutional implementation of the Constitution is thus an activity that is often done implicitly, and in the course of either addressing a policy problem or (increasingly) delegating power to the executive branch to address the problem.<sup>36</sup> Legislatures may therefore implement the

<sup>29</sup> 18 U.S.C. §§ 3161–3174 (2012).

<sup>30</sup> H.R. REP. NO. 93-1508 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401, 7402.

<sup>31</sup> Cf. Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1497 n.21 (2006) ("[F]rom several years of experience litigating criminal procedure issues on appeal, I can attest that the criminal defense bar also spends minimal time developing conceptions of constitutional text."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 72 (1997) (noting the "extreme rarity of textual argument in [the] area" of constitutional criminal procedure).

<sup>32</sup> See *infra* notes 45–48 and accompanying text.

<sup>33</sup> Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1982) (presenting a typology of constitutional "modalities" that include historical, textual, structural, doctrinal, and ethical arguments).

<sup>34</sup> I am grateful to Larry Solan for this point.

<sup>35</sup> See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111 (1997).

<sup>36</sup> See Adrian Vermeule, *Optimal Abuse of Power*, NW. U. L. REV. 673, 683–88 (2015)



Constitution in relatively imaginative ways that obscure the degree to which their decisionmaking is grounded in the document's text.<sup>37</sup> The fact that a legislative constitutional decision does not necessarily look like a judicial one, however, does not necessarily mean that it was unanchored from the Constitution's text.

## II. SEMANTIC VAGUENESS AND PRECISIFICATION

Legal scholars frequently remark on the Constitution's textual vagueness, but rarely explain what it means for a text to be vague.<sup>38</sup> Indeed, scholars and judges sometimes misuse the term "vagueness" to describe legal texts that are ambiguous (i.e., that have more than one distinct meaning<sup>39</sup>) or that display some other type of indeterminacy.<sup>40</sup> This casual usage serves to conceal some of the ways in which semantically vague texts can shape constitutional law. This Part therefore provides a working account of semantic vagueness. It then argues that most judicial and legislative constitutional decisions can be understood as efforts to "precisify" vague constitutional texts.<sup>41</sup> Thus understood, one can provide an analytically productive account of how vague constitutional texts necessarily generate divergences between how courts and legislatures seek to implement the Constitution.

### A. Semantic Vagueness Defined

Philosophers of language define semantic vagueness by reference to "borderline cases."<sup>42</sup> That is, an expression is "vague" if "there are cases (actual or possible) in

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(describing legislative strategies to compensate for legislatures being "structurally incapable of supplying policy change at the necessary rates").

<sup>37</sup> Cf. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1310 (2001) (arguing that "the institutional strength of Congress is not its attention to legalisms but its expertise in the policy aspects of constitutional decisions").

<sup>38</sup> For a notable exception, see Solum, *supra* note 10, at 98 (providing a standard definition of vagueness).

<sup>39</sup> See Jill C. Anderson, *Misreading Like A Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1534–35 (2014).

<sup>40</sup> See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 421 (1985) ("Although constitutional theorists tend to use (or misuse) the term 'open texture' as no more than a synonym for 'vagueness,' it has a different technical, philosophical meaning.").

<sup>41</sup> This account will not touch on many of the competing theories of semantic vagueness. See, e.g., Roy Sorensen, *Vagueness*, STAN. ENCYCLOPEDIA PHIL. (Feb. 8, 1997), <http://plato.stanford.edu/entries/vagueness/> (last modified Mar. 12, 2012) (summarizing these theories). It does, however, adequately describe semantic vagueness as it is understood by most legal philosophers.

<sup>42</sup> See *id.* ("There is wide agreement that a term is vague to the extent that it has borderline cases."); see also ENDICOTT, *supra* note 8, at 31 ("An expression is vague if there are borderline cases for its application."); cf. Waldron, *supra* note 8, at 520 (cautioning that one's concept of a borderline case will depend on the "paradigm" cases that one takes to be at the core of a vague word's application).

which one just does not know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts."<sup>43</sup> Consider, for example, the expression 'tall' as it applies to a collection of natural rock formations. A competent English speaker might know that the expression applies to Mount Everest, and that it does not apply to a clump of pebbles. There will be some hill, however, for which the speaker does not (and potentially cannot) know whether the expression applies.<sup>44</sup> This is a borderline case.

So defined, semantic vagueness is a well-recognized feature of the U.S. Constitution. Consider, for example, the Sixth Amendment's "right to a speedy . . . trial." In a rare instance of candor as to the Constitution's indeterminacy, the Supreme Court acknowledged the vagueness of the Speedy Trial Clause in language consistent with this philosophical definition. Specifically, in *Barker v. Wingo*,<sup>45</sup> the Court explained that "[i]t is . . . impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate."<sup>46</sup> There are certainly expeditious adjudications that anyone would characterize as "speedy trials," and unconscionably lengthy cases that nobody would characterize as "speedy trials." But there are also borderline cases for which there is no non-arbitrary way to decide whether a trial was speedy. We may agree that a thirty-day delay between a drug-smuggling defendant's indictment and his conviction honors his speedy trial right. Likewise, we may agree that the right is violated when the delay lasts thirty years. We may likewise agree that the speedy trial right is violated if the government postpones a murder defendant's trial for five years solely for the purpose of gaining a tactical

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<sup>43</sup> PAUL GRICE, *Postwar Oxford Philosophy*, in *STUDIES IN THE WAY OF WORDS* 171, 177 (1989); see also ENDICOTT, *supra* note 8, at 31–33 (elaborating on Grice's definition of vague).

