

LECTURE

DELIVERED OCTOBER 25, 2017

No. 1284 | FEBRUARY 1, 2018

The Role of the Judiciary in Maintaining the Separation of Powers

The Honorable Brett M. Kavanaugh

Abstract: *In a perfect world, the outcomes of cases would seldom vary based solely on the backgrounds, political affiliations, or policy views of judges. Adhering to the text of a statute is neutral as a matter of politics and policy. The text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow the text where it leads. The simple but very troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous. Too much of the current statutory interpretation regime revolves around judges' personally instinctive assessments of clarity versus ambiguity. Statutes will always have ambiguities. That is the nature of language, but perhaps we can avoid attaching serious interpretive consequences to binary ambiguity determinations that are hard to make in a neutral, impartial way. Judges should instead decide on the best reading of the statute. They are trained to do that, and it can be done in a neutral and impartial way in most cases.*

Thank you, General Meese, for the kind introduction. I am honored to be here to deliver the Joseph Story Lecture. As General Meese said, Joseph Story had a profound influence on American law as a Supreme Court Justice and as a scholar, and I am honored to deliver a lecture in his name. I am particularly honored to be here when I look at the distinguished list of past speakers, including Justice Anthony Kennedy, Justice Clarence Thomas, my colleague Judge Ray Randolph, and my former colleague Judge Janice Rogers Brown, whom I miss greatly.

I will admit that I have not been a regular attendee at the Story Lecture for the past few years because, as John Malcolm of Heritage

KEY POINTS

- In a perfect world, the outcomes of cases would seldom vary based solely on the backgrounds, political affiliations, or policy views of judges.
- Adhering to a statute's text is neutral as a matter of politics and policy. The text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow the text where it leads.
- Statutes will always have ambiguities. That is the nature of language, but perhaps we can avoid attaching serious interpretive consequences to binary ambiguity determinations that are so hard to make in a neutral, impartial way.
- Judges should instead decide on the best reading of the statute. They are trained to do that, and it can be done in a neutral and impartial way in most cases.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1284>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

knows, every year it seems to fall on the same night as basketball tryouts for the CYO girls' basketball team I coach at Blessed Sacrament School in DC. And this year, I finally pulled rank and seniority, and I moved the team's tryouts back a night. So tonight, I am with you. Last night, I was trying—with limited success—to get 47 fifth-grade and sixth-grade girls to listen to me. I will try not to use my coach voice with you tonight.

The tryouts were good—we are going to have a good team—you are probably not here to hear about that. Coaching my daughters and the fifth-grade and sixth-grade girls' basketball team has been a very important part of my life for the past six years. And it sometimes means during the winter I am scrambling out of the courthouse to get to practice, and sometimes I do not always transition very well.

And last year, I was frustrated at practice. I finally blew the whistle and yelled at the girls, "You can't dribble through a zone press; you've got to pass the ball." I guess my voice must have been pretty loud because there was silence in the gym, and there is really never silence in the gym with a bunch of fifth-graders and sixth-graders. Then one of the girls on the team—who has a future as a stand-up comic—broke the silence and said, "Oh, he's using his judge voice on us now." And they all started laughing at me. I love all those girls. With them in mind, tonight, I also will try not to use my judge voice on you.

I am especially honored to be here with Ed Meese. To begin with, on a personal level, I am grateful to him for the kind support of my confirmation, the wonderful letter he wrote for me back in 2006. I thank many others in this room who also helped me through that process. As General Meese knows well, you do not forget your confirmation process. And my process was interesting because I was serving in the White House when I was nominated for the judgeship. I had worked there for five-and-a-half years before I became a judge.

And actually, standing here today, some 12 years later, let me say first that I think the White House experience made me a far better judge than I otherwise would have been, in terms of understanding of government, of the legislative process, of the regulatory process, of national security decision making, the pressure, the ups and downs and the ins and outs of how our government operates at the very highest level. I believe my White House experience made me a more knowledgeable judge, certainly, and also

a more independent judge. Independent because working at the White House, at least in my view, helps give you the backbone and fortitude to say "no" to the government—even when the stakes are high.

