AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice: Due Process and Habeas Corpus: Due Process

**United States v. Davis**, \_\_\_ U.S. \_\_\_ (2019)

*Maurice Davis and an accomplice were arrested and charged with committing multiple robberies and with using a firearm in connection with a “crime of violence.” The crucial provision of that statute,* [*18 U.S.C. § 924(c)*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_pp_4b24000003ba5)*, has a residual clause declaring a crime of violence to be any felony that “by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Davis claimed this provision was unconstitutionally vague under the due process clause of the Fifth Amendment. The trial court rejected his claim and he was convicted. After a series of appeals and remands, however, the trial court was overturned by the Court of Appeals for the Fifth Circuit. The United States appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote agreed that* [*18 U.S.C. § 924(c)*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_pp_4b24000003ba5) *was unconstitutionally vague. Justice Neil Gorsuch’s majority opinion claimed that no good standards exist for determining whether a felony inherently creates a substantial risk of physical force. All nine justices agreed that the statute was unconstitutionally vague if interpreted as referring to whether a particular felony inherently created a substantial risk of physical force, but not unconstitutionally vague if interpreted as referring to whether the defendant’s felony created a substantial risk of physical force. Why did Gorsuch adopt the unconstitutional reading of the statute? Why did Justice Brett Kavanaugh, in dissent, adopt the constitutional reading of the statute? Who has the better of the argument? Gorsuch and Kavanaugh debated how to best apply the principle that statutes should be interpreted as constitutional whenever possible. What position does each take and who has the better of the argument? Why did Justice Gorsuch, normally one of the more conservative justices on the Roberts Court, jump ship in this case?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idbea4470967a11e9b22cbaf3cb96eb08) delivered the opinion of the Court

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Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. Vague laws contravene the “first essential of due process of law” that statutes must give people “of common intelligence” fair notice of what the law demands of them. Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to “make an act a crime. Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.

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What do [*Johnson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545718&pubNum=0000780&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *v. United States* (2015) and *Sessions v. Dimaya* (2018) have to say about the statute before us? Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined “ordinary case.” . . . For years, almost everyone understood [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) to require exactly the same categorical approach that this Court found problematic in [those cases]. . . .

. . . [T]he government “abandon[ed] its longstanding position” that [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) requires a categorical analysis and began urging lower courts to “adopt a new ‘case specific’ method” that would look to “the ‘defendant's actual conduct’ in the predicate offense.” . . . So, while the consequences in this case may be of constitutional dimension, the real question before us turns out to be one of pure statutory interpretation.

. . . . [A] case-specific approach would avoid the vagueness problems that doomed the statutes in [*Johnson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545718&pubNum=0000780&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and *Dimaya.* In those cases, we recognized that there would be no vagueness problem with asking a jury to decide whether a defendant's “ ‘real-world conduct’ ” created a substantial risk of physical violence. . . . But all this just tells us that it might have been a good idea for Congress to have written a residual clause for [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) using a case-specific approach. It doesn't tell us whether Congress actually wrote such a clause. To answer that question, we need to examine the statute's text, context, and history. . . .

. . . . [T]he statutory text commands the categorical approach. Consider the word “offense.” It's true that “in ordinary speech,” this word can carry at least two possible meanings. It can refer to “a generic crime, say, the crime of fraud or theft in general,” or it can refer to “the specific acts in which an offender engaged on a specific occasion. But the word “offense” appears just once in § 924(c)(3), in the statute's prefatory language. And everyone agrees that, in connection with the elements clause, the term “offense” carries the first, “generic” meaning. So reading this statute most naturally, we would expect “offense” to retain that same meaning in connection with the residual clause. . . . The language of the residual clause itself reinforces the conclusion that the term “offense” carries the same “generic” meaning throughout the statute. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=N9DF6C0A0263F11E9886EE581FC384A29&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=66da79928ac84eb7b2dac4d78ee2a564&Rank=24&RuleBookModeDisplay=False&contextData=(sc.Search))[Section 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) . . . speaks of an offense that, “by its nature,” involves a certain type of risk. And that would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct. . . .

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[Section 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0)'s history provides still further evidence that it carries the same categorical-approach command as [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) [of the United States Code]. It's no accident that the language of the two laws is almost exactly the same. The statutory term “crime of violence” traces its origins to the Comprehensive Crime Control Act of 1984. There, Congress enacted the definition of “crime of violence” in [§ 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). It also “employed the term ‘crime of violence’ in numerous places in the Act/ At that time, Congress didn't provide a separate definition of “crime of violence” in [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) but relied on [§ 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s general definition. The two statutes, thus, were originally designed to be read together.