<sup>44</sup> There is a debate as to whether one *can* know whether a vague expression applies to a borderline case. Semantic theories hold that a vague expression is indeterminate (or undefined) with respect to its application to borderline cases. See ENDICOTT, *supra* note 8, at 138. Thus, competent speakers may agree that the expression 'tall' applies to a large mountain and that it does not apply to a mound of dirt. 'Tall' might be undefined, however, with respect to the borderline cases of a hill. Epistemic theories, by contrast, hold that vague expressions are always precisely defined, and that we are simply ignorant of their correct application to borderline cases. See generally TIMOTHY WILLIAMSON, *VAGUENESS* (1994). Thus, according to the epistemic theorist, there is always a hill, *x*, that is not tall, and an infinitesimally larger hill, *x*, that is tall. See Andrei Marmor & Scott Soames, *Introduction* to *PHILOSOPHICAL FOUNDATIONS*, *supra* note 8, at 5–6. The definition offered here is sufficiently capacious to accommodate both "semantic" and "epistemic" theories of vagueness. The epistemic theory is controversial, however, and in any event is unlikely to resolve the practical challenges that vagueness poses for legal decisionmakers. See ANDREI MARMOR, *THE LANGUAGE OF LAW* 86 n.1 (2014) ("[I]t probably makes no difference, in the legal context, which particular theory of vagueness one works with."). To the extent that the claims in this Article conflict with the epistemic theory of vagueness, the conflicts reflect a rejection of the view.

<sup>45</sup> 407 U.S. 514 (1972).

<sup>46</sup> *Id.* at 521 (footnote omitted).

advantage. Is the right violated, however, when the same delay occurs in part because the defendant is hoping that the government will lose its leverage over a cooperating witness?<sup>47</sup> In such a borderline case, we might know the precise length and circumstances of a trial delay without knowing—and, possibly, without being able to know—whether the defendant received a “speedy trial.”<sup>48</sup> Thus, the Court implicitly recognized the existence of borderline cases in which a speaker does not (or cannot) know whether the “speedy trial” right is violated.

Looking beyond the speedy trial clause, semantic vagueness is endemic to the Constitution’s rights provisions. For example, we may know the precise length and circumstances of a borderline-constitutional police stop without knowing whether it amounted to an “unreasonable . . . seizure[.]”<sup>49</sup> Similarly, we may know the precise sentence that a convicted defendant receives without knowing whether it was a “cruel and unusual punishment[.]”<sup>50</sup> and we may know precisely how much that defendant was forced to pay in restitution without knowing whether it was an “excessive fine[.]”<sup>51</sup>

Or, turning to an even more indeterminate phrase, all can now agree that de facto racial segregation constitutes a denial of “the equal protection of the laws.”<sup>52</sup> A borderline case, however, might include whether the Equal Protection Clause is violated by a statute that prohibits race-conscious busing programs designed to facilitate the integration of an urban school district.<sup>53</sup> If that statute were unconstitutional, would the same school district run afoul of the Equal Protection Clause if it implemented a race-conscious school assignment policy designed to ensure that its most oversubscribed and desirable schools are racially integrated?<sup>54</sup> There simply may be no semantically definite answer to such a question.

### *B. Precisification of Legal Texts*

In many contexts, including lawmaking, a competent speaker must choose whether to apply a vague expression to a borderline case even when the choice will generate disagreements with other competent speakers. In these borderline cases, we can describe the speaker as offering a “precisification” of a vague term.<sup>55</sup> Consider,

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<sup>47</sup> See *id.* at 533, 536 (holding that the speedy trial right was not violated under such circumstances but emphasizing that it was a “close” case).

<sup>48</sup> U.S. CONST. amend. VI.

<sup>49</sup> U.S. CONST. amend. IV.

<sup>50</sup> U.S. CONST. amend. VIII.

<sup>51</sup> *Id.*

<sup>52</sup> U.S. CONST. amend. XIV, § 1; see, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 488–89, 491–92 (1954).

<sup>53</sup> See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 459, 487 (1982) (invalidating such a statute under the Equal Protection Clause).

<sup>54</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007) (invalidating such a policy).

<sup>55</sup> See Kit Fine, *Vagueness, Truth and Logic*, 30 *SYNTHESE* 235, 271–78 (1975).

for example, a speaker who is evaluating whether a borderline-tall hill is ‘tall.’ The speaker might be aware that it is impossible to say whether to apply or withhold the term ‘tall’ to the hill. But the circumstances of the conversation might nonetheless force the speaker to assert that a particular hill is, or is not, tall. (Suppose, for example, that the speaker works for a ski resort and is responsible for classifying the hill as one that is appropriate for beginners.) Suppose that the speaker decides that the hill is tall given the context of the conversation. Others might disagree with the *truth* of the claim but nevertheless agree that the speaker has offered a plausible (or “admissible”<sup>56</sup>) precisification of the vague expression.<sup>57</sup>

The term “precisification” is borrowed from a theory of vagueness that philosophers do not universally accept. It is, however, particularly useful for analyzing the processes by which officials apply vague legal texts. The term is associated with a supervaluationist theory of vagueness, and is used to describe the application of vague terms to borderline cases.<sup>58</sup> In broad strokes, supervaluationists argue that there are “truth-gaps” in how a vague term applies to objects. Specifically, “a vague sentence is true if true for all complete precisifications[.]”<sup>59</sup> For example, the sentence “the hill is tall or it is not tall” could conform to the supervaluationist’s definition of truth. However, a precisification such as “the hill is tall” may be “admissible”—acceptable to competent speakers—without being true.

Regardless whether the supervaluationist account of vagueness is correct, the term “precisification” is useful for describing how vagueness influences legal decisionmaking. For example, an epistemic theorist might argue that, for the purposes of evaluating the truth of a vague sentence, the concept of precisification is useless. For the epistemic theorist it is either true or false that a particular hill is tall; there are no truth-gaps.<sup>60</sup> Lawmakers, however, must make decisions under conditions of epistemic uncertainty in which nobody knows how a vague legal expression should apply to a borderline case. It is therefore helpful to characterize a lawmaker’s decision as a “precisification” of the vague expression while bracketing the question whether the lawmaker made the epistemologically correct decision.

Indeed, legal decisionmaking can be said to require speakers to precisify vague texts. For example, a court cannot refuse to decide whether or not a defendant’s speedy trial right was violated simply because the defendant presents a borderline case. The conventions of judicial decisionmaking require the court to decide whether or not the speedy trial right was violated no matter how difficult the decision may be. This is because, as Timothy Endicott has observed, judicial systems operate

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<sup>56</sup> *Id.* at 272. I use the terms “plausible” and “admissible” interchangeably.