I think Chief Justice John Roberts and Justice Elena Kagan, both of whom had substantial White House experience, would probably say that their White House experiences likewise have made them better jurists. But at the time of my confirmation in 2006, it is fair to say that certain Senators were not sold on that. They were not sold that the White House was the best launching pad for a position on the DC Circuit. Indeed, one Senator at my hearing noted that I had worked at the White House for more than five years and said in his remarks, this nomination "is not just a drop of salt in the partisan wounds, it is the whole shaker." And this is true. After the hearing, my mom said to me, "I think he really respects you." As only a mom can.

So people often ask me whether the job of an appellate judge is lonely or isolating. And the short answer is that it can be—if you let it. The day the President signed my commission to be a judge—which was Tuesday, May 30, 2006, at 7:00 a.m., not that you remember those things—I promptly went up to the Supreme Court and Justice Kennedy, for whom I'd clerked, swore me in in a private ceremony in his chambers with just my family, Justice Kennedy, and Chief Justice Roberts present. Justice Kennedy then told me I would get to my new chambers that afternoon and there would be a phone and a computer and a desk, and no one would ever call me again. So, he advised me to get out and teach and speak and interact with the bar and students—something he had regularly done on the Ninth Circuit and has continued to do for his many years on the Supreme Court.

Anyway, I listened. I have taught full-term Separation of Powers and Constitutional Law classes every year for the past decade. I try to get out to many bar events and visit law schools. And tonight, I am following his advice with the honor of delivering the Story Lecture. When Justice Kennedy says something, I listen. Me and 320 million other Americans.

Judging Policies in Light of Principles— Rather Than Remolding Principles in Light of Policies

I want to thank General Meese not just for hosting me here and helping me in the confirmation

process back in 2006, but, far more importantly, for the central role he played in leading the revival of originalism and textualism in American law. I cannot emphasize enough how significant General Meese has been in changing the direction of American law.

I think often of Chief Justice William Rehnquist and Justice Antonin Scalia as two jurists who helped bring about a revolution in legal theory and legal doctrine. When we mention those two giants, we also must celebrate Ed Meese. He, of course, was responsible for many landmark policies and important decisions in his roles at the White House and as Attorney General. And as Attorney General, more than perhaps any Attorney General in modern history, he took an interest in constitutional theory and doctrine. He delivered a famous speech on July 9, 1985, to the American Bar Association. It is a great speech, and if I can give you an initial homework assignment tonight, it is this: Go read General Meese's July 9, 1985, speech.

But let me give you some highlights for now. His first paragraph greeted the members of the House of Delegates of the American Bar Association, and he said: "I know the sessions here...will be very productive." Now when I read that last week—*very productive* meetings of the ABA House of Delegates—I wondered, "Was that intended as a laugh line, General Meese?"

General Meese then proceeded to talk about "how utterly unpredictable," in his words, the Supreme Court of the 1980s could be when rendering its judgments. He referred to the snail darter case¹ that had come out a few years earlier and remembered what someone had said when the case came down: "The bad news...was that the snail darter had won; the good news was that he didn't use the 14th Amendment."

General Meese then said that the Court, during its most recent term in 1984–1985, "continued to roam at large in a veritable constitutional forest." He discussed three areas of the Court's jurisprudence: federalism, criminal procedure, and religion. Discussing federalism, General Meese said that it helps us "better secure our ultimate goal of political liberty through decentralized government." Well said. When discussing religion, he said: "[T]o have argued...that the [First Amendment] demands

a strict neutrality between religion and irreligion would have struck the founding generation as bizarre. The purpose was to prohibit religious tyranny, not to undermine religion generally." Well said.

