

Harnessing Vagueness

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NOVEMBER 20, 2024

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Roadmap

- ▶ Distinguishing between ambiguity and vagueness
- ▶ Working with vagueness
 - Legal and political issues
- ▶ Vagueness and discretion
- ▶ Canons of construction



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Ambiguity: Two Senses

"In writing on the interpretation of texts, the loose norm is to refer to all uncertainties of meaning as *ambiguities*. But there is a useful and real distinction between textual uncertainties that are the consequences of verbal ambiguity...and those that are the consequence of verbal vagueness..."

-Scalia and Garner

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Verbal Ambiguity

- Which of these two meanings should I choose?

"She's the mother of an infant daughter who works 12 hours a day."

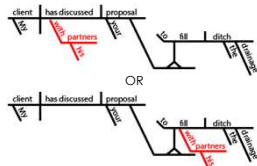
"Acme sells children's apparel, footwear, and accessories."



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Ambiguity diagrammed

"My client has discussed your proposal to fill the drainage ditch with his partners."



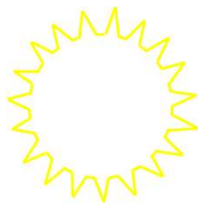
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Verbal Vagueness

- What are the boundaries of this word or phrase?

- Boundaries can be too broad
- They can also be porous

"must operate in a safe manner"



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Ambiguity: Useful Distinction

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General Causes of Ambiguity

- ▶ Modifier placement
 - What does a phrase or clause modify?
 - Drainage ditch example
 - See 8.14 (a) in Revisor's Manual
- ▶ Modifying items in a series
 - Does the modifier apply to all?
 - "Negligent act, error, or omission"
 - See 8.14 (b) in Revisor's Manual

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More General Ambiguities

- ▶ Ranges
 - Are end points included?
 - "Between the ages of 17 and 45"
 - See 8.11 in Revisor's Manual
- ▶ References, including pronouns
 - What are we referring to?
 - "She's the mother of an infant daughter who works twelve hours a day."

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Limiting Ambiguity

- ▶ Active management
 - Lists
 - Repetition
 - Definitions
- ▶ Reducing chances
 - Good writing
 - Parallelism
 - Breaking up sentences

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Working with Vagueness

- ▶ Vagueness is often desired or even necessary in law
 - You can't predict every possibility
 - Be intentional
 - Know the gray area
- ▶ Vagueness as a legal or political problem
 - Unconstitutional vagueness
 - Delegation of legislative authority
 - Undue discretion

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General Causes of Vagueness



- ▶ Word choice
- ▶ Poorly defined words
- ▶ Assumptions

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Weasel Words

- Acceptable
- Adequate
- Applicable
- Appropriate
- Discretion
- Encouraged
- Including but not limited to
- May
- Reasonable
- Satisfactorily
- Sufficient
- When practical
- Will



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Definition Ripple Effect

- ▶ "Fish means a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals."
- ▶ "No person shall import into this state, or take, possess, or sell within this state, any bird, mammal, fish, amphibia or reptile, or any part or product thereof, that the commission determines to be an endangered animal or rare animal, except as otherwise provided in this chapter."
- ▶ Conclusion – bumblebees may be protected as fish under California law

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Definition Considerations

- ▶ Use ordinary meaning
 - Previous example
 - 'Hospitals' includes day care centers."
 - Reader not likely to look up "hospitals"
- ▶ Over-generality
 - A term chosen that covers more than it should
 - Does "communicable diseases," cover the common cold?

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Unconstitutional Vagueness

"To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements."

- Skilling v. United States, 561 U.S. 358 (2010)

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Delegation of Legislative Authority

► Intelligible Principle Test

"Accordingly, this Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."

Mistretta v. United States, 488 U.S. 361 (1989)

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Political Delegation Issues

- Does the legislature want to decide the issue?
 - Does it have the expertise?
 - Is it too detailed for effective legislation?
- Can the legislature decide the issue?
 - Timing
 - Compromise
- Is the legislature comfortable with a different decision maker?