<sup>57</sup> See Delia Graff Fara, *Shifting Sands: An Interest-Relative Theory of Vagueness*, 28 PHIL. TOPICS 45, 57 (2000) (describing the constraints that supervaluationists have argued to be determinative of whether a precisification is “admissible”).

<sup>58</sup> See Fine, *supra* note 55, at 271–78.

<sup>59</sup> *Id.* at 282.

<sup>60</sup> See WILLIAMSON, *supra* note 44, at 3.

according to a principle of “juridical bivalence.”<sup>61</sup> This principle entails a system of adjudication that “treat[s] people as if the application of the law to their situation were bivalent” no matter how vague the law may be.<sup>62</sup> Consider, for example, a borderline-tall plaintiff who brings a claim under a statute that prohibits height discrimination in employment, but which is worded so that its protections do not extend to “tall individuals.” Even if ordinary language leaves it open whether the term ‘tall’ applies to the plaintiff, the principle of “juridical bivalence” will require the judge to make a determination whether the plaintiff is too ‘tall’ to be in the protected class. The plaintiff is ‘tall’ within the meaning of the statute or he is not; there is no in-between.

### C. Divergent Precifications and the Sorites Paradox

The process of precisifying vague legal texts, coupled with the principle of juridical bivalence, will necessarily generate divergent applications of those texts. Indeed, such divergence is necessary for lawmakers to avoid the *sorites* paradox.<sup>63</sup> For any semantically vague expression, it is possible to identify a series of cases along a continuum to which the expression may or may not apply. Along this continuum—which Timothy Endicott calls a “*sorites* series”<sup>64</sup>—there will be (1) a set of cases to which the expression obviously applies, (2) a set of cases to which the expression obviously does not apply, and (3) a set of borderline cases for which one cannot know whether or not the expression applies.<sup>65</sup> In a borderline case, two speakers might arrive at different conclusions as to whether to apply the expression, and we cannot say that either speaker is incorrect in her choice.

However, the inferential logic that compels a speaker to apply a vague expression to incrementally different borderline cases would likewise compel her to apply the expression in cases that are clearly inappropriate. For example,<sup>66</sup> if a trial of  $n$  days is represented as  $x_n$ , we can say that if  $x_n$  is speedy, then  $x_{n+1}$  is also speedy. Of course, a one-day trial,  $x_1$ , is speedy. Therefore:

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<sup>61</sup> ENDICOTT, *supra* note 8, at 72–73.

<sup>62</sup> *Id.* at 72.

<sup>63</sup> For a more involved discussion of the paradox, see Dominic Hyde, *Sorites Paradox*, STAN. ENCYCLOPEDIA PHIL. (Jan. 17, 1997), <https://plato.stanford.edu/archives/win2014/entries/sorites-paradox/> (last modified Dec. 6, 2011).

<sup>64</sup> ENDICOTT, *supra* note 8, at 34.

<sup>65</sup> See MARMOR, *supra* note 44, at 88 (“The essential feature of vagueness, in the strict semantic sense, consists in the fact that when a word, W, is vague, there are bound to be borderline cases of W’s application to objects that are in a space between W’s definite extension and definite nonextension, objects about which there is no saying whether W applies or not. . . . This is clearly the case with words such as ‘rich,’ ‘mature,’ ‘bald,’ etc.”); Waldron, *supra* note 8, at 516 (“In general, problems of vagueness will arise whenever we confront a continuum with terminology that has, or aspires to have, a bivalent logic.” (footnote omitted)).

<sup>66</sup> This example and notation closely track Timothy Endicott’s illustration of the *sorites* paradox using baldness. See ENDICOTT, *supra* note 8, at 33; see also, e.g., Hyde, *supra* note 63.

- (1)  $x_1$  is speedy,  
 (2)  $x_2$  is speedy,  
 . . . .  
 (5,475)  $x_{5,475}$  is speedy.

By applying a valid rule of inferential logic<sup>67</sup> based on a clear case, a lawmaker would arrive at the obviously false conclusion that a fifteen-year trial would not violate the Sixth Amendment.

At some point, a lawmaker will be compelled to disregard this logic and establish a cutoff point between a trial  $x_n$  that is speedy and a trial  $x_{n+1}$  that is not speedy. This will require the lawmaker to arrive at different legal conclusions in virtually identical borderline cases. Any such decisions are necessarily arbitrary, and the lawmaker must make them on some basis other than the epistemic truth that a trial's length is, or is not, speedy within the meaning of the Sixth Amendment.<sup>68</sup>

Thus, when a vague legal expression is at issue, the *sorites* paradox creates a powerful incentive for lawmakers to arrive at different legal conclusions in virtually identical cases. At the cost of violating the rule-of-law principle that like cases should be treated alike,<sup>69</sup> judges may be forced to decide that a particular trial was not "speedy" within the meaning of the Sixth Amendment notwithstanding the fact that an earlier judicial decision approved of a similar (but arguably distinguishable) trial delay. Similarly, legislators who are seeking to implement a constitutional guarantee may be forced to establish a sharp cutoff point between a trial that does not violate the speedy trial right and a trial that does.

### III. PRECISIFICATION AND CONSTITUTIONAL DIVERGENCE

A precise account of semantic vagueness serves to clarify the frequently made (but seldom explained) observation that the Constitution's vagueness leads to interpretive conflicts. Over the past two decades there has been an explosion of scholarship

<sup>67</sup> Namely, *modus ponens*.

<sup>68</sup> See Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 8, at 14, 22–24 (discussing the epistemic arbitrariness of precision). Elsewhere, Timothy Endicott explains this point using the illustration of a judge having to decide whether a noise ordinance is violated by any one of a "million raves," each playing music at an imperceptibly lower volume than the one before it. See ENDICOTT, *supra* note 8, at 57–58; see also Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1290–91 (2010) (discussing Endicott's "case of the million raves").