In summarizing his views, he stated that "far too many of the Court's opinions were, on the whole, more policy choices than articulations of constitutional principle." He then noted—in a critical passage—that "until there emerges a coherent jurisprudential stance, the work of the Court will continue in this ad hoc fashion." He argued for a jurisprudence of originalism: to judge policies in light of principles rather than to remold principles in light of policies. General Meese's speech struck a nerve in the American legal establishment. And it represented a call to attention and a call to action for all those who are concerned about the rule of law and the role of courts. He urged more attention, as he put it, to the words of the Constitution, for the Framers of the Constitution chose their words carefully, he said.

The Constitution: A Document of Majestic Specificity

It is sometimes said that the Constitution is a document of majestic generalities. As I see it and as General Meese described it, the Constitution is largely a document of majestic specificity. And those specific words have meaning, which (absent constitutional amendment) continue to bind us as judges, legislators, and executive officials.

If I could suggest another homework assignment from my talk today, it is this: In the next few days, block out 30 minutes of time and read the text of the Constitution word for word. I guarantee you will come away with a renewed appreciation for our Constitution and for its majestic specificity.

The text of the Constitution binds all three branches. And again, thinking back to my confirmation process, I met with Senator Robert Byrd (D-WV) at one point during the process when I was trying to get confirmed. And this was an interesting meeting. At the very start of the meeting, he said, "You will never forget this meeting." And it turned out he was right. And first he asked about my family. At that point, back in 2006, I said, well, I have a one-year-old daughter. And he said, "I have two daughters. They're 68 and 64." Then he pulled out his Constitution. He

1. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

had his, it was right there, and I was prepared, I had this same Constitution right there, too. It's tattered now, but I still have it. And he pulled his Constitution out, and he read to me Article I's language about the power of the purse. Why did he do that? He did that because the text of the Constitution matters. And he did that because, if you remember Senator Byrd, he really cared about the power of the purse.

So General Meese's 1985 speech helped advance a straightforward philosophy of constitutional and statutory interpretation. It is not complicated, but it is profound and worth repeating often. The judge's job is to interpret the law, not to make the law or make policy. So, read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. Don't make up new constitutional rights that are not in the Constitution. Don't shy away from enforcing constitutional rights that are in the text of the Constitution. Changing the Constitution is for the amendment process. Changing policy within constitutional bounds is for the legislatures.

Remember that the structure of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture, but are essential to protecting individual liberty. Structure protects liberty. And remember that courts have a critical role, when a party has standing, in enforcing those separation of powers and federalism limits. Simple but profound.

Along with Chief Justice Rehnquist and Justice Scalia and Judge Robert Bork and Judge Laurence Silberman and Judge Doug Ginsburg and many others in the 1970s and 1980s, General Meese laid the groundwork for a rule of law as a law of rules, for the notion of judges as umpires and not as policymakers, for the notion, as he put it in 1985, that judges should not be roaming at large in the constitutional forest.

So I will talk tonight about the separation of powers. If you were in my judicial chambers, you would hear me often saying to my clerks: "Every case is a separation of powers case." And I believe that. "Who decides?" is the basic separation of powers question at the core of so many legal disputes.

And the bread and butter of our docket on the DC Circuit is interpretation of statutes, usually when deciding whether an agency exceeded its statutory

authority or statutory limits. That question of policing the balance between the Legislative and Executive Branches—our administrative law docket—constitutes one of the most critical separation of powers issues in American law. And the most important factor is the *precise wording* of the statutory text. If you sat in our courtroom for a week or two and listened to case after case after case, you would hear judge after judge from across the ideological spectrum ask counsel about the precise wording of the statute or regulation at issue.

Statutory interpretation has improved dramatically over the past generation. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls. The text of the law is the law. As Justice Elena Kagan recently stated, "[W]e're all textualists now."² By emphasizing the centrality of the words of the statute, Justice Scalia helped bring about a massive and enduring change on the Supreme Court and in American law.

But more work remains. In my view, certain aspects of statutory interpretation are still troubling—and as I will explain, one primary problem stands out.