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. . . . True, when presented with two “fair alternatives,” this Court has sometimes adopted the narrower construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. But no one before us has identified a case in which this Court has invoked the canon to expand the reach of a criminal statute in order to save it. . . . Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests. . . . Even if you think it's possible to read the statute to impose such additional punishment, it's impossible to say that Congress surely intended that result, or that the law gave Mr. Davis and Mr. Glover fair warning that [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5)'s mandatory penalties would apply to their conduct. Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe. Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. . . .

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The dissent defends giving this old law a new meaning by appealing to intuition. It suggests that a categorical reading of [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) is “unnatural” because “[i]f you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, ‘Well, tell me how it went down—what happened?’ ” Maybe so. But the language in the statute before us isn't the language posited in the dissent's push poll. [Section 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) doesn't ask about the risk that “a particular crime posed” but about the risk that an “offense ... by its nature, involves.” . . . Most of the statutes the dissent cites impose penalties on whoever “creates,” or “engages in conduct that creates,” or acts under “circumstances that create” a substantial risk of harm; others employ similar language. Not a single one imposes penalties for committing certain acts during “an offense ... that by its nature, involves” a substantial risk, or anything similar. . . . When the dissent finally turns to address the words Congress actually wrote in [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0), its main argument seems to be that a categorical reading violates the canon against superfluity. . . . As this Court has long understood, the residual clause, read categorically, “sweeps more broadly” than the elements clause—potentially reaching offenses, like burglary, that do not have violence as an element but that arguably create a substantial risk of violence So even under the categorical reading, the residual clause is far from superfluous.

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In the end, the dissent is forced to argue that holding [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) unconstitutional would invite “bad” social policy consequences. . . . The dissent acknowledges that “the consequences cannot change our understanding of the law.” But what's the point of all this talk of “bad” consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals? . . .

Of course, too, Congress always remains free to adopt a case-specific approach to defining crimes of violence for purposes of [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) going forward. . . . [O]ne easy way of achieving that goal would be to amend the statute so it covers any felony that, “based on the facts underlying the offense, involved a substantial risk” that physical force against the person or property of another would be used in the course of committing the offense. The dissent's catalog of case-specific, risk-based criminal statutes supplies plenty of other models Congress could follow. Alternatively still, Congress might choose to retain the categorical approach but avoid vagueness in other ways, such as by defining crimes of violence to include certain enumerated offenses or offenses that carry certain minimum penalties. All these options and more are on the table. But these are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.

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Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idbea4470967a11e9b22cbaf3cb96eb08), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idbea4470967a11e9b22cbaf3cb96eb08) and Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idbea4470967a11e9b22cbaf3cb96eb08) join, and with whom THE CHIEF JUSTICE joins as to all but Part II–C, dissenting.

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. . . . [T]he substantial-risk prong, properly read, focuses not on the elements of the underlying crime, but rather on the defendant's conduct during that crime. If a defendant used or carried a firearm during and in relation to the crime, and the defendant's conduct during the crime created a substantial risk that physical force may be used, then the defendant may be guilty of a [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) offense. . . .

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. . . [C]riminal laws that apply a risk standard to a defendant's conduct are not too vague, but instead are perfectly constitutional. . . . That kind of risk-based criminal statute is not only constitutional, it is very common. As the Court has recognized, “dozens of federal and state criminal laws use terms like ‘substantial risk,’ ‘grave risk,’ and ‘unreasonable risk,’ ” and almost all of those statutes “require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion.

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A statute is unconstitutionally vague only if “it fails to give ordinary people fair notice of the conduct it punishes,” or is “so standardless that it invites arbitrary enforcement.” [Section 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) affords people of ordinary intelligence ample notice that they may be punished if they carry or use a gun while engaging in criminal conduct that presents a risk that physical force may be used. There “is a whole range of conduct that anyone with at least a semblance of common sense would know” is covered by [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0). . . .

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. . . [I]t makes little sense . . . to say that [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0)'s substantial-risk inquiry focuses on whether a hypothetical defendant's imagined conduct during an ordinary case of the crime creates a substantial risk that physical force may be used, rather than on whether the actual defendant's actual conduct during the actual crime created a substantial risk that physical force may be used. Why would we interpret a federal law that criminalizes current-offense conduct to focus on a hypothetical defendant rather than on the actual defendant? As Judge Newsom cogently wrote for the Eleventh Circuit en banc majority, “If you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, ‘Well, tell me how it went down—what happened?”

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The gaping hole in the Court's analysis, in my view, is that [*Johnson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545718&pubNum=0000780&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and *Dimaya* addressed statutes that imposed penalties based on a defendant's prior criminal convictions.

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. . . [I]n the prior-conviction cases, the Court emphasized that the categorical approach avoids the difficulties and inequities of relitigating “past convictions in minitrials conducted long after the fact. Without the categorical approach, courts would have to determine the underlying conduct from years-old or even decades-old documents with varying levels of factual detail. . . .