<sup>69</sup> ENDICOTT, *supra* note 8, at 58; see also H. L. A. HART, THE CONCEPT OF LAW 163–64 (3d ed. 2012) (identifying the principle of treating like cases alike as "the central precept of justice"). For recent discussions of the treating-like-cases-alike principle, see, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1674–75 (2010); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 29–30 (2012).

examining the ways in which constitutional law is made both within and outside the courts.<sup>70</sup> This scholarship has demonstrated that constitutional law is comprised of an array of competing judicial doctrines, executive actions, agency policies, and legislation, none of which is strictly compelled by the Constitution's semantic meaning.<sup>71</sup> Each of these forms of constitutional elaboration, this Part argues, can be framed as ways of precisifying semantically vague constitutional provisions.

As a general matter, legal systems involve what Timothy Endicott calls "reflexivity."<sup>72</sup> That is, a codified legal system will both establish written laws and authorize certain institutions to resolve any indeterminacy concerning the content of those laws.<sup>73</sup> In the United States, the Constitution serves these functions by (1) establishing multiple branches of government, and (2) according overlapping authority to those branches to implement the document's rights provisions. As Jack Balkin has argued, the Constitution provides a framework that authorizes the political and judicial branches to offer their own "interpretations" of the Constitution.<sup>74</sup> One could easily rephrase this argument to say that the Constitution empowers the three branches of government to offer competing precisifications of the document's text.<sup>75</sup>

First, consider the most obvious contribution to constitutional law: judicial doctrine. The principal of juridical bivalence requires that courts stipulate how a vague legal text applies in borderline cases.<sup>76</sup> One can thus view constitutional doctrine as a way of precisifying the Constitution's text. If the Supreme Court decides that a five-year trial delay does not necessarily violate the speedy trial right under certain circumstances, and that decision is accorded precedential weight,<sup>77</sup> then the Court has enhanced the precision of a semantically vague constitutional right. If a subsequent

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<sup>70</sup> See, e.g., sources cited *supra* notes 4–10.

<sup>71</sup> See generally, e.g., BALKIN, *supra* note 4; WHITTINGTON, *supra* note 10.

<sup>72</sup> See Timothy Endicott, *Vagueness and Law*, in VAGUENESS: A GUIDE 171, 171–74 (Guisepina Ronzitti ed., 2011). Endicott derives his argument from a reading of the following passage in Aristotle's *Politics*: "Where it seems that the law does not draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which leaves it undetermined, as rightly as they can." *Id.* at 171 (quoting Aristotle, *Politics* III.16).

<sup>73</sup> See *id.* at 171. In Hartian terms, a legal system is the "[u]nion of [p]rimary and [s]econdary [r]ules." HART, *supra* note 69, at 79. Primary rules directly govern the conduct of legal subjects. Secondary rules govern organizational aspects of a legal system including how to identify whether something is a law (the "rule of recognition") and how to resolve disagreements about those laws (the "rule of adjudication"). See *id.* at 77–99.

<sup>74</sup> See BALKIN, *supra* note 4, at 3–6.

<sup>75</sup> Indeed, by reframing the process in terms of precisification, one can sidestep the debate over whether we should refer to extrajudicial lawmaking as constitutional "interpretation" or as some other phenomenon.

<sup>76</sup> See *supra* notes 61–62 and accompanying text.

<sup>77</sup> See Endicott, *supra* note 72, at 173 ("[L]egal systems very commonly use the resolution of disputes as a technique for regulating the meaning and application of their language, through a rule of precedent." (footnote omitted)).

case presented the precise circumstances that the Court discussed in its earlier decision, it would be clear that the defendant's speedy trial right was not violated. At the same time, however, the *sorites* paradox might require another court to decide that the speedy trial right was violated in a similar, but distinguishable case.<sup>78</sup>

Legislation can also serve to precisify semantically vague constitutional texts.<sup>79</sup> A vague height discrimination statute, for example, might be said to implement an even vaguer constitutional norm of equal protection. If a legislature wishes to offer more guidance than simply excluding "tall individuals" from the statute's protections, it could specify that the law protects only people whose height does not exceed a specific cutoff (say, exactly 5'8"). Such a law would thus stipulate that, in certain borderline cases, some individuals will be able to enjoy the statute's protections and others would not. More realistically, the Speedy Trial Act of 1974<sup>80</sup> generally requires that a trial begin within seventy days of a defendant's initial appearance or indictment.<sup>81</sup> This statute was expressly designed to give effect to the Sixth Amendment's speedy trial guarantee.<sup>82</sup> In many contexts, however, seventy days might be regarded as a borderline delay with respect to the Sixth Amendment's speedy trial right (and in some cases it would not be regarded as raising any sort of constitutional problem). Thus, the Act is a necessarily arbitrary legislative precisification of a semantically vague constitutional right.

One can thus reformulate legislative constitutional decisionmaking as a process by which Congress contributes to the Constitution's meaning by precisifying the document's vague textual provisions. To whatever degree one acknowledges that the Constitution authorizes Congress to implement vague constitutional principles, one must concede that these implementations will diverge from traditional court-centered understandings of the Constitution's text. From a philosophical perspective, however, both institutions are engaged in the same task: deciding how to resolve borderline cases in which one cannot know, and must therefore merely stipulate, whether or not a vague text applies. These concurrent precisification processes will necessarily generate divergent applications of a semantically vague expression.

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<sup>78</sup> See *supra* Section II.C.

<sup>79</sup> Legal philosophers appear to have overlooked this function of legislatures. Timothy Endicott, for example, emphasizes that semantically vague expressions empower courts to make law by deciding borderline cases. See Endicott, *supra* note 72, at 173 ("Vague laws give a form of power to courts. . . . [B]ecause it is characteristic of law to regulate itself, courts characteristically make law when they resolve a dispute."). Likewise, Andrei Marmor treats legal vagueness as the product of a dynamic whereby legislatures create semantically vague laws, and courts resolve the indeterminacy of vague laws as they apply to the parties of a given dispute. See generally MARMOR, *supra* note 44, at 85–105.