To begin, one overarching goal for me is to make judging a more neutral, impartial process in all cases, not just statutory interpretation. The American rule of law, as I see it, depends on neutral, impartial judges who say what the law *is*, not what the law should be. Judges are umpires, or at least should always strive to be umpires. In a perfect world, at least as I envision it, the outcomes of cases would not often vary based solely on the backgrounds, political affiliations, or policy views of judges. This is the rule of law as the law of rules; the judge as umpire; the judge who is not free to roam in the constitutional or statutory forest as he or she sees fit.

In my view, too, this goal is not merely a preference of mine but a constitutional mandate in a separation-of-powers system. Article I assigns the Legislative Branch, along with the President, the power to make laws. Article III grants the courts the "judicial Power" to interpret those laws in individual "Cases" and "Controversies." When courts apply doctrines that allow them in effect to rewrite the laws they are encroaching on the legislature's Article I power.

2. Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

But this vision of judge as umpire raises a natural question: How can we move toward that ideal in our judicial system, when judges come from many different backgrounds and may have a variety of very strong ideological, political, or policy predispositions?

To be sure, on occasion, the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common-law-like function. Federal Rule of Evidence 501 is a good example. But many statutory cases involve interpretation of a statute's text.

How Much Ambiguity Is Necessary for Judges to Resort to Canons of Construction?

Under the structure of our Constitution, Congress and the President—not the courts—possess the authority and responsibility to legislate. As a result, clear statutes are to be followed. Statutory texts are not just common-law principles or aspirations. This tenet—adhere to the text—is neutral as a matter of politics and policy. The text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow the text where it leads.

At the same time, when the text of the statute is ambiguous rather than clear, judges may resort to a variety of canons of construction. These ambiguity-dependent canons include: (1) in cases of textual ambiguity, avoid interpretations raising constitutional questions; (2) if there is textual ambiguity, rely on the legislative history; and (3) in cases of textual ambiguity, defer to an executive agency's reasonable interpretation of a statute, also known as *Chevron* deference.

Here is the problem. And it is a major problem. All of these canons depend on a problematic threshold question. Courts may resort to the canons only if the statute is not clear but rather is ambiguous. But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case there without triggering the ambiguity-dependent canons?

Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains “enough” ambiguity to cross the line where courts may resort to the constitutional avoidance doctrine, legislative history, or *Chevron* deference.

In my experience, judges often go back and forth arguing over this exact point. One judge will say, “The statute is clear; that should be the end of it. Case over.” The other judge will respond, “I think the text is ambiguous,” meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other. And that's because there is no objectively right answer.

It turns out that there are at least two separate problems facing these disagreeing judges. First, the judges must decide how much clarity is enough to call a statute clear. If the statute is, say, 60/40 in one direction, is that enough to call it clear? How about 80/20? Who knows?

And second, imagine that we could agree on an 80/20 clarity threshold. In other words, suppose that judges may call a text “clear” only if it is 80/20 or more in one direction. Even if we say that 80/20 is the necessary level of clarity, how do we then apply that formula to particular statutory text? Again, who knows? Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion.

I tend to be a judge who finds clarity more readily than some of my colleagues—perhaps a little less readily than a couple. I probably apply something approaching a 65/35 or 60/40 rule. In other words, if it is 60/40 clear, it is not ambiguous, and I do not resort to the canons. I think a few of my colleagues and other judges around the country apply more of, say, a 90/10 rule, at least in certain cases. Only if the proffered interpretation is at least 90/10 clear will they call it clear. Otherwise, ambiguous; the canons kick in.

Who is right in that debate? Who knows. No case or canon of interpretation says that a 60/40 approach or a 90/10 or a 55/45 approach is the correct one (or even a better one). Of course, even if my colleagues, as I said, could agree on 60/40, for example, we would still have to figure out whether the text in question surmounts that 60/40 threshold. And that itself is a difficult task.