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What Is Discretion?

- ▶ Defined:
 - Individual choice or judgment
 - Power of free decision
- ▶ Sources
 - Named choices (A or B)
 - Words of discretion (e.g. may)
 - Ambiguity and vagueness



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A rule must be disapproved by the judge or chief judge if the rule:

...

D. exceeds, conflicts with, does not comply with, or **grants the agency discretion beyond what is allowed by**, its enabling statute or other applicable law;

E. is unconstitutional or illegal;

...

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Discretion and Notice

"A rule is required to be sufficiently specific to put the public on fair notice of what its provisions require. In addition, discretionary power may be delegated to administrative officers '[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.'"

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The Use of May and Discretion

- ▶ **"May"** has historically been a common cause of defect rulings, because it includes discretion *not to do* something.
 - "The department *may* enter into a reciprocal agreement with another state if that state demonstrates that...."
 - "This portion of subpart 3 is defective because it grants unfettered discretion to the agency to grant or deny reciprocity."

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Limits of discretion

- ▶ What are the limits of the discretion?
 - Discretion to act or discretion to select from choices.
 - If discretion to act, then "may" is appropriate
 - If discretion to select, use "must" or "shall"
 - "In cases governed by subpart 2, the commissioner may appoint a case reviewer or a family visitor."

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When is "May" okay?

- ▶ In those cases when discretion has been specifically granted.
 - These cases are relatively rare
- ▶ If the subject is a regulated party ("the licensee may reapply").

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"Including but not limited to"

- ▶ "including but not limited to" is often called impermissibly vague in rules.
- ▶ "This phrase suggests that known items are part of this rule but are not being made known to the regulated public. The rule language fails to reflect the intent of the agency."
- ▶ "...grants unduly broad discretion to the agency to import new items that are not listed..."

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Define the Gray Area

"Including but not limited to..."



"...and other products that degrade on exposure to light and air."



This structure provides a higher level of notice to the regulated entity or the public.

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Overdrafting – An Example

"§ 50.10 Trees, shrubs, plants, grass and other vegetation. (a) General injury. No person shall prune, cut, carry away, pull up, dig, fell, bore, chop, saw, chip, pick, move, sever, climb, molest, take, break, deface, destroy, set fire to, burn, scorch, carve, paint, mark, or in any manner interfere with, tamper, mutilate, misuse, disturb or damage any tree, shrub, plant, grass, flower, or part thereof, nor shall any person permit any chemical, whether solid, fluid, or gaseous, to seep, drip, drain or be emptied, sprayed, dusted or injected upon, about or into any tree, shrub, plant, grass, flower, or part thereof, except when specifically authorized by competent authority; nor shall any person build fires, or station, or use any tar kettle, heater, road roller or other engine within an area covered by this part in such a manner that the vapor, fumes, or heat therefrom may injure any tree or other vegetation."

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Overdrafting – Consequences

- ▶ Wordy
- ▶ Hard to read
- ▶ Substantive problems
 - Multiplies the numbers of terms to be interpreted
 - *Expressio unius est exclusio alterius*

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Peer review, peer review, peer review

- ▶ One of the hardest tasks for stakeholders of legislation is interpreting text in the alternative
- ▶ Also can be difficult for drafters
- ▶ Public access to documents upon introduction helps
- ▶ Better to find these earlier

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Ambiguity: Interpreting Texts

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-Scalia and Garner

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Interpreting versus Drafting

► Canons of Construction

- A set rules and principles for interpreting statutory language
- Plain meaning
- *In Pari Materia*



"Most interpretative canons apply to both ambiguity (as narrowly defined) and vagueness."

-Scalia and Garner

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...More What You'd Call...Guidelines



- Follow the rules...mostly
- For every drafting rule or principle, there are countless legitimate (and important) exceptions that have legal consequences

- Remember the primary objective of drafting: to fully and accurately express the desired legal principle and/or policy objective

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Questions?

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