<sup>80</sup> 18 U.S.C. §§ 3161–3174 (2012). Certain statutorily enumerated events toll this seventy day clock. See, e.g., *id.* § 3161(h)(1)(D) (tolling the clock for any "delay resulting from any pretrial motion").

<sup>81</sup> *Id.* § 3161(c)(1); see also *Zedner v. United States*, 547 U.S. 489, 492 (2006).

<sup>82</sup> See H.R. REP. NO. 93-1508 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401, 7402.



This divergence is amplified by the fact that many of the Constitution's semantically vague provisions are context-sensitive in their application. Many semantically vague constitutional expressions involve a gradable adjective that exists in reference to a comparison class.<sup>83</sup> As Jason Stanley explains, a gradable adjective is one that allows for modifiers and that speakers use to make comparative constructions.<sup>84</sup> The expression 'tall,' for example can be modified ("Kevin is tall") and can be used to compare objects or individuals ("Kevin is taller than Isaiah"). A "comparison class" consists of the domain of objects that are relevant in the context of a particular utterance of an expression using a gradable adjective.<sup>85</sup> For example, the relevant comparison class for the phrase "Kevin is tall" is likely to be a group of individuals (rather than, say, a group of skyscrapers). The relevant group of individuals, however, might depend on whether Kevin is a law professor or a professional basketball player. Depending on the context, one might mean that "Kevin is tall for a law professor" or "Kevin is tall for an NBA player." The phrase "Mount Everest is tall," however, might have mountains as the relevant comparison class. (One often can make the intended comparison class of an expression explicit by adding the phrase 'for an *x*').

The truth conditions of an expression containing a gradable adjective will shift based on the context in which it is used.<sup>86</sup> Specifically, the comparison class will determine the truth conditions for evaluating an utterance that includes a gradable adjective.<sup>87</sup> The truth conditions for the expression "Kevin is tall," for example, will depend on the comparison class that a group of competent speakers would agree upon in a given context. If the appropriate comparison class were a group of law professors, then the sentence might be true if Kevin were six feet tall. The sentence would be false, however, if the appropriate comparison class were NBA players.<sup>88</sup>

Much of the Constitution's semantic vagueness arises from its use of gradable adjectives. This is particularly true with respect to the document's criminal procedures protections. The Sixth Amendment's speedy trial right, for example, is expressed in terms of a gradable adjective ("speedy") that exists in reference to a comparison

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<sup>83</sup> See Christopher Kennedy, *Vagueness and Grammar: The Semantics of Relative and Absolute Gradable Adjectives*, 30 LINGUISTICS & PHIL. 1, 3–6 (2007) (defining and giving examples of gradable adjectives).

<sup>84</sup> See Jason Stanley, *On the Linguistic Basis for Contextualism*, 119 PHIL. STUD. 119, 124 (2004).

<sup>85</sup> See Kennedy, *supra* note 83, at 7–8; Ewan Klein, *A Semantics for Positive and Comparative Adjectives*, 4 LINGUISTICS & PHIL. 1, 12–13 (1980).

<sup>86</sup> See Kennedy, *supra* note 83, at 3. This is the prevailing view among philosophers of language. *But see generally* HERMAN CAPPELEN & ERNIE LEPORE, *INSENSITIVE SEMANTICS: A DEFENSE OF SEMANTIC MINIMALISM AND SPEECH ACT PLURALISM* (2005) (arguing that gradable adjectives are not context sensitive).

<sup>87</sup> See Klein, *supra* note 85, at 12–16 (discussing comparison classes and giving examples); *see also* Kennedy, *supra* note 83, at 3, 7–11 (discussing the effect of comparison classes).

<sup>88</sup> See *NBA League Averages*, BASKETBALL REFERENCE, [http://www.basketball-reference.com/leagues/NBA\\_stats.html](http://www.basketball-reference.com/leagues/NBA_stats.html) [<https://perma.cc/2M26-XEAR>] (listing the average height of NBA players in the 2015–2016 season as 6'7").

class (“trial”). Thus, in determining whether the right to a speedy trial is violated, one does not compare a trial’s length to that of all things in the world that have a beginning and ending. One does not ask whether the trial was speedy in comparison to Usain Bolt’s completion of a 100-meter race, or in comparison to the formation of a glacier. Rather, one compares a trial’s length to the lengths of some relevant class of trials. Similarly, the Eighth Amendment includes two gradable adjectives—“cruel” and “unusual”—that are expressed in reference to some set of criminal punishments.<sup>89</sup> More subtly, the Fourth Amendment’s search-and-seizure protections are expressed using the gradable adjective “unreasonable”—one search can be more or less reasonable than another—and two potential comparison classes (“searches” or “seizures”).<sup>90</sup>

This type of semantic vagueness generates significant divergences in how lawmakers implement constitutional protections. Because gradable adjectives are context-sensitive, lawmakers working in different contexts will have different understandings of constitutional language. Specifically, if lawmakers differ in their understanding of the relevant comparison class of an expression that involves a gradable adjective, they will diverge in their understandings of the expression’s truth conditions. There are two well-recognized ways in which this can occur.

First, disagreement between speakers will exist when there is imprecision as to the comparison class a speaker has in mind for a specific utterance.<sup>91</sup> Imagine that Kevin is a six-foot-tall former NBA player who went on to become a law professor. If a speaker says, “Kevin is tall,” the context may leave it unclear as to which comparison class the speaker has in mind. Unless this imprecision is resolved, then one cannot determine whether the sentence is true. Similarly, two sets of lawmakers may disagree as to the comparison class relevant to determining whether a particular trial delay violated the Sixth Amendment’s “right to a speedy . . . trial[.]”<sup>92</sup> If the trial in question is for murder, should it be compared only to other murder trials, or would it be appropriate to consider burglary trials as well? If only murder trials are to be considered, should we differentiate between a complex murder-for-hire trial involving no witnesses and a relatively straightforward crime-of-passion trial that involves several witnesses? Each of these questions about the relevant comparison class will affect a lawmaker’s constitutional analysis.

Second, and relatedly, the truth conditions of an utterance using a gradable adjective can shift according to the *object* that is being described. Some theorists argue that even if the comparison class for an utterance is explicit, the truth conditions of a gradable adjective will shift depending on the interests of the speaker or contextual factors that relate to the object to which the speaker is referring.<sup>93</sup> Regardless whether

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<sup>89</sup> U.S. CONST. amend. VIII.

<sup>90</sup> U.S. CONST. amend. IV.

<sup>91</sup> See Kennedy, *supra* note 83, at 9–10 (discussing the potential ambiguity that an implicit comparison class creates).

<sup>92</sup> See U.S. CONST. amend. VI.

<sup>93</sup> See Fara, *supra* note 57, at 54–63 (discussing the relationship between a speaker’s interests and the truth conditions in use for a vague expression); Kennedy, *supra* note 83, at

one accepts this position, the object of an utterance will provide valuable context as to the likely comparison class at issue.<sup>94</sup> (If we know that Kevin is a first-rate law professor but had an undistinguished basketball career, then we'll have a good sense of the comparison class that is intended when people mention him at a faculty lunch.) In either case, lawmakers will be influenced by the case that generates a constitutional decision involving a semantically vague expression.<sup>95</sup> If a lawmaker is discussing the scope of the Speedy Trial Clause in the context of a high-profile detainee case, then the relevant standards of comparison might consist of trials involving complex terrorism-related charges.<sup>96</sup> By contrast, if a judge is trying to decide whether the speedy trial right was violated in a run-of-the-mill burglary case, the relevant standards may involve a very different set of trials.

Because courts and legislatures encounter very different kinds of policy problems, they will diverge significantly in their application of constitutional provisions that involve gradable adjectives. Both courts and legislatures operate under significant constraints that influence the issues that appear on their respective policy agendas.<sup>97</sup> With a few exceptions, the Supreme Court has control over its own docket and can select cases that conform to the Justices' policy agendas.<sup>98</sup> At the same time, however, the Court's case selection is governed by many institutional norms that are unrelated to the facts of the particular case before it.<sup>99</sup> By contrast, legislative agendas are often driven by "policy shocks," including high-profile events that mobilize legislators to overcome the institutional hurdles that typically prevent new laws from being enacted.<sup>100</sup> Accordingly, these institutions will differ with regard to the *objects*

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16–21 (arguing that the standards of comparison for an utterance using a gradable adjective shift based on the object of the utterance rather than being relativized to the interests of the speaker).

<sup>94</sup> See Hans Kamp & Barbara Partee, *Prototype Theory and Compositionality*, 57 COGNITION 129, 142–43 (1995) (explaining that a comparison class "is often, but not exclusively, provided by the noun of the adjective-noun construction").

<sup>95</sup> This argument is closely related to the role of prototypes in the analysis of vague legal expressions. See, e.g., Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in 23 LINGUISTIC INSIGHTS: VAGUENESS IN NORMATIVE TEXTS 73, 80 (Vijay K. Bhatia et al. eds., 2005); Waldron, *supra* note 8, at 520–21.

<sup>96</sup> See, e.g., *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

<sup>97</sup> See BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* 16 (2005) (discussing the time and informational constraints that shape Congress's policy agenda); Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 731 (2011) (discussing constraints on the Supreme Court's policy agenda).

<sup>98</sup> O'Rourke, *supra* note 97, at 745–46.

<sup>99</sup> See, e.g., H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 246 (1991) (quoting a Supreme Court Justice's observation that circuit splits are an indicator that the Court should grant certiorari).

<sup>100</sup> See JONES & BAUMGARTNER, *supra* note 97, at 55–56 (discussing the potential of new information to "shock" and spur legislative action and using the corporate scandals of 2001–2002 as an example).

to which they are seeking to apply context-sensitive constitutional provisions. This, in turn, will lead them to embrace quite different understandings of the semantically vague expressions that they are working with.

Thus, a careful account of semantic vagueness suggests that interpretive divergence and institutional conflicts are products of the Constitution's design. The document establishes three separate branches of government, and gives those branches overlapping authority to implement semantically vague provisions of its text. Accordingly, there are multiple institutions empowered to make competing decisions about how the Constitution's text applies in borderline cases. As an epistemic matter, it is impossible to say that one of these decisions is true while the others are false. Thus, as Jack Balkin observed, the Constitution serves to regulate political life both through "constitutional language and through the institutions, practices, and traditions that are built around this language."<sup>101</sup> To this observation, one can add that the Constitution's combination of vagueness (with respect to its rights provisions) and specificity (with respect to its structural provisions) serves to ensure continuing interinstitutional competition over the document's meaning.

#### IV. PRECISIFICATION AND THE INTERPRETATION/CONSTRUCTION DEBATES

This Article contends that lawmakers occupying different institutional roles will necessarily diverge in how they precisify semantically vague phrases.<sup>102</sup> To the extent that this argument is correct, it can help to clarify much of the terminological and normative confusion that plagues the current literature on extrajudicial constitutionalism. Over the past two decades, there has been explosion of scholarship examining the ways in which constitutional law is made both within and outside the courts. This scholarship had led even sophisticated originalists to acknowledge that lawmakers implement the Constitution through a combination of judicial doctrines, executive actions, and legislative choices, none of which is strictly compelled by the Constitution's semantic meaning.<sup>103</sup> The sheer abundance of this literature, however, has generated a considerable amount of terminological and conceptual confusion about the nature of constitutional lawmaking. A philosophically informed account of semantic vagueness, I argue, can allow us to use a simplified terminology to address a range of constitutional problems.<sup>104</sup>

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<sup>101</sup> See BALKIN, *supra* note 4, at 41.

<sup>102</sup> See *supra* Part III.

<sup>103</sup> See, e.g., BALKIN, *supra* note 4, at 15 ("Constitutional doctrines created by courts, and institutions and practices created by the political branches, flesh out and implement the constitutional text and underlying principles."); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 7 (1999) ("[C]onstitutional construction is essentially political.").

<sup>104</sup> This is not to suggest that all debates over the meaning of constitutional interpretation are unproductive. Rather, the terminological confusion that these debates have generated can serve to becloud arguments over other, unrelated constitutional matters.

Specifically, the concept of “precisifying” semantically vague expressions can allow scholars to sidestep a number of unproductive debates over the meaning of constitutional “interpretation.” Legal theorists have appropriated the term “interpretation” in ways that conflict with the ordinary meaning of the term and the technical definitions that other theorists have offered. Andrei Marmor, for example, has argued that “interpretation” occurs in the exceptional case in which a legal text does not have a clear and ordinary “understanding.”<sup>105</sup> For Marmor, legal “interpretation” occurs when the linguistic determinants of meaning do not resolve the question, and the interpreter must exercise some degree of evaluative judgment.<sup>106</sup> Marmor uses this definition of interpretation to attack originalist theories of constitutional and statutory interpretation, arguing that constitutional interpretation requires a degree of normative reasoning that is incompatible with originalism.<sup>107</sup>

By contrast, constitutional originalists have offered narrow definitions of “interpretation” that make a space for normative reasoning in constitutional law. Keith Whittington and Larry Solum, for example, differentiate between the “interpretation” of relatively precise constitutional provisions and the “construction” of vague constitutional provisions.<sup>108</sup> According to these scholars, constitutional “interpretation” occurs when there is only one permissible understanding of a textual provision, albeit one that might involve pragmatic and contextual considerations.<sup>109</sup> “Construction,” by contrast, involves the inherently political act of deciding on the single best understanding of an indeterminate constitutional provision.<sup>110</sup> In other words, these originalists define “interpretation” like Marmor defines “understanding,” and define “construction” like Marmor defines “interpretation.”<sup>111</sup>

Each of these accounts of “interpretation” provides a way of accurately describing the practice of constitutional law while insisting upon the determinacy of much of the Constitution’s text. But this clarity comes at the cost of adopting a definition

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<sup>105</sup> See MARMOR, *supra* note 44, at 108.

<sup>106</sup> See *id.* (defining interpretation so that it “involves the exercise of some judgment, when it calls for some evaluative considerations about what would make more sense, what would fit better, or what would be a better understanding of the object of interpretation compared to other plausible interpretations of it”).

<sup>107</sup> See *id.* at 8 (summarizing his critique of textualism in statutory and constitutional interpretation).

<sup>108</sup> WHITTINGTON, *supra* note 103, at 5–13 (defining constitutional “interpretation” as the “process of discovering the meaning of the constitutional text” using ordinary methods of judicial reasoning and “construction” as the “essentially political” process of implementing underdetermined constitutional provisions); see also WHITTINGTON, *supra* note 10, at 3–19 (further elaborating the concept of constitutional construction); Solum, *supra* note 10, at 98 (providing a standard definition of vagueness and stating “ambiguities in legal texts can (usually) be resolved by interpretation, but constitutional vagueness always requires construction”).

<sup>109</sup> See WHITTINGTON, *supra* note 103, at 5–6; Solum, *supra* note 10, at 98.

<sup>110</sup> See WHITTINGTON, *supra* note 103, at 6–10; Solum, *supra* note 10, at 98.

<sup>111</sup> I’m grateful to Erik Encarnacion for this point and for pressing me on this argument.

of “interpretation” that radically departs from the ordinary usage of that term.<sup>112</sup> By contrast, Jack Balkin uses a capacious understanding of “interpretation” to develop an alternative account of originalism. Specifically, Balkin defines “constitutional interpretation” to include both the “ascertainment of meaning” through ordinary linguistic practices and the “construction” of a text using “all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent.”<sup>113</sup> For Balkin, the term “interpretation” encompasses all of the categories advanced by Marmor, Solum, and Whittington. Balkin’s definition is intended to reflect the ordinary meaning of constitutional “interpretation” at the cost of some degree of taxonomic precision.

These debates have resulted in overlapping definitions of “interpretation” that can be summarized as follows:

#### Constitutional Theorist

	<b>Marmor (Nonoriginalist)</b>	<b>Solum/ Whittington (Originalist)</b>	<b>Balkin (Originalist)</b>
<b>Semantically de- terminate</b>	Understanding	Interpretation	Interpretation
<b>Textual Provision</b>  <b>Semantic meaning depends on contex- tual factors</b>	Depends (understand- ing if context yields single meaning; inter- pretation if judgment is required)	Interpretation	Interpretation
<b>Semantic meaning depends on com- plex normative considerations</b>	Interpretation	Construction	Interpretation

This definitional proliferation results from a valuable debate over the normatively correct methods of constitutional interpretation. With respect to other research questions, however, the terminological morass is unnecessary and conceptually confusing.

One can sidestep the morass by recognizing that *all* the hermeneutic activities described above are ways of implementing—and, in the case of semantically vague

<sup>112</sup> Cf. ENDICOTT, *supra* note 8, at 170 (“The grammar of interpretation cannot be explicated by treating some paradigm cases as deviant or metaphorical. An account of the concept of interpretation should admit interpretations of dreams, novels, census data, seismograph records, constitutions, and the entrails of a chicken, without dismissing any as non-standard uses of the word.”).

<sup>113</sup> BALKIN, *supra* note 4, at 4 (footnote omitted).

expressions, precisifying—constitutional texts.<sup>114</sup> The semantic vagueness literature highlights the application of expressions to objects. (“Mount Everest is tall.” “The chair is red.”) If the expression is semantically vague, then there are cases in which one does not know whether to apply the expression.<sup>115</sup> In such borderline cases, one can precisify the vague expression by stipulating whether or not it applies given the context.<sup>116</sup> Even when an expression is determinate, however, one can characterize a speaker as “implementing” an expression when she applies it to an object. For example, if one explained to a child that “a chair is a piece of furniture,” then one might be implementing the expression by applying it to an “object” in a non-borderline case.

This precisification account easily maps onto the familiar idea of “implementing” the Constitution’s text through judicial doctrine. According to Richard Fallon’s influential framework, constitutional law consists largely of doctrines designed to implement the Constitution’s text so judges can use the document to authoritatively resolve specific cases.<sup>117</sup> Although he does not use the term, Fallon’s argument relies on the principle of juridical bivalence.<sup>118</sup> The Constitution must “function effectively as law,” which requires the Supreme Court to “provide an authoritative resolution of disputes” that are grounded in semantically vague (or otherwise indeterminate) textual provisions.<sup>119</sup> The Court, for example, has constructed doctrinal rules to clarify whether a race-preferential school admissions policy violates the Equal Protection Clause.<sup>120</sup> And, returning to the speedy trial example, the Court has established a

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<sup>114</sup> Superficially, this argument resonates with Daryl Levinson’s pragmatist position that there is no distinction between the tasks of discerning the Constitution’s normative content and the construction of constitutional decision rules and remedies. *See generally* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). *Cf.* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (presenting an influential taxonomy that distinguishes between “constitutional operative propositions” and the “decision rules” that give effect to those propositions (internal quotation marks omitted)). In fact, I am arguing that it is simply *unnecessary* to make the distinction in order to address some important theoretical questions. In other contexts, I have found it theoretically productive to maintain a conceptual distinction between the Constitution’s normative content and the doctrines that are designed to implement that content—even when doing so helps to contribute to the terminological confusion that plagues constitutional theory. *See* Anthony O’Rourke, *Statutory Constraints and Constitutional Decisionmaking*, 2015 WIS. L. REV. 87, 108 & nn.86–91 (explaining how a constitutional decision can be regulatory “to incentivize nonjudicial officers to engage in specific behaviors that are not clearly set forth by statute, regulation, or constitutional text”); Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 419–20 (2013) (describing the Supreme Court’s use of delegation).

<sup>115</sup> *See* ENDICOTT, *supra* note 8, at 31; *see also supra* notes 42–44 and accompanying text.

<sup>116</sup> *See supra* notes 55–82 and accompanying text.

<sup>117</sup> *See generally* Fallon, Jr., *supra* note 35.

<sup>118</sup> *See supra* notes 61–62 and accompanying text.

<sup>119</sup> *See* Fallon, Jr., *supra* note 35, at 56.

<sup>120</sup> *See, e.g.,* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (declaring the state program unconstitutional).

multifactor balancing test that lower courts must apply to determine whether, in specific cases, the government has violated the Sixth Amendment.<sup>121</sup>

Legislative constitutionalism can likewise be characterized as a form of constitutional precisification. To whatever degree one acknowledges that the Constitution authorizes Congress to implement vague constitutional principles, one must concede that legislative interpretations will diverge from traditional court-centered understandings of the Constitution's text. From a linguistic perspective, however, both institutions are engaged in the same task: instructing how to resolve borderline cases in which one cannot know, and must therefore merely stipulate, whether or not a vague text applies. Accordingly, legislative constitutionalism can be parsimoniously described as an account of how Congress contributes to the development of constitutional meaning through precisifying of vague texts.

Thus, constitutional "interpretation" and "construction" (in the many ways those terms have been defined) are simply different approaches to precisifying the Constitution's text. All participants in the "interpretation" debate acknowledge that some constitutional provisions are determinate, and thus only have viable semantic meaning in a particular context. In these cases, lawmakers can implement the Constitution by applying the semantically viable meaning to the case before them. Such cases, however, rarely give rise to serious constitutional disputes.<sup>122</sup> Other constitutional provisions are semantically vague or otherwise indeterminate, and require lawmakers to "precisify" their content by applying them in borderline cases. In some subsets of these cases, the contextual factors that make a particular precisification plausible might include the Constitution's structure, historical practices, and other traditional modalities of interpretation.<sup>123</sup> In other cases, the lawmaker will have to engage in normative or straightforwardly political reasoning in order to arrive at a plausible precisification of the Constitution's text. In all cases, however, we can speak of the lawmakers—including judges, legislators, and agency policymakers—as working to "precisify" the Constitution's meaning.

This terminological simplification serves to provide a concise explanation of why lawmakers diverge in how they implement the Constitution. Specifically, when two institutions are authorized to interpret a legal text, semantic vagueness will necessarily give rise to a multiplicity of correct interpretations which take the form of divergent applications of the text to borderline cases. This, in turn, allows two

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<sup>121</sup> See *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Thus, the Court created a malleable standard that enables judges to make an equitable assessment of whether to accord the speedy trial right in a particular case. For further discussion, see Anthony O'Rourke, *The Speedy Trial Right and National Security Detention*, 12 J. INT'L CRIM. JUSTICE 871 (2014).

<sup>122</sup> There have been no serious constitutional arguments, for example, challenging the Constitution's clear requirement that "[t]he Senate of the United States shall be composed of two Senators from each State[.]" U.S. CONST. art. I, § 3, cl. 1.

<sup>123</sup> See BOBBITT, *supra* note 33, at 9–24 (discussing traditional and historical modalities of constitutional interpretation).



institutions to promulgate conflicting, but equally accurate, decisions that are constrained by the same constitutional text.

#### CONCLUSION

The Constitution contains a number of vague provisions, and also creates a diverse set of lawmaking institutions with overlapping authority to implement those provisions. Given this combination of structural precision and normative vagueness, it should come as little surprise when courts and legislatures diverge in their understandings of the Constitution's rights provisions. By offering a new framework for analyzing this phenomenon, this Article illustrates that philosophy of language offers valuable insights to scholars who are struggling to understand how different branches of government—operating with competing agendas, different institutional structures, and limited information—make constitutional law. According to most analysts of extrajudicial constitutionalism, when implementing vague constitutional provisions the political branches are engaging in a fundamentally *political* activity unrelated to the practice of interpreting the Constitution's text.<sup>124</sup> This Article demonstrates, however, that vague constitutional language can influence these political activities in subtle and surprising ways. It thus exposes an overlooked connection between extrajudicial constitutionalism and the Constitution's semantic architecture.

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<sup>124</sup> See *supra* notes 108–10 and accompanying text.