The simple but very troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous. In a considerable understatement, the Supreme Court itself has admitted that “there is no errorless test for

identifying or recognizing ‘plain’ or ‘unambiguous’ language.”³ Professor Ward Farnsworth has elaborated persuasively on this point, arguing that “[t] here are no rules or clear agreements among judges about just how to decide whether a text is ambiguous.” As he puts it: “For making *that* determination, no theory helps; it is simply a judgment about the clarity of the English and whether it is reasonable to read it more than one way.”⁴

The conceptual problem opens the door to a more practical problem; “judgments about ambiguity also are dangerous, because they are easily biased by strong policy preferences that the makers of the judgments hold.” Because judgments about clarity versus ambiguity turn on little more than a judge’s instincts, sometimes it is hard for judges to ensure that they are separating their policy views from what the law requires of them.

And it is not simply a matter of judges trying hard enough: Policy preferences can seep into ambiguity determinations in subconscious ways. As a practical matter, of course, judges do not make the clarity versus ambiguity determination behind a veil of ignorance; statutory interpretation issues are all briefed at the same stage of the proceeding, so a judge who decides to open the ambiguity door already knows what he or she will find behind it.

Unfortunately, moreover, the clarity-versus-ambiguity question plays right into what many consider to be the worst of our professional training. As lawyers, we are indoctrinated from the first days of law school to find ambiguity in even the clearest of pronouncements. It is no accident that the most popular law school exam preparation book is titled, *Getting to Maybe*.

The problem of difficult clarity-versus-ambiguity determinations would not be quite as significant if the issue affected cases only at the margins. But the outcome of many cases turns on the initial—and often incoherent—dichotomy between ambiguity and clarity. It has been said, correctly in my view, that determinations of ambiguity are the linchpin of statutory interpretation.

Now, a number of really important Supreme Court decisions have implicated the clarity-versus-ambiguity problem. Consider some of the cases that

have turned on the constitutional avoidance canon in the recent past: the health care case, *National Federation of Independent Business v. Sebelius*; the voting rights case, *Northwest Austin Municipal Utility District No. One v. Holder*; and the *Federal Election Commission v. Wisconsin Right to Life* campaign finance case. Those were hugely significant cases, each of which turned to a significant extent on an initial question of whether the relevant statute was clear or ambiguous. If the statute was ambiguous, then judges can resort to constitutional avoidance. If the statute is clear, no. All those cases were important, and they were all decided on the basis of a difficult evaluation of clarity versus ambiguity.

Same with *Chevron* deference. As Justice Scalia explained in the *Duke Law Journal* 25 years ago: “How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought.”⁵ And, in fact, the Court has skirmished—and our court particularly has skirmished—over exactly this terrain numerous times in the last 25 years, in hugely significant cases, many of which turned to a significant extent on an initial question of whether the relevant statute was clear or ambiguous.

All of these cases came down to what turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*: Is the language clear or is it ambiguous? No wonder people suspect that judges’ personal views are infecting these kinds of cases. We have set up a system where that suspicion is almost inevitable because the reality of the ambiguity-versus-clarity determination causing that is almost inevitable.

Of course, in characterizing some of these decisions as examples of the problem—I want to be clear—I am not in any way suggesting that the judges themselves are acting in an improper or political manner. To the contrary: In my experience, most judges apply the doctrine as faithfully as possible. But too much of the current statutory interpretation regime revolves around personally instinctive assessments of clarity versus ambiguity.

This kind of decision making threatens to undermine the stability of the law and the neutrality (both

3. United States v. Turkette, 452 U.S. 576, 580 (1981).

4. Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 273 (2010).

5. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520-21 (1989).

actual and perceived) of the judiciary. After more than 11 years on the DC Circuit, I have a definite sense that the clarity versus ambiguity determination (“Is the statute clear or ambiguous?”) is too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable among judges of different partisan backgrounds and ideological predilections.

My point should not be misunderstood. Statutes will always have ambiguities. That is the nature of language, including Congress’ language. We cannot eliminate or avoid ambiguities or wish them away. But even though ambiguity is unavoidable as a practical matter, perhaps we can avoid attaching serious interpretive consequences to binary ambiguity determinations that are so hard to make in a neutral, impartial way. In other words, instead of injecting the ambiguity problem into the heart of statutory interpretation, we can consider whether to sideline that threshold inquiry as much as possible.

Moving Ambiguity from the Heart of Statutory Interpretation to the Sideline

What is the solution? Here is one idea: Judges should strive to find the best reading of the statute. They should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous. In other words, we can try to make sure that judges do not, or at least only rarely, have to ask whether a statute is clear or ambiguous in the course of interpreting it.

Statutory interpretation could proceed in a two-step process. First, courts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction. (Semantic canons, by the way, are really just a fancy way of referring to the general rules by which we understand the English language.)

Second, once judges have arrived at the best reading of the text, they can apply, openly and honestly, any substantive canons (such as the absurdity doctrine; settled plain statement rules, such as the presumption against extra-territoriality, the presumption of a *mens rea* requirement, or the presumption against retroactivity) that might justify departure from the best reading of the text.

Under this two-step approach, few if any statutory interpretation cases would turn on an initial finding of clarity versus ambiguity in the way that they do now.

Now, to be sure, determining the best reading of the statute is not always easy. But we have tools to perform that task and communicate it to the parties and the public in our opinions. Why layer on a whole separate inquiry—“Is the statute clear or ambiguous?”—that does not help uncover the best reading and that is inherently difficult to resolve in a neutral, impartial, and predictable way?

The Constitutional Avoidance Canon. Let me take you into a few of these canons to show what I am talking about. Let’s start with the constitutional avoidance canon. Under this canon, judges interpret ambiguous statutes so as to avoid a serious constitutional question, or actual unconstitutionality, that would arise if the ambiguity were resolved in one direction rather than the other. For the canon to be triggered, there must be ambiguity in the statute.

One initial problem with the constitutional avoidance doctrine, apart from the ambiguity inquiry, is that it sometimes looks more like judicial abdication—a failure to confront the constitutional question raised by the statute as written—than judicial restraint. And another problem with it, again, apart from the ambiguity problem, is that sometimes it is invoked when there are mere *questions* of unconstitutionality rather than actual unconstitutionality. As a result, the doctrine gives judges enormous discretion to push statutes in one direction so as to avoid even coming within a penumbra of the constitutional line.

But put aside those critiques of the constitutional avoidance doctrine, which I think are serious and weighty. Apart from (or, I guess, in addition to) those reasons, I would consider jettisoning the constitutional avoidance canon for a different reason: The trigger for the canon—“Clear or ambiguous?”—is so uncertain.

That flaw was famously highlighted in *NFIB v. Sebelius*. In analyzing that case, it is perhaps important to underscore something that seems to be overlooked by almost all observers, even those who should know better. Chief Justice Roberts agreed with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all of the key constitutional and statutory issues raised about the individual mandate.

Those five Justices agreed about the scope of the Commerce and Necessary and Proper Clauses. They agreed about the scope of the Taxing Clause. And they agreed that the individual mandate provision

was best read to impose a legal mandate—a penalty rather than a tax. In short, they agreed that the individual mandate, best read, could not be sustained as constitutional under the Commerce, Necessary and Proper, and Taxing Clauses.

What they disagreed on with respect to the individual mandate—and, amazingly, all they disagreed on—was how to apply the constitutional avoidance canon. In particular, they disagreed about whether the individual mandate provision was sufficiently ambiguous that the Court should resort to the constitutional avoidance canon. The dissenters said it was not ambiguous; the Chief Justice said it was ambiguous.

For all that has been written about the *NFIB* case, the decision on the individual mandate turned not on the proper interpretation of the Constitution and not on the best interpretation of the statute. It turned entirely on how much room judges have to find ambiguity when invoking the constitutional avoidance canon. In my view, this is a very odd state of affairs. A case of extraordinary magnitude boils down to whether a key provision is clear or ambiguous, even though we have no real idea how much ambiguity is enough to begin with, nor how to ascertain what level of ambiguity exists in a particular statute.

My point here is not to reopen the debate about whether the Chief Justice or the four dissenters had the better argument about the clarity or ambiguity of the statutory provision in question. I imagine people in this room have views about that. My point is that such a question arguably should not be part of the inquiry because—despite the best efforts of conscientious judges—it is not answerable in a neutral, predictable, or impartial way. A case of that magnitude should not turn on such a question, but that is what the canon of constitutional avoidance required, which was why those five Justices were all compelled to confront and analyze it.

If the constitutional avoidance canon were jettisoned, what would happen? Judges could instead determine the best reading of the statute based on the words of the statute, the context, and the agreed-upon canons of interpretation. If the statute turned out to be unconstitutional, then judges would say so and determine the appropriate remedy by applying proper severability principles.

Legislative History. Let me turn to the next one. Another ambiguity-dependent canon is the principle that we should construe ambiguous statutes in light

of their legislative history. We see this all the time. If the statute is clear, we have no need to resort to the legislative history; if it is ambiguous, some judges say we should look at it.

Now many have criticized the use of legislative history on separate formal and functional grounds. As a formal matter, committee reports and floor statements are not the law enacted by Congress. And as a functional matter, committee reports and floor statements reflect an effort sometimes by a subgroup in Congress—or, worse, outside of it—to affect how the statute will subsequently be interpreted and implemented, in ways that Congress and the President may not have wanted. Moreover, legislative history is often conflicting because of different floor statements, reports, and the like. And it can be, in the end, like looking over a crowd and picking out your friends.

But apart from all those critiques of legislative history—and again, those critiques are weighty—I have another major problem with how legislative history is used: The clarity-versus-ambiguity trigger for resorting to legislative history in the first place means that the decision is often indeterminate. That, in turn, greatly exacerbates the problems with the use of legislative history. Just think about this: If, as a judge, all you need to “pick out your friends”—that is, to pick out the result you think is most reasonable—is a finding of ambiguity, and if there is no set or principled way to determine clarity versus ambiguity, then some judges are going to be more likely to find ambiguity in certain cases. That is obvious as a matter of common sense and basic human psychology.

In a world without initial determinations of ambiguity, judges would instead decide on the best reading of the statute. In that world, legislative history would be largely limited to helping answer the question of whether the literal language of the statute produced an absurdity. Most importantly, in that world we would not make statutory interpretation depend so heavily on the difficult assessment of whether the text is clear or ambiguous.

Constitutional avoidance, legislative history: Two huge canons of interpretation used all the time depend on that initial determination of clarity versus ambiguity. Now let me go to the third and last one that I will discuss: *Chevron* deference.

***Chevron* Deference.** Under *Chevron*, if a statutory term is deemed ambiguous, courts uphold an

agency's authoritative reading of a statute, even if it is not the best reading, so long as the agency's reading is at least reasonable. This statutory interpretation principle is the one I encounter most as a judge on the DC Circuit.

Now, again, as with constitutional avoidance and with legislative history, there are other critiques people make of *Chevron*. Just to mention a couple: To begin with, it has little if any basis in the text of the Administrative Procedure Act. So, *Chevron* itself is an atextual invention by the courts. And in many ways, it operates as little more than a judicially orchestrated shift of power from Congress to the Executive Branch.

But put aside those critiques of *Chevron* for the moment, weighty as they may be. From the judge's vantage point, the fundamental problem once again is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous. The key move from step one (stop if it is clear) to step two (where you go if it is ambiguous) of *Chevron* is not determinate because it depends on the threshold clarity-versus-ambiguity determination. As Justice Scalia pointed out, that determination "is the chink in *Chevron's* armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions."⁶

I see this problem *all the time* in our court's many agency cases, and it has major practical consequences. In certain major *Chevron* cases, different judges will reach different results even though they may actually *agree* that what the agency is doing is contrary to the best reading of the statutory text. I have been involved in cases where that has happened.

Now, think about the implications of that for a moment. Consider, for example, a high-profile case involving a major agency rule that rests on the agency's interpretation of a statute. Suppose the judges agree that the agency's reading of the statute is not the best reading of the statute. But two judges believe that the statute is ambiguous, so those judges nonetheless uphold the agency's interpretation even though it is not the best interpretation, in their view. The other judge says that the statute is sufficiently clear, so that judge would strike down the agency's interpretation.

That simple determination of clarity versus ambiguity may affect billions of dollars; could affect the individual rights of millions of citizens; may affect

the fate of clean-air rules, securities regulations, labor laws, or the like. And yet, as I have emphasized, there is no particularly principled guide, as I see it, for making that clarity-versus-ambiguity decision, and no good way for two judges to find neutral principles on which to debate and decide, or even to talk about, that question.

This state of affairs, in my view, is, again, unsettling. As I have stated before, my goal is to help make statutory interpretation—and constitutional interpretation—a more neutral, impartial process where like cases are treated alike by judges of all ideological stripes, regardless of the issue and regardless of the identity of the parties in the case. That is the goal. I think that has to be our goal. But that objective is hard to achieve, at least in many cases, if the threshold trigger for *Chevron* deference is ambiguity.

What is the solution to this one? To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms—at least, they should under current law—when statutes use terms like "reasonable," "appropriate," "feasible," or "practicable." In those cases, courts can say that the agency may choose among reasonable options allowed by the text of the statute. But that is really the *State Farm* doctrine.⁷ You legal nerds here tonight know what I mean by the *State Farm* doctrine; I think there are a lot of us. But that is not really the *Chevron* doctrine.

In cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text. Judges are trained to do that, and it *can* be done in a neutral and impartial way in most cases. Of course, there will be disagreements about what the meaning is, but it will not be sidetracked by that threshold ambiguity-versus-clarity determination.

Put simply, the problem with certain applications of *Chevron*, as I see it, is that the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of that initial clarity-versus-ambiguity decision. Here, too, as with constitutional avoidance, as with the legislative history canon, we need to consider eliminating that inquiry as part of the threshold trigger.

6. *Id.* at 520.

7. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

Conclusion

In sum, a number of critical canons of statutory interpretation that have major real-world effects depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity-versus-ambiguity determinations in a coherent and evenhanded way, courts, in my view, should reduce the number of canons of construction that depend on an initial finding of ambiguity.

Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any of the relevant substantive canons, for example, the absurdity doctrine or the settled presumptions, such as the presumption against extra-territoriality, or the presumption of *mens rea*, or the presumption against retroactivity.

To be clear, I fully appreciate that disputed calls will always arise in statutory interpretation. Figuring out the best reading of the text is not always an easy task. I am not a modern-day Yogi Berra, who once purportedly said that there would be no more close calls if we just moved first base.

But the current situation in statutory interpretation is more akin to a situation where umpires can, at least on some pitches, largely define their own strike zones. My solution is to define the strike zone in advance much more precisely so that each umpire is operating within the same guidelines. If we do that, we will need to worry less about who the umpire is when the next pitch is thrown.

That is just too hard, some might argue. Statutory interpretation is inherently complex, people say. It is all politics anyway, some contend. I have heard all the excuses. I have been doing this for 11 years. I am not buying it. In my view, it is a mistake to think that this current mess in statutory interpretation is somehow the natural and unalterable order of things. Put simply, we can do better in the realm of statutory interpretation. And for the sake of the neutral and impartial rule of law, we must do better.

We have made enormous strides in constitutional and statutory interpretation over the past 30 years, thanks to people like Justice Scalia and General Meese. But it is now up to us to take the next step. That much is clear. Thank you.

—*The Honorable Brett M. Kavanaugh serves as a judge on the United States Court of Appeals for the District of Columbia Circuit. These remarks were delivered on October 25, 2017, as part of The Joseph Story Distinguished Lecture series hosted by The Heritage Foundation.*