Second, in the prior-conviction cases, the Court insisted on the categorical approach to avoid “Sixth Amendment concerns.” The Court has read its Sixth Amendment precedents to require the categorical approach. Under the categorical approach, the judge looks only to the fact of conviction and the statutory definition of the prior offense. . . .

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But neither of the two reasons identified in [*Johnson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545718&pubNum=0000780&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and *Dimaya* applies to [18 U.S.C. § 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0)—not even a little.

First, [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) does not require examination of old conduct underlying a prior conviction. [Section 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) operates entirely in the present. . . . The defendant's conduct during the underlying crime is part of the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=N9DF6C0A0263F11E9886EE581FC384A29&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=66da79928ac84eb7b2dac4d78ee2a564&Rank=24&RuleBookModeDisplay=False&contextData=(sc.Search))[§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) offense. Second, [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5) likewise raises no Sixth Amendment concerns. A jury will find the facts or, if the case ends in a guilty plea, the defendant will accept the facts in the plea agreement. . . .

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. . . [T]he text of [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) must be interpreted against the backdrop of traditional criminal-law practice. As described above, substantial-risk statutes are commonplace in federal and state criminal law. Those statutes ordinarily call for examination of the actual defendant's actual conduct during the actual crime. . . . The term “offense” applies to both prongs. In the elements prong, the term refers to the elements of the underlying crime. In the substantial-risk prong, the term refers to the defendant's conduct during the underlying crime. That is entirely commonplace and sensible.

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. . . [I]if the substantial-risk prong of [§ 924(c)(3)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b1b5000051ac5) requires assessing a hypothetical defendant's conduct rather than the actual defendant's conduct, then there would be little daylight between the elements prong and the substantial-risk prong. After all, a crime is defined by its elements. The elements tell you what happens in an ordinary case of a crime. To imagine how a hypothetical defendant would have committed an ordinary case of the crime, you would presumably look back to the elements of the crime. But doing that under the substantial-risk prong—as the Court would do—would just duplicate the inquiry that already occurs under the elements prong. . . .

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Under the conduct-specific approach to the substantial-risk prong, the “by its nature” language simply means that the Government has to show more than a defendant's proclivity for crime and more than the mere fact that the defendant was carrying a gun. The Government has to show that the defendant's conduct by its nature during the crime created a substantial risk that physical force may be used.

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It is an elementary principle of statutory interpretation that an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality. . . . This Court's longstanding practice of saving ambiguous statutes from unconstitutionality where fairly possible affords proper respect for the representative branches of our Government. The Court has explained that “a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous.” . . . . [Section 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) is best read to focus on the defendant's actual conduct. But at a minimum—given the text, the background of substantial-risk laws, and the relevant precedents—it is fairly possible to interpret [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) to focus on the defendant's actual conduct. Because that reasonable interpretation would save [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) from unconstitutionality, this case should be very straightforward. . . .

First, the Court concludes that the constitutional avoidance canon must yield to the rule of lenity. That argument disregards the Court's oft-repeated statements that the rule of lenity is a tool of last resort that applies “only when, after consulting traditional canons of statutory construction,” grievous ambiguity remains.” . . .

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Second, and relatedly, the Court claims that the canon of constitutional avoidance, as a general matter, cannot be relied upon to broaden the scope of a criminal statute, as opposed to narrowing the scope of a criminal statute. . . . [T]that theory seems to come out of nowhere. The Court's novel cabining of the constitutional avoidance canon is not reflected in this Court's precedents. . . . Moreover, the premise of this novel broadening/ narrowing theory is flawed. A categorical approach to [§ 924(c)(3)(B)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_b4940000b80e0) would not be inherently narrower than a conduct-specific approach. Each approach would sweep in some crimes that the other would not. . . .

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The Court's decision means that people who in the future commit violent crimes with firearms may be able to escape conviction under [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5). In enacting [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5), Congress sought to keep firearms away from violent criminal situations. Today, the Court invalidates a critical provision designed to achieve that goal. . . .Many offenders who have already committed violent crimes with firearms—and who have already been convicted under [§ 924(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS924&originatingDoc=Idbea4470967a11e9b22cbaf3cb96eb08&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_4b24000003ba5)—may be released early from prison. . . .

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To be sure, the consequences cannot change our understanding of the law. But when the consequences are this bad, it is useful to double-check the work. And double-checking here, in my view, reveals several problems: relying on cases from the prior-conviction context whose rationales do not apply in this current-offense context; not fully accounting for the long tradition of substantial-risk criminal statutes; not reading the words of the statute in context and consistent with precedents. . . ; and then, perhaps most problematically, misapplying the longstanding constitutional avoidance canon. After double-checking, it should be evident that the law does not compel those serious consequences. I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